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# Title 38—Pensions, Bonuses, and Veterans' Relief

(This book contains part 18 to End)

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*Part*

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# CHAPTER I—DEPARTMENT OF VETERANS AFFAIRS (CONTINUED)

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## Subpart A—General

AUTHORITY: Sec. 602, 78 Stat. 252 (42 U.S.C. 2000d–1) and the laws referred to in Appendix A.

### § 18.1 Purpose.

The purpose of this part is to effectuate the provisions of Title VI of the Civil Rights Act of 1964 (hereafter referred to as the *Act*) to the end that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of Veterans Affairs.

[29 FR 19301, Dec. 31, 1964. Designated subpart A at 45 FR 63268, Sept. 24, 1980]

### § 18.2 Application of this part.

This part applies to any program for which Federal financial assistance is authorized under a law administered by the Department of Veterans Affairs, including the types of Federal financial assistance listed in appendix A to this subpart. It applies to money paid, property transferred, or other Federal financial assistance extended after the effective date of this part pursuant to an application approved prior to such effective date. This part does not apply to (a) any Federal financial assistance by way of insurance or guaranty contracts, (b) money paid, property transferred, or other assistance extended before the effective date of this part, (c) any assistance to any individual who is the ultimate beneficiary, or (d) any employment practice, under any such program, of any employer, employment agency, or labor organization, except to the extent described in § 18.3. The fact that a type of Federal financial assistance is not listed in appendix A to this subpart shall not mean, if Title VI of the Act is otherwise applicable, that a program is not covered. Other types of Federal financial assistance under statutes now in force or hereinafter enacted may be added to appendix A to this subpart by notice published in the FEDERAL REGISTER.

[38 FR 17965, July 5, 1973. Designated subpart A at 45 FR 63268, Sept. 24, 1980, as amended at 68 FR 51369, Aug. 26, 2003]

### § 18.3 Discrimination prohibited.

(a) *General.* No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this part applies.

(b) *Specific discriminatory actions prohibited.* (1) A recipient to which this part applies may not, directly or through contractual or other arrangements, on grounds of race, color, or national origin:

(i) Deny an individual any service, financial aid, or other benefit provided under the program;

(ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

(iii) Subject an individual to segregation or separate treatment in any matter related to receipt of any service, financial aid, or other benefit under the program;

(iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program;

(v) Treat an individual differently from others in determining whether is satisfied any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or

other benefit provided under the program.

(vi) Deny a person an opportunity to participate in the program through the provision of services or otherwise or afford an opportunity to do so which is different from that afforded others under the program.

(vii) Deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program.

(2) A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, or national origin.

(3) In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program to which this part applies on the grounds of race, color or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this part.

(4) As used in this section the services, financial aid, or other benefits provided under a program receiving Federal financial assistance shall be deemed to include any service, financial aid, or other benefit provided in or through a facility provided with the aid of Federal financial assistance.

(5) The enumeration of specific forms of prohibited discrimination in this paragraph does not limit the generality of the prohibition in paragraph (a) of this section.

(6)(i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.

(ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color or national origin.

(c) *Medical emergencies.* Notwithstanding the foregoing provisions of this section, a recipient of Federal financial assistance shall not be deemed to have failed to comply with paragraph (a) of this section if immediate provision of a service or other benefit to an individual is necessary to prevent his or her death or serious impairment of his or her health, and such service or other benefit cannot be provided except by or through a medical institution which refuses or fails to comply with paragraph (a) of this section.

(d) *Employment practices.* (1) Whenever a primary objective of the Federal financial assistance to a program to which part 18 applies, is to provide employment, a recipient of such assistance may not (directly or through contractual or other arrangements) subject any individual to discrimination on the ground of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising, employment, layoff, or termination, upgrading, demotion, or transfer, rates of pay or other forms of compensation, and use of facilities). The requirements applicable to construction employment under any such program shall be those specified in or pursuant to part III of Executive Order 11246 (3 CFR Chapter IV) or any Executive order which supersedes it.

(2) In regard to Federal financial assistance which does not have providing employment as a primary objective, the provisions of paragraph (d)(1) of this section apply to the employment

practices of the recipient if discrimination on the ground of race, color, or national origin in such employment practices tends, on the grounds of race, color, or national origin, to exclude persons from participation in, to deny them the benefits of or to subject them to discrimination under the program receiving Federal financial assistance. In any such case, the provisions of paragraph (d)(1) of this section shall apply to the extent necessary to assure equality of opportunity to and nondiscriminatory treatment of beneficiaries.

[29 FR 19301, Dec. 31, 1964, as amended at 38 FR 17965, July 5, 1973; 42 FR 60144, Nov. 25, 1977. Designated subpart A at 45 FR 63268, Sept. 24, 1980, and further amended at 51 FR 10384, Mar. 26, 1986; 68 FR 51369, Aug. 26, 2003]

### § 18.4 Assurances required.

(a) *General.* (1) Every application for Federal financial assistance to which this part applies, except an application to which paragraph (b) of this section applies, and every application for Federal financial assistance to provide a facility shall, as a condition to its approval and the extension of any Federal financial assistance pursuant to the application, contain or be accompanied by an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by or pursuant to this part. Every award of Federal financial assistance shall require the submission of such an assurance. In the case of an application for Federal financial assistance to provide real property or structures thereon, the assurance shall obligate the recipient, or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. In the case of personal property the assurance shall obligate the recipient for the period during which the recipient retains ownership or possession of the property. In all other cases the assurance shall obligate the recipient for the period during which Federal financial assistance is extended pursuant to the application. The responsible agency official shall specify the form of the foregoing assurances and the extent to which like assurances will be required of subgrantees, contractors and subcontractors, transferees, successors in interest, and other participants. Any such assurance shall include provisions which give the United States a right to seek its judicial enforcement.

(2) Transfers of surplus property are subject to regulations issued by the Administrator of General Services (41 CFR subpart 101–6.2).

(b) *Continuing Federal financial assistance.* Every application by a State or a State agency for continuing Federal financial assistance to which this part applies (including the types of Federal financial assistance listed in appendix A to this subpart) shall as a condition to its approval and the extension of any Federal financial assistance pursuant to the application (1) contain or be accompanied by a statement that the program is (or, in the case of a new program, will be) conducted in compliance with all requirements imposed by or pursuant to this part, and (2) provide or be accompanied by provision for such methods of administration for the program as are found by the responsible agency official to give reasonable assurance that the applicant and all recipients of Federal financial assistance under such program will comply with all requirements imposed by or pursuant to this part. In any case in which the recipient is claiming financial assistance pursuant to arrangements entered into prior to the effective date of this part, the assurances provided by this paragraph shall be included in the first application or claim for assistance on or after the effective date of this part.

(c) *Elementary and secondary schools.* The requirements of paragraph (a) or (b) of this section with respect to any elementary or secondary school or school system shall be deemed to be satisfied if such school or school system (1) is subject to a final order of a court of the United States for the desegregation of such school or school system, and provides an assurance that it will comply with such order, including any future modification of such order, or (2) submits a plan for the desegregation of such school or school

system which the responsible agency official determines is adequate to accomplish the purposes of the Act and this part, at the earliest practicable time, and provides reasonable assurance that it will carry out such plan; in any case of continuing Federal financial assistance the responsible agency official may reserve the right to redetermine, after such period as may be specified by the official, the adequacy of the plan to accomplish the purposes of the Act and this part. In any case in which a final order of a court of the United States for the desegregation of such school or school system is entered after submission of such a plan, such plan shall be revised to conform to such final order, including any future modification of such order.

(d) *Extent of application to institution or facility*. In the case where any assurances are required from an academic, a medical care, or any other institution or facility, insofar as the assurances relate to the institution's practices with respect to the admission, care, or other treatment of persons by the institution or with respect to the opportunity of persons to participate in the receiving or providing of services, treatment, or benefits, such assurances shall be applicable to the entire institution or facility.

[38 FR 17965, July 5, 1973. Designated subpart A at 45 FR 63268, Sept. 24, 1980, and amended at 51 FR 10384, Mar. 26, 1986; 68 FR 51369, Aug. 26, 2003]

### § 18.6 Compliance information.

(a) *Cooperation and assistance.* Each responsible agency official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.

(b) *Compliance reports.* Each recipient shall keep such records and submit to the responsible agency official or designee, timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the responsible agency official or designee may determine to be necessary to enable the official to ascertain whether the recipient has complied or is complying with this part. In the case in which a primary recipient extends Federal financial assistance to any other recipient, such other recipient shall also submit such compliance reports to the primary recipient as may be necessary to enable the primary recipient to carry out its obligations under this part. In general, recipients should have available for the agency racial and ethnic data showing the extent to which members of minority groups are beneficiaries of federally assisted programs.

(c) *Access to sources of information.* Each recipient shall permit access by the responsible agency official or designee during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of a recipient is in the exclusive possession of any other agency, institution or person and this agency, institution or person shall fail or refuse to furnish this information, the recipient shall so certify in its report and shall set forth what efforts it has made to obtain the information.

(d) *Information to beneficiaries and participants.* Each recipient shall make available to participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the program for which the recipient receives Federal financial assistance, and make such information available to them in such manner, as the responsible agency official finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this part.

[29 FR 19301, Dec. 31, 1964, as amended at 38 FR 17966, July 5, 1973. Designated subpart A at 45 FR 63268, Sept. 24, 1980 and amended at 51 FR 10384, Mar. 26, 1986; 68 FR 51369, Aug. 26, 2003]

### § 18.7 Conduct of investigations.

(a) *Periodic compliance reviews.* The responsible agency official or designee shall from time to time review the practices of recipients to determine whether they are complying with this part.

(b) *Complaints.* Any person or any specific class of individuals who believe

they have been subjected to discrimination prohibited by this part may themselves, or by a representative, file with the responsible agency official or designee a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination unless the time for filing is extended by the responsible agency offical or designee.

(c) *Investigations.* The responsible agency official or designee will initiate a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation should include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part.

(d) *Resolution of matters.* (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the responsible agency official or designee will so inform the recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 18.8.

(2) If an investigation does not warrant action pursuant to paragraph (d)(1) of this section the responsible agency official or designee will so inform the recipient and the complainant, if any, in writing.

(e) *Intimidatory or retaliatory acts prohibited.* No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because the individual has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

[29 FR 19301, Dec. 31, 1964. Designated subpart A at 45 FR 63268, Sept. 24, 1980 and amended at 51 FR 10384, Mar. 26, 1986]

## § 18.8 Procedure for effecting compliance.

(a) *General.* If there appears to be a failure or threatened failure to comply with this part, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law. Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.

(b) *Noncompliance with § 18.4.* If an applicant fails or refuses to furnish an assurance required under § 18.4 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section Federal financial assistance may be refused in accordance with the procedures of paragraph (c) of this section. The Department of Veterans Affairs shall not be required to provide assistance in such a case during the pendency of the administrative proceedings under such paragraph except that the Department of Veterans Affairs shall continue assistance during the pendency of such proceedings where such assistance is due and payable pursuant to an application therefor approved prior to the effective date of this part.

(c) *Termination of or refusal to grant or to continue Federal financial assistance.* No order suspending, terminating or refusing to grant or continue Federal financial assistance shall become effective until (1) the responsible agency official has advised the applicant or recipient of failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there

has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part, (3) the action has been approved by the Secretary pursuant to § 18.10(e), and (4) the expiration of 30 days after the Secretary has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. Any action to suspend or terminate or to refuse to grant or to continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other applicant or recipient as to whom such a finding has been made and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.

(d) *Other means authorized by law.* No action to effect compliance with Title VI of the Act by any other means authorized by law shall be taken by the Department of Veterans Affairs until (1) the responsible agency official has determined that compliance cannot be secured by voluntary means, (2) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this period of at least 10 days, additional efforts shall be made to persuade the recipient or other person to comply with this part and to take such corrective action as may be appropriate.

[29 FR 19301, Dec. 31, 1964, as amended at 38 FR 17966, July 5, 1973. Designated subpart A at 45 FR 63268, Sept. 24, 1980, and amended at 51 FR 10384, Mar. 26, 1986]

### § 18.9 Hearings.

(a) *Opportunity for hearing.* Whenever an opportunity for a hearing is required by § 18.8(c), reasonable notice shall be given by registered or certified mail, return receipt requested, to the affected applicant or recipient. This notice shall advise the applicant or recipient of the action proposed to be taken, the specific provision under which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for this action, and either (1) fix a date not less than 20 days after the date of such notice within which the applicant or recipient may request of the responsible agency official that the matter be scheduled for hearing or (2) advise the applicant or recipient that the matter in question has been set down for hearing at a stated place and time. The time and place so fixed shall be reasonable and shall be subject to change for cause. The complainant, if any, shall be advised of the time and place of the hearing. An applicant or recipient may waive a hearing and submit written information and argument for the record. The failure of an applicant or recipient to request a hearing under this paragraph or to appear at a hearing for which a date has been set shall be deemed to be a waiver of the right to a hearing under section 602 of the Act and § 18.8(c) of this part and consent to the making of a decision on the basis of such information as is available.

(b) *Time and place of hearing.* Hearings shall be held at the offices of the Department of Veterans Affairs in Washington, D.C., at a time fixed by the responsible agency official unless the official determines that the convenience of the applicant or recipient or of the Department of Veterans Affairs requires that another place be selected. Hearings shall be held before the responsible agency official or, at the official's discretion, before an administrative law judge appointed in accordance with section 3105 of Title 5, U.S.C., or detailed under section 3344 of Title 5, U.S.C.

(c) *Right to counsel.* In all proceedings under this section, the applicant or recipient and the Department of Veterans Affairs shall have the right to be represented by counsel.

(d) *Procedures, evidence, and record.* (1) The hearing decision and any administrative review thereof shall be conducted in conformity with the procedures contained in 5 U.S.C. 554–557 (sections 5–8 of the Administrative Procedure Act) and in accordance with such rules of procedure as are proper (and not inconsistent with this section) relating to the conduct of the hearing, giving of notices subsequent to those

provided for in paragraph (a) of this section, taking of testimony, exhibits, arguments and briefs, requests for findings, and other related matters. Both the Department of Veterans Affairs and the applicant or recipient shall be entitled to introduce all relevant evidence on the issues as stated in the notice for hearing or as determined by the officer conducting the hearing at the outset of or during the hearing.

(2) Technical rules of evidence shall not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by the officer conducting the hearing. The hearing officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence except to the extent the substance thereof is stipulated for the record. All decisions shall be based upon the hearing record and written findings shall be made.

(e) *Consolidated or joint hearings.* In cases in which the same or related facts are asserted to constitute noncompliance with this part with respect to two or more Federal statutes; authorities, or other means by which Federal financial assistance is extended and to which this part applies, or noncompliance with this part and the regulations of one or more other Federal departments or agencies issued under Title VI of the Act, the Secretary may, by agreement with such other departments or agencies where applicable, provide for the conduct of consolidated or joint hearings, and for the application to such hearings of rules of procedures not inconsistent with this part. Final decisions in such cases, insofar as this part is concerned, shall be made in accordance with § 18.10.

[29 FR 19301, Dec. 28, 1964, as amended at 38 FR 17966, July 5, 1973. Designated subpart A at 45 FR 63268, Sept. 24, 1980 and amended at 51 FR 10384, Mar. 26, 1986; 68 FR 51369, Aug. 26, 2003]

### § 18.10 Decisions and notices.

(a) *Procedure on decisions by an administrative law judge.* If the hearing is held by an administrative law judge such administrative law judge shall either make an initial decision, if so authorized, or certify the entire record including recommended findings and proposed decision to the responsible agency official for a final decision, and a copy of such initial decision or certification shall be mailed to the applicant or recipient. Where the initial decision is made by the administrative law judge the applicant or recipient may within 30 days of the mailing of such notice of initial decision file with the responsible agency official exceptions to the initial decision with reasons therefor. In the absence of exceptions, the responsible agency official may within 45 days after the initial decision serve on the applicant or recipient a notice that the decision will be reviewed. Upon the filing of such exceptions or of such notice of review the responsible agency official shall review the initial decision and issue a decision thereon including the reasons therefor. In the absence of either exceptions or a notice of review the initial decision shall constitute the final decision of the responsible agency official.

(b) *Decisions on record or review by the responsible agency official.* Whenever a record is certified to the responsible agency official for decision or the official reviews the decision of an administrative law judge pursuant to paragraph (a) of this section, or whenever the responsible agency official conducts the hearing, the applicant or recipient shall be given reasonable opportunity to file with the official briefs or other written statements of its contentions, and a written copy of the final decision of the responsible agency official shall be sent to the applicant or recipient and to the complainant, if any.

(c) *Decisions on record where a hearing is waived.* Whenever a hearing is waived

pursuant to § 18.9(a) a decision shall be made by the responsible agency official on the record and a written copy of such decision shall be sent to the applicant or recipient, and to the complainant, if any.

(d) *Rulings required.* Each decision of an administrative law judge or responsible agency official shall set forth a ruling on each finding, conclusion, or exception presented, and shall identify the requirements imposed by or pursuant to this part with which it is found that the applicant or recipient has failed to comply.

(e) *Approval by Secretary.* Any final decision by an administrative law judge which provides for the suspension or termination of, or the refusal to grant or continue Federal financial assistance, or the imposition of any other sanction available under this part of the Act, shall promptly be transmitted to the Secretary personally, who may approve such decision, may vacate it, or remit or mitigate any sanction imposed.

(f) *Content of orders.* The final decision may provide for suspension or termination of, or refusal to grant or continue Federal financial assistance, in whole or in part, to which this regulation applies, and may contain such terms, conditions, and other provisions as are consistent with and will effectuate the purposes of the Act and this part, including provisions designed to assure that no Federal financial assistance to which this regulation applies will thereafter be extended to the applicant or recipient determined by such decision to be in default in its performance of an assurance given by it pursuant to this part, or to have otherwise failed to comply with this part, unless and until it corrects its noncompliance and satisfies the responsible agency official that it will fully comply with this part.

(g) *Post termination proceedings.* (1) An applicant or recipient adversely affected by an order issued under paragraph (f) of this section shall be restored to full eligibility to receive Federal financial assistance if it satisfies the terms and conditions of that order for such eligibility or if it brings itself into compliance with this section and provides reasonable assurance that it will fully comply with this part.

(2) Any applicant or recipient adversely affected by an order entered pursuant to paragraph (f) of this section may at any time request the responsible agency official to restore fully its eligibility to receive Federal financial assistance. Any such request shall be supported by information showing that the applicant or recipient has met the requirements of paragraph (g)(1) of this section. If the responsible agency official determines that those requirements have been satisfied, the official shall restore such eligibility.

(3) If the responsible agency official denies any such request, the applicant or recipient may submit a request for a hearing in writing, specifying why it believes such official to have been in error. It shall thereupon be given an expeditious hearing, with a decision on the record, in accordance with rules of procedure issued by the responsible agency official. The applicant or recipient will be restored to such eligibility if it proves at such a hearing that it satisfied the requirements of paragraph (g)(1) of this section. While proceedings under this paragraph are pending, the sanctions imposed by the order issued under paragraph (f) of this section shall remain in effect.

[29 FR 19301, Dec. 31, 1964, as amended at 38 FR 17966, July 5, 1973. Designated subpart A at 45 FR 63268, Sept. 24, 1980, and amended at 51 FR 10384, Mar. 26, 1986; 68 FR 51369, Aug. 26, 2003]

### § 18.11 Judicial review.

Action taken pursuant to section 602 of the Act is subject to judicial review as provided in section 603 of the Act.

[29 FR 19301, Dec. 31, 1964. Designated subpart A at 45 FR 63268, Sept. 24, 1980]

### § 18.12 Effect on other regulations, forms and instructions.

(a) *Effect on other regulations.* All regulations, orders, or like directions issued before the effective date of this part by any officer of the Department of Veterans Affairs which impose requirements designed to prohibit any discrimination against individuals on the grounds of race, color or national origin under any program to which this part applies, and which authorize the

suspension or termination of or refusal to grant or to continue Federal financial assistance to any applicant for or recipient of such assistance for failure to comply with such requirements, are hereby superseded to the extent that such discrimination is prohibited by this part, except that nothing in this part shall be deemed to relieve any person of any obligation assumed or imposed under any such superseded regulation, order, instruction, or like direction prior to the effective date of this part. Nothing in this part, however, shall be deemed to supersede any of the following (including future amendments thereof):

(1) Executive Orders 10925 (3 CFR, 1959–1963 Comp., p. 448), 11114 (3 CFR, 1959–1963, p. 774), and 11246 (3 CFR, 1965 Supp., p. 167) and regulations issued thereunder, or

(2) Executive Order 11063 (3 CFR, 1959–1963 Comp., p. 652) and regulations issued thereunder, or any other orders, regulations or instructions, insofar as such orders, regulations, or instructions prohibit discrimination on the grounds of race, color or national origin in any program or situation to which this part is inapplicable, or prohibit discrimination on any other ground.

(b) *Forms and instructions.* Each responsible agency officials shall issue and promptly make available to interested persons forms and detailed instructions and procedures for effectuating this part as applied to programs to which this part applies and for which he is responsible.

(c) *Supervision and coordination.* The Secretary may from time to time assign to officials of the Department of Veterans Affairs or to officials of other departments or agencies of the Government with the consent of such departments or agencies, responsibilities in connection with the effectuation of the purposes of Title VI of the Act and this part (other than responsibility for final decision as provided in § 18.10) including the achievement of effective coordination and maximum uniformity within the Department of Veterans Affairs and within the executive branch of the Government in the application of Title VI and this part to similar programs and in similar situations. Any action taken, determination made, or requirement imposed by an official of another department or agency acting pursuant to an assignment of responsibility under this paragraph shall have the same effect as though such action has been taken by the responsible official of this Agency.

[29 FR 19301, Dec. 31, 1964, as amended at 38 FR 17967, July 5, 1973. Designated subpart A at 45 FR 63268, Sept. 24, 1980; 68 FR 51369, Aug. 26, 2003]

### § 18.13 Definitions.

As used in this part:

(a) The term *agency* means the Department of Veterans Affairs, and includes each of its operating agencies and other organization units.

(b) The term *Secretary* means the Secretary of Veterans Affairs.

(c) The term *responsible agency official* with respect to any program receiving Federal financial assistance means the Secretary or other official of the Department of Veterans Affairs or an official of another department or agency to the extent the Secretary has delegated authority to such official.

(d) The term *United States* means the States of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and the territories and possessions of the United States, and the term *State* means any one of the foregoing.

(e) The term *Federal financial assistance* includes (1) grants of Federal funds, (2) the grant or donation of Federal property and interests in property, (3) the detail of Federal personnel, (4) the sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient, and (5) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

(f) The terms *program or activity* and *program* mean all of the operations of any entity described in paragraphs (f)(1) through (4) of this section, any

part of which is extended Federal financial assistance:

(1)(i) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(ii) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(i) A college, university, or other postsecondary institution, or a public system of higher education; or

(ii) A local educational agency (as defined in 20 U.S.C. 7801), system of vocational education, or other school system;

(3)(i) An entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) Any other entity which is established by two or more of the entities described in paragraph (f)(1), (2), or (3) of this section.

(g) The term *facility* includes all or any portion of structures, equipment, or other real or personal property or interests therein, and the provision of facilities includes the construction, expansion, renovation, remodeling, alteration or acquisition of facilities.

(h) The term *recipient* means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in the United States, to whom Federal financial assistance is extended, directly or through another recipient, including any successor, assignee, or transferee thereof, but such term does not include any ultimate beneficiary.

(i) The term *applicant* means a person who submits an application, request, or plan required to be approved by the Secretary, or by a recipient, as a condition to eligibility for Federal financial assistance, and *application* means such an application, request, or plan.

[29 FR 19301, Dec. 31, 1964, as amended at 38 FR 17967, July 5, 1973. Designated subpart A at 45 FR 63268, Sept. 24, 1980, and amended at 51 FR 10385, Mar. 26, 1986; 68 FR 51369, Aug. 26, 2003]

## APPENDIX A TO SUBPART A OF PART 18—STATUTORY PROVISIONS TO WHICH THIS SUBPART APPLIES

1. Payments to State homes (38 U.S.C. 1741–1743).
2. State home facilities for furnishing domiciliary, nursing home, and hospital care (38 U.S.C. 8131–8137).
3. Space and office facilities for representatives of recognized national organizations (38 U.S.C. 5902(a)(2)).
4. All-volunteer force educational assistance, vocational rehabilitation, post-Vietnam era veterans' educational assistance, survivors' and dependents' educational assistance, and administration of educational benefits (38 U.S.C. Chapters 30, 31, 32, 34, 35 and 36, respectively).
5. Sharing of medical facilities, equipment, and information (38 U.S.C. 8151–8157).
6. Approval of educational institutions (38 U.S.C. 104).
7. Space and office facilities for representatives of State employment services (38 U.S.C. 7725(1)).
8. Medical care for survivors and dependents of certain veterans (38 U.S.C. 1713).
9. Transfers for nursing home care; adult day health care (38 U.S.C. 1720).
10. Treatment and rehabilitation for alcohol or drug dependence or abuse disabilities (38 U.S.C. 1720A).
11. Aid to States for establishment, expansion, and improvement of veterans cemeteries (38 U.S.C. 2408).
12. Assistance in establishing new medical schools; grants to affiliated medical schools; assistance to health manpower training institutions (38 U.S.C. Chapter 82).
13. Department of Veterans Affairs health professional scholarship program (38 U.S.C. 7601–7655).
14. Emergency veterans job training (Pub. L. 98–77, 97 Stat. 443–452).

[51 FR 10385, Mar. 26, 1986]

APPENDIX B TO SUBPART A OF PART 18—ILLUSTRATIVE APPLICATIONS

The following examples, without being exhaustive, will illustrate the application of the nondiscrimination provisions to certain grants of the Department of Veterans Affairs. (In all cases the discrimination prohibited is discrimination on the grounds of race, color, or national origin prohibited by title VI of the Act and this part, as a condition of the receipt of Federal financial assistance.)

(a) In grants which support the provision of health or welfare services for veterans in State homes, discrimination in the selection or eligibility of individuals to receive the services, and segregation or other discriminatory practices in the manner of providing them, are prohibited. This prohibition extends to all facilities and services provided by the State as grantee under the program or by a political subdivision of the State. It extends also to services purchased or otherwise obtained by the grantee (or political subdivision) from hospitals, nursing homes, schools, and similar institutions for beneficiaries of the program, and to the facilities in which such services are provided, subject, however, to the provisions of § 18.3(c).

(b) In grants to assist in the construction of facilities for the provision of health or welfare services assurances will be required that services will be provided without discrimination, to the same extent that discrimination would be prohibited as a condition of Federal operating grants for the support of such services. Thus, as a condition of grants for the construction of a State home for furnishing nursing home care, assurances will be required that there will be no discrimination in the admission or treatment of patients. In the case of such grants the assurance will apply to patients, to interns, residents, student nurses, and other trainees, and to the privilege of physicians, dentists, and other professionally qualified persons to practice in the nursing home, and will apply to the entire facility for which, or for a part of which, the grant is made, and to facilities operated in connection therewith.

(c) Upon transfers of real or personal surplus property for health or educational uses, discrimination is prohibited to the same extent as in the case of grants for the construction of facilities or the provision of equipment for like purposes.

(d) A recipient may not take action that is calculated to bring about indirectly what this part forbids it to accomplish directly. Thus a State, in selecting or approving projects or sites for the construction of a nursing home which will receive Federal financial assistance, may not base its selections or approvals on criteria which have the effect of defeating or of substantially impairing accomplishment of the objectives of the Federal assistance program with respect to individuals of a particular race, color, or national origin.

(38 U.S.C. 1741, 1744, 8131–8137, 8155, 5902(a)(2), Chapters 31, 34, 35 and 36)

[38 FR 17968, July 5, 1973. Designated subpart A at 45 FR 63268, Sept. 24, 1980]

## Subparts B–C [Reserved]

## Subpart D—Nondiscrimination on the Basis of Handicap

AUTHORITY: 29 U.S.C. 706, 794.

SOURCE: 45 FR 63268, Sept. 24, 1980, unless otherwise noted.

GENERAL PROVISIONS

### § 18.401 Purpose.

The purpose of this part is to effectuate section 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance.

### § 18.402 Application.

This part applies to each recipient of Federal financial assistance from the Department of Veterans Affairs and to each program or activity that receives such assistance.

[45 FR 63268, Sept. 24, 1980, as amended at 68 FR 51370, Aug. 26, 2003]

### § 18.403 Definitions.

As used in this part, the term:

(a) *The Act* means the Rehabilitation Act of 1973, Pub. L. 93–112, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93–516, and Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. 95–602, 29 U.S.C. 794.

(b) *Section 504* means section 504 of the Act.

(c) *Education of the Handicapped Act* means that statute as amended by the Education for all Handicapped Children Act of 1975, Pub. L. 94–142, 20 U.S.C. 1401 *et seq.*

(d) *Agency* means the Department of Veterans Affairs.

(e) *Secretary* means the Secretary of Veterans Affairs.

(f) *Recipient* means any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient but excluding the ultimate beneficiary of the assistance.

(g) *Applicant for assistance* means one who submits an application, request, or plan required to be approved by an Agency official or by a recipient as a condition to eligibility for Federal financial assistance.

(h) *Federal financial assistance* means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Agency provides or otherwise makes available assistance in the form of:

(1) Funds, including funds extended to any entity for payment to or on behalf of students admitted to that entity, extended directly to those students for payment to that entity, or extended directly to those students contingent upon their participation in education or training of that entity;

(2) Services of Federal personnel; or

(3) Real and personal property or any interest in or use of property, including;

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

(i) *Facility* means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property.

(j) *Handicapped person.* (1) Handicapped person means any person who:

(i) Has a physical or mental impairment which substantially limits one or more major life activities;

(ii) Has a record of such an impairment; or

(iii) Is regarded as having such an impairment.

(2) As used in paragraph (j)(1) of this section, the phrase:

(i) *Physical or mental impairment* means:

(A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal; special sense organs including speech organs; respiratory; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(B) Any mental or psychological discorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(C) The term *physical or mental impairment* includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, drug addiction and alcoholism.

(ii) *Major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

(iii) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(iv) *Is regarded as having an impairment* means:

(A) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a recipient as constituting such a limitation;

(B) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment;

(C) Has none of the impairments defined in paragraph (j)(2)(i) of this section, but is treated by a recipient as having such an impairment.

(k) *Qualified handicapped person* means:

(1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the

essential functions of the job in question;

(2) With respect to public elementary, secondary, or adult educational services, a handicapped person:

(i) Of an age during which nonhandicapped persons are provided such services;

(ii) Of any age during which it is mandatory under State laws to provide such services to handicapped persons; or

(iii) To whom a State is required to provide a free appropriate public education under section 612 of the Education of the Handicapped Act; and

(3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity; and

(4) With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

(l) *Handicap* means any condition or characteristic that renders a person a handicapped person as defined in paragraph (j) of this section.

(m) *Program or activity* means all of the operations of any entity described in paragraphs (m)(1) through (4) of this section, any part of which is extended Federal financial assistance:

(1)(i) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(ii) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(i) A college, university, or other postsecondary institution, or a public system of higher education; or

(ii) A local educational agency (as defined in 20 U.S.C. 7801), system of vocational education, or other school system;

(3)(i) An entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) Any other entity that is established by two or more of the entities described in paragraph (m)(1), (2), or (3) of this section.

[45 FR 63268, Sept. 24, 1980, as amended at 68 FR 51370, Aug. 26, 2003]

### § 18.404 Discrimination prohibited.

(a) *General.* No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance.

(b) *Discriminatory actions prohibited.* (1) A recipient, in providing an aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service that is equal to that afforded others;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified handicapped person

by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipient's program or activity;

(vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

(2) Aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must give handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

(3) Despite the existence of separate or different aid, benefits, or services provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunity to participate in aid, benefits, or services that are not separate or different.

(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration that:

(i) Have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap,

(ii) Have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program or activity with respect to handicapped persons, or

(iii) Perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

(5) In determining the site or location of a facility, an applicant for assistance or a recipient may not make selections that:

(i) Have the effect of excluding handicapped persons from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity that receives Federal financial assistance, or

(ii) Have the purpose or effect of defeating or substantially impairing the accomplishment of the objective of the program or activity with respect to handicapped persons.

(6) As used in this section, the aid, benefit, or service provided under a program or activity receiving Federal financial assistance includes any aid, benefit, or service provided in or through a facility that has been constructed, expanded, altered, leased or rented, or otherwise acquired, in whole of in part, with Federal financial assistance.

(c) *Aid, benefits, or services limited by Federal law.* The exclusion of nonhandicapped persons or the exclusion of a specific class of handicapped persons from aid, benefits, or services limited by Federal statue or Executive order to a different class of handicapped persons is not prohibited by this part.

(d) *Special communication.* Recipients shall take appropriate action to ensure that communications with their applicants, employees, and beneficiaries are available to persons with impaired vision and hearing.

[45 FR 63268, Sept. 24, 1980, as amended at 68 FR 51370, Aug. 26, 2003]

### § 18.405 Assurances required.

(a) *Assurances.* An applicant for Federal financial assistance to which this part applies shall submit an assurance on a form specified by the Secretary, that the program or activity will be operated in compliance with this part.

(b) *Duration of obligation.* (1) When Federal financial assistance is extended in the form of real property or structures on the property, the assurance will obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for the purpose for which Federal financial assistance is extended or for another purpose involving the provisions of similar services or benefits.

(2) Where Federal financial assistance is extended to provide personal property, the assurance will obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases the assurance will obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Extent of application to institution or facility.* An assurance shall apply to the entire institution or facility.

(d) *Covenants.* (1) Where Federal financial assistance is provided in the form of real property or interest in the property from the Agency, the instrument effecting or recording this transfer shall contain a covenant running with the land to assure nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provisions of similar services or benefits.

(2) Where no transfer of property is involved but property is purchased or improved with Federal financial assistance, the recipient shall agree to include the covenant described in paragraph (b)(2) of this section in the instrument effecting or recording any subsequent transfer of property.

(3) Where Federal financial assistance is provided in the form of real property or interest in the property from the Agency, the covenant shall also include a condition coupled with a right to be reserved by the Agency to revert title to the property if there is a breach of the covenant. If a transferree of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on the property for the purpose for which the property was transferred, the Secretary may, upon request of the transferee and if necessary to accomplish such financing and upon such conditions as considered appropriate, agree to forbear the exercise of the right to revert title for as long as the lien of the mortgage or other encumbrance remains effective.

(e) *Other methods of enforcement.* (1) Recipients are required to keep such records as the responsible VA official deems necessary for complete and accurate compliance reports. VA can specify intervals for reporting and prescribe the form and content of information required to ascertain whether the recipient has complied or is complying with the law.

(2) Periodic compliance reviews of training establishments will be conducted by VA compliance officers. During these reviews recipients are required to permit access by VA compliance officers during normal business hours to such of their books, records, accounts, facilities and other sources of information including interviews with personnel and trainees as may be pertinent to ascertain compliance with the law.

(3) From study of documentation, results of interviews, and observation of activities during tours of facilities, compliance officers will evaluate recipients' compliance status.

[45 FR 63268, Sept. 24, 1980, as amended at 51 FR 10385, Mar. 26, 1986; 68 FR 51370, Aug. 26, 2003]

### § 18.406 Remedial action, voluntary action and self-evaluation.

(a) *Remedial action.* (1) If the Secretary finds that a recipient has discriminated against qualified persons on the basis of handicap in violation of section 504 or this part, the recipient shall take such remedial action as the Secretary considers necessary to overcome the effects of the discrimination.

(2) Where a recipient is found to have discriminated against qualified persons on the basis of handicap in violation of section 504 or this part and where another recipient exercises control over the recipient that has discriminated, the Secretary, where appropriate, may require either or both recipients to take remedial action.

(3) The Secretary may, where necessary to overcome the effects of discrimination in violation of section 504 or this part, require a recipient to take remedial action with respect to:

(i) Handicapped persons who are no longer participants in the recipient's program or activity but who were participants in the program or activity when such discrimination occurred;

(ii) Handicapped persons who would have been participants in the program or activity had the discrimination not occurred; or

(iii) Handicapped persons presently in the program or activity, but not receiving full benefits or equal and integrated treatment within the program or activity.

(b) *Voluntary action.* A recipient may take steps, in addition to any action that is required by this part, to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity by qualified handicapped persons.

(c) *Self-evaluation.* (1) A recipient shall, within one year of the effective date of this part:

(i) Evaluate with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, its current policies and practices and the effects of the policies and practices that do not or may not meet the requirements of this part;

(ii) Modify, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, any policies and practices that do not meet the requirements of this part; and

(iii) Take, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, appropriate remedial steps to eliminate the effects of any discrimination that resulted from adherence to these policies and practices.

(2) A recipient that employs fifteen or more persons shall, for at least three years following completion of the evaluation required under paragraph (c)(1) of this section, maintain on file, make available for public inspection, and provide to the Secretary upon request:

(i) A list of the interested persons consulted;

(ii) A description of areas examined and any problems identified; and

(iii) A description of any modifications made and of any remedial steps taken.

(3) Recipients who become such more than one year after the effective date of these regulations shall complete these self-evaluation requirements within one year after becoming recipients of Federal financial assistance.

(The information collection requirements contained in paragraph (c) have been approved by the Office of Management and Budget under control number 2900–0415)

[45 FR 63268, Sept. 24, 1980, as amended at 49 FR 32574, Aug. 15, 1984; 68 FR 51370, Aug. 26, 2003]

### § 18.407 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* A recipient that employs fifteen or more persons shall designate at least one person to coordinate its efforts to comply with this part.

(b) *Adoption of grievance procedures.* A recipient that employs fifteen or more persons shall adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part. Such procedures need not be established with respect to complaints from applicants for employment or from applicants for admission to postsecondary educational institutions.

### § 18.408 Notice.

(a) A recipient that employs fifteen or more persons shall take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees, including those with impaired vision or hearing, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of handicap in violation of section 504 and this part. The notification shall state, where appropriate, that the recipient does not discriminate in admission or access to, or treatment, or employment in, its programs or activities. The notification shall also include an identification of the responsible employee designated under § 18.407. A recipient shall make the initial notification required by this paragraph within 90 days of the effective date of this part. Methods of initial and continuing notification may include the posting of notices, publication in newspapers and

magazines, placement of notices in recipient's publication, and distribution of memorandums or other written communications.

(b) If a recipient publishes or uses recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees, it shall include in those materials or publications a statement of the policy described in paragraph (a) of this section. A recipient may meet the requirement of this section either by including appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

[45 FR 63268, Sept. 24, 1980, as amended at 68 FR 51370, Aug. 26, 2003]

### § 18.409 Administrative requirements for certain recipients.

The Secretary may require any recipient with fewer than fifteen employees, or any class of such recipients, to comply with §§ 18.407 and 18.408 in whole or in part, when the Secretary finds a violation of this part or finds that such compliance will not significantly impair the ability of the recipient or class of recipients to provide benefits or services.

### § 18.410 Effect of State or local law or other requirements and effect of employment opportunities.

(a) The obligation to comply with this part is not obviated or alleviated by the existence of any State law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive services or to practice any occupation or profession.

(b) The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for handicapped persons than for nonhandicapped persons.

EMPLOYMENT PRACTICES

### § 18.411 Discrimination prohibited.

(a) *General.* (1) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity to which this part applies.

(2) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

(3) A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination in employment. The relationships referred to in this section include relationships with employment and referral agencies, with organizations providing or administering fringe benefits to employees of the recipient, and with organizations providing training and apprenticeships.

(b) *Specific activities.* Nondiscrimination in employment applies to:

(1) Recruitment, advertising, and the processing of applications for employment;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(3) Rates of pay or other forms of compensation and changes in compensation;

(4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(5) Leaves of absence, sick leave, or any other leave;

(6) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

(8) Employer sponsored activities, including those that are social or recreational; and

(9) Any other term, condition, or privilege of employment.

(c) *Collective bargaining agreements.* A recipient's obligation to comply with

this subpart is not affected by any inconsistent term of any collective bargaining agreement to which it is a party.

[45 FR 63268, Sept. 24, 1980, as amended at 68 FR 51370, Aug. 26, 2003]

### § 18.412 Reasonable accommodation.

(a) A recipient shall make reasonable accommodation to the known physical or mental limitations of a handicapped applicant or employee if such accommodation would enable that person to perform the essential functions of the job unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program or activity.

(b) Reasonable accommodation may include:

(1) Making facilities used by employees readily accessible to and usable by handicapped persons; and

(2) Job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters and other similar actions.

(c) In determining under paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program or activity, factors to be considered include:

(1) The overall size of the recipient's program or activity with respect to number of employees, number and type of facilities, and size of budget;

(2) The type of the recipient's operation, including the composition and structure of the recipient's work force; and

(3) The nature and cost of the accommodation needed.

(d) A recipient may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

[45 FR 63268, Sept. 24, 1980, as amended at 51 FR 10385, Mar. 26, 1986; 68 FR 51370, Aug. 26, 2003]

### § 18.413 Employment criteria.

(a) A recipient may not use any employment test or other selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons unless:

(1) The test score or other selection criterion, as used by the recipient, is shown to be job-related for the position in question; and

(2) Alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Secretary to be available.

(b) A recipient shall select and administer tests concerning employment to best ensure that when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's job skills, aptitude, or whatever other factor the test purports to measure, rather than reflect the applicant's or employee's impaired sensory, manual, or speaking skills (except when those skills are the factors that the test purports to measure).

### § 18.414 Preemployment inquiries.

(a) Except as provided in paragraphs (b) and (c) of this section, a recipient may not conduct a preemployment medical examination or may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap. A recipient may, however, make preemployment inquiry into the applicant's ability to perform job-related functions.

(b) When a recipient is taking remedial action to correct the effects of past discrimination pursuant to § 18.406(a), when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to § 18.406(b), or when a recipient is taking affirmative action pursuant to section 503 of the Act, the recipient may invite applicants for employment to indicate whether and to what extent they are handicapped, provided that:

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for

use solely in connection with its remedial action obligations or its voluntary or affirmative action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential as provided in paragraph (d) of this section, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with this part.

(c) Nothing in this section shall prohibit a recipient from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty, provided that:

(1) All entering employees are subjected to such an examination regardless of handicap, and (2) the results of such an examination are used only in accordance with the requirements of this part.

(d) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be collected and maintained on separate forms that shall be accorded confidentiality as medical records, except that:

(1) Supervisors and managers may be informed regarding restrictions on the work or duties of handicapped persons and regarding necessary accommodations;

(2) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment;

(3) Government officials investigating compliance with the Act shall be provided relevant information upon request.

ACCESSIBILITY

### § 18.421 Discrimination prohibited.

No qualified handicapped person shall, because a recipient's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which this part applies.

### § 18.422 Existing facilities.

(a) *Accessibility.* A recipient shall operate each program or activity to which this part applies so that when each part is viewed in its entirety it is readily accessible to handicapped persons. This paragraph does not require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons.

(b) *Methods.* A recipient may comply with the requirement of paragraph (a) of this section through such measures as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aids to beneficiaries, home visits, delivery of health, or other social services at alternate accessible sites, alteration of existing facilities and construction of new facilities in conformance with § 18.423 or any other methods that make its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in making its programs or activities readily accessible to handicapped persons. In choosing among available methods for complying with paragraph (a) of this section, a recipient shall give priority to methods that serve handicapped persons in the most integrated setting appropriate.

(c) *Small health, welfare or other social service providers, and recipients that operate other than educational programs or activities.* If a recipient with fewer than fifteen employees finds after consultation with a handicapped person seeking its services that there is no method of complying with paragraph (a) of this section other than making a significant alteration in its existing facilities, the recipient may, as an alternative, refer the qualified handicapped person to other providers whose services are accessible. Where referrals are necessary, transportation costs shall not exceed costs to and from recipients' programs or activities.

(d) *Time period.* A recipient shall comply with paragraph (a) of this section within 60 days of the effective date of this part except that when structural changes in facilities are necessary, these changes shall be made as soon as practicable, but not later than three

years after the effective date of this part.

(e) *Transition plan.* If structural changes to facilities are necessary to meet the requirements of paragraph (a) of this section, a recipient shall develop a transition plan within six months of the effective date of this part setting forth the steps necessary to complete such change. The plan shall be developed with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons. A copy of the transition plan shall be available for public inspection. The plan shall, at a minimum:

(1) Identify physical obstacles in the recipient's facilities that limit the accessibility of its program or activity to handicapped persons;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve full accessibility under paragraph (a) of this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the person responsible for implementation of the plan.

(f) *Notice.* The recipient shall implement procedures to ensure that interested persons, including persons with impaired vision or hearing, can obtain information concerning the existence and location of services, activities, and facilities that are accessible to and usable by handicapped persons.

(The information collection requirements contained in paragraph (e) have been approved by the Office of Management and Budget under control number 2900–0414)

[45 FR 63268, Sept. 24, 1980, as amended at 49 FR 32574, Aug. 15, 1984; 68 FR 51370, Aug. 26, 2003]

### § 18.423 New construction.

(a) *Design and construction.* Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed so that the facility or part of the facility is readily accessible to and usable by handicapped persons, if the construction was commenced after the effective date of this part.

(b) *Alteration.* Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient after the effective date of this part in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered so that the altered portion of the facility is readily accessible to and usable by handicapped persons.

(c) *Conformance with Uniform Federal Accessibility Standards.* (1) Effective as of January 18, 1991, design, construction, or alteration of buildings in conformance with sections 3-8 of the Uniform Federal Accessibility Standards (USAF) (appendix A to 41 CFR subpart 101–19.6) shall be deemed to comply with the requirements of this section with respect to those buildings. Departures from particular technical and scoping requirements of UFAS by the use of other methods are permitted where substantially equivalent or greater access to and usability of the building is provided.

(2) For purposes of this section, section 4.1.6(1)(g) of UFAS shall be interpreted to exempt from the requirements of UFAS only mechanical rooms and other spaces that, because of their intended use, will not require accessibility to the public or beneficiaries or result in the employment or residence therein of persons with physical handicaps.

(3) This section does not require recipients to make building alterations that have little likelihood of being accomplished without removing or altering a load-bearing structural member.

[45 FR 63268, Sept. 24, 1980, as amended at 55 FR 52138, 52141, Dec. 19, 1990]

## ELEMENTARY, SECONDARY, AND ADULT EDUCATION

### § 18.431 Application.

Sections 18.431 through 18.439 apply to elementary, secondary, and adult education programs or activities that receive Federal financial assistance from the Department of Veterans Affairs and to recipients that operate or receive Federal financial assistance for

the operation of such programs or activities.

[45 FR 63268, Sept. 24, 1980, as amended at 68 FR 51370, Aug. 26, 2003]

### § 18.432 Location and notification.

A recipient that operates a public elementary or secondary educational program shall annually:

(a) Undertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education; and

(b) Take appropriate steps to notify handicapped persons their parents or guardians of the recipients's duty under §§ 18.431 through 18.439.

### § 18.433 Free appropriate public education.

(a) *General.* A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) *Appropriate education.* (1) The provision of an appropriate education is the provision of regular or special education and related aids and services that:

(i) Are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met; and

(ii) Are based upon adherence to procedures that satisfy the requirements of §§ 18.434, 18.435, and 18.436.

(2) Implementation of an Individualized Education Program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.

(3) A recipient may place a qualified handicapped person or refer that person for aid, benefits, or services other than those that it operates or provides as its means of carrying out the requirements of §§ 18.431 through 18.439. The recipients remain responsible for ensuring that the requirements of §§ 18.431 through 18.439 are met with respect to any qualified handicapped person so placed or referred.

(c) *Free education.* (1) The provision of a free education is the provision of educational and related services without cost to the handicapped person, parents or guardian, except for those fees that are imposed on nonhandicapped persons or their parents or guardian. It may consist either of the provision of free services or, if a recipient places a handicapped person or refers that person for aid, benefits, or services not operated or provided by the recipient as its means of carrying out the requirements of §§ 18.431 through 18.439, of payment for the costs of the aid, benefits, or services. Funds available from any public or private agency may be used to meet the requirements of this subpart. Nothing in this section shall be construed to relieve an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a handicapped person.

(2) If a recipient places a handicapped person or refers that person for aid, benefits, or services not operated or provided by the recipient as its means of carrying out the requirements of this subpart, the recipient shall ensure that adequate transportation to and from the aid, benefits, or services is provided at no greater cost than would be incurred by the person, parents or guardian if the person were placed in the aid, benefits, or services operated by the recipient.

(3) If placement in a public or private residential program is necessary to provide free appropriate public education to a handicapped person because of his or her handicap, the program, including non-medical care and room and board, shall be provided at no cost to the person, parents or guardian.

(4) If a recipient has made available, in conformance with this section and § 18.434, a free appropriate public education to a handicapped person and the person's parents or guardian chooses to place the person in a private school, the recipient is not required to pay for the person's education in the private school. Disagreements between a parent or guardian and a recipient regarding whether the recipient has made a free appropriate public education available or regarding the question of financial responsibility are subject to the due process procedures of § 18.436.

(d) *Compliance.* A recipient may not exclude any qualified handicapped person from a public elementary or secondary education after the effective date of this part. A recipient that is not, on the effective date of this part, in full compliance with the requirements of paragraphs (a) through (c) of this section shall meet those requirements at the earliest practicable time, but not later than October 1, 1981.

[45 FR 63268, Sept. 24, 1980, as amended at 51 FR 10385, Mar. 26, 1986; 51 FR 12702, Apr. 15, 1986; 68 FR 51370, Aug. 26, 2003]

### § 18.434 Education setting.

(a) *Academic setting.* A recipient shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. In deciding whether to place a person in a setting other than the regular educational environment, a recipient shall consider the proximity of the alternate setting to the person's home.

(b) *Nonacademic settings.* In providing or arranging for the provision of nonacademic and extracurricular services and activities, a recipient shall ensure that handicapped persons participate with nonhandicapped persons in those activities and services to the maximum extent appropriate to the needs of the handicapped person in question.

(c) *Comparable facilities.* If a recipient in compliance with paragraph (a) of this section operates a facility that is identifiable as being for handicapped persons, the recipient shall ensure that the facility and the services and activities provided in that facility are comparable to the other facilities, services, and activities of the recipient.

### § 18.435 Evaluation and placement.

(a) *Preplacement evaluation.* A recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation of any qualified person who, because of handicap, needs or is believed to need special education or related services before taking any action concerning the initial placement of the person in regular or program special education and any subsequent change in placement.

(b) *Evaluation procedures.* Elementary, secondary, and adult education programs or activities that receive Federal financial assistance shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services which ensure that:

(1) Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer;

(2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and

(3) Tests are selected and administered to best ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflect the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure.)

(c) *Placement procedures.* In interpreting evaluation data and in making placement decisions, a recipient shall:

(1) Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background and adaptive behavior;

(2) Establish procedures to ensure that information obtained from all sources is documented and carefully considered;

(3) Ensure that the placement decision is made by a group of persons, including persons knowledgeable about

the student, the meaning of the evaluation data and the placement options; and

(4) Ensure that the placement decision is made in accordance with § 18.434.

(d) *Reevaluation.* A recipient to which this section applies shall establish procedures, in accordance with paragraph (b) of this section, for periodic reevaluation of students who have been provided special education and related services. A reevaluation procedure consistent with the Education for the Handicapped Act is one means of meeting this requirement.

[45 FR 63268, Sept. 24, 1980, as amended at 68 FR 51370, Aug. 26, 2003]

### § 18.436 Procedural safeguards.

(a) A recipient that operates a public elementary or secondary education program shall implement a system of procedural safeguards with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services. The system shall include:

(1) Notice;

(2) An opportunity for the parents or guardian of the person to examine relevant records;

(3) An impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel; and

(4) Review procedure.

(b) Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

### § 18.437 Nonacademic services.

(a) *General.* (1) Elementary, secondary, and adult education programs that receive Federal financial assistance shall provide nonacademic and extracurricular services and activities in a manner which gives handicapped students an equal opportunity for participation in these services and activities.

(2) Nonacademic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipient, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment.

(b) *Counseling services.* Elementary, secondary, and adult education programs that receive Federal financial assistance and that provide personal, academic, or vocational counseling, guidance, or placement services to their students shall provide these services without discrimination on the basis of handicap and shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities.

(c) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar aid, benefits, or services to any of its students, an elementary, secondary, or adult education program or activity that receives Federal financial assistance may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors interscholastic, club, or intramural activities shall provide to qualified handicapped students an equal opportunity for participation.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different from those offered to nonhandicapped students only if separation or differentiation is consistent with the requirements of § 18.434 and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

[45 FR 63268, Sept. 24, 1980, as amended at 68 FR 51370, Aug. 26, 2003]

### § 18.438 Adult education.

A recipient that provides adult education may not, on the basis of handicap, exclude qualified handicapped persons. The recipient shall take into account the needs of these persons in determining the aid, benefits, or services to be provided.

[45 FR 63268, Sept. 24, 1980, as amended at 68 FR 51370, Aug. 26, 2003]

### § 18.439 Private education.

(a) A recipient that provides private elementary or secondary education may not on the basis of handicap, exclude a qualified handicapped person if the person can, with minor adjustments, be provided an appropriate education, as defined in § 18.433(b)(1), within that recipient's program or activity.

(b) A recipient may not charge more for providing an appropriate education to handicapped persons than to nonhandicapped persons except to the extent that any additional charge is justified by a substantial increase in cost to the recipient.

(c) A recipient to which this section applies that provides special education shall do so in accordance with §§ 18.435 and 18.436. Each recipient to which this section applies is subject to §§ 18.434, 18.437, and 18.438.

[45 FR 63268, Sept. 24, 1980, as amended at 68 FR 51370, Aug. 26, 2003]

POSTSECONDARY EDUCATION

### § 18.441 Application.

Sections 18.441 through 18.447 apply to postsecondary education programs or activities that receive Federal financial assistance from the Department of Veterans Affairs and to recipients that operate or receive or benefit from Federal financial assistance for the operation of such programs or activities.

[45 FR 63268, Sept. 24, 1980, as amended at 68 FR 51370, Aug. 26, 2003]

### § 18.442 Admissions and recruitment.

(a) *General.* Qualified handicapped persons may not, on the basis of handicap, be denied admission or be subjected to discrimination in admission or recruitment by a recipient.

(b) *Admission.* In administering its admission policies, a recipient;

(1) May not apply limitations on the number or proportion of handicapped persons who may be admitted;

(2) May not use any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons or any class of handicapped persons unless:

(i) The test or criterion, as used by the recipient, has been validated as a predictor of success in the education program or activity in question; and

(ii) Alternate tests or criteria that have a less disproportionate, adverse effect are not shown by the Secretary to be available;

(3) Shall assure itself that:

(i) Admissions tests are selected and administered to best ensure that, when a test is administered to an applicant who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflect the applicant's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure);

(ii) Admissions tests that are designed for persons with impaired sensory, manual, or speaking skills are offered as often and in as timely a manner as are other admissions tests; and

(iii) Admissions tests are administered in facilities that, on the whole, are accessible to handicapped persons; and

(4) Except as provided in paragraph (c) of this section, may not make preadmission inquiries as to whether an applicant for admission is a handicapped person. After admission, the recipient may inquire on a confidential basis as to handicaps that may require accommodation.

(c) *Preadmission inquiry exception.* When a recipient is taking remedial action to correct the effects of past discrimination under § 18.406(a) or when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity under § 18.406(b), the recipient may invite applicants for admission to indicate whether and to what extent they are handicapped.

(1) The recipient shall state clearly on any written questionnaire used for this purpose or make clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary action efforts; and

(2) The recipient shall state clearly that the information is being requested

on a voluntary basis, that it will be kept confidential, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will be used only in accordance with this part.

(d) *Validity studies.* For the purpose of paragraph (b)(2) of this section, a recipient may base prediction equations on first year grades, but shall conduct periodic validity studies against the criterion of overall success in the education program or activity in question to monitor the general validity of the test scores.

### § 18.443 General treatment of students.

(a) No qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, research, occupational training, housing, health insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other aid, benefits, or services operated by a recipient to which this subpart applies.

(b) A recipient that considers participation by students in education programs or activities not operated wholly by the recipient as part of, or equivalent to, an education program or activity operated by the recipient shall assure itself that the other education program or activity, as a whole, provides an equal opportunity for the participation of qualified handicapped persons.

(c) A recipient to which this subpart applies may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity.

(d) A recipient shall operate its program or activity in the most integrated setting appropriate.

[45 FR 63268, Sept. 24, 1980, as amended at 68 FR 51370, Aug. 26, 2003]

### § 18.444 Academic adjustments.

(a) *Academic requirements.* A recipient shall make necessary modifications to its academic requirements to ensure that these requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted. Academic requirements that the recipient can demonstrate are essential to the instruction being pursued by the student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section.

(b) *Other rules.* A recipient may not impose upon handicapped students other rules, such as the prohibition of tape recorders in classrooms or guide dogs in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient's education program or activity.

(c) *Course examinations.* In its course examinations or other procedures for evaluating students' academic achievement, a recipient shall provide methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills that will best ensure that the results of the evaluation represent the students' achievement in the course, rather than reflect the students' impaired sensory, manual, or speaking skills (except where such skills are the factors that the test purports to measure).

(d) *Auxiliary aids.* (1) A recipient shall ensure that no qualified handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

(2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal

use or study, or other devices or services of a personal nature.

[45 FR 63268, Sept. 24, 1980, as amended at 68 FR 51370, Aug. 26, 2003]

### § 18.445 Housing.

(a) *Housing provided by a recipient.* A recipient that provides housing to its nonhandicapped students shall provide comparable, convenient, and accessible housing to qualified handicapped students at the same cost as to others. At the end of the transition period provided for in § 18.422(e), this housing shall be available in sufficient quantity and variety so that the scope of handicapped students' choice of living accommodations is, as a whole, comparable to that of nonhandicapped students.

(b) *Other housing.* A recipient that assists any agency, organization, or person in making housing available to any of its students shall assure itself that such housing is, as a whole, made available in a manner that does not result in discrimination on the basis of handicap.

### § 18.446 Financial and employment assistance to students.

(a) *Provision of financial assistance.* (1) In providing financial assistance to qualified handicapped persons, a recipient may not:

(i) On the basis of handicap, provide less assistance than is provided to nonhandicapped persons, limit eligibility for assistance, or otherwise discriminate; or

(ii) Assist any entity or person that provides assistance to any of the recipient's students in a manner that discriminates against qualified handicapped persons on the basis of handicap.

(2) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established under wills, trusts, bequests, or similar legal instruments that require awards to be made on the basis of factors that discriminate or have the effect of discriminating on the basis of handicap only if the overall effect of the award of scholarships, fellowships, and other forms of financial assistance is not discriminatory on the basis of handicap.

(b) *Assistance in making available outside employment.* A recipient that assists any agency, organization, or person in providing employment opportunities to any of its students shall assure itself that these employment opportunities, as a whole, are made available in a manner that would not violate §§ 18.411 through 18.414 if the opportunities were provided by the recipient.

(c) *Employment of students by recipients.* A recipient that employs any of its students may not do so in a manner that violates §§ 18.411 through 18.414.

### § 18.447 Nonacademic services.

(a) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar aid, benefits, or services to any of its students, a recipient may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors intercollegiate, club or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different only if separation or differentiation is consistent with the requirements of § 18.443(d) and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

(b) *Counseling and placement services.* A recipient that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities. This requirement does not preclude a recipient from providing factual information about licensing and certification requirements that may present obstacles to handicapped persons in their pursuit of particular careers.

(c) *Social organizations.* A recipient that provides significant assistance to

fraternities, sororities, or similar organizations shall assure itself that the membership practices of these organizations do not permit discrimination otherwise prohibited by §§ 18.441 through 18.447.

[45 FR 63268, Sept. 24, 1980, as amended at 68 FR 51370, Aug. 26, 2003]

HEALTH AND SOCIAL SERVICES

### § 18.451 Application.

Subpart F applies to health, and other social service programs or activities that receive Federal financial assistance from the Department of Veterans Affairs and to recipients that operate or receive Federal financial assistance for the operation of such programs or activities.

[45 FR 63268, Sept. 24, 1980, as amended at 68 FR 51370, Aug. 26, 2003]

### § 18.452 Health and other social services.

(a) *General.* In providing health, or other social services or benefits, a recipient may not, on the basis of handicap:

(1) Deny a qualified handicapped person these benefits or services;

(2) Give a qualified handicapped person the opportunity to receive benefits or services that are not equal to those offered nonhandicapped persons.

(3) Provide a qualified handicapped person with benefits or services that are not as effective (as defined in § 18.404(b)(2)) as the benefits or services provided to others;

(4) Provide benefits or services in a manner that limits or has the effect of limiting the participation of qualified handicapped persons; or

(5) Provide different or separate benefits or services to handicapped persons except where necessary to provide qualified handicapped persons with benefits and services that are as effective as those provided to others.

(b) *Notice.* A recipient that provides notice concerning benefits or services or written material concerning waivers of rights of consent to treatment shall ensure that qualified handicapped persons, including those with impaired sensory or speaking skills, are not denied effective notice because of their handicap.

(c) *Emergency treatment for the hearing impaired.* A recipient hospital that provides health services or benefits shall establish a procedure for effective communication with persons with impaired hearing for the purpose of providing emergency care.

(d) *Auxiliary aids.* (1) A recipient that employs fifteen or more persons shall provide appropriate auxiliary aids to persons with impaired sensory, manual, or speaking skills, where necessary to give these persons an equal opportunity to benefit from the service in question.

(2) The Secretary may require recipients with fewer than fifteen employees to provide auxiliary aids where the provision of aids would not significantly impair the ability of the recipient to provide its benefits or services.

(3) Auxiliary aids may include brailled and taped material, interpreters, and aids for persons with impaired hearing or vision.

### § 18.453 Drug and alcohol addicts.

A recipient that operates a general hospital or outpatient facility may not discriminate, with regard to a drug or alcohol abuser or alcoholic who is suffering from a medical condition, in the admission of that person for treatment of the medical condition, or in the treatment of the medical condition because of the person's drug or alcohol abuse or alcoholism.

### § 18.454 Education of institutionalized persons.

A recipient that operates or supervises a program or activity that provides aid, benefits, or services for persons who are institutionalized because of handicap and is responsible for providing training shall ensure that each qualified handicapped person, as defined in § 18.403(k)(2), in its program or activity that provides aid, benefits, or services is provided an appropriate education, as defined in § 18.433(b). Nothing in this section shall be interpreted as altering in any way the obligations of recipients under §§ 18.431 through 18.439.

[45 FR 63268, Sept. 24, 1980; 51 FR 12702, Apr. 15, 1986; 68 FR 51370, Aug. 26, 2003]

PROCEDURES

### § 18.461 Procedures.

The procedural provisions applicable to Title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in §§ 18.6 through 18.11 and part 18b of this chapter.

APPENDIX A TO SUBPART D OF PART 18—STATUTORY PROVISIONS TO WHICH THIS PART APPLIES

1. Payments to State Homes (38 U.S.C. 1741–1743).
2. State home facilities for furnishing domiciliary, nursing home, and hospital care (38 U.S.C. 8131–8137).
3. Transfers for nursing home care; adult day health care (38 U.S.C. 1720).
4. Sharing of medical facilities, equipment, and information (38 U.S.C. 8151–8157).
5. Assistance in establishing new state medical schools, grants to affiliated medical schools; assistance to health manpower training institutions (38 U.S.C. Chapter 82).
6. Approval of educational institutions (38 U.S.C. 104).
7. Medical care for survivors and dependents of certain veterans (38 U.S.C. 1713).
8. Space and office facilities for representatives of State employment service (38 U.S.C. 7725(4)).
9. Space and office facilities for representatives of recognized national service organizations (38 U.S.C. 5902(a)(2)).
10. All-volunteer force educational assistance, vocational rehabilitation post-Vietnam era veterans educational assistance; veterans educational assistance, survivors' and dependents' educational assistance, and administration of educational benefits (38 U.S.C. Chapters 30, 31, 32, 34, 35 and 36 respectively).
11. Treatment and rehabilitation for alcohol or drug dependence or abuse disabilities (38 U.S.C. 1720A).
12. Aid to States for establishment, expansion, and improvement of veterans cemeteries (38 U.S.C. 2408).
13. Department of Veterans Affairs health professional scholarship program (38 U.S.C. 7601–7655).
14. Emergency veterans job training (Pub. L. 98–77, 97 Stat. 443–452).

[45 FR 63268, Sept. 24, 1980, as amended at 51 FR 10385, Mar. 26, 1986; 51 FR 12702, Apr. 15, 1986]

## Subpart E—Nondiscrimination on the Basis of Age

AUTHORITY: Age Discrimination Act of 1975, as amended, 42 U.S.C. 6101, *et seq.*; 45 CFR part 90 (1979).

SOURCE: 50 FR 34133, Aug. 23, 1985, unless otherwise noted.

GENERAL

### § 18.501 Purpose.

The purpose of these regulations is to set out Department of Veterans Affairs (VA) policies and procedures under the Age Discrimination Act of 1975 and the governmentwide age discrimination regulations at 45 CFR part 90. The Act and the governmentwide regulations prohibit discrimination on the basis of age in programs or activities receiving Federal financial assistance. The Act and the governmentwide regulations permit federally assisted programs or activities, and recipients of Federal funds, to continue to use age distinctions and factors other than age which meet the requirements of the Act and its implementing regulations.

(Authority: 42 U.S.C. 6101–6107)

[50 FR 34133, Aug. 23, 1985, as amended at 54 FR 34984, Aug. 23, 1989; 68 FR 51372, Aug. 26, 2003]

### § 18.502 Application.

(a) These regulations apply to any program or activity receiving Federal financial assistance provided by VA directly or through another recipient.

(b) These regulations do not apply to:

(1) An age distinction contained in that part of a Federal, State, or local statute or ordinance adopted by an elected, general purpose legislative body which:

(i) Provides any benefits or assistance to persons based on age; or

(ii) Establishes criteria for participation in age-related terms; or

(iii) Describes intended beneficiaries or target groups in age-related terms.

(2) Any employment practice of any employer, employment agency, labor organization, or any labor-management joint apprenticeship training program, except any program or activity receiving Federal financial assistance for public service employment under

the Job Training Partnership Act, 29 U.S.C. 1501, *et seq.*

(Authority: 42 U.S.C. 6101–6107)

**§ 18.503 Definitions.**

As used in these regulations:

(a) *Act* means the Age Discrimination Act of 1975, as amended (Title III of Pub. L. 94–135, 42 U.S.C. 6101–6107).

(b) *Action* means any act, activity, policy, rule, standard, or method of administration; or the use of any policy, rule, standard, or method of administration.

(c) *Secretary* means the Secretary of Veterans Affairs or designees.

(d) *Age* means how old a person is, or the number of elapsed years from the date of a person's birth.

(e) *Age discrimination* means unlawful treatment based on age.

(f) *Age distinction* means any action using age or an age-related term.

(g) *Age-related term* means a word or words which necessarily imply a particular age or range of ages (for example, *children, adult, older persons,* but not *student*).

(h) *Day* means calendar day.

(i) *Federal financial assistance* means any grant, entitlement, loan, cooperative agreement, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which a Federal agency or department provides or otherwise makes available assistance in the form of:

(1) Funds; or

(2) Services of Federal personnel; or

(3) Real and personal property or any interest in or use of property, including:

(i) Transfers or leases of property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of property if the Federal share of its market value is not returned to the Federal Government.

(j) *Program or activity* means all of the operations of any entity described in paragraphs (j)(1) through (4) of this section, any part of which is extended Federal financial assistance:

(1)(i) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(ii) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(i) A college, university, or other postsecondary institution, or a public system of higher education; or

(ii) A local educational agency (as defined in 20 U.S.C. 7801), system of vocational education, or other school system;

(3)(i) An entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) Any other entity that is established by two or more of the entities described in paragraph (j)(1), (2), or (3) of this section.

(k) *Recipient* means any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended, directly or through another recipient. Recipient includes any successor, assignee, or transferee, but excludes the ultimate beneficiary of the assistance.

(l) *Subrecipient* means any of the entities in the definition of *recipient* to which a recipient extends or passes on Federal financial assistance. A subrecipient is generally regarded as a recipient of Federal financial assistance and has all the duties of a recipient in these regulations.

(m) *United States* means the fifty States, the District of Columbia, Puerto Rico, the Virgin Islands, the Canal

Zone, the Trust Territories of the Pacific Islands, the Northern Marianas, and the territories and possessions of the United States.

(Authority: 42 U.S.C. 6101–6107)

[50 FR 34133, Aug. 23, 1985, as amended at 68 FR 51371, Aug. 26, 2003]

STANDARDS FOR DETERMINING AGE DISCRIMINATION

### § 18.511 Rules against age discrimination.

The rules in this section are limited by the exceptions contained in §§ 18.513 and 18.514 of these regulations.

(a) *General rule.* No person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.

(b) *Specific rules.* A recipient may not, in any program or activity receiving Federal financial assistance, directly or through contractual licensing, or other arrangements, use age distinctions or take any other actions which have the effect, on the basis of age, of:

(1) Excluding individuals from, denying them the benefits of, or subjecting them to discrimination under, a program or activity receiving Federal financial assistance; or

(2) Denying or limiting individuals in their opportunity to participate in any program or activity receiving Federal financial assistance.

(c) The specific forms of age discrimination listed in paragraph (b) of this section do not necessarily constitute a complete list.

(Authority: 42 U.S.C. 6101–6107)

### § 18.512 Definitions of "normal operation" and "statutory objective."

For the purpose of these regulations, the terms *normal operation* and *statutory objective* shall have the following meaning:

(a) *Normal operation* means the operation of a program or activity without significant changes that would impair its ability to meet its objectives.

(b) *Statutory objective* means any purpose of a program or activity expressly stated in any Federal statute, State statute, or local statute or ordinance adopted by an elected, general purpose legislative body.

(Authority: 42 U.S.C. 6101–6107)

### § 18.513 Exceptions to the rules against age discrimination; normal operation or statutory objective of any program or activity.

A recipient is permitted to take an action, otherwise prohibited by § 18.511, if the action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity. An action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity, if:

(a) Age is used as a measure or approximation of one or more other characteristics; and

(b) The other characteristic(s) must be measured or approximated in order for the normal operation of the program or activity to continue, or to achieve any statutory objective of the program or activity; and

(c) The other characteristic(s) can be reasonably measured or approximated by the use of age; and

(d) The other characteristic(s) are impractical to measure directly on an individual basis.

(Authority: 42 U.S.C. 6101–6107)

### § 18.514 Exceptions to the rules against age discrimination; reasonable factors other than age.

A recipient is permitted to take an action otherwise prohibited by § 18.511 which is based on a factor other than age, even though that action may have a disproportionate effect on persons of different ages. An action may be based on a factor other than age only if the factor bears a direct and substantial relationship to the normal operation of the program or activity or to the achievement of a statutory objective.

(Authority: 42 U.S.C. 6101–6107)

### § 18.515 Burden of proof.

The burden of proving that an age distinction or other action falls within the exceptions outlined in §§ 18.513 and

18.514 is on the recipient of Federal financial assistance.

(Authority: 42 U.S.C. 6101–6107)

### § 18.516 Affirmative action by recipients.

Even in the absence of a finding of discrimination, a recipient may take affirmative action to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity on the basis of age.

(Authority: 42 U.S.C. 6101–6107)

RESPONSIBILITIES OF DEPARTMENT OF VETERANS AFFAIRS RECIPIENTS

### § 18.531 General responsibilities.

Each VA recipient must ensure that its programs or activities are in compliance with the Act and these regulations.

(Authority: 42 U.S.C. 6101–6107)

[50 FR 34133, Aug. 23, 1985, as amended at 68 FR 51372, Aug. 26, 2003]

### § 18.532 Notice of subrecipients.

Where a recipient passes on Federal financial assistance from VA to programs or activities of subrecipients, the recipient shall provide the subrecipients written notice of their obligations under the Act and these regulations with respect to such programs and activities.

(Approved by the Office of Management and Budget under control number 2900–0400)

(Authority: 42 U.S.C. 6101–6107)

[50 FR 34133, Aug. 23, 1985, as amended at 68 FR 51372, Aug. 26, 2003]

### § 18.533 Assurance of compliance and recipient assessment of age distinctions.

(a) Each recipient of Federal financial assistance from VA shall sign a written assurance as specified by the Secretary that it will comply with the Act and these regulations.

(b) *Recipient assessment of age distinctions.* (1) As part of a compliance review under § 18.541 or complaint investigation under § 18.544, the Secretary may require a recipient employing the equivalent of 15 of more employees to complete a written self-evaluation, in a manner specified by the responsible agency official, of any age distinction imposed in its programs or activities receiving Federal financial assistance from VA to assess the recipient's compliance with the Act.

(2) Whenever an assessment indicates a violation of the Act or these regulations, the recipient shall take corrective action.

(Authority: 42 U.S.C. 6101–6107)

### § 18.534 Information requirements.

Each recipient shall:

(a) Make available upon request to VA information necessary to determine whether the recipient is complying with the Act and these regulations.

(b) Permit reasonable access by VA to the books, records, accounts, and other recipient facilities and sources of information to the extent necessary to determine whether the recipient is in compliance with the Act and these regulations.

(Authority: 42 U.S.C. 6101–6107)

INVESTIGATION, CONCILIATION, AND ENFORCEMENT PROCEDURES

### § 18.541 Compliance reviews.

(a) VA may conduct compliance reviews and preaward reviews of recipients or use other similar procedures that will permit it to investigate and correct violations of the Act and these regulations. VA may conduct these reviews even in the absence of a complaint against a recipient. The review may be as comprehensive as necessary to determine whether a violation of these regulations has occurred.

(b) If a compliance review or preaward review indicates a violation of the Act or these regulations, VA will attempt to achieve voluntary compliance with the Act. If voluntary compliance cannot be achieved, VA may institute enforcement proceedings as described in § 18.546.

(Authority: 42 U.S.C. 6101–6107)

### § 18.542 Complaints.

(a) Any person, individually or as a member of a class or on behalf of others, may file a complaint with VA alleging discrimination prohibited by the Act or these regulations based on an action occurring on or after July 1,

1979. A complainant shall file a complaint within 180 days from the date the complainant first had knowledge of the alleged act of discrimination. However, for good cause shown, VA may extend this time limit. Complaints may be submitted to the Director, Office of Equal Opportunity (06B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420.

(b) VA will attempt to facilitate the filing of complaints wherever possible, including taking the following measures:

(1) Acknowledging receipt and acceptance of a complaint in writing.

(2) Accepting as a sufficient complaint, any written statement which identifies the parties involved and the date the complainant first had knowledge of the alleged violation, describes generally the action or practice complained of, and is signed by the complainant.

(3) Freely permitting a complainant to add information to the complaint to meet the requirements of a sufficient complaint.

(4) Widely disseminating information regarding the obligations of recipients under the Act and these regulations.

(5) Notifying the complainant and the recipient of their rights and obligations under the complaint procedure, including the right to have a representative at all stages of the complaint procedure.

(6) Notifying the complainant and the recipient (or their representatives) of their right to contact VA for information and assistance regarding the complaint resolution process.

(c) VA will refer a complaint of discrimination based on age to another appropriate Federal agency when the complaint is outside the jurisdiction of VA. VA will notify the complainant in writing that the complaint has been referred; explain the reason why the complaint is not within the jurisdiction of VA; and give the complainant the name, agency, and address of the official to whom the complaint was referred.

(Approved by the Office of Management and Budget under control number 2900–0401)

(Authority: 42 U.S.C. 6101–6107)

**§ 18.543 Mediation.**

(a) Referral of complaints for mediation. VA will refer to the Federal Mediation and Conciliation Service all complaints that:

(1) Fall within the jurisdiction of the Act and these regulations; and

(2) Contain all information necessary for further processing.

(b) Both the complainant and the recipient shall participate in the mediation process to the extent necessary to reach an agreement or make an informed judgment that an agreement is not possible. However, the recipient and the complainant need not meet with the mediator at the same time.

(c) If the complainant and the recipient reach an agreement, the mediator shall prepare a written statement of the agreement and have the complainant and the recipient sign it. The mediator shall send a copy of the agreement to VA. VA will take no further action on the complaint unless the complainant or the recipient fails to comply with the agreement.

(d) The mediator shall protect the confidentiality of all information obtained in the course of the mediation process. No mediator shall testify in any adjunctive proceeding, produce any document, or otherwise disclose any information obtained in the course of the mediation process without prior approval of the head of the mediation agency.

(e) VA will use the mediation process for a maximum of 60 days after the responsible agency official receives a complaint.

(f) Mediation ends if:

(1) 60 days elapse from the time the responsible agency official receives the complaint; or

(2) Prior to the end of that 60-day period, an agreement is reached; or

(3) Prior to the end of that 60-day period, the mediator determines that an agreement cannot be reached.

(g) The mediator shall return unresolved complaints to VA.

(Authority: 42 U.S.C. 6101–6107)

### § 18.544 Investigation.

(a) *Informal investigation.* (1) VA will investigate complaints that are reopened because of a violation of a mediation agreement.

(2) As part of the initial investigation VA will use informal fact finding methods, including joint or separate discussions with the complainant and recipient to establish the facts and, if possible, settle the complaint on terms that are mutually agreeable to the parties. VA may seek the assistance of any involved State agency.

(3) VA will put any agreement in writing and have it signed by the parties and an authorized official from the VA.

(4) The settlement shall not affect the operation of any other enforcement effort of VA, including compliance reviews and investigation of other complaints which may involve the recipient.

(5) A settlement need not contain an admission of discrimination or other wrongdoing by the recipient nor should it be considered a finding of discrimination against the recipient.

(b) *Formal investigation.* If VA cannot resolve the complaint through informal investigation, it will begin to develop formal findings through further investigation of the complaint. If the investigation indicates a violation of these regulations, VA will attempt to obtain voluntary compliance. If voluntary compliance cannot be achieved, VA may institute enforcement proceedings as described in § 18.546.

(Authority: 42 U.S.C. 6101–6107)

[50 FR 34133, Aug. 23, 1985, as amended at 68 FR 51372, Aug. 26, 2003]

### § 18.545 Prohibition against intimidation or retaliation.

A recipient may not engage in acts of intimidation or retaliation against any person who:

(a) Attempts to assert a right protected by the Act or these regulations; or

(b) Cooperates in any mediation, investigation, hearing, or other part of VA's investigation, conciliation, and enforcement process.

(Authority: 42 U.S.C. 6101–6107)

### § 18.546 Compliance procedure.

(a) VA may enforce the Act and these regulations through:

(1) Termination of Federal financial assistance from VA with respect to a recipient's program or activity that has violated the Act or these regulations. The determination of the recipient's violation may be made only after a recipient has had an opportunity for a hearing on the record before an administrative law judge. Therefore, cases which are settled in mediation, or prior to a hearing, will not involve termination of a recipient's Federal financial assistance from VA.

(2) Any other means authorized by law including but not limited to:

(i) Referral to the Department of Justice for proceedings to enforce any rights of the United States or obligations of the recipient created by the Act or these regulations.

(ii) Use of any requirement of or referral to any Federal, State, or local government agency that will have the effect of correcting a violation of the Act or these regulations.

(b) VA will limit any termination under paragraph (a)(1) of this section to the particular program or activity or part of such program or activity of a recipient that VA finds to be in violation of the Act or these regulations. VA will not base any part of a termination on a finding with respect to any program or activity of the recipient which does not receive Federal financial assistance from VA.

(c) VA will take no action under paragraph (a) of this section until:

(1) The Secretary has advised the recipient of its failure to comply with the Act and these regulations and has determined that voluntary compliance cannot be obtained.

(2) Thirty days have elapsed after the Secretary has sent a written report of the circumstances and grounds of the action to the committees of the Congress having legislative jurisdiction over the program or activity involved. The Secretary will file a report whenever any action is taken under paragraph (a) of this section.

(d) VA also may defer granting new Federal financial assistance from VA to a recipient when a hearing under

paragraph (a)(1) of this section is initiated.

(1) New Federal financial assistance from VA includes all assistance for which VA requires an application or approval, including renewal or continuation of existing activities, or authorization of new activities during the deferral period. New Federal financial assistance from VA does not include increases in funding resulting solely from a change in the formula or method of computing awards, nor does it include assistance approved prior to the beginning of a hearing under paragraph (a)(1) of this section.

(2) VA will not begin a deferral until the recipient has received a notice of an opportunity for a hearing under paragraph (a)(1) of this section. VA will not continue a deferral for more than 60 days unless a hearing has begun within that time or the time for beginning the hearing has been extended by mutual consent of the recipient and the Secretary. VA will not continue a deferral for more than 30 days after the close of the hearing, unless the hearing results in a finding against the recipient.

(Authority: 42 U.S.C. 6101–6107)

[50 FR 34133, Aug. 23, 1985, as amended at 68 FR 51372, Aug. 26, 2003]

### § 18.547 Hearings, decisions, post-termination proceedings.

Certain VA procedural provisions applicable to Title VI of the Civil Rights Act of 1964 apply to VA enforcement of these regulations. They are found at §§ 18.9 through 18.11 and part 18b of this title.

(Authority: 42 U.S.C. 6101–1607)

### § 18.548 Remedial action by recipient.

Where VA finds that a recipient has discriminated on the basis of age, the recipient shall take any remedial action that VA may require to overcome the effects of the discrimination. If another recipient exercises control over the recipient that has discriminated, VA may require both recipients to take remedial action.

(Authority: 42 U.S.C. 6101–1607)

### § 18.549 Alternate funds disbursal procedure.

(a) When VA withholds funds from a recipient under these regulations, the Secretary may disburse the withheld funds directly to an alternate recipient: Any public or non-profit private organization or agency, or State or political subdivision of the State.

(b) The Secretary will require any alternate recipient to demonstrate;

(1) The ability to comply with these regulations; and

(2) The ability to achieve the goals of the Federal statute authorizing the Federal financial assistance.

(Authority: 42 U.S.C. 6101–1607)

[50 FR 34133, Aug. 23, 1985, as amended at 68 FR 51372, Aug. 26, 2003]

### § 18.550 Exhaustion of administrative remedies.

(a) A complainant may file a civil action following the exhaustion of administrative remedies under the Act. Administrative remedies are exhausted if:

(1) 180 days have elapsed since the complainant filed the complaint and VA has made no finding with regard to the complaint; or

(2) VA issues any finding in favor of the recipient.

(b) If VA fails to make a finding within 180 days or issues a finding in favor of the recipient, VA will:

(1) Promptly advise the complainant of this fact; and

(2) Advise the complainant of his or her right to bring a civil action for injunctive relief; and

(3) Inform the complainant that:

(i) The complainant may bring a civil action only in a United States district court for the district in which the recipient is found or transacts business;

(ii) A complainant prevailing in a civil action has the right to be awarded the costs of the action, including reasonable attorney's fees, but the complainant must demand these costs in the complaint;

(iii) Before commencing the action, the complainant shall give 30 days notice by registered mail to the Secretary, the Attorney General of the United States, and the recipient;

(iv) The notice must state: The alleged violation of the Act; the relief requested; the court in which the complainant is bringing the action; and, whether or not attorney's fees are demanded in the event the complainant prevails; and

(v) The complainant may not bring action if the same alleged violations of the Act by the same recipient is the subject of a pending action in any court of the United States.

(Authority: 42 U.S.C. 6101–6107)

## APPENDIX A TO SUBPART E OF PART 18—STATUTORY PROVISIONS TO WHICH THIS SUBPART APPLIES

1. Approval of educational institutions (38 U.S.C. 104).
2. Space and office facilities for representatives of State employment services (38 U.S.C. 7725(1)).
3. Medical care for survivors and dependents of certain veterans (38 U.S.C. 1713).
4. Transfers for nursing home care; adult day health care (38 U.S.C. 1720).
5. Treatment and rehabilitation for alcohol or drug dependence or abuse disabilities (38 U.S.C. 1720A).
6. Payments to State Homes (38 U.S.C. 1741–1743).
7. Aid to States for establishment, expansion, and improvement of veterans' cemeteries (38 U.S.C. 2408).
8. Vocational Rehabilitation; Post-Vietnam Era Veterans' Educational Assistance; Survivors' and Dependents' Educational Assistance; and Administration of Educational Benefits (38 U.S.C. Chapters 31, 32, 34, 35 and 36 respectively).
9. Space and office facilities for representatives of recognized national organizations (38 U.S.C. 5902(a)(2)).
10. Department of Veterans Affairs Health Professional Scholarship Program (38 U.S.C. 7601–7655).
11. State Home Facilities for Furnishing Domiciliary, Nursing Home and Hospital Care (38 U.S.C. 8131–8137).
12. Sharing of Medical Facilities, Equipment and Information (38 U.S.C. 8151–8157).
13. Assistance in Establishing New State Medical Schools; Grants to Affiliated Medical Schools; Assistance to Health Manpower Training Institutions (38 U.S.C. Chapter 82).
14. Emergency Veterans' Job Training (Pub. L. 98–77, 97 Stat. 443–452).

## APPENDIX B TO SUBPART E OF PART 18—LIST OF AGE DISTINCTIONS CONTAINED IN STATUTES AND REGULATIONS GOVERNING FEDERAL FINANCIAL ASSISTANCE OF THE DEPARTMENT OF VETERANS AFFAIRS

Section 90.31(f) of the governmentwide regulations (45 CFR part 90) requires each Federal agency to publish an appendix to its final regulations containing a list of age distinctions in Federal statutes and regulations affecting financial assistance administered by the agency. This appendix is VA's list of age distinctions contained in Federal statutes and VA regulations which:

(1) Provide benefits or assistance to persons based upon age; or

(2) Establish criteria for participation in age-related terms; or

(3) Describe intended beneficiaries or target groups in age-related terms.

Appendix B deals only with VA's programs of financial assistance covered by the Age Discrimination Act. It does not list age distinctions used by VA in its direct assistance programs, such as veterans' compensation. Also, this appendix contains only age distinctions in Federal statutes and VA regulations in effect on January 1, 1985.

This appendix has two sections: A list of age distinctions in Federal statutes, and a list of age distinctions in VA regulations. The first column contains the name of the program; the second column has the statute name and U.S. Code citation for statutes, or the regulation name and Code of Federal Regulations citation for regulations; the third column contains the section number of the statute or regulation and the description of the age distinction; and the fourth column cites the Catalog of Federal Domestic Assistance number for the program(s) affected where it is available.

AGE DISTINCTIONS IN STATUTES GOVERNING FEDERAL FINANCIAL ASSISTANCE PROGRAMS OF THE DEPARTMENT OF VETERANS AFFAIRS

| Program | Statute | Section and Age Distinction | CFDA |
|---|---|---|---|
| Veterans' Benefits | Section 101 of the Veterans' Benefits Act of 1957, as amended; 38 U.S.C. 101. | Section 101(4)(A) defines the term "child" for the purposes of Title 38, U.S.C. (except for chapter 19 and section 8502(b) of Title 38) as "a person who is unmarried and—(i) who is under the age of eighteen years; (ii) who, before attaining the age of eighteen years, became permanently incapable of self-support; or (iii) who, after attaining the age of eighteen years and until completion of education or training (but not after attaining the age of twenty-three years), is pursuing a course of instruction at an approved educational institution; and who is a legitimate child, a legally adopted child, a stepchild who is a member of a veteran's household or was a member at the time of the veteran's death, or an illegitimate child but, as to the alleged father, only if acknowledged in writing signed by him, or if he has been judicially ordered to contribute to the child's support or has been, before his death, judicially decreed to be the father of such child, or if he is otherwise shown by evidence statisfactory to the Secretary to be the father or such child. . . .".<br>Section 101(4)(B) provides that for the purposes of section 101(4)(A) of Title 38, in the case of an adoption under the laws of any jurisdiction other than a State, a person residing outside any of the States shall not be considered a legally adopted child of a veteran during the lifetime of that veteran, unless, among other things, such a person was less than eighteen years of age at the time of the adoption. | |
| Approval of Educational Institutions. | Section 104 of the Veterans' Benefits Act of 1957, as amended, 38 U.S.C. 104. | Section 104(a) authorizes the Secretary to approve or disapprove an educational institution for the purpose of determining whether or not benefits are payable under Title 38, U.S.C. (except chapter 15 of title 38) for a child over the age of eighteen years and under the age of twenty-three years who is attending a school, college, academy, seminary, technical institution, university, or other educational institution.<br>Section 104(b) provides that the Secretary may not approve an educational institution under section 104 of Title 38, unless the institution has agreed to report the termination of attendance of any child. If the educational institution fails to report any such termination promptly, the approval of the Secretary shall be withdrawn. | |
| Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPA). | Section 103(b) of the Veterans Health Care Expansion Act of 1973, as amended; 38 U.S.C. 1713. | Section 1713(a) authorizes the Secretary to provide medical care to: "(1) The spouse or child of a veteran who has a total disability, permanent in nature, resulting from a service-connected disability, (2) the surviving spouse or child of a veteran who (A) died as a result of a service-connected disability, or (B) at the time of death had a total disability permanent in nature, resulting from a service-connected disability, and (3) the surviving spouse or child of a person who died in the active military, naval, or air service in the line of duty and not due to such person's own misconduct, who are not otherwise eligible for medical care under Chapter 55 of Title 10, U.S.C. (CHAMPUS). | 64.009 |

AGE DISTINCTIONS IN STATUTES GOVERNING FEDERAL FINANCIAL ASSISTANCE PROGRAMS OF THE DEPARTMENT OF VETERANS AFFAIRS—Continued

| Program | Statute | Section and Age Distinction | CFDA |
|---|---|---|---|
| | | Section 1713(c) provides that for the purposes of this program, ''a child between the ages of eighteen and twenty-three (1) who is eligible for benefits under subsection (a) of this section, (2) who is pursuing a full-time course of instruction at an educational institution, approved under Chapter 36 of this title, and (3) who while pursuing such course of instruction, incurs a disabling illness or injury . . . which results in such child's inability to continue or resume such child's chosen program of education . . . shall remain eligible for benefits under this section until the end of the six-month period beginning on the date the disability is removed, the end of the two-year period beginning on the date of the onset of the disability, or the twenty-third birthday of the child, whichever occurs first''. | |
| VA Hospital, Domiciliary or Nursing Home Care. | Section 510 of the Veterans' Benefits Act of 1957, amended; 38 U.S.C. 1710. | Section 1710 authorizes the Secretary, within the limits of VA facilities, to furnish hospital care or nursing home care. Among the persons eligible for such care are veterans with a nonservice-connected disability if they are sixty-five years of age or older. | 64.009<br>64.010<br>64.015<br>64.016 |
| Post-Vietnam Era Veterans' Educational Assistance. | Post Vietnam Era Veterans' Educational Act of 1977, as amended; U.S.C. Chapter 32. | Section 3201 states that the purpose of Chapter 32 of Title 38, U.S.C. is: ''(1) To provide educational asssistance to those men and women who enter the Armed Forces after December 31, 1976, (2) to assist young men and women in obtaining an education they might not otherwise be able to afford, and (3) to promote and assist the all volunteer military program of the United States by attracting qualified men and women to serve in the Armed Forces''. | 64.120 |
| Veterans' Educational Assistance. | Section 2 of the Veterans' Readjustment Benefits Act of 1966, amended; 38 U.S.C. Chapter 34. | Section 3451 states that the education program created by this chapter is for the purpose of: '' . . . (1) Enhancing and making more attractive service in the Armed Forces of the United States, (2) extending the benefits of higher education to qualified and deserving young persons who might not otherwise be able to afford such an education, (3) providing vocational readjustment and restoring lost educational opportunities to those service men and women whose careers have been interrupted or impeded by reason of active duty after January 31, 1955, and (4) aiding such persons in attaining the vocational and educational status which they might normally have aspired to and obtained had they not served their country''.<br>Section 3492(b) authorizes the Secretary to pay to an eligible veteran receiving tutorial assistance pursuant to section 3492(a) of this chapter, the cost of such tutorial assistance, subject to certain limits, upon certification by the educational institution that '' . . . (2) the tutor chosen to perform such assistance is qualified and is not the eligible veteran's parent, spouse, child (whether or not married or over eighteen years of age), brother, or sister; and (3) the charges for such assistance do not exceed the customary charges for such tutorial assistance''. | 64.111 |

AGE DISTINCTIONS IN STATUTES GOVERNING FEDERAL FINANCIAL ASSISTANCE PROGRAMS OF THE DEPARTMENT OF VETERANS AFFAIRS—Continued

| Program | Statute | Section and Age Distinction | CFDA |
|---|---|---|---|
| Survivors' and Dependents' Educational Assistance. | War Orphans' Educational Assistance Act of 1956, as amended; 38 U.S.C. Chapter 35. | Section 3500 states that ''the educational program established by this chapter is for the purpose of providing opportunities for education to children whose education would otherwise be impeded or interrupted by reason of the disability or death of a parent from a disease or injury incurred or aggravated in the Armed Forces after the beginning of the Spanish-American War, and for the purpose of aiding such children in attaining the educational status which they might have aspired to and attained but for the disability or death of such parent. The Congress further declares that the educational program extended to the surviving spouses of veterans who died of service-connected total disabilities and to spouses of veterans with a service-connected total disability permanent in nature is for the purpose of assisting them in preparing to support themselves and their families at a standard of living level which the veteran, but for the veteran's death or service disability, could have expected to provide for the veteran's family''.<br>Section 3501 defines the term ''eligible person'' as: ''(A) a child of a person who—(i) died of a service-connected disability, (ii) has a total disability permanent in nature resulting from a service-connected disability, or who died while a disability so evaluated was in existence or (iii) at the time of application for benefits under this chapter is a member of the Armed Forces serving on active duty listed, pursuant to section 556 of Title 37 [U.S.C.] and regulations issued thereunder, by the Secretary concerned in one or more of the following categories . . . for a total of ninety days: (A) missing in action, (B) captured in line of duty by a hostile force, or (C) forcibly detained or interned in line of duty by a foreign government or power, . . .'' Subparagraph (a)(2) of this section provides that the term ''child'' includes individuals who are married and individuals who are above the age of twenty-three years. | 64.117 |

AGE DISTINCTIONS IN STATUTES GOVERNING FEDERAL FINANCIAL ASSISTANCE PROGRAMS OF THE DEPARTMENT OF VETERANS AFFAIRS—Continued

| Program | Statute | Section and Age Distinction | CFDA |
|---|---|---|---|
| | | Section 3512 establishes periods of eligibility. Provides that the educational program to which an eligible child within the meaning of this chapter is entitled to may be afforded, ''. . . during the period beginning on the person's eighteenth birthday, or on the successful completion of the person's secondary schooling, whichever first occurs, and ending on the person's twenty-sixth birthday, except that—(1) if the person is above the age of compulsory school attendance under applicable State law, and the Secretary determines that the person's best interests will be served thereby, such period may begin before the person's eighteenth birthday; (2) if the person has a mental or physical handicap, and . . . the person's best interests will be served by pursuing a program of special restorative training or a specialized course of vocational training approved under section 3536 of this title, such period may begin before the person's fourteenth birthday; (3) if the Secretary finds that the parent from whom eligibility is derived has a service-connected total disability permanent in nature, or if the death of the parent from whom eligibility is derived occurs, after the eligible person's eighteenth birthday but before the person's twenty-sixth birthday, then (unless paragraph (4) applies) such period shall end 8 years after, whichever date last occurs: (A) the date on which the Secretary first finds that the parent from whom eligibility is derived has a service-connected total disability permanent in nature, or (B) the date of death of the parent from whom eligibility is derived; (4) if the person serves on duty with the Armed Forces as an eligible person after the person's eighteenth birthday but before the person's twenty-sixth birthday, then such period shall end 8 years after the person's first discharge or release from such duty with the Armed Forces . . . in no event shall such period be extended beyond the person's thirty-first birthday by reason of this paragraph; and (5)(A) if the person becomes eligible by reason of the provisions of section 3501(a)(1)(A)(ii) of this title after the person's eighteenth birthday but before the person's twenty-sixth birthday, then (unless clause (4) of this section applies) such period shall end eight years after the date on which the person becomes eligible by reason of such provisions, but in no event shall such period be extended beyond the person's thirty-first birthday by reason of this clause. . . .''.<br>Section 3513 provides that the parent or guardian of a person or the eligible person (if such person has attained legal majority) for whom the educational assistance is sought under Chapter 35 shall submit an application to the Secretary, which shall be in such form and contain such information as the Secretary shall prescribe. | |

AGE DISTINCTIONS IN STATUTES GOVERNING FEDERAL FINANCIAL ASSISTANCE PROGRAMS OF THE DEPARTMENT OF VETERANS AFFAIRS—Continued

| Program | Statute | Section and Age Distinction | CFDA |
|---|---|---|---|
| | | Section 3562 provides that the commencement of a program of education or special restorative training under Chapter 35 shall be a bar, ''(1) to subsequent payments of compensation, dependency and indemnity compensation, or pension based on a death of a parent to an eligible person over the age of eighteen by reason of pursuing a course in an educational institution, or (2) to increased rates, or additional amounts of compensation, dependency and indemnity compensation, or pension because of such a person whether eligibility is based upon the death or upon the total permanent disability of the parent''. Section 3563 states that ''The Secretary shall notify the parent or guardian of each eligible person as defined in section 3501(a)(1)(A) of this title of the educational assistance available to such person under Chapter 35. Such notification shall be provided not later then the month in which such eligible person attains such person's thirteenth birthday or as soon thereafter as feasible''. | |

AGE DISTINCTIONS IN REGULATIONS GOVERNING FEDERAL FINANCIAL ASSISTANCE PROGRAMS OF THE DEPARTMENT OF VETERANS AFFAIRS

| Program | Regulation | Section and Age Distinction | CFDA |
|---|---|---|---|
| Veterans' Benefits ..... | Adjudication (38 CFR part 3) .. | Section 3.57 defines the term ''child'' of a veteran as, ''. . . an unmarried person who is a legitimate child, a child legally adopted before the age of 18 years, a stepchild who acquired that status before the age of 18 years and who is a member of the veteran's household or was a member of the veteran's household at the time of the veteran's death, or an illegitimate child; and (i) who is under the age of 18 years; or (ii) who, before reaching the age of 18 years, became permanently incapable of self-support; or (iii) who, after reaching the age of 18 years and until completion of education or training (but not after reaching the age of 23 years) is pursuing a course of instruction at an approved educational institution. (2) For the purposes of determining entitlement of benefits based on a child's school attendance, the term ''child'' of the veteran also includes the following unmarried persons: (i) A person who was adopted by the veteran between the ages of 18 or 23 years. (ii) A person who became a stepchild of a veteran between the ages of 18 or 23 years and who is a member of the veteran's household at the time of the veteran's death. . . .'' | |
| Survivors' and Dependents' Educational Assistance. | Adjudication (38 CFR part 3) .. | Section 3.807(d) sets forth basic eligibility criteria for the program of educational assistance under 38 U.S.C. Chapter 35. Defines the term ''child'' as the son or daughter of a veteran who meets the requirements of 38 CFR 3.57, except as to age or marital status. | 64.117 |
| | Survivors' and Dependent's Educational Assistant Under 38 U.S.C. Chapter 35 (38 CFR part 21, subpart C). | Section 21.3021 describes beneficiaries of the program. Paragraph (a) defines the term ''eligible person'' as, ''(1) A child of a: (i) Veteran who died of a service-connected disability. . . .'' Paragraph (b) defines the term ''child'' as a son or daughter of a veteran as defined in 38 CFR 3.807(d). | |

AGE DISTINCTIONS IN REGULATIONS GOVERNING FEDERAL FINANCIAL ASSISTANCE PROGRAMS OF THE DEPARTMENT OF VETERANS AFFAIRS—Continued

| Program | Regulation | Section and Age Distinction | CFDA |
|---|---|---|---|
| | | Section 21.3023 states that: "(a) Child; age 18. A child who is eligible for educational assistance and who is also eligible for pension, compensation dependency and indemnity compensation based on school attendance must elect whether he or she will receive educational assistance or pension, compensation or dependency and indemnity compensation. (1) An election of education assistance either before or after the age of 18 years is a bar to subsequent payment or increased rates or additional amounts of pension, compensation or dependency and indemnity compensation on account of a child based on school attendance on or after the age of 18 years. . . . (2) Payment of pension, compensation or dependency and indemnity compensation to or on account of a child after his or her 18th birthday does not bar subsequent payments of educational assistance. . . . (b) Child; under 18 or helpless. Educational assistance allowance or special restorative training allowance may generally be paid concurrently with pension, compensation or dependency and indemnity compensation for a child under the age of 18 years or for a helpless child based on the service of one or more parents. Where, however, entitlement is based on the death of more than one parent in the same parental line, concurrent payments in two or more cases may not be authorized if the death of one such parent occurred on or after June 9, 1960. In the latter cases, an election of educational assistance and pension, compensation or dependency and indemnity compensation in one case does not preclude a reelection of benefits before attaining age 18 or while helpless based on the service of another parent in the same parental line. . . ."<br>Section 21.3040 sets forth criteria for the commencement and termination of the program of education or special restorative training for an eligible child under 38 U.S.C. Chapter 35. Paragraph (a) of this section provides that a program of education or special restorative training may not be afforded prior to the eligible persons' 18th birthday or the completion of secondary schooling, whichever is earlier, unless it is determined through counseling that the best interests of the eligible person will be served by entering training at an earlier date and the eligible person has passed: (1) Compulsory school attendance age under State law; or (2) his or her 14th birthday and due to physical or mental handicap may benefit by special restorative or specialized vocational training. Paragraph (c) of this section provides that no person is eligible for educational assistance who reached his or her 26th birthday on or before the effective date of a finding of permanent total service-connected disability, or on or before the date the veteran's death occurred, or on or before the 91st day of listing by the Secretary concerned of the member of the Armed Forces or whose service eligibility is claimed as being is one of the missing categories identified in 38 CFR 21.3021(a) (1)(iii) and (3)(ii). Paragraph (d) provides that no person is eligible for educational assistance beyond his or her 31st birthday, except in certain exceptional cases. | |

AGE DISTINCTIONS IN REGULATIONS GOVERNING FEDERAL FINANCIAL ASSISTANCE PROGRAMS OF THE DEPARTMENT OF VETERANS AFFAIRS—Continued

| Program | Regulation | Section and Age Distinction | CFDA |
|---|---|---|---|
| | | Section 21.3041 sets forth periods of eligibility for an eligible child. Paragraph (a) of this section provides the basic beginning date for the educational assistance as the person's 18th birthday or successful completion of secondary schooling, whichever occurs first. Paragraph (b) authorizes certain exceptions to the basic beginning date, if: (1) A person has passed compulsory school attendance under applicable State law, or (2) has passed his or her 14th birthday and has a physical or mental handicap. Paragraph (c) provides the basic ending date as the person's 26th birthday. Paragraphs (d) and (e) set forth criteria for modifying or extending the ending date. | |
| | Administration of Educational Benefits; 38 U.S.C. Chapter 34, 35, and 36 (38 CFR part 21, subpart D). | Section 21.3300 provides that VA may prescribe special restorative training for the purpose of enabling an eligible child to pursue a program of education, special vocational program, or other appropriate goal, where needed to overcome or lessen the effects of a physical or mental disability.<br>Section 21.4102(a) requires VA to provide counseling for the purpose set forth in 38 CFR 21.4100 to an eligible child when: (1) The eligible child may require specialized vocational or special restorative training, or (2) the eligible child has reached compulsory school attendance age under State law, but has neither reached his or her 18th birthday nor completed secondary schooling, or (3) if requested by the eligible child or his or her parent or guardian for the purpose of preparing an educational plan.<br>Section 21.4139(b) provides that VA will make payment of educational assistance under 38 U.S.C. Chapter 35 to the eligible person if: (1) He or she has attained majority and has no known legal disability or (2) is in the eligible person's best interests, and there is no reason not to designate the eligible person as payee. VA may pay minors under this provision.<br>Section 21.4141 provides that payment of educational assistance allowance under 38 U.S.C. Chapter 35 will be subject to offsets of amounts of pension, compensation, or dependency and indemnity compensation paid over the same period on behalf of a child based on school attendance. | |
| VA Hospital, Domiciliary or Nursing Home Care. | Eligiblity for hospital, domiciliary or nursing home care of persons discharged or released from active military, naval, or air service (38 CFR 17.47). | Section 17.47(e) provides that within the limits of VA facilities, hospital or nursing home care may be provided to any veteran with a nonservice-connected disability if such a veteran is 65 years of age or older. | 64.009<br>64.010<br>64.015<br>64.016 |

AGE DISTINCTIONS IN REGULATIONS GOVERNING FEDERAL FINANCIAL ASSISTANCE PROGRAMS OF THE DEPARTMENT OF VETERANS AFFAIRS—Continued

| Program | Regulation | Section and Age Distinction | CFDA |
|---|---|---|---|
| Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPA). | Medical Care for Survivors and Dependents of Certain Veterans (38 CFR 17.54). | Section 17.54 states that medical care may be provided for: ''(1) The spouse or child of a veteran who has a total disability, permanent in nature, resulting from a service-connected disability, and (2) the surviving spouse or child of a veteran who—(a) died as a result of a service-connected disability, or (b) at the time of death had a total disability, permanent in nature resulting from a service-connected disability and—(3) the surviving spouse or child of a person who died in the active military, naval or air service . . . Who are not otherwise eligible for medical care as beneficiaries of the Armed Forces under the provisions of Chapter 55 of Title 10, United States Code (CHAMPUS) . . . and (4) An eligible child who is pursuing a full-time course of instruction approved under 38 U.S.C. Chapter 36, and who incurs a disabling illness or injury while pursuing such course; . . . shall remain eligible for medical care until: (a) The end of the 6-month period beginning on the date the disability is removed, or (b) the end of the 2-year period beginning on the date of the onset of the disability; or (c) the 23d birthday of the child, whichever occurs first. . . .'' | 64.009 |
| Veterans' Educational Assistance. | Administration of Educational Benefits; 38 U.S.C. Chapters 34, 35, and 36 (38 CFR part 21, subpart D). | Section 21.4135(d) sets forth the following dates for the discontinuance of the educational assistance allowance provided for a dependent child, under Chapter 34 of Title 38: ''. . . (1) Last day of the in calendar year in which marriage occurred unless discontinuance is required at an earlier date under other provisions. (2) Age 18. Day preceding 18th birthday. (3) School attendance. Last day of month in which 23rd birthday, whichever is earlier. (4) Helplessness ceased. Last day of month school attendance ceased or day preceding following 60 days after notice to payee that helplessness has ceased.''<br>Section 21.4136 sets forth monthly rates for the payment of educational assistance allowance under 38 U.S.C. Chapter 34. Paragraph (f) defines the term ''dependent'' as a spouse, child or dependent parent who meets the definitions of relationship specified in 38 CFR 3.50, 3.51, 3.57 and 3.59. | |

# PART 18a—DELEGATION OF RESPONSIBILITY IN CONNECTION WITH TITLE VI, CIVIL RIGHTS ACT OF 1964

Sec.

18a.1 Delegations of responsibility between the Secretary of Veterans Affairs and the Secretary, Department of Health and Human Services, and the Secretary, Department of Education.
18a.2 Delegation to the Under Secretary for Benefits.
18a.3 Delegation to the Chief Medical Director.
18a.4 Duties of the Director, Contract Compliance Service.
18a.5 Delegation to the General Counsel.

AUTHORITY: 5 U.S.C. 301, 38 U.S.C. 501 and 38 CFR 18.9(d) and appendix A, part 18.

## § 18a.1 Delegations of responsibility between the Secretary of Veterans Affairs and the Secretary, Department of Health and Human Services, and the Secretary, Department of Education.

(a) Authority has been delegated to the Secretary of Veterans Affairs by the Secretary, Department of Health and Human Services, and the Secretary, Department of Education to perform responsibilities of those Departments and of the responsible Departmental officials under Title VI of

the Civil Rights Act of 1964 and the Departments' regulations issued thereunder (45 CFR part 80 and 34 CFR part 100) with respect to: Proprietary (i.e., other than public or nonprofit) educational institutions, except if operated by a hospital; and post secondary, nonprofit, educational institutions other than colleges and universities, except if operated by a college or university, a hospital, or a unit of State or local government (i.e., those operating such institutions as an elementary or secondary school, an area vocational school, a school for the handicapped, etc.)

(1) The compliance responsibilities so delegated include:

(i) Soliciting, receiving, and determining the adequacy of assurances of compliance under 45 CFR 80.4 and 34 CFR 100.4;

(ii) All actions under 45 CFR 80.6 including mailing, receiving, and evaluating compliance reports under § 80.6(b) and 34 CFR 100.6(b); and

(iii) All other actions related to securing voluntary compliance, or related to investigations, compliance reviews, complaints, determinations of apparent failure to comply, and resolutions of matters by informal means.

(2) The Department of Health and Human Services and the Department of Education specifically reserve to themselves the responsibilities for the effectuation of compliance under 45 CFR 80.8, 80.9, 80.10 and 34 CFR 100.8, 100.9 and 100.10.

(b) Authority has been delegated to the Secretary, Department of Health and Human Services and the Secretary, Department of Education, to perform responsibilities of the Department of Veterans Affairs and of the responsible Department of Veterans Affairs official under Title VI of the Civil Rights Act of 1964 and the Department of Veterans Affairs regulations issued thereunder (part 18 of this chapter) with respect to institutions of higher learning, including post-high school institutions which offer nondegree courses for which credit is given and which would be accepted on transfer by a degree-granting institution toward a baccalaureate or higher degree; hospitals and other health facilities and elementary and secondary schools and school systems including, but not limited to, their activities in connection with providing or seeking approval to provide vocational rehabilitation to eligible persons under Chapter 31 of Title 38 U.S.C., or education or training to eligible persons under Chapters 34, 35, or 36 of Title 38 U.S.C.

(1) The compliance responsibilities so delegated include:

(i) Soliciting, receiving, and determining the adequacy of assurances of compliance under § 18.4 of this chapter;

(ii) Mailing, receiving, and evaluating compliance reports under § 18.6(b) of this chapter; and

(iii) All other actions related to securing voluntary compliance or related investigations, compliance reviews, complaints, determinations of apparent failure to comply and resolutions of matters by informal means.

(2) The Department of Veterans Affairs specifically reserves to itself responsibilities for effectuation of compliance under §§ 18.8, 18.9, and 18.10 of this chapter. Not included in the delegation to the Secretary, Department of Health and Human Services and the Secretary, Department of Education and specifically reserved to the Department of Veterans Affairs is the exercise of compliance responsibilities with respect to:

(i) Postsecondary schools which do not offer a program or courses leading, or creditable, towards the granting of at least a bachelor's degree, or its equivalent;

(ii) Privately-owned and operated proprietary technical, vocational, and other private schools at the elementary or secondary level; and

(iii) Those institutions of higher learning and elementary and secondary schools and school systems which, as of January 3, 1969, have already been subjected to formal noncompliance proceedings by the Department of Health and Human Services or the Department of Education and have had their right to receive Federal financial assistance from that agency terminated for noncompliance with Title VI of the Civil Rights Act of 1964.

The Department of Veterans Affairs also retains the right to exercise delegated compliance responsibilities itself in special cases with the agreement of

the appropriate official in the Department of Health and Human Services or the Department of Education.

(c) Any institution of higher learning or a hospital or other health facility which is listed by the Department of Health and Human Services or the Department of Education as having filed an assurance of compliance will be accepted as having met the requirements of the law for the purpose of payment under 38 U.S.C. Chapters 31, 34, 35, or 36 and 38 U.S.C. sections 1741, 8131–8137 and 8155.

(d) If the Department of Health and Human Services or the Department of Education finds that a school, hospital or other health facility which has signed an assurance of compliance is apparently in noncompliance, action will be initiated by that Department to obtain compliance by voluntary means. If voluntary compliance is not achieved, the Department of Veterans Affairs will join in subsequent proceedings.

(e) An institution which is on the Department of Health and Human Services or the Department of Education list of noncomplying institutions will be considered to be in a status of compliance for Department of Veterans Affairs purposes if an assurance of compliance is filed with the Department of Veterans Affairs and actual compliance is confirmed. Certificates of eligibility may be issued and enrollments approved and other appropriate payments made until such time as the Department of Veterans Affairs has made an independent determination that the institution is not in compliance.

[35 FR 10759, July 2, 1970, as amended at 51 FR 10385, Mar. 26, 1986]

### § 18a.2 Delegation to the Under Secretary for Benefits.

The Under Secretary for Benefits is delegated responsibility for obtaining evidence of voluntary compliance for vocational rehabilitation, education, and special restorative training to implement Title VI, Civil Rights Act of 1964. Authority is delegated to the Under Secretary for Benefits and designee to take any necessary action as to programs of vocational rehabilitation, education, or special restorative training under 38 U.S.C. Chapters 31, 34, 35, and 36 for the purpose of securing evidence of voluntary compliance directly or through the agencies to whom the Secretary of Veterans Affairs has delegated responsibility for various schools or training establishments to implement part 18 of this chapter. The Under Secretary for Benefits also is delegated responsibility for obtaining evidence of voluntary compliance from recognized national organizations whose representatives are afforded space and office facilities in field facilities under jurisdiction of the Under Secretary for Benefits.

[35 FR 10759, July 2, 1970, as amended at 51 FR 10386, Mar. 26, 1986; 54 FR 34984, Aug. 23, 1989]

### § 18a.3 Delegation to the Chief Medical Director.

The Chief Medical Director is delegated responsibility for obtaining evidence of voluntary compliance implementing the provisions of Title VI, Civil Rights Act of 1964, in connection with payments to State homes, with State home facilities for furnishing nursing home care, and from recognized national organizations whose representatives are afforded space and office facilities in field facilities under jurisdiction of the Chief Medical Director.

[35 FR 10759, July 2, 1970, as amended at 51 FR 10386, Mar. 26, 1986]

### § 18a.4 Duties of the Director, Contract Compliance Service.

Upon referral by the Chief Medical Director or the Under Secretary for Benefits, the Director, Contract Compliance Service will:

(a) Investigate and process all complaints arising under Title VI of the Civil Rights Act of 1964;

(b) Conduct periodic audits, reviews and evaluations;

(c) Attempt to secure voluntary compliance by conciliatory or other informal means whenever investigation of a complaint, compliance review, failure to furnish assurance of compliance, or other source indicates noncompliance with Title VI; and

report to the Chief Medical Director or the Under Secretary for Benefits, whichever is appropriate, the results of

investigations, audits, reviews and evaluations or the results of attempts to secure voluntary compliance.

[35 FR 10759, July 2, 1970, as amended at 51 FR 10386, Mar. 26, 1986]

### § 18a.5 Delegation to the General Counsel.

The General Counsel is delegated the responsibility, upon receipt of information from the Under Secretary for Benefits, the Chief Medical Director, or the designee of either of them, that compliance cannot be secured by voluntary means, of forwarding to the recipient or other person the notice required by § 18.9(a) of this chapter, and also is delegated the responsibility of representing the agency in all proceedings resulting from such notice.

[35 FR 10759, July 2, 1970]

## PART 18b—PRACTICE AND PROCEDURE UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 AND PART 18 OF THIS CHAPTER

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AUTHORITY: 5 U.S.C. 301, 38 U.S.C. 501 and 38 CFR 18.9(d) and appendix A, part 18.

SOURCE: 35 FR 10760, July 2, 1970, unless otherwise noted.

GENERAL RULES

### § 18b.1 Scope of rules.

The rules of procedure in this part supplement §§ 18.9 and 18.10 of this chapter and govern the practice for hearings, decisions, and administrative review conducted by the Department of Veterans Affairs pursuant to Title VI of the Civil Rights Act of 1964 (section 602, 78 Stat. 252) and part 18 of this chapter.

### § 18b.2 Reviewing authority.

The term *reviewing authority* means the Secretary of Veterans Affairs, or any person or persons acting pursuant to authority delegated by the Secretary to carry out responsibility under § 18.10 of this chapter. The term includes the Secretary with respect to action under § 18b.75.

[35 FR 10760, July 2, 1970, as amended at 51 FR 10386, Mar. 26, 1986]

### § 18b.9 Definitions.

The definitions contained in § 18.13 of this chapter apply to this part, unless the context otherwise requires.

### § 18b.10 Records to be public.

All pleadings, correspondence, exhibits, transcripts of testimony, exceptions, briefs, decisions, and other documents filed in the docket in any proceeding may be inspected and copied in the office of the Civil Rights hearing clerk. Inquiries may be made at the Department of Veterans Affairs Central Office, 810 Vermont Avenue NW., Washington, DC 20420.

### § 18b.11 Use of number.

As used in this part, words importing the singular number may extend and be applied to several persons or things, and vice versa.

[51 FR 10386, Mar. 26, 1986]

### § 18b.12 Suspension of rules.

Upon notice to all parties, the reviewing authority or the presiding officer, with respect to matters pending before them, may modify or waive any rule upon determination that no party will be unduly prejudiced and the ends of justice will thereby be served.

APPEARANCE AND PRACTICE

### § 18b.13 Appearance.

A party may appear in person or by counsel and participate fully in any proceeding. A State agency or a corporation may appear by any of its officers or by any employee it authorizes to appear on its behalf. Counsel must be members in good standing of the bar of a State, territory, or possession of the United States or of the District of Columbia or the Commonwealth of Puerto Rico.

### § 18b.14 Authority for representation.

Any individual acting in any proceeding may be required to show authority to act in such capacity.

[35 FR 10760, July 2, 1970, as amended at 51 FR 10386, Mar. 26, 1986]

### § 18b.15 Exclusion from hearing for misconduct.

Disrespectful, disorderly, or contumacious language or contemptuous conduct, refusal to comply with directions, or continued use of dilatory tactics by any person at any hearing before a presiding officer shall constitute grounds for immediate exclusion of such person from the hearing by the presiding officer.

PARTIES

### § 18b.16 Parties.

The term party shall include an applicant or recipient or other person to whom a notice of hearing or opportunity for hearing has been mailed naming that person as respondent. The Department shall also be deemed a party to all proceedings and shall be represented by the General Counsel.

[35 FR 10760, July 2, 1970, as amended at 51 FR 10386, Mar. 26, 1986; 54 FR 34984, Aug. 23, 1989]

### § 18b.17 Amici curiae.

(a) Any interested person or organization may file a petition to participate in a proceeding as an amicus curiae. Such petition shall be filed prior to the prehearing conference, or if none is held, before the commencement of the hearing, unless the petitioner shows good cause for filing the petition later. The presiding officer may grant the petition if the officer finds that the petitioner has a legitimate interest in the proceedings, that such participation will not unduly delay the outcome, and may contribute materially to the proper disposition thereof. An amicus curiae is not a party and may not introduce evidence at a hearing.

(b) An amicus curiae may submit a statement of position to the presiding officer prior to the beginning of a hearing, and shall serve a copy on each party. The amicus curiae may submit a brief on each occasion a decision is to be made or a prior decision is subject to review. The brief shall be filed and served on each party within the time limits applicable to the party whose position the amicus curiae deems to support; or if the amicus curiae does not deem to support the position of any party, within the longest time limit applicable to any party at that particular stage of the proceedings.

(c) When all parties have completed their initial examination of a witness, any amicus curiae may request the presiding officer to propound specific questions to the witness. The presiding officer, in the officer's discretion, may grant any such request if the officer believes the proposed additional testimony may assist materially in elucidating factual matters at issue between the parties and will not expand the issues.

[35 FR 10760, July 2, 1970, as amended at 51 FR 10386, Mar. 26, 1986]

### § 18b.18 Complainants not parties.

A person submitting a complaint pursuant to § 18.7(b) of this chapter is not a party to the proceedings governed by this part, but may petition, after proceedings are initiated, to become an amicus curiae.

DOCUMENTS

### § 18b.20 Form of documents to be filed.

Documents to be filed shall be dated, the original signed in ink, shall show the docket description and title of the proceeding, and shall show the title, if any, and address of the signatory. Copies need not be signed but the name of the person signing the original shall be reproduced. Documents shall be legible and shall not be more than 8½ inches wide and 12 inches long.

### § 18b.21 Signature of documents.

The signature of a party, authorized officer, employee, or attorney constitutes a certificate that one of them has read the document, that to the best of that person's knowledge, information, and belief there is good ground to support it, and that it is not interposed for delay. If a document is not signed or is signed with intent to defeat the purpose of this section, it may be stricken as sham and false and the proceeding may proceed as though the document had not been filed. Similar action may be taken if scandalous or indecent matter is inserted.

[35 FR 10760, July 2, 1970, as amended at 51 FR 10386, Mar. 26, 1986]

### § 18b.22 Filing and service.

All notices by a Department of Veterans Affairs official, and all written motions, requests, petitions, memoranda, pleadings, exceptions, briefs, decisions, and correspondence to a Department of Veterans Affairs official from a party, or vice versa, relating to a proceeding after its commencement shall be filed and served on all parties. Parties shall supply the original and two copies of documents submitted for filing. Filings shall be made with the Civil Rights hearing clerk at the address stated in the notice of hearing or notice of opportunity for hearing, during regular business hours. Regular business hours are every Monday through Friday (legal holidays in the District of Columbia excepted) from 8 a.m. to 4:30 p.m., eastern standard or daylight saving time, whichever is effective in the District of Columbia at the time. Originals only of exhibits and transcripts of testimony need be filed.

For requirements of service on amici curiae, see § 18b.76.

### § 18b.23 Service; how made.

Service shall be made by personal delivery of one copy to each person to be served or by mailing by first-class mail, properly addressed with postage prepaid. When a party or amicus has appeared by attorney or other representative, service upon such attorney or representative, will be deemed service upon the party or amicus. Documents served by mail preferably should be mailed in sufficient time to reach the addressee by the date on which the original is due to be filed, and should be airmailed if the addressee is more than 300 miles distant.

### § 18b.24 Date of service.

The date of service shall be the day when the matter is deposited in the U.S. mail or is delivered in person, except that the date of service of the initial notice of hearing or opportunity for hearing shall be the date of its delivery, or of its attempted delivery if refused.

### § 18b.25 Certificate of service.

The original of every document filed and required to be served upon parties to a proceeding shall be endorsed with a certificate of service signed by the party making service or by the party's attorney or representative, stating that such service has been made, the date of service, and the manner of service, whether by mail or personal delivery.

[35 FR 10760, July 2, 1970, as amended at 51 FR 10386, Mar. 26, 1986]

## TIME

### § 18b.26 Computation.

In computing any period of time under the rules in this part or in an order issued hereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed in the District of Columbia, in which event it includes the next following business day. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded from the computation.

### § 18b.27 Extension of time or postponement.

Requests for extension of time should be served on all parties and should set forth the reasons for the application. Applications may be granted upon a showing of good cause by the applicant. From the designation of a presiding officer until the issuance of a decision such requests should be addressed to the presiding officer. Answers to such requests are permitted, if made promptly.

[35 FR 10760, July 2, 1970, as amended at 51 FR 10386, Mar. 26, 1986]

### § 18b.28 Reduction of time to file documents.

For good cause, the reviewing authority or the presiding officer, with respect to matters pending before them, may reduce any time limit prescribed by the rules in this part, except as provided by law or in part 18 of this chapter.

## PROCEEDINGS BEFORE HEARING

### § 18b.30 Notice of hearing or opportunity for hearing.

Proceedings are commenced by mailing a notice of hearing or opportunity for hearing to an affected applicant or recipient, pursuant to §§ 18.9 and 18a.5 of this chapter.

### § 18b.31 Answer to notice.

The respondent, applicant or recipient may file an answer to the notice within 20 days after service thereof. Answers shall admit or deny specifically and in detail each allegation of the notice, unless the respondent party is without knowledge, in which case the answer should so state, and the statement will be deemed a denial. Allegations of fact in the notice not denied or controverted by answer shall be deemed admitted. Matters alleged as affirmative defenses shall be separately stated and numbered. Failure of the respondent to file an answer within the 20-day period following service of the notice may be deemed an admission of

all matters of fact recited in the notice.

[35 FR 10760, July 2, 1970, as amended at 51 FR 10386, Mar. 26, 1986]

### § 18b.32 Amendment of notice or answer.

The General Counsel may amend the notice of hearing or opportunity for hearing once as a matter of course before an answer thereto is served, and each respondent may amend the answer once as a matter of course not later than 10 days before the date fixed for hearing but in no event later than 20 days from the date of service of the original answer. Otherwise a notice or answer may be amended only by leave of the presiding officer. A respondent shall file the answer to an amended notice within the time remaining for filing the answer to the original notice or within 10 days after service of the amended notice, whichever period may be the longer, unless the presiding officer otherwise orders.

[35 FR 10760, July 2, 1970, as amended at 51 FR 10386, Mar. 26, 1986]

### § 18b.33 Request for hearing.

Within 20 days after service of a notice of opportunity for hearing which does not fix a date for hearing the respondent, either in the answer or in a separate document, may request a hearing. Failure of the respondent to request a hearing shall be deemed a waiver of the right to a hearing and to constitute consent to the making of a decision on the basis of such information as is available.

[35 FR 10760, July 2, 1970, as amended at 51 FR 10386, Mar. 26, 1986]

### § 18b.34 Consolidation.

The reviewing authority may provide for proceedings in the Department of Veterans Affairs to be joined or consolidated for hearing with proceedings in other Federal departments or agencies, by agreement with such other departments or agencies. All parties to any proceeding consolidated subsequent to service of the notice of hearing or opportunity for hearing shall be served with notice of such consolidation.

### § 18b.35 Motions.

Motions and petitions shall state the relief sought, the authority relied upon, and the facts alleged. If made before or after the hearing, these matters shall be in writing. If made at the hearing, they may be stated orally; but the presiding officer may require that they be reduced to writing and filed and served on all parties in the same manner as a formal motion. Motions, answers, and replies shall be addressed to the presiding officer, if the case is pending before the officer. A repetitious motion will not be entertained.

[35 FR 10760, July 2, 1970, as amended at 51 FR 10386, Mar. 26, 1986]

### § 18b.36 Responses to motions and petitions.

Within 8 days after a written motion or petition is served, or such other period as the reviewing authority or the presiding officer may fix, any party may file a response thereto. An immediate oral response may be made to an oral motion.

### § 18b.37 Disposition of motions and petitions.

The reviewing authority or the presiding officer may not sustain or grant a written motion or petition prior to expiration of the time for filing responses thereto, but may overrule or deny such motion or petition without awaiting response: *Provided, however,* That prehearing conferences, hearings and decisions need not be delayed pending disposition of motions or petitions. Oral motions and petitions may be ruled on immediately. Motions and petitions submitted to the reviewing authority or the presiding officer, respectively, and not disposed of in separate rulings or in their respective decisions will be deemed denied. Oral arguments shall not be held on written motions or petitions unless the presiding officer in the officer's discretion expressly so orders.

[35 FR 10760, July 2, 1970, as amended at 51 FR 10386, Mar. 26, 1986]

RESPONSIBILITIES AND DUTIES OF PRESIDING OFFICER

### § 18b.40 Who presides.

An administrative law judge assigned under 5 U.S.C. 3105 or 3344 (formerly section 11 of the Administrative Procedure Act) shall preside over the taking of evidence in any hearing to which these rules or procedure apply.

[35 FR 10760, July 2, 1970, as amended at 51 FR 10386, Mar. 26, 1986]

### § 18b.41 Designation of an administrative law judge.

The designation of the administrative law judge as presiding officer shall be in writing, and shall specify whether the administrative law judge is to make an initial decision or to certify the entire record including recommended findings and proposed decision to the reviewing authority, and may also fix the time and place of hearing. A copy of such order shall be served on all parties. After service of an order designating an administrative law judge to preside, and until such administrative law judge makes a decision, motions and petitions shall be submitted to the administrative law judge. In the case of the death, illness, disqualification or unavailability of the designated administrative law judge, another administrative law judge may be designated to take that person's place.

[51 FR 10386, Mar. 26, 1986]

### § 18b.42 Authority of presiding officer.

The presiding officer shall have the duty to conduct a fair hearing, to take all necessary action to avoid delay, and to maintain order. The presiding officer shall have all powers necessary to these ends, including (but not limited to) the power to:

(a) Arrange and issue notice of the date, time, and place of hearings, or, upon due notice to the parties, to change the date, time, and place of hearings previously set.

(b) Hold conferences to settle, simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding.

(c) Require parties and amici curiae to state their position with respect to the various issues in the proceeding.

(d) Administer oaths and affirmations.

(e) Rule on motions, and other procedural items on matters pending before the presiding officer.

(f) Regulate the course of the hearing and conduct of counsel therein.

(g) Examine witnesses and direct witnesses to testify.

(h) Receive, rule on, exclude or limit evidence.

(i) Fix the time for filing motions, petitions, briefs, or other items in matters pending before the presiding officer.

(j) Issue initial or recommended decisions.

(k) Take any action authorized by the rules in this part, or in conformance with the provisions of 5 U.S.C. 551–559 (the Administrative Procedure Act).

[35 FR 10760, July 2, 1970, as amended at 51 FR 10386, Mar. 26, 1986]

HEARING PROCEDURES

### § 18b.50 Statements of position and trial briefs.

The presiding officer may require parties and amici curiae to file written statements of position prior to the beginning of a hearing. The presiding officer may also require the parties to submit trial briefs.

### § 18b.51 Evidentiary purpose.

(a) The hearing is directed to receiving factual evidence and expert opinion testimony related to the issues in the proceeding. Argument will not be received in evidence; rather it should be presented in statements, memoranda, or briefs, as determined by the presiding officer. Brief opening statements, which shall be limited to statement of the party's position and what the party intends to prove, may be made at hearings.

(b) Hearings for the reception of evidence will be held only in cases where issues of fact must be resolved in order to determine whether the respondent has failed to comply with one or more applicable requirements of part 18 of

this chapter. In any case where it appears from the respondent's answer to the notice of hearing or opportunity for hearing, from failure timely to answer, or from admissions or stipulations in the record, that there are no matters of material fact in dispute, the reviewing authority or presiding officer may enter an order so finding, vacating the hearing date if one has been set, and fixing the time for filing briefs under § 18b.70. Thereafter the proceedings shall go to conclusion in accordance with §§ 18b.70 through 18b.76. The presiding officer may allow an appeal from such order in accordance with § 18b.65.

[35 FR 10760, July 2, 1970, as amended at 51 FR 10386, Mar. 26, 1986]

### § 18b.52 Testimony.

Testimony shall be given orally under oath or affirmation by witnesses at the hearing; but the presiding officer, in the officer's discretion, may require or permit that the direct testimony of any witness be prepared in writing and served on all parties in advance of the hearing. Such testimony may be adopted by the witness at the hearing, and filed as part of the record thereof. Unless authorized by the presiding officer, witnesses will not be permitted to read prepared testimony into the record. Except as provided in §§ 18b.54 and 18b.55, witnesses shall be available at the hearing for cross-examination.

[35 FR 10760, July 2, 1970, as amended at 51 FR 10386, Mar. 26, 1986]

### § 18b.53 Exhibits.

Proposed exhibits shall be exchanged at the prehearing conference, or otherwise prior to the hearing if the presiding officer so requires. Proposed exhibits not so exchanged may be denied admission as evidence. The authenticity of all proposed exhibits exchanged prior to hearing will be deemed admitted unless written objection thereto is filed prior to the hearing or unless good cause is shown at the hearing for failure to file such written objection.

### § 18b.54 Affidavits.

An affidavit is not inadmissible as such. Unless the presiding officer fixes other time periods affidavits shall be filed and served on the parties not later than 15 days prior to the hearing; and not less than 7 days prior to hearing a party may file and serve written objection to any affidavit on the ground that it is believed necessary to test the truth of assertions therein at hearing. In such event the assertions objected to will not be received in evidence unless the affiant is made available for cross-examination, or the presiding officer determines that cross-examination is not necessary for the full and true disclosure of facts referred to in such assertions. Notwithstanding any objection, however, affidavits may be considered in the case of any respondent who waives a hearing.

[35 FR 10760, July 2, 1970, as amended at 51 FR 10386, Mar. 26, 1986]

### § 18b.55 Depositions.

Upon such terms as may be just, for the convenience of the parties or of the Department of Veterans Affairs, the presiding officer may authorize or direct the testimony of any witness to be taken by deposition.

### § 18b.56 Admissions as to facts and documents.

Not later than 15 days prior to the scheduled date of the hearing except for good cause shown or prior to such earlier date as the presiding officer may order, any party may serve upon an opposing party a written request for the admission of the genuineness and authenticity of any relevant documents described in and exhibited with the request, or for the admission of the truth of any relevant matters of fact stated in the request. Each of the matters of which an admission is requested shall be deemed admitted, unless within a period designated in the request (not less than 10 days after service thereof, or within such further time as the presiding officer or the reviewing authority if no presiding officer has yet been designated may allow upon motion and notice) the party to whom the

request is directed serves upon the requesting party a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why the party cannot truthfully either admit or deny such matters. Copies of requests for admission and answers thereto shall be served on all parties. Any admission made by a party to such request is only for the purposes of the pending proceeding, or any proceeding or action instituted for the enforcement of any order entered therein, and shall not constitute an admission by the party for any other purpose or be used against the party in any other proceeding or action.

[35 FR 10760, July 2, 1970, as amended at 51 FR 10386, Mar. 26, 1986]

### § 18b.57 Evidence.

Irrelevant, immaterial, unreliable, and unduly repetitious evidence will be excluded.

### § 18b.58 Cross-examination.

A witness may be cross-examined on any matter material to the proceeding without regard to the scope of his direct examination.

### § 18b.59 Unsponsored written material.

Letters expressing views or urging action and other unsponsored written material regarding matters in issue in a hearing will be placed in the correspondence section of the docket of the proceeding. These data are not deemed part of the evidence or record in the hearing.

### § 18b.60 Objections.

Objections to evidence shall be timely and briefly state the ground relied upon.

### § 18b.61 Exceptions to rulings of presiding officer unnecessary.

Exceptions to rulings of the presiding officer are unnecessary. It is sufficient that a party, at the time the ruling of the presiding officer is sought, makes known the action which the party desires the presiding officer to take, or the party's objection to an action taken, and the party's grounds therefor.

[35 FR 10760, July 2, 1970, as amended at 51 FR 10386, Mar. 26, 1986]

### § 18b.62 Official notice.

Where official notice is taken or is to be taken of a material fact not appearing in the evidence of record, any party, on timely request, shall be afforded an opportunity to show the contrary.

### § 18b.63 Public document items.

Whenever there is offered (in whole or in part) a public document, such as an official report, decision, opinion, or published scientific or economic statistical data issued by any of the executive departments (or their subdivisions), legislative agencies or committees, or administrative agencies of the Federal Government (including Government-owned corporations), or a similar document issued by a State or its agencies, and such document (or part thereof) has been shown by the offeror to be reasonably available to the public, such document need not be produced or marked for identification, but may be offered for official notice, as a public document item by specifying the document or relevant part thereof.

### § 18b.64 Offer of proof.

An offer of proof made in connection with an objection taken to any ruling of the presiding officer rejecting or excluding proffered oral testimony shall consist of a statement of the substance of the evidence which counsel contends would be adduced by such testimony; and, if the excluded evidence consists of evidence in documentary or written form or of reference to documents or records, a copy of such evidence shall be marked for identification and shall accompany the record as the offer of proof.

### § 18b.65 Appeals from ruling of presiding officer.

Rulings of the presiding officer may not be appealed to the reviewing authority prior to consideration of the entire proceeding except with the consent of the presiding officer and where the reviewing authority certifies on

the record or in writing that the allowance of an interlocutory appeal is clearly necessary to prevent exceptional delay, expense, or prejudice to any party, or substantial detriment to the public interest. If an appeal is allowed, any party may file a brief with the reviewing authority within such period as the presiding officer directs. No oral argument will be heard unless the reviewing authority directs otherwise. At any time prior to submission of the proceeding to the reviewing authority for decision, the reviewing authority may direct the presiding officer to certify any question or the entire record to the reviewing authority for decision. Where the entire record is so certified, the presiding officer shall recommend a decision.

[35 FR 10760, July 2, 1970, as amended at 51 FR 10386, Mar. 26, 1986]

THE RECORD

### § 18b.66 Official transcript.

The Department of Veterans Affairs will designate the official reporter for all hearings. The official transcripts of testimony taken, together with any exhibits, briefs, or memoranda of law filed therewith shall be filed with the Department of Veterans Affairs. Transcripts of testimony in hearings may be obtained from the official reporter by the parties and the public at rates not to exceed the maximum rates fixed by the contract between the Department of Veterans Affairs and the reporter. Upon notice to all parties, the presiding officer may authorize corrections to the transcript which involve matters of substance.

### § 18b.67 Record for decision.

The transcript of testimony, exhibits, and all papers and requests filed in the proceedings, except the correspondence section of the docket, including rulings and any recommended or initial decision shall constitute the exclusive record for decision.

POSTHEARING PROCEDURES; DECISIONS

### § 18b.70 Posthearing briefs; proposed findings and conclusions.

(a) The presiding officer shall fix the time for filing posthearing briefs, which may contain proposed findings of fact and conclusions of law, and, if permitted, reply briefs.

(b) Briefs should include a summary of the evidence relied upon together with references to exhibit numbers and pages of the transcript, with citations of authorities relied upon.

### § 18b.71 Decisions following hearing.

When the time for submission of posthearing briefs has expired, the presiding officer shall certify the entire record, including recommended findings and proposed decision, to the reviewing authority; or if so authorized shall make an initial decision. A copy of the recommended findings and proposed decision, or of the initial decision, shall be served upon all parties, and amici, if any.

[35 FR 10760, July 2, 1970, as amended at 51 FR 10386, Mar. 26, 1986]

### § 18b.72 Exceptions to initial or recommended decisions.

Within 20 days after the mailing of an initial or recommended decision, any party may file exceptions to the decision, stating reasons therefor, with the reviewing authority. Any other party may file a response thereto within 30 days after the mailing of the decision. Upon the filing of such exceptions, the reviewing authority shall review the decision and issue its own decision thereon.

### § 18b.73 Final decisions.

(a) Where the hearing is conducted by a hearing examiner who makes an initial decision, if no exceptions thereto are filed within the 20-day period specified in § 18b.72, such decision shall become the final decision of the Department of Veterans Affairs, and shall constitute ''final agency action'' within the meaning of 5 U.S.C. 704 (formerly section 10(c) of the Administrative Procedure Act), subject to the provisions of § 18b.75.

(b) Where the hearing is conducted by an administrative law judge who makes a recommended decision or upon the filing of exceptions to an administrative law judge's initial decision, the reviewing authority shall review the recommended or initial decision and shall issue a decision thereon, which

shall become the final decision of VA, and shall constitute ''final agency action'' within the meaning of 5 U.S.C. 704 (formerly section 10(c) of the Administrative Procedures Act), subject to the provisions of § 18b.75.

(c) All final decisions shall be promptly served on all parties, and amici, if any.

[35 FR 10760, July 2, 1970, as amended at 51 FR 10386, Mar. 26, 1986; 54 FR 34984, Aug. 23, 1989]

### § 18b.74 Oral argument to the reviewing authority.

(a) If any party desires to argue a case orally on exceptions or replies to exceptions to an initial or recommended decision, the party shall make such request in writing. The reviewing authority may grant or deny such requests in his or her discretion. If granted, the reviewing authority will serve notice of oral argument on all parties. The notice will set forth the order of presentation, the amount of time allotted, and the time and place for argument. The names of persons who will argue should be filed with the agency hearing clerk not later than 7 days before the date set for oral argument.

(b) The purpose of oral argument is to emphasize and clarify the written argument in the briefs. Reading at length from the brief or other texts is not favored. Participants should confine their arguments to points of controlling importance and to points upon which exceptions have been filed. Consolidations of appearances at oral argument by parties taking the same side will permit the parties' interests to be presented more effectively in the time allotted.

(c) Pamphlets, charts, and other written material may be presented at oral argument only if such material is limited to facts already in the record and is served on all parties and filed with the Department hearing clerk at least 7 days before the argument.

[35 FR 10760, July 2, 1970, as amended at 51 FR 10386, Mar. 26, 1986; 54 FR 34984, Aug. 23, 1989]

### § 18b.75 Review by the Secretary.

Within 20 days after an initial decision becomes a final decision pursuant to § 18b.73(a), or within 20 days of the mailing of a final decision referred to in § 18b.73(b), as the case may be, a party may request the Secretary to review the final decision. The Secretary may grant or deny such request, in whole or in part, or serve notice of intent to review the decision in whole or in part upon motion. If the Secretary grants the requested review, or serves notice of intent to review upon motion, each party to the decision shall have 20 days following notice of the Secretary's proposed action within which to file exceptions to the decision and supporting briefs and memoranda, or briefs and memoranda in support of the decision. Failure of a party to request review under this section shall not be deemed a failure to exhaust administrative remedies for the purpose of obtaining judicial review.

[35 FR 10760, July 2, 1970, as amended at 51 FR 10387, Mar. 26, 1986]

### § 18b.76 Service on amici curiae.

All briefs, exceptions, memoranda, requests, and decisions referred to in §§ 18b.70 through 18b.76 shall be served upon amici curiae at the same times and in the same manner required for service on parties. Any written statements of position and trial briefs required of parties under § 18b.50 shall be served on amici.

POSTHEARING DEPARTMENT ACTIONS

### § 18b.77 Final Department action.

(a) The final decision of the administrative law judge or reviewing authority that a school or training establishment is not in compliance will be referred by the reviewing authority to the Secretary for approval as required by § 18.10(e) of this chapter. The finding will be accompanied by letters from the Secretary to the House Veterans' Affairs Committee and the Senate Veterans Affairs Committee containing a full report on the circumstances as required by § 18.8(c) of this chapter, the reasons for the proposed action and a statement that the proposed action will become the final Department action 30 days after the date of the letter.

(b) A copy of the letters to the congressional committees will be sent to all parties to the proceedings.

[35 FR 10760, July 2, 1970, as amended at 51 FR 10387, Mar. 26, 1986; 54 FR 34984, Aug. 23, 1989]

JUDICIAL STANDARDS OF PRACTICE

### § 18b.90 Conduct.

Parties and their representatives are expected to conduct themselves with honor and dignity and observe judicial standards of practice and ethics in all proceedings. They should not indulge in offensive personalities, unseemly wrangling, or intemperate accusations or characterizations. A representative of any party whether or not a lawyer shall observe the traditional responsibilities of lawyers as officers of the court and use best efforts to restrain the principal represented from improprieties in connection with a proceeding.

[35 FR 10760, July 2, 1970, as amended at 51 FR 10387, Mar. 26, 1986]

### § 18b.91 Improper conduct.

With respect to any proceeding it is improper for any interested person to attempt to sway the judgment of the reviewing authority by undertaking to bring pressure or influence to bear upon the reviewing authority or any officer having a responsibility for a decision in the proceeding, or decisional staff. It is improper that such interested persons or any members of the Department of Veterans Affairs's staff or the presiding officer give statements to communications media, by paid advertisement or otherwise, designed to influence the judgment of any officer having a responsibility for a decision in the proceeding, or decisional staff. It is improper for any person to solicit communications to any such officer, or decisional staff, other than proper communications by parties or amici curiae.

[35 FR 10760, July 2, 1970, as amended at 51 FR 10387, Mar. 26, 1986]

### § 18b.92 Ex parte communications.

Only persons employed by or assigned to work with the reviewing authority who perform no investigative or prosecuting function in connection with a proceeding shall communicate ex parte with the reviewing authority or the presiding officer, or any employee or person involved in the decisional process in such proceedings with respect to the merits of that or a factually related proceeding. The reviewing authority, the presiding officer, or any employee or person involved in the decisional process of a proceeding shall communicate ex parte with respect to the merits of that or a factually related proceeding only with persons employed by or assigned to work with them and who perform no investigative or prosecuting function in connection with the proceeding.

### § 18b.93 Expeditious treatment.

Requests for expeditious treatment of matters pending before the reviewing authority or the presiding officer are deemed communications on the merits, and are improper except when forwarded from parties to a proceeding and served upon all other parties thereto. Such communications should be in the form of a motion.

### § 18b.94 Matters not prohibited.

A request for information which merely inquires about the status of a proceeding without discussing issues or expressing points of view is not deemed an ex parte communication. Such requests should be directed to the civil rights hearing clerk. Communications with respect to minor procedural matters or inquiries or emergency requests for extensions of time are not deemed ex parte communications prohibited by § 18b.92. Where feasible, however, such communications should be by letter with copies to all parties. Ex parte communications between a respondent and the responsible agency official or the Secretary with respect to securing such respondent's voluntary compliance with any requirement of part 18 of this chapter are not prohibited.

### § 18b.95 Filing of ex parte communications.

A prohibited communication in writing received by the Secretary, the reviewing authority, or by the presiding officer, shall be made public by placing it in the correspondence file of the

docket in the case and will not be considered as part of the record for decision. If the prohibited communication is received orally, a memorandum setting forth its substance shall be made and filed in the correspondence section of the docket in the case. A person referred to in such memorandum may file a comment for inclusion in the docket if the memorandum is considered to be incorrect.

[35 FR 10760, July 2, 1970, as amended at 51 FR 10387, Mar. 26, 1986]

# PART 19—BOARD OF VETERANS' APPEALS: APPEALS REGULATIONS

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APPENDIX A TO PART 19—CROSS-REFERENCES

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

SOURCE: 57 FR 4104, Feb. 3, 1992, unless otherwise noted.

## Subpart A—Operation of the Board of Veterans' Appeals

### § 19.1 Establishment of the Board.

The Board of Veterans' Appeals is established by authority of, and functions pursuant to, title 38, United States Code, chapter 71.

### § 19.2 Composition of the Board; Titles.

(a) The Board consists of a Chairman, Vice Chairman, Deputy Vice Chairmen, Members and professional, administrative, clerical and stenographic personnel. Deputy Vice Chairmen are Members of the Board who are appointed to that office by the Secretary upon the recommendation of the Chairman.

(b) A member of the Board (other than the Chairman) may also be known as a Veterans Law Judge. An individual designated as an acting member pursuant to 38 U.S.C. 7101(c)(1) may also be known as an acting Veterans Law Judge.

(Authority: 38 U.S.C. 501(a), 512, 7101(a))

[68 FR 6625, Feb. 10, 2003]

### § 19.3 Assignment of proceedings.

(a) *Assignment.* The Chairman may assign a proceeding instituted before the Board, including any motion, to an individual Member or to a panel of three or more Members for adjudication or other appropriate action. The Chairman may participate in a proceeding assigned to a panel of Members.

(Authority: 38 U.S.C. 7102)

(b) *Inability to serve.* If a Member is unable to participate in the disposition of a proceeding or motion to which the Member has been assigned, the Chairman may assign the proceeding or motion to another Member or substitute another Member (in the case of a proceeding or motion assigned to a panel).

(Authority: 38 U.S.C. 7101(a), 7102)

[61 FR 20448, May 7, 1996]

### § 19.4 Principal functions of the Board.

The principal functions of the Board are to make determinations of appellate jurisdiction, consider all applications on appeal properly before it, conduct hearings on appeal, evaluate the evidence of record, and enter decisions in writing on the questions presented on appeal.

(Authority: 38 U.S.C. 7102, 7104, 7107)

### § 19.5 Criteria governing disposition of appeals.

In the consideration of appeals, the Board is bound by applicable statutes, regulations of the Department of Veterans Affairs, and precedent opinions of the General Counsel of the Department of Veterans Affairs. The Board is not bound by Department manuals, circulars, or similar administrative issues.

(Authority: 38 U.S.C. 501(a), 7104(c))

### § 19.6 [Reserved]

### § 19.7 The decision.

(a) *Decisions based on entire record.* The appellant will not be presumed to be in agreement with any statement of fact contained in a Statement of the Case to which no exception is taken. Decisions of the Board are based on a review of the entire record.

(Authority: 38 U.S.C. 7104(a), 7105(d)(4))

(b) *Content.* The decision of the Board will be in writing and will set forth specifically the issue or issues under appellate consideration. Except with respect to issues remanded to the agency of original jurisdiction for further development of the case and appeals which are dismissed because the issue has been resolved by administrative action or because an appellant seeking nonmonetary benefits has died while the appeal was pending, the decision will also include separately stated findings of fact and conclusions of law on all material issues of fact and law presented on the record, the reasons or bases for those findings and conclusions, and an order granting or denying the benefit or benefits sought on appeal or dismissing the appeal.

(Authority: 38 U.S.C. 7104(d))

(c) A decision by a panel of Members will be by a majority vote of the panel Members.

[57 FR 4104, Feb. 3, 1992, as amended at 61 FR 20449, May 7, 1996]

### § 19.8 Content of Board decision, remand, or order in simultaneously contested claims.

The content of the Board's decision, remand, or order in appeals involving a simultaneously contested claim will be limited to information that directly affects the issues involved in the contested claim. Appellate issues that do not involve all of the contesting parties will be addressed in one or more separate written decisions, remands, or orders that will be furnished only to the appellants concerned and their representatives, if any.

(Authority: 5 U.S.C. 552a(b), 38 U.S.C. 5701(a))

[61 FR 68666, Dec. 30, 1996]

### § 19.9 Remand for further development.

(a) *General.* If further evidence, clarification of the evidence, correction of a procedural defect, or any other action is essential for a proper appellate decision, a Veterans Law Judge or panel of Veterans Law Judges shall remand the case to the agency of original jurisdiction, specifying the action to be undertaken.

(b) *Exceptions.* A remand to the agency of original jurisdiction is not necessary for the purposes of:

(1) Clarifying a procedural matter before the Board, including the appellant's choice of representative before the Board, the issues on appeal, or requests for a hearing before the Board;

(2) Consideration of an appeal, in accordance with § 20.903(b) of this chapter, with respect to law not already considered by the agency of original jurisdiction. This includes, but is not limited to, statutes, regulations, and court decisions; or

(3) Reviewing additional evidence received by the Board, if, pursuant to § 20.1304(c) of this chapter, the appellant or the appellant's representative waives the right to initial consideration by the agency of original jurisdiction, or if the Board determines that the benefit or benefits to which the evidence relates may be fully allowed on appeal.

(c) *Scope.* This section does not apply to:

(1) The Board's request for an opinion under Rule 901 (§ 20.901 of this chapter);

(2) The Board's supplementation of the record with a recognized medical treatise; and

(3) Matters over which the Board has original jurisdiction described in Rules 609 and 610 (§§ 20.609 and 20.610 of this chapter).

(Authority: 38 U.S.C. 7102, 7103(c), 7104(a)).

[67 FR 3104, Jan. 23, 2002, as amended at 69 FR 53808, Sept. 3, 2004]

### § 19.10 [Reserved]

### § 19.11 Reconsideration panel.

(a) *Assignment of Members.* When a motion for reconsideration is allowed, the Chairman will assign a panel of three or more Members of the Board, which may include the Chairman, to conduct the reconsideration.

(b) *Number of Members constituting a reconsideration panel.* In the case of a matter originally heard by a single Member of the Board, the case shall be referred to a panel of three Members of the Board. In the case of a matter originally heard by a panel of Members of the Board, the case shall be referred to an enlarged panel, consisting of three or more Members than the original panel. In order to obtain a majority opinion, the number of Members assigned to a reconsideration panel may be increased in successive increments of three.

(c) *Members included in the reconsideration panel.* The reconsideration panel may not include any Member who participated in the decision that is being reconsidered. Additional Members will be assigned in accordance with paragraph (b) of this section.

(Authority: 38 U.S.C. 7102, 7103)

[61 FR 20449, May 7, 1996]

### § 19.12 Disqualification of Members.

(a) *General.* A Member of the Board will disqualify himself or herself in a hearing or decision on an appeal if that appeal involves a determination in which he or she participated or had supervisory responsibility in the agency

of original jurisdiction prior to his or her appointment as a Member of the Board, or where there are other circumstances which might give the impression of bias either for or against the appellant.

(Authority: 38 U.S.C. 7102, 7104)

(b) *Appeal on same issue subsequent to decision on administrative appeal.* Any Member of the Board who made the decision on an administrative appeal will disqualify himself or herself from acting on a subsequent appeal by the claimant on the same issue.

(Authority: 38 U.S.C. 7102, 7104, 7106)

(c) *Disqualification of Members by the Chairman.* The Chairman of the Board, on his or her own motion, may disqualify a Member from acting in an appeal on the grounds set forth in paragraphs (a) and (b) of this section and in those cases where a Member is unable or unwilling to act.

(Authority: 38 U.S.C. 7102, 7104, 7106)

[57 FR 4104, Feb. 3, 1992, as amended at 61 FR 20449, May 7, 1996]

### § 19.13 Delegation of authority to Chairman and Vice Chairman, Board of Veterans' Appeals.

The Chairman and/or Vice Chairman have authority delegated by the Secretary of Veterans Affairs to:

(a) Approve the assumption of appellate jurisdiction of an adjudicative determination which has not become final in order to grant a benefit, and

(b) Order VA Central Office investigations of matters before the Board.

(Authority: 38 U.S.C. 303, 512(a))

### § 19.14 Delegation of authority—Appeals regulations.

(a) The authority exercised by the Chairman of the Board of Veterans' Appeals described in §§ 19.3(b) and 19.12(c) of this part may also be exercised by the Vice Chairman of the Board.

(b) The authority exercised by the Chairman of the Board of Veterans' Appeals described in § 19.11 of this part may also be exercised by the Vice Chairman of the Board and by Deputy Vice Chairmen of the Board.

(Authority: 38 U.S.C. 512(a), 7102, 7104)

[57 FR 4104, Feb. 3, 1992, as amended at 70 FR 8930, Feb. 24, 2005]

## Subpart B—Appeals Processing by Agency of Original Jurisdiction

### § 19.25 Notification by agency of original jurisdiction of right to appeal.

The claimant and his or her representative, if any, will be informed of appellate rights provided by 38 U.S.C. chapters 71 and 72, including the right to a personal hearing and the right to representation. The agency of original jurisdiction will provide this information in each notification of a determination of entitlement or nonentitlement to Department of Veterans Affairs benefits.

(Authority: 38 U.S.C. 7105(a))

### § 19.26 Action by agency of original jurisdiction on Notice of Disagreement.

When a Notice of Disagreement is timely filed, the agency of original jurisdiction must reexamine the claim and determine if additional review or development is warranted. When a Notice of Disagreement is received following a multiple-issue determination and it is not clear which issue, or issues, the claimant desires to appeal, clarification sufficient to identify the issue, or issues, being appealed should be requested from the claimant or his or her representative. If no preliminary action is required, or when it is completed, the agency of original jurisdiction must prepare a Statement of the Case pursuant to § 19.29 of this part, unless the matter is resolved by granting the benefits sought on appeal or the Notice of Disagreement is withdrawn by the appellant or his or her representative.

(Authority: 38 U.S.C. 7105(d)(1))

### § 19.27 Adequacy of Notice of Disagreement questioned within the agency of original jurisdiction.

If, within the agency of original jurisdiction, there is a question as to the adequacy of a Notice of Disagreement,

the procedures for an administrative appeal must be followed.

(Authority: 38 U.S.C. 7105, 7106)

### § 19.28 Determination that a Notice of Disagreement is inadequate protested by claimant or representative.

Whether a Notice of Disagreement is adequate is an appealable issue. If the claimant or his or her representative protests an adverse determination made by the agency of original jurisdiction with respect to the adequacy of a Notice of Disagreement, the claimant will be furnished a Statement of the Case.

(Authority: 38 U.S.C. 7105)

### § 19.29 Statement of the Case.

The Statement of the Case must be complete enough to allow the appellant to present written and/or oral arguments before the Board of Veterans' Appeals. It must contain:

(a) A summary of the evidence in the case relating to the issue or issues with which the appellant or representative has expressed disagreement;

(b) A summary of the applicable laws and regulations, with appropriate citations, and a discussion of how such laws and regulations affect the determination; and

(c) The determination of the agency of original jurisdiction on each issue and the reasons for each such determination with respect to which disagreement has been expressed.

(Authority: 38 U.S.C. 7105(d)(1))

### § 19.30 Furnishing the Statement of the Case and instructions for filing a Substantive Appeal.

(a) *To whom the Statement of the Case is furnished.* The Statement of the Case will be forwarded to the appellant at the latest address of record and a separate copy provided to his or her representative (if any).

(b) *Information furnished with the Statement of the Case.* With the Statement of the Case, the appellant and the representative will be furnished information on the right to file, and time limit for filing, a Substantive Appeal; information on hearing and representation rights; and a VA Form 9, ''Appeal to Board of Veterans' Appeals.''

(Authority: 38 U.S.C. 7105)

[57 FR 4104, Feb. 3, 1992, as amended at 61 FR 20449, May 7, 1996]

### § 19.31 Supplemental statement of the case.

(a) *Purpose and limitations.* A ''Supplemental Statement of the Case,'' so identified, is a document prepared by the agency of original jurisdiction to inform the appellant of any material changes in, or additions to, the information included in the Statement of the Case or any prior Supplemental Statement of the Case. In no case will a Supplemental Statement of the Case be used to announce decisions by the agency of original jurisdiction on issues not previously addressed in the Statement of the Case, or to respond to a notice of disagreement on newly appealed issues that were not addressed in the Statement of the Case. The agency of original jurisdiction will respond to notices of disagreement on newly appealed issues not addressed in the Statement of the Case using the procedures in §§ 19.29 and 19.30 of this part (relating to statements of the case).

(b) *When furnished.* The agency of original jurisdiction will furnish the appellant and his or her representative, if any, a Supplemental Statement of the Case if:

(1) The agency of original jurisdiction receives additional pertinent evidence after a Statement of the Case or the most recent Supplemental Statement of the Case has been issued and before the appeal is certified to the Board of Veterans' Appeals and the appellate record is transferred to the Board;

(2) A material defect in the Statement of the Case or a prior Supplemental statement of the Case is discovered; or

(3) For any other reason the Statement of the Case or a prior Supplemental Statement of the Case is inadequate.

(c) *Pursuant to remand from the Board.* The agency of original jurisdiction will issue a Supplemental Statement of the Case if, pursuant to a remand by the

Board, it develops the evidence or cures a procedural defect, unless:

(1) The only purpose of the remand is to assemble records previously considered by the agency of original jurisdiction and properly discussed in a prior Statement of the Case or Supplemental Statement of the Case; or

(2) The Board specifies in the remand that a Supplemental Statement of the Case is not required.

(Authority: 38 U.S.C. 7105(d)).

[67 FR 3104, Jan. 23, 2002]

### § 19.32 Closing of appeal for failure to respond to Statement of the Case.

The agency of original jurisdiction may close the appeal without notice to an appellant or his or her representative for failure to respond to a Statement of the Case within the period allowed. However, if a Substantive Appeal is subsequently received within the 1-year appeal period (60-day appeal period for simultaneously contested claims), the appeal will be considered to be reactivated.

(Authority: 38 U.S.C. 7105(d)(3))

### § 19.33 Timely filing of Notice of Disagreement or Substantive Appeal questioned within the agency of original jurisdiction.

If, within the agency of original jurisdiction, there is a question as to the timely filing of a Notice of Disagreement or Substantive Appeal, the procedures for an administrative appeal must be followed.

(Authority: 38 U.S.C. 7105, 7106)

### § 19.34 Determination that Notice of Disagreement or Substantive Appeal was not timely filed protested by claimant or representative.

Whether a Notice of Disagreement or Substantive Appeal has been filed on time is an appealable issue. If the claimant or his or her representative protests an adverse determination made by the agency of original jurisdiction with respect to timely filing of the Notice of Disagreement or Substantive Appeal, the claimant will be furnished a Statement of the Case.

(Authority: 38 U.S.C. 7105)

### § 19.35 Certification of appeals.

Following receipt of a timely Substantive Appeal, the agency of original jurisdiction will certify the case to the Board of Veterans' Appeals. Certification is accomplished by the completion of VA Form 8, ''Certification of Appeal.'' The certification is used for administrative purposes and does not serve to either confer or deprive the Board of Veterans' Appeals of jurisdiction over an issue.

(Authority: 38 U.S.C. 7105)

[57 FR 4104, Feb. 3, 1992, as amended at 61 FR 20449, May 7, 1996; 66 FR 53339, Oct. 22, 2001]

### § 19.36 Notification of certification of appeal and transfer of appellate record.

When an appeal is certified to the Board of Veterans' Appeals for appellate review and the appellate record is transferred to the Board, the appellant and his or her representative, if any, will be notified in writing of the certification and transfer and of the time limit for requesting a change in representation, for requesting a personal hearing, and for submitting additional evidence described in Rule of Practice 1304 (§ 20.1304 of this chapter).

(Authority: 38 U.S.C. 7105)

### § 19.37 Consideration of additional evidence received by the agency of original jurisdiction after an appeal has been initiated.

(a) *Evidence received prior to transfer of records to Board of Veterans' Appeals.* Evidence received by the agency of original jurisdiction prior to transfer of the records to the Board of Veterans' Appeals after an appeal has been initiated (including evidence received after certification has been completed) will be referred to the appropriate rating or authorization activity for review and disposition. If the Statement of the Case and any prior Supplemental Statements of the Case were prepared before the receipt of the additional evidence, a Supplemental Statement of the Case will be furnished to the appellant and his or her representative as provided in § 19.31 of this part, unless the additional evidence received duplicates evidence previously of record which was discussed in the Statement

of the Case or a prior Supplemental Statement of the Case or the additional evidence is not relevant to the issue, or issues, on appeal.

(b) *Evidence received after transfer of records to the Board of Veterans' Appeals.* Additional evidence received by the agency of original jurisdiction after the records have been transferred to the Board of Veterans' Appeals for appellate consideration will be forwarded to the Board if it has a bearing on the appellate issue or issues. The Board will then determine what action is required with respect to the additional evidence.

(Authority: 38 U.S.C. 7105(d)(1))

### § 19.38 Action by agency of original jurisdiction when remand received.

When a case is remanded by the Board of Veterans' Appeals, the agency of original jurisdiction will complete the additional development of the evidence or procedural development required. Following completion of the development, the case will be reviewed to determine whether the additional development, together with the evidence which was previously of record, supports the allowance of all benefits sought on appeal. If so, the appellant and his or her representative, if any, will be promptly informed. If any benefits sought on appeal remain denied following this review, the agency of original jurisdiction will issue a Supplemental Statement of the Case concerning the additional development pertaining to those issues in accordance with the provisions of § 19.31 of this part. Following the 60-day period allowed for a response to the Supplemental Statement of the Case pursuant to Rule of Practice 302, paragraph (c) (§ 20.302(c) of this chapter), the case will be returned to the Board for further appellate processing unless the appeal is withdrawn or review of the response to the Supplemental Statement of the Case results in the allowance of all benefits sought on appeal. Remanded cases will not be closed for failure to respond to the Supplemental Statement of the Case.

(Authority 38 U.S.C. 7105(d)(1))

[57 FR 4104, Feb. 3, 1992, as amended at 69 FR 53808, Sept. 3, 2004]

### §§ 19.39–19.49 [Reserved]

## Subpart C—Administrative Appeals

### § 19.50 Nature and form of administrative appeal.

(a) *General.* An administrative appeal from an agency of original jurisdiction determination is an appeal taken by an official of the Department of Veterans Affairs authorized to do so to resolve a conflict of opinion or a question pertaining to a claim involving benefits under laws administered by the Department of Veterans Affairs. Such appeals may be taken not only from determinations involving dissenting opinions, but also from unanimous determinations denying or allowing the benefit claimed in whole or in part.

(b) *Form of Appeal.* An administrative appeal is entered by a memorandum entitled ''Administrative Appeal'' in which the issues and the basis for the appeal are set forth.

(Authority: 38 U.S.C. 7106)

### § 19.51 Officials authorized to file administrative appeals and time limits for filing.

The Secretary of Veterans Affairs authorizes certain officials of the Department of Veterans Affairs to file administrative appeals within specified time limits, as follows:

(a) *Central Office*—(1) *Officials.* The Under Secretary for Benefits or a service director of the Veterans Benefits Administration, the Under Secretary for Health or a service director of the Veterans Health Administration, and the General Counsel.

(2) *Time limit.* Such officials must file an administrative appeal within 1 year from the date of mailing notice of such determination to the claimant.

(b) *Agencies of original jurisdiction*—(1) *Officials.* Directors, adjudication officers, and officials at comparable levels in field offices deciding any claims for benefits, from any determination originating within their established jurisdiction.

(2) *Time limit.* The Director or comparable official must file an administrative appeal within 6 months from

the date of mailing notice of the determination to the claimant. Officials below the level of Director must do so within 60 days from such date.

(c) *The date of mailing.* With respect to paragraphs (a) and (b) of this section, the date of mailing notice of the determination to the claimant will be presumed to be the same as the date of the letter of notification to the claimant.

(Authority: 38 U.S.C. 7106)

[57 FR 4104, Feb. 3, 1992, as amended at 61 FR 20449, May 7, 1996]

### § 19.52 Notification to claimant of filing of administrative appeal.

When an administrative appeal is entered, the claimant and his or her representative, if any, will be promptly furnished a copy of the memorandum entitled ''Administrative Appeal,'' or an adequate summary thereof, outlining the question at issue. They will be allowed a period of 60 days to join in the appeal if they so desire. The claimant will also be advised of the effect of such action and of the preservation of normal appeal rights if he or she does not elect to join in the administrative appeal.

(Authority: 38 U.S.C. 7106)

### § 19.53 Restriction as to change in payments pending determination of administrative appeals.

If an administrative appeal is taken from a review or determination by the agency of original jurisdiction pursuant to §§ 19.50 and 19.51 of this part, that review or determination may not be used to effect any change in payments until after a decision is made by the Board of Veterans' Appeals.

(Authority: 38 U.S.C. 7106)

### §§ 19.54–19.74 [Reserved]

## Subpart D—Hearings Before the Board of Veterans' Appeals at Department of Veterans Affairs Field Facilities

### § 19.75 Field hearing docket.

Hearings on appeal held at Department of Veterans Affairs field facilities will be scheduled for each area served by a regional office in accordance with the place of each case on the Board's docket, established under § 20.900 of this chapter, relative to other cases for which hearings are scheduled to be held within that area. Such scheduling is subject to § 20.704(f) of this chapter pertaining to advancement of a case on the hearing docket.

(Authority: 38 U.S.C. 7107)

[65 FR 14471, Mar. 17, 2000]

### § 19.76 Notice of time and place of hearing before the Board of Veterans' Appeals at Department of Veterans Affairs field facilities.

The agency of original jurisdiction will notify the appellant and his or her representative of the place and time of a hearing before the Board of Veterans' Appeals at a Department of Veterans Affairs field facility not less than 30 days prior to the hearing date. This time limitation does not apply to hearings which have been rescheduled due to a postponement requested by an appellant, or on his or her behalf, or due to the prior failure of an appellant to appear at a scheduled hearing before the Board of Veterans' Appeals at a Department of Veterans Affairs field facility with good cause. The right to notice at least 30 days in advance will be deemed to have been waived if an appellant accepts an earlier hearing date due to the cancellation of another previously scheduled hearing.

(Authority: 38 U.S.C. 7107)

[61 FR 20449, May 7, 1996, as amended at 61 FR 43008, Aug. 20, 1996]

### §§ 19.77–19.99 [Reserved]

## Subpart E—Simultaneously Contested Claims

### § 19.100 Notification of right to appeal in simultaneously contested claims.

All interested parties will be specifically notified of the action taken by the agency of original jurisdiction in a simultaneously contested claim and of the right and time limit for initiation of an appeal, as well as hearing and representation rights.

(Authority: 38 U.S.C. 7105A(a))

### § 19.101 Notice to contesting parties on receipt of Notice of Disagreement in simultaneously contested claims.

Upon the filing of a Notice of Disagreement in a simultaneously contested claim, all interested parties and their representatives will be furnished a copy of the Statement of the Case. The Statement of the Case so furnished will contain only information which directly affects the payment or potential payment of the benefit(s) which is (are) the subject of that contested claim. The interested parties who filed Notices of Disagreement will be duly notified of the right to file, and the time limit within which to file, a Substantive Appeal and will be furnished with VA Form 9, ''Appeal to Board of Veterans' Appeals.''

(Authority: 38 U.S.C. 7105A(b))

[57 FR 4104, Feb. 3, 1992, as amended at 61 FR 20449, May 7, 1996]

### § 19.102 Notice of appeal to other contesting parties in simultaneously contested claims.

When a Substantive Appeal is filed in a simultaneously contested claim, the content of the Substantive Appeal will be furnished to the other contesting parties to the extent that it contains information which could directly affect the payment or potential payment of the benefit which is the subject of the contested claim.

(Authority: 38 U.S.C. 7105A(b))

APPENDIX A TO PART 19—CROSS-REFERENCES

| Sec. | Cross-reference | Title of cross-referenced material or comment |
|---|---|---|
| 19.5 | 38 CFR 14.507(b) | See re ''precedent opinions'' of the General Counsel of the Department of Veterans Affairs. |
| | 38 CFR 20.1303 | *Rule 1303. Nonprecedential nature of Board decisions.* |
| 19.7 | 38 CFR 20.905 | *Rule 905. Vacating a decision.* |
| 19.13 | 38 CFR 2.66 | Contains similar provisions. |
| 19.25 | 38 CFR 19.52 | *Notification to claimant of filing of administrative appeal.* |
| | 38 CFR 19.100 | *Notification of right to appeal in simultaneously contested claims.* |
| 19.26 | 38 CFR 20.302 | *Rule 302. Time limit for filing Notice of Disagreement, Substantive Appeal, and response to Supplemental Statement of the Case.* |
| 19.27 | 38 CFR 19.50–19.53 | See re administrative appeals. |
| 19.30 | 38 CFR 20.202 | *Rule 202. Substantive Appeal.* |
| 19.32 | 38 CFR 20.302 | *Rule 302. Time limit for filing Notice of Disagreement, Substantive Appeal, and response to Supplemental Statement of the Case.* |
| | 38 CFR 20.501 | *Rule 501. Time limits for filing Notice of Disagreement, Substantive Appeal, and response to Supplemental Statement of the Case in simultaneously contested claims.* |
| 19.33 | 38 CFR 19.50–19.53 | See re administrative appeals. |
| 19.50 | 38 CFR 19.53 | *Restriction as to change in payments pending determination of administrative appeals.* |
| 19.76 | 38 CFR 20.704 | *Rule 704. Scheduling and notice of hearings conducted by traveling Sections of the Board of Veterans' Appeals at Department of Veterans Affairs field facilities.* |
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APPENDIX A TO PART 20—CROSS-REFERENCES

AUTHORITY: 38 U.S.C. 501(a) and as noted in specific sections.

SOURCE: 57 FR 4109, Feb. 3, 1992, unless otherwise noted.

## Subpart A—General

### § 20.1 Rule 1. Purpose and construction of Rules of Practice.

(a) *Purpose.* These rules establish the practices and procedures governing appeals to the Board of Veterans' Appeals.

(Authority: 38 U.S.C. 501(a), 7102, 7104)

(b) *Construction.* These rules are to be construed to secure a just and speedy decision in every appeal.

(Authority: 38 U.S.C. 501(a), 5107, 7104)

### § 20.2 Rule 2. Procedure in absence of specific Rule of Practice.

Where in any instance there is no applicable rule or procedure, the Chairman may prescribe a procedure which is consistent with the provisions of title 38, United States Code, and these rules.

(Authority: 38 U.S.C. 501(a), 512(a), 7102, 7104)

### § 20.3 Rule 3. Definitions.

As used in these Rules:

(a) *Agency of original jurisdiction* means the Department of Veterans Affairs activity or administration, that

is, the Veterans Benefits Administration, Veterans Health Administration, or National Cemetery Administration, that made the initial determination on a claim.

(b) *Agent* means a person who has met the standards and qualifications for accreditation outlined in §14.629(b) of this chapter and who has been properly designated under the provisions of Rule 604 (§20.604 of this part). It does not include representatives recognized under Rules 602, 603, or 605 (§20.602, 20.603, or §20.605 of this part).

(c) *Appellant* means a claimant who has initiated an appeal to the Board of Veterans' Appeals by filing a Notice of Disagreement pursuant to the provisions of 38 U.S.C. 7105.

(d) *Attorney-at-law* means a member in good standing of a State bar.

(e) *Benefit* means any payment, service, commodity, function, or status, entitlement to which is determined under laws administered by the Department of Veterans Affairs pertaining to veterans and their dependents and survivors.

(f) *Claim* means application made under title 38, United States Code, and implementing directives for entitlement to Department of Veterans Affairs benefits or for the continuation or increase of such benefits, or the defense of a proposed agency adverse action concerning benefits.

(g) *Claimant* means a person who has filed a claim, as defined by paragraph (f) of this section.

(h) *Electronic hearing* means a hearing on appeal in which an appellant or a representative participates, through voice transmission or through picture and voice transmission, by electronic or other means, in a hearing with a Member or Members sitting at the Board's principal location in Washington, DC.

(i) *Hearing on appeal* means a hearing conducted after a Notice of Disagreement has been filed in which argument and/or testimony is presented concerning the determination, or determinations, by the agency of original jurisdiction being appealed.

(j) *Law student* means an individual pursuing a Juris Doctor or equivalent degree at a school approved by a recognized accrediting association.

(k) *Legal intern* means a graduate of a law school, which has been approved by a recognized accrediting association, who has not yet been admitted to a State bar.

(l) *Motion* means a request that the Board rule on some question which is subsidiary to the ultimate decision on the outcome of an appeal. For example, the questions of whether a representative's fees are reasonable or whether additional evidence may be submitted more than 90 days after certification of an appeal to the Board are raised by motion (see Rule 609, paragraph (i), and Rule 1304, paragraph (b) §§20.609(i) and 20.1304(b) of this part). Unless raised orally at a personal hearing before Members of the Board, motions for consideration by the Board must be made in writing. No formal type of document is required. The motion may be in the form of a letter which contains the necessary information.

(m) *Paralegal* means a graduate of a course of paralegal instruction given by a school which has been approved by a recognized accrediting association, or an individual who has equivalent legal experience.

(n) *Past-due benefits* means a nonrecurring payment resulting from a benefit, or benefits, granted on appeal or awarded on the basis of a claim reopened after a denial by the Board of Veterans' Appeals or the lump sum payment which represents the total amount of recurring cash payments which accrued between the effective date of the award, as determined by applicable laws and regulations, and the date of the grant of the benefit by the agency of original jurisdiction, the Board of Veterans' Appeals, or an appellate court.

(o) *Presiding Member* means that Member of the Board who presides over a hearing, whether conducted as a single Member or panel hearing.

(p) *Simultaneously contested claim* refers to the situation in which the allowance of one claim results in the disallowance of another claim involving the same benefit or the allowance of one claim results in the payment of a lesser benefit to another claimant.

(q) *State* includes any State, possession, territory, or Commonwealth of

the United States, as well as the District of Columbia.

(Authority: 38 U.S.C. 501(a))

[57 FR 4109, Feb. 3, 1992, as amended at 61 FR 20449, May 7, 1996; 67 FR 36104, May 23, 2002; 69 FR 53808, Sept. 3, 2004]

**§§ 20.4–20.99 [Reserved]**

## Subpart B—The Board

### § 20.100 Rule 100. Name, business hours, and mailing address of the Board.

(a) *Name.* The name of the Board is the Board of Veterans' Appeals.

(b) *Business hours.* The Board is open during business hours on all days except Saturday, Sunday and legal holidays. Business hours are from 8 a.m. to 4:30 p.m.

(c) *Mailing address.* Except as otherwise noted in these Rules, mail to the Board must be addressed to: Chairman (01), Board of Veterans' Appeals, 810 Vermont Avenue NW., Washington, DC 20420.

(Authority: 38 U.S.C. 7101(a))

### § 20.101 Rule 101. Jurisdiction of the Board.

(a) *General.* All questions of law and fact necessary to a decision by the Secretary of Veterans Affairs under a law that affects the provision of benefits by the Secretary to veterans or their dependents or survivors are subject to review on appeal to the Secretary. Decisions in such appeals are made by the Board of Veterans' Appeals. In its decisions, the Board is bound by applicable statutes, the regulations of the Department of Veterans Affairs and precedent opinions of the General Counsel of the Department of Veterans Affairs. Examples of the issues over which the Board has jurisdiction include, but are not limited to, the following:

(1) Entitlement to, and benefits resulting from, service-connected disability or death (38 U.S.C. chapter 11).

(2) Dependency and indemnity compensation for service-connected death, including benefits in certain cases of inservice or service-connected deaths (38 U.S.C. 1312) and certification and entitlement to death gratuity (38 U.S.C. 1323).

(3) Benefits for survivors of certain veterans rated totally disabled at time of death (38 U.S.C. 1318).

(4) Entitlement to nonservice-connected disability pension, service pension and death pension (38 U.S.C. chapter 15).

(5) All-Volunteer Force Educational Assistance Program (38 U.S.C. chapter 30).

(6) Training and Rehabilitation for Veterans with Service-Connected Disabilities (38 U.S.C. chapter 31).

(7) Post-Vietnam Era Veterans' Educational Assistance (38 U.S.C. chapter 32).

(8) Veterans' Educational Assistance (38 U.S.C. chapter 34).

(9) Survivors' and Dependents' Educational Assistance (38 U.S.C. chapter 35).

(10) Veterans' Job Training (Pub. L. 98–77, as amended; 38 CFR 21.4600 *et seq.*).

(11) Educational Assistance for Members of the Selected Reserve (10 U.S.C. chapter 106).

(12) Educational Assistance Test Program (10 U.S.C. chapter 107; 38 CFR 21.5701 *et seq.*).

(13) Educational Assistance Pilot Program (10 U.S.C. chapter 107; 38 CFR 21.5290 *et seq.*).

(14) Matters arising under National Service Life Insurance and United States Government Life Insurance (38 U.S.C. chapter 19).

(15) Payment or reimbursement for unauthorized medical expenses (38 U.S.C. 1728).

(16) Burial benefits and burial in National Cemeteries (38 U.S.C. chapters 23 and 24).

(17) Benefits for persons disabled by medical treatment or vocational rehabilitation (38 U.S.C. 1151).

(18) Basic eligibility for home, condominium and mobile home loans as well as waiver of payment of loan guaranty indebtedness (38 U.S.C. chapter 37, 38 U.S.C. 5302).

(19) Waiver of recovery of overpayments (38 U.S.C. 5302).

(20) Forfeiture of rights, claims or benefits for fraud, treason, or subversive activities (38 U.S.C. 6102–6105).

(21) Character of discharge (38 U.S.C. 5303).

(22) Determinations as to duty status (38 U.S.C. 101(21)–(24)).

(23) Determinations as to marital status (38 U.S.C. 101(3), 103).

(24) Determination of dependency status as parent or child (38 U.S.C. 101(4), (5)).

(25) Validity of claims and effective dates of benefits (38 U.S.C. chapter 51).

(26) Apportionment of benefits (38 U.S.C. 5307).

(27) Payment of benefits while a veteran is hospitalized and questions regarding an estate of an incompetent institutionalized veteran (38 U.S.C. 5503).

(28) Benefits for surviving spouses and children of deceased veterans under Public Law 97–377, section 156 (38 CFR 3.812(d)).

(29) Eligibility for automobile and automobile adaptive equipment assistance (38 U.S.C. chapter 39).

(b) *Appellate jurisdiction of determinations of the Veterans Health Administration.* The Board's appellate jurisdiction extends to questions of eligibility for hospitalization, outpatient treatment, and nursing home and domiciliary care; for devices such as prostheses, canes, wheelchairs, back braces, orthopedic shoes, and similar appliances; and for other benefits administered by the Veterans Health Administration. Medical determinations, such as determinations of the need for and appropriateness of specific types of medical care and treatment for an individual, are not adjudicative matters and are beyond the Board's jurisdiction. Typical examples of these issues are whether a particular drug should be prescribed, whether a specific type of physiotherapy should be ordered, and similar judgmental treatment decisions with which an attending physician may be faced.

(c) *Appeals as to jurisdiction.* All claimants have the right to appeal a determination made by the agency of original jurisdiction that the Board does not have jurisdictional authority to review a particular case. Jurisdictional questions which a claimant may appeal, include, but are not limited to, questions relating to the timely filing and adequacy of the Notice of Disagreement and the Substantive Appeal.

(d) *Authority to determine jurisdiction.* The Board may address questions pertaining to its jurisdictional authority to review a particular case, including, but not limited to, determining whether Notices of Disagreement and Substantive Appeals are adequate and timely, at any stage in a proceeding before it, regardless of whether the agency of original jurisdiction addressed such question(s). When the Board, on its own initiative, raises a question as to a potential jurisdictional defect, all parties to the proceeding and their representative(s), if any, will be given notice of the potential jurisdictional defect(s) and granted a period of 60 days following the date on which such notice is mailed to present written argument and additional evidence relevant to jurisdiction and to request a hearing to present oral argument on the jurisdictional question(s). The date of mailing of the notice will be presumed to be the same as the date stamped on the letter of notification. The Board may dismiss any case over which it determines it does not have jurisdiction.

(e) *Application of 38 CFR 19.9 and 20.1304.* Section 19.9 of this chapter shall not apply to proceedings to determine the Board's own jurisdiction. However, the Board may remand a case to an agency of original jurisdiction in order to obtain assistance in securing evidence of jurisdictional facts. The time restrictions on requesting a hearing and submitting additional evidence in § 20.1304 of this part do not apply to a hearing requested, or evidence submitted, under paragraph (d) of this section.

(Authority: 38 U.S.C. 511(a), 7104, 7105, 7108)

[57 FR 4109, Feb. 3, 1992, as amended at 66 FR 53339, Oct. 22, 2001]

### § 20.102 Rule 102. Delegation of authority—Rules of Practice.

(a) The authority exercised by the Chairman of the Board of Veterans' Appeals described in Rules 717(d) and 1001(c) (§§ 20.717(d) and 20.1001(c) of this part) may also be exercised by the Vice Chairman of the Board and by Deputy Vice Chairmen of the Board.

(b) The authority exercised by the Chairman of the Board of Veterans' Appeals described in Rules 2 and 606(d) (§§ 20.2, and 20.606(d) of this part), may also be exercised by the Vice Chairman of the Board; by Deputy Vice Chairmen

of the Board; and, in connection with a proceeding or motion assigned to them by the Chairman, by a Member or Members of the Board.

(Authority: 38 U.S.C. 512(a), 7102, 7104)

[57 FR 4109, Feb. 3, 1992; 57 FR 20055, May 11, 1992; 57 FR 38443, Aug. 25, 1992; 61 FR 20449, May 7, 1996; 70 FR 8930, Feb. 24, 2005]

**§§ 20.103–20.199 [Reserved]**

## Subpart C—Commencement and Perfection of Appeal

### § 20.200 Rule 200. What constitutes an appeal.

An appeal consists of a timely filed Notice of Disagreement in writing and, after a Statement of the Case has been furnished, a timely filed Substantive Appeal.

(Authority: 38 U.S.C. 7105)

### § 20.201 Rule 201. Notice of Disagreement.

A written communication from a claimant or his or her representative expressing dissatisfaction or disagreement with an adjudicative determination by the agency of original jurisdiction and a desire to contest the result will constitute a Notice of Disagreement. While special wording is not required, the Notice of Disagreement must be in terms which can be reasonably construed as disagreement with that determination and a desire for appellate review. If the agency of original jurisdiction gave notice that adjudicative determinations were made on several issues at the same time, the specific determinations with which the claimant disagrees must be identified. For example, if service connection was denied for two disabilities and the claimant wishes to appeal the denial of service connection with respect to only one of the disabilities, the Notice of Disagreement must make that clear.

(Authority: 38 U.S.C. 7105)

### § 20.202 Rule 202. Substantive Appeal.

A Substantive Appeal consists of a properly completed VA Form 9, ''Appeal to Board of Veterans' Appeals,'' or correspondence containing the necessary information. If the Statement of the Case and any prior Supplemental Statements of the Case addressed several issues, the Substantive Appeal must either indicate that the appeal is being perfected as to all of those issues or must specifically identify the issues appealed. The Substantive Appeal should set out specific arguments relating to errors of fact or law made by the agency of original jurisdiction in reaching the determination, or determinations, being appealed. To the extent feasible, the argument should be related to specific items in the Statement of the Case and any prior Supplemental Statements of the Case. The Board will construe such arguments in a liberal manner for purposes of determining whether they raise issues on appeal, but the Board may dismiss any appeal which fails to allege specific error of fact or law in the determination, or determinations, being appealed. The Board will not presume that an appellant agrees with any statement of fact contained in a Statement of the Case or a Supplemental Statement of the Case which is not specifically contested. Proper completion and filing of a Substantive Appeal are the last actions the appellant needs to take to perfect an appeal.

(Authority: 38 U.S.C. 7105(d)(3)–(5))

(Approved by the Office of Management and Budget under control number 2900–0085)

[57 FR 4109, Feb. 3, 1992, as amended at 61 FR 20450, May 7, 1996]

### § 20.203 [Reserved]

### § 20.204 Rule 204. Withdrawal of Appeal.

(a) *When and by whom filed.* Only an appellant, or an appellant's authorized representative, may withdraw an appeal. An appeal may be withdrawn as to any or all issues involved in the appeal.

(b) *Filing.* (1) *Form and content.* Except for appeals withdrawn on the record at a hearing, appeal withdrawals must be in writing. They must include the name of the veteran, the name of the claimant or appellant if other than the veteran (*e.g.*, a veteran's survivor, a guardian, or a fiduciary appointed to receive VA benefits on an individual's behalf), the applicable Department of Veterans Affairs file number, and a

statement that the appeal is withdrawn. If the appeal involves multiple issues, the withdrawal must specify that the appeal is withdrawn in its entirety, or list the issue(s) withdrawn from the appeal.

(2) *Where to file.* Appeal withdrawals should be filed with the agency of original jurisdiction until the appellant or representative filing the withdrawal receives notice that the appeal has been transferred to the Board. Thereafter, file the withdrawal at the following address: Director, Management and Administration (014), Board of Veterans' Appeals, 810 Vermont Avenue, NW., Washington, DC 20420.

(3) *When effective.* Until the appeal is transferred to the Board, an appeal withdrawal is effective when received by the agency of original jurisdiction. Thereafter, it is not effective until received by the Board. A withdrawal received by the Board after the Board issues a final decision under Rule 1100(a) (§ 20.1100(a) of this part) will not be effective.

(c) *Effect of filing.* Withdrawal of an appeal will be deemed a withdrawal of the Notice of Disagreement and, if filed, the Substantive Appeal, as to all issues to which the withdrawal applies. Withdrawal does not preclude filing a new Notice of Disagreement and, after a Statement of the Case is issued, a new Substantive Appeal, as to any issue withdrawn, provided such filings would be timely under these rules if the appeal withdrawn had never been filed.

(Authority: 38 U.S.C. 7105(b) and (d))

[68 FR 13236, Mar. 19, 2003]

**§§ 20.205–20.299 [Reserved]**

## Subpart D—Filing

### § 20.300 Rule 300. Place of filing Notice of Disagreement and Substantive Appeal.

The Notice of Disagreement and Substantive Appeal must be filed with the Department of Veterans Affairs office from which the claimant received notice of the determination being appealed unless notice has been received that the applicable Department of Veterans Affairs records have been transferred to another Department of Veterans Affairs office. In that case, the Notice of Disagreement or Substantive Appeal must be filed with the Department of Veterans Affairs office which has assumed jurisdiction over the applicable records.

(Authority: 38 U.S.C. 7105 (b)(1), (d)(3))

### § 20.301 Rule 301. Who can file an appeal.

(a) *Persons authorized.* A Notice of Disagreement and/or a Substantive Appeal may be filed by a claimant personally, or by his or her representative if a proper Power of Attorney or declaration of representation, as applicable, is on record or accompanies such Notice of Disagreement or Substantive Appeal.

(b) *Claimant rated incompetent by Department of Veterans Affairs or under disability and unable to file.* If an appeal is not filed by a person listed in paragraph (a) of this section, and the claimant is rated incompetent by the Department of Veterans Affairs or has a physical, mental, or legal disability which prevents the filing of an appeal on his or her own behalf, a Notice of Disagreement and a Substantive Appeal may be filed by a fiduciary appointed to manage the claimant's affairs by the Department of Veterans Affairs or a court, or by a person acting as next friend if the appointed fiduciary fails to take needed action or no fiduciary has been appointed.

(c) *Claimant under disability and able to file.* Notwithstanding the fact that a fiduciary may have been appointed for a claimant, an appeal filed by a claimant will be accepted.

(Authority: 38 U.S.C. 7105(b)(2))

### § 20.302 Rule 302. Time limit for filing Notice of Disagreement, Substantive Appeal, and response to Supplemental Statement of the Case.

(a) *Notice of Disagreement.* Except in the case of simultaneously contested claims, a claimant, or his or her representative, must file a Notice of Disagreement with a determination by the agency of original jurisdiction within one year from the date that that agency mails notice of the determination to him or her. Otherwise, that determination will become final. The date of

mailing the letter of notification of the determination will be presumed to be the same as the date of that letter for purposes of determining whether an appeal has been timely filed.

(Authority: 38 U.S.C. 7105(b)(1))

(b) *Substantive Appeal.* (1) *General.* Except in the case of simultaneously contested claims, a Substantive Appeal must be filed within 60 days from the date that the agency of original jurisdiction mails the Statement of the Case to the appellant, or within the remainder of the 1-year period from the date of mailing of the notification of the determination being appealed, whichever period ends later. The date of mailing of the Statement of the Case will be presumed to be the same as the date of the Statement of the Case and the date of mailing the letter of notification of the determination will be presumed to be the same as the date of that letter for purposes of determining whether an appeal has been timely filed.

(2) *Special rule in certain cases where additional evidence is submitted.* Except in the case of simultaneously contested claims, if (i) a claimant submits additional evidence within 1 year of the date of mailing of the notification of the determination being appealed, and (ii) that evidence requires, in accordance with § 19.31 of this title, that the claimant be furnished a Supplemental Statement of the Case, then the time to submit a Substantive Appeal shall end not sooner than 60 days after such Supplemental Statement of the Case is mailed to the appellant, even if the 60-day period extends beyond the expiration of the 1-year appeal period.

(Authority: 38 U.S.C. 7105 (b)(1), (d)(3).)

(c) *Response to Supplemental Statement of the Case.* Where a Supplemental Statement of the Case is furnished, a period of 60 days from the date of mailing of the Supplemental Statement of the Case will be allowed for response. The date of mailing of the Supplemental Statement of the Case will be presumed to be the same as the date of the Supplemental Statement of the Case for purposes of determining whether a response has been timely filed. Provided a Substantive Appeal has been timely filed in accordance with paragraph (b) of this section, the response to a Supplemental Statement of the Case is optional and is not required for the perfection of an appeal.

(Authority: 38 U.S.C. 7105(d)(3))

[57 FR 4109, Feb. 3, 1992; as amended at 66 FR 50318, Oct. 3, 2001; 68 FR 64806, Nov. 17, 2003]

### § 20.303 Rule 303. Extension of time for filing Substantive Appeal and response to Supplemental Statement of the Case.

An extension of the 60-day period for filing a Substantive Appeal, or the 60-day period for responding to a Supplemental Statement of the Case when such a response is required, may be granted for good cause. A request for such an extension must be in writing and must be made prior to expiration of the time limit for filing the Substantive Appeal or the response to the Supplemental Statement of the Case. The request for extension must be filed with the Department of Veterans Affairs office from which the claimant received notice of the determination being appealed, unless notice has been received that the applicable records have been transferred to another Department of Veterans Affairs office. A denial of a request for extension may be appealed to the Board.

(Authority: 38 U.S.C. 7105(d)(3))

### § 20.304 Rule 304. Filing additional evidence does not extend time limit for appeal.

Except as provided in Rule 302(b) (§ 20.302(b) of this part), the filing of additional evidence after receipt of notice of an adverse determination does not extend the time limit for initiating or completing an appeal from that determination.

(Authority: 38 U.S.C. 7105.)

[57 FR 4109, Feb. 3, 1992; as amended at 66 FR 50318, Oct. 3, 2001]

### § 20.305 Rule 305. Computation of time limit for filing.

(a) *Acceptance of postmark date.* When these Rules require that any written document be filed within a specified period of time, a response postmarked prior to expiration of the applicable

time limit will be accepted as having been timely filed. In the event that the postmark is not of record, the postmark date will be presumed to be five days prior to the date of receipt of the document by the Department of Veterans Affairs. In calculating this 5-day period, Saturdays, Sundays and legal holidays will be excluded.

(b) *Computation of time limit.* In computing the time limit for filing a written document, the first day of the specified period will be excluded and the last day included. Where the time limit would expire on a Saturday, Sunday, or legal holiday, the next succeeding workday will be included in the computation.

(Authority: 38 U.S.C. 7105)

### § 20.306 Rule 306. Legal holidays.

For the purpose of Rule 305 (§ 20.305 of this part), the legal holidays, in addition to any other day appointed as a holiday by the President or the Congress of the United States, are as follows: New Year's Day—January 1; Inauguration Day—January 20 of every fourth year or, if the 20th falls on a Sunday, the next succeeding day selected for public observance of the inauguration; Birthday of Martin Luther King, Jr.—Third Monday in January; Washington's Birthday—Third Monday in February; Memorial Day—Last Monday in May; Independence Day—July 4; Labor Day—First Monday in September; Columbus Day—Second Monday in October; Veterans Day—November 11; Thanksgiving Day—Fourth Thursday in November; and Christmas Day—December 25. When a holiday occurs on a Saturday, the Friday immediately before is the legal public holiday. When a holiday occurs on a Sunday, the Monday immediately after is the legal public holiday.

(Authority: 5 U.S.C. 6103)

### §§ 20.307–20.399 [Reserved]

## Subpart E—Administrative Appeals

### § 20.400 Rule 400. Action by claimant or representative on notification of administrative appeal.

When an official of the Department of Veterans Affairs enters an administrative appeal, the claimant and his or her representative, if any, are notified and given a period of 60 days from the date of mailing of the letter of notification to join in the administrative appeal. The date of mailing of the letter of notification will be presumed to be the same as the date of the letter of notification. If the claimant, or the representative acting on his or her behalf, elects to join in the administrative appeal, it becomes a ''merged appeal'' and the rules governing an appeal initiated by a claimant are for application. The presentation of evidence or argument by the claimant or his or her representative in response to notification of the right to join in the administrative appeal will be construed as an election to join in the administrative appeal. If the claimant does not authorize the merger, he or she must hold such evidence or argument in abeyance until resolution of the administrative appeal.

(Authority: 38 U.S.C. 7106)

### § 20.401 Rule 401. Effect of decision on administrative or merged appeal on claimant's appellate rights.

(a) *Merged appeal.* If the administrative appeal is merged, the appellate decision on the merged appeal will constitute final disposition of the claimant's appellate rights.

(b) *Appeal not merged.* If the claimant does not authorize merger, normal appellate rights on the same issue are preserved, and the Chairman will assign the proceeding to a Member or panel of Members of the Board who did not make the decision on the administrative appeal. The period of time from the date of notification to the claimant of the administrative appeal to the date of the Board's decision on the administrative appeal is not chargeable

to the claimant for purposes of determining the time limit for perfecting his or her separate appeal.

(Authority: 38 U.S.C. 7106)

[57 FR 4109, Feb. 3, 1992, as amended at 61 FR 20450, May 7, 1996]

**§§ 20.402–20.499 [Reserved]**

## Subpart F—Simultaneously Contested Claims

### § 20.500 Rule 500. Who can file an appeal in simultaneously contested claims.

In a simultaneously contested claim, any claimant or representative of a claimant may file a Notice of Disagreement or Substantive Appeal within the time limits set out in Rule 501 (§ 20.501 of this part).

(Authority: 38 U.S.C. 7105(b)(2), 7105A)

### § 20.501 Rule 501. Time limits for filing Notice of Disagreement, Substantive Appeal, and response to Supplemental Statement of the Case in simultaneously contested claims.

(a) *Notice of Disagreement.* In simultaneously contested claims, the Notice of Disagreement from the person adversely affected must be filed within 60 days from the date of mailing of the notification of the determination to him or her; otherwise, that determination will become final. The date of mailing of the letter of notification will be presumed to be the same as the date of that letter for purposes of determining whether a Notice of Disagreement has been timely filed.

(Authority: 38 U.S.C. 7105A(a))

(b) *Substantive Appeal.* In the case of simultaneously contested claims, a Substantive Appeal must be filed within 30 days from the date of mailing of the Statement of the Case. The date of mailing of the Statement of the Case will be presumed to be the same as the date of the Statement of the Case for purposes of determining whether an appeal has been timely filed.

(Authority: 38 U.S.C. 7105A(b))

(c) *Supplemental Statement of the Case.* Where a Supplemental Statement of the Case is furnished by the agency of original jurisdiction in a simultaneously contested claim, a period of 30 days from the date of mailing of the Supplemental Statement of the Case will be allowed for response, but the receipt of a Supplemental Statement of the Case will not extend the time allowed for filing a Substantive Appeal as set forth in paragraph (b) of this section. The date of mailing of the Supplemental Statement of the Case will be presumed to be the same as the date of the Supplemental Statement of the Case for purposes of determining whether a response has been timely filed. Provided a Substantive Appeal has been timely filed in accordance with paragraph (b) of this section, the response to a Supplemental Statement of the Case is optional and is not required for the perfection of an appeal.

(Authority: 38 U.S.C. 7105(d)(3), 7105A(b))

[57 FR 4109, Feb. 3, 1992, as amended at 68 FR 64806, Nov. 17, 2003]

### § 20.502 Rule 502. Time limit for response to appeal by another contesting party in a simultaneously contested claim.

A party to a simultaneously contested claim may file a brief or argument in answer to a Substantive Appeal filed by another contesting party. Any such brief or argument must be filed with the agency of original jurisdiction within 30 days from the date the content of the Substantive Appeal is furnished as provided in § 19.102 of this chapter. Such content will be presumed to have been furnished on the date of the letter that accompanies the content.

(Authority: 38 U.S.C. 7105A(b))

[66 FR 60153, Dec. 3, 2001]

### § 20.503 Rule 503. Extension of time for filing a Substantive Appeal in simultaneously contested claims.

An extension of the 30-day period to file a Substantive Appeal in simultaneously contested claims may be granted if good cause is shown. In granting an extension, consideration will be given to the interests of the other parties involved. A request for such an extension must be in writing and must be made prior to expiration

of the time limit for filing the Substantive Appeal.

(Authority: 38 U.S.C. 7105A(b))

### § 20.504 Rule 504. Notices sent to last addresses of record in simultaneously contested claims.

Notices in simultaneously contested claims will be forwarded to the last address of record of the parties concerned and such action will constitute sufficient evidence of notice.

(Authority: 38 U.S.C. 7105A(b))

### §§ 20.505–20.599 [Reserved]

## Subpart G—Representation

CROSS-REFERENCE: In cases involving access to medical records relating to drug abuse, alcoholism, alcohol abuse, sickle cell anemia, or infection with the human immunodeficiency virus, also see 38 U.S.C. 7332.

### § 20.600 Rule 600. Right to representation.

An appellant will be accorded full right to representation in all stages of an appeal by a recognized organization, attorney, agent, or other authorized person.

(Authority: 38 U.S.C. 5901–5905, 7105(a))

### § 20.601 Rule 601. Only one representative recognized.

A specific claim may be prosecuted at any one time by only one recognized organization, attorney, agent or other person properly designated to represent the appellant.

(Authority: 38 U.S.C. 7105(b)(2))

### § 20.602 Rule 602. Representation by recognized organizations.

In order to designate a recognized organization as his or her representative, an appellant must execute a VA Form 21–22, ''Appointment of Veterans Service Organization as Claimant's Representative.'' This form gives the organization power of attorney to represent the appellant. The designation will be effective when it is received by the agency of original jurisdiction or, if the appellate record has been certified to the Board for review, by the Board of Veterans' Appeals. A properly filed designation made prior to appeal will continue to be honored, unless it has been revoked by the appellant or unless the representative has properly withdrawn.

(Authority: 38 U.S.C. 7105(b)(2))

### § 20.603 Rule 603. Representation by attorneys-at-law.

(a) *Designation.* An attorney-at-law may be designated as an appellant's representative through a properly executed VA Form 22a, ''Appointment of Attorney or Agent as Claimant's Representative.'' This form gives the attorney power of attorney to represent the appellant. In lieu thereof, an attorney may state in writing on his or her letterhead that he or she is authorized to represent the appellant in order to have access to information in the appellant's file pertinent to the particular claim presented. For an attorney to have complete access to all information in an individual's records, the attorney must provide a signed consent from the appellant or the appellant's guardian. Such consent shall be equivalent to an executed power of attorney. The designation must be of an individual attorney, rather than a firm or partnership. An appellant may limit an attorney's right to act as his or her representative in an appeal to representation with respect to a specific claim for one or more specific benefits by noting the restriction in the written designation. Unless specifically noted to the contrary, however, designations of an attorney as a representative will extend to all matters with respect to claims for benefits under laws administered by the Department of Veterans Affairs. Designations are effective when they are received by the agency of original jurisdiction or, if the appellate record has been certified to the Board for review, by the Board of Veterans' Appeals. A properly filed designation made prior to appeal will continue to be honored, unless it has been revoked or unless the representative has properly withdrawn. Legal interns, law students, and paralegals may not be independently accredited to represent appellants under this Rule.

(b) *Attorneys employed by recognized organization.* A recognized organization may employ an attorney-at-law to represent an appellant. If the attorney so

employed is not an accredited representative of the recognized organization, the signed consent of the appellant for the substitution of representatives must be obtained and submitted to the agency of original jurisdiction or, if the appellate record has been certified to the Board for review, to the Board of Veterans' Appeals. When the signed consent is received by the agency of original jurisdiction or the Board, as applicable, the attorney will be recognized as the appellant's representative in lieu of the organization.

(c) *Participation of associated or affiliated attorneys.* With the specific written consent of the appellant, an attorney associated or affiliated with the appellant's attorney of record, including an attorney employed by the same legal services office as the attorney of record, may assist in representation of the appellant and may have access to the appellant's Department of Veterans Affairs records to the same extent as the attorney of record. Unless revoked by the appellant, such consent will remain effective in the event the original attorney of record is replaced by another attorney who is a member of the same law firm or an attorney employed by the same legal services office. The consent must include the name of the veteran; the name of the appellant if other than the veteran (e.g., a veteran's survivor, a guardian, or a fiduciary appointed to receive VA benefits on an individual's behalf); the applicable Department of Veterans Affairs file number; the name of the attorney of record; the consent of the appellant for the use of the services of the associated or affiliated attorney and for that individual to have access to applicable Department of Veterans Affairs records; and the name of the associated or affiliated attorney who will be assisting in the case. The consent must be filed with the agency of original jurisdiction or, if the appellate record has been certified to the Board for review, with the Board of Veterans' Appeals. The presiding Member at a hearing on appeal may require that not more than one attorney participate in the examination of any one witness or impose other reasonable limitations to ensure orderly conduct of the hearing.

(Authority: 38 U.S.C. 5901, 5904)

[57 FR 4109, Feb. 3, 1992, as amended at 61 FR 20450, May 7, 1996]

### § 20.604 Rule 604. Representation by agents.

(a) *Designation.* The designation of an agent will be by a duly executed power of attorney, VA Form 22a, ''Appointment of Attorney or Agent as Claimant's Representative,'' or its equivalent. The designation must be of an individual, rather than a firm or partnership. The designation will be effective when it is received by the agency of original jurisdiction or, if the appellate record has been certified to the Board for review, by the Board of Veterans' Appeals. A properly filed designation made prior to appeal will continue to be honored, unless it has been revoked or unless the representative has properly withdrawn.

(b) *Admission to practice.* The provisions of 38 U.S.C. 5904 and of § 14.629(b) of this chapter are applicable to the admission of agents to practice before the Department of Veterans Affairs. Authority for making determinations concerning admission to practice rests with the General Counsel of the Department of Veterans Affairs, and any questions concerning admissions to practice should be addressed to: Office of the General Counsel (022A), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420.

(Authority: 38 U.S.C. 5904)

[57 FR 4109, Feb. 3, 1992, as amended at 61 FR 20450, May 7, 1996]

### § 20.605 Rule 605. Other persons as representative.

(a) *Scope of rule.* This section applies to representation other than by a recognized organization, an agent admitted to practice before the Department of Veterans Affairs, or an attorney-at-law.

(b) *Who may act as representative.* Any competent person may be recognized as a representative for a particular claim, unless that person has been barred from practice before the Department of Veterans Affairs.

(c) *Designation.* The designation of an individual to act as an appellant's representative may be made by executing a VA Form 22a, ''Appointment of Attorney or Agent as Claimant's Representative.'' This form gives the individual power of attorney to represent the appellant in all matters pertaining to the presentation and prosecution of claims for any and all benefits under laws administered by the Department of Veterans Affairs. In lieu of using the form, the designation may be by a written document signed by both the appellant and the individual representative, which may be in the form of a letter, which authorizes a named individual to act as the appellant's representative only with respect to a specific claim involving one or more specific benefits. The document must include the name of the veteran; the name of the appellant if other than the veteran (e.g., a veteran's survivor, a guardian, or a fiduciary appointed to receive VA benefits on an individual's behalf); the applicable Department of Veterans Affairs file number; the appellant's consent for the individual representative to have access to his or her Department of Veterans Affairs records; the name of the individual representative; a description of the specific claim for benefits to which the designation of representation applies; and a certification that no compensation will be charged or paid for the individual representative's services. The designation, in either form, must be filed with the agency of original jurisdiction or, if the appellate record has been certified to the Board for review, with the Board of Veterans' Appeals. The designation will be effective when it is received by the agency of original jurisdiction or, if the appellate record has been certified to the Board for review, by the Board of Veterans' Appeals. A properly filed designation made prior to appeal will continue to be honored, unless it has been revoked or unless the representative has properly withdrawn.

(d) *Representation of more than one appellant.* An individual recognized as an appellant's representative under this Rule may represent only one appellant. If an individual has been recognized as a representative for one appellant and wishes to represent another appellant, he or she must obtain permission to do so from the Office of the General Counsel as provided in § 14.630 of this chapter.

(Authority: 38 U.S.C. 5903)

[57 FR 4109, Feb. 3, 1992, as amended at 61 FR 20450, May 7, 1996]

### § 20.606 Rule 606. Legal interns, law students and paralegals.

(a) *Consent of appellant.* If it is contemplated that a legal intern, law student, or paralegal will assist in the appeal, written consent must be obtained from the appellant. The written consent must include the name of the veteran; the name of the appellant if other than the veteran (e.g., a veteran's survivor, a guardian, or a fiduciary appointed to receive VA benefits on an individual's behalf); the applicable Department of Veterans Affairs file number; the name of the attorney-at-law; the consent of the appellant for the use of the services of legal interns, law students, or paralegals and for such individuals to have access to applicable Department of Veterans Affairs records; and the names of the legal interns, law students, or paralegals who will be assisting in the case. In the case of appeals before the Board in Washington, DC, the signed consent must be submitted to: Director, Management and Administration (01E), Board of Veterans' Appeals, 810 Vermont Avenue, NW., Washington, DC 20420. In the case of hearings before a Member or Members of the Board at Department of Veterans field facilities, the consent must be presented to the presiding Member of the hearing as noted in paragraph (d). Unless revoked by the appellant, such consent will remain effective in the event the original attorney of record is replaced by another attorney who is a member of the same law firm or another attorney employed by the same legal services office.

(b) *Supervision.* Legal interns, law students and paralegals must be under the direct supervision of a recognized attorney-at-law in order to prepare and present cases before the Board of Veterans' Appeals.

(c) *Hearings.* Legal interns, law students and paralegals who desire to participate at a hearing before the Board

in Washington, DC, must make advance arrangements with the Director, Management and Administration (01E) and submit written authorization from the attorney naming the individual who will be participating in the hearing. In the case of hearings before a Member or Members of the Board at Department of Veterans field facilities in the field, the attorney-at-law not less than 10 days prior to the scheduled hearing date must inform the office of the Department of Veterans Affairs official who gave notice of the Travel Board hearing date and time that the services of a legal intern, law student, or paralegal will be used at the hearing. At the same time, a prehearing conference with the presiding Member of the hearing must be requested. At the conference, the written consent of the appellant for the use of the services of such an individual required by paragraph (a) must be presented and agreement reached as to the individual's role in the hearing. Legal interns, law students or paralegals may not present oral arguments at hearings either in the field or in Washington, DC, unless the recognized attorney-at-law is present. Not more than two such individuals may make presentations at a hearing. The presiding Member at a hearing on appeal may require that not more than one such individual participate in the examination of any one witness or impose other reasonable limitations to ensure orderly conduct of the hearing.

(d) *Withdrawal of permission for legal interns, law students, and paralegals to assist in the presentation of an appeal.* When properly designated, the attorney-at-law is the recognized representative of the appellant and is responsible for ensuring that an appeal is properly presented. Legal interns, law students, and paralegals are permitted to assist in the presentation of an appeal as a courtesy to the attorney-at-law. Permission for a legal intern, law student, or paralegal to prepare and present cases before the Board may be withdrawn by the Chairman or presiding Member at any time if a lack of competence, unprofessional conduct, or interference with the appellate process is demonstrated by that individual.

(Authority: 38 U.S.C. 5904, 7105(b)(2))

[57 FR 4109, Feb. 3, 1992, as amended at 61 FR 20450, May 7, 1996; 61 FR 29028, June 7, 1996]

### § 20.607 Rule 607. Revocation of a representative's authority to act.

Subject to the provisions of § 20.1304 of this part, an appellant may revoke a representative's authority to act on his or her behalf at any time, irrespective of whether another representative is concurrently designated. Written notice of the revocation must be given to the agency of original jurisdiction or, if the appellate record has been certified to the Board for review, to the Board of Veterans' Appeals. The revocation is effective when notice of the revocation is received by the agency of original jurisdiction or the Board, as applicable. An appropriate designation of a new representative will automatically revoke any prior designation of representation. If an appellant has limited a designation of representation by an attorney-at-law to a specific claim under the provisions of Rule 603, paragraph (a) (§ 20.603(a) of this part), or has limited a designation of representation by an individual to a specific claim under the provisions of Rule 605, paragraph (c) (§ 20.605(c) of this part), such specific authority constitutes a revocation of an existing representative's authority to act only with respect to, and during the pendency of, that specific claim. Following the final determination of that claim, the existing representative's authority to act will be automatically restored in full, unless otherwise revoked.

(Authority: 38 U.S.C. 5901–5904)

### § 20.608 Rule 608. Withdrawal of services by a representative.

(a) *Withdrawal of services prior to certification of an appeal.* A representative may withdraw services as representative in an appeal at any time prior to certification of the appeal to the Board of Veterans' Appeals by the agency of original jurisdiction. The representative must give written notice of such withdrawal to the appellant and to the agency of original jurisdiction. The withdrawal is effective when notice of

the withdrawal is received by the agency of original jurisdiction.

(b) *Withdrawal of services after certification of an appeal*—(1) *Applicability.* The restrictions on a representative's right to withdraw contained in this paragraph apply only to those cases in which the representative has previously agreed to act as representative in an appeal. In addition to express agreement, orally or in writing, such agreement shall be presumed if the representative makes an appearance in the case by acting on an appellant's behalf before the Board in any way after the appellant has designated the representative as such as provided in §§ 20.602 through 20.605 of this part. The preceding sentence notwithstanding, an appearance in an appeal solely to notify the Board that a designation of representation has not been accepted will not be presumed to constitute such consent.

(2) *Procedures.* After the agency of original jurisdiction has certified an appeal to the Board of Veterans' Appeals, a representative may not withdraw services as representative in the appeal unless good cause is shown on motion. Good cause for such purposes is the extended illness or incapacitation of an agent admitted to practice before the Department of Veterans Affairs, an attorney-at-law, or other individual representative; failure of the appellant to cooperate with proper preparation and presentation of the appeal; or other factors which make the continuation of representation impossible, impractical, or unethical. Such motions must be in writing and must include the name of the veteran, the name of the claimant or appellant if other than the veteran (e.g., a veteran's survivor, a guardian, or a fiduciary appointed to receive VA benefits on an individual's behalf), the applicable Department of Veterans Affairs file number, and the reason why withdrawal should be permitted, and a signed statement certifying that a copy of the motion was sent by first-class mail, postage prepaid, to the appellant, setting forth the address to which the copy was mailed. Such motions should not contain information which would violate privileged communications or which would otherwise be unethical to reveal. Such motions must be filed at the following address: Office of the Senior Deputy Vice Chairman (012), Board of Veterans' Appeals, 810 Vermont Avenue, NW., Washington, DC 20420. The appellant may file a response to the motion with the Board at the same address not later than 30 days following receipt of the copy of the motion and must include a signed statement certifying that a copy of the response was sent by first-class mail, postage prepaid, to the representative, setting forth the address to which the copy was mailed.

(Authority: 38 U.S.C. 5901–5904, 7105(a))

(Approved by the Office of Management and Budget under control number 2900–0085)

[57 FR 4109, Feb. 3, 1992, as amended at 61 FR 20450, May 7, 1996; 69 FR 21069, Apr. 20, 2004]

### § 20.609 Rule 609. Payment of representative's fees in proceedings before Department of Veterans Affairs field personnel and before the Board of Veterans' Appeals.

(a) *Applicability of rule.* The provisions of this section apply to the services of representatives with respect to benefits under laws administered by the Department of Veterans Affairs in all proceedings before Department of Veterans Affairs field personnel or before the Board of Veterans' Appeals regardless of whether an appeal has been initiated.

(b) *Who may charge fees for representation.* Only agents and attorneys-at-law may receive fees from claimants or appellants for their services. Recognized organizations (including their accredited representatives when acting as such) and individuals recognized pursuant to Rule 605 (§ 20.605 of this part) are not permitted to receive fees. An attorney-at-law or agent who may also be an accredited representative of a recognized organization may not receive such fees unless he or she has been properly designated as representative in accordance with Rule 603(a) or Rule 604(a) (§ 20.603(a) or § 20.604(a) of this part) in his or her individual capacity.

(c) *Circumstances under which fees may be charged.* (1) *General.* Except as noted in paragraph (d) of this section, attorneys-at-law and agents may charge

claimants or appellants for their services only if both of the following conditions have been met:

(i) A final decision has been promulgated by the Board of Veterans' Appeals with respect to the issue, or issues, involved; and

(ii) The attorney-at-law or agent was retained not later than one year following the date that the decision by the Board of Veterans' Appeals with respect to the issue, or issues, involved was promulgated. (This condition will be considered to have been met with respect to all successor attorneys-at-law or agents acting in the continuous prosecution of the same matter if a predecessor was retained within the required time period.)

(2) *Clear and unmistakable error cases.* For the purposes of this section, in the case of a motion under subpart O of this part (relating to requests for revision of prior Board decisions on the grounds of clear and unmistakable error), the ''issue'' referred to in this paragraph (c) shall have the same meaning as ''issue'' in Rule 1401(a) (§ 20.1401(a) of this part).

(d) *Exceptions*—(1) *Chapter 37 loans.* With respect to services of agents and attorneys provided after October 9, 1992, a reasonable fee may be charged or paid in connection with any proceeding in a case arising out of a loan made, guaranteed, or insured under chapter 37, United States Code, even though the conditions set forth in paragraph (c) of this section are not met.

(2) *Payment of fee by disinterested third party.* (i) An attorney-at-law or agent may receive a fee or salary from an organization, governmental entity, or other disinterested third party for representation of a claimant or appellant even though the conditions set forth in paragraph (c) of this section have not been met. In no such case may the attorney or agent charge a fee which is contingent, in whole or in part, on whether the matter is resolved in a manner favorable to the claimant or appellant.

(ii) For purposes of this part, a person shall be presumed not to be disinterested if that person is the spouse, child, or parent of the claimant or appellant, or if that person resides with the claimant or appellant. This presumption may be rebutted by clear and convincing evidence that the person in question has no financial interest in the success of the claim.

(iii) The provisions of paragraph (g) of this section (relating to fee agreements) shall apply to all payments or agreements to pay involving disinterested third parties. In addition, the agreement shall include or be accompanied by the following statement, signed by the attorney or agent: ''I certify that no agreement, oral or otherwise, exists under which the claimant or appellant will provide anything of value to the third-party payer in this case in return for payment of my fee or salary, including, but not limited to, reimbursement of any fees paid.''.

(e) *Fees permitted.* Fees permitted for services of an attorney-at-law or agent admitted to practice before the Department of Veterans Affairs must be reasonable. They may be based on a fixed fee, hourly rate, a percentage of benefits recovered, or a combination of such bases. Factors considered in determining whether fees are reasonable include:

(1) The extent and type of services the representative performed;

(2) The complexity of the case;

(3) The level of skill and competence required of the representative in giving the services;

(4) The amount of time the representative spent on the case;

(5) The results the representative achieved, including the amount of any benefits recovered;

(6) The level of review to which the claim was taken and the level of the review at which the representative was retained;

(7) Rates charged by other representatives for similar services; and

(8) Whether, and to what extent, the payment of fees is contingent upon the results achieved.

(f) *Presumption of reasonableness.* Fees which total no more than 20 percent of any past-due benefits awarded, as defined in Rule 20.3(n) (§ 20.3(n) of this part), will be presumed to be reasonable.

(g) *Fee agreements.* All agreements for the payment of fees for services of attorneys-at-law and agents (including

agreements involving fees or salary paid by an organization, governmental entity or other disinterested third party) must be in writing and signed by both the claimant or appellant and the attorney-at-law or agent. The agreement must include the name of the veteran, the name of the claimant or appellant if other than the veteran, the name of each disinterested third-party payer (see paragraph (d)(2) of this section), the applicable Department of Veterans Affairs file number, and the specific terms under which the amount to be paid for the services of the attorney-at-law or agent will be determined. A copy of the agreement must be filed with the Board of Veterans' Appeals within 30 days of its execution by mailing the copy to the following address: Office of the Senior Deputy Vice Chairman (012), Board of Veterans' Appeals, 810 Vermont Avenue, NW, Washington, DC 20420.

(h) *Payment of fees by Department of Veterans Affairs directly to an attorney-at-law from past-due benefits.* (1) Subject to the requirements of the other paragraphs of this section, including paragraphs (c) and (e), the claimant or appellant and an attorney-at-law may enter into a fee agreement providing that payment for the services of the attorney-at-law will be made directly to the attorney-at-law by the Department of Veterans Affairs out of any past-due benefits awarded as a result of a successful appeal to the Board of Veterans' Appeals or an appellate court or as a result of a reopened claim before the Department following a prior denial of such benefits by the Board of Veterans' Appeals or an appellate court. Such an agreement will be honored by the Department only if the following conditions are met:

(i) The total fee payable (excluding expenses) does not exceed 20 percent of the total amount of the past-due benefits awarded,

(ii) The amount of the fee is contingent on whether or not the claim is resolved in a manner favorable to the claimant or appellant, and

(iii) The award of past-due benefits results in a cash payment to a claimant or an appellant from which the fee may be deducted. (An award of past-due benefits will not always result in a cash payment to a claimant or an appellant. For example, no cash payment will be made to military retirees unless there is a corresponding waiver of retirement pay. (See 38 U.S.C. 5304(a) and § 3.750 *et seq.* of this chapter.))

(2) For purposes of this paragraph, a claim will be considered to have been resolved in a manner favorable to the claimant or appellant if all or any part of the relief sought is granted.

(3) For purposes of this paragraph, ''past-due benefits'' means a nonrecurring payment resulting from a benefit, or benefits, granted on appeal or awarded on the basis of a claim reopened after a denial by the Board of Veterans' Appeals or the lump sum payment which represents the total amount of recurring cash payments which accrued between the effective date of the award, as determined by applicable laws and regulations, and the date of the grant of the benefit by the agency of original jurisdiction, the Board of Veterans' Appeals, or an appellate court.

(i) When the benefit granted on appeal, or as the result of the reopened claim, is service connection for a disability, the ''past-due benefits'' will be based on the initial disability rating assigned by the agency of original jurisdiction following the award of service connection. The sum will equal the payments accruing from the effective date of the award to the date of the initial disability rating decision. If an increased evaluation is subsequently granted as the result of an appeal of the disability evaluation initially assigned by the agency of original jurisdiction, and if the attorney-at-law represents the claimant or appellant in that phase of the claim, the attorney-at-law will be paid a supplemental payment based upon the increase granted on appeal, to the extent that the increased amount of disability is found to have existed between the initial effective date of the award following the grant of service connection and the date of the rating action implementing the appellate decision granting the increase.

(ii) Unless otherwise provided in the fee agreement between the claimant or appellant and the attorney-at-law, the

attorney-at-law's fees will be determined on the basis of the total amount of the past-due benefits even though a portion of those benefits may have been apportioned to the claimant's or appellant's dependents.

(iii) If an award is made as the result of favorable action with respect to several issues, the past-due benefits will be calculated only on the basis of that portion of the award which results from action taken on issues concerning which the criteria in paragraph (c) of this section have been met.

(4) In addition to filing a copy of the fee agreement with the Board of Veterans' Appeals as required by paragraph (g) of this section, the attorney-at-law must notify the agency of original jurisdiction within 30 days of the date of execution of the agreement of the existence of an agreement providing for the direct payment of fees out of any benefits subsequently determined to be past due and provide that agency with a copy of the fee agreement.

(i) *Motion for review of fee agreement.* The Board of Veterans' Appeals may review a fee agreement between a claimant or appellant and an attorney-at-law or agent upon its own motion or upon the motion of any party to the agreement and may order a reduction in the fee called for in the agreement if it finds that the fee is excessive or unreasonable in light of the standards set forth in paragraph (e) of this section. Such motions must be in writing and must include the name of the veteran, the name of the claimant or appellant if other than the veteran, and the applicable Department of Veterans Affairs file number. Such motions must set forth the reason, or reasons, why the fee called for in the agreement is excessive or unreasonable; must be accompanied by all evidence the moving party desires to submit; and must include a signed statement certifying that a copy of the motion and any evidence was sent by first-class mail, postage prepaid, to each other party to the agreement, setting forth the address to which each such copy was mailed. Such motions (other than motions by the Board) must be filed at the following address: Office of the Senior Deputy Vice Chairman (012), Board of Veterans' Appeals, 810 Vermont Avenue, NW, Washington, DC 20420. The other parties may file a response to the motion, with any accompanying evidence, with the Board at the same address not later than 30 days following the date of receipt of the copy of the motion and must include a signed statement certifying that a copy of the response and any evidence was sent by first-class mail, postage prepaid, to each other party to the agreement, setting forth the address to which each such copy was mailed. Once there has been a ruling on the motion, an order shall issue which will constitute the final decision of the Board with respect to the motion. If a reduction in the fee is ordered, the attorney or agent must credit the account of the claimant or appellant with the amount of the reduction and refund any excess payment on account to the claimant or appellant not later than the expiration of the time within which the ruling may be appealed to the United States Court of Appeals for Veterans Claims.

(j) In addition to whatever other penalties may be prescribed by law or regulation, failure to comply with the requirements of this section may result in proceedings under § 14.633 of this chapter to terminate the attorney's or agent's right to practice before the Department of Veterans Affairs and the Board of Veterans' Appeals.

(Authority: 38 U.S.C. 5902, 5904, 5905)

(Approved by the Office of Management and Budget under control number 2900–0085)

[57 FR 4109, Feb. 3, 1992, as amended at 57 FR 38443, Aug. 25, 1992; 59 FR 25330, May 16, 1994; 64 FR 2138, Jan. 13, 1999; 65 FR 14472, Mar. 17, 2000; 67 FR 36104, May 23, 2002; 67 FR 49600, July 31, 2002]

### § 20.610 Rule 610. Payment of representative's expenses in proceedings before Department of Veterans Affairs field personnel and before the Board of Veterans' Appeals.

(a) *Applicability of rule.* The provisions of this section apply to the services of representatives with respect to benefits under laws administered by the Department of Veterans Affairs in all proceedings before Department of

Veterans Affairs field personnel or before the Board of Veterans' Appeals regardless of whether an appeal has been initiated.

(b) *General.* Any representative may be reimbursed for expenses incurred on behalf of a veteran or a veteran's dependents or survivors in the prosecution of a claim for benefits pending before the Department of Veterans Affairs. Whether such a representative will be reimbursed for expenses and the method of such reimbursement is a matter to be determined by the representative and the claimant or appellant. Expenses are not payable directly to the representative by the Department of Veterans Affairs out of benefits determined to be due to a claimant or appellant. Unless required in conjunction with a motion for the review of expenses filed in accordance with paragraph (d) of this section, agreements for the reimbursement of expenses need not be filed with the Department of Veterans Affairs or the Board of Veterans' Appeals.

(c) *Nature of expenses subject to reimbursement.* ''Expenses'' include nonrecurring expenses incurred directly in the prosecution of a claim for benefits upon behalf of a claimant or appellant. Examples of such expenses include expenses for travel specifically to attend a hearing with respect to a particular claim, the cost of copies of medical records or other documents obtained from an outside source, the cost of obtaining the services of an expert witness or an expert opinion, etc. ''Expenses'' do not include normal overhead costs of the representative such as office rent, utilities, the cost of obtaining or operating office equipment or a legal library, salaries of the representative and his or her support staff, the cost of office supplies, etc.

(d) *Expense charges permitted; motion for review of expenses.* Reimbursement for the expenses of a representative may be obtained only if the expenses are reasonable. The Board of Veterans' Appeals may review expenses charged by a representative upon the motion of the claimant or appellant and may order a reduction in the expenses charged if it finds that they are excessive or unreasonable. Such motions must be in writing and must include the name of the veteran, the name of the claimant or appellant if other than the veteran, and the applicable Department of Veterans Affairs file number. Such motions must specifically identify which expenses charged are unreasonable; must set forth the reason, or reasons, why such expenses are excessive or unreasonable; must be accompanied by all evidence the claimant or appellant desires to submit; and must include a signed statement certifying that a copy of the motion and any evidence was sent by first-class mail, postage prepaid, to the representative. Such motions must be filed at the following address: Office of the Senior Deputy Vice Chairman (012), Board of Veterans' Appeals, 810 Vermont Avenue, NW, Washington, DC 20420. The representative may file a response to the motion, with any accompanying evidence, with the Board at the same address not later than 30 days following the date of receipt of the copy of the motion and must include a signed statement certifying that a copy of the response and any evidence was sent by first-class mail, postage prepaid, to the claimant or appellant, setting forth the address to which the copy was mailed. Factors considered in determining whether expenses are excessive or unreasonable include the complexity of the case, the potential extent of benefits recoverable, whether travel expenses are in keeping with expenses normally incurred by other representatives, etc. Once there has been a ruling on the motion, an order shall issue which will constitute the final decision of the Board with respect to the motion.

(e) In addition to whatever other penalties may be prescribed by law or regulation, failure to comply with the requirements of this section may result in proceedings under § 14.633 of this chapter to terminate the attorney's or agent's right to practice before the Department of Veterans Affairs and the Board of Veterans' Appeals.

(Authority: 38 U.S.C. 5904)

(Approved by the Office of Management and Budget under control number 2900–0085)

[57 FR 4109, Feb. 3, 1992, as amended at 57 FR 38443, Aug. 25, 1992; 67 FR 36105, May 23, 2002]

**§§ 20.612–20.699 [Reserved]**

## Subpart H—Hearings on Appeal

### § 20.700 Rule 700. General.

(a) *Right to a hearing.* A hearing on appeal will be granted if an appellant, or an appellant's representative acting on his or her behalf, expresses a desire to appear in person.

(b) *Purpose of hearing.* The purpose of a hearing is to receive argument and testimony relevant and material to the appellate issue. It is contemplated that the appellant and witnesses, if any, will be present. A hearing will not normally be scheduled solely for the purpose of receiving argument by a representative. Such argument should be submitted in the form of a written brief. Oral argument may also be submitted on audio cassette for transcription for the record in accordance with paragraph (d) of this section. Requests for appearances by representatives alone to personally present argument to Members of the Board may be granted if good cause is shown. Whether good cause has been shown will be determined by the presiding Member assigned to conduct the hearing.

(c) *Nonadversarial proceedings.* Hearings conducted by the Board are ex parte in nature and nonadversarial. Parties to the hearing will be permitted to ask questions, including follow-up questions, of all witnesses but cross-examination will not be permitted. Proceedings will not be limited by legal rules of evidence, but reasonable bounds of relevancy and materiality will be maintained. The presiding Member may set reasonable time limits for the presentation of argument and may exclude documentary evidence, testimony, and/or argument which is not relevant or material to the issue, or issues, being considered or which is unduly repetitious.

(d) *Informal hearings.* This term is used to describe situations in which the appellant cannot, or does not wish to, appear. In the absence of the appellant, the authorized representative may present oral arguments, not exceeding 30 minutes in length, to the Board on an audio cassette without personally appearing before the Board of Veterans Appeals. These arguments will be transcribed by Board personnel for subsequent review by the Member or Members to whom the appeal has been assigned for a determination. This procedure will not be construed to satisfy an appellant's request to appear in person.

(e) *Electronic hearings.* When suitable facilities and equipment are available, an appellant may be scheduled for an electronic hearing. Any such hearing will be in lieu of a hearing held by personally appearing before a Member or panel of Members of the Board and shall be conducted in the same manner as, and considered the equivalent of, such a hearing. If an appellant declines to participate in an electronic hearing, the appellant's opportunity to participate in a hearing before the Board shall not be affected.

(Authority: 38 U.S.C. 7102, 7105(a), 7107)

[57 FR 4109, Feb. 3, 1992, as amended at 58 FR 27935, May 12, 1993; 61 FR 20450, May 7, 1996]

### § 20.701 Rule 701. Who may present oral argument.

Only the appellant and/or his or her authorized representative may appear and present argument in support of an appeal. At the request of an appellant, a Veterans Benefits Counselor of the Department of Veterans Affairs may present the appeal at a hearing before the Board of Veterans' Appeals.

(Authority: 38 U.S.C. 7102, 7105, 7107)

[58 FR 27935, May 12, 1993]

### § 20.702 Rule 702. Scheduling and notice of hearings conducted by the Board of Veterans' Appeals in Washington, DC.

(a) *General.* To the extent that officials scheduling hearings for the Board of Veterans' Appeals determine that necessary physical resources and qualified personnel are available, hearings will be scheduled at the convenience of appellants and their representatives, with consideration of the travel distance involved. While a Statement of the Case should be prepared prior to the hearing, it is not a prerequisite for a hearing and an appellant may request that the hearing be scheduled prior to issuance of the Statement of the Case.

(Authority: 38 U.S.C. 7102, 7105(a), 7107)

(b) *Notification of hearing.* When a hearing is scheduled, the person requesting it will be notified of its time and place, and of the fact that the Government may not assume any expense incurred by the appellant, the representative or witnesses attending the hearing.

(Authority: 38 U.S.C. 7102, 7105(a), 7107)

(c) *Requests for changes in hearing dates.* (1) The appellant or the representative may request a different date for the hearing within 60 days from the date of the letter of notification of the time and place of the hearing, or not later than two weeks prior to the scheduled hearing date, whichever is earlier. The request must be in writing, but the grounds for the request need not be stated. Only one such request for a change of the date of the hearing will be granted, subject to the interests of other parties if a simultaneously contested claim is involved. In the case of hearings to be conducted by the Board of Veterans' Appeals in Washington, DC, such requests for a new hearing date must be filed with: Director, Management and Administration (01E), Board of Veterans' Appeals, 810 Vermont Avenue, NW., Washington, DC 20420.

(2) After the period described in paragraph (c)(1) of this section has passed, or after one change in the hearing date is granted based on a request received during such period, the date of the hearing will become fixed. After a hearing date has become fixed, an extension of time for appearance at a hearing will be granted only for good cause, with due consideration of the interests of other parties if a simultaneously contested claim is involved. Examples of good cause include, but are not limited to, illness of the appellant and/or representative, difficulty in obtaining necessary records, and unavailability of a necessary witness. The motion for a new hearing date must be in writing and must explain why a new hearing date is necessary. If good cause is shown, the hearing will be rescheduled for the next available hearing date after the appellant or his or her representative gives notice that the contingency which gave rise to the request for postponement has been removed. Ordinarily, however, hearings will not be postponed more than 30 days. In the case of a hearing conducted by the Board of Veterans' Appeals in Washington, DC, whether good cause for establishing a new hearing date has been shown will be determined by the presiding Member assigned to conduct the hearing. In the case of hearings to be conducted by the Board of Veterans' Appeals in Washington, DC, the motion for a new hearing date must be filed with: Director, Management and Administration (01E), Board of Veterans' Appeals, 810 Vermont Avenue, NW., Washington, DC 20420.

(Authority: 38 U.S.C. 7102, 7105(a), 7105A, 7107)

(d) *Failure to appear for a scheduled hearing.* If an appellant (or when a hearing only for oral argument by a representative has been authorized, the representative) fails to appear for a scheduled hearing and a request for postponement has not been received and granted, the case will be processed as though the request for a hearing had been withdrawn. No further request for a hearing will be granted in the same appeal unless such failure to appear was with good cause and the cause for the failure to appear arose under such circumstances that a timely request for postponement could not have been submitted prior to the scheduled hearing date. A motion for a new hearing date following a failure to appear must be in writing; must be submitted not more than 15 days following the original hearing date; and must set forth the reason, or reasons, for the failure to appear at the originally scheduled hearing and the reason, or reasons, why a timely request for postponement could not have been submitted. In the case of hearings to be conducted by the Board of Veterans' Appeals in Washington, DC, the motion must be filed with: Director, Management and Administration (01E), Board of Veterans' Appeals, 810 Vermont Avenue, NW., Washington, DC 20420. If good cause is shown, the hearing will be rescheduled for the next available hearing date after the appellant or his or her representative gives notice that the contingency which gave rise to the failure to appear has been removed. Ordinarily, however, hearings will not be

postponed more than 30 days. In the case of hearings before the Board of Veterans' Appeals in Washington, DC, whether good cause for such failure to appear has been established will be determined by the presiding Member assigned to conduct the hearing.

(Authority: 38 U.S.C. 7102, 7105(a), 7105A, 7107)

(e) *Withdrawal of hearing requests.* A request for a hearing may be withdrawn by an appellant at any time before the date of the hearing. A request for a hearing may not be withdrawn by an appellant's representative without the consent of the appellant. In the case of hearings to be conducted by the Board of Veterans' Appeals in Washington, DC, the notice of withdrawal must be sent to: Director, Management and Administration (01E), Board of Veterans' Appeals, 810 Vermont Avenue, NW., Washington, DC 20420.

(Authority: 38 U.S.C. 7102, 7105(a), 7107)

(Approved by the Office of Management and Budget under control number 2900–0085)

[57 FR 4109, Feb. 3, 1992, as amended at 58 FR 27935, May 12, 1993; 61 FR 20450, May 7, 1996]

### § 20.703 Rule 703. When a hearing before the Board of Veterans' Appeals at a Department of Veterans Affairs field facility may be requested.

An appellant, or an appellant's representative, may request a hearing before the Board of Veterans' Appeals at a Department of Veterans Affairs field facility when submitting the substantive appeal (VA Form 9) or anytime thereafter, subject to the restrictions in Rule 1304 (§ 20.1304 of this part). Requests for such hearings before a substantive appeal has been filed will be rejected.

(Authority: 38 U.S.C. 7105(a), 7107)

[61 FR 43009, Aug. 20, 1996]

### § 20.704 Rule 704. Scheduling and notice of hearings conducted by the Board of Veterans' Appeals at Department of Veterans Affairs field facilities.

(a) *General.* Hearings are conducted by a Member or Members of the Board of Veterans' Appeals during prescheduled visits to Department of Veterans Affairs facilities having adequate physical resources and personnel for the support of such hearings. Subject to paragraph (f) of this section, the hearings will be scheduled in the order specified in § 19.75 of this chapter. Requests for such hearings must be submitted to the agency of original jurisdiction, in writing, and should not be submitted directly to the Board of Veterans' Appeals.

(b) *Notification of hearing.* When a hearing is scheduled, the person requesting it will be notified of its time and place, and of the fact that the Government may not assume any expense incurred by the appellant, the representative or witnesses attending the hearing.

(c) *Requests for changes in hearing dates.* Requests for a change in a hearing date may be made at any time up to two weeks prior to the scheduled date of the hearing if good cause is shown. Such requests must be in writing, must explain why a new hearing date is necessary, and must be filed with the office of the official of the Department of Veterans Affairs who signed the notice of the original hearing date. Examples of good cause include, but are not limited to, illness of the appellant and/or representative, difficulty in obtaining necessary records, and unavailability of a necessary witness. If good cause is shown, the hearing will be rescheduled for the next available hearing date after the appellant or his or her representative gives notice that the contingency which gave rise to the request for postponement has been removed. If good cause is not shown, the appellant and his or her representative will be promptly notified and given an opportunity to appear at the hearing as previously scheduled. If the appellant elects not to appear at the prescheduled date, the request for a hearing will be considered to have been withdrawn. In such cases, however, the record will be submitted for review by the Member who would have presided over the hearing. If the presiding Member determines that good cause has been shown, the hearing will be rescheduled for the next available hearing date after the contingency which gave rise to the request for postponement has been removed.

(d) *Failure to appear for a scheduled hearing.* If an appellant (or when a hearing only for oral argument by a representative has been authorized, the representative) fails to appear for a scheduled hearing and a request for postponement has not been received and granted, the case will be processed as though the request for a hearing had been withdrawn. No further request for a hearing will be granted in the same appeal unless such failure to appear was with good cause and the cause for the failure to appear arose under such circumstances that a timely request for postponement could not have been submitted prior to the scheduled hearing date. A motion for a new hearing date following a failure to appear for a scheduled hearing must be in writing, must be filed within 15 days of the originally scheduled hearing date, and must explain why the appellant failed to appear for the hearing and why a timely request for a new hearing date could not have been submitted. Such motions must be filed with: Director, Management and Administration (01E), Board of Veterans' Appeals, 810 Vermont Avenue, NW., Washington, DC 20420. Whether good cause for such failure to appear and the impossibility of timely requesting postponement have been established will be determined by the Member who would have presided over the hearing. If good cause and the impossibility of timely requesting postponement are shown, the hearing will be rescheduled for the next available hearing date at the same facility after the appellant or his or her representative gives notice that the contingency which gave rise to the failure to appear has been removed.

(e) *Withdrawal of hearing requests.* A request for a hearing may be withdrawn by an appellant at any time before the date of the hearing. A request for a hearing may not be withdrawn by an appellant's representative without the consent of the appellant. Notices of withdrawal must be submitted to the office of the Department of Veterans Affairs official who signed the notice of the hearing date.

(f) *Advancement of the case on the hearing docket.* A hearing may be scheduled at a time earlier than would be provided for under § 19.75 of this chapter upon written motion of the appellant or the representative. The same grounds for granting relief, motion filing procedures, and designation of authority to rule on the motion specified in Rule 900(c) (§ 20.900(c) of this part) for advancing a case on the Board's docket shall apply.

(Authority: 38 U.S.C. 7107)

(Approved by the Office of Management and Budget under control number 2900–0085)

[57 FR 4109, Feb. 3, 1992, as amended at 61 FR 20451, May 7, 1996; 65 FR 14471, Mar. 17, 2000]

### § 20.705 Rule 705. Where hearings are conducted.

A hearing on appeal before the Board of Veterans' Appeals may be held in one of the following places at the option of the appellant:

(a) In Washington, DC, or

(b) At a Department of Veterans Affairs facility having adequate physical resources and personnel for the support of such hearings.

(Authority: 38 U.S.C. 7102, 7105(a), 7107)

[58 FR 27936, May 12, 1993, as amended at 61 FR 20451, May 7, 1996]

### § 20.706 Rule 706. Functions of the presiding Member.

The presiding Member of a hearing panel is responsible for the conduct of the hearing, administration of the oath or affirmation, and for ruling on questions of procedure. The presiding Member will assure that the course of the hearing remains relevant to the issue, or issues, on appeal and that there is no cross-examination of the parties or witnesses. The presiding Member will take such steps as may be necessary to maintain good order at hearings and may terminate a hearing or direct that the offending party leave the hearing if an appellant, representative, or witness persists in disruptive behavior.

(Authority: 38 U.S.C. 7102, 7105(a), 7107)

### § 20.707 Rule 707. Designation of Member or Members to conduct the hearing.

The Member or panel to whom a proceeding is assigned under § 19.3 of this part shall conduct any hearing before the Board in connection with that proceeding. Where a proceeding has been

assigned to a panel, the Chairman, or the Chairman's designee, shall designate one of the Members as the presiding Member. The Member or Members who conduct the hearing shall participate in making the final determination of the claim, subject to the exception in § 19.11(c) of this part (relating to reconsideration of a decision).

(Authority: 38 U.S.C. 7102, 7107)

[61 FR 20451, May 7, 1996]

### § 20.708 Rule 708. Prehearing conference.

An appellant's authorized representative may request a prehearing conference with the presiding Member of a hearing to clarify the issues to be considered at a hearing on appeal, obtain rulings on the admissibility of evidence, develop stipulations of fact, establish the length of argument which will be permitted, or take other steps which will make the hearing itself more efficient and productive. With respect to hearings to be held before the Board at Washington, DC, arrangements for a prehearing conference must be made through: Director, Management and Administration (01E), Board of Veterans' Appeals, 810 Vermont Avenue, NW., Washington, DC 20420. Requests for prehearing conferences in cases involving hearings to be held before the Board at Department of Veterans Affairs field facilities must be addressed to the office of the Department of Veterans Affairs official who signed the letter giving notice of the time and place of the hearing.

(Authority: 38 U.S.C. 7102, 7105(a), 7107)

[61 FR 20452, May 7, 1996]

### § 20.709 Rule 709. Procurement of additional evidence following a hearing.

If it appears during the course of a hearing that additional evidence would assist in the review of the questions at issue, the presiding Member may direct that the record be left open so that the appellant and his or her representative may obtain the desired evidence. The presiding Member will determine the period of time during which the record will stay open, considering the amount of time estimated by the appellant or representative as needed to obtain the evidence and other factors adduced during the hearing. Ordinarily, the period will not exceed 60 days, and will be as short as possible in order that appellate consideration of the case not be unnecessarily delayed.

(Authority: 38 U.S.C. 7102, 7105(a), 7107)

### § 20.710 Rule 710. Witnesses at hearings.

The testimony of witnesses, including appellants, will be heard. All testimony must be given under oath or affirmation. Oath or affirmation is not required for the sole purpose of presenting contentions and argument.

(Authority: 38 U.S.C. 7102, 7105(a), 7107)

[61 FR 29028, June 7, 1996]

### § 20.711 Rule 711. Subpoenas.

(a) *General.* An appellant, or his or her representative, may arrange for the production of any tangible evidence or the voluntary appearance of any witnesses desired. When necessary evidence cannot be obtained in any other reasonable way, the appellant, or his or her representative, may move that a subpoena be issued to compel the attendance of witnesses residing within 100 miles of the place where a hearing on appeal is to be held and/or to compel the production of tangible evidence. A subpoena will not be issued to compel the attendance of Department of Veterans Affairs adjudicatory personnel.

(b) *Contents of motion for subpoena.* The motion for a subpoena must be in writing, must clearly show the name and address of each witness to be subpoenaed, must clearly identify all documentary or other tangible evidence to be produced, and must explain why the attendance of the witness and/or the production of the tangible evidence cannot be obtained without a subpoena.

(c) *Where filed.* Motions for a subpoena must be filed with the Director, Management and Administration (01E), Board of Veterans' Appeals, 810 Vermont Avenue, NW, Washington, DC 20420.

(d) *When motion for subpoena is to be filed in cases involving a hearing on appeal.* Motions for the issuance of a subpoena for the attendance of a witness, or the production of documents or

other tangible evidence, at a hearing on appeal must be filed not later than 30 days prior to the hearing date.

(e) *Ruling on motion for subpoena*—(1) *To whom assigned.* The ruling on the motion will be made by the Member or panel of Members to whom the case is assigned. Where the case has not been assigned, the Chairman, or the Chairman's designee, will assign the case to a Member or panel who will then rule on the motion.

(2) *Procedure.* If the motion is denied, the Member(s) ruling on the motion will issue an order to that effect which sets forth the reasons for the denial and will send copies to the moving party and his or her representative, if any. Granting the motion will be signified by completion of a VA Form 0714, ''Subpoena,'' if attendance of a witness is required, and/or VA Form 0713, ''Subpoena Duces Tecum,'' if production of tangible evidence is required. The completed form shall be signed by the Member ruling on the motion, or, where applicable, by any panel Member on behalf of the panel ruling on the motion, and served in accordance with paragraph (g) of this section.

(f) *Fees.* Any person who is required to attend a hearing as a witness shall be allowed and paid the same fees and mileage as are paid witnesses in the district courts of the United States. A subpoena for a witness will not be issued or served unless the party on whose behalf the subpoena is issued submits a check in an amount equal to the fee for one day's attendance and the mileage allowed by law, made payable to the witness, as an attachment to the motion for the subpoena. Except for checks on the business accounts of attorneys-at-law, agents, and recognized service organizations, such checks must be in the form of certified checks or cashiers checks.

(g) *Service of subpoenas.* The Board will serve the subpoena by certified mail, return receipt requested. The check for fees and mileage described in paragraph (f) of this section shall be mailed with the subpoena. The receipt, which must bear the signature of the witness or of the custodian of the tangible evidence, and a copy of the subpoena will be filed in the claims folder, loan guaranty folder, or other applicable Department of Veterans Affairs records folder.

(h) *Motion to quash or modify subpoena*—(1) *Filing procedure.* Upon written motion of the party securing the subpoena, or of the person subpoenaed, the Board may quash or modify the subpoena if it is unreasonable and oppressive or for other good cause shown. Relief may include, but is not limited to, requiring the party who secured the subpoena to advance the reasonable cost of producing books, papers, or other tangible evidence. The motion must specify the relief sought and the reasons for requesting relief. Such motions must be filed at the address specified in paragraph (c) of this section within 10 days after mailing of the subpoena or the time specified in the subpoena for compliance, whichever is less. The motion may be accompanied by such supporting evidence as the moving party may choose to submit. It must be accompanied by a declaration showing:

(i) That a copy of the motion, and any attachments thereto, were mailed to the party who secured the subpoena, or the person subpoenaed, as applicable;

(ii) The date of mailing; and

(iii) The address to which the copy was mailed.

(2) *Response.* Not later than 10 days after the date that the motion was mailed to the responding party, that party may file a response to the motion at the address specified in paragraph (c) of this section. The response may be accompanied by such supporting evidence as the responding party may choose to submit. It must be accompanied by a declaration showing:

(i) That a copy of the response, and any attachments thereto, were mailed to the moving party;

(ii) The date of mailing; and

(iii) The address to which the copy was mailed. If the subpoena involves testimony or the production of tangible evidence at a hearing before the Board and less than 30 days remain before the scheduled hearing date at the time the response is received by the Board, the Board may reschedule the hearing to permit disposition of the motion.

(3) *Ruling on the motion.* The Member or panel to whom the case is assigned will issue an order disposing of the motion. Such order shall set forth the reasons for which a motion is either granted or denied. The order will be mailed to all parties to the motion. Where applicable, an order quashing a subpoena will require refund of any sum advanced for fees and mileage.

(i) *Disobedience.* In case of disobedience to a subpoena issued by the Board, the Board will take such steps as may be necessary to invoke the aid of the appropriate district court of the United States in requiring the attendance of the witness and/or the production of the tangible evidence subpoenaed. A failure to obey the order of such a court may be punished by the court as a contempt thereof.

(Authority: 38 U.S.C. 5711, 5713, 7102(a))

(Authority: 38 U.S.C. 5711, 7102(a), 7107)

[57 FR 4109, Feb. 3, 1992, as amended at 61 FR 20452, May 7, 1996; 66 FR 49538, Sept. 28, 2001]

### § 20.712 Rule 712. Expenses of appellants, representatives, and witnesses incident to hearings not reimbursable by the Government.

No expenses incurred by an appellant, representative, or witness incident to attendance at a hearing may be paid by the Government.

(Authority: 38 U.S.C. 111)

### § 20.713 Rule 713. Hearings in simultaneously contested claims.

(a) *General.* If a hearing is scheduled for any party to a simultaneously contested claim, the other contesting claimants and their representatives, if any, will be notified and afforded an opportunity to be present. The appellant will be allowed to present opening testimony and argument. Thereafter, any other contesting party who wishes to do so may present testimony and argument. The appellant will then be allowed an opportunity to present testimony and argument in rebuttal. Cross-examination will not be allowed.

(b) *Requests for changes in hearing dates.* Any party to a simultaneously contested claim may request a change in a hearing date in accordance with the provisions of Rule 702, paragraph (c) (§ 20.702(c) of this part), or Rule 704, paragraph (c) (§ 20.704(c) of this part), as applicable. In order to obtain a new hearing date under the provisions of Rule 702, paragraph (c)(1), the consent of all other interested parties must be obtained and submitted with the request for a new hearing date. If such consent is not obtained, paragraph (c)(2) of that rule will apply even though the request is submitted within 60 days from the date of the letter of notification of the time and place of the hearing. A copy of any motion for a new hearing date required by these rules must be mailed to all other interested parties by certified mail, return receipt requested. The receipts, which must bear the signatures of the other interested parties, and a letter explaining that they relate to the motion for a new hearing date and containing the applicable Department of Veterans Affairs file number must be filed at the same address where the motion was filed as proof of service of the motion. Each interested party will be allowed a period of 10 days from the date that the copy of the motion was received by that party to file written argument in response to the motion.

(Authority: 38 U.S.C. 7105A)

### § 20.714 Rule 714. Record of hearing.

(a) *Board of Veterans' Appeals.* A hearing before a Member or panel of Members of the Board, whether held in Washington, DC, or at a Department of Veterans Affairs field facility, will be recorded on audio tape. In those instances where a complete written transcript is prepared, that transcript will be the official record of the hearing and the tape recording will be retained at the Board for a period of 12 months following the date of the hearing as a duplicate record of the hearing. Tape recordings of hearings that have not been transcribed will be maintained by the Board as the official record of hearings and retained in accordance with retention standards approved by the National Archives and Records Administration. A transcript will be prepared and incorporated as a part of the claims folder, loan guaranty folder, or other applicable Department of Veterans Affairs records folder if one or more of the following conditions have been met:

(1) The appellant or representative has shown good cause why such a written transcript should be prepared. (The presiding Member will determine whether good cause has been shown. Requests that recordings of hearing proceedings be transcribed may be made orally at the time of the hearing. Requests made subsequent to the hearing must be in writing and must explain why transcription is necessary. They must be filed with: Director, Management and Administration (01E), Board of Veterans' Appeals, 810 Vermont Avenue, NW., Washington, DC 20420.)

(2) Testimony and/or argument has been presented at the hearing pertaining to an issue which is to be remanded to the agency of original jurisdiction for further development or an issue which is not in appellate status which is to be referred to the agency of original jurisdiction for consideration.

(3) The hearing involves an issue relating to National Service Life Insurance or United States Government Life Insurance.

(4) With respect to hearings conducted by a Member or Members of the Board at a Department of Veterans Affairs field facility :

(i) An issue on appeal involves radiation, Agent Orange, or asbestos exposure;

(ii) The appeal involves reconsideration of a prior Board of Veterans' Appeals decision on the same issue; or

(5) The Board's decision on an issue addressed at the hearing has been appealed to the United States Court of Appeals for Veterans Claims.

(b) *Copy of hearing tape recording or written transcript.* One copy of the tape recording of hearing proceedings before the Board of Veterans' Appeals, or the written transcript of such proceedings when such a transcript has been prepared in accordance with the provisions of paragraph (a) of this section, shall be furnished without cost to the appellant or representative if a request is made in accordance with § 1.577 of this chapter.

(Authority: 38 U.S.C. 7102, 7105(a), 7107)

[57 FR 4109, Feb. 3, 1992, as amended at 58 FR 27936, May 12, 1993; 61 FR 20452, May 7, 1996; 65 FR 14472, Mar. 17, 2000]

## § 20.715 Rule 715. Recording of hearing by appellant or representative.

An appellant or representative may record the hearing with his or her own equipment. Filming, videotaping or televising the hearing may only be authorized when prior written consent is obtained from all appellants and contesting claimants, if any, and made a matter of record. In no event will such additional equipment be used if it interferes with the conduct of the hearing or the official recording apparatus. In all such situations, advance arrangements must be made. In the case of hearings held before the Board of Veterans' Appeals in Washington, DC, arrangements must be made with the Director, Management and Administration (01E), Board of Veterans' Appeals, 810 Vermont Avenue, NW., Washington, DC 20420. In the case of hearings held before the Board at Department of Veterans Affairs field facilities, arrangements must be made through the office of the Department of Veterans Affairs official who signed the letter giving notification of the time and place of the hearing.

(Authority: 38 U.S.C. 7102, 7105(a), 7107)

[58 FR 27936, May 12, 1993, as amended at 61 FR 20452, May 7, 1996]

## § 20.716 Rule 716. Correction of hearing transcripts.

The tape recording on file at the Board of Veterans' Appeals or a transcript prepared by the Board of Veterans' Appeals is the only official record of a hearing before the Board. Alternate transcript versions prepared by the appellant and representative will not be accepted. If an appellant wishes to seek correction of perceived errors in a hearing transcript, the appellant or his or her representative should move for the correction of the hearing transcript within 30 days after the date that the transcript is mailed to the appellant. The motion must be in writing and must specify the error, or errors, in the transcript and the correct wording to be substituted. In the case of hearings held before the Board of Veterans' Appeals, whether in Washington, DC, or in the field, the motion must be filed with the Director, Management and Administration (01E),

Board of Veterans' Appeals, 810 Vermont Avenue, NW., Washington, DC 20420. The ruling on the motion will be made by the presiding Member of the hearing.

(Authority: 38 U.S.C. 7102, 7105(a), 7107)

[58 FR 27936, May 12, 1993, as amended at 61 FR 20452, May 7, 1996]

### § 20.717 Rule 717. Loss of hearing tapes or transcripts—motion for new hearing.

(a) *Motion for new hearing.* In the event that a hearing has not been recorded in whole or in part due to equipment failure or other cause, or the official transcript of the hearing is lost or destroyed and the recording upon which it was based is no longer available, an appellant or his or her representative may move for a new hearing. The motion must be in writing and must specify why prejudice would result from the failure to provide a new hearing.

(b) *Time limit for filing motion for a new hearing.* The motion will not be granted if there has been no request for a new hearing within a period of 120 days from the date of a final Board of Veterans' Appeals decision or, in cases appealed to the United States Court of Appeals for Veterans Claims, if there has been no request for a new hearing within a reasonable period of time after the appeal to that Court has been filed.

(c) *Where motion for a new hearing is filed.* In the case of hearings held before the Board of Veterans' Appeals, whether in Washington, DC, or in the field, the motion must be filed with: Director, Management and Administration (01E), Board of Veterans' Appeals, 810 Vermont Avenue, NW., Washington, DC 20420.

(d) *Ruling on motion for a new hearing.* The ruling on the motion for a new hearing will be made by the Member who presided over the hearing. If the presiding Member is no longer available, the ruling on the motion may be made by the Member or Members to whom the case has been assigned for a determination. In cases in which a final Board of Veterans' Appeals decision has already been promulgated with respect to the appeal in question, the Chairman will assign the matter in accordance with § 19.3 of this title. Factors to be considered in ruling on the motion include, but will not be limited to, the extent of the loss of the record in those cases where only a portion of a hearing tape is unintelligible or only a portion of a transcript has been lost or destroyed, and the extent and reasonableness of any delay in moving for a new hearing. If a new hearing is granted in a case in which a final Board of Veterans' Appeals decision has already been promulgated, a supplemental decision will be issued.

(Authority: 38 U.S.C. 7102, 7105(a), 7107)

[57 FR 4109, Feb. 3, 1992, as amended at 58 FR 27936, May 12, 1993; 61 FR 20452, May 7, 1996; 65 FR 14472, Mar. 17, 2000]

### §§ 20.718–20.799 [Reserved]

## Subpart I—Evidence

### § 20.800 Rule 800. Submission of additional evidence after initiation of appeal.

Subject to the limitations set forth in Rule 1304 (§ 20.1304 of this part), an appellant may submit additional evidence, or information as to the availability of additional evidence, after initiating an appeal.

(Authority: 38 U.S.C. 7105(d)(1))

### §§ 20.801–20.899 [Reserved]

## Subpart J—Action by the Board

### § 20.900 Rule 900. Order of consideration of appeals.

(a) *Docketing of appeals.* Applications for review on appeal are docketed in the order in which they are received. Cases returned to the Board following action pursuant to a remand assume their original places on the docket.

(b) *Appeals considered in docket order.* Except as otherwise provided in this Rule, appeals are considered in the order in which they are entered on the docket.

(c) *Advancement on the docket.* (1) *Grounds for advancement.* A case may be advanced on the docket on the motion of the Chairman, the Vice Chairman, a party to the case before the Board, or such party's representative. Such a motion may be granted only if the case

involves interpretation of law of general application affecting other claims, if the appellant is seriously ill or is under severe financial hardship, or if other sufficient cause is shown. ''Other sufficient cause'' shall include, but is not limited to, administrative error resulting in a significant delay in docketing the case or the advanced age of the appellant. For purposes of this Rule, ''advanced age'' is defined as 75 or more years of age. This paragraph does not require the Board to advance a case on the docket in the absence of a motion of a party to the case or the party's representative.

(2) *Requirements for motions.* Motions for advancement on the docket must be in writing and must identify the specific reason(s) why advancement on the docket is sought, the name of the veteran, the name of the appellant if other than the veteran (*e.g.*, a veteran's survivor, a guardian, or a fiduciary appointed to receive VA benefits on an individual's behalf), and the applicable Department of Veterans Affairs file number. The motion must be filed with: Director, Administrative Service (014), Board of Veterans' Appeals, 810 Vermont Avenue, NW., Washington, DC 20420.

(3) *Disposition of motions.* If a motion is received prior to the assignment of the case to an individual member or panel of members, the ruling on the motion will be by the Vice Chairman, who may delegate such authority to a Deputy Vice Chairman. If a motion to advance a case on the docket is denied, the appellant and his or her representative will be immediately notified. If the motion to advance a case on the docket is granted, that fact will be noted in the Board's decision when rendered.

(d) *Consideration of appeals remanded by the United States Court of Appeals for Veterans Claims.* A case remanded by the United States Court of Appeals for Veterans Claims for additional development or other appropriate action will be treated expeditiously by the Board without regard to its place on the Board's docket.

(e) *Postponement to provide hearing.* Any other provision of this Rule notwithstanding, a case may be postponed for later consideration and determination if such postponement is necessary to afford the appellant a hearing.

(Authority: 38 U.S.C. 7107, Pub. Law No. 103–446, § 302)

[57 FR 4109, Feb. 3, 1992, as amended at 60 FR 51923, Oct. 4, 1995; 61 FR 20453, May 7, 1996; 65 FR 14472, Mar. 17, 2000; 68 FR 53683, Sept. 12, 2003]

### § 20.901 Rule 901. Medical opinions and opinions of the General Counsel.

(a) *Opinion from the Veterans Health Administration.* The Board may obtain a medical opinion from an appropriate health care professional in the Veterans Health Administration of the Department of Veterans Affairs on medical questions involved in the consideration of an appeal when, in its judgment, such medical expertise is needed for equitable disposition of an appeal.

(Authority: 38 U.S.C. 5103A(d), 7109)

(b) *Armed Forces Institute of Pathology opinions.* The Board may refer pathologic material to the Armed Forces Institute of Pathology and request an opinion based on that material.

(Authority: 38 U.S.C. 7109(a))

(c) *Opinion of the General Counsel.* The Board may obtain an opinion from the General Counsel of the Department of Veterans Affairs on legal questions involved in the consideration of an appeal.

(Authority: 38 U.S.C. 7104(c))

(d) *Independent medical expert opinions.* When, in the judgment of the Board, additional medical opinion is warranted by the medical complexity or controversy involved in an appeal, the Board may obtain an advisory medical opinion from one or more medical experts who are not employees of the Department of Veterans Affairs. Opinions will be secured, as requested by the Chairman of the Board, from recognized medical schools, universities, clinics, or medical institutions with which arrangements for such opinions have been made by the Secretary of Veterans Affairs. An appropriate official of the institution will select the

individual expert, or experts, to give an opinion.

(Authority: 38 U.S.C. 7109)

(e) For purposes of this section, the term ''the Board'' includes the Chairman, the Vice Chairman, any Deputy Vice Chairman, and any Member of the Board before whom a case is pending.

(Authority: 38 U.S.C. 5107(a), 7104(c), 7109)

[57 FR 4109, Feb. 3, 1992, as amended at 61 FR 20453, May 7, 1996; 66 FR 38159, July 23, 2001; 69 FR 19937, Apr. 15, 2004]

### § 20.902 Rule 902. Filing of requests for the procurement of opinions.

The appellant or representative may request that the Board obtain an opinion under Rule 901 (§ 20.901 of this part). The request must be in writing. It will be granted upon a showing of good cause, such as the identification of a complex or controversial medical or legal issue involved in the appeal which warrants such an opinion.

(Authority: 38 U.S.C. 5107(a), 7102(c), 7104(c), 7109)

### § 20.903 Rule 903. Notification of evidence secured and law to be considered by the Board and opportunity for response.

(a) *If the Board obtains a legal or medical opinion.* If the Board requests an opinion pursuant to Rule 901 (§ 20.901 of this part), the Board will notify the appellant and his or her representative, if any. When the Board receives the opinion, it will furnish a copy of the opinion to the appellant, subject to the limitations provided in 38 U.S.C. 5701(b)(1), and to the appellant's representative, if any. A period of 60 days from the date the Board furnishes a copy of the opinion will be allowed for response, which may include the submission of relevant evidence or argument. The date the Board furnishes a copy will be presumed to be the same as the date of the letter or memorandum that accompanies the copy of the opinion for purposes of determining whether a response was timely filed.

(b) *If the Board considers law not already considered by the agency of original jurisdiction.* If, pursuant to § 19.9(b)(2) of this chapter, the Board intends to consider law not already considered by the agency of original jurisdiction and such consideration could result in denial of the appeal, the Board will notify the appellant and his or her representative, if any, of its intent to do so and that such consideration in the first instance by the Board could result in denial of the appeal. The notice from the Board will contain a copy or summary of the law to be considered. A period of 60 days from the date the Board furnishes the notice will be allowed for response, which may include the submission of relevant evidence or argument. The date the Board furnishes the notice will be presumed to be the same as the date of the letter that accompanies the notice for purposes of determining whether a response was timely filed. No notice is required under this paragraph if the Board intends to grant the benefit being sought or if the appellant or the appellant's representative has advanced or otherwise argued the applicability of the law in question.

(Authority: 38 U.S.C. 7104(a), 7109(c)).

[67 FR 3105, Jan. 23, 2002, as amended at 69 FR 53808, Sept. 3, 2004]

### § 20.904 Rule 904. Vacating a decision.

An appellate decision may be vacated by the Board of Veterans' Appeals at any time upon request of the appellant or his or her representative, or on the Board's own motion, on the following grounds:

(a) *Denial of due process.* Examples of circumstances in which denial of due process of law will be conceded are:

(1) When the appellant was denied his or her right to representation through action or inaction by Department of Veterans Affairs or Board of Veterans' Appeals personnel,

(2) When a Statement of the Case or required Supplemental Statement of the Case was not provided, and

(3) When there was a prejudicial failure to afford the appellant a personal hearing. (Where there was a failure to honor a request for a hearing and a hearing is subsequently scheduled, but the appellant fails to appear, the decision will not be vacated.)

(b) *Allowance of benefits based on false or fraudulent evidence.* Where it is determined on reconsideration that an allowance of benefits by the Board has

been materially influenced by false or fraudulent evidence submitted by or on behalf of the appellant, the prior decision will be vacated only with respect to the issue or issues to which, within the judgment of the Board, the false or fraudulent evidence was material.

(Authority: 38 U.S.C. 7104(a))

**§§20.905–20.999 [Reserved]**

## Subpart K—Reconsideration

**§20.1000 Rule 1000. When reconsideration is accorded.**

Reconsideration of an appellate decision may be accorded at any time by the Board of Veterans' Appeals on motion by the appellant or his or her representative or on the Board's own motion:

(a) Upon allegation of obvious error of fact or law;

(b) Upon discovery of new and material evidence in the form of relevant records or reports of the service department concerned; or

(c) Upon allegation that an allowance of benefits by the Board has been materially influenced by false or fraudulent evidence submitted by or on behalf of the appellant.

(Authority: 38 U.S.C. 7103, 7104)

**§20.1001 Rule 1001. Filing and disposition of motion for reconsideration.**

(a) *Application requirements.* A motion for Reconsideration must be in writing and must include the name of the veteran; the name of the claimant or appellant if other than the veteran (e.g., a veteran's survivor, a guardian, or a fiduciary appointed to receive VA benefits on an individual's behalf); the applicable Department of Veterans Affairs file number; and the date of the Board of Veterans' Appeals decision, or decisions, to be reconsidered. It must also set forth clearly and specifically the alleged obvious error, or errors, of fact or law in the applicable decision, or decisions, of the Board or other appropriate basis for requesting Reconsideration. If the applicable Board of Veterans' Appeals decision, or decisions, involved more than one issue on appeal, the motion for reconsideration must identify the specific issue, or issues, to which the motion pertains. Issues not so identified will not be considered in the disposition of the motion.

(b) *Filing of motion for reconsideration.* A motion for reconsideration of a prior Board of Veterans' Appeals decision may be filed at any time. Such motions must be filed at the following address: Director, Management and Administration (01E), Board of Veterans' Appeals, 810 Vermont Avenue, NW., Washington, DC 20420.

(c) *Disposition.* The Chairman will review the sufficiency of the allegations set forth in the motion and, depending upon the decision reached, proceed as follows:

(1) *Motion denied.* The appellant and representative or other appropriate party will be notified if the motion is denied. The notification will include reasons why the allegations are found insufficient. This constitutes final disposition of the motion.

(2) *Motion allowed.* If the motion is allowed, the appellant and his or her representative, if any, will be notified. The appellant and the representative will be given a period of 60 days from the date of mailing of the letter of notification to present additional arguments or evidence. The date of mailing of the letter of notification will be presumed to be the same as the date of the letter of notification. The Chairman will assign a Reconsideration panel in accordance with §19.11 of this chapter.

(Authority: 38 U.S.C. 7103, 7108)

**§20.1002 Rule 1002. [Reserved]**

**§20.1003 Rule 1003. Hearings on reconsideration.**

After a motion for reconsideration has been allowed, a hearing will be granted if an appellant requests a hearing before the Board. The hearing will be held by a Member or Members assigned to the reconsideration panel. A hearing will not normally be scheduled solely for the purpose of receiving argument by a representative. Such argument should be submitted in the form of a written brief. Oral argument may also be submitted on audio cassette for transcription for the record in accordance with Rule 700(d) (§20.700(d) of this

part). Requests for appearances by representatives alone to personally present argument to a Member or panel of Members of the Board may be granted if good cause is shown. Whether good cause has been shown will be determined by the presiding Member.

(Authority: 38 U.S.C. 7102, 7103, 7105(a))

[61 FR 20453, May 7, 1996]

**§§ 20.1004–20.1099 [Reserved]**

## Subpart L—Finality

### § 20.1100 Rule 1100. Finality of decisions of the Board.

(a) *General.* All decisions of the Board will be stamped with the date of mailing on the face of the decision. Unless the Chairman of the Board orders reconsideration, and with the exception of matters listed in paragraph (b) of this section, all Board decisions are final on the date stamped on the face of the decision. With the exception of matters listed in paragraph (b) of this section, the decision rendered by the reconsideration Panel in an appeal in which the Chairman has ordered reconsideration is final.

(b) *Exceptions.* Final Board decisions are not subject to review except as provided in 38 U.S.C. 1975 and 1984 and 38 U.S.C. chapters 37 and 72. A remand is in the nature of a preliminary order and does not constitute a final decision of the Board.

(Authority: 38 U.S.C. 511(a), 7103, 7104(a))

[57 FR 4109, Feb. 3, 1992, as amended at 61 FR 20453, May 7, 1996]

### § 20.1101 Rule 1101. [Reserved]

### § 20.1102 Rule 1102. Harmless error.

An error or defect in any decision by the Board of Veterans' Appeals which does not affect the merits of the issue or substantive rights of the appellant will be considered harmless and not a basis for vacating or reversing such decision.

(Authority: 38 U.S.C. 7103)

### § 20.1103 Rule 1103. Finality of determinations of the agency of original jurisdiction where appeal is not perfected.

A determination on a claim by the agency of original jurisdiction of which the claimant is properly notified is final if an appeal is not perfected as prescribed in Rule 302 (§ 20.302 of this part).

(Authority: 38 U.S.C. 7105)

### § 20.1104 Rule 1104. Finality of determinations of the agency of original jurisdiction affirmed on appeal.

When a determination of the agency of original jurisdiction is affirmed by the Board of Veterans' Appeals, such determination is subsumed by the final appellate decision.

(Authority: 38 U.S.C. 7104(a))

### § 20.1105 Rule 1105. New claim after promulgation of appellate decision.

When a claimant requests that a claim be reopened after an appellate decision has been promulgated and submits evidence in support thereof, a determination as to whether such evidence is new and material must be made and, if it is, as to whether it provides a basis for allowing the claim. An adverse determination as to either question is appealable.

(Authority: 38 U.S.C. 5108, 7104)

### § 20.1106 Rule 1106. Claim for death benefits by survivor-prior unfavorable decisions during veteran's lifetime.

Except with respect to benefits under the provisions of 38 U.S.C. 1311(a)(2), 1318, and certain cases involving individuals whose Department of Veterans Affairs benefits have been forfeited for treason or for subversive activities under the provisions of 38 U.S.C. 6104 and 6105, issues involved in a survivor's claim for death benefits will be decided without regard to any prior disposition of those issues during the veteran's lifetime.

(Authority: 38 U.S.C. 7104(b))

[67 FR 16317, Apr. 5, 2002]

**§§20.1107–20.1199 [Reserved]**

## Subpart M—Privacy Act

### §20.1200 Rule 1200. Privacy Act request—appeal pending.

When a Privacy Act request is filed under §1.577 of this chapter by an individual seeking records pertaining to him or her and the relevant records are in the custody of the Board, such request will be reviewed and processed prior to appellate action on that individual's appeal.

(Authority: 5 U.S.C. 552a; 38 U.S.C. 7107)

### §20.1201 Rule 1201. Amendment of appellate decisions.

A request for amendment of an appellate decision under the Privacy Act (5 U.S.C. 552a) may be entertained. However, such a request may not be used in lieu of, or to circumvent, the procedures established under Rules 1000 through 1003 (§§20.1000–20.1003 of this part). The Board will review a request for correction of factual information set forth in a decision. Where the request to amend under the Privacy Act is an attempt to alter a judgment made by the Board and thereby replace the adjudicatory authority and functions of the Board, the request will be denied on the basis that the Act does not authorize a collateral attack upon that which has already been the subject of a decision of the Board. The denial will satisfy the procedural requirements of §1.579 of this chapter. If otherwise appropriate, the request will be considered one for reconsideration under Rules 1000 through 1003 (§§20.1000–20.1003 of this part).

(Authority: 5 U.S.C. 552a(d); 38 U.S.C. 7103, 7108)

**§§20.1202–20.1299 [Reserved]**

## Subpart N—Miscellaneous

CROSS-REFERENCE: In cases involving access to patient information relating to a Department of Veterans Affairs program for, or the treatment of, drug abuse, alcoholism, alcohol abuse, sickle cell anemia, or infection with the human immunodeficiency virus, also see 38 U.S.C. 7332.

### §20.1300 Rule 1300. Removal of Board records.

No original record, paper, document or exhibit certified to the Board may be taken from the Board except as authorized by the Chairman or except as may be necessary to furnish copies or to transmit copies for other official purposes.

(Authority: 38 U.S.C. 5701)

[61 FR 29028, June 7, 1996]

### §20.1301 Rule 1301. Disclosure of information.

(a) *Policy*. It is the policy of the Board of Veterans' Appeals for the full text of appellate decisions, Statements of the Case, and Supplemental Statements of the Case to be disclosed to appellants. In those situations where disclosing certain information directly to the appellant would not be in conformance with 38 U.S.C. 5701, that information will be removed from the decision, Statement of the Case, or Supplemental Statement of the Case and the remaining text will be furnished to the appellant. A full-text appellate decision, Statement of the Case, or Supplemental Statement of the Case will be disclosed to the designated representative, however, unless the relationship between the appellant and representative is such (for example, a parent or spouse) that disclosure to the representative would be as harmful as if made to the appellant.

(Authority: 38 U.S.C. 7105(d)(2))

(b) *Index to decisions*. The appellate decisions of the Board of Veterans' Appeals have been indexed to facilitate access to the contents of the decisions (BVA Index I–01–1). The index, which is published quarterly in microfiche form with an annual cumulation, is available for review at Department of Veterans Affairs regional offices and at the Research Center at the Board of Veterans' Appeals in Washington, DC. The index can be used to locate citations to decisions with issues similar to those of concern to an appellant. Each indexed decision has a locator number assigned to it. The manner in which the locator number is written will depend upon the age of the decision. Decisions archived prior to late 1989 will have a

number such as *82–07–0001.* Decisions archived at a later date will have a number such as *BVA–90–12345.* This number must be used when requesting a paper copy of that decision. These requests must be directed to the Appellate Index and Retrieval Staff (01C1), Board of Veterans' Appeals, 810 Vermont Avenue, NW., Washington, DC 20420. Microfiche copies of BVA Index I–01–1 can be obtained from Promisel and Korn, Inc., 7201 Wisconsin Avenue, suite 480, Bethesda, MD 20814.

(Authority: 5 U.S.C. 552(a)(2))

### § 20.1302 Rule 1302. Death of appellant during pendency of appeal.

An appeal pending before the Board of Veterans' Appeals when the appellant dies will be dismissed.

(Authority: 38 U.S.C. 7104(a))

[62 FR 55170, Oct. 23, 1997]

### § 20.1303 Rule 1303. Nonprecedential nature of Board decisions.

Although the Board strives for consistency in issuing its decisions, previously issued Board decisions will be considered binding only with regard to the specific case decided. Prior decisions in other appeals may be considered in a case to the extent that they reasonably relate to the case, but each case presented to the Board will be decided on the basis of the individual facts of the case in light of applicable procedure and substantive law.

(Authority: 38 U.S.C. 7104(a))

### § 20.1304 Rule 1304. Request for change in representation, request for personal hearing, or submission of additional evidence following certification of an appeal to the Board of Veterans' Appeals.

(a) *Request for a change in representation, request for a personal hearing, or submission of additional evidence within 90 days following notification of certification and transfer of records.* An appellant and his or her representative, if any, will be granted a period of 90 days following the mailing of notice to them that an appeal has been certified to the Board for appellate review and that the appellate record has been transferred to the Board, or until the date the appellate decision is promulgated by the Board of Veterans' Appeals, whichever comes first, during which they may submit a request for a personal hearing, additional evidence, or a request for a change in representation. Any such request or additional evidence must be submitted directly to the Board and not to the agency of original jurisdiction. The date of mailing of the letter of notification will be presumed to be the same as the date of that letter for purposes of determining whether the request was timely made or the evidence was timely submitted. Any evidence which is submitted at a hearing on appeal which was requested during such period will be considered to have been received during such period, even though the hearing may be held following the expiration of the period. Any pertinent evidence submitted by the appellant or representative is subject to the requirements of paragraph (d) of this section if a simultaneously contested claim is involved.

(b) *Subsequent request for a change in representation, request for a personal hearing, or submission of additional evidence*—(1) *General rule.* Subject to the exception in paragraph (b)(2) of this section, following the expiration of the period described in paragraph (a) of this section, the Board of Veterans' Appeals will not accept a request for a change in representation, a request for a personal hearing, or additional evidence except when the appellant demonstrates on motion that there was good cause for the delay. Examples of good cause include, but are not limited to, illness of the appellant or the representative which precluded action during the period; death of an individual representative; illness or incapacity of an individual representative which renders it impractical for an appellant to continue with him or her as representative; withdrawal of an individual representative; the discovery of evidence that was not available prior to the expiration of the period; and delay in transfer of the appellate record to the Board which precluded timely action with respect to these matters. Such motions must be in writing and must include the name of the veteran; the name of the claimant or appellant if other than the veteran (e.g., a veteran's survivor, a guardian,

or a fiduciary appointed to receive VA benefits on an individual's behalf); the applicable Department of Veterans Affairs file number; and an explanation of why the request for a change in representation, the request for a personal hearing, or the submission of additional evidence could not be accomplished in a timely manner. Such motions must be filed at the following address: Director, Management and Administration (01E), Board of Veterans' Appeals, 810 Vermont Avenue, NW., Washington, DC 20420. Depending upon the ruling on the motion, action will be taken as follows:

(i) *Good cause not shown.* If good cause is not shown, the request for a change in representation, the request for a personal hearing, or the additional evidence submitted will be referred to the agency of original jurisdiction upon completion of the Board's action on the pending appeal without action by the Board concerning the request or additional evidence. Any personal hearing granted as a result of a request so referred or any additional evidence so referred may be treated by that agency as the basis for a reopened claim, if appropriate. If the Board denied a benefit sought in the pending appeal and any evidence so referred which was received prior to the date of the Board's decision, or testimony presented at a hearing resulting from a request for a hearing so referred, together with the evidence already of record, is subsequently found to be the basis of an allowance of that benefit, the effective date of the award will be the same as if the benefit had been granted by the Board as a result of the appeal which was pending at the time that the hearing request or additional evidence was received.

(ii) *Good cause shown.* If good cause is shown, the request for a change in representation or for a personal hearing will be honored. Any pertinent evidence submitted by the appellant or representative will be accepted, subject to the requirements of paragraph (d) of this section if a simultaneously contested claim is involved.

(2) *If the Board obtains evidence or considers law not considered by the agency of original jurisdiction.* The motion described in paragraph (b)(1) of this section is not required to submit evidence in response to the notice described in paragraph (a) or (b) of Rule 903 (paragraph (a) or (b) of §20.903 of this part).

(c) *Consideration of additional evidence by the Board or by the agency of original jurisdiction.* Any pertinent evidence submitted by the appellant or representative which is accepted by the Board under the provisions of this section, or is submitted by the appellant or representative in response to a §20.903 of this part, notification, as well as any such evidence referred to the Board by the agency of original jurisdiction under §19.37(b) of this chapter, must be referred to the agency of original jurisdiction for review, unless this procedural right is waived by the appellant or representative, or unless the Board determines that the benefit or benefits to which the evidence relates may be fully allowed on appeal without such referral. Such a waiver must be in writing or, if a hearing on appeal is conducted, the waiver must be formally and clearly entered on the record orally at the time of the hearing. Evidence is not pertinent if it does not relate to or have a bearing on the appellate issue or issues.

(d) *Simultaneously contested claims.* In simultaneously contested claims, if pertinent evidence which directly affects payment, or potential payment, of the benefit sought is submitted by any claimant and is accepted by the Board under the provisions of this section, the substance of such evidence will be mailed to each of the other claimants who will then have 60 days from the date of mailing of notice of the new evidence within which to comment upon it and/or submit additional evidence in rebuttal. For matters over which the Board does not have original jurisdiction, a waiver of initial agency of original jurisdiction consideration of pertinent additional evidence received by the Board must be obtained from each claimant in accordance with paragraph (c) of this section. The date of mailing of the letter of notification of the new evidence will be presumed to be the same as the date of that letter for purposes of determining whether such comment or evidence in rebuttal

was timely submitted. No further period will be provided for response to such comment or rebuttal evidence.

(Authority: 38 U.S.C. 7104, 7105, 7105A)

[57 FR 4109, Feb. 3, 1992, as amended at 60 FR 25851, May 15, 1995; 61 FR 20453, May 7, 1996; 67 FR 3105, Jan. 23, 2002; 69 FR 53808, Sept. 3, 2004]

## Subpart O—Revision of Decisions on Grounds of Clear and Unmistakable Error

SOURCE: 64 FR 2139, Jan. 13, 1999, unless otherwise noted.

### § 20.1400 Rule 1400. Motions to revise Board decisions.

(a) Review to determine whether clear and unmistakable error exists in a final Board decision may be initiated by the Board, on its own motion, or by a party to that decision (as the term ''party'' is defined in Rule 1401(b) (§ 20.1401(b) of this part) in accordance with Rule 1404 (§ 20.1404 of this part).

(b) All final Board decisions are subject to revision under this subpart except:

(1) Decisions on issues which have been appealed to and decided by a court of competent jurisdiction; and

(2) Decisions on issues which have subsequently been decided by a court of competent jurisdiction.

(Authority: 38 U.S.C. 501(a), 7111)

[64 FR 2139, Jan 13, 1999, as amended at 64 FR 73414, Dec. 30, 1999]

### § 20.1401 Rule 1401. Definitions.

(a) *Issue.* Unless otherwise specified, the term ''issue'' in this subpart means a matter upon which the Board made a final decision (other than a decision under this subpart). As used in the preceding sentence, a ''final decision'' is one which was appealable under Chapter 72 of title 38, United States Code, or which would have been so appealable if such provision had been in effect at the time of the decision.

(b) *Party.* As used in this subpart, the term ''party'' means any party to the proceeding before the Board that resulted in the final Board decision which is the subject of a motion under this subpart, but does not include officials authorized to file administrative appeals pursuant to § 19.51 of this title.

(Authority: 38 U.S.C. 501(a), 7104(a))

### § 20.1402 Rule 1402. Inapplicability of other rules.

Motions filed under this subpart are not appeals and, except as otherwise provided, are not subject to the provisions of part 19 of this title or this part 20 which relate to the processing and disposition of appeals.

(Authority: 38 U.S.C. 501(a))

### § 20.1403 Rule 1403. What constitutes clear and unmistakable error; what does not.

(a) *General.* Clear and unmistakable error is a very specific and rare kind of error. It is the kind of error, of fact or of law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error. Generally, either the correct facts, as they were known at the time, were not before the Board, or the statutory and regulatory provisions extant at the time were incorrectly applied.

(b) *Record to be reviewed*—(1) *General.* Review for clear and unmistakable error in a prior Board decision must be based on the record and the law that existed when that decision was made.

(2) *Special rule for Board decisions issued on or after July 21, 1992.* For a Board decision issued on or after July 21, 1992, the record that existed when that decision was made includes relevant documents possessed by the Department of Veterans Affairs not later than 90 days before such record was transferred to the Board for review in reaching that decision, provided that the documents could reasonably be expected to be part of the record.

(c) *Errors that constitute clear and unmistakable error.* To warrant revision of a Board decision on the grounds of clear and unmistakable error, there must have been an error in the Board's adjudication of the appeal which, had it not been made, would have manifestly changed the outcome when it was made. If it is not absolutely clear

that a different result would have ensued, the error complained of cannot be clear and unmistakable.

(d) *Examples of situations that are not clear and unmistakable error*—(1) *Changed diagnosis.* A new medical diagnosis that ''corrects'' an earlier diagnosis considered in a Board decision.

(2) *Duty to assist.* The Secretary's failure to fulfill the duty to assist.

(3) *Evaluation of evidence.* A disagreement as to how the facts were weighed or evaluated.

(e) *Change in interpretation.* Clear and unmistakable error does not include the otherwise correct application of a statute or regulation where, subsequent to the Board decision challenged, there has been a change in the interpretation of the statute or regulation.

(Authority: 38 U.S.C. 501(a), 7111)

### § 20.1404 Rule 1404. Filing and pleading requirements; withdrawal.

(a) *General.* A motion for revision of a decision based on clear and unmistakable error must be in writing, and must be signed by the moving party or that party's representative. The motion must include the name of the veteran; the name of the moving party if other than the veteran; the applicable Department of Veterans Affairs file number; and the date of the Board of Veterans' Appeals decision to which the motion relates. If the applicable decision involved more than one issue on appeal, the motion must identify the specific issue, or issues, to which the motion pertains. Motions which fail to comply with the requirements set forth in this paragraph shall be dismissed without prejudice to refiling under this subpart.

(b) *Specific allegations required.* The motion must set forth clearly and specifically the alleged clear and unmistakable error, or errors, of fact or law in the Board decision, the legal or factual basis for such allegations, and why the result would have been manifestly different but for the alleged error. Nonspecific allegations of failure to follow regulations or failure to give due process, or any other general, non-specific allegations of error, are insufficient to satisfy the requirement of the previous sentence. Motions which fail to comply with the requirements set forth in this paragraph shall be dismissed without prejudice to refiling under this subpart.

(c) *Filing.* A motion for revision of a decision based on clear and unmistakable error may be filed at any time. Such motions should be filed at the following address: Director, Management and Administration (01E), Board of Veterans' Appeals, 810 Vermont Avenue, NW., Washington, DC 20420.

(d) *Requests not filed at the Board.* A request for revision transmitted to the Board by the Secretary pursuant to 38 U.S.C. 7111(f) (relating to requests for revision filed with the Secretary other than at the Board) shall be treated as if a motion had been filed pursuant to paragraph (c) of this section.

(e) *Motions for reconsideration.* A motion for reconsideration, as described in subpart K of this part, whenever filed, will not be considered a motion under this subpart.

(f) *Withdrawal.* A motion under this subpart may be withdrawn at any time before the Board promulgates a decision on the motion. Such withdrawal shall be in writing, shall be filed at the address listed in paragraph (c) of this section, and shall be signed by the moving party or by such party's representative. If such a writing is timely received, the motion shall be dismissed without prejudice to refiling under this subpart.

(Authority: 38 U.S.C. 501(a), 7111)

[64 FR 2139, Jan. 13, 1999, as amended at 66 FR 35903, July 10, 2001]

### § 20.1405 Rule 1405. Disposition.

(a) *Docketing and assignment; notification of representative*—(1) *General.* Motions under this subpart will be docketed in the order received and will be assigned in accordance with § 19.3 of this title (relating to assignment of proceedings). Where an appeal is pending on the same underlying issue at the time the motion is received, the motion and the appeal may be consolidated under the same docket number and disposed of as part of the same proceeding. A motion may not be assigned to any Member who participated in the decision that is the subject of the motion. If a motion is assigned to a panel, the decision will be by a majority vote of the panel Members.

(2) *Advancement on the docket.* A motion may be advanced on the docket subject to the same substantive and procedural requirements as those applicable to an appeal under Rule 900(c) (§ 20.900(c) of this part).

(3) *Notification of representative.* When the Board receives a motion under this subpart from an individual whose claims file indicates that he or she is represented, the Board shall provide a copy of the motion to the representative before assigning the motion to a Member or panel. Within 30 days after the date on which the Board provides a copy of the motion to the representative, the representative may file a relevant response, including a request to review the claims file prior to filing a further response. Upon request made within the time allowed under this paragraph (a)(2), the Board shall arrange for the representative to have the opportunity to review the claims file, and shall permit the representative a reasonable time after making the file available to file a further response.

(b) *Evidence.* No new evidence will be considered in connection with the disposition of the motion. Material included in the record on the basis of Rule 1403(b)(2) (§ 20.1403(b)(2) of this part) is not considered new evidence.

(c) *Hearing*—(1) *Availability.* The Board may, for good cause shown, grant a request for a hearing for the purpose of argument. No testimony or other evidence will be admitted in connection with such a hearing. The determination as to whether good cause has been shown shall be made by the member or panel to whom the motion is assigned.

(2) *Submission of requests.* Requests for such a hearing shall be submitted to the following address: Director, Management and Administration (01E), Board of Veterans' Appeals, 810 Vermont Avenue, NW, Washington, DC 20420.

(d) *Decision to be by the Board.* The decision on a motion under this subpart shall be made by the Board. There shall be no referral of the matter to any adjudicative or hearing official acting on behalf of the Secretary for the purpose of deciding the motion.

(e) *Referral to ensure completeness of the record.* Subject to the provisions of paragraph (b) of this section, the Board may use the various agencies of original jurisdiction to ensure completeness of the record in connection with a motion under this subpart.

(f) *General Counsel opinions.* The Board may secure opinions of the General Counsel in connection with a motion under this subpart. In such cases, the Board will notify the party and his or her representative, if any. When the opinion is received by the Board, a copy of the opinion will be furnished to the party's representative or, subject to the limitations provided in 38 U.S.C. 5701(b)(1), to the party if there is no representative. A period of 60 days from the date of mailing of a copy of the opinion will be allowed for response. The date of mailing will be presumed to be the same as the date of the letter or memorandum which accompanies the copy of the opinion for purposes of determining whether a response was timely filed.

(g) *Decision.* The decision of the Board on a motion will be in writing. The decision will include separately stated findings of fact and conclusions of law on all material questions of fact and law presented on the record, the reasons or bases for those findings and conclusions, and an order granting or denying the motion.

(Authority: 38 U.S.C. 501(a), 7104(d), 7111)

[64 FR 2139, Jan. 13, 1999, as amended at 64 FR 7091, Feb. 12, 1999; 66 FR 37151, July 17, 2001; 68 FR 53682, Sept. 12, 2003]

### § 20.1406 Rule 1406. Effect of revision; discontinuance or reduction of benefits.

(a) *General.* A decision of the Board that revises a prior Board decision on the grounds of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision.

(b) *Discontinuance or reduction of benefits.* Revision of a prior Board decision under this subpart that results in the discontinuance or reduction of benefits is subject to laws and regulations governing the reduction or discontinuance of benefits by reason of erroneous

award based solely on administrative error or errors in judgment.

(Authority: 38 U.S.C. 7111(b))

### §20.1407 Rule 1407. Motions by the Board.

If the Board undertakes, on its own motion, a review pursuant to this subpart, the party to that decision and that party's representative (if any) will be notified of such motion and provided an adequate summary thereof and, if applicable, outlining any proposed discontinuance or reduction in benefits that would result from revision of the Board's prior decision. They will be allowed a period of 60 days to file a brief or argument in answer. The failure of a party to so respond does not affect the finality of the Board's decision on the motion.

(Authority: 38 U.S.C. 501(a), 7111)

### §20.1408 Rule 1408. Special rules for simultaneously contested claims.

In the case of a motion under this subpart to revise a final Board decision in a simultaneously contested claim, as that term is used in Rule 3(o) (§20.3(o) of this part), a copy of such motion shall, to the extent practicable, be sent to all other contesting parties. Other parties have a period of 30 days from the date of mailing of the copy of the motion to file a brief or argument in answer. The date of mailing of the copy will be presumed to be the same as the date of the letter which accompanies the copy. Notices in simultaneously contested claims will be forwarded to the last address of record of the parties concerned and such action will constitute sufficient evidence of notice.

(Authority: 38 U.S.C. 501(a))

### §20.1409 Rule 1409. Finality and appeal.

(a) A decision on a motion filed by a party or initiated by the Board pursuant to this subpart will be stamped with the date of mailing on the face of the decision, and is final on such date. The party and his or her representative, if any, will be provided with copies of the decision.

(b) For purposes of this section, a dismissal without prejudice under Rule 1404(a)(§20.1404(a) of this part), Rule 1404(b)(§20.1404(b)), or Rule 1404(f)(§20.1404(f)), or a referral under Rule 1405(e) is not a final decision of the Board.

(c) Once there is a final decision on a motion under this subpart relating to a prior Board decision on an issue, that prior Board decision on that issue is no longer subject to revision on the grounds of clear and unmistakable error. Subsequent motions relating to that prior Board decision on that issue shall be dismissed with prejudice.

(d) Chapter 72 of title 38, United States Code (relating to judicial review), applies with respect to final decisions on motions filed by a party or initiated by the Board pursuant to this subpart.

(Authority: 38 U.S.C. 501(a); Pub. L. 105–111)

[64 FR 2139, Jan. 13, 1999, as amended at 66 FR 35903, July 10, 2001]

### §20.1410 Rule 1410. Stays pending court action.

The Board will stay its consideration of a motion under this subpart upon receiving notice that the Board decision that is the subject of the motion has been appealed to a court of competent jurisdiction until the appeal has been concluded or the court has issued an order permitting, or directing, the Board to proceed with the motion.

(Authority: 38 U.S.C. 501(a))

### §20.1411 Rule 1411. Relationship to other statutes.

(a) The ''benefit of the doubt'' rule of 38 U.S.C. 5107(b) does not apply to the Board's decision, on a motion under this subpart, as to whether there was clear and unmistakable error in a prior Board decision.

(b) A motion under this subpart is not a claim subject to reopening under 38 U.S.C. 5108 (relating to reopening claims on the grounds of new and material evidence).

(c) A motion under this subpart is not an application for benefits subject to any duty associated with 38 U.S.C. 5103(a) (relating to applications for benefits).

(d) A motion under this subpart is not a claim for benefits subject to the requirements and duties associated with 38 U.S.C. 5107(a) (requiring ''well-

grounded'' claims and imposing a duty to assist).

(Authority: 38 U.S.C. 501(a))

## APPENDIX A TO PART 20—CROSS-REFERENCES

| Sec. | Cross-reference | Title of cross-referenced material or comment |
|---|---|---|
| 20.1 | 38 CFR 3.103(a) | *Statement of policy.* |
| 20.100 | 38 CFR 20.306 | *Rule 306. Legal holidays.* |
| 20.200 | 38 CFR 20.201 | *Rule 201. Notice of Disagreement.* |
| | 38 CFR 20.202 | *Rule 202. Substantive Appeal.* |
| | 38 CFR 20.300–20.306 | See re filing Notices of Disagreement and Substantive Appeals. |
| 20.202 | 38 CFR 19.29 | *Statement of the Case.* |
| | 38 CFR 19.31 | *Supplemental Statement of the Case.* |
| 20.301 | 38 CFR 20.500 | *Rule 500. Who can file an appeal in simultaneously contested claims.* |
| | 38 CFR 20.602 | *Rule 602. Representation by recognized organizations.* |
| | 38 CFR 20.603 | *Rule 603. Representation by attorneys-at-law.* |
| | 38 CFR 20.604 | *Rule 604. Representation by agents.* |
| | 38 CFR 20.605 | *Rule 605. Other persons as representative.* |
| 20.302 | 38 CFR 20.501 | *Rule 501. Time limits for filing Notice of Disagreement, Substantive Appeal, and response to Supplemental Statement of the Case in simultaneously contested claims.* |
| 20.303 | 38 CFR 20.304 | *Rule 304. Filing additional evidence does not extend time limit for appeal.* |
| | 38 CFR 20.503 | *Rule 503. Extension of time for filing a Substantive Appeal in simultaneously contested claims.* |
| 20.305 | 38 CFR 20.306 | *Rule 306. Legal holidays.* |
| 20.400 | 38 CFR 19.50–19.53 | See also re administrative appeals. |
| 20.401 | 38 CFR 19.50–19.53 | See also re administrative appeals. |
| | 38 CFR 20.302–20.306 | See re time limits for perfecting an appeal. |
| | 38 CFR 20.501, 20.503 | See re time limits for perfecting an appeal in simultaneously contested claims. |
| 20.500 | 38 CFR 20.713 | *Rule 713. Hearings in simultaneously contested claims.* |
| 20.501 | 38 CFR 20.305 | *Rule 305. Computation of time limit for filing.* |
| | 38 CFR 20.306 | *Rule 306. Legal holidays.* |
| | 38 CFR 20.713 | *Rule 713. Hearings in simultaneously contested claims.* |
| 20.502 | 38 CFR 20.305 | *Rule 305. Computation of time limit for filing.* |
| | 38 CFR 20.306 | *Rule 306. Legal holidays.* |
| | 38 CFR 20.713 | *Rule 713. Hearings in simultaneously contested claims.* |
| 20.503 | 38 CFR 20.713 | *Rule 713. Hearings in simultaneously contested claims.* |
| 20.504 | 38 CFR 20.713 | *Rule 713. Hearings in simultaneously contested claims.* |
| 20.600 | 38 CFR 14.626 et seq | See also re representation. |
| | 38 CFR 20.602 | *Rule 602. Representation by recognized organizations.* |
| | 38 CFR 20.603 | *Rule 603. Representation by attorneys-at-law.* |
| | 38 CFR 20.604 | *Rule 604. Representation by agents.* |
| | 38 CFR 20.605 | *Rule 605. Other persons as representative.* |
| 20.602 | 38 CFR 14.628 | *Recognition of organizations.* |
| | 38 CFR 14.631 | *Powers of attorney.* |
| | 38 CFR 20.100 | *Rule 100. Name, business hours, and mailing address of the Board.* |
| | 38 CFR 20.607 | *Rule 607. Revocation of a representative's authority to act.* |
| | 38 CFR 20.608 | *Rule 608. Withdrawal of services by a representative.* |
| | 38 CFR 20.609 | *Rule 609. Payment of representative's fees in proceedings before Department of Veterans Affairs field personnel and before the Board of Veterans' Appeals.* |
| | 38 CFR 20.610 | *Rule 610. Payment of representative's expenses in proceedings before Department of Veterans Affairs field personnel and before the Board of Veterans' Appeals.* |
| 20.603 | 38 CFR 14.629 | *Requirements for accreditation of representatives, agents, and attorneys.* |
| | 38 CFR 14.631 | *Powers of attorney.* |
| | 38 CFR 20.100 | *Rule 100. Name, business hours, and mailing address of the Board.* |
| | 38 CFR 20.606 | *Rule 606. Legal interns, law students and paralegals.* |
| | 38 CFR 20.607 | *Rule 607. Revocation of a representative's authority to act.* |
| | 38 CFR 20.608 | *Rule 608. Withdrawal of services by a representative.* |
| | 38 CFR 20.609 | *Rule 609. Payment of representative's fees in proceedings before Department of Veterans Affairs field personnel and before the Board of Veterans' Appeals.* |
| | 38 CFR 20.610 | *Rule 610. Payment of representative's expenses in proceedings before Department of Veterans Affairs field personnel and before the Board of Veterans' Appeals.* |
| 20.604 | 38 CFR 14.631 | *Powers of attorney.* |
| | 38 CFR 20.100 | *Rule 100. Name, business hours, and mailing address of the Board.* |
| | 38 CFR 20.607 | *Rule 607. Revocation of a representative's authority to act.* |
| | 38 CFR 20.608 | *Rule 608. Withdrawal of services by a representative.* |
| | 38 CFR 20.609 | *Rule 609. Payment of representative's fees in proceedings before Department of Veterans Affairs field personnel and before the Board of Veterans' Appeals.* |
| | 38 CFR 20.610 | *Rule 610. Payment of representative's expenses in proceedings before Department of Veterans Affairs field personnel and before the Board of Veterans' Appeals.* |
| 20.605 | 38 CFR 14.630 | *Authorization for a particular claim.* |

| Sec. | Cross-reference | Title of cross-referenced material or comment |
|---|---|---|
| | 38 CFR 14.631 | *Powers of attorney.* |
| | 38 CFR 20.100 | *Rule 100. Name, business hours, and mailing address of the Board.* |
| | 38 CFR 20.607 | *Rule 607. Revocation of a representative's authority to act.* |
| | 38 CFR 20.608 | *Rule 608. Withdrawal of services by a representative.* |
| | 38 CFR 20.609 | *Rule 609. Payment of representative's fees in proceedings before Department of Veterans Affairs field personnel and before the Board of Veterans' Appeals.* |
| | 38 CFR 20.610 | *Rule 610. Payment of representative's expenses in proceedings before Department of Veterans Affairs field personnel and before the Board of Veterans' Appeals.* |
| 20.606 | 38 CFR 20.603 | *Rule 603. Representation by attorneys-at-law.* |
| 20.607 | 38 CFR 14.631(d) | See also re revocation of powers of attorney. |
| 20.609 | 38 CFR 14.629 | *Requirements for accreditation of representatives, agents, and attorneys.* |
| | 38 CFR 20.603 | *Rule 603. Representation by attorneys-at-law.* |
| | 38 CFR 20.604 | *Rule 604. Representation by agents.* |
| | 38 CFR 20.606 | *Rule 606. Legal interns, law students and paralegals.* |
| | 38 CFR 20.610 | *Rule 610. Payment of representative's expenses in proceedings before Department of Veterans Affairs field personnel and before the Board of Veterans' Appeals.* |
| 20.610 | 38 CFR 20.609 | *Rule 609. Payment of representative's fees in proceedings before Department of Veterans Affairs field personnel and before the Board of Veterans' Appeals.* |
| 20.611 | 38 CFR 1.525(d), 14.631(e) | See also re continuation of authority conferred by powers of attorney upon the death of a claimant. |
| 20.701 | 38 CFR 20.710 | *Rule 710. Witnesses at hearings.* |
| 20.702 | 38 CFR 20.704 | *Rule 704. Scheduling and notice of hearings conducted by traveling Sections of the Board of Veterans' Appeals at Department of Veterans Affairs facilities.* |
| | 38 CFR 20.713 | *Rule 713. Hearings in simultaneously contested claims.* |
| 20.703 | 38 CFR 20.201 | *Rule 201. Notice of Disagreement.* |
| 20.704 | 38 CFR 20.702 | *Rule 702. Scheduling and notice of hearings conducted by the Board of Veterans' Appeals in Washington, DC, and by agency of original jurisdiction personnel acting on behalf of the Board of Veterans' Appeals at field facilities.* |
| 20.706 | 38 CFR 20.700(c) | See also re the presiding Member's role in the conduct of hearings. |
| | 38 CFR 20.708 | *Rule 708. Prehearing conference.* |
| | 38 CFR 20.709 | *Rule 709. Procurement of additional evidence following a hearing.* |
| 20.707 | 38 CFR 19.11 | *Reconsideration Section.* |
| 20.708 | 38 CFR 20.606(d) | See re the prehearing conference required when a legal intern, law student, or paralegal is to participate in a hearing held before a traveling Section of the Board. |
| 20.709 | 38 CFR 19.37 | *Consideration of additional evidence received by the agency of original jurisdiction after an appeal has been initiated.* |
| | 38 CFR 20.1304 | *Rule 1304. Request for change in representation, request for personal hearing, or submission of additional evidence following certification of an appeal to the Board of Veterans' Appeals.* |
| 20.710 | 38 CFR 20.711 | *Rule 711. Subpoenas.* |
| 20.711 | 38 CFR 2.1 | See for further information on subpoenas, including action to be taken in the event of noncompliance. |
| 20.713 | 38 CFR 20.702 | *Rule 702. Scheduling and notice of hearings conducted by the Board of Veterans' Appeals in Washington, DC, and by agency of original jurisdiction personnel acting on behalf of the Board of Veterans' Appeals at field facilities.* |
| | 38 CFR 20.704 | *Rule 704. Scheduling and notice of hearings conducted by traveling Sections of the Board of Veterans' Appeals at Department of Veterans Affairs facilities.* |
| 20.715 | 38 CFR 20.706 | *Rule 706. Functions of the presiding Member.* |
| 20.800 | 38 CFR 20.304 | *Rule 304. Filing additional evidence does not extend time limit for appeal.* |
| | 38 CFR 20.709 | *Rule 709. Procurement of additional evidence following a hearing.* |
| | 38 CFR 20.1304 | *Rule 1304. Request for change in representation, request for personal hearing, or submission of additional evidence following certification of an appeal to the Board of Veterans' Appeals.* |
| 20.901 | 38 CFR 14.507 | See re opinions of the General Counsel of the Department of Veterans Affairs. |
| 20.903 | 38 CFR 20.305 | *Rule 305. Computation of time limit for filing.* |
| | 38 CFR 20.306 | *Rule 306. Legal holidays.* |
| 20.1003 | 38 CFR 20.700(b) | See re submission of written brief and of oral argument on audio cassette. |
| 20.1105 | 38 CFR 3.156 | *New and material evidence.* |
| | 38 CFR 3.160(e) | *Reopened claim.* |
| | 38 CFR 20.1304(b)(1) | See re request for a personal hearing or submission of additional evidence more than 60 days after a case has been certified to the Board of Veterans' Appeals as possible basis for a reopened claim. |
| 20.1106 | 38 CFR 3.22(a)(2) | See re correction of a rating, after a veteran's death, based on clear and unmistakable error, in cases involving claims for benefits under the provisions of 38 U.S.C. 1318. |
| 20.1300 | 38 CFR 1.500–1.527 | See re the release of information from Department of Veterans Affairs claimant records. |
| | 38 CFR 1.550–1.559 | See re the release of information from Department of Veterans Affairs records other than claimant records. |
| | 38 CFR 1.575–1.584 | See re safeguarding personal information in Department of Veterans Affairs records. |
| | 38 CFR 20.1301 | *Rule 1301. Disclosure of information.* |
| 20.1301 | 38 CFR 1.577 | *Access to records.* |
| 20.1302 | 38 CFR 20.611 | *Rule 611. Continuation of representation following death of a claimant or appellant.* |
| 20.1304 | 38 CFR 3.103(c), 20.700–20.717. | See also re hearings. |

| Sec. | Cross-reference | Title of cross-referenced material or comment |
|---|---|---|
| | 38 CFR 3.156 | *New and material evidence.* |
| | 38 CFR 3.160(e) | *Reopened claim.* |
| | 38 CFR 20.305 | *Rule 305. Computation of time limit for filing.* |
| | 38 CFR 20.306 | *Rule 306. Legal holidays.* |

# PART 21—VOCATIONAL REHABILITATION AND EDUCATION

## Subpart A—Vocational Rehabilitation Under 38 U.S.C. Chapter 31


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STATE APPROVING AGENCIES

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APPROVAL OF COURSES

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21.8280 Effective date of induction into a vocational training program.
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RATE OF PURSUIT

21.8310 Rate of pursuit.

AUTHORIZATION OF SERVICES

21.8320 Authorization of services.

LEAVES OF ABSENCE

21.8340 Leaves of absence.

SATISFACTORY CONDUCT AND COOPERATION

21.8360 Satisfactory conduct and cooperation.

TRANSPORTATION SERVICES

21.8370 Authorization of transportation services.

ADDITIONAL APPLICABLE REGULATIONS

21.8380 Additional applicable regulations.

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21.8410 Delegation of authority.

## Subpart A—Vocational Rehabilitation Under 38 U.S.C. Chapter 31

AUTHORITY: 38 U.S.C. 501(a), 3100–3121, unless otherwise noted.

SOURCE: 49 FR 40814, Oct. 18, 1984, unless otherwise noted.

### VOCATIONAL REHABILITATION OVERVIEW

### § 21.1 Training and rehabilitation for veterans with service-connected disabilities.

(a) *Purposes.* The purposes of this program are to provide to eligible veterans with compensable service-connected disabilities all services and assistance necessary to enable them to achieve maximum independence in daily living and, to the maximum extent feasible, to become employable

and to obtain and maintain suitable employment.

(Authority: 38 U.S.C. 3100)

(b) *Basic requirements.* Before a service-disabled veteran may receive training and rehabilitation services under Chapter 31, Title 38 U.S.C., three basic requirements must be met:

(1) The Department of Veterans Affairs must first find that the veteran has basic entitlement to services as prescribed by §21.40.

(Authority: 38 U.S.C. 3102)

(2) The services necessary for training and rehabilitation must be identified by the Department of Veterans Affairs and the veteran.

(Authority: 38 U.S.C. 3106)

(3) An individual written plan must be developed by the Department of Veterans Affairs and the veteran describing the goals of the program and the means through which these goals will be achieved.

(Authority: 38 U.S.C. 3107)

[49 FR 40814, Oct. 18, 1984; 50 FR 9622, Mar. 11, 1985]

NONDUPLICATION

### §21.21 Election of benefits under education programs administered by the Department of Veterans Affairs.

(a) *Election of benefits required.* A veteran must make an election of benefits among the programs of education administered by VA for which he or she may be eligible. A veteran who has basic entitlement to rehabilitation under chapter 31 and is also eligible for assistance under any of the other education programs administered by VA must make an election of benefits between chapter 31 and any other VA program of education for which he or she may be eligible. The veteran may reelect at any time if he or she is otherwise eligible. (See §§21.264 and 21.334.)

(Authority: 38 U.S.C. 1781(b))

(b) *Use of prior training in formulating a rehabilitation program.* If a veteran has pursued an educational or training program under an education program listed in §21.4020 of this part, the earlier program of education or special restorative training shall be utilized to the extent practicable.

(Authority: 38 U.S.C. 3695(b))

[53 FR 880, Jan. 14, 1988, as amended at 57 FR 57108, Dec. 3, 1992]

### §21.22 Nonduplication—Federal programs.

(a) *Allowances.* A service-disabled veteran who is eligible for benefits under Chapter 31, may not receive a subsistence allowance or elect payment of an allowance at the educational assistance rate under Chapter 30 pursuant to §21.264 if the veteran:

(1) Is on active duty and is pursuing a course of education which is being paid for by the Armed Forces (or by the Department of Health and Human Services in the case of the Public Health Service), or

(2) Is attending a course of education or training paid for under Chapter 41, Title 5 U.S.C. and whose full salary is being paid to such veteran while so training.

(Authority: 38 U.S.C. 3681; Pub. L. 98–525)

(b) *Services which may be authorized.* A service-disabled veteran who is in one of the two categories defined in paragraph (a) of this section is entitled to receive all benefits, other than an allowance, to which he or she is otherwise entitled under Chapter 31, including:

(1) Payment of any tuition and fees not paid for by the Armed Forces.

(2) The cost of special services, such as reader services, tutorial assistance, and special equipment during the period of such training.

(Authority: 38 U.S.C. 3681)

[49 FR 40814, Oct. 18, 1984, as amended at 54 FR 4283, Jan. 30, 1989; 57 FR 57108, Dec. 3, 1992]

CLAIMS

### §21.30 Claims.

A specific claim in the form prescribed by the Department of Veterans Affairs must be filed for:

(a) A program of rehabilitation services, or

(b) Employment assistance.

(Authority: 38 U.S.C. 501(a), 3102, 3117, 5101(a))

### § 21.31 Informal claim.

Any communication or action indicating an intent to apply for rehabilitation or employment assistance, from a veteran, a duly authorized representative, or a Member of Congress may be considered an informal claim. Upon receipt of an informal claim, if a formal claim has not been filed, an application form will be forwarded to the veteran for execution. In the case of a claim for rehabilitation, or employment assistance, the formal claim will be considered filed as of the date of receipt of the informal claim if received within 1 year from the date it was sent to the veteran, or before cessation of the course, whichever is earlier.

(Authority: 38 U.S.C. 501(a), 5101(a), 5103(a))

### § 21.32 Time limit.

(a) *Time limit for filing evidence.* The provisions of this paragraph are applicable to an original application, formal or informal, for rehabilitation or employment assistance and to a claim for increased benefits by reason of the existence of a dependent.

(1) If a claimant's application is incomplete, the claimant will be notified of the evidence necessary to complete the application;

(2) If the evidence is not received within 1 year from the date of such notification, benefits may not be paid by reason of that application.

(b) *Failure to furnish claim or notice of time limit.* The failure of VA to furnish a claimant:

(1) Any form or information concerning the right to file a claim or to furnish notice of the time limit for the filing of a claim is not a basis for adjusting the periods allowed for these actions;

(2) Appropriate notice of time limits within which evidence must be submitted to perfect a claim shall result in an adjustment of the period during which the time limit runs. The period during which the time limit runs shall be determined in accordance with paragraph (c) of this section. As to appeals see § 19.129 of this chapter.

(Authority: (38 U.S.C. 5113))

(c) *Adjustment of time limit.* (1) In computing the time limit for any action required of a claimant or beneficiary to perfect the types of claims described in paragraph (a) of this section, the first day of the specified period will be excluded and the last day included. This rule is applicable in cases in which the time limit expires on a workday. Where the time limit would expire on a Saturday, Sunday, or holiday, the next succeeding workday will be included in the computation.

(2) The period during which the veteran must provide information necessary to perfect his or her claim does not begin to run until the veteran has been notified of this requirement for submission of information. The date of the letter of notification informing the veteran of the action required and the time limit for accomplishing the action shall be ''The first day of the specified period'' referred to in paragraph (c)(1) of this section.

(Authority: 38 U.S.C. 5101, 5113)

CROSS-REFERENCE: Due Process. See § 3.103.

[49 FR 40814, Oct. 18, 1984, as amended at 55 FR 12821, Apr. 6, 1990]

## DEFINITIONS

### § 21.35 Definitions.

(a) *Employment handicap.* This term means an impairment of a veteran's ability to prepare for, obtain, or retain employment consistent with such veteran's abilities, aptitudes, and interests.

(Authority: 38 U.S.C. 3101(1), 3102)

(b) *Independence in daily living.* This term means the ability of a veteran, without the service of others, or with a reduced level of the services of others, to live and function within such veteran's family and community.

(Authority: 38 U.S.C. 3101(2))

(c) *Program of education.* This term means:

(1) A combination of subjects or unit courses pursued at a school which is

generally acceptable to meet requirements for a predetermined educational, professional or vocational objective; or

(2) Such subjects or courses which are generally acceptable to meet requirements for more than one objective if all objectives pursued are generally recognized as being related to a single career field; or

(3) Any unit course or subject, or combination of courses or subjects, pursued by an eligible veteran at any educational institution required by the Administrator of the Small Business Administration as a condition to obtaining financial assistance under the provisions of section (7)(i)(1) of the Small Business Act.

(Authority: 15 U.S.C. 636(i)(1), 38 U.S.C. 3452(b))

(d) *Program of independent living services and assistance.* This term includes:

(1) The services provided in this program that are needed to enable a veteran to achieve maximum independence in daily living, including counseling, diagnostic, medical, social, psychological, and educational services determined by the Department of Veterans Affairs to be necessary, and

(2) The monthly allowance authorized by 38 U.S.C. Chapter 31 for such a veteran.

(Authority: 38 U.S.C. 3101(4))

(e) *Rehabilitated to the point of employability.* This term means that the veteran is employable in an occupation for which a vocational rehabilitation program has been provided under this program

(Authority: 38 U.S.C. 3101(5))

(f) *Rehabilitation program.* This term includes, when appropriate:

(1) A vocational rehabilitation program (see paragraph (i) of this section);

(2) A program of independent living services and assistance (see paragraph (d) of this section) for a veteran for whom a vocational goal has been determined not to be currently reasonably feasible; or

(Authority: 38 U.S.C. 3101(6); Pub. L. 99–576)

(3) A program of employment services for employable veterans who are prior participants in Department of Veterans Affairs or state-federal vocational rehabilitation programs.

(Authority: 38 U.S.C. 3117)

(g) *Serious employment handicap.* This term means a significant impairment of a veteran's ability to prepare for, obtain, or retain employment consistent with such veteran's abilities, aptitudes, and interests.

(Authority: 38 U.S.C. 3101(7)

(h) *Vocational goal.* (1) The term *vocational goal* means a gainful employment status consistent with a veteran's abilities, aptitudes, and interests;

(2) The term *achievement of a vocational goal is reasonably feasible* means the effects of the veteran's disability (service and nonservice-connected), when considered in relation to the veteran's circumstances does not prevent the veteran from successfully pursuing a vocational rehabilitation program and becoming gainfully employed in an occupation consistent with the veteran's abilities, aptitudes, and interests;

(3) The term *achievement of a vocational goal is not currently reasonably feasible* means the effects of the veteran's disability (service and nonservice-connected), when considered in relation to the veteran's circumstances at the time of the determination:

(i) Prevent the veteran from successfully achieving a vocational goal at that time; or

(ii) Are expected to worsen within the period needed to achieve a vocational goal and which would, therefore, make achievement not reasonably feasible.

(Authority: 38 U.S.C. 3101(8))

(i) *Vocational rehabilitation program.* This term includes:

(1) The services that are needed for the accomplishment of the purposes of 38 U.S.C. Chapter 31 including such counseling, diagnostic, medical, social, psychological, independent living, economic, educational, vocational, and employment services as are determined by the Department of Veterans Affairs to be needed;

(i) In the case of a veteran for whom the achievement of a vocational goal has not been found to be currently infeasible, such services include:

(A) Determining whether a vocational goal is reasonably feasible;

(B) Improving the veteran's potential to participate in a program of services designed to achieve a vocational goal;

(C) Enabling the veteran to achieve maximum independence in daily living;

(ii) In the case of a veteran for whom achievement of a vocational goal is feasible, such services include assisting the veteran to become, to the maximum extent feasible, employable and to obtain and maintain suitable employment; and

(2) The term also includes the monetary assistance authorized by 38 U.S.C. Chapter 31 for a veteran receiving any of the services described in this paragraph.

(Authority: 38 U.S.C. 3101(9); Pub. L. 99–576)

(j) *Program of employment services.* This term includes the counseling, medical, social, and other placement and post-placement services provided to a veteran under 38 U.S.C. Chapter 31 to assist the veteran in obtaining or maintaining suitable employment.

(Authority: 38 U.S.C. 3117)

(k) *Other terminology.* The following are primarily intended as explanations rather than definitions of terms to which frequent reference will be made in these regulations.

(1) *Counseling psychologist.* Unless otherwise stated, the term *counseling psychologist* refers to a counseling psychologist in the Vocational Rehabilitation and Employment Division in the Veterans Benefits Administration, Department of Veterans Affairs.

(Authority: 38 U.S.C. 3118(c))

(2) *Vocational rehabilitation specialist.* Unless otherwise stated, the term *vocational rehabilitation specialist* refers to a vocational rehabilitation specialist in the Vocational Rehabilitation and Employment Division in the Veterans Benefits Administration of the Department of Veterans Affairs, or to a Department of Veterans Affairs counseling psychologist performing the duties of a vocational rehabilitation specialist.

(Authority: 38 U.S.C. 3118(c))

(3) *School, educational institution, institution.* These terms means any public or private school, secondary school, vocational school, correspondence school, business school, junior college, teachers' college, college, normal school, professional school, university, or scientific or technical institution, or other institution furnishing education for adults.

(Authority: 38 U.S.C. 3452(c))

(4) *Training establishment.* This term means any establishment providing apprentice or other training on the job, including those under the supervision of a college or university or any State department of education, or any State apprenticeship agency, or any State board of vocational education, or any joint apprenticeship committee, or the Bureau of Apprenticeship and Training established in accordance with 29 U.S.C. Chapter 4C, or any agency of the Federal Government authorized to supervise such training.

(Authority: 38 U.S.C. 3452(e))

(5) *Rehabilitation facility.* This term means a distinct organizational entity, either separate or within a larger insititution or agency, which provides goal-oriented comprehensive and coordinated services to individuals designed to evaluate and minimize the handicapping effects of physical, mental, social and vocational disadvantages, and to effect a realization of the individual's potential.

(Authority: 38 U.S.C. 3115(a))

(6) *Workshop.* This term means a charitable organization or institution, conducted not for profit, but for the purpose of carrying out an organized program of evaluation and rehabilitation for handicapped workers and/or for providing such individuals with remunerative employment and other occupational rehabilitative activity of an educational or therapeutic nature.

(Authority: 38 U.S.C. 3115(a))

(7) *Vocational rehabilitation counselor.* Unless otherwise stated, the term vocational rehabilitation counselor refers to a vocational rehabilitation counselor in the Vocational Rehabilitation and Employment Division in the Veterans Benefits Administration, Department of Veterans Affairs.

(Authority: 38 U.S.C. 3118(c))

[49 FR 40814, Oct. 18, 1984; 50 FR 9622, Mar. 11, 1985, as amended at 53 FR 50956, Dec. 19, 1988; 62 FR 17707, Apr. 11, 1997]

BASIC ENTITLEMENT

### §21.40 Basic entitlement.

A veteran or serviceperson shall be entitled to a program of rehabilitation services under 38 U.S.C. chapter 31 if all of the following conditions are met:

(a) *Service-connected disability.* (1) The veteran has a service-connected disability of 20 percent or more which is, or but for the receipt of retired pay would be, compensable under 38 U.S.C. chapter 11, and which was incurred or aggravated in service on or after September 16, 1940; or

(2) A serviceperson is hospitalized for a service-connected disability in a hospital over which the Secretary concerned has charge pending discharge or release from active military, naval or air service and is suffering from a disability which will likely be compensable at a rate of 20 percent or more under 38 U.S.C. Chapter 11; or

(3) A veteran or serviceperson, as described in paragraphs (a)(1) and (2) of this section, has a service-connected disability which is compensable or is likely to be compensable at less than 20 percent, if the individual filed an original application for Chapter 31 before November 1, 1990.

(b) *Employment handicap.* The veteran or serviceperson is determined to be in need of rehabilitation to overcome an employment handicap.

(Authority: 38 U.S.C. 3102, Pub. L. 101–508)

[56 FR 15836, Apr. 18, 1991]

PERIODS OF ELIGIBILITY

### §21.41 Basic period of eligibility.

A veteran having basic entitlement may be provided a program of rehabilitative services during the twelve-year period following discharge. The beginning date of the twelve-year period is the day of the veteran's discharge or release from his or her last period of active military, naval, or air service and the ending date is twelve years from the discharge or release date, unless the beginning date is deferred or the ending date is deferred or extended as provided in §§21.42, 21.44, and 21.45.

(Authority: 38 U.S.C. 3103)

[49 FR 40814, Oct. 18, 1984; 50 FR 9622, Mar. 11, 1985]

### §21.42 Basic period of eligibility deferred.

The basic twelve-year period of eligibility does not begin to run if the veteran was prevented from beginning or continuing a vocational rehabilitation program for one of the following reasons:

(a) *Qualifying compensable service-connected disability established.* The basic twelve-year period shall not begin to run until the veteran establishes the existence of a compensable service-connected disability described in §21.40(a). When the veteran establishes the existence of a compensable service-connected disability described in §21.40(a), the basic twelve-year period begins on the day the Department of Veterans Affairs notifies the veteran of this. The ending date is twelve years from the beginning date.

(Authority: 38 U.S.C. 3103(b)(3), Pub. L. 101–508)

(b) *Character of discharge.* (1) The basic twelve-year period of eligibility shall not begin to run during any period when the veteran had not met the requirement of a discharge or release from the active military, naval or air services under conditions other than dishonorable before:

(i) The discharge or release was changed by appropriate authority, or

(ii) The Department of Veterans Affairs determines that the discharge or release was under conditions other than dishonorable.

(2) The basic twelve-year period shall not begin to run during any period in which the veteran's discharge or dismissal was considered a bar to benefits by the Department of Veterans Affairs,

before this bar is removed by the Department of Veterans Affairs.

(3) When there is a change in the character of discharge or dismissal under paragraph (b) (1) or (2) of this section the beginning date of the basic twelve-year period of eligibility is the effective date of the change. Determination of character of discharge and change in the character of discharge shall be made under the provisions of § 3.12. The ending date is twelve years from the beginning date.

(Authority: 38 U.S.C. 3103(b)(2))

(c) *Medical condition prevents initiation or continuation.* (1) The basic 12-year period of eligibility shall not begin to run or continue to run during any period of 30 days or more in which the veteran's participation in vocational rehabilitation is infeasible because of the veteran's medical condition, which condition may include the disabling effects of chronic alcoholism, subject to paragraph (c)(5) of this section. The 12-year period shall begin or resume when it is feasible for the veteran to participate in a vocational rehabilitation program, as that term is defined in § 21.35.

(2) The term *disabling effects of chronic alcoholism* means alcohol-induced physical or mental disorders or both, such as habitual intoxication, withdrawal, delirium, amnesia, dementia, and other like manifestations of chronic alcoholism which, in the particular case:

(i) Have been medically diagnosed as manifestations of alcohol dependency or chronic alcohol abuse; and

(ii) Are determined to have prevented commencement or completion of the affected individual's rehabilitation program.

(3) A diagnosis of alcoholism, chronic alcoholism, alcohol dependency, chronic alcohol abuse, etc., in and of itself, does not satisfy the definition of *disabling effects of chronic alcoholism.*

(4) Injury sustained by a veteran as a proximate and immediate result of activity undertaken by the veteran while physically or mentally unqualified to do so due to alcoholic intoxication is not considered a disabling effect of chronic alcoholism.

(5) The disabling effects of chronic alcoholism, which prevent initiation or continuation of participation in a vocational rehabilitation program after November 17, 1988, shall not be considered to be the result of willful misconduct.

(Authority: 38 U.S.C. 3103(b)(1), Pub. L. 100–689)

[49 FR 40814, Oct. 18, 1984; 50 FR 9622, Mar. 11, 1985, as amended at 55 FR 40171, Oct. 2, 1990; 56 FR 15836, Apr. 18, 1991]

### § 21.44 Extension beyond basic period of eligibility because of serious employment handicap.

The basic period of eligibility of a veteran with a serious employment handicap may be extended when the veteran's employment and particular handicap necessitate an extension as necessary to pursue a vocational rehabilitation program under the following conditions:

(a) *Not rehabilitated to the point of employability.* The basic period of eligibility may be extended when the veteran has not previously been rehabilitated to the point of employability.

(Authority: 38 U.S.C. 3103(c))

(b) *Rehabilitated to the point of employability.* The veteran was previously declared rehabilitated to the point of employability, under the Department of Veterans Affairs vocational rehabilitation program, but either:

(1) The veteran's service-connected disability or disabilities have worsened to the extent that he or she is unable to perform the duties of the occupation in which he or she is trained, or in a related occupation; or

(2) The occupation in which the veteran was rehabilitated to the point of employability is not presently suitable in view of the veteran's current employment handicap and capabilities. (The finding of unsuitability must be based upon objective evidence developed in the course of reconsideration which shows that the nature or extent of the veteran's employment handicap and his or her capabilities are significantly different than were previously found.) or;

(3) Occupational requirements have changed and additional services are needed to help the veteran continue in

the occupation in which he or she was trained or in a related field.

(Authority: 38 U.S.C. 3103(c))

### §21.45 Extension beyond basic period of eligibility for a program of independent living services.

The period of eligibility for a veteran to pursue a program of independent living services may be extended beyond the basic twelve-year period under the following conditions:

(a) The veteran's medical condition (service and nonservice-connected disabilities) is so severe that achievement of a vocational goal is not currently reasonably feasible, or (b) the extension is necessary to ensure that he or she will achieve maximum independence in daily living.

(Authority: 38 U.S.C. 3103(d); Pub. L. (99–576)

[49 FR 40814, Oct. 18, 1984, as amended at 53 FR 50956, Dec. 19, 1988]

### §21.47 Eligibility for employment assistance.

(a) *Providing employment services to veterans eligible for a rehabilitation program under chapter 31.* Each veteran, other than one found in need of a program of independent living services and assistance, who is otherwise currently eligible for and entitled to participate in a program of rehabilitation under chapter 31 may receive employment services. Included are those veterans who:

(1) Have completed a program of rehabilitation services under chapter 31 and been declared rehabilitated to the point of employability;

(2) Have not completed a period of rehabilitation to the point of employability under chapter 31, but:

(i) Have elected to secure employment without completing the period of rehabilitation to the point of employability; and

(ii) Are employable; or

(3) Have never received services for rehabilitation to the point of employability under chapter 31 if they:

(i) Are employable or employed in a suitable occupation;

(ii) Have an employment handicap or a serious employment handicap; and

(iii) Need employment services to secure and/or maintain suitable employment.

(Authority: 38 U.S.C. 3102)

(b) *Veteran previously participated in a VA vocational rehabilitation program or a similar program under the Rehabilitation Act of 1973, as amended.* A veteran who at some time in the past has participated in a vocational rehabilitation program under chapter 31 or a similar program under the Rehabilitation Act of 1973 as amended, and is employable is eligible for employment services under the following conditions even though he or she is ineligible for any other assistance under chapter 31:

(1) The veteran is employable in a suitable occupation;

(2) The veteran has filed a claim for vocational rehabilitation or employment assistance;

(3) The veteran meets the criteria for eligibility described in §21.40(a); and

(4) The veteran has an employment handicap or serious employment handicap; and

(5) The veteran:

(i) Completed a vocational rehabilitation program under 38 U.S.C. ch. 31 or participated in such a program for at least 90 days on or after September 16, 1940; or

(ii) Completed a vocational rehabilitation program under the Rehabilitation Act of 1973 after September 26, 1975, or participated in such a program which included at least 90 days of post-secondary education or vocational training.

(Authority: 38 U.S.C. 3117)

(c) *Veteran never received vocational rehabilitation services from the Department of Veterans Affairs or under the Rehabilitation Act of 1973.* If a veteran is currently ineligible under chapter 31 because he or she does not have an employment handicap, and has never before participated in a vocational rehabilitation program under chapter 31 or under the Rehabilitation Act of 1973, no employment assistance may now be provided to the veteran under chapter 31.

(Authority: 38 U.S.C. 3117)

(d) *Duration of period of employment assistance.* The periods during which employment assistance may be provided are not subject to limitations on periods of eligibility for vocational rehabilitation provided in §§ 21.41 through 21.45 of this part, but entitlement to such assistance is, as provided in § 21.73 of this part, limited to 18 total months of assistance.

(Authority: 38 U.S.C. 3105)

[54 FR 21215, May 17, 1989, as amended at 56 FR 15836, Apr. 18, 1991]

### § 21.48 Severance of service-connection—reduction to noncompensable degree.

When a rating action is taken which proposes severance of service-connection or reduction to a noncompensable degree, the provisions of the following paragraphs will govern the veteran's entitlement to rehabilitation and employment assistance under 38 U.S.C. Chapter 31.

(a) *Applicant.* If the veteran is an applicant for rehabilitation or employment assistance when the proposed rating action is taken, all processes respecting determination of entitlement or induction into training shall be immediately suspended. In no event shall any veteran be inducted into a rehabilitation program or provided employment assistance during the interim periods provided in § 3.105 (d) and (e) of this title. If the proposed rating action becomes final, the application will be denied. See also § 21.50 as to initial evaluation.

(Authority: 38 U.S.C. 3104)

(b) *Reduction while in a rehabilitation program.* If the proposed rating action is taken while the veteran is in a rehabilitation program and results in a reduction to a noncompensable rating of his or her disability, the veteran may be retained in the program until the completion of the program, except if ''discontinued'' under § 21.198 he or she may not reenter.

(Authority: 38 U.S.C. 3103)

(c) *Severance while in a rehabilitation program.* If the proposed rating action is taken while the veteran is in a rehabilitation program and results in severance of the service-connection of his or her disability, rehabilitation will be terminated effective as of the last day of the month in which severance of service-connection becomes final.

(Authority: 38 U.S.C. 3103)

INITIAL AND EXTENDED EVALUATION

### § 21.50 Initial evaluation.

(a) *Eligibility for initial evaluation.* VA shall provide an initial evaluation to each individual who applies for benefits under chapter 31 if the individual's compensable service-connected disability meets one of the conditions contained in § 21.40(a).

(Authority: 38 U.S.C. 3102(1), Pub. L. 101–508)

(b) *Purpose.* An initial evaluation will be provided to each individual who meets the conditions of paragraph (a) of this section to:

(1) Determine the existence of an employment handicap;

(2) Determine the basic twelve-year period of eligibility;

(3) Determine whether an employment handicap shall be considered a serious employment handicap;

(4) Determine whether the basic twelve-year period of eligibility is extended for a veteran with a serious employment handicap;

(5) Determine as expeditiously as possible, without extended evaluation, whether achievement of a vocational goal is currently reasonably feasible.

(6) Evaluate the ability of the veteran to live and function independently within the veteran's family and community;

(7) Determine if the veteran is eligible for employment services under § 21.47;

(8) Develop information necessary to plan an individual program for a veteran found eligible and entitled to services under Chapter 31; and

(9) Assist a veteran who is found ineligible for assistance under Chapter 31 to identify other resources and programs for which he or she may be eligible.

(Authority: 38 U.S.C. 523, 3106(a), (d), 3116)

(c) *Scope of initial evaluation.* The initial evaluation shall include consideration of:

(1) The handicapping effects of the veteran's service-connected disability on employability and independence in daily living;

(2) The veteran's residual physical and mental capabilities which contribute to employability and independence in daily living;

(3) The veteran's ability to function independently in family and community;

(4) Prior assessments of employability by a counseling psychologist;

(5) Assessments authorized to provide additional information necessary for initial evaluation; and

(6) The veteran's personal history including:

(i) Education and training;

(ii) Employment;

(iii) Nonservice-connected dis- ability(ies), and

(iv) Family and community adjustment.

(Authority: 38 U.S.C. 3106(a))

(d) *Responsibility for initial evaluation.* (1) All determinations regarding service requirements for basic entitlement and, the beginning and ending dates of a veteran's basic twelve-year period of eligibility shall be made by appropriate staff of the Adjudication Division.

(2) All other determinations, including extension of the basic twelve-year period because of serious employment handicap, and entitlement to assistance under Chapter 31 shall be made by appropriate staff of the Vocational Rehabilitation and Employment Division.

(Authority: 38 U.S.C. 3102, 3103, 3115(a))

(e) *Cooperation of the veteran.* The cooperation of the veteran is essential to an initial evaluation. The purpose of the initial evaluation and the steps in the process shall be explained to the veteran and his or her cooperation requested. If the veteran does not cooperate in the initiation or completion of the initial evaluation the counseling psychologist shall make a reasonable effort through counseling to secure the veteran's cooperation. If the veteran's cooperation cannot be secured, the counseling psychologist shall suspend the initial evaluation until such time as the veteran cooperates. The veteran will be informed of any suspension of the initial evaluation, the reasons for this action, and the steps necessary to resume the evaluation.

(Authority: 38 U.S.C. 3111)

[49 FR 40814, Oct. 18, 1984, as amended at 53 FR 50956, Dec. 19, 1988; 56 FR 15836, Apr. 18, 1991]

## §21.51 Employment handicap.

(a) *Importance of decision.* The proper determination of employment handicap is a critical decision for rehabilitation planning and program accountability. To the extent possible, necessary information shall be developed in the course of initial evaluation and the significance of the information under paragraphs (d) and (e) of this section for determining employment handicap shown in each case.

(Authority: 38 U.S.C. 3101(1), 3102)

(b) *Definition.* The term *employment handicap* means an impairment of the veteran's ability to prepare for, obtain, or retain employment consistent with the veteran's abilities, aptitudes, and interests.

(Authority: 38 U.S.C. 3101(1))

(c) *Components of employment handicap.* Components of employment handicap include:

(1) *Impairment.* This term means the restrictions on employability caused by:

(i) The veteran's service and nonservice-connected disabilities;

(ii) Deficiencies in education and training;

(iii) Negative attitudes toward the disabled; and

(iv) Other pertinent factors.

(2) *Service-connected disability.* The veteran's service-connected disability need not be the sole or primary cause of the employment handicap but it must materially contribute to the impairment described in paragraph (c)(1) of this section. Therefore its effects must be identifiable, measurable, or observable.

(3) *Nonservice-connected disability.* This term includes all physical and

mental disabilities which have not been found to be service-connected by the Department of Veterans Affairs, including alcoholism and drug abuse. The effects of alcoholism and drug abuse are to be considered in the same manner as other nonservice-connected disabilities in evaluating restrictions on employability. When the manifestations of alcoholism, drug abuse or other nonservice-connected disabilities raise questions as to the reasonable feasibility of a vocational goal for a veteran otherwise entitled to assistance under Chapter 31 such questions will be resolved under provisions of § 21.53.

(4) *Consistency with abilities, aptitudes, and interests.* The following points should be considered to determine if the veteran's training and employment are consistent with his or her abilities, aptitudes and interests:

(i) A finding that a veteran is employed in an occupation which is consistent with his or her abilities, aptitudes and interests may not be made if the occupation does not require reasonably developed skills, except under conditions described in paragraphs (e)(2) and (3), of this section;

(ii) The veteran's residual capacities, as well as limitations arising from the veteran's service and nonservice-connected disabilities are relevant;

(iii) Evidence of the consistency of interests with training and employment may be based on:

(A) The veteran's statements to a Department of Veterans Affairs counseling psychologist during initial evaluation or subsequent reevaluation;

(B) The veteran's history of participation in specific activities; or

(C) Information developed by the Department of Veterans Affairs through use of interest inventories.

(Authority: 38 U.S.C. 3102)

(d) *Determining extent of impairment.* The extent of the veterans impairment shall be assessed through consideration of factors described in paragraph (c)(1) of this section:

(e) *Material contribution of service-connected disability to the impairment.* A finding that the veteran's service-connected disability materially contributes to his or her impairment to employment will be made by assessing the following factors:

(1) *Preparation for employment.* The service-connected condition adversely affects the veteran's current ability to prepare for employment in one or more fields which would otherwise be consistent with the veteran's abilities, aptitudes, and interests. An adverse effect is demonstrated when the physical or psychological results of the service-connected condition:

(i) Impair the veteran's ability to train;

(ii) Prevent or impede access to training facilities; or

(iii) Diminish the veteran's motivation and ability to mobilize his or her energies for education or training.

(2) *Obtaining employment.* The service-connected condition places the veteran at a competitive disadvantage with similarly circumstanced nondisabled persons in obtaining employment. A veteran without reasonably developed specific job skills shall be considered to be at a competitive disadvantage unless evidence of record shows a history of current, stable, continuing employment.

(3) *Retaining employment.* The physical or psychological effects of a service-connected condition adversely affect the veteran's ability to maintain employment which requires reasonably developed skills. This criterion is not met if a veteran though lacking reasonably developed skills, has a history of continuing, stable employment.

(Authority: 38 U.S.C. 3101(1))

(f) *Determination of employment handicap.* The counseling psychologist may find the veteran has an employment handicap.

(1) An employment handicap which entitles the veteran to assistance under this program exists when all of the following conditions are met:

(i) The veteran has an impairment of employability; this includes veterans who are qualified for suitable employment, but do not obtain or retain such employment for reasons not within their control;

(ii) The veteran's service-connected disability materially contributes to the impairment of employability;

(iii) The veteran has not overcome the effects of the impairment of employability through employment in an occupation consistent with his or her pattern of abilities, aptitudes and interests.

(2) An employment handicap does not exist when *any* of the following conditions is present:

(i) The veteran's employability is not impaired; this includes veterans who are qualified for suitable employment, but do not obtain or retain such employment for reasons within their control;

(ii) The veteran's employability is impaired, but his or her service-connected disability does not materially contribute to the impairment of employability.

(iii) The veteran has overcome the effects of the impairment of employability through employment in an occupation consistent with his or her pattern of abilities, aptitudes and interests, and is successfully maintaining such employment.

(Authority: 38 U.S.C. 3102)

(g) *Eligibility for employment assistance.* If a veteran is not found to have an employment handicap a separate determination of his or her eligibility for employment assistance will be made under provisions of §21.47.

(Authority: 38 U.S.C. 3117)

(h) *Responsibility for determinations.* The determination of an employment handicap and eligibility for employment assistance may only be made by a counseling psychologist in the Vocational Rehabilitation and Employment Division.

(Authority: 38 U.S.C. 3106(a))

[49 FR 40814, Oct. 18, 1984; 50 FR 9622, Mar. 11, 1985, as amended at 54 FR 21216, May 17, 1989]

### §21.52 Serious employment handicap.

(a) *Requirement of determination of serious employment handicap.* A separate determination whether a serious employment handicap exists shall be made in each case in which an employment handicap is found.

(Authority: 38 U.S.C. 3106(a))

(b) *Definition.* The term *serious employment handicap* means a significant impairment of a veteran's ability to prepare for, obtain or retain employment consistent with such veteran's abilities, aptitudes, and interests.

(Authority: 38 U.S.C. 3101(7))

(c) *Serious employment handicap exists.* A veteran who has been found to have an employment handicap shall also be held to have serious employment handicap if he or she has:

(1) A neuropsychiatric service-connected disability rated at thirty percent or more disabling; or

(2) Any other service-connected disability rated at fifty percent or more disabling.

(d) *Serious employment handicap may exist.* A veteran with a nonneuropsychiatric service-connected disability may be found to have a serious employment handicap even though the disability is rated at thirty or forty percent disabling, when either of the following conditions exists:

(1) The veteran has a prior history of poor adjustment in training and employment, and special efforts will be needed if the veteran is to be rehabilitated; or

(2) The veteran's situation presents special problems due to nonservice-connected disability, family pressures, etc., and a number of special and supportive services are needed to effect rehabilitation.

(e) *Serious employment handicap normally not found.* A finding of serious employment handicap will normally not be made when a veteran's service-connected disability is rated at less than thirty percent disabling. A finding of serious employment handicap may nevertheless be made when:

(1) The veteran's service-connected disability has caused substantial periods of unemployment or unstable work history;

(2) The veteran has demonstrated a pattern of maladaptive behavior which is shown by a history of withdrawal from society or continuing dependency on government income support programs; and

(f) *Responsibility for determining serious employment handicap.* A counseling

psychologist in the Vocational Rehabilitation and Employment Division shall make determinations of serious employment handicap.

(Authority: 38 U.S.C. 3106(a))

[49 FR 40814, Oct. 18, 1984, as amended at 54 FR 37332, Sept. 8, 1989]

### § 21.53 Reasonable feasibility of achieving a vocational goal.

(a) *Requirement.* The Department of Veterans Affairs shall determine the reasonable feasibility of achieving a vocational goal in each case in which a veteran has either:

(1) An employment handicap, or

(2) A serious employment handicap.

(Authority: 38 U.S.C. 3106(a))

(b) *Definition.* The term *vocational goal* means a gainful employment status consistent with the veteran's abilities, aptitudes, and interests.

(Authority: 38 U.S.C. 3101(8))

(c) *Expeditious determination.* The determination of reasonable feasibility shall be made as expeditiously as possible when necessary information has been developed in the course of initial evaluation. If an extended evaluation is necessary as provided in § 21.57 a decision of feasibility shall be made by the end of the extended evaluation. Any reasonable doubt shall be resolved in favor of a finding of feasibility.

(Authority: 38 U.S.C. 3105(d))

(d) *Vocational goal is reasonably feasible.* Achievement of a vocational goal is reasonably feasible for a veteran with either an employment or serious employment handicap when the following conditions are met:

(1) Vocational goal(s) has (have) been identified;

(2) The veteran's physical and mental conditions permit training for the goal(s) to begin within a reasonable period; and

(3) The veteran:

(i) Possesses the necessary educational skills and background to pursue the vocational goal; or

(ii) Will be provided services by the Department of Veterans Affairs to develop such necessary educational skills as part of the program.

(Authority: 38 U.S.C. 3104(a)(1), 3106(a))

(e) *Criteria for reasonable feasibility not met.* (1) When VA finds that the provisions of paragraph (d) of this section are not met, but VA has not determined that achievement of a vocational goal is not currently reasonably feasible, VA shall provide the rehabilitation services contained in § 21.35(i)(1)(i) of this part as appropriate;

(2) A finding that achievement of a vocational goal is infeasible without a period of extended evaluation requires compelling evidence which establishes infeasibility beyond any reasonable doubt.

(Authority: 38 U.S.C. 3104(a)(1), 3106(b))

(f) *Independent living services.* The counseling psychologist shall determine the current reasonable feasibility of a program of independent living services in each case in which a vocational rehabilitation program is not found reasonably feasible. The concurrence of the Vocational Rehabilitation and Employment (VR&C) Officer is required in any case in which the counseling psychologist does not approve a program of independent living services.

(Authority: 38 U.S.C. 3100)

(g) *Responsible staff.* A counseling psychologist in the Vocational Rehabilitation and Employment Division shall determine whether achievement of a vocational goal is:

(1) Reasonably feasible; or

(2) Not currently reasonably feasible under the provisions of paragraph (e) of this section for the purpose of determining present eligibility to receive a program of independent living services.

(Authority: 38 U.S.C. 3106(b), Pub. L. 99–576)

[49 FR 40814, Oct. 18, 1984, as amended at 53 FR 50956, Dec. 19, 1988; 54 FR 37332, Sept. 8, 1989]

### § 21.57 Extended evaluation.

(a) *Purpose.* The purpose of an extended evaluation for a veteran with a serious employment handicap is to determine the current feasibility of the

veteran achieving a vocational goal, when this decision reasonably cannot be made on the basis of information developed during the initial evaluation.

(Authority: 38 U.S.C. 3106(c), Pub. L. 99–576)

(b) *Scope of services.* During the extended evaluation, a veteran may be provided:

(1) Diagnostic and evaluative services;

(2) Services to improve his or her ability to attain a vocational goal;

(3) Services to improve his or her ability to live and function independently in the community;

(4) An allowance as provided in §21.260.

(Authority: 38 U.S.C. 3104)

(c) *Determination.* (1) The determination of the reasonable feasibility of a veteran achieving a vocational goal will be made at the earliest time possible during an extended evaluation, but not later than the end of the period of evaluation, or an extension of that period. Any reasonable doubt as to feasibility will be resolved in the veteran's favor;

(Authority: 38 U.S.C. 3106(d))

(2) When it is reasonably feasible for the veteran to achieve a vocational goal, an individualized written rehabilitation plan (IWRP) will be developed as indicated in §21.84 of this part.

(Authority: 38 U.S.C. 3106(b))

(d) *Responsibility for determining the need for a period of extended evaluation.* A counseling psychologist in the Vocational Rehabilitation and Employment Division shall determine whether a period of extended evaluation is needed.

(Authority: 38 U.S.C. 3106(c))

[49 FR 40814, Oct. 18, 1984, as amended at 53 FR 50956, Dec. 19, 1988; 54 FR 37332, Sept. 8, 1989; 62 FR 17707, Apr. 11, 1997]

### §21.58 Redetermination of employment handicap and serious employment handicap.

(a) *Prior to induction into a program.* A determination as to employment handicap, serious employment handicap, or eligibility for a program of employment services will not be changed except for:

(1) Unmistakable error in fact or law; or

(2) New and material evidence which justifies a change.

(b) *After induction into a program.* (1) The Department of Veterans Affairs will not redetermine a finding of employment handicap, serious employment handicap, or eligibility for a program of employment services subsequent to the veteran's induction into a program because of a reduction in his or her disability rating, including a reduction to 0 percent:

(2) The Department of Veterans Affairs may consider whether a finding of employment handicap should be changed to serious employment handicap when there is an increase in the degree of service-connected disability, or other significant change in the veteran's situation;

(3) A redetermination of employment handicap, serious employment handicap, or eligibility for a program of employment services will be made when there is a clear and unmistakable error of fact or law.

(Authority: 38 U.S.C. 3102, 3106)

(c) *Following rehabilitation or discontinuance.* A veteran's eligibility and entitlement to assistance must be redetermined in any case in which:

(1) The veteran is determined to be rehabilitated to the point of employability under the provisions of §21.190;

(2) The veteran is determined to meet the requirements for rehabilitation under the provisions of §21.196; or

(3) The veteran's program is discontinued under the provisions of §21.198, except as described in §21.198(c)(3).

(Authority: 38 U.S.C. 3102, 3111)

### §21.59 Review and appeal of decisions on eligibility and entitlement.

A veteran may appeal decisions of the Vocational Rehabilitation and Employment staff on eligibility and entitlement to rehabilitation services to the Board of Veterans Appeals as provided in §19.2 of Title 38, CFR. However, the veteran or an accredited representative, on his or her behalf, may

request administrative review by Central Office prior to filing an appeal to BVA. A case already on appeal to BVA may not be referred to Central Office for administrative review or advisory opinion.

(Authority: 38 U.S.C. 3107(c))

VOCATIONAL REHABILITATION PANEL

### § 21.60 Vocational Rehabilitation Panel.

(a) *Establishment of the Panel.* A Vocational Rehabilitation Panel will be established at each field facility by the facility head. The purpose of the Panel is to provide technical assistance in the planning of rehabilitation programs for seriously disabled veterans and dependents. This purpose will be most effectively carried out through use of the services of a wide range of professionals to bring the resources of the Department of Veterans Affairs and the community to bear on problems presented in the individual case.

(Authority: 38 U.S.C. 3104(a))

(b) *Composition of the Panel.* The Panel will include, but not be limited to the following:

(1) A counseling psychologist in the VR&C (Vocational Rehabilitation and Employment) Division as the chairperson;

(2) A vocational rehabilitation specialist in VR&C;

(3) A medical consultant from a Department of Veterans Affairs Medical Center;

(4) A member of the Social Services staff from a Department of Veterans Affairs Medical Center; and

(5) Other specialists from the Department of Veterans Affairs.

(Authority: 38 U.S.C. 3104(a), 3115(a))

(c) *Appointment to the Panel.*

(1) The VR&C (Vocational Rehabilitation and Employment) Officer may not serve as either chairperson or member of the Panel.

(2) The VR&C Officer will arrange for the participation of nonmedical professional staff in the Panel's meetings.

(Authority: 38 U.S.C. 3115(a)(2))

(d) *Scope of Panel review.* The Panel will review each case which has been referred to it in relation to:

(1) Specific reason for the referral; and

(2) Other problem areas which the Panel identifies in the course of its consideration of the case.

(e) *Referral.* A case may be referred to the Panel by:

(1) A counseling psychologist in VR&C;

(2) A vocational rehabilitation specialist in VR&C; or

(3) The VR&C officer.

(f) *Report.* The Panel must prepare a report on its findings and recommendations in each case. The Panel's recommendations may include specific actions which are warranted on the basis of current information, or may identify additional information needed to provide a sounder basis for planning the veteran's program of rehabilitation.

(Authority: 38 U.S.C. 3104(a))

### § 21.62 Duties of the Vocational Rehabilitation Panel.

(a) *Consultation requested.* The panel shall provide technical and consultative services when requested by professional staff of the Vocational Rehabilitation and Employment (VR&C) Division to:

(1) Assist staff members in planning and carrying out a rehabilitation plan for seriously disabled veterans and their dependents; and

(2) Consider other cases of individuals eligible for, or being provided assistance under chapter 31 and other programs of education and training administered by the Department of Veterans Affairs.

(Authority: 38 U.S.C. 3104(a))

(b) *Independent living services.* The Panel has a key responsibility to assure that seriously disabled service-connected veterans who need independent living services to increase their independence in daily living are provided necessary services. In carrying out this responsibility the Panel shall review all cases which come before it to assure that the proposed program of vocational rehabilitation or independent living services includes

those services necessary to enable the veteran to achieve the goals of the program.

(Authority: 38 U.S.C. 3100)

(c) *Dependents.* The specific duties of the Panel with respect to dependents are more fully described §§21.3300, 21.3301, 21.3304, 21.4105, and 21.4276 of this part.

(Authority: 38 U.S.C. 3536, 3540, 3541, 3542, 3543)

[54 FR 37332, Sept. 8, 1989]

DURATION OF REHABILITATION PROGRAMS

### §21.70 Vocational rehabilitation.

(a) *General.* The goal of a vocational rehabilitation program is to:

(1) Evaluate and improve the veteran's ability to achieve a vocational goal;

(2) Provide services needed to qualify for suitable employment;

(3) Enable the veteran to achieve maximum independence in daily living;

(4) Enable the veteran to become employed in a suitable occupation and to maintain suitable employment.

(b) *Vocational rehabilitation program.* This term includes:

(1) The services that are needed for the accomplishment of the purposes of Chapter 31, including such counseling, diagnostic, medical, social, psychological, independent living, economic, educational, vocational, and employment services as are determined by the Department of Veterans Affairs to be needed;

(i) In the case of a veteran for whom the achievement of a vocational goal has not been found to be currently infeasible such needed services include:

(A) Determining whether a vocational goal is reasonably feasible;

(B) Improving the veteran's potential to participate in a program of services designed to achieve a vocational goal;

(C) Enabling the veteran to achieve maximum independence in daily living;

(ii) In the case of a veteran for whom achievement of a vocational goal is feasible, such needed services include assisting the veteran to become, to the maximum extent feasible, employable and to obtain and maintain suitable employment;

(2) The term also includes the monetary assistance authorized by Chapter 31 for a veteran receiving any of the services described in this paragraph.

(Authority: 38 U.S.C. 3101(9); Pub. L. 99–576)

(c) *Duration of vocational rehabilitation.* Decisions on the duration of periods for attaining the goals named in paragraph (a) of this section are made in the course of development and approval of the Individualized Written Rehabilitation Plan. However, the duration of a vocational rehabilitation program may not exceed 48 months (or its equivalent when pursued on a part-time basis), except as provided in §21.78.

(Authority: 38 U.S.C. 3695, 3105)

[49 FR 40814, Oct. 18, 1984; 50 FR 9622, Mar. 11, 1985, as amended at 53 FR 50957, Dec. 19, 1988]

### §21.72 Rehabilitation to the point of employability.

(a) *General.* Rehabilitation to the point of employability may include the services needed to:

(1) Evaluate and improve the veteran's ability to undertake training;

(2) Train the veteran to the level generally recognized as necessary for entry into employment in a suitable occupational objective. Where a particular degree, diploma, or certificate is generally necessary for entry into the occupation, e.g., an MSW for social work, the veteran shall be trained to that level.

(Authority: 38 U.S.C. 3101(5), 3104)

(b) *When duration of training may exceed general requirements*—(1) *Employment handicap.* If the amount of training necessary to qualify for employment in a particular occupation in a geographical area where a veteran lives or will seek employment exceeds the amount generally needed for employment in that occupation, the Department of Veterans Affairs will provide, or arrange for the necessary additional training.

(2) *Serious employment handicap.* The Department of Veterans Affairs will assist a veteran with a serious employment handicap to train to a higher level than is usually required to qualify in a particular occupation, when one of the following conditions exist:

(i) The veteran is preparing for a type of work in which he or she will be at a definite disadvantage in competing with nondisabled persons for jobs or business, and the additional training will help to offset the competitive disadvantage;

(ii) The number of feasible occupations are restricted, and additional training will enhance the veteran's employability in one of those occupations;

(iii) The number of employment opportunities within feasible occupations are restricted.

(Authority: 38 U.S.C. 3105(c))

(c) *Responsibility for estimating duration of training.* (1) The counseling psychologist shall estimate the duration of training and the estimate shall be incorporated in the IWRP (Individualized Written Rehabilitation Plan). When the period of training is estimated to exceed 48 months, the concurrence of the Vocational Rehabilitation and Employment Officer is required, prior to approving the IWRP, under conditions listed in § 21.78.

(2) The estimated duration of the period of training required to complete an original or amended IWRP may be extended when necessary. Authorization of an extension is the responsibility of the counseling psychologist, except as provided in paragraph (d) of this section. Any extension which will result in use of more than 48 months of entitlement must meet conditions described in § 21.78.

(Authority: 38 U.S.C. 3695(b))

(d) *Extension of training by the vocational rehabilitation specialist.* (1) The VRS (Vocational Rehabilitation Specialist) may authorize an extension of up to six months of the period of vocational rehabilitation training authorized by the IWRP when:

(i) The veteran is in *rehabilitation to the point of employability* status under § 21.190;

(ii) The veteran has completed more than half of the prescribed training;

(iii) The veteran is making satisfactory progress;

(iv) The extension is necessary to complete training;

(v) Training can be completed within six months; and

(vi) The extension will not result in use of more than 48 months of entitlement under Chapter 31 alone or in combination with other programs identified in § 21.4020.

(2) If the conditions listed in paragraph (d)(1) of this section are not met, and an extension is needed to complete the program, the case will be referred to the counseling psychologist for a determination.

(Authority: 38 U.S.C. 3105(c))

### § 21.73 Duration of employment assistance programs.

(a) *Duration.* Employment assistance may be provided to the veteran for the period necessary to enable the veteran to secure employment in a suitable occupation, and to adjust in the employment. This period shall not exceed 18 months. A veteran may be provided such assistance if he or she is eligible for employment assistance under the provisions of § 21.47 of this part.

(Authority: 38 U.S.C. 3105(b))

(b) *Employment assistance not charged against Chapter 31 entitlement.* The period of employment assistance provided in paragraph (a) of this section is not charged against the months of entitlement under Chapter 31 (see § 21.70).

(Authority: 38 U.S.C. 3105(b))

[49 FR 40814, Oct. 18, 1984, as amended at 54 FR 21216, May 17, 1989]

### § 21.74 Extended evaluation.

(a) *General.* An extended evaluation may be authorized for the period necessary to determine whether the attainment of a vocational goal is currently reasonably feasible for the veteran. The services which may be provided during the period of extended evaluation are listed in § 21.57(b) of this part.

(Authority: 38 U.S.C. 3105(a), 3106(a))

(b) *Duration.* An extended evaluation may not be for less than two weeks (full or part-time equivalent) nor for more than twelve months, unless a longer period is necessary to determine whether achievement of a vocational goal is reasonably feasible.

(Authority: 38 U.S.C. 3105(a))

(c) *Approval of the period of an extended evaluation.* (1) The counseling psychologist may approve an initial period of up to 12 months for an extended evaluation.

(2) An additional period of extended evaluation of up to 6 months may be approved by the counseling psychologist, if there is reasonable certainty that the feasibility of achieving a vocational goal can be determined during the additional period. The counseling psychologist will obtain the concurrence of the Vocational Rehabilitation and Employment (VR&C) Officer before approving the extension of a period of extended evaluation.

(3) An extension beyond a total period of 18 months for additional periods of up to 6 months each may only be approved by the counseling psychologist if there is a substantial certainty that a determination of current feasibility may be made within this extended period. The concurrence of the VR&C Officer is also required for this extension.

(Authority: 38 U.S.C. 3105(a), 3106(b); Pub. L. 99–576)

[49 FR 40814, Oct. 18, 1984, as amended at 53 FR 50957, Dec. 19, 1988; 54 FR 37332, Sept. 8, 1989; 62 FR 17707, Apr. 11, 1997]

### §21.76 Independent living.

(a) *General.* A program of independent living services may be authorized to enable the veteran to:

(1) Reach the goals of the program, and

(2) Maintain the newly achieved level of independence in daily living.

(Authority: 38 U.S.C. 3101(4), 3104(b))

(b) *Period of independent living services.* The duration of an independent living services program may not exceed 24 months unless the counseling psychologist finds that an additional period of up to 6 months would enable the veteran to substantially increase his or her level of independence in daily living. The concurrence of the Vocational Counseling and Rehabilitation Officer in this finding is required.

(Authority: 38 U.S.C. 3105(d))

[49 FR 40814, Oct. 18, 1984, as amended at 54 FR 37332, Sept. 8, 1989]

### §21.78 Approving more than 48 months of rehabilitation.

(a) *General.* Neither the basic period of entitlement which may be authorized for a program of rehabilitation under Chapter 31 alone, nor a combination of entitlement of Chapter 31 and other programs listed in §21.4020 shall exceed 48 months except as indicated in paragraphs (b) and (c) of this section.

(Authority: 38 U.S.C. 3695)

(b) *Employment handicap.* A rehabilitation program for a veteran with an employment handicap may only be extended beyond 48 months when:

(1) The veteran previously completed training for a suitable occupation but the veteran's service-connected disability has worsened to the point that he or she is unable to perform the duties of the occupation for which training had been provided, and a period of training in the same or a different field is required. An extension beyond 48 months under Chapter 31 alone shall be authorized for this purpose.

(Authority: 38 U.S.C. 3105(c)(1)(A))

(2) The occupation in which the veteran previously completed training is found to be unsuitable because of the veteran's abilities and employment handicap. An extension beyond 48 months under Chapter 31 alone shall be approved for this purpose.

(Authority: 38 U.S.C. 3105(c)(1)(B))

(3) The veteran previously used education benefit entitlement under other programs administered by VA, and the additional period of assistance to be provided under Chapter 31 which the veteran needs to become employable will result in more than 48 months being used under all VA education programs, under these conditions the number of months necessary to complete the program may be authorized

under Chapter 31, provided that the length of the extension will not result in authorization of more than 48 months under Chapter 31 alone.

(Authority: 38 U.S.C. 3695)

(4) A veteran in an approved Chapter 31 program has elected payment of benefits at the Chapter 30 educational assistance rate. The 48 month limitation may be exceeded only:

(i) To the extent that the entitlement in excess of 48 months does not exceed the entitlement previously used by the veteran in a course at the secondary school level under § 21.4235 before December 31, 1989, or

(ii) If the veteran is in a course on a term, quarter, or semester basis which began before the 36 month limitation on Chapter 30 entitlement was reached, and completion of the course will be possible by permitting the veteran to complete the training under Chapter 31.

(Authority: 38 U.S.C. 3013, 3695; Pub. L. 98–525)

(5) The assistance to be provided in excess of 48 months consists only of a period of employment assistance (see § 21.73).

(Authority: 38 U.S.C. 3105(b))

(c) *Serious employment handicap.* The duration of a rehabilitation program for a veteran with a serious employment handicap may be extended beyond 48 months under Chapter 31 for the number of months necessary to complete a rehabilitation program under the following conditions:

(1) To enable the veteran to complete a period of rehabilitation to the point of employability;

(2) To provide an extended evaluation in cases in which the total period needed for an extended evaluation and for rehabilitation to the point of employability would exceed 48 months;

(3) To provide a program of independent living services, including cases in which achievement of a vocational goal becomes feasible during or following a program of independent living services;

(4) Following rehabilitation to the point of employability:

(i) The veteran has been unable to secure employment in the occupation for which training has been provided despite intensive efforts on the part of the Department of Veterans Affairs and the veteran, and a period of retraining or additional training is needed;

(ii) The skills which the veteran developed in training for an occupation in which he or she was employed are no longer adequate to maintain employment in that field and a period of retraining is needed;

(iii) The veteran's service-connected disability has worsened to the point that he or she is unable to perform the duties of the occupation for which the veteran has been trained, and a period of training in the same or different field is required;

(iv) The occupation in which the veteran previously completed training is found to be unsuitable due to the veteran's abilities and employment handicap.

(5) The assistance to be provided in excess of 48 months consists, only of a period of employment assistance. (see § 21.73).

(Authority: 38 U.S.C. 3105(c)(2))

(d) *Approval of extension beyond 48 months.* All extensions of a rehabilitation program beyond 48 months of total entitlement under all Department of Veterans Affairs programs requires the approval of the counseling psychologist and concurrence of the Vocational Rehabilitation and Employment Officer. Concurrence of the VR&C officer is not required for an extension due to provision of employment assistance (see § 21.21).

(Authority: 38 U.S.C. 3105(b))

[49 FR 40814, Oct. 18, 1984, as amended at 54 FR 4283, Jan. 30, 1989; 57 FR 57108, Dec. 3, 1992]

### § 21.79 Determining entitlement usage under Chapter 31.

(a) General. The determination of entitlement usage for chapter 31 participants is made under the provisions of this section except as provided in paragraph (f) of this section. Charges for entitlement usage shall be based upon

the principle that a veteran who pursues a rehabilitation program for 1 day should be charged 1 day of entitlement. The determination of entitlement is based upon the rate at which the veteran pursues his or her rehabilitation program. The rate of pursuit is determined under the provisions of §21.310 of this part.

(Authority: 38 U.S.C. 3108(d))

(b) No charge against chapter 31 entitlement. No charge will be made against chapter 31 entitlement under any of the following circumstances:

(1) The veteran is receiving employment services under an Individualized Employment Assistance Plan (IEAP);

(2) The veteran is receiving an employment adjustment allowance; or

(3) The veteran is on leave from his or her program, but leave is not authorized by the Department of Veterans Affairs.

(Authority: 38 U.S.C. 3108(d), 3117)

(c) Periods during which entitlement may be charged. Charges for usage of chapter 31 entitlement may only be made for program participants in one of the following case statuses:

(1) Rehabilitation to the point of employability;

(2) Extended evaluation; or

(3) Independent living.

(Authority: 38 U.S.C. 3106, 3109)

(d) Method of charging entitlement under chapter 31. The Department of Veterans Affairs will make a charge against entitlement:

(1) On the basis of total elapsed time (1 day of entitlement for each day of pursuit) if the veteran is being provided a rehabilitation program on a full-time basis;

(2) On the basis of a proportionate rate of elapsed time if the veteran is being provided a rehabilitation program on a three-quarter, one-half or less than one-half time basis. Entitlement is charged at a:

(i) Three-quarter time rate if pursuit is three-quarters or more, but less than full-time;

(ii) One-half time rate if pursuit is half-time or more, but less than three-quarter time;

(iii) One-quarter time rate if pursuit is less than half-time. Measurement of pursuit on a one-quarter time basis is limited to veterans in independent living or extended evaluation programs.

(Authority: 38 U.S.C. 3108(d), 3680(g))

(e) *Computing entitlement.* (1) The computation of entitlement is based upon the rate of program pursuit, as determined under §21.310 of this part, over the elapsed time during which training and rehabilitation services were furnished;

(2) The Department of Veterans Affairs will compute elapsed time from the commencing date of the rehabilitation program as determined under §21.322 of this part to the date of termination as determined under §21.324 of this part. This includes the period during which veterans not receiving subsistence allowance because of a statutory bar; e.g., certain incarcerated veterans or servicepersons in a military hospital, nevertheless, received other chapter 31 services and assistance. Elapsed time includes the total period from the commencing date until the termination date, except for any period of unauthorized leave;

(3) If the veteran's rate of pursuit changes after the commencing date of the rehabilitation program, the Department of Veterans Affairs will:

(i) Separate the period of rehabilitation program services into the actual periods of time during which the veteran's rate of pursuit was different; and

(ii) Compute entitlement based on the rate of pursuit for each separate elapsed time period.

(Authority: 38 U.S.C. 3108(f))

(f) *Special situtations.* (1) When a chapter 31 participant elects benefits of the kind provided under chapter 30 or chapter 34 as a part of his or her rehabilitation program under chapter 31, the veteran's entitlement usage will be determined by using the entitlement provisions of those programs. Entitlement charges shall be in accordance with §21.7076 for chapter 30 and §21.1045 under chapter 34. The entitlement usage computed under these provisions is deducted from the veteran's chapter 31 entitlement. No entitlement charges

are made against either chapter 30 or chapter 34.

(Authority: 38 U.S.C. 3108(f))

(2) When a veteran is pursuing on-job training or work experience in a Federal agency on a nonpay or nominal pay basis, the amount of entitlement used is determined in the following manner:

(i) Entitlement used in on-job training in a Federal agency on a nonpay or nominal pay basis is determined in the same manner as other training.

(ii) Entitlement used in pursuing work experience will be computed in the same manner as for veterans in on-job training except that work experience may be pursued on a less than full-time basis. If the veteran is receiving work experience on a less than full-time basis, entitlement charges are based upon a proportionate amount of the workweek. For example, if the workweek is 40 hours, three-quarter time is at least 30 hours, but less than 40 hours, and half-time is at least 20 hours but less than 30 hours.

(Authority: 38 U.S.C. 3108(c))

(3) Entitlement is charged on a full-time basis for a veteran found to have a reduced work tolerance.

(Authority: 38 U.S.C. 3108(d), 3680(g))

(g) Overpayment. The Department of Veterans Affairs will make a charge against entitlement for an overpayment of subsistence allowance under the conditions described in § 21.1045(h) of this part.

(Authority: 38 U.S.C. 3680(g))

[54 FR 47770, Nov. 17, 1989]

INDIVIDUALIZED WRITTEN REHABILITATION PLAN

### § 21.80 Requirement for a rehabilitation plan.

(a) *General.* An IWRP (Individualized Written Rehabilitation Plan) will be developed for each veteran eligible for rehabilitation services under Chapter 31. The plan is intended to assist in:

(1) Providing a structure which allows VR&C staff to translate the findings made in the course of the initial evaluation into specific rehabilitation goals and objectives;

(2) Monitoring the veteran's progress in achieving the rehabilitation goals established in the plan;

(3) Assuring the timeliness of assistance by Department of Veterans Affairs staff in providing services specified in the plan; and

(4) Evaluating the effectiveness of the planning and delivery of rehabilitation services by VR&C staff.

(b) *When a plan is prepared.* A plan will be prepared in each case in which a veteran will pursue:

(1) A vocational rehabilitation program, as that term is defined in § 21.35(i);

(2) An extended evaluation program;

(3) An independent living services program; or

(4) An employment program.

(c) *Plan—a generic term.* The term *plan* refers to the IWRP (Individualized Written Rehabilitation Plan) § 21.84, IEEP (Individualized Extended Evaluation Plan) § 21.86, IEAP (Individualized Employment Assistance Plan) § 21.88, and IILP (Individualized Independent Living Plan) § 21.90.

(Authority: 38 U.S.C. 3107(a))

(d) *Plan not required.* A plan will not be prepared for a veteran who is not eligible for any assistance under Chapter 31. Department of Veterans Affairs staff, with the veteran's assistance and cooperation, will utilize information developed in the course of an initial evaluation to assist the veteran to develop alternatives for education and training, independence in daily living, or employment assistance. This assistance should help the veteran in achieving attainable vocational, independent living and employment goals utilizing benefits and services for which the veteran may be eligible under other Department of Veterans Affairs or non-Department of Veterans Affairs programs.

(Authority: 38 U.S.C. 523, 7722(c))

### § 21.82 Completing the plan under Chapter 31.

(a) *Serious employment handicap.* Each plan for a veteran with a serious employment handicap shall provide for

completion of the program provided by the plan under Chapter 31. The provisions of §21.70 and §21.78(c) are designed to enable a veteran with a serious employment handicap to pursue and complete a rehabilitation plan under Department of Veterans Affairs auspices. These provisions shall be used as necessary to accomplish the goals of the plan.

(Authority: 38 U.S.C. 3105(c), 3107)

(b) *Employment handicap.* A plan for a veteran with an employment handicap that is not a serious employment handicap shall require that the program be completed within 48 months, if the veteran is not eligible for an extension as provided in §21.78. When the program provided by the plan cannot be completed under Chapter 31 because of limitations imposed by the veteran's termination date or months of remaining entitlement, realistic, comprehensive and detailed arrangements must be made which will enable the veteran to successfully complete training under other auspices. If an arrangement cannot be made which meets these requirements, the long-range vocational goal of the veteran must be reevaluated, and another vocational goal selected which can be completed using the veteran's remaining Chapter 31 resources.

(Authority: 38 U.S.C. 3107(a))

(c) *Employment assistance when training is not completed under Chapter 31.* A plan for employment assistance may be implemented even though the veteran's training has not been or will not be completed under Chapter 31.

(Authority: 38 U.S.C. 3117(a))

### §21.84 Individualized written rehabilitation plan.

(a) *Purpose.* The purposes of the IWRP (Individualized Written Rehabilitation Plan) are to:

(1) Identify goals and objectives to be achieved by the veteran during the period of rehabilitation services that will lead to the point of employability;

(2) Plan for placement of the veteran in the occupational field for which training and other services will be provided; and

(3) Specify the key services needed by the veteran to achieve the goals and objectives of the plan.

(Authority: 38 U.S.C. 3107)

(b) *Elements of the plan.* A plan will include the following:

(1) A statement of long-range rehabilitation goals. Each statement of long-range goals shall include at a minimum:

(i) One vocational goal for a veteran with an employment handicap; or

(ii) One vocational goal and, if applicable, one independent living goal for a veteran with a serious employment handicap.

(2) Intermediate rehabilitation objectives; Intermediate objectives are statements of achievement expected of the veteran to attain the long-range goal. The development of appropriate intermediate objectives is the cornerstone of an effective plan. Intermediate objectives should have the following characteristics:

(i) The activity specified relates to the achievement of the goal;

(ii) The activity specified is definable in terms of observable behavior (e.g., pursuing an A.A. degree);

(iii) The activity has a projected completion date;

(iv) The outcome desired upon completion is measurable (e.g., receiving an A.A. degree).

(3) The specific services to be provided by the Department of Veterans Affairs as stated. Counseling shall be included in all plans for a veteran with a serious employment handicap.

(4) The projected starting and completion dates of the planned services and the duration of each service;

(5) Objective criteria and an evaluation procedure and schedule for determining whether the objectives and goals are being achieved as set forth; and

(6) The name, location, and phone number of the VBA case manager.

(Authority: 38 U.S.C. 3107(a))

[49 FR 40814, Oct. 18, 1984; 50 FR 9622, Mar. 11, 1985]

**§ 21.86 Individualized extended evaluation plan.**

(a) *Purpose.* The purpose of an IEEP is to identify the services needed for the VA to determine the veteran's current ability to achieve a vocational goal when this cannot reasonably be determined during the initial evaluation.

(Authority: 38 U.S.C. 3106(a), 3107(a))

(b) *Elements of the plan.* An IEEP shall include the same elements as an IWRP except that:

(1) The long range goal shall be to determine achievement of a vocational goal is currently reasonably feasible;

(2) The intermediate objectives relate to problems of questions which must be resolved for the VA to determine the current reasonable feasibility of achieving a vocational goal.

(Authority: 38 U.S.C. 3106(a), 3107(a))

[53 FR 50957, Dec. 19, 1988]

**§ 21.88 Individualized employment assistance plan.**

(a) *Purpose.* The purpose of the IEAP (Individualized Employment Assistance Plan) is to assure that a comprehensive, thoughtful approach is taken, enabling eligible veterans to secure suitable employment.

(Authority: 38 U.S.C. 3107)

(b) *Requirement for a plan.* An IEAP will be prepared:

(1) As part of an IWRP; or

(2) When the veteran is eligible for employment assistance under provisions of § 21.47.

(Authority: 38 U.S.C. 3107(a))

(c) *Elements of the plan.* The IEAP shall follow the same structure as the IWRP. Each IEAP will include full utilization of community resources to enable the veteran to:

(1) Secure employment; and

(2) Maintain employment.

(Authority: 38 U.S.C. 3117)

(d) *Preparation of the IEAP.* Preparation of the IEAP will be completed:

(1) No later than 60 days before the projected end of the period of rehabilitation services leading to the point of employability; or

(2) Following initial evaluation when employment services constitute the whole of the veteran's program under provisions of § 21.47.

(Authority: 38 U.S.C. 3107(a))

**§ 21.90 Individualized independent living plan.**

(a) *Purpose.* The purpose of the IILP is to identify the steps through which a veteran, whose disabilities are so severe that a vocational goal is not currently reasonably feasible, can become more independent in daily living within the family and community.

(Authority: 38 U.S.C. 3109, 3120)

(b) *Elements of the plan.* The IILP shall follow the same structure as the IWRP. The plan will include:

(1) Services which may be provided under Chapter 31 to achieve independence in daily living;

(Authority: 38 U.S.C. 3104)

(2) Utilization of programs with a demonstrated capacity to provide independent living services for severely handicapped persons;

(Authority: 38 U.S.C. 3104(b), 3120(a))

(3) Services provided under other Department of Veterans Affairs and non-Department of Veterans Affairs programs needed to achieve the goals of the plan;

(Authority: 38 U.S.C. 3107)

(4) Arrangements for maintaining the improved level of independence following completion of the plan.

(Authority: 38 U.S.C. 3107(a))

[49 FR 40814, Oct. 18, 1984, as amended at 53 FR 50957, Dec. 19, 1988]

**§ 21.92 Preparation of the plan.**

(a) *General.* The plan will be jointly developed by Department of Veterans Affairs staff and the veteran.

(b) *Approval of the plan.* The terms and conditions of the plan must be approved and agreed to by the counseling psychologist, the vocational rehabilitation specialist, and the veteran.

(c) *Implementation of the plan.* The vocational rehabilitation specialist or counseling psychologist designated as case manager has the primary role in carrying out Department of Veterans Affairs responsibility for implementation of the plan.

(d) *Responsible staff.* The counseling psychologist has the primary responsibility for the preparation of plans.

(Authority: 38 U.S.C. 3107(a))

**§21.94 Changing the plan.**

(a) *General.* The veteran, the counseling psychologist or the vocational rehabilitation specialist may request a change in the plan at any time.

(Authority: 38 U.S.C. 3107(b))

(b) *Long-range goals.* A change in the staement of a long-range goal may only be made following a reevaluation of the veteran's rehabilitation program by the counseling psychologist. A change may be made when:

(1) Achievement of the current goal(s) is no longer reasonably feasible; or

(2) The veteran's circumstances have changed or new information has been developed which makes rehabilitation more likely if a different long-range goal is established; and

(3) The veteran fully participates and concurs in the change.

(Authority: 38 U.S.C. 3107(b))

(c) *Intermediate objectives or services.* A change in intermediate objectives or services provided under the plan may be made by the case manager when such change is necessary to carry out the statement of long-range goals. The veteran must concur in the change.

(Authority: 38 U.S.C. 3107(b))

(d) *Minor changes.* Minor changes in the plan (e.g., changing the date of a scheduled evaluation) by the case manager may be made without the participation and concurrence of the veteran.

(Authority: 38 U.S.C. 3107(b))

(e) *Changes in duration of the plan.* Any change in the total duration of a veteran's rehabilitation plan is subject to provisions on duration of a rehabilitation program described in §§21.70–21.78.

(Authority: 38 U.S.C. 3107(b))

**§21.96 Review of the plan.**

(a) *General.* The veteran's progress in reaching the goals of the plan will be reviewed and evaluated as scheduled in the plan by the case manager and the veteran.

(b) *Comprehensive review required.* The case manager and the veteran will review all of the terms of the plan and the veteran's progress at least every twelve months. On the basis of such review the veteran and the case manager will agree whether the plan should be:

(1) Retained in its current form;

(2) Amended; or

(3) Redeveloped.

(Authority: 38 U.S.C. 3107(b))

**§21.98 Appeal of disagreement regarding development of, or change in, the plan.**

(a) *General.* The veteran may request a review of a proposed, original, or amended plan when Department of Veterans Affairs staff and the veteran do not reach agreement on the terms and conditions of the plan. A veteran who requests a review of the plan must submit a written statement to the case manager which:

(1) Requests a review of the proposed, original, or amended plan; and

(2) Details his or her objections to the terms and conditions of the proposed, original, or amended plan.

(b) *Review by Vocational Rehabilitation and Employment Officer.* Upon receipt of the veteran's request for review of the plan, the counseling psychologist or the case manager will forward the request together with relevant comment to the VR&C Officer who will:

(1) Review relevant information; and

(2) Inform the veteran of his or her decision within 90 days.

(c) *Review by Director, Vocational Rehabilitation and Employment Service.* The veteran's request shall be reviewed by the Director, VR&C in any case in which the VR&C Officer is the case manager. The veteran will be informed of the decision within 90 days.

(d) *Appeal to the Board of Veterans Appeals.* The veteran may appeal an adverse decision of the VR&C Officer, or the Director, VR&C to the Board of Veterans Appeals.

(Authority: 38 U.S.C. 3107(c))

[49 FR 40814, Oct. 18, 1984, as amended at 62 FR 17708, Apr. 11, 1997]

COUNSELING

## § 21.100 Counseling.

(a) *General.* A veteran requesting or being furnished assistance under Chapter 31 shall be provided professional counseling services by Vocational Rehabilitation and Employment (VR&C) Service and other staff as necessary to:

(1) Carry out an initial evaluation in each case in which assistance is requested;

(2) Develop a rehabilitation plan or plan for employment services in each case in which the veteran is found during the initial evaluation to be eligible and entitled to services;

(3) Assist veterans found ineligible for services under Chapter 31 to the extent provided in § 21.82; and

(4) Try to overcome problems which arise during the course of the veteran's rehabilitation program or program of employment services.

(Authority: 38 U.S.C. 3101)

(b) *Types of counseling services.* VA will furnish comprehensive counseling services, including but not limited to

(1) Psychological;
(2) Vocational;
(3) Personal adjustment;
(4) Employment;
(5) Educational.

(Authority: 38 U.S.C. 3104(a)(2))

(c) *Qualifications.* Counseling services may only be furnished by VA or other personnel who meet requirements established under provisions of § 21.380 and other policies of the VA pertaining to the qualifications of staff providing assistance under Chapter 31.

(Authority: 38 U.S.C. 3118)

(d) *Limitations.* (1) If a veteran resides within a State, counseling services necessary to carry out the initial evaluation and the development of a rehabilitation plan or a program of employment services will be furnished by counseling psychologists in the Vocational Rehabilitation and Employment (VR&C) Division;

(2) If a veteran does not reside in a State the counseling services necessary to carry out an initial evaluation may be accomplished in the same manner as for a veteran residing in a State or through other arrangements when deemed appropriate by the VR&C Division. These alternative arrangements include, but are not limited to:

(i) Use of counseling centers or individual qualified professionals under contract to VA; and

(ii) Professional staff of other Federal agencies located in the area in which the veteran resides.

(3) Alternative arrangements to provide counseling are subject to the following requirements:

(i) All arrangements must be consistent with the provisions of paragraph (c) of this section regarding utilization of professionally qualified persons to provide counseling services during the initial evaluation;

(ii) All determinations of eligibility, entitlement and the development of a rehabilitation plan will continue to be made by counseling psychologists in the VR&C Division.

(4) If a counseling psychologist in the VR&C Division determines that the evidence of record is insufficient to carry out an initial evaluation in a case in which alternative arrangements were used, VA staff may authorize the veteran to travel to a VA facility to complete the evaluation.

(Authority: 38 U.S.C. 3118(c))

(e) *Definition.* For the purposes of this section, the term *State* means each of the several States, the District of Columbia, and the Commonwealth of Puerto Rico.

(Authority: 38 U.S.C. 101(20))

[49 FR 40814, Oct. 18, 1984, as amended at 54 FR 32071, Aug. 4, 1989; 62 FR 17708, Apr. 11, 1997]

EDUCATIONAL AND VOCATIONAL TRAINING SERVICES

### § 21.120 Educational and vocational training services.

(a) *Purposes.* The purposes of providing educational and vocational training services are to enable a veteran eligible for, and entitled to, services and assistance under Chapter 31 to:

(1) Meet the requirements for employment in the occupational objective established in the IWRP (Individualized Written Rehabilitation Plan);

(2) Provide incidental training which is necessary to achieve the employment objective in the IEAP (Individualized Employment Assistance Plan);

(3) Provide incidental training needed to achieve the goals of an IILP (Individualized Independent Living Plan); or

(4) Provide training services necessary to implement an IEEP (Individualized Extended Evaluation Plan).

(b) *Selection of courses.* VA will generally select courses of study and training, completion of which usually results in a diploma, certificate, degree, qualification for licensure, or employment. If such courses are not available in the area in which the veteran resides, or if they are available but not accessible to the veteran, other arrangements may be made. Such arrangements may include, but are not limited to:

(1) Relocation of the veteran to another area in which necessary services are available, or

(2) Use of an individual instructor to provide necessary training.

(Authority: 38 U.S.C. 3107)

(c) *Charges for education and training services.* The cost of education and training services will be one of the factors considered in selecting a facility when:

(1) There is more than one facility in the area in which the veteran resides which:

(i) Meets requirements for approval under §§ 21.292 through 21.298;

(ii) Can provide the education and training services, and other supportive services specified in the veteran's plan; and

(iii) Is within reasonable commuting distance; or

(2) The veteran wishes to train at a suitable facility in another area, even though training can be provided at a suitable facility in the area in which the veteran resides.

(Authority: 38 U.S.C. 3104(a)(7), 3115(a))

[49 FR 40814, Oct. 18, 1984; 50 FR 9622, Mar. 11, 1985]

### § 21.122 School course.

(a) *Explanation of terms—schools, educational institution, and institution.* These terms mean any public or private school, secondary school, vocational school, correspondence school, business school, junior college, teacher's college, college, normal school, professional school, university, scientific or technical institution, or other institution funishing education for adults.

(Authority: 38 U.S.C. 501(a), 3104)

(b) *Course.* A course generally consists of a number of areas of subject matter which are organized into learning units for the purpose of attaining a specific educational or vocational objective. Organized instruction in the units comprising the course is offered within a given period of time and credit toward graduation or certification is generally given.

(Authority: 38 U.S.C. 3104(a)(7))

(c) *School course.* A *school course* is a course as defined in paragraph (b) of this section offered by a facility identified in paragraph (a) of this section.

(Authority: 38 U.S.C. 3115)

### § 21.123 On-job course.

(a) *Training establishment.* This term means any establishment providing apprentice or other training on the job, including those under the supervision of a college or university or any State department of education, or any state apprenticeship agency, or any State board of vocational education, or any joint apprenticeship committee, or the Bureau of Apprenticeship and Training established in accordance with 29 U.S.C. Chapter 4C, or any agency of the

Federal government authorized to supervise such training.

(b) *On-job course,* An on-job course is pursued toward a specified vocational objective, provided by a training establishment. The trainee learns, in the course of work performed under supervision, primarily by receiving formal instruction, observing practical demonstration of work tasks, and assisting in those tasks. Productive work should gradually increase with greater independence from formal instruction as the course progresses.

(Authority: 38 U.S.C. 501(a), 3104)

[49 FR 40814, Oct. 18, 1984; 50 FR 9622, Mar. 11, 1985]

### § 21.124 Combination course.

(a) *General.* A combination course is a course which combines training on the job with training in school. For the purpose of VA vocational rehabilitation, a course will be considered to be a combination course, if the student spends full-time on the job and one or more times a week also attends school on a part-tme basis. A veteran may pursue the components of a combination course in the following manner:

(1) Concurrent school and on-job training;

(2) Primarily on-job with some related instruction in school;

(3) In a school as a preparatory course to entering on-job training; or

(4) First training on-job followed by the school portion.

(b) *Cooperative course.* A cooperative course is a special type of combination course which usually:

(1) Has an objective which the student attains primarily through school instruction with the on-job portion being supplemental to the school course;

(2) Is at the college or junior college level although some cooperative courses are offered at post-secondary schools which do not offer a college degree or at secondary schools;

(3) Requires the student to devote at least one-half of the total training period to the school portion of the course; and

(4) Includes relatively long periods each of training on the job and in school such as a full term in school followed by a full term on the job.

(Authority: 38 U.S.C. 3104(a)(7))

[49 FR 40814, Oct. 18, 1984; 50 FR 9622, Mar. 11, 1985]

### § 21.126 Farm cooperative course.

(a) *Definition.* An approvable farm cooperative course is a full-time course designated to restore employability by training a veteran to:

(1) Operate a farm which he or she owns or leases; or

(2) Manage a farm as the employee of another.

(b) *Reaching the goal of a farm cooperative course.* The farm cooperative course must enable a veteran to become proficient in the type of farming for which he or she is being provided rehabilitation services. The areas in which proficiency is to be established include:

(1) Planning;

(2) Producing;

(3) Marketing;

(4) Maintaining farm equipment;

(5) Conserving farm resources;

(6) Financing the farm;

(7) Managing the farm; and

(8) Keeping farm and home accounts.

(c) *Instruction, including organized group instruction.* Instruction in a farm cooperative course may be by a mixture of organized group (classroom) instruction and individual instruction or by individual instruction alone. A course which includes organized group instruction must meet the following criteria to be considered as full-time:

(1) The number of clock hours of instruction which should be provided yearly shall meet the requirements of § 21.310(a)(4) and § 21.4264 pertaining to full-time pursuit of a farm cooperative course:

(2) The individual instructor portion of a farm cooperative course shall include at least 100 hours of individual instruction per year.

(d) *Instruction given solely by an individual instructor.* (1) Instruction in a farm cooperative course may be given solely by an individual instructor if organized group instruction is:

(i) Not available within reasonable commuting distance of the veteran's farm; or

(ii) The major portion of the organized group instruction that is available does not have a direct relation to the veteran's farming operation and pertinent VA records are fully and clearly documented accordingly.

(2) To be considered full-time pursuit the individual instruction provided in these course must:

(i) Consist of at least 200 hours of instruction per year;

(ii) Be given by a fully qualified individual instructor by contract between VA and the instructor or an educational agency which employs the instructor.

(e) *Plan requirements for farm operator or farm manager.* (1) The plan for training developed by the case manager and the veteran in collaboration with the instructor must include:

(i) A complete written survey including but not limited to the areas identified in § 21.298 (a) and (b);

(ii) An overall, long-term plan based upon the survey of the operation of the farm;

(iii) An annual plan identifying the part of the overall plan to be implemented which will be prepared before the beginning of each crop year; and

(iv) A detailed individual training program showing the kind and amount of instruction, classroom and individual, or individual; and

(2) The farm must meet the requirements for selecting a farm found in § 21.298.

(Authority: 38 U.S.C. 3104(a)(7))

[49 FR 40814, Oct. 18, 1984; 50 FR 9622, Mar. 11, 1985]

### § 21.128 Independent study course.

A veteran may pursue a course by independent study under the following conditions:

(a) *College level.* The course is offered by a college or university.

(b) *College degree.* The course leads to or is fully creditable towards a standard college degree.

(c) *Course content.* The course consists of a prescribed program of study with provision for interaction between the student and regularly employed faculty of the university or college by mail, telephone, personally, or class attendance.

(d) *School responsibility.* The university or college:

(1) Evaluates the course in semester or quarter hours or the equivalent; and

(2) Prescribes a period for completion.

(Authority: 38 U.S.C. 3104(a)(7))

### § 21.129 Home study course.

(a) *Definition.* A *home study* course is a course conducted by mail, consisting of a series of written lesson assignments furnished by a school to the student for study and preparation of written answers, solutions to problems, and work projects which are corrected and graded by the school and returned to the trainee.

(b) *Limitations on inclusion of home study courses, in rehabilitation plans.* A veteran and his or her case manager may include a home study course in a rehabilitation plan only when it supplements the major part of the program. The purpose of the home study course is to provide the veteran with theory or technical information directly related to the practice of the occupation for which the veteran is training.

(Authority: 38 U.S.C. 3104(a)(7))

### § 21.130 Educational and vocational courses outside the United States.

(a) *General.* VA may provide educational and vocational courses outside a State if the case manager determines that such training is in the best interest of the veteran and the Federal Government.

(b) *Specific conditions.* (1) The training must be necessary to enable the veteran to qualify for, obtain, and retain suitable employment in the occupational objective; and

(2) Either:

(i) The training is not available in the United States; or

(ii) The training is available in the United States, but personal hardship would result from requiring that the veteran pursue training in this country; and

(3) All necessary supportive and follow-up services, including medical care and treatment and employment services, reasonably can be provided by or through VA, considering such factors

as the availability, accessibility and cost of such services.

(Authority: 38 U.S.C. 3114)

[49 FR 40814, Oct. 18, 1984, as amended at 55 FR 27822, July 6, 1990]

### § 21.132 Repetition of the course.

(a) *Repeating all or part of the course.* A veteran, having completed a course under Chapter 31 according to the standards and practices of the institution, ordinarily will not pursue it again at the expense of VA. However, VA may approve repetition of all, or any part of the course when VA determines that the repetition is necessary to accomplish the veteran's vocational rehabilitation. A veteran repeating a course under Chapter 31 is subject to the same requirements for satisfactory pursuit and completion of the course as are other veterans taking the course unless a longer period is needed because of the veteran's reduced work tolerance.

(Authority: 38 U.S.C. 3104(a)(7))

(b) *Review course.* A veteran who has completed a course of training under Chapter 31 may pursue a review course, such as a bar review course, if it is specifically organized and conducted as a review course.

(Authority: 38 U.S.C. 3104(a)(7))

(c) *Auditing a subject.* Auditing, as defined in § 21.4200(i), may not be authorized as a part of any rehabilitation plan. However, if an individual repeats a course under the conditions described in paragraph (a) of this section, the course shall not be considered an audited course, if pursued in the same manner as a subject offered for credit. The individual must meet the same requirements as other students, and not be a mere listener.

(Authority: 38 U.S.C. 3680(a))

### § 21.134 Limitation on flight training.

Flight Training approved under chapter 31 may only be authorized in degree curriculums in the field of aviation that include required flight training. This type of training is otherwise subject to the same limitations as are applicable to flight training under Chapter 30.

(Authority: 38 U.S.C. 3680A(b))

[57 FR 57108, Dec. 3, 1992]

## SPECIAL REHABILITATION SERVICES

### § 21.140 Evaluation and improvement of rehabilitation potential.

(a) *General.* The purposes of these services are to:

(1) Evaluate if the veteran:

(i) Has an employment handicap;

(ii) Has a serious employment handicap; and

(iii) Is reasonably feasible for a vocational goal or an independent living goal.

(2) Provide a basis for planning:

(i) A program of services and assistance to improve the veteran's potential for vocational rehabilitation or independent living;

(ii) A suitable vocational rehabilitation program; or

(iii) A suitable independent living program.

(3) Reevaluate the vocational rehabilitation or independent living potential of a veteran participating in a rehabilitation program under Chapter 31, as necessary.

(4) Enable a veteran to achieve:

(i) A vocational goal; or

(ii) An independent living goal.

(Authority: 38 U.S.C. 3104)

(b) *Periods during which evaluation and improvement services may be provided.* Evaluation and improvement services may be provided concurrently, whenever necessary, with a period of rehabilitation services, including:

(1) Initial evaluation or reevaluation;

(2) Extended evaluation:

(3) Rehabilitation to the point of employability:

(4) A program of independent living services: or

(5) Employment services, incidental to obtaining or maintaining employment.

(c) *Duration of full-time assistance.* If evaluation and improvement services are furnished on a full-time basis as a

preliminary part of the period of rehabilitation to the point of employability, or as the vocational rehabilitation program, the duration of such assistance may not exceed 12 months, except as provided in § 21.74(c).

(Authority: 38 U.S.C. 3105)

(d) *Scope of services.* Evaluation and improvement services include:

(1) Diagnostic services;

(2) Personal and work adjustment training;

(3) Medical care and treatment;

(4) Independent living services;

(5) Language training, speech and voice correction, training in ambulation, and one-hand typewriting;

(6) Orientation, adjustment, mobility and related services; and

(7) Other appropriate services.

(Authority: 38 U.S.C. 3104(a)(1), (6), (9), (10), (15))

### § 21.142 Adult basic education.

(a) *Definition.* The term *adult basic education* means an instructional program for the undereducated adult planned around those basic and specific skills most needed to help him or her to function adequately in society.

(b) *Purposes.* The purposes of providing adult basic education are to:

(1) Upgrade a veteran's basic educational skills;

(2) Provide refresher training; or

(3) Remedy deficiencies which prevent the veteran from undertaking a course of education or vocational training.

(c) *Periods during which basic adult education may be provided.* Basic adult education may be authorized, as necessary, during;

(1) Rehabilitation to the point of employability;

(2) Extended evaluation; and

(3) Independent living services.

(Authority: 38 U.S.C. 3104(a)(1))

### § 21.144 Vocational course in a sheltered workshop or rehabilitation facility.

(a) *General.* A vocational course in a sheltered workshop or rehabilitation facility may be an institutional, on-job, or combination course which has been modified to facilitate successful pursuit by a person with a disability that would otherwise prevent or impair the person's participation in the course.

(b) *Authorization.* A vocational course in a sheltered workshop or rehabilitation facility may be authorized when the training offered is a sound method of restoring a veteran's employability.

(Authority: 38 U.S.C. 3104(a)(7))

### § 21.146 Independent instructor course.

(a) *Definition.* An independent instructor course is a full-time course of vocational training which the veteran pursues with an individual instructor, who, independently of a training institution or on-job training establishment, furnishes and conducts a vocational course at a suitable place of training.

(b) *Limitations on including an independent instructor course in a rehabilitation plan.* A veteran and his or her case manager may include an independent instructor course in a rehabilitation plan, other than one involving a farm cooperative program, only when either or both of the following conditions exist:

(1) Training is not available through an established school, on-job training establishment, rehabilitation facility or sheltered workshop within a reasonable commuting distance from the veteran's home; or

(2) The veteran's condition or other circumstances do not permit the veteran to attend an otherwise suitable facility within commuting distance. See § 21.126.

(c) *Training in the home.* Training in the home is a specialized type of independent instructor course which the veteran pursues in his or her home if:

(1) He or she is unable to pursue training at an otherwise suitable facility because of the effects of his or her disability;

(2) Based on proper medical opinion, the veteran is able to pursue the prescribed training; and

(3) The veteran's home provides a favorable educational environment with adequate work and study space.

(d) *Planning an individual instructor course.* The case manager, the veteran, and the instructor should jointly plan

the training program for a veteran for whom an independent instructor course is prescribed.

(e) *Assuring employment.* Since the customary channels leading to employment may not be readily available to a veteran requiring an individual instructor course, the IEAP (Individual Employment Assistance Plan) shall indicate thorough consideration of plans and prospects for seeking and obtaining employment, including self-employment, upon completion of training.

(f) *Rate of pursuit.* A veteran in an independent instructor program shall pursue training at a rate comparable to the rate at which similar training is pursued on an institutional basis, unless the veteran's work tolerance is reduced by the effects of his or her disability.

(Authority: 38 U.S.C. 3104(a)(7))

**§ 21.148 Tutorial assistance.**

(a) *General.* A veteran may be provided individualized tutorial assistance, if VA determines that special assistance beyond that ordinarily given by the facility to students pursuing the same or a similar subject is needed to correct a deficiency in a subject.

(b) *Authorization of tutorial assistance.* Tutorial assistance may be provided during any period of rehabilitation services authorized by VA.

(Authority: 38 U.S.C. 3104(a)(7))

(c) *Use of relatives precluded.* Tutorial assistance at VA expense may not be provided by a relative of the veteran. The term *relative* has the same meaning as under § 21.374 pertaining to the use of a relative as an attendant.

(Authority: 38 U.S.C. 3492)

(d) *Payment at the Chapter 30 rate.* If a veteran has elected payment at the educational assistance rate payable under Chapter 30, he or she may not be provided individualized tutorial assistance under provision of Chapter 31. (See § 21.334.)

(Authority: 38 U.S.C. 3108(f))

[49 FR 40814, Oct. 18, 1984, as amended at 54 FR 4283, Jan. 30, 1989; 57 FR 57108, Dec. 3, 1992]

**§ 21.150 Reader service.**

(a) *Limitations on vision.* A veteran considered to have a visual impairment necessitating reader service includes a veteran:

(1) Whose best corrected vision is 20/200 in both eyes;

(2) Whose central vision is greater than 20/200 but whose field of vision is limited to such an extent that the widest diameter of a visual field subtends to an angle no greater than 20 degrees; or

(3) With impaired vision, whose condition or prognosis indicates that the residual sight will be adversely affected by the use of his or her eyes for reading.

(b) *Periods during which reader service may be provided.* reader service necessary to the development of a rehabilitation plan, or the successful pursuit of a rehabilitation program may be provided during:

(1) Initial evaluation or reevaluation;

(2) Extended evaluation;

(3) Rehabilitation to the point of employability;

(4) Independent living services; or

(5) Employment services, including an initial employment period of up to three months.

(c) *Reader responsibility.* The reader should be able to do more than read to the veteran. The reader should have an understanding of the subject matter based upon prior training or experience which allows him or her to:

(1) Read printed material with understanding; and

(2) Test the veteran's understanding of what has been read.

(d) *Extent of service.* The number of hours of service will be determined in each case by the amount of reading necessitated by the course and the efficacy of other equipment with which the veteran has been furnished to enable him or her to read printed material unassisted.

(e) *Recording.* VA will not normally pay for recording textbooks or other materials as a part of reader services, since excellent recording services are provided by volunteer organizations at no cost.

(f) *Selecting a relative as a reader.* Utilization of a relative of the veteran as a reader is subject to the limitations

on use of a relative as an attendant under § 21.374.

(Authority: 38 U.S.C. 3104(a)(14))

**§ 21.152 Interpreter service for the hearing impaired.**

(a) *General.* The main purpose of interpreter service for the hearing impaired is to facilitate instructor-student communication. VA will provide interpreter service as necessary for the development and pursuit of a rehabilitation program. This service will be provided if:

(1) A VA physician determines that:

(i) The veteran is deaf or his or her hearing is severely impaired; and

(ii) All appropriate services and aids have been furnished to improve the veteran's residual hearing; or

(2) A VA physician determines that the veteran:

(i) Can benefit from language and speech training; and

(ii) Agrees to undertake language and speech training.

(b) *Periods during which interpreter service may be provided.* Interpreter service may be furnished during:

(1) Initial evaluation or reevaluation;

(2) Extended evaluation;

(3) Rehabilitation to the point of employability;

(4) Independent living services; or

(5) Employment services, including the first three months of employment.

(c) *Selecting the interpreter.* Only certified interpreters or persons meeting generally accepted standards for interpreters shall provide interpreter service. When an individual is not certified by a State or professional association, VA shall seek the assistance of a State certifying agency or a professional association in ascertaining whether the individual is qualified to serve as an interpreter.

(Authority: 38 U.S.C. 3104(a)(14))

(d) *Relatives.* Interpreter service at VA expense may not be provided by a relative of the veteran. The term *relative* has the same meaning as under § 21.374 pertaining to the use of relatives as attendants.

(Authority: 38 U.S.C. 3492)

**§ 21.154 Special transportation assistance.**

(a) *General.* A veteran, who because of the effects of disability has transportation expenses in addition to those incurred by persons not so disabled, shall be provided a transportation allowance to defray such additional expenses. The assistance provided in this section is in addition to provisions for interregional and intraregional travel which may be authorized under provisions of §§ 21.370 through 21.376.

(Authority: 38 U.S.C. 3104(a)(13))

(b) *Periods during which special transportation allowance may be provided.* A special transportation allowance may be provided during:

(1) Extended evaluation;

(2) Rehabilitation to the point of employability;

(3) Independent living services; or

(4) Employment services, including the first three months of employment.

(Authority: 38 U.S.C. 3104(a)(14))

(c) *Scope of transportation assistance.* (1) Transportation assistance includes mileage, parking fees, reasonable fee for a driver, transportation furnished by a rehabilitation facility or sheltered workshop, and other reasonable expenses which may be incurred in local travel;

(2) The veteran's monthly transportation allowance may not exceed the lesser of actual expenses incurred or one-half of the subsistence allowance of a single veteran in full-time institutional training, unless extraordinary arrangements, such as transportation by ambulance, are necessary to enable a veteran to pursue a rehabilitation program.

(d) *Determining the need for a transportation allowance.* The case manager will determine the need for a transportation allowance. The assistance of a medical consultant shall be utilized, as necessary, to determine the need for special transportation assistance and to develop transportation arrangements which do not unduly tax the veteran's ability to travel and pursue a rehabilitation program.

(e) *Use of a relative precluded.* A relative of the veteran may not be paid

any part of a special transportation allowance. The term *relative* has the same meaning as under § 21.374 pertaining to the use of a relative as an attendant.

(Authority: 38 U.S.C. 3104(a)(13))

### § 21.155 Services to a veteran's family.

(a) *General.* VA shall provide services to a veteran's family which are necessary to the implementation of the veteran's rehabilitation plan. The term *family* includes the veteran's immediate family, legal guardian, or any individual in whose home the veteran certifies an intention to live.

(b) *Scope of services to a veteran's family.* The services which may be furnished to the family are generally limited to consultation, homecare training, counseling, and mental health services of brief duration which are designed to enable the family to cope with the veteran's needs. Extended medical, psychiatric or other services may not be furnished to family members under these provisions.

(c) *Providing services to a veteran's family.* VR&C Staff will:

(1) Identify services which family members may need to facilitate the rehabilitation of the veteran; and

(2) Arrange for provision of the services which have been identified.

(d) *Resources for provision of services to family members.* (1) The established program and services which are furnished by Veterans Health Administration (VHA) to family members of veterans eligible for Chapter 31 should be used to the extent practicable; but

(2) If services are not readily available through regular VHA programs, necessary services will normally be secured through arrangements with other public and nonprofit agencies.

(Authority: 38 U.S.C. 3104(a)(11))

[49 FR 40814, Oct. 18, 1984, as amended at 62 FR 17708, Apr. 11, 1997]

### § 21.156 Other incidental goods and services.

(a) *General.* Other incidental goods and services may be authorized if the case manager determines them to be necessary to implement the veteran's rehabilitation plan. For example, a calculator may be authorized for a veteran pursuing an engineering degree, even though the veteran may not be required to have a calculator for any specific subject in his or her course, where there is substantial evidence that lack of a calculator places the veteran at a distinct disadvantage in successfully pursuing the course.

(b) *Limitation on cost.* The costs of incidental goods and services normally should not exceed five percent of training costs for any twelve-month period.

(Authority: 38 U.S.C. 3104(a)(10))

INDEPENDENT LIVING SERVICES

### § 21.160 Independent living services.

(a) *Purpose.* The purpose of independent living services is to assist eligible veterans whose ability to function independently in family, community, or employment is so limited by the severity of disability (service and nonservice-connected) that vocational or rehabilitation services need to be appreciably more extensive than for less disabled veterans.

(Authority: 38 U.S.C. 3104(a)(15), 3109, 3120)

(b) *Definitions.* The term *independence in daily living* means the ability of a veteran, without the services of others or with a reduced level of the services of others, to live and function within the veteran's family and community.

(Authority: 38 U.S.C. 3101(2))

(c) *Situations under which independent living services may be furnished.* Independent living services may be furnished:

(1) As part of a program to achieve rehabilitation to the point of employability;

(2) As part of an extended evaluation to determine the current reasonable feasibility of achieving a vocational goal;

(3) Incidental to a program of employment services; or

(4) As a program of rehabilitation services for eligible veterans for whom achievement of a vocational goal is not currently reasonably feasible. This program of rehabilitation services may be furnished to help the veteran:

(i) Function more independently in the family and community without the

assistance of others or a reduced level of the assistance of others;

(ii) Become reasonably feasible for a vocational rehabilitation program; or

(iii) Become reasonably feasible for extended evaluation.

(Authority: 38 U.S.C. 3104(a)(15), 3109, 3120)

(d) *Services which may be authorized.* The services which may be authorized as part of an IILP (Individualized Independent Living Plan) include:

(1) Any appropriate service which may be authorized for a vocational rehabilitation program as that term is defined in § 21.35(i), except for a course of education or training as described in § 21.120; and

(2) Independent living services offered by approved independent living centers and programs which are determined to be necessary to carry out the veteran's plan including:

(i) Evaluation of independent living potential;

(ii) Training in independent living skills;

(iii) Attendant care;

(iv) Health maintenance programs; and

(v) Identifying appropriate housing accommodations.

(Authority: 38 U.S.C. 3104(a)(15), 3109, 3120)

(e) Coordination with other VA elements and other Federal, State, and local programs. Implementation of programs of independent living services and assistance will generally require extensive coordination with other VA and non-VA programs. If appropriate arrangements cannot be made to provide these services through VA, other governmental, private nonprofit and for-profit agencies and facilities may be used to secure necessary services if the requirements contained in § 21.294 are met.

(Authority: 38 U.S.C. 3104(a)(15), 3109, 3115, 3120)

[49 FR 40814, Oct. 18, 1984, as amended at 53 FR 50957, Dec. 19, 1988; 55 FR 42186, Oct. 18, 1990]

### § 21.162 Participation in a program of independent living services.

(a) *Approval of a program of independent living services.* A program of independent living services and assistance is approved when:

(1) The VA determines that achievement of a vocational goal is not currently reasonably feasible;

(2) The VA determines that the veteran's independence in daily living can be improved, and the gains made can reasonably be expected to continue following completion of the program;

(3) All steps required by §§ 21.90 and 21.92 of this part for the development and preparation of an Individualized Independent Living Plan (IILP) have been completed; and

(4) The VR&C Officer concurs in the IILP.

(Authority: 38 U.S.C. 3104(a)(15), 3109, 3120)

(b) *Considerations for the VR&C Officer.* The VR&C Officer will consider the following factors in administering programs providing independent living services:

(1) If VA resources available limit the number of veterans who may be provided a program of independent living services and assistance, the first priority shall be given to veterans for whom the reasonable feasibility of achieving a vocational goal is precluded solely as a result of service-connected disability; and

(2) To the maximum extent feasible, a substantial portion of veterans provided with programs of independent living services and assistance shall be receiving long-term care in VA medical centers and nursing homes.

(Authority: 38 U.S.C. 3120(c))

[49 FR 40814, Oct. 18, 1984, as amended at 53 FR 50957, Dec. 19, 1988; 55 FR 48842, Nov. 23, 1990; 62 FR 17708, Apr. 11, 1997]

## CASE STATUS

### § 21.180 Case status system.

(a) *General.* Each veteran's case will be assigned to a specific case status from the point of initial contact until all appropriate steps in the rehabilitation process have been completed. The case status system will:

(1) Assist VR&C staff to fulfill its case management responsibility to provide authorized assistance to enable the veteran to successfully pursue his or her program; and

(2) Assure program management and accountability.

(Authority: 38 U.S.C. 3107)

(b) *Responsibility for change of case status.* The case manager is responsible for assigning a case to the appropriate case status at each point in the rehabilitation process.

(c) *Case manager.* The VR&C (Vocational Rehabilitation and Employment) Officer or his or her designee will assign a case manager when the veteran's case is placed in *evaluation and planning* status. The VR&C Officer or his or her designee may assign case management responsibility for development and implementation of a rehabilitation plan authorized under Chapter 31 to a counseling psychologist or vocational rehabilitation specialist in the VR&C Division. The case manager assigned will, unless replaced by the VR&C Officer, continue to be responsible for case management throughout the course of the veteran's rehabilitation program. When securing medical care, treatment, and other related services, the VR&C case manager will coordinate with Veterans Health Administration (VHA) staff members who have case management responsibility for the veteran.

(Authority: 38 U.S.C. 3106(e))

(d) *Informing the veteran.* The veteran will be informed in writing of changes in case status by VA which affect his or her receipt of benefits and services under Chapter 31. The letter to the veteran will include the reason for the change of case status, and other information required under provisions of § 21.420.

(Authority: 38 U.S.C. 3107)

(e) *Normal progression for eligible veterans.* The cases of veterans who are eligible for and entitled to services under Chapter 31 for whom individualized plans have been prepared will generally undergo the following changes of status:

(1) *Individualized written rehabilitation plan.* A veteran with an IWRP (Individualized Written Rehabilitation Plan) will generally move sequentially from *applicant* status through *evaluation and planning* status, *rehabilitation to the point of employability* status, *employment services* status, and *rehabilitated* status.

(2) *Individualized extended evaluation plan.* A veteran with an IEEP (Individualized Extended Evaluation Plan) will generally move from *applicant* status through *evaluation and planning* status to *extended evaluation* status. Once in *extended evaluation* status there will generally be a finding which leads to development of an IWRP (paragraph (e)(1) of this section), or IILP (Individualized Independent Living Plan) (paragraph (e)(3) of this section).

(3) *Individualized independent living plan.* A veteran with an IILP (Individualized Independent Living Plan) will generally move from *applicant* status through *evaluation and planning, extended evaluation, independent living,* and *rehabilitated status.*

(4) *Individualized employment assistance plan.* (i) A veteran with an IEAP (Individualized Employment Assistance Plan) which is a part of an IWRP will move through the case statuses described in paragraph (e)(1) of this section, or in some cases through the steps in paragraph (e)(2) of this section.

(ii) A veteran for whom only employment services are provided will generally move from *applicant* through *evaluation and planning, employment services* to *rehabilitated* status.

(Authority: 38 U.S.C. 3107)

(f) *Normal progression for ineligible veterans.* A veteran found ineligible for services under Chapter 31 will generally move from *applicant* to *evaluation and planning* status, to *ineligible* status.

(Authority: 38 U.S.C. 3107)

(g) *Changes of status.* The case manager may change the case status when:

(1) Conditions for change specified in the status are met;

(2) The change is not specifically precluded by the status to which change is being considered; and

(3) The change is consistent with provisions of other applicable regulations.

(Authority: 38 U.S.C. 3106)

[49 FR 40814, Oct. 18, 1984, as amended at 54 FR 34987, Aug. 23, 1989; 62 FR 17708, Apr. 11, 1997]

### § 21.182 "Applicant" status.

(a) *Purpose.* The purposes of *applicant* status are to:

(1) Process a veteran's claim for assistance under Chapter 31 in a timely manner; and

(2) Identify service-disabled veterans whom VA should contact individually to increase their awareness and understanding of how they may benefit from services furnished under Chapter 31.

(Authority: 38 U.S.C. 3102)

(b) *Assignment to applicant* status. VA will assign a veteran's records to *applicant* status when either:

(1) VA receives a formal or informal application from a veteran for services under Chapter 31; or

(2) The VR&C (Vocational Rehabilitation and Employment) Division:

(i) Advises a veteran in writing of the veteran's potential eligibility for Chapter 31 services, or

(ii) Is informed that the veteran has been advised in writing of his or her potential eligibility for Chapter 31 services by other VA elements.

(Authority: 38 U.S.C. 3102(2))

(c) *Termination of applicant* status. *Applicant* status will be terminated when:

(1) An appointment for an initial evaluation has been kept by the veteran; or

(2) The veteran's service-connected disability is reduced to a noncompensable degree; or

(3) The veteran's service-connected disability is severed; or

(4) The veteran's application is invalid because of fraud or error; or

(5) The veteran withdraws his or her claim, or otherwise indicates that no further assistance is desired.

(Authority: 38 U.S.C. 3106)

(d) *Transfer of terminated cases to discontinued* status. Each instance in which a veteran's case is terminated for reasons described in paragraph (c)(4) or (5) of this section shall be placed in *discontinued* status.

(Authority: 38 U.S.C. 3102)

CROSS-REFERENCE: See §§ 21.30 Claims, 21.31 Informal claims, and 21.32 Time limits.

[49 FR 40814, Oct. 18, 1984, as amended at 52 FR 2518, Jan. 23, 1987]

### § 21.184 "Evaluation and planning" status.

(a) *Purpose.* The purpose of *evaluation and planning* status is to identify veterans for whom evaluation and planing services are needed to:

(1) Accomplish an initial evaluation as provided in § 21.50;

(2) Develop an IWRP (Individualized Written Rehabilitation Plan), IEEP (Individualized Extended Evaluation Plan), IILP (Individualized Independent Living Plan) or IEAP (Individualized Employment Assistance Plan); or

(3) Reevaluate:

(i) Findings made in prior initial evaluations, or

(ii) Current or previous individualized rehabilitation plans.

(b) *Assignment to evaluation and planning* status. A veteran's records will be assigned to *evaluation and planning* status for any of the purposes specified in paragraph (a) of this section.

(c) *Termination of evaluation and planning* status. The assignment of the veteran's records to *evaluation and planning* status may be terminated under the following conditions:

(1) *Evaluation and planning completed.* The services necessary to complete evaluation and planning have been provided. These services are:

(i) Completion of an initial evaluation;

(ii) Development of an IWRP (Individualized Written Rehabilitation Plan) or other individual rehabilitation plan in those cases in which eligibility and entitlement to services provided under Chapter 31 are established; or

(iii) Completion of reevaluation of prior findings made in initial evaluation or modification of a rehabilitation plan.

(2) *Evaluation and planning not completed.* The VR&C Division shall make every reasonable effort to enable the veteran to complete the evaluation and planning phase of the rehabilitation process. A determination that every reasonable effort by VA has been made, and that little likelihood exists that

continued efforts will lead to completion of planning and evaluation, may be made under the following conditions:

(i) The veteran writes VA and requests that his or her case be inactivated;

(ii) The veteran fails to keep scheduled appointments following his or her initial appointment; or

(iii) The veteran otherwise fails to cooperate with VA in the evaluation and planning process. If the veteran fails to cooperate, the provisions of § 21.362 are applicable.

(Authority: 38 U.S.C. 3106, 3107)

CROSS-REFERENCE: See §§ 21.50 through 21.58 Initial and extended evaluation, and §§ 21.80 through 21.98 Individualized written rehabilitation plan.3

### § 21.186 "Ineligible" status.

(a) *Purpose.* The purpose of *ineligible* status is to identify the cases in which a veteran requests services under Chapter 31, but the request is denied by VA, usually, on the basis of information developed when the veteran was in *evaluation and planning* status.

(Authority: 38 U.S.C. 3106)

(b) *Assignment to ineligible* status. A veteran's case will be assigned to *ineligible* status following a finding by VA that the veteran is not eligible for or entitled to services under Chapter 31. The finding must preclude all possible Chapter 31 services.

(Authority: 38 U.S.C. 3106, 3107)

(c) *Termination of ineligible* status. The assignment of the veteran's case to *ineligible* status should be terminated if the veteran thereafter becomes eligible to receive any Chapter 31 service. Placement of the case in *ineligible* status is a bar to reconsideration of eligibility unless a material change in circumstances occurs.

(Authority: 38 U.S.C. 3106)

### § 21.188 "Extended evaluation" status.

(a) *Purpose.* The purposes of *extended evaluation* status are to:

(1) Identify a veteran for whom a period of *extended evaluation* is needed; and

(2) Assure that necessary services are provided by VA during the extended evaluation.

(Authority: 38 U.S.C. 3106)

(b) *Assignment to extended evaluation* status. A veteran's case may be assigned or reassigned to *extended evaluation* status under provisions of § 21.57, § 21.74, § 21.86, § 21.94, § 21.96, or § 21.98.

(Authority: 38 U.S.C. 3107)

(c) *Continuation in extended evaluation* status. A veteran's case will be in *extended evaluation* status during periods in which:

(1) The veteran is pending induction into the facility at which rehabilitation services will be provided;

(2) The veteran is receiving rehabilitation services prescribed in the IEEP (§ 21.86); or

(3) The veteran is on authorized leave of absence during an extended evaluation.

(Authority: 38 U.S.C. 3108)

(d) *Termination of extended evaluation status.* A veteran in *extended evaluation* status will remain in that status until one of the following events occur:

(1) Following notification of necessary arrangements to begin an extended evaluation, the date the extended evaluation begins, and instructions as to the next steps to be taken, the veteran:

(i) Fails to report and does not respond to followup contact by the case manager;

(ii) Declines or refuses to enter the program; or

(iii) Defers induction for a period exceeding 30 days beyond the scheduled date of induction, except where the deferment is due to illness or other sufficient reason;

(2) VA determines the reasonable feasibility of a vocational goal for the veteran before completion of all of the planned evaluation because the decision does not require the further evaluation;

(3) The veteran completes the extended evaluation;

(4) Either the veteran or VA interrupts the extended evaluation;

(5) Either the veteran or VA discontinues the extended evaluation; or

(6) Service-connection for the veteran's service-connected disability is severed by VA or his or her continued eligibility otherwise ceases.

(Authority: 38 U.S.C. 3106)

CROSS-REFERENCES: See §§ 21.57 Extended evaluation, 21.322 Commencing dates, 21.324 Reduction or termination.

### § 21.190 "Rehabilitation to the point of employability" status.

(a) *Purpose.* The *rehabilitation to the point of employability* status serves to:

(1) Identify veterans who receive training and rehabilitation services to enable them to attain a vocational goal; and

(2) Assure that services specified in the veteran's IWRP are provided in a timely manner by VA.

(Authority: 38 U.S.C. 3101)

(b) *Assignment.* A veteran's case may be assigned or reassigned to *rehabilitation to the point of employability* status under the provisions of §§ 21.84, 21.94, 21.96, or 21.98.

(Authority: 38 U.S.C. 3107)

(c) *Continuation in rehabilitation to the point of employability* status. A veteran will be assigned to *rehabilitation to the point of employability* status during periods in which:

(1) The veteran has progressed through *applicant* status and *evaluation and planning* status (including extended evaluation status when appropriate), and is pending induction into the facility at which training and rehabilitation services will be provided;

(2) The veteran is receiving training and rehabilitation services prescribed in the IWRP; or

(3) The veteran is on authorized leave of absence.

(Authority: 38 U.S.C. 3104, 3108)

(d) *Termination of rehabilitation to the point of employability* status when goals of the IWRP for this period are achieved. VA will consider a veteran to have completed the period of rehabilitation to the point of employability, and will terminate this status under the following conditions:

(1) The veteran achieves the goals of, and has been provided services specified in, the IWRP;

(2) The veteran who leaves the program has completed a sufficient portion of the services prescribed in the IWRP to establish clearly that he or she is generally employable as a trained worker in the occupational objective established in the IWRP;

(3) The veteran, who has not completed all prescribed services in the IWRP, accepts employment in the occupational objective established in the IWRP with wages and other benefits commensurate with wages and benefits received by trained workers; or

(4) The veteran:

(i) Satisfactorily completes a prescribed program, the practice of which requires pursuing an examination for licensure, but

(ii) Is unable to take the licensure examination prior to the basic twelve-year termination date and there is no basis for extension of that date.

(Authority: 38 U.S.C. 3107)

(e) *Other conditions for termination of rehabilitation to the point of employability* status. In addition to termination under conditions described in paragraph (d) of this section, the classification of the veteran's records in this status may be terminated under any of the following conditions:

(1) A veteran who has been notified of necessary arrangements to begin the program, the date the program begins and instructions as to the next steps to be taken:

(i) Fails to report and does not respond to initial or subsequent followup by the case manager;

(ii) Declines or refuses to enter the program; or

(iii) Defers induction for a period exceeding 30 days beyond the scheduled beginning date of the program, except where the deferment is due to illness or other sufficient reason.

(2) Either the veteran or VA interrupts the period of rehabilitation to the point of employability;

(3) Either VA or the veteran discontinues the period of rehabilitation to the point of employability;

(4) The veteran reaches his or her termination date, and there is no basis for extension under § 21.44;

(5) The veteran's entitlement to training and rehabilitation services under Chapter 31 is exhausted, and there is no basis for extension under § 21.78; or

(6) Service-connection for the veteran's service-connected disability is served by VA or he or she otherwise ceases to be eligible.

(Authority: 38 U.S.C. 3107)

(f) *Payment of employment adjustment allowance.* An employment adjustment allowance will be paid when the veteran's classification in *rehabilitation to the point of employability* status is terminated under provisions of paragraph (d) of this section. An employment adjustment allowance will not be paid if termination is for one of the reasons specified in paragraph (e) of this section.

(Authority: 38 U.S.C. 3108(a))

CROSS-REFERENCES: See §§ 21.120 Educational and vocational trainings services, 21.282 Effective date of induction into a rehabilitation program, and 21.284 Reentering into a rehabilitation program.

### § 21.192 "Independent living program" status.

(a) *Purpose.* The *independent living program* status serves to:

(1) Identify veterans who are being furnished a program of independent living services by VA; and

(2) Assure that such veterans receive necessary services from VA in a timely manner.

(b) *Assignment to independent living program* status. A veteran may be assigned or reassigned to *independent living program* status under the provisions of §§ 21.88, 21.94, 21.96, or 21.98.

(Authority: 38 U.S.C. 3107)

(c) *Continuation in independent living program* status. A veteran will be in *independent living program* status during periods in which:

(1) The provisions of § 21.282 for induction into a program are met, but the veteran is pending induction into the facility at which rehabilitation services will be provided;

(2) The veteran receives rehabilitation services prescribed in an IILP; or

(3) The veteran is on authorized leave of absence status.

(Authority: 38 U.S.C. 3109, 3120)

(d) *Termination of independent living program* status. When a veteran's case has been assigned to *independent living program* status, the case will be terminated from that status, if one of the following occurs:

(1) A veteran, who has been notified of necessary arrangements to begin a program, the date the program begins and instructions as to the next steps to be taken:

(i) Fails to report and does not respond to followup contact by the case manager;

(ii) Declines or refuses to enter the program; or

(iii) Defers entry for more than 30 days beyond the scheduled beginning date, unless the deferment is due to illness or other sufficient reason.

(2) The veteran completes the IILP;

(3) Either the veteran or VA interrupts the program;

(4) Either the veteran or VA discontinues the program; or

(5) Service-connection for the veteran's service-connected disability is severed by VA or he or she otherwise ceases to be eligible.

(Authority: 38 U.S.C. 3109, 3110)

CROSS-REFERENCES: See §§ 21.160 Independent living services, 21.282 Effective date of induction into a rehabilitation program, 21.322 Commencing date, and 21.324 Reduction or termination date.

### § 21.194 "Employment services" status.

(a) *Purpose.* The status *employment services* serves to:

(1) Identify veterans who are being furnished employment services; and

(2) Assure that these veterans receive necessary services in a timely manner.

(b) *Assignment to employment services* status. A veteran's case may be assigned or reassigned to *employment services* status under the provisions of §§ 21.84, 21.88, 21.94 and 21.98.

(c) *Continuation in employment services* status. A case will remain in *employment services* status for the period specified in the IEAP, subject to the limitations specified in paragraph (d) of this section.

(d) *Termination of employment services* status. The veteran will continue in *employment services* status until the earliest of the following events occurs:

(1) He or she is determined to be rehabilitated under the provisions of §21.283; or

(2) He or she is:

(i) Employed for at least 60 days in employment that does not meet the criteria for rehabilitation contained in §21.283, if the veteran intends to maintain this employment and declines further assistance; and

(ii) Adjusted to the duties and responsibilities of the job.

(3) Either the veteran or VA interrupts the employment services program;

(4) Either the veteran or VA discontinues the employment services program;

(5) He or she reaches the end of the period for which employment services have been authorized and there is no basis for extension; or

(6) Service-connection for the veteran's service-connected disability is severed or he or she otherwise ceases to be eligible.

(Authority: 38 U.S.C. 3117)

CROSS-REFERENCES: See §§21.47 Eligibility for employment assistance, 21.250 Overview of employment services, and 21.326 Authorization of employment services.

[49 FR 40814, Oct. 18, 1984, as amended at 58 FR 68768, Dec. 29, 1993]

### §21.196 "Rehabilitated" status.

(a) *Purpose.* The purpose of *rehabilitated* status is to identify those cases in which the goals of a rehabilitation program or a program of employment services have been substantially achieved.

(b) *Assignment to ''rehabilitated'' status.* A veteran's case shall be assigned to ''rehabilitated'' status when his or her case meets the criteria for rehabilitation contained in §21.283.

(Authority: 38 U.S.C. 3102, 3107 and 3117)

(c) *Termination of rehabilitated* status. A veteran's case will not be removed from *rehabilitated* status under §21.284 once that status has been assigned, unless the determination of rehabilitation is set aside for a reason specified in §21.284.

(Authority: 38 U.S.C. 3100)

CROSS-REFERENCE: See §21.284 Reentrance into a rehabilitation program.

[49 FR 40814, Oct. 18, 1984; 50 FR 9622, Mar. 11, 1985, as amended at 58 FR 68768, Dec. 29, 1993]

### §21.197 "Interrupted" status.

(a) *Purpose.* The purpose of *interrupted* status is to recognize that a variety of situations may arise in the course of a rehabilitation program in which a temporary suspension of the program is warranted. In each case, VA first must determine that the veteran will be able to return to a rehabilitation program or a program of employment services following the resolution of the situation causing the interruption. This determination will be documented in the veteran's record.

(Authority: 38 U.S.C. 3117)

(b) *Assignment to ''interrupted'' status.* A veteran's case will be assigned to *interrupted* status when:

(1) VA determines that a suspension of services being provided is necessary; and

(2) Either:

(i) A definite date for resumption of the program is established; or

(ii) The evidence indicates the veteran will be able to resume the program at some future date, which can be approximately established.

(Authority: 38 U.S.C. 3110)

(c) *Reasons for assignment to ''interrupted'' status.* A veteran's case may be interrupted and assigned to *interrupted* status for reasons including but not limited to the following:

(1) *Veteran does not initiate or continue rehabilitation process.* If a veteran does not begin or continue the rehabilitation process, the veteran's case will be interrupted and assigned to *interrupted* status, including:

(i) A case in *evaluation and planning* status;

(ii) A case in *extended evaluation* status;

(iii) A case in *rehabilitation to the point of employability* status;

(iv) A case in *independent living program* status; or

(v) A case in *employment services* status.

(2) *Unsatisfactory conduct and cooperation.* If a veteran's conduct or cooperation becomes unsatisfactory, services and assistance may be interrupted as determined under provisions of §§ 21.362 and 21.364.

(3) *Services not available.* The veteran cannot continue the program because the necessary training and rehabilitation services are unavailable.

(4) *Prior to assignment to ''discontinued'' status.* A veteran's case shall be assigned to *interrupted* status prior to discontinuance and assignment to *discontinued* status in all cases except as provided in § 21.182(d) and upon the veteran's death. The purpose of assignment to *interrupted* status is to assure that all appropriate actions have been taken to help the veteran continue in his or her program before discontinuing benefits and services.

(5) *Absences.* The veteran is not entitled to be placed on authorized absence under §§ 21.340 through 21.350 while in interrupted status.

(Authority: 38 U.S.C. 3111)

(d) *Reentrance from ''interrupted''* status. (1) A veteran in *interrupted* status may be assigned to his or her prior status or other appropriate status, if he or she reports for entrance or reentrance into the prescribed program at the time and place scheduled for the resumption of the rehabilitation program.

(2) If a veteran in *interrupted* status fails to report for entrance or reentrance into the program at the appointed time and place, the veteran's case will remain in *interrupted* status. The case manager will then determine whether there is a satisfactory reason for the veteran's failure to enter a new or reenter the prior program. If the evidence of record does not establish a satisfactory reason, the veteran's case will be discontinued and assigned to *discontinued* status.

(e) *Case management responsibility during a period of interruption.* The case manager shall maintain contact with the veteran during *interruption* and shall arrange for appropriate medical or other services the veteran needs to be able to enter or reenter a rehabilitation program or a program of employment services.

(Authority: 38 U.S.C. 3107)

CROSS-REFERENCE: See § 21.324 Reduction or termination date.

[49 FR 40814, Oct. 18, 1984, as amended at 52 FR 2518, Jan. 23, 1987]

## § 21.198 "Discontinued" status.

(a) *Purpose.* The purpose of *discontinued* status is to identify situations in which termination of all services and benefits received under Chapter 31 is necessary.

(b) *Placement in ''discontinued''.* VA will discontinue the veteran's case and assign the case to *discontinued* status following assignment to *interrupted* status as provided in § 21.197 for reasons including but not limited to the following:

(1) *Veteran declines to initiate or continue rehabilitation process.* If a veteran does not initiate or continue the rehabilitation process and does not furnish an acceptable reason for his or her failure to do so following assignment to *interrupted* status, the veteran's case will be discontinued and assigned to *discontinued* status. This includes:

(i) A case in *applicant* status;

(ii) A case in *evaluation and planning* status;

(iii) A case in *extended evaluation* status;

(iv) A case in *rehabilitation to the point of employability* status;

(v) A case in *independent living program* status;

(vi) A case in *employment services* status; or

(vii) A case in *interrupted* status;

(2) *Unsatisfactory conduct and cooperation.* When a veteran's conduct or cooperation becomes unsatisfactory, services and assistance may be discontinued and assigned to *discontinued* status as determined under provisions of §§ 21.362 and 21.364.

(3) *Eligibility and entitlement.* Unless the veteran desires employment assistance, the veteran's case will be discontinued and assigned to *discontinued* status when:

(i) The veteran reaches the basic twelve-year termination date, and there is no basis for extension; or

(ii) The veteran has used 48 months of entitlement under one or more VA programs, and there is no basis for extension of entitlement.

(4) *Medical and related problems.* A veteran's case will be discontinued and assigned to *discontinued* status when:

(i) The veteran will be unable to participate in a rehabilitation program because of a serious physical or emotional problem for an extended period; and

(ii) VA medical staff are unable to estimate an approximate date by which the veteran will be able to begin or return to the program.

(5) *Withdrawal.* Veteran voluntarily withdraws from the program.

(6) *Failure to progress.* The veteran's case will be discontinued and assigned to *discontinued* status if his or her failure to progress in a program is due to:

(i) Continuing lack of application by the veteran unrelated to any personal or other problems; or

(ii) Inability of the veteran to benefit from rehabilitation services despite the best efforts of VA and the veteran.

(Authority: 38 U.S.C. 3108, 3111)

(7) *Special review of proposed discontinuance action.* The Vocational Rehabilitation and Employment (VR&C) Officer shall review each case in which discontinuance is being considered for a veteran with a service-connected disability rated 50 percent or more disabling. The VR&C Officer may utilize exisitng resources to assist in the review, including referral to the Vocational Rehabilitation Panel (VRP).

(Authority: 38 U.S.C. 3104(a)(1))

(c) *Termination of ''discontinued'' status.* Except as noted in paragraph (c)(3) of this section assignment of the veteran's case to the same status from which the veteran was discontinued or to a different one requires that VA first find:

(1) The reason for the discontinuance has been removed; and

(2) VA has redetermined his or her eligibility and entitlement under Chapter 31.

(3) In addition to the criteria described in paragraphs (c) (1) and (2) of this section a veteran placed into *discontinued* status as a result of a finding of unsatisfactory conduct or cooperation under §§21.362 and 21.364 must also meet the requirements for reentrance into a rehabilitation program found in §21.364.

(Authority: 38 U.S.C. 3111)

(d) *Follow-up of a cases placed in ''discontinued'' status.* VA shall establish appropriate procedures to follow up on cases which have been placed in *discontinued* status, except in those cases reassigned from *applicant* status. The purpose of such followup is to determine if:

(1) The reasons for discontinuance may have been removed, and reconsideration of eligibility and entitlement is possible; or

(2) The veteran is employed, and criteria for assignment to *rehabilitated* status are met.

(Authority: 38 U.S.C. 3107)

CROSS-REFERENCE: See §21.324 Reduction or termination dates of subsistence allowance.

[49 FR 40814, Oct. 18, 1984, as amended at 52 FR 2518, Jan. 23, 1987; 53 FR 32620, Aug. 26, 1988]

SUPPLIES

## §21.210 Supplies.

(a) *Purpose of furnishing supplies.* Supplies are furnished to enable a veteran to pursue rehabilitation and achieve the goals of his or her program.

(b) *Definition.* The term *supplies* includes books, tools, and other supplies and equipment which VA determines are necessary for the veteran's rehabilitation program.

(c) *Periods during which supplies may be furnished.* Supplies may be furnished during:

(1) Extended evaluation;

(2) Rehabilitation to the point of employability;

(3) Employment services; and

(4) An independent living services program.

(Authority: 38 U.S.C. 3104(a))

(d) *Supplies precluded.* Notwithstanding the provisions of paragraph (c) of this section, supplies may not be furnished to a veteran who has elected, or is in receipt of, payment at the educational assistance rate paid under Chapter 34.

(Authority: 38 U.S.C. 3108(a))

### § 21.212 General policy in furnishing supplies during periods of rehabilitation.

(a) *Furnishing necessary supplies during a period of rehabilitation services.* A veteran will be furnished supplies that are necessary for a program of rehabilitation services. For example, a veteran training in a school will be furnished the supplies needed to pursue the school course. If additional supplies are subsequently needed to secure employment, they will be furnished during the period of employment services as provided in § 21.214(d).

(b) *Determining supplies needed during a period of rehabilitation.* Subject to the provisions of §§ 21.210 through 21.222, VA will authorize only those supplies which are required:

(1) To be used by similarly circumstanced non-disabled persons in the same training or employment situation;

(2) To mitigate or compensate for the effects of the veteran's disability while he or she is being evaluated, trained or assisted in gaining employment; or

(3) To allow the veteran to function more independently and thereby lessen his or her dependence on others for assistance.

(c) *When supplies may be authorized.* Supplies should generally be authorized subsequent to the date of enrollment in training or beginning date of other rehabilitation services unless there are compelling reasons to authorize them earlier. Supplies may not be authorized earlier than the date the veteran's rehabilitation plan is approved by VA and the veteran is accepted by the facility or individual providing services.

(d) *Supplies needed, but not specifically required.* VA may determine that an item, such as a calculator, while not required by the school for the pursuit of a particular school subject, is nevertheless necessary for the veteran to successfully pursue his or her program under the provisions of § 21.156 pertaining to incidental goods and services. The item may be authorized if:

(1) It is generally owned and used by students pursuing the course; and

(2) Students who do not have the item would be placed at a distinct disadvantage in pursuing the course.

(e) *Supplies for special projects and theses.* The amount of supplies that VA may authorize for special projects, including theses, may not exceed the amount generally needed by similarly circumstanced nonveterans in meeting course or thesis requirements.

(Authority: 38 U.S.C. 3104(a))

(f) *Responsibility for authorization of supplies.* The case manager is responsible for the authorization of supplies, subject to requirements for prior approval contained in § 21.258 and other instructions governing payment of program charges.

(Authority: 38 U.S.C. 3106(e))

### § 21.214 Furnishing supplies for special programs.

(a) *General.* A veteran pursuing one of the following types of vocational rehabilitation programs is eligible for any types of supplies listed in § 21.212. The following paragraphs clarify the applicability of the general provisions of § 21.212 to these special situations.

(b) *Supplies furnished to veterans pursuing training in the home.* VA may furnish to veterans training in the home:

(1) Books, tools, and supplies which schools or training establishments that train individuals outside the home for the objective the veteran is pursuing at home ordinarily require all students and trainees to personally possess;

(2) Supplies and equipment which are essential to the prescribed course of training because the veteran is pursuing the course at home. Equipment in this category consists of items which ordinarily are not required by a school or training establishment;

(3) Special equipment, such as a vise or drafting table;

(4) Supplies needed to enable the veteran to function more independently in his or her home and community.

(Authority: 38 U.S.C. 3104(a))

(c) *Supplies furnished to a veteran in farm cooperative training.* The books and related training supplies which VA may furnish a veteran in farm cooperative training depend upon the type of instruction he or she is receiving:

(1) When organized, group instruction is part of a veteran's course, VA will furnish those books and supplies which the school requires all students in the school portion of the course to own personally or on a rental basis;

(2) When all instruction is given on the veteran's farm by an individual instructor, VA will furnish to a student only those textbooks and other supplies which would ordinarily be required by a school.

(Authority: 38 U.S.C. 3104(a)(7))

(d) *Obtaining and maintaining employment.* A veteran being furnished employment services may receive supplies which:

(1) The employer requires similarly circumstanced nonveterans to own upon begining employment to the extent that the items were not furnished during the period in which the veteran was training for the objective, or the items that were furnished for training purposes are not adequate for employment;

(2) VA determines that special equipment is necessary for the veteran to perform his or her duties, subject to the obligation of the employer to make reasonable accommodation to the disabling effects of the veteran's condition.

(Authority: 38 U.S.C. 3104(a), 4212)

(e) *Self-employment.* The supplies and services which may be furnished, subject to the requirements prescribed under §21.258, to a veteran for whom self-employment has been approved as the occupational objective, are generally limited to those necessary to begin operations:

(1) Minimum stocks of materials, e.g., inventory of saleable merchandise or goods, expendable items required for day-to-day operations, and items which are consumed on the premises;

(2) Essential equipment, including machinery, occupational fixtures, accessories, and appliances; and

(3) Other incidental services such as business license fees.

(Authority: 38 U.S.C. 3104(a)(2))

(f) *Supplies and related assistance which may not be furnished for self-employment.* VA may not authorize assistance for:

(1) Purchase of, or part payment for, land and buildings;

(2) Making full or part payment of leases or rentals;

(3) Purchase or rentals of trucks, cars, or other means of transportation;

(4) Stocking a farm for animal husbandry operations.

(Authority: 38 U.S.C. 3104(a)(12))

[49 FR 40814, Oct. 18, 1984; 50 FR 9622, Mar. 11, 1985]

## §21.216 Special equipment.

(a) *General.* Special equipment should be authorized as necessary to enable a veteran to mitigate or overcome the effects of disability in pursuing a rehabilitation program. The major types of special equipment which may be authorized include:

(1) *Equipment for educational or vocational purposes.* This category includes items which are ordinarily used by nondisabled persons pursuing evaluation or training, modified to allow for use by disabled persons. e.g., calculators with speech capability for blinded persons.

(2) *Sensory aids and prostheses.* This category includes items which are specifically designed to mitigate or overcome the effects of disability. They range from eyeglasses and hearing aids to closed-circuit TV systems which amplify reading material for veterans with severe visual impairments.

(3) *Modifications to improve access.* This category includes adaptations of environment not generally associated with education and training, such as adaptive equipment for automobiles or

supplies necessary to modify a veteran's home to make either training or self-employment possible.

(Authority: 38 U.S.C. 3104(a))

(b) *Coordination with other VA elements in securing special equipment.* In any case in which the veteran needs special equipment and is eligible for such equipment under other VA programs, such as medical care and treatment at VA medical centers, the items will be secured under that program. The veteran must be found ineligible for needed special equipment under other programs and benefits administered by VA before the item may be authorized under Chapter 31.

(Authority: 38 U.S.C. 3115)

### § 21.218 Methods of furnishing supplies.

(a) *Supplies furnished by the school or facility.* VA will make arrangements for the school or other facility furnishing a veteran training, rehabilitation assistance, or employment under Chapter 31 to provide supplies to the extent practicable. This method is the one most likely to assure that supplies are available and can be secured expeditiously. A facility may be considered to be furnishing supplies when the facility itself is the supplier, or the facility has designated a supplier. Prior authorization of supplies by the case manager is required, except for standard sets of books, tools, or supplies which the facility requires all trainees or employees to have.

(b) *Issuance of supplies not furnished by the facility.* VA will issue authorized supplies directly to the veteran, if the supplies are not furnished by the facility providing training, rehabilitation services, or employment.

(Authority: 38 U.S.C. 3104(a))

CROSS-REFERENCE: See 48 CFR part 831. Contract cost principles and procedures.

### § 21.219 Supplies consisting of clothing, magazines and periodicals, and items which may be personally used by the veteran.

(a) *Furnishing protective articles and clothing.* Protective articles or apparel worn in place of ordinary clothing will be furnished at VA expense, when the school or training establishment requires similarly circumstanced nonveterans to use the articles of apparel. No other clothing will be supplied.

(b) *Furnishing magazines and periodicals.* Appropriate past issues of magazines, periodicals, or reprints may be furnished in the same manner as text material, when relevant to the course or training.

(c) *Furnishing items which may be personally used.* Musical instruments, cameras, or other items which could be used personally by the veteran may only be furnished if required by the facility to meet requirements for degree or course completion.

(Authority: 38 U.S.C. 3104(a)(7))

### § 21.220 Replacement of supplies.

(a) *Lost, stolen, misplaced or damaged supples.* VA will replace articles which are necessary to further pursuit of the veteran's program and which are lost, stolen, misplaced, or damaged beyond repair through no fault of the veteran;

(1) VA will make an advancement from the Vocational Rehabilitation Revolving Fund to a veteran to replace articles for which VA will not pay, if the veteran is without funds to pay for them;

(2) If a veteran refuses to replace an article indispensable to the program after VA determines that its loss or damage was his or her fault, the veteran's refusal may be considered as noncooperation under § 21.364;

(3) If the veteran's program is discontinued under provisions of § 21.364(b), he or she will be reentered into the program only when he or she replaces the necessary articles.

(Authority: 38 U.S.C. 3104(a))

(b) *Personally purchased supplies.* VA will not generally reimburse a veteran who personally buys supplies. VA may pay for the required supplies which a training facility or other vendor sells to a veteran, if the facility chooses to return to the veteran the amounts he or she paid, so that the charges stand as an unpaid obligation of VA to the facility. If the facility does not agree to such an arrangement, VA may still pay

the veteran, if the facts and equities of the case are demonstrated.

(Authority: 38 U.S.C. 3115)

(c) *Supplies used in more than one part of the program.* Except as provided in paragraph (a) of this section, VA will generally furnish any nonconsumable supplies only one time, even though the same supplies may be required for use by the veteran in another subject or in another quarter, semester, or school year.

(Authority: 38 U.S.C. 3104(a)(7))

**§ 21.222 Release of, and repayment for, training and rehabilitation supplies.**

The value of supplies authorized by VA will be repaid under the provisions of this section, when the veteran fails to complete the program as planned.

(a) *Consumable supplies.* VA will require reimbursement from a veteran for consumable supplies authorized, unless:

(1) The veteran fails to complete the rehabilitation program through no fault of his or her own;

(2) The employment objective of the rehabilitation plan is changed as a result of reevaluation by VA staff;

(3) The total value of the supplies for which repayment is required is less than $100; or

(4) The veteran dies.

(Authority: 38 U.S.C. 3104)

(b) *Nonconsumable supplies (general).* (1) In addition to the exceptions noted in paragraph (c) of this section, VA will not require reimbursement from a veteran for nonconsumable supplies authorized, if:

(i) The veteran and VA change the long-range goal of the rehabilitation plan and those supplies are not required for the veteran's pursuit of training for the new goal;

(ii) The veteran's failure to complete the program was not his or her fault;

(iii) The veteran was pursuing the program at a facility which recovers nonconsumable supplies from veterans through contractural arrangements with VA, and the veteran returned to the facility all the nonconsumable supplies furnished at VA expense;

(iv) The veteran reenters the Armed Forces or is in the process of reentering the Armed Forces;

(v) The veteran satisfactorily completed one-half or more of a noncollege degree course (or at least two terms in the case of a college course) for which VA furnished the supplies;

(vi) The veteran certifies that he or she is using in current employment the supplies furnished during training;

(vii) The total value of the supplies for which repayment is required is less than $100;

(viii) The veteran dies;

(ix) The veteran is furnished supplies during a period of employment services but loses the job through no fault of his or her own;

(x) A veteran discontinued from an *independent living services* program is using supplies and equipment to reduce his or her dependence on others; or

(xi) The veteran is declared rehabilitated.

(2) The amount which a veteran must repay will be the lesser of the current value of the supplies, or the original cost of the supplies. VA will accept supplies in lieu of repayment of the value of the supplies if VA has authorized a change of objective.

(Authority: 38 U.S.C. 3104(a))

(c) *Training in the home and self-employment.* In addition to the reasons for not requiring repayment or return of nonconsumable supplies listed in paragraph (b) of this section, VA will not require a veteran to pay for or return nonconsumable supplies if: (1) In the case of a veteran training in the home:

(i) VA furnished such supplies to equip his or her home as a place of training; and

(ii) The veteran has completed enough of his or her training program to be considered employable, and has been declared rehabilitated to the point of employability;

(2) A veteran in a self-employment program not in the home is declared rehabilitated; or

(3) The veteran dies and the Director, VR&C Service determines that the

facts and equities of the family situation warrant waiver of all or a part of the requirements for repayment.

(Authority: 38 U.S.C. 3104(a)(12))

[49 FR 40814, Oct. 18, 1984, as amended at 62 FR 17708, Apr. 11, 1997]

### § 21.224 Prevention of abuse.

Supplies are to be furnished under the most careful checks by the case manager as to what is needed by the veteran to pursue his or her program. Determinations of the supplies needed to enable the veteran to successfully pursue his or her rehabilitation program are made under the provisions of §§ 21.210 through 21.222.

(Authority: 38 U.S.C. 3104, 3111)

MEDICAL AND RELATED SERVICES

### § 21.240 Medical treatment, care and services.

(a) *General.* A Chapter 31 participant shall be furnished medical treatment, care and services which VA determines are necessary to develop, carry out and complete the veteran's rehabilitation plan. The provision of such services is a part of the veteran's entitlement to benefits and services under Chapter 31, and is limited to the period or periods in which the veteran is a Chapter 31 participant.

(Authority: 38 U.S.C. 3104, 3107)

(b) *Scope of services.* The services which may be furnished under Chapter 31 include the treatment, care and services described in part 17 of this title. In addition the following services may be authorized under Chapter 31 even if not included or described in part 17:

(1) Prosthetic appliances, eyeglasses, and other corrective or assistive devices;

(2) Services to a veteran's family as necessary for the effective rehabilitation of the veteran;

(3) Special services (including services related to blindness and deafness) including:

(i) Language training; speech and voice correction, training in ambulation, and one-hand typewriting;

(ii) Orientation, adjustment, mobility and related services;

(iii) Telecommunications, sensory and other technical aids and devices.

(c) *Eligibility.* A veteran is eligible for the services described in paragraph (b) of this section during periods in which he or she is considered a Chapter 31 participant. These periods include:

(1) Initial evaluation;

(2) Extended evaluation;

(3) Rehabilitation to the point of employability;

(4) Independent living services program;

(5) Employment services; and

(6) Other periods to the extent that services are needed to begin or continue in any of the statutes described in paragraphs (c)(1) through (5) of this section. Such periods include but are not limited to services needed to facilitate reentry into rehabilitation following:

(i) Interruption; or

(ii) Discontinuance because of illness or injury.

(Authority: 38 U.S.C. 3104)

CROSS-REFERENCE: See § 17.48(g). Participating in a rehabilitation program under Chapter 31.

### § 21.242 Resources for provision of treatment, care and services.

(a) *General.* VA medical centers are the primary resources for the provision of medical treatment, care and services for Chapter 31 participants which may be authorized under the provisions of § 21.240. The availability of necessary services in VA facilities shall be ascertained in each case.

(Authority: 38 U.S.C. 3115)

(b) *Hospital care and medical service.* Hospital care and medical services provided under Chapter 31 shall only be furnished in facilities over which VA has direct jurisdiction, except as authorized on a contract or fee basis under the provisions of part 17 of this title.

(Authority: 38 U.S.C. 3115(b))

CROSS-REFERENCES: See § 17.30(l). Hospital care. § 17.30(m) Medical services.

EMPLOYMENT SERVICES

**§ 21.250 Overview of employment services.**

(a) *General.* Employment services shall be provided if:

(1) Eligibility for employment services exists;

(2) The employment services which are needed have been identified; and

(3) The services which have been identified are incorporated in the veteran's IWRP (Individualized Written Rehabilitation Plan) or IEAP (Individualized Employment Assistance Plan).

(Authority: 38 U.S.C. 3107, 3117)

(b) *Definitions.* (1) The term *program (period) of employment services* includes the counseling, medical, social, and other placement and postplacement services provided to a veteran under 38 U.S.C. Chapter 31 to assist the veteran in obtaining or maintaining suitable employment. The term *program of employment services* is used only if the veteran's eligibility under Chapter 31 is limited to employment services.

(2) The term *job development* means a comprehensive professional service to assist the individual veteran to actually obtain a suitable job, and not simply the solicitation of jobs on behalf of the veteran. Continuing and mutually beneficial relationships with employers should be established by VA staff through referral of suitable employees and supportive services (e.g., adjustment counseling and job modification). Job development activities by VA staff are intended to provide disabled workers with a chance for suitable employment with cooperating employers.

(3) The term *employable* means the veteran is able to secure and maintain employment in the competitive labor market or in a sheltered workshop or other special situation at the minimum wage.

(Authority: 38 U.S.C. 3101, 3106, 3116, 3117)

(c) *Determining eligibility for, and the extent of, employment services.*

(1) A veteran's eligibility for employment services shall be determined under the provisions of § 21.47;

(2) The duration of the period of employment services is determined under provisions of § 21.73;

(3) An IEAP (Individualized Employment Assistance Plan) shall be prepared under provisions of § 21.88;

(4) A veteran shall be placed in and removed from ''Employment Assistance Status'' under provisions of § 21.194.

(Authority: 38 U.S.C. 3101, 3117)

[49 FR 40814, Oct. 18, 1984; 50 FR 9622, Mar. 11, 1985, as amended at 54 FR 21216, May 17, 1989]

**§ 21.252 Job development and placement services.**

(a) *General.* Job development and placement services may include:

(1) Direct placement assistance by VA;

(2) Utilization of the job development and placement services of:

(i) DVOP (Disabled Veterans Outreach Program) specialists;

(ii) Programs authorized under the Rehabilitation Act of 1973, as amended;

(iii) The State Employment Services and the Veterans' Employment and Training Service of the United States Department of Labor;

(iv) The Office of Personnel Management; and

(v) The services of any other public, or nonprofit organization having placement services available; and

(vi) Any for-profit agency in a case in which it has been determined that comparable services are not available through public and nonprofit agencies and comparable services cannot be provided cost-effectively by the public and nonprofit agencies listed in this paragraph.

(Authority: 38 U.S.C. 3117(a)(2))

(b) *Promotion of employment and training opportunities.* As funding permits, VA employees engaged in the administration of Chapter 31 will promote the establishment of employment, training, and related opportunities to accomplish the purposes described in § 21.1.

(Authority: 38 U.S.C. 3101)

(c) *Advocacy responsibility.* VA shall take reasonable steps to ensure that a veteran being provided employment services receives the benefit of any applicable provision of law or regulation providing for special consideration or

emphasis or preference of the veteran in employment or training, especially programs and activities identified in the preceding paragraphs of this section.

(Authority: 38 U.S.C. 523)

(d) *Interagency coordination.* VA employees providing assistance to Chapter 31 participants shall coordinate their job development, placement, promotional, and advocacy activities with similar or related activities of:

(1) The Department of Labor and State employment security agencies as provided by written agreement or other arrangement;

(2) The State approving agencies:

(3) Other public, for-profit and nonprofit agencies providing employment and related services.

(Authority: 38 U.S.C. 3116, 3117, Pub. L. 100–689)

[49 FR 40814, Oct. 18, 1984, as amended at 55 FR 42187, Oct. 18, 1990; 62 FR 17708, Apr. 11, 1997]

### § 21.254 Supportive services.

(a) *General.* Supportive services which may be provided during a period or program of employment services include a broad range of medical treatment, care and services, supplies, license and other fees, special services, including services to the blind and deaf, transportation assistance, services to the veteran's family, and other appropriate services, subject to the limitations provided in VA regulations governing the provisions of these services under Chapter 31.

(b) *Exclusions.* The following benefits may not be provided to the veteran by VA during a period or program of employment services:

(1) Subsistence allowance, or payment of an allowance at the educational assistance rate paid under Chapter 30 for similar training;

(2) Education and training services, other than brief courses, such as review courses necessary for licensure;

(3) Revolving Fund Loan; and

(4) Work-study allowance.

(Authority: 38 U.S.C. 3104(a), 3108(f))

(c) *Disabled veterans trained for self-employment under a State rehabilitation agency.* A service-disabled veteran who has trained for self-employment under the auspices of a State rehabilitation agency may be provided supplemental equipment and initial stocks and supplies similar to the materials supplied to the most severely disabled veterans in self-employment programs under Chapter 31, if the following conditions are met:

(1) The veteran is eligible for employment assistance under provisions of § 21.47;

(2) An official of the State rehabilitation program with responsibility for administration of self-employment programs certifies that:

(i) The veteran has successfully completed training for a self-employment program;

(ii) The assistance needed is not available through the State rehabilitation program, or other non-VA sources;

(iii) The assistance requested is a part of the veteran's IWRP (Individualized Written Rehabilitation Plan) developed by the State rehabilitation program;

(3) The requirements of § 21.258 pertaining to self-employment for the most severely disabled veterans are met; and

(4) The Director, VR&E Service, approves the request, if the cost of supplies is more than $2,500. The approval of the Director is required prior to authorization of supplies.

(Authority: 38 U.S.C. 3117(b))

[49 FR 40814, Oct. 18, 1984, as amended at 54 FR 4283, Jan. 30, 1989; 57 FR 57108, Dec. 3, 1992; 62 FR 17709, Apr. 11, 1997]

### § 21.256 Incentives for employers.

(a) *General.* VA may make payments to employers to enable a veteran who has been rehabilitated to employability to begin and maintain employment or to provide on-job training. The purpose of such payment is to facilitate the placement of veterans who are generally qualified for employment but may lack some specific training or work experience which the employer requires or who are difficult to place due to their disability. The specific conditions which must be met before

this option may be considered are contained in paragraphs (b) through (d) of this section.

(b) *Requirements for payments to employers.* Payments may be made to employers to provide on-job training or to begin and maintain employment if all of the following conditions are met:

(1) The veteran is in need of an on-job training situation or is generally qualified for employment but such on-job situation or employment opportunity is not otherwise available despite repeated and intensive efforts on the part of VA and the veteran to secure such opportunities. These conditions are also considered to be met when:

(i) There are few employers within commuting distance of the veteran's home who can provide a training or employment opportunity consistent with the veteran's plan; and

(ii) The veteran reasonably could not be required to seek on-job or employment opportunities in other areas due to the effects of his or her disability, family situation, or other pertinent factors; and

(iii) The available local employers will only provide a training or employment opportunity if VA agrees to reimburse for direct expenses to the degree permitted under this section.

(2) The training establishment or employer is in compliance with provisions of § 21.292 (a) and (b), pertaining to the approval of courses and facilities.

(3) VA entered into an agreement with the employer in writing prior to the beginning of the period of on-job training or employment, whereby the employer will be reimbursed for direct expenses approved under provisions of paragraph (c) of this section.

(4) The on-job training program or employment of the veteran does not displace a current employee or prevent the recall of a laid-off employee.

(c) *Limitation on payment.* Payments to the employer may be made only for the employer's direct expenses as a result of hiring the veteran and generally may not exceed one-half of the wage paid to other employees in the same or similar job. Direct expenses include:

(1) Instruction;

(2) Instructional aids;

(3) Training materials and supplies provided to the veteran;

(4) Minor modification of equipment to the special limitations of the veteran;

(5) Significant loss of productivity of the employer caused by using the veteran as opposed to a nondisabled employee.

(d) *Duration.* The period for which the employer is paid may not exceed the period necessary to accomplish on-job training or to begin and maintain employment at the journeyman level for at least 2 months. The period for which payment may be authorized may not exceed 9 months, unless the VR&C Officer, approves a longer period.

(e) *Benefits and services.* (1) An eligible veteran on whose behalf payments are made to the employer shall be provided all other Chapter 31 benefits and services furnished to other veterans receiving employment services. A veteran may not be paid a subsistence allowance during the period in which job training or work experience is furnished under this section.

(2) Notwithstanding any other provisions of these regulations, if the program in which the veteran is participating meets the criteria for approval of on-job training under chapter 30, the veteran may be paid at educational assistance rates provided for this type of training under chapter 30 to the extent that he or she has remaining eligibility and entitlement under chapter 30 and has elected to receive a subsistence allowance in accordance with § 21.7136.

(Authority: 38 U.S.C. 3108(f), 3116(b))

(f) *Non-duplication.* VA will not make payments under the provisions of this section to an employer receiving payments from any other program for the same training or employment expenses.

(Authority: 38 U.S.C. 3116(b))

[49 FR 40814, Oct. 18, 1984; 50 FR 9622, Mar. 11, 1985; 54 FR 4283, Jan. 30, 1989; 57 FR 57108, Dec. 3, 1992; 62 FR 17709, Apr. 11, 1997]

### § 21.257 Self-employment.

(a) *General.* Vocational rehabilitation will generally be found to have been accomplished by the veteran when he or she achieves suitable employment in the objective selected, in an existing business, agency or organization in the public or private sector. Rehabilitation

of the veteran may be achieved through self-employment in a small business, if the veteran's access to the normal channels for suitable employment in the puplic or private sector is limited because of his or her disability or other circumstances in the veteran's situation warrant consideration of self-employment as an additional option.

(b) *Self-employment plan.* VA staff will conduct a comprehensive survey and analysis of the feasibility of self-employment prior to authorization of a rehabilitation plan leading to self-employment. The analysis and self-employment plan developed on the basis of such analysis shall be made a part of the veteran's Chapter 31 record. The survey and plan shall include:

(1) An analysis of the economic viability of the proposed small business plan;

(2) A cost analysis which specifies the amount and type of assistance, if any, which VA would be committed to furnish;

(3) Provision for development of a market for the veteran's services during the period of rehabilitation to the point of employability, and/or employment services;

(4) A suitable occupational objective in which employment can normally be secured in the public or private sector;

(5) Training necessary for the operation of a successful small business;

(6) Availability of non-VA financing, including the veteran's financial resources, local banks and other sources;

(7) Coordination with the Small Business Administration to secure special consideration under section 8 of the Small Business Act, as amended;

(8) The location of the site selected for the business and the cost of the site, if any.

(Authority: 38 U.S.C. 3104(a)(12))

### § 21.258 Special assistance for veterans in self-employment.

(a) *General.* A veteran in a self-employment program is eligible for certain special assistance in addition to the services for which veterans in a vocational rehabilitation program are generally eligible under the provisions of § 21.252. A veteran may be provided the assistance described under § 21.214 to the extent of his or her eligibility for such services as determined under paragraphs (b) and (c) of this section and § 21.254(c).

(Authority: 38 U.S.C. 3116, 3117)

(b) *Special services for the most severely disabled veterans.* Special services listed in § 21.214(e) shall be provided as necessary for the most severely disabled veterans. The term *most severely disabled veteran* means a veteran who has been determined to have a serious employment handicap and limitations on employability arising from the effects of disability (service-connected and nonservice-connected) which necessitates selection of self-employment as the veteran's vocational goal. This category includes veterans requiring:

(1) Homebound training and self-employment; or

(2) Self-employment for other reasons even though the veteran is able to pursue training on other than a homebound basis, e.g., lack of suitable employment opportunities in the area.

(Authority: 38 U.S.C. 3104(a)(12))

(c) *Special services for other veterans.* Special services described in § 21.214(e) may be furnished to a veteran with a serious employment handicap if the veteran also meets the following conditions:

(1) Self-employment is clearly shown to be the soundest method of achieving rehabilitation; or

(2) Self-employment is selected as an alternative to retaining the veteran in another occupation, and the cost of a self-employment program will not exceed the cost of retraining in another occupation.

(d) *Assisting a veteran with an employment handicap to become self-employed.* A veteran with an employment handicap may not be furnished any of the special services described in § 21.214(e). However, if it is determined that consideration of self-employment is warranted, VA may provide:

(1) Incidental training in the management of a small business;

(2) License or other fees required for employment and self-employment; and

(3) The tools and supplies which would ordinarily be required for the

veteran to begin employment in the field in which the veteran has trained.

(Authority: 38 U.S.C. 3104(a)(12))

[49 FR 40814, Oct. 18, 1984; 50 FR 9622, Mar. 11, 1985, as amended at 55 FR 25975, June 26, 1990; 55 FR 28511, July 11, 1990]

MONETARY ASSISTANCE SERVICES

## § 21.260 Subsistence allowance.

(a) *General.* A veteran participating in a rehabilitation program under 38 U.S.C. Chapter 31 will receive a monthly subsistence allowance at the rates in paragraph (b) of this section, unless the veteran elects to receive payment at the rate of monthly educational assistance allowance payable under 38 U.S.C. Chapter 30 for the veteran's type of training. See § 21.264 for election of payment at the Chapter 30 rate and §§ 21.7136, 21.7137, and 21.7138 to determine the applicable Chapter 30 rate.

(Authority: 38 U.S.C. 3108(a), 3108(f))

(b) *Rate of payment.* VA pays subsistence allowance at the rates stated in the following tables:

(1) Subsistence allowance is paid at the following rates effective October 1, 1994, and before November 2, 1994:

| Type of program | No dependents | One dependent | Two dependents | Additional amount for each dependent over two |
|---|---|---|---|---|
| Institutional: [1] | | | | |
| Full-time | $374.93 | $465.08 | $548.05 | $39.95 |
| ¾ time | 281.71 | 349.32 | 409.76 | 30.73 |
| ½ time | 188.49 | 233.56 | 274.54 | 20.49 |
| Nonpay or nominal pay on-job training in a Federal, State, or local agency; training in the home; vocational course in a rehabilitation facility or sheltered workshop; independent instructor: | | | | |
| Full-time only | 374.93 | 465.08 | 548.05 | 39.95 |
| Nonpay or nominal pay work experience in a Federal, State, or local agency: | | | | |
| Full-time | 374.93 | 465.08 | 548.05 | 39.95 |
| ¾ time | 281.71 | 349.32 | 409.76 | 30.73 |
| ½ time | 188.49 | 233.56 | 274.54 | 20.49 |
| Farm cooperative, apprenticeship, or other on-job training: [2] | | | | |
| Full-time only | 327.81 | 396.44 | 456.88 | 29.71 |
| Combination of institutional and OJT (Full-time only): | | | | |
| Institutional greater than ½ time | 374.93 | 465.08 | 548.05 | 39.45 |
| OJT greater than ½ time | 327.81 | 396.44 | 456.88 | 29.71 |
| Non-farm cooperative (Full-time only): | | | | |
| Institutional | 374.93 | 465.08 | 548.05 | 39.95 |
| On-job | 327.81 | 396.44 | 456.88 | 29.71 |
| Improvement of rehabilitation potential: | | | | |
| Full-time only | 374.93 | 465.08 | 548.05 | 39.95 |
| ¾ time | 281.71 | 349.32 | 409.76 | 30.73 |
| ½ time | 188.49 | 233.56 | 274.54 | 20.49 |
| ¼ time [3] | 94.24 | 116.78 | 137.27 | 10.24 |

[1] For measurement of rate of pursuit, see §§ 21.4270 through 21.4275.
[2] For on-job training, subsistence allowance may not exceed the difference between the monthly training wage, not including overtime, and the entrance journeyman wage for the veteran's objective.
[3] The quarter-time rate may be paid only during extended evaluation.

(2) Subsistence allowance is paid at the following rates effective November 2, 1994, and before October 1, 1995:

| Type of program | No dependents | One dependent | Two dependents | Additional amount for each dependent over two |
|---|---|---|---|---|
| Institutional: [1] | | | | |
| Full-time | $374.93 | $465.08 | $548.05 | $39.95 |
| ¾ time | 281.71 | 349.32 | 409.76 | 30.73 |
| ½ time | 188.49 | 233.56 | 274.54 | 20.49 |

| Type of program | No dependents | One dependent | Two dependents | Additional amount for each dependent over two |
|---|---|---|---|---|
| Nonpay or nominal pay on-job training in a facility of a Federal, State, local, or federally recognized Indian tribe agency; training in the home; vocational course in a rehabilitation facility or sheltered workshop; independent instructor: | | | | |
| Full-time only | 374.93 | 465.08 | 548.05 | 39.95 |
| Nonpay or nominal pay work experience in a facility of a Federal, State, local, or federally recognized Indian tribe agency: | | | | |
| Full-time | 374.93 | 465.08 | 548.05 | 39.95 |
| ¾ time | 281.71 | 349.32 | 409.76 | 30.73 |
| ½ time | 188.49 | 233.56 | 274.54 | 20.49 |
| Farm cooperative, apprenticeship, or other on-job training:[2] | | | | |
| Full-time only | 327.81 | 396.44 | 456.88 | 29.71 |
| Combination of institutional and OJT (Full-time only): | | | | |
| Institutional greater than ½ time | 374.93 | 465.08 | 548.05 | 39.45 |
| OJT greater than ½ time | 327.81 | 396.44 | 456.88 | 29.71 |
| Non-farm cooperative (Full-time only): | | | | |
| Institutional | 374.93 | 465.08 | 548.05 | 39.95 |
| On-job | 327.81 | 396.44 | 456.88 | 29.71 |
| Improvement of rehabilitation potential: | | | | |
| Full-time only | 374.93 | 465.08 | 548.05 | 39.95 |
| ¾ time | 281.71 | 349.32 | 409.76 | 30.73 |
| ½ time | 188.49 | 233.56 | 274.54 | 20.49 |
| ¼ time[3] | 94.24 | 116.78 | 137.27 | 10.24 |

[1] For measurement of rate of pursuit, see §§ 21.4270 through 21.4275.
[2] For on-job training, subsistence allowance may not exceed the difference between the monthly training wage, not including overtime, and the entrance journeyman wage for the veteran's objective.
[3] The quarter-time rate may be paid only during extended evaluation.

(3) The following table states the monthly rates of subsistence allowance payable for participation in a rehabilitation program under 38 U.S.C. Chapter 31 that occurs after September 30, 1995, and before October 1, 1996:

| Type of program | No dependents | One dependent | Two dependents | Additional amount for each dependent over two |
|---|---|---|---|---|
| Institutional:[1] | | | | |
| Full-time | $385.80 | $478.57 | $563.94 | $41.11 |
| ¾ time | 289.88 | 359.45 | 421.64 | 31.62 |
| ½ time | 193.96 | 240.33 | 282.50 | 21.08 |
| Nonpay or nominal pay on-job training in a facility of a Federal, State, local, or federally recognized Indian tribe agency; training in the home; vocational course in a rehabilitation facility or sheltered workshop; independent instructor: | | | | |
| Full-time only | 385.80 | 478.57 | 563.94 | 41.11 |
| Nonpay or nominal pay work experience in a facility of a Federal, State, local, or Indian tribe agency: | | | | |
| Full-time | 385.80 | 478.57 | 563.94 | 41.11 |
| ¾ time | 289.88 | 359.45 | 421.64 | 31.62 |
| ½ time | 193.96 | 240.33 | 282.50 | 21.08 |
| Farm cooperative, apprenticeship, or other on-job training (OJT):[2] | | | | |
| Full-time only | 337.32 | 407.94 | 470.13 | 30.57 |
| Combination of institutional and OJT (Full-time only): | | | | |
| Institutional greater than ½ time | 385.80 | 478.57 | 563.94 | 41.11 |
| OJT greater than ½ time[2] | 337.32 | 407.94 | 470.13 | 30.57 |
| Non-farm cooperative (Full-time only): | | | | |
| Institutional | 385.80 | 478.57 | 563.94 | 41.11 |
| On-job[2] | 337.32 | 407.94 | 470.13 | 30.57 |
| Improvement of rehabilitation potential: | | | | |
| Full-time only | 385.80 | 478.57 | 563.94 | 41.11 |
| ¾ time | 289.88 | 359.45 | 421.64 | 31.62 |
| ½ time | 193.96 | 240.33 | 282.50 | 21.08 |
| ¼ time[3] | 96.97 | 120.17 | 141.25 | 10.54 |

[1] For measurement of rate of pursuit, see §§ 21.4270 through 21.4275.
[2] For on-job training, subsistence allowance may not exceed the difference between the monthly training wage, not including overtime, and the entrance journeyman wage for the veteran's objective.

[3] The quarter-time rate may be paid only during extended evaluation.

(4) The following table states the monthly rates of subsistence allowance payable for participation in a rehabilitation program under 38 U.S.C. Chapter 31 that occurs after September 30, 1996, and before October 1, 1997:

| Type of program | No dependents | One dependent | Two dependents | Additional amount for each dependent over two |
|---|---|---|---|---|
| Institutional: [1] | | | | |
| Full-time | $396.22 | $491.49 | $579.17 | $42.22 |
| ¾time | 297.71 | 369.16 | 433.02 | 32.47 |
| ½ time | 199.20 | 246.82 | 290.13 | 21.65 |
| Nonpay or nominal pay on-job training in a facility of a Federal, State, local, or federally recognized Indian tribe agency; training in the home; vocational course in a rehabilitation facility or sheltered workshop; independent instructor: | | | | |
| Full-time only | 396.22 | 491.49 | 579.17 | 42.22 |
| Nonpay or nominal pay work experience in a facility of a Federal, State, local, or federally recognized Indian tribe agency: | | | | |
| Full-time | 396.22 | 491.49 | 579.17 | 42.22 |
| ¾ time | 297.71 | 369.16 | 433.02 | 32.47 |
| ½ time | 199.20 | 246.82 | 290.13 | 21.65 |
| Farm cooperative, apprenticeship, or other on-job training (OJT) [2] | | | | |
| Full-time only | 346.43 | 418.95 | 482.82 | 31.40 |
| Combination of institutional and OJT (Full-time only): | | | | |
| Institutional greater than ½ time | 396.22 | 491.49 | 579.17 | 42.22 |
| OJT greater than ½ time [2] | 346.43 | 418.95 | 482.82 | 31.40 |
| Non-farm cooperative (Full-time only): | | | | |
| Institutional | 396.22 | 491.49 | 579.17 | 42.22 |
| On-job [2] | 346.43 | 418.95 | 482.82 | 31.40 |
| Improvement of rehabilitation potential: | | | | |
| Full-time only | 396.22 | 491.49 | 579.17 | 42.22 |
| ¾ time | 297.71 | 369.16 | 433.02 | 32.47 |
| ½ time | 199.20 | 246.82 | 290.13 | 21.65 |
| ¼ time [3] | 99.59 | 123.41 | 145.06 | 10.82 |

[1] For measurement of rate of pursuit, see §§ 21.4270 through 21.4275.
[2] For on-job training, subsistence allowance may not exceed the difference between the monthly training wage, not including overtime, and the entrance journeyman wage for the veteran's objective.
[3] The quarter-time rate may be paid only during extended evaluation.

(5) The following table states the monthly rates of subsistence allowance payable for participation in a rehabilitation program under 38 U.S.C. Chapter 31 that occurs after September 30, 1997, and before November 1, 1998:

| Type of program | No dependents | One dependent | Two dependents | Additional amount for each dependent over two |
|---|---|---|---|---|
| Institutional: [1] | | | | |
| Full-time | $407.31 | $505.25 | $595.39 | $43.40 |
| ¾ time | 306.05 | 379.50 | 445.14 | 33.38 |
| ½ time | 204.78 | 253.73 | 298.25 | 22.26 |
| Nonpay or nominal pay on-job training in a facility of a Federal, State, local, or federally recognized Indian tribe agency; training in the home; vocational course in a rehabilitation facility or sheltered workshop; independent instructor: | | | | |
| Full-time only | 407.31 | 505.25 | 595.39 | 43.40 |
| Nonpay or nominal pay work experience in a facility of a Federal, State, local, or federally recognized Indian tribe agency: | | | | |
| Full-time | 407.31 | 505.25 | 595.39 | 43.40 |
| ¾ time | 306.05 | 379.50 | 445.14 | 33.38 |
| ½ time | 204.78 | 253.73 | 298.25 | 22.26 |
| Farm cooperative, apprenticeship, or other on-job training (OJT): [2] | | | | |
| Full-time only | 356.13 | 430.68 | 496.34 | 32.28 |
| Combination of institutional and OJT (Full-time only): | | | | |
| Institutional greater than ½ time | 407.31 | 505.25 | 595.39 | 43.40 |

| Type of program | No dependents | One dependent | Two dependents | Additional amount for each dependent over two |
|---|---|---|---|---|
| OJT greater than ½ time[2] | 356.13 | 430.68 | 496.34 | 32.28 |
| Non-farm cooperative (Full-time only): | | | | |
| Institutional | 407.31 | 505.25 | 595.39 | 43.40 |
| On-job[2] | 356.13 | 430.68 | 496.34 | 32.28 |
| Improvement of rehabilitation potential: | | | | |
| Full-time only | 407.31 | 505.25 | 595.39 | 43.40 |
| ¾ time | 306.05 | 379.50 | 445.14 | 33.38 |
| ½ time | 204.78 | 253.73 | 298.25 | 22.26 |
| ¼ time[3] | 102.38 | 126.87 | 148.09 | 11.12 |

[1]For measurement of rate of pursuit, see §§ 21.4270 through 21.4275.
[2]For on-job training, subsistence allowance may not exceed the difference between the monthly training wage, not including overtime, and the entrance journeyman wage for the veteran's objective.
[3]The quarter-time rate may be paid only during extended evaluation.

(6) The following table states the monthly rates of subsistence allowance payable for participation in a rehabilitation program under 38 U.S.C. Chapter 31 that occurs after September 30, 1998, and before October 1, 1999:

| Type of program | No dependents | One dependent | Two dependents | Additional amount for each dependent over two |
|---|---|---|---|---|
| Institutional:[1] | | | | |
| Full-time | $413.83 | $513.33 | $604.92 | $44.09 |
| ¾ time | 310.95 | 385.57 | 452.26 | 33.91 |
| ½ time | 208.06 | 257.79 | 303.02 | 22.62 |
| Nonpay or nominal pay on-job training in a facility of a Federal, State, local, or federally recognized Indian tribe agency; training in the home; vocational course in a rehabilitation facility or sheltered workshop; independent instructor: | | | | |
| Full-time only | 413.83 | 513.33 | 604.92 | 44.09 |
| Nonpay or nominal pay work experience in a facility of a Federal, State, local, or federally recognized Indian tribe agency: | | | | |
| Full-time | 413.83 | 513.33 | 604.92 | 44.09 |
| ¾ time | 310.95 | 385.57 | 452.26 | 33.91 |
| ½ time | 208.06 | 257.79 | 303.02 | 22.62 |
| Farm cooperative, apprenticeship, or other on-job training (OJT):[2] | | | | |
| Full-time only | 361.83 | 437.57 | 504.28 | 32.80 |
| Combination of institutional and OJT (Full-time only): | | | | |
| Institutional greater than ½ time | 413.83 | 513.33 | 604.92 | 44.09 |
| OJT greater than ½ time[2] | 361.83 | 437.57 | 504.28 | 32.80 |
| Non-farm cooperative (Full-time only): | | | | |
| Institutional | 413.83 | 513.33 | 604.92 | 44.09 |
| On-job[2] | 361.83 | 437.57 | 504.28 | 32.80 |
| Improvement of rehabilitation potential: | | | | |
| Full-time only | 413.83 | 513.33 | 604.92 | 44.09 |
| ¾ time | 310.95 | 385.57 | 452.26 | 33.91 |
| ½ time | 208.06 | 257.79 | 303.02 | 22.62 |
| ¼ time[3] | 104.02 | 128.90 | 151.51 | 11.30 |

[1]For measurement of rate of pursuit, see §§ 21.4270 through 21.4275.
[2]For on-job training, subsistence allowance may not exceed the difference between the monthly training wage, not including overtime, and the entrance journeyman wage for the veteran's objective.
[3]The quarter-time rate may be paid only during extended evaluation.

(7) The following table states the monthly rates of subsistence allowance payable for participation in a rehabilitation program under 38 U.S.C. Chapter 31 that occurs after September 30, 1999, and before October 1, 2000:

| Type of program | No dependents | One dependent | Two dependents | Additional amount for each dependent over two |
|---|---|---|---|---|
| Institutional:[1] | | | | |
| Full-time | $420.45 | $521.54 | $614.60 | $44.80 |
| ¾ time | 315.93 | 391.74 | 459.50 | 34.45 |
| ½ time | 211.39 | 261.91 | 307.87 | 22.98 |
| Nonpay or nominal pay on-job training in a Federal, State, local, or federally recognized Indian tribe agency; training in the home; vocational course in a rehabilitation facility or sheltered workshop; independent instructor; institutional non-farm cooperative: | | | | |
| Full-time only | 420.45 | 521.54 | 614.60 | 44.80 |
| Nonpay or nominal pay work experience in a Federal, State, local, or federally recognized Indian tribe agency: | | | | |
| Full-time | 420.45 | 521.54 | 614.60 | 44.80 |
| ¾ time | 315.93 | 391.74 | 459.50 | 34.45 |
| ½ time | 211.39 | 261.91 | 307.87 | 22.98 |
| Farm cooperative, apprenticeship, or other on-job training (OJT):[2] | | | | |
| Full-time only | 367.62 | 444.57 | 512.35 | 33.32 |
| Combination of institutional and OJT (Full-time only): | | | | |
| Institutional greater than ½ time | 420.45 | 521.54 | 614.60 | 44.80 |
| OJT greater than ½ time[2] | 367.62 | 444.57 | 512.35 | 33.32 |
| Non-farm cooperative (Full-time only): | | | | |
| Institutional | 420.45 | 521.54 | 614.60 | 44.80 |
| On-job[2] | 367.62 | 444.57 | 512.35 | 33.32 |
| Improvement of rehabilitation potential: | | | | |
| Full-time | 420.45 | 521.54 | $614.60 | $44.80 |
| ¾ time | 315.93 | 391.74 | 459.50 | 34.45 |
| ½ time | 211.39 | 261.91 | 307.87 | 22.98 |
| ¼ time[3] | 105.98 | 130.96 | 153.93 | 11.48 |

[1] For measurement of rate of pursuit, see §§ 21.4270 through 21.4275.
[2] For on-job training, subsistence allowance may not exceed the difference between the monthly training wage, not including overtime, and the entrance journeyman wage for the veteran's objective.
[3] The quarter-time rate may be paid only during extended evaluation.

(Authority: 38 U.S.C. 3108, 3115(a)(1); Pub. L. 103–446)

(c) *Subsistence allowance precluded.* A veteran may not receive a subsistence allowance when VA is providing the veteran only the following services:

(1) Initial evaluation;

(2) Placement and post-placement services under 38 U.S.C. 3105(b); or

(3) Counseling.

(Authority: 38 U.S.C. 3108 (a)(1) and (a)(3))

(d) *Dependents.* The term *dependent* means a spouse, child or dependent parent who meets the definition of relationship specified in §§ 3.50, 3.51, 3.57 or 3.59 of this chapter.

(Authority: 38 U.S.C. 3108(b))

[49 FR 40814, Oct. 18, 1984, as amended at 51 FR 9955, Mar. 24, 1986; 52 FR 42113, Nov. 3, 1987; 54 FR 4283, Jan. 30, 1989; 56 FR 7567, Feb. 25, 1991; 60 FR 4561, Jan. 24, 1995; 65 FR 51764, Aug. 25, 2000; 65 FR 60724, Oct. 12, 2000]

## § 21.262 Procurement and reimbursement of cost for training and rehabilitation services, supplies, or facilities.

(a) *General.* Whenever services, supplies and facilities from source outside VA are required by any of these regulations, they shall be provided through contract, agreement of other cooperative arrangement between VA and the vendor.

(Authority: 38 U.S.C. 3115(b))

(b) *VA Acquisition Regulations.* Payments of charges for training and rehabilition services, supplies, or facilities, authorized under Chapter 31 are subject to the provisions of applicable VA Acquisition Regulations especially 48 CFR part 831 and subpart 871.2.

(Authority: 38 U.S.C. 3115(a))

## § 21.264 Election of payment at the 38 U.S.C. chapter 30 educational assistance rate.

(a) *Eligibility.* A veteran who applies for, and is found entitled to training or

education under Chapter 31, may elect to receive payment at the educational allowance rate and other assistance furnished under Chapter 30, for similar training in lieu of a subsistence allowance, provided the following criteria are met:

(1) The veteran has remaining eligibility for, and entitlement to educational assistance under Chapter 30;

(2) The veteran enrolls in a program of education or training approved for benefits under Chapter 30;

(3) The program of education is part of an IWRP (Individualized Written Rehabilitation Plan) approved by VA.

(Authority: 38 U.S.C. 3015, 3022, 3108(f))

(b) *Reelection of subsistence allowance.* Reelection of payment of benefits at the Chapter 31 subsistence allowance rate may be made only after completion of a term, quarter, semester, or other period of instruction unless:

(1) Chapter 30 eligibility or entitlement ends earlier;

(2) Failure to approve immediate reelection would prevent the veteran from continuing in the rehabilitation program.

(Authority: 38 U.S.C. 3015, 3022, 3108(f))

(c) *Services precluded.* A veteran entitled to vocational rehabilitation training or education who elects payment at the educational assistance rate payable under Chapter 30 shall be provided the same training and rehabilitation services as other veterans under Chapter 31, but may not be provided:

(1) Subsistence allowances;

(2) Loans from the revolving fund loan;

(3) Payment of costs for:

(i) Vocational and other training services;

(ii) Supplies; or

(iii) Individualized tutorial assistance.

(Authority: 38 U.S.C. 3015, 3022, 3108(f))

(d) *Chapter 30 provisions applicable.* A veteran who has elected payment at the Chapter 30 educational assistance rate must meet the same terms and conditions as other veterans pursuing similar training under these programs.

(Authority: 38 U.S.C. 3015, 3022, 3108(f))

[49 FR 40814, Oct. 18, 1984, as amended at 54 FR 4283, Jan. 30, 1989; 57 FR 57108, Dec. 3, 1992]

### § 21.266 Payment of subsistence allowance under special conditions.

(a) *Hospitalized veteran or serviceperson.* A veteran pursuing a VA rehabilitation program under Chapter 31 while hospitalized in a VA medical center or in any other hospital at VA expense may receive the subsistence allowance otherwise payable. The subsistence allowance will be paid at the rates specified in § 21.260, except:

(1) The amount of subsistence allowance or the allowance provided under § 21.264 that may be paid to a veteran pursuing a rehabilitation program for any month for which the veteran receives compensation at the rate prescribed in § 3.401(h) of this title, as the result of hospital treatment (not including post-hospital convalescence) or observation at the expense of VA may not exceed, when added to any compensation to which such veteran is entitled for the month, an amount equal to the greater of:

(i) The sum of: (A) the amount of monthly subsistence of the allowance payable under § 21.264, and (B) the amount of monthly disability compensation that would be paid to the veteran if he or she was not receiving compensation at the temporary 100 percent rate as the result of such hospital treatment or observation, or

(ii) The amount of monthly disability compensation payable under § 3.401(h) of this title.

(2) A veteran pursuing a rehabilitation program while in post hospital convalescence (§ 3.401(h)) will be paid the regular rate of subsistence allowance.

(3) A serviceperson pursuing a rehabilitation program under Chapter 31 will not receive a subsistence allowance if he or she is hospitalized in a medical facility under the jurisdiction of the Secretary pending final discharge from the armed forces.

(Authority: 38 U.S.C. 3108(h))

(b) *Specialized rehabilitation facility*—(1) A veteran in a specialized rehabilitation facility will be paid the regular rate of subsistence allowance at the institutional rate. VA may pay the cost of room and board in lieu of subsistence allowance when:

(i) The specialized rehabilitation facility requires that similarly circumstanced persons pay the same charges for room and board, and

(ii) The case manager finds and the veteran agrees that it is to the veteran's advantage for VA to pay the cost of room and board.

(2) Even though VA pays the cost of room and board, the veteran will be paid that portion of subsistence allowance otherwise payable for dependents.

(Authority: 38 U.S.C. 3108(e))

(c) *Non-pay work experience or training in a Federal agency.* A veteran in an on-job program or being provided work experience in a Federal agency at no or nominal pay shall receive subsistence allowance at the institutional rate.

(Authority: 38 U.S.C. 3108(c))

(d) *Extended evaluation and independent living program.* A veteran in a program of extended evaluation or independent living service program shall be paid subsistence allowance for full or part-time participation at the rate specified for institutional training in § 21.260. If an extended evaluation or independent living program is pursued on a less than a quarter-time basis, as measured under § 21.310(d), VA will only pay established charges for services furnished.

(Authority: 38 U.S.C. 3108(h))

(e) *On-job training.* A veteran in an on-job training program will be paid subsistence allowance at the rate provided under § 21.260(b), except that subsistence allowance may not exceed the difference between the monthly training wage, exclusive of overtime, and the entrance journeyman wage for the veteran's objective.

(Authority: 38 U.S.C. 3108(c))

**§ 21.268 Employment adjustment allowance.**

(a) *General.* A veteran who completes a period of rehabilitation and reaches the point of employability will be paid an employment adjustment allowance for a period of two months at the full-time subsistence allowance rate for the type of program the veteran was last pursuing. (See § 21.190(d))

(Authority: 38 U.S.C. 3108(a))

(b) *Reelection of subsistence allowance.* A veteran who has elected payment at the Chapter 30 educational assistance allowance rate may be paid an employment adjustment allowance only if he or she reelects subsistence allowance to become effective no later than the day following completion of the period of rehabilitation to the point of employability.

(Authority: 38 U.S.C. 3108(f))

(c) *Special programs.* An employment adjustment allowance will be paid at the institutional rate of subsistence allowance for veterans in any of the following programs:

(1) On-job training at no or nominal pay in a Federal agency;

(2) Training in the home program;

(3) Independent instructor program;

(4) Cooperative program; or

(5) Self-employment program.

(d) *Combination program.* A veteran who has pursued a combination program will be paid an employment adjustment allowance at the full-time rate for the type of training the veteran was actually pursuing at the completion of the period of rehabilitation to the point of employability.

(e) *Subsequent payments of employment adjustment allowance.* If a veteran has ever received an employment adjustment allowance following rehabilitation to the point of employability, he or she may, nevertheless, receive it again when completing an additional rehabilitation program to the point of employability if:

(1) The prior determination of rehabilitation to the point of employability is set aside; and

(2) The veteran is reinducted into a new vocational rehabilitation program as provided in § 21.282.

(f) *Employment adjustment allowance not charged against entitlement.* An employment adjustment allowance will not be charged against the veteran's basic entitlement.

(Authority: 38 U.S.C. 3108(a))

[49 FR 40814, Oct. 18, 1984, as amended at 54 FR 4284, Jan. 30, 1989; 57 FR 57108, Dec. 3, 1992]

### § 21.270 Payment of subsistence allowance during leave and between periods of instruction.

(a) *Payment during leave.* VA will pay an eligible veteran a subsistence allowance during any period of approved leave including a veteran:

(1) Receiving medical or rehabilitation services on an outpatient basis at a VA medical center, and who provides his or her own room and board;

(2) Receiving service department retirement or retained pay while not on active duty;

(3) Hospitalized at a VA medical center while on approved leave. If the veteran becomes eligible for payment of disability compensation at the temporary 100 percent rate, under § 3.401(h) of this title due to hospitalization, payment will be made under provisions of § 21.266(a).

(Authority: 38 U.S.C. 3110)

(b) *Payment for intervals between periods of instruction.* Subsistence allowance will paid to a veteran during the following periods unless the case manager and the veteran jointly determine that such payment is not in the veteran's interest:

(1) A period between consecutive terms within an enrollment period that does not exceed 1 full calendar month;

(2) A period between consecutive school terms, when the veteran, as part of his or her approved program of vocational rehabilitation, transfers from one educational institution to another for the purpose of enrolling in, and pursuing, the same objective at the second institution, provided the period does not exceed 30 days;

(3) A period which does not exceed 30 days, between a semester, term, or quarter, when the educational institution certifies the enrollment of the veteran on an individual semester, term, or quarter basis.

(c) *Payment for other periods.* Subsistence allowance will be paid for:

(1) Weeekend and legal holidays, or customary vacation periods associated with them;

(2) Periods in which the school is closed temporarily under emergency conditions described in § 21.4138(f).

### § 21.272 Veteran-student services.

(a) *Eligibility.* Veterans who are pursuing a rehabilitation program under chapter 31 on a three-quarter or full-time basis are eligible to receive a work-study allowance.

(Authority: 38 U.S.C. 3104(a)(4), 3485)

(b) *Selection criteria.* Whenever feasible, VA will give priority to veterans with service-connected disabilities rated at 30 percent or more disabling in selection of recipients of this allowance. VA shall consider the following additional selection criteria:

(1) Need of the veteran to augment the subsistence allowance or payment made by the Chapter 30 rate;

(2) Motivation of the veteran; and

(3) Compatibility of the work assignment with the veteran's physical condition.

(Authority: 38 U.S.C. 3104(a)(4), 3108(f), 3485)

(c) *Utilization.* Veteran-student services may be utilized in connection with:

(1) VA outreach service program as carried out under the supervision of a VA employee;

(2) Preparation and processing of necessary VA papers and other documents at educational institutions, regional offices or other VA facilities;

(3) Hospital and domiciliary care and medical treatment at VA facilities; and

(4) Any other appropriate activity of VA.

(d) *Rate of payment.* (1) In return for the veterans' agreement to perform services for VA totaling 25 times the number of weeks contained in an enrollment period, VA will pay an allowance equal to the higher of:

(i) The hourly minimum wage in effect under section 6(a) of the Fair Labor Standards Act of 1938 times the

number of hours the veteran has agreed to work; or

(ii) The hourly minimum wage under comparable law of the State in which the services are to be performed times the number of hours the veteran has agreed to work.

(2) VA will pay proportionately less to a veteran who agrees to perform a lesser number of hours of services.

(Authority: 38 U.S.C. 3104(a)(4), 3485)

(e) *Payment in advance.* VA will pay in advance an amount equal to 40 percent of the total amount payable under the contract (but not more than an amount equal to 50 times the applicable hourly minimum wage).

(Authority: 38 U.S.C. 3104(a)(4), 3485)

(f) *Veteran reduces rate of training.* In the event the veteran reduces his or her training to less than three-quarter time before completing an agreement, the veteran, with the approval of the Director of the VA field station, or designee, may be permitted to complete the portions of an agreement in the same or immediately following term, quarter or semester in which the veteran ceases to be at least a three-quarter time student.

(Authority: 38 U.S.C. 3104(a)(4), 3485)

(g) *Veteran terminates training.* If the veteran terminates all training before completing an agreement, VA:

(1) Will permit him or her to complete the portion of the agreement represented by the sum of money VA has advanced to the veteran for which he or she has not performed any services; but

(2) Will not permit him or her to complete that portion of an agreement for which no advance has been made.

(h) *Indebtedness for unperformed service.* (1) If the veteran has received an advance for hours of unperformed service that remain after application of paragraphs (f) and (g) of this section, that advance:

(i) Will be a debt due the United States; and

(ii) Will be subject to recovery in the same manner as any other debt due the United States;

(2) For each hour of unperformed service, the amount of indebtedness shall equal the hourly wage upon which the contract was made.

(i) *Survey.* VA will conduct an annual survey of its regional offices to determine the number of veterans whose services can be utilized effectively.

(Authority: 38 U.S.C. 3104(a)(4), 3485)

[49 FR 40814, Oct. 18, 1984; 50 FR 9622, Mar. 11, 1985; 54 FR 4284, Jan. 30, 1989, as amended at 56 FR 14648, Apr. 11, 1991; 57 FR 57108, Dec. 3, 1992; 62 FR 17709, Apr. 11, 1997]

### § 21.274 Revolving fund loan.

(a) *Establishment of revolving fund loan.* A revolving fund is established to provide advances to veterans who would otherwise be unable to begin or continue in a rehabilitation program without such assistance.

(b) *Definition.* The term *advance* means a non-interest loan from the revolving fund.

(c) *Eligibility.* A veteran is eligible for an advance if the following conditions are present:

(1) An Individualized Written Rehabilitation Plan, Individualized Extended Evaluation Plan, or Individualized Independent Living Plan has been prepared; and

(2) The veteran and VA staff agree on the terms and conditions of the plan.

(d) *Advance conditions.* (1) An advance may be approved when the following conditions are met:

(i) The purpose of the advance is clearly and directly related to beginning, continuing, or reentering a rehabilitation program;

(ii) The veteran would otherwise be unable to begin, continue or reenter his or her rehabilitation program;

(iii) The advance does not exceed either the amount needed, or twice the monthly subsistence allowance for a veteran without dependents in full-time institutional training; and

(iv) The veteran has elected, or is in receipt of, subsistence allowance.

(2) An advance may not be made to a veteran who meets conditions described in paragraph (d)(1) of this section if the veteran:

(i) Has not fully repaid an advance;

(ii) Does not agree to the terms and conditions for repayment; or

(iii) Will not be eligible in the future for payments of pension, compensation, subsistence allowance, educational assistance, or retired pay.

(e) *Determination of the amount of the advance.* (1) If the conditions described in paragraphs (c) and (d)(2) of this section are met, a counseling psychologist or vocational rehabilitation specialist in the VR&C Division will:

(i) Document the findings; and

(ii) Determine the amount of the advance.

(2) Loans will be made in multiples of $10.

(f) *Repayment*—(1) *Offset possible.* The amount advanced will be repaid in monthly installments from future VA payments for compensation, pension, subsistence allowance, educational assistance allowance or retired pay.

(i) Repayment will begin on the earlier of the following dates:

(A) The first day of the month following the month in which the advance is granted; or

(B) The first day of the month after receipt of the advance in which the veteran receives a subsistence allowance

(ii) The VR&C staff person who approves the advance will determine the rate of repayment.

(iii) The monthly rate of repayment may not be less than 10 percent of the amount advanced unless the monthly benefit against which the advance is being offset is less than that amount.

(2) *Offset not possible.* If the amount advanced cannot be repaid from the benefits cited in paragraph (f)(1) of this section because the veteran is not in receipt of any of these benefits, collection of the amount due will be made in the same manner as any other debt payable to VA.

(Authority: 38 U.S.C. 3112)

### § 21.276 Incarcerated veterans.

(a) *General.* The provisions contained in this section describe the limitations on payment of subsistence allowance and charges for tuition and fees for:

(1) Incarcerated veterans;

(2) Formerly incarcerated veterans in halfway houses; and

(3) Incarcerated and formerly incarcerated veterans in work release programs.

(Authority: 38 U.S.C. 3108(g), 3680(a))

(b) *Definition.* The term *incarcerated veteran* means any veteran incarcerated in a Federal, State, or local prison, jail, or other penal institution for a felony. It does not include any veteran who is pursuing a rehabilitation program under Chapter 31 while residing in a halfway house or participating in a work-release program in connection with such veteran's conviction of a felony.

(c) *Subsistence allowance not paid to an incarcerated veteran.* A subsistence allowance may not be paid to an incarcerated veteran convicted of a felony, but VA may pay all or part of the veteran's tuition and fees.

(Authority: 38 U.S.C. 3108(g))

(d) *Halfway house.* A subsistence allowance may be paid to a veteran pursuing a rehabilitation program while residing in a halfway house as a result of a felony conviction even though all of the veteran's living expenses are paid by a non-VA Federal, State, or local government program.

(Authority: 38 U.S.C. 3108(a))

(e) *Work-release program.* A subsistence allowance may be paid to a veteran in a work-release program as a result of a felony conviction.

(f) *Services.* VA may provide other appropriate services, including but not limited to medical, reader service, and tutorial assistance necessary for the veteran to pursue his or her rehabilitation program.

(Authority: 38 U.S.C. 3108(g))

(g) *Payment of allowance at the rates paid under Chapter 30.* A veteran incarcerated for a felony conviction or a veteran in a halfway house or work-release program who elects payment at the educational assistance rate paid under Chapter 30 shall be paid in accordance with the provisions of law applicable to other incarcerated veterans training under Chapter 30.

(Authority: 38 U.S.C. 3108(f), 3680(a))

(h) *Apportionment.* Apportionment of subsistence allowance which began before October 17, 1980 made to dependents of an incarcerated veteran convicted of a felony may be continued.

(Authority: 38 U.S.C. 3108(g))

[49 FR 40814, Oct. 18, 1984, as amended at 51 FR 22807, June 23, 1986; 54 FR 4284, Jan. 30, 1989; 57 FR 57108, Dec. 3, 1992]

ENTERING A REHABILITATION PROGRAM

**§ 21.282 Effective date of induction into a rehabilitation program.**

(a) *General.* Except as provided in paragraph (b) the effective date of induction of a veteran into a rehabilitation program will be one of the dates provided in §§ 21.320 through 21.334.

(Authority: 38 U.S.C. 3108)

(b) *Retroactive induction.* (1) A veteran may be inducted into a vocational rehabilitation program retroactively when all of the following conditions are met:

(i) The period for which retroactive induction is requested is within the veteran's basic period of eligibility or extended eligibility as provided in §§ 21.41 through 21.44;

(ii) The veteran was entitled to disability compensation during the period for which retroactive induction is requested, and met the criteria of entitlement to vocational rehabilitation for that period; and

(iii) The training the veteran pursued during the period is applicable to the occupational objective that is confirmed in initial evaluation to be compatible with his or her disability, consistent with his or her abilities, interests, and aptitudes, and otherwise suitable for accomplishing vocational rehabilitation.

(Authority: 38 U.S.C. 5113)

(2) A veteran shall not be inducted into a vocational rehabilitation program retroactively if any of the following conditions exist even though all conditions of paragraph (b) of this section are met;

(i) Timely induction was prevented by the veteran's lack of cooperation in completing an initial evaluation;

(ii) The veteran has previously received benefits under another VA program of education or training for any period for which retroactive benefits are being requested under Chapter 31;

(iii) A period of extended evaluation is authorized to determine the reasonable feasibility of a vocational goal; or

(iv) The veteran's claim is not received within the time limits described in § 21.31.

(Authority: 38 U.S.C. 3101(9))

(c) *Effective date of retroactive induction.* The effective date of a veteran's retroactive induction into training shall be no earlier than one year prior to the date of application for Chapter 31 benefits but in no event may precede:

(1) The effective date of the establishment of the veteran's compensable service-connected disability; or

(2) The first date the veteran began training in the program leading to the occupational objective established in the veteran's plan.

(Authority: 38 U.S.C. 5113)

**§ 21.283 Rehabilitated.**

(a) *General.* For purposes of chapter 31 a veteran shall be declared rehabilitated when he or she has overcome the employment handicap to the maximum extent feasible as described in paragraph (c), (d) or (e) of this section.

(Authority: 38 U.S.C. 3101 (1), (2))

(b) *Definition.* The term ''suitably employed'' includes employment in the competitive labor market, sheltered situations, or on a nonpay basis which is consistent with the veteran's abilities, aptitudes and interests if the criteria contained in paragraph (c) (1) or (2) of this section are otherwise met.

(Authority: 38 U.S.C. 3100)

(c) *Rehabilitation to the point of employability has been achieved.* The veteran who has been found rehabilitated to the point of employability shall be declared rehabilitated if he or she:

(1) Is employed in the occupational objective for which a program of services was provided or in a closely related occupation for at least 60 continuous days;

(2) Is employed in an occupation unrelated to the occupational objective of the veteran's rehabilitation plan for at least 60 continuous days if the veteran concurs in the change and such employment:

(i) Follows intensive, yet unsuccessful, efforts to secure employment for the veteran in the occupation objective of a rehabilitation plan for a closely related occupation contained in the veteran's rehabilitation plan;

(ii) Is consistent with the veterans's aptitudes, interests, and abilities; and

(iii) Utilizes some of the academic, technical or professional knowledge and skills obtained under the rehabilitation plan; or

(3) Pursues additional education or training, in lieu of obtaining employment, after completing his or her prescribed program of training and rehabilitation services if:

(i) The additional education or training is not approvable as part of the veteran's rehabilitation program under this chapter; and

(ii) Achievement of employment consistent with the veterans's aptitudes, interests, and abilities will be enhanced by the completion of the additional education or training.

(Authority: 38 U.S.C. 3101(1), 3107 and 3117)

(d) *Rehabilitation to the point of employability has not been completed.* A veteran under a rehabilitation plan who obtains employment without being declared rehabilitated to the point of employability as contemplated by the plan, including a veteran in a rehabilitation program consisting solely of employment services, is considered to be rehabilitated if the following conditions exist:

(1) The veteran obtains and retains employment substantially using the services and assistance provided under the plan for rehabilitation.

(2) The employment obtained is consistent with the veterans's abilities, aptitudes and interests.

(3) Maximum services feasible to assist the veteran to retain the employment obtained have been provided.

(4) The veteran has maintained the employment for at least 60 continuous days.

(Authority: 38 U.S.C. 3101(1), 3107 and 3117)

(e) *Independent living.* A veteran who has pursued a program of independent living services will be considered rehabilitated when all goals of the program have been achieved, or if not achieved, when:

(1) The veteran, nevertheless, has attained a substantial increase in the level of independence with the program assistance provided;

(2) The veteran has maintained the increased level of independence for at least 60 days; and

(3) Further assistance is unlikely to significantly increase the veteran's level of independence.

(Authority: 38 U.S.C. 3101 (1), (2) 3107)

[58 FR 68768, Dec. 29, 1993]

### § 21.284 Reentrance into a rehabilitation program.

(a) *Reentrance into rehabilitation to the point of employability following a determination of rehabilitation.* A veteran who has been found *rehabilitated* under provisions of § 21.283 may be provided an additional period of training or services only if the following conditions are met:

(1) The veteran has a compensable service-connected disability and either;

(2) Current facts, including any relevant medical findings, establish that the veteran's service-connected disability has worsened to the extent that the effects of the service-connected disability considered in relation to other facts precludes him or her from performing the duties of the occupation for which the veteran previously was found rehabilitated; or

(3) The occupation for which the veteran previously was found rehabilitated under Chapter 31 is found to be unsuitable on the basis of the veteran's specific employment handicap and capabilities.

(Authority: 38 U.S.C. 3101(a))

(b) *Reentrance into a program of independent living services following a determination of rehabilitation.* A finding of rehabilitation following a program of independent living services may only be set aside, and an additional period of independent living services provided, if the following conditions are met:

(1) Either:

(i) The veteran's condition has worsened and as a result the veteran has sustained a substantial loss of independence; or

(ii) Other changes in the veteran's circumstances have caused a substantial loss of independence; and

(2) The provisions of § 21.162 pertaining to participation in a program of independent living services are met.

(Authority: 38 U.S.C. 3109)

(c) *Reentrance into rehabilitation to the point of employability during a period of employment services.* A finding of rehabilitation to the point of employability by VA may be set aside during a period of employment services and an additional period of training and related services provided, if any of the following conditions are met:

(1) The conditions for setting aside a finding of rehabilitation under paragraph (a) of this section are found;

(2) The rehabilitation services originally given to the veteran are now inadequate to make the veteran employable in the occupation for which he or she pursued rehabilitation;

(3) Experience during the period of employment services has demonstrated that employment in the objective or field for which the veteran was rehabilitated to the point of employability should not reasonably have been expected at the time the program was originally developed; or

(4) The veteran, because of technological change which occurred subsequent to the declaration of rehabilitation to the point of employability, is no longer able:

(i) To perform the duties of the occupation for which he or she trained, or in a related occupation; or

(ii) To secure employment in the occupation for which he or she trained, or in a related occupation.

(Authority: 38 U.S.C. 3117)

[49 FR 40814, Oct. 18, 1984, as amended at 58 FR 68769, Dec. 29, 1993]

COURSE APPROVAL AND FACILITY SELECTION

### § 21.290 Training and rehabilitation resources.

(a) *General.* For the purpose of providing training and rehabilitation services under Chapter 31 VA may:

(1) Use facilities, staff and other resources of VA;

(2) Employ any additional personnel and experts needed;

(3) Use the facilities and services of any:

(i) Federal agency;

(ii) State agency;

(iii) Other public agency; or

(iv) Agency maintained by joint Federal and state contributions.

(4) Use the facilities and services of any:

(i) Public institution or establishment;

(ii) Private institution or establishment; or

(iii) Private individual.

(b) *Agreement required.* Use of facilities and services provided under paragraph (a) of this section shall be procured through contract, agreement, or other cooperative arrangement. The specific requirements for use of contracts or other arrangements are described in 48 CFR 871.2.

(Authority: 38 U.S.C. 3115)

### § 21.292 Course approvals.

(a) *Courses must be approved.* Only those courses approved by the Department of Veterans Affairs shall be utilized to provide training and rehabilitation services under Chapter 31.

(Authority: 38 U.S.C. 3106)

(b) *General.* VA staff in consultation with the veteran will select courses and services needed to carry out the rehabilitation plan only from those which VA determines are offered by a training or rehabilitation facility which:

(1) Meets the requirements of §§ 21.120 through 21.162;

(2) Meets the criteria of §§ 21.290 through 21.299; and

(3) Is in compliance with Title VI of the Civil Rights Act of 1964, section 503(a) Veterans Readjustment Act of 1972, and sections 501 through 504 of the Rehabilitation Act of 1973.

(c) *Obtaining information necessary for approval.* In determining whether services and courses may be approved for a veteran's training and rehabilitation under Chapter 31, the Department of Veterans Affairs may use information relevant to the approval or certification of such services and courses for similar purposes developed by:

(1) The State approving agencies;

(2) The Department of Labor;

(3) State vocational rehabilitation agencies;

(4) Nationally recognized accrediting associations;

(5) The Committee on Accreditation of Rehabilitation Facilities; and

(6) Other organizations and agencies.

(d) *Course not approved.* If a course or program is not approved by one of the agencies identified in paragraph (c) of this section, VR&C staff shall develop necessary information to determine whether criteria given in paragraphs (a) and (b) of this section are met.

(e) *Course disapproved.* The VR&C Officer may approve for 38 U.S.C. chapter 31 use courses that one of the agencies in paragraph (c) of this section has disapproved.

(Authority: 38 U.S.C. 3115)

[49 FR 40814, Oct. 18, 1984, as amended at 62 FR 17709, Apr. 11, 1997]

### § 21.294 Selecting the training or rehabilitation facility.

(a) *Criteria the facility must meet.* In addition to approval of the courses offered, all facilities which provide training and rehabilitation services under Chapter 31 must meet the criteria contained in §§ 21.290 through 21.299 applicable to the type of facility. Each facility must:

(1) Have space, equipment, instructional material and instructor personnel adequate in kind, quality, and amount to provide the desired service for the veteran;

(2) Fully accept the obligation to give the training or rehabilitation services in all parts of the plan which call for the facility's participation;

(3) Provide courses or services which:

(i) Meet the customary requirements in the locality for employment in the occupation in which training is given when employment is the objective of the program; and

(ii) Meet the requirements for licensure or permit to practice the occupation, if such is required;

(4) Agree:

(i) To cooperate with VA, and

(ii) To provide timely and accurate information covering the veteran's attendance, performance, and progress in training in the manner prescribed by VA.

(b) *Selecting a facility for provision of independent living services.* (1) Facilities offering independent living services will be utilized to:

(i) Evaluate independent living potential;

(ii) Provide a program of independent living services to veterans for whom an IILP (Individualized Independent Living Plan) has been developed; or

(iii) Provide independent living services to veterans as part of an IWRP (Individualized Written Rehabilitation Plan) or an IEEP (Individualized Extended Evaluation Plan).

(2) VA may use public and nonprofit agencies and facilities to furnish independent living services. Public and nonprofit facilities may be:

(i) Veterans Health Administration (VHA) facilities that provide independent living services;

(ii) Facilities which meet standards established by the State rehabilitation agency for rehabilitation facilities or for providers of independent living services;

(iii) Facilities which are neither approved nor disapproved by the State rehabilitation agency, but are determined by VA as able to provide the services necessary in an individual veteran's case.

(3) VA also may use for-profit agencies and organizations to furnish programs of independent living services only if services comparable in effectiveness to those provided by for-profit agencies and organizations:

(i) Are not available through public or nonprofit agencies or VHA; or

(ii) Cannot be obtained cost-effectively from public or nonprofit agencies or VHA.

(4) In addition to the criteria described in paragraph (b)(3)(i) of this section for public and private nonprofit agencies; for-profit agencies and organizations must meet any additional standards established by local, state (including the State rehabilitation agency), and Federal agencies which are applicable to for-profit facilities and agencies offering independent living services.

(Authority: 38 U.S.C. 3115, 3120)

(c) *Use of facilities.* VA policy shall be to use VA facilities, if available, to provide rehabilitation services for veterans in a rehabilitation program under chapter 31. Non-VA facilities may be used to provide rehabilitation services only when necessary services are not readily available at a VHA facility. This policy shall be implemented in accordance with the provisions of paragraph (b) of this section in the case of the use of for-profit facilities to provide programs of independent living services, or in the case of employment services, provision of such services by non-VA sources is permitted under § 21.252.

(Authority: 38 U.S.C. 3115)

(d) *Selection of individual to provide training or rehabilitation services.* Persons selected to provide individual instruction or other services as part of a program leading to the long-range goal of a veteran's plan must meet one of the following criteria:

(1) State requirements for teaching in the field or occupation for which training is being provided; or

(2) Expertise demonstrated through employment in the field in which the veteran is to be trained; or

(3) Requirements established by professional associations to provide the services needed by the veteran.

(e) *Relatives.* Relatives of the veteran may not be selected to provide services, even if otherwise qualified, unless such use is specifically permitted by VA regulation governing provision of the service. Selection of a training or rehabilitation facility owned by the veteran or a relative, or in which the veteran or a relative of the veteran has an interest is precluded, except for selection of a farm as provided in § 21.298. The term relative has the same meaning as in § 21.374.

(f) *Contracts or agreements required.* The Department of Veterans Affairs will negotiate formal contracts for reimbursement to providers of services as requred by § 21.262. However, a letter contract will be effected immediately to permit the induction of the veteran into a program if:

(1) The veteran is immediately entered into a school with which a contract is required;

(2) The veteran's rehabilitation plan will be jeopardized by withholding services until a contract can be completed; and

(3) There are no known reasons to indicate that a contract may not be completed in a reasonable time.

(Authority: 38 U.S.C. 3115)

(g) *Training outside the United States.* VA may only use those facilities and courses outside the United States to provide training under Chapter 31 which meet requirements for approval under §§ 21.4250(c) and 21.4260. The conditions under which training outside the United States may be approved are contained in § 21.130.

(Authority: 38 U.S.C. 3114)

(h) *Flight training.* Flight training may only be provided in educational institutions which offer a standard college degree. The specific conditions under which flight training may be approved are contained in § 21.134.

(Authority: 38 U.S.C. 3115)

(i) *Additional consideration.* The case manager will consider the veteran's preference for a particular training or rehabilitation facility but VA has final responsibility for selection of the facility.

(Authority: 38 U.S.C. 3115)

[49 FR 40814, Oct. 18, 1984; 50 FR 9622, Mar. 11, 1985, as amended at 53 FR 50958, Dec. 19, 1988; 55 FR 42187, Oct. 18, 1990; 62 FR 17709, Apr. 11, 1997]

### § 21.296 Selecting a training establishment for on-job training.

(a) *Additional criteria for selecting a training establishment.* In addition to meeting all of the requirements of § 21.294 the training establishment must:

(1) Sign an agreement to provide on-job training to disabled veterans;

(2) Provide continuous training for each veteran without interruption except for normal holidays and vacation periods;

(3) Provide daytime training for the veteran except when the veteran cannot obtain necessary on-job or related training during the working hours of the day;

(4) Modify the program when necessary to compensate for the limitations resulting from the veteran's disability or needs;

(5) Organize training into definite steps or units which will result in progressive training;

(6) Encourage rapid progress of each veteran rather than limit the progress of the individual to the progress of the group;

(7) Not, during the period of training, use the veteran on production activities beyond the point of efficient training;

(8) Agree to pay the veteran during training (except as provided in paragraph (b) of this section) a salary or wage rate;

(i) Commensurate with the value of the veteran's productive labor,

(ii) Not less than that prescribed by the Fair Labor Standards Act of 1938, as amended, and

(iii) Not less than that customarily paid to nonveteran-trainees in the same or similar training situation;

(9) Agree to provide the veteran with employment at the end of the training program, provided the veteran's conduct and progress have been satisfactory; and

(10) Agree to furnish VA a statement in writing showing wages, compensation, and other income paid directly or indirectly to each veteran in training under Chapter 31 during the month.

(Authority: 38 U.S.C. 3108(c), 3115)

(b) *On-job training at subminimum wage rates.* A subminimum hourly wage rate for handicapped workers may be considered where necessary in order to prevent curtailment of opportunities for employment. Payment at the subminimum rate must be approved by the Wage and Hour Division of the Department of Labor.

(Authority: 38 U.S.C. 3115)

[49 FR 40814, Oct. 18, 1984; 50 FR 9622, Mar. 11, 1985]

### § 21.298 Selecting a farm.

(a) *Control of the farm—farm operator.* A farm selected for farm cooperative training must be under the control of the veteran by ownership, lease or other written tenure arrangement. If the veteran does not own the farm, the lease or other written agreement shall:

(1) Afford the veteran control of the farm at least until the end of his or her course;

(2) Allow the veteran's control to be such that he or she is able:

(i) To carry out the provisions of the training program; and

(ii) To operate the farm in accordance with the farm and home plan developed by the case manager and the veteran in collaboration with the instructor, and when appropriate, the landowner or lessor;

(3) Permit instruction in the planning, management, and operation of farming enterprise in the veteran's farm and home plan;

(4) At least by the end of the necessary minimum period of training, assure the veteran a reasonably satisfactory living under normal economic conditions;

(5) Provide for the necessary buildings and equipment to enable the veteran to satisfactorily begin pursuit of the course of farm cooperative training;

(6) Provide for resources which give reasonable promise that any additional items required for the pursuit of the course, including livestock, will be available as they become necessary;

(7) Provide for capital improvements to be made which are necessary for carrying out the farm and home plan, with the veteran furnishing no greater portion of the costs than the benefits accruing to the veteran warrant; and

(8) Provide for the landowner or leasor to share the costs of improved practices put into effect in proportion to the returns he or she will receive from such practices.

(b) *Farms on which more than one person trains—farm operator.* If a veteran in training is a partner of another person or if more than one person is involved in operating the farm, the farm shall be of such size and character that the farm:

(1) Together with the instruction part of the course will occupy the full time of the veteran; and

(2) Meets all requirements of paragraph (a) of this section.

(c) *Selecting a farm—farm manager.* The farm on which a veteran trains to become a farm manager shall be of such size and character that, together with the group instruction part of the course the farm:

(1) Will occupy the full time of the veteran;

(2) Will permit instruction in all aspects of the management and operation of a farm of the type for which the veteran is being trained; and

(3) Meets the requirements of paragraph (a) of this section.

(d) *Employer agreement.* VA may approve a farm on which a veteran is to train to become a farm manager only if the employer-trainer agrees:

(1) To instruct the veteran in various aspects of farm management in accordance with the individual's plan;

(2) To pay the veteran for each successive period of training a salary or wage rate:

(i) Commensurate with the value of the veteran's productive labor; and

(ii) Not less than that customarily paid to a nonveteran trainee in the same or similar training situation in that community; and

(3) To employ the veteran as a manager of the farm on which he or she is being trained if his or her conduct and progress remain satisfactory, or assure that the veteran will be employed as manager of a specified comparable farm.

(Authority: 38 U.S.C. 3115)

[49 FR 40814, Oct. 18, 1984; 50 FR 9622, Mar. 11, 1985]

## § 21.299 Use of Government facilities for on-job training or work experience at no or nominal pay.

(a) *Types of facilities which may be used to provide training.* Notwithstanding any other provision of regulations governing chapter 31, the facilities of any agency of the United States or of any State or local government receiving Federal financial assistance may be used to provide training or work experience at no or nominal pay as all or part of the veteran's program of vocational training under §§ 21.123, 21.294, and 21.296 of this part. The counseling psychologist and case manager must determine that the training work experience is necessary to accomplish vocational rehabilitation and providing such training or work experience is in the best interest of the veteran and the Federal government.

(Authority: 38 U.S.C. 3115, Pub. L. 100–689)

(b) *Employment status of veterans.* (1) While pursuing on-job training or work experience in a facility of the United States, a veteran:

(i) Shall be deemed to be an employee of the United States for the purposes of benefits under chapter 81, title 5 U.S.C.; but

(ii) Shall not be deemed an employee of the United States for the purpose of laws administered by the Office of Personnel Management.

(2) While pursuing on-job training or work experience in a State or local government agency the veteran shall have the employment status and rights comparable to those provided in paragraph (b)(1) of this section for a veteran pursuing on-job training or work experience at a Federal agency.

(Authority: 38 U.S.C. 3115, Pub. L. 100–689)

(c) *Terms applicable to training in State and local government.* (1) The term *State* means each of the several States Territories, any possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

(Authority: 38 U.S.C. 101(20))

(2) The term *local government agency* means an administrative subdivision of a government including a county, municipality, city, town, township, public

authority, district, school district, or other such agency or instrumentality of a local government.

(3) The term *Federal financial assistance* means the direct or indirect provision of funds by grant, loan, contract, or any other arrangement by the Federal government to a State or local government agency.

(d) *Additional considerations in providing on-job training and work experience in State and local government agencies.* (1) The veteran's progress and adjustment in a rehabilitation program conducted wholly or in part at a State or local government agency shall be closely monitored by VR&C staff members to assure that:

(i) Training and rehabilitation services are provided in accordance with the veteran's rehabilitation plan. The plan shall provide for:

(A) Close supervision of the veteran's progress and adjustment by the case manager during the period he or she is at the State or local government agency; and

(B) The employer's periodic certification (not less than once every three months) that the veteran's progress and adjustment are in accordance with the program which has been jointly developed by VA, the veteran and the employer; and

(ii) The veteran achieves his or her employment goal.

(2) Training may not be provided for a position which involves religious or political activities;

(3) The veteran's training:

(i) Will not result in the displacement of currently employed workers; and

(ii) Will not be in a job while another person is laid off from a substantially equivalent job, or will not be in a job the opening for which was created as a result of the employer having terminated the employment of any regular employee or otherwise having reduced its workforce with the intention of using the opening for a Chapter 31 trainee.

(Authority: Pub. L. 100–689)

[55 FR 3739, Feb. 5, 1990]

RATE OF PURSUIT

## § 21.310 Rate of pursuit of a rehabilitation program.

(a) *Programs offered at educational institutions.* This section provides policy for determining the full-time and part-time rate of pursuit of a rehabilitation program by a veteran whose ability to pursue a program has not been reduced by the effects of disability.

(1) *Measuring full and part-time training.* VA will measure the full-time and part-time rate of pursuit of training offered at educational institutions according to the criteria found in §§ 21.4270 through 21.4275, except as provided in paragraphs (a) (2) and (3) of this section.

(2) *Independent study course.* (i) For certain seriously disabled veterans described in subdivision (i)(A) of this subparagraph VA may measure the veteran's enrollment:

(A) In an independent study course as half-time or greater training, or

(B) Both in independent study subjects and subjects requiring class attendance on the basis of the combined training load when the number of credit hours of independent study equals or exceeds the number of other credit hours.

(ii) To qualify for measurement described in paragraph (a)(2)(i) of this section:

(A) The seriously disabled veteran must have a disability or circumstances which preclude regular attendance at an institution of higher learning, and

(B) Independent study must be a sound method for providing the training necessary for restoring the veteran's employability.

(iii) In all other cases VA will measure independent study according to the provisions of § 21.4280.

(3) *Special school.* If training is pursued in a special school, such as those for persons with visual or hearing disabilities, the rate of pursuit will be measured under §§ 21.2470 through 21.4275 unless it is the established policy of the school to measure the rate of pursuit for full-time or particular level or part-time training based upon fewer

semester, credit, or clock hours of attendance than prescribed in these regulations.

(4) *Farm cooperative.* If training in a farm cooperative program is provided by an educational institution, the rate of pursuit shall be determined the same as under §21.4270 for that type of training.

(5) *Course offered under contract.* When a school or other entity furnishes all or part of a vocational rehabilitation program under contact with another school, VA will measure the course or courses as appropriate for the school or other entity actually providing the training.

(b) *Education or training not furnished by an educational institution.* The following types of training which are not furnished by an educational institution (§21.35(k)(3) may only be pursued full-time:

(1) *On-job training.* Full-time training in an on-job program is the lesser of the number of hours in the prevailing workweek for:

(i) Journeyman employees in the same job categories at the establishment where training is being provided;

(ii) Other persons in on-job training for the same or similar occupations at the facility where the veteran is training or at other facilities in the locality.

(2) *Farm cooperative training.* If training in a farm cooperative program is provided by an individual instructor, the full-time rate of pursuit must meet the requirements of §21.126.

(3) *Independent instructor.* The full-time rate of pursuit for a veteran in an independent instructor program must meet the requirements of §21.146.

(4) *Training in the home.* The full-time rate for a training program provided in the veteran's home must meet the requirements of §21.146.

(5) *Vocational course in a rehabilitation facility or sheltered workshop.* A vocational course of training offered by a rehabilitation facility or sheltered workshop (§21.35(k) (5) and (6)), will be measured under provisions of §21.4270(b) for trade or technical nonaccredited courses, unless it is the established policy of the facility to measure the rate of pursuit for full-time or a particular level of part-time training based upon fewer clock hours of attendance than provided in that regulation.

(c) *Combination and cooperative programs.* The rate of pursuit of a program which combines institutional training and on job training will be measured as follows:

(1) The institutional part will be assessed under §§21.4270 through 21.4275, and

(2) The on-the-job part will be assessed under paragraph (b)(1) of this section.

(d) *Rehabilitative services.* Measurement of the rate of pursuit for veterans in programs consisting primarily of services designed to evaluate and improve physical and psychological functioning will be assessed under this paragraph.

(1) The services assessed under this paragraph include:

(i) Evaluation and improvement of the rehabilitation potential of a veteran for whom attainment of a vocational goal is reasonably feasible;

(ii) Extended evaluation to determine whether attainment of a vocational goal is reasonably feasible; or

(iii) A program of independent living services to enable a veteran to function more independently in his or her family and community when attainment of a vocational goal is not reasonably feasible.

(2) Measurement of the rate of pursuit for services and programs named in paragraph (d)(1) of this section will be:

(i) As provided in paragraph (a) of this section for services furnished by educational institutions; or

(ii) According to the noneducational facility's customary criteria for full-time and part-time pursuit. If the facility does not have established criteria for full-time and part-time pursuit, or services are being provided by more than one facility, the rate of pursuit will be assessed in the following manner:

| Rate of pursuit | Clock hours per month |
|---|---|
| Full-time | 120 or more. |
| Three-quarter time [1] | 90–119. |
| Half-time [1] | 60–89. |
| Quarter-time [1] | 30–59. |

[1] Extended evaluation and independent living.

(Authority: 38 U.S.C. 3108(d))

### § 21.312 Reduced work tolerance.

(a) *General.* VA will consider that a veteran with reduced work tolerance is pursuing a rehabilitation program full-time when the amount of time the veteran is devoting to his or her program is as great as the effects of his or her disability (service and nonservice-connected) will permit.

(b) *Pursuit of a program.* A veteran with reduced work tolerance may pursue a rehabilitation program when the following conditions are met:

(1) Reduced work tolerance has been determined.

(2) Achievement of the goals of the program are reasonably feasible;

(3) The IWRP (Individualized Written Rehabilitation Plan) or other plan provides for completion of the program under Chapter 31.

(c) *Redetermination of work tolerance.* As necessary, but not less than once yearly, the veteran's work tolerance will be reevaluated. The rate of pursuit required to meet the standard of full-time pursuit will be modified if there is either an increase or decrease in the work tolerance of the veteran.

(d) *Payment of allowance.* A veteran with a reduced work tolerance will be paid a subsistence allowance, at the full-time rate for the type of program being pursued, when the veteran meets the standard for full-time pursuit established for him or her in the Plan. A veteran with reduced work tolerance, who elects benefits at the Chapter 34 rate, will have to meet normal attendance requirements for that chapter, however.

(e) *Determining work tolerance.* A VA physician will make all determinations and redeterminations of work tolerance.

(Authority: 38 U.S.C. 3108(d))

### § 21.314 Pursuit of training under special conditions.

A veteran is required to pursue a rehabilitation program at a rate which meets the requirement for full- or part-time participation described in §§ 21.310 and 21.312. However, a veteran may pursue a rehabilitation program at a lesser rate, if such pursuit is a part of the veteran's plan. Subsistence allowance is not payable during such periods.

(Authority: 38 U.S.C. 3108(d))

## AUTHORIZATION OF SUBSISTENCE ALLOWANCE AND TRAINING AND REHABILITATION SERVICES

### § 21.320 Awards for subsistence allowance and authorization of rehabilitation services.

Awards providing for payment of a subsistence allowance and authorization of services necessary for rehabilitation may be prepared when an IWRP (Individualized Written Rehabilitation Plan) or other plan has been completed and other requirements for entrance or reentrance into a rehabilitation program have been met.

(a) *Commencing date of subsistence allowance.* The commencing date of an award of subsistence allowance will be determined under the provisions of § 21.322.

(b) *Commencing date of authorization of training and rehabilitation services.* The commencing date for authorization of training and rehabilitation services is the same as the effective date for awards for subsistence allowance under provisions of § 21.322, except when:

(1) The commencing date for authorization of a program of employment services is determined under provisions of § 21.326;

(2) An earlier commencement date is established in the veteran's plan or the veteran is entitled to earlier induction under § 21.282;

(3) The veteran elects payment at the educational assistance allowance rate, in which case the commencing date of payment is determined under provisions applicable to commencement of payment under Chapter 30.

(Authority: 38 U.S.C. 3108 (a) and (f))

(c) *Ending date of subsistence allowance.* The ending date of an award for subsistence allowance will be the earliest of the following dates:

(1) The ending date provided in the veteran's IWRP or other plan;

(2) The ending date of a period of enrollment as certified by a training or rehabilitation facility;

(3) The ending date specified in § 21.324.

(Authority: 38 U.S.C. 3108)

(d) *Ending date for training and rehabilitation services.* The ending date of training and rehabilitation services will be the same as the termination date for subsistence allowance under paragraph (c) of this section, except when:

(1) The ending date for a period of employment services is determined under provisions of § 21.326;

(2) A later termination date is established in the veteran's plan;

(3) A veteran has elected payment at the educational assistance rate paid under Chapter 30. The ending date of the award is determined under regulations applicable to termination of training under Chapter 30.

(Authority: 38 U.S.C. 3108 (a) and (f))

[49 FR 40814, Oct. 18, 1984, as amended at 54 FR 4284, Jan. 30, 1989; 57 FR 57108, Dec. 3, 1992]

### § 21.322 Commencing dates of subsistence allowance.

(a) *General.* VA will determine the commencing date of an award or increased award of subsistence allowance under this section. VA will not authorize subsistence allowance for any period prior to the earliest date for which disability compensation is payable or would be payable but for the veteran's receipt of retired pay.

(Authority: 38 U.S.C. 3108, 3113)

(b) *Entrance or reentrance into vocational rehabilitation, extended evaluation, independent living services.* Except in the case of retroactive induction into a rehabilitation program, as provided in § 21.282, the commencing date of an award of subsistence allowance shall be the earlier of:

(1) The date the facility requires the veteran to report for prescribed activities; or

(2) The date training or rehabilitation services begin.

(c) *Increases for dependents*—(1) *Dependency exists at the time of entrance or reentrance into a rehabilitation program.* A veteran may have one or more dependents on or before the date he or she enters or reenters a rehabilitation program. When this occurs, the following rules apply:

(i) The effective date of the increase will be the date of entrance or reentrance if:

(A) VA receives the claim for the increase within one year of the date of entrance or reentrance; and

(B) VA receives any necessary evidence within 1 year of the date VA requested the evidence and informed the veteran of the time limits during which this evidence must be submitted. If VA fails to inform the veteran of these time limits, the period of submission of the evidence is adjusted in accordance with § 21.32 of this part.

(ii) The effective date of the increase will be the date VA receives notice of the dependents existence if:

(A) VA receives the claim for the increase more than one year after the date of entrance or reentrance; and

(B) VA receives any necessary evidence within 1 year of the date VA requested the evidence and informed the veteran of the time limits during which this evidence must be submitted. If VA fails to inform the veteran of these time limits, the period for submission of the evidence is adjusted in accordance with § 21.32 of this part;

(iii) The effective date of the increase will be the date VA receives all necessary evidence if that evidence is received more than one year from the date VA requested the evidence and informed the veteran of the time limits during which this evidence must be submitted. If VA fails to inform the veteran of these time limits, the period for submission of the evidence is adjusted in accordance with § 21.32 of this part.

(2) *Dependency arises after entrance or reentrance into a rehabilitation program.* If the veteran acquires a dependent after he or she enters or reenters a rehabilitation program, the increase will be effective on the latest of the following dates:

(i) *Date of claim.* This term means the following listed in order of their applicability:

(A) Date of the veteran's marriage, or birth of his or her child, or his or her adoption of a child, if the evidence of

the event is received within one year from the date of the event;

(B) Date notice is received of the dependents's existence if evidence is received within 1 year from the date VA requested the evidence and informed the veteran of the time limits during which this evidence must be submitted. If VA fails to inform the veteran of these time limits, the period for submission of the evidence is adjusted in accordance with § 21.32 of this part.

(C) Date VA receives evidence of the dependent's existence if this date is more than one year after VA requested this evidence and informed the veteran of the time limits during which this evidence must be submitted. If VA fails to inform the veteran of the time limits, the period for submission of the evidence is adjusted in accordance with § 21.32 of this part.

(ii) *Date dependency arises*—(3) *Increased award not permitted.* No increased award for dependency may be paid prior to the date the law permits benefits for dependents generally.

(Authority: 38 U.S.C. 3108(b))

(d) *Correction of military records.* In accordance with the facts found, but not earlier than the date the change, correction, or modification was made by the service department, if eligibility of a veteran arises as the result of correction or modification of military records under 10 U.S.C. 1552, or change, correction or modification of a discharge or dismissal under 10 U.S.C. 1553, or other competent military authority.

(e) *Bar to benefits removed by VA.* In accordance with the facts found, but not earlier than the date the change was made by VA, if eligibility of a veteran arises as the result of review of the evidence of record regarding the character of discharge by VA, when the veteran's discharge or dismissal was a bar to benefits under 38 U.S.C. 5301.

(Authority: 38 U.S.C. 3103(b))

(f) *Incarcerated veterans.* (1) Date of release from Federal, State, or local penal institution of a veteran incarcerated for conviction of a felony.

(2) Earlier of the following dates in the case of a veteran residing in a half-way house or participating in a work-release program as a result of a felony conviction.

(i) Date of release from the half-way house or work-release program, or

(ii) Date a veteran becomes obligated to pay part of his or her living expenses.

(Authority: 38 U.S.C. 3108(g))

(g) *Temporary 100 percent award terminated.* Date of reduction of a temporary award of disability compensation at the 100 percent rate because of hospitalization.

(Authority: 38 U.S.C. 3108(h))

(h) *Liberalizing laws and VA issues.* In accordance with facts found, but not earlier than the date of the act or administrative issue.

(Authority: 38 U.S.C. 5113)

CROSS-REFERENCE. See § 21.260(c) for definition of dependents.

[49 FR 40814, Oct. 18, 1984, as amended at 51 FR 22808, June 23, 1986; 52 FR 42113, Nov. 3, 1987; 55 FR 12821, Apr. 6, 1990]

### § 21.324 Reduction or termination dates of subsistence allowance.

(a) *General.* The effective date of the reduction of the amount paid or termination of payment of subsistance allowance will be the earliest of the dates specified in this section. If an award is reduced, the reduced rate will be effective the day following the date of termination of the greater benefit.

(b) *Death of a veteran.* Date of death, if death occurs while the veteran is in attendance or authorized leave status; otherwise date of last attendance.

(c) *Death of a dependent.* (1) Before October 1, 1982. Last day of the calendar year in which death occurs, unless the veteran's program is terminated earlier under other provisions.

(Authority: 38 U.S.C. 5113)

(2) *After September 30, 1982.* Last day of the month in which death occurs unless discontinuance is required at an earlier date under other provisions.

(Authority: 38 U.S.C. 5112(b), 5113)

(d) *Divorce*—(1) *Before October 1, 1982.* Last day of the calendar year in which divorce occurs, unless the veteran's

program is terminated earlier under other provisions.

(Authority: 38 U.S.C. 5113)

(2) *After September 30, 1982.* Last day of the month in which divorce occurs unless discontinuance is required at an earlier date under other provisions.

(Authority: 38 U.S.C. 5112(b), 5113)

(e) *Child*—(1) *Marriage*—(i) *Before October 1, 1982.* Last day of the month in which the marriage occurs, unless the veteran's program is terminated earlier under other provisions.

(Authority: 38 U.S.C. 5113)

(ii) *After September 30, 1982.* Last day of the month in which the marriage occurs, unless discontinuance is required at an earlier date under other provisions.

(Authority: 38 U.S.C. 5112(b), 5113)

(2) *Age 18.* Day preceding the child's 18th birthday.

(3) *School attendance.*

(i) Last day of the month in which the child ceases attending school; or

(ii) The day preceding the child's 23rd birthday, whichever is earlier.

(4) *Helplessness.* Last day of the month in which 60 days has passed from VA's notice to the payee that the child's helplessness has ceased.

(f) *Interrupted, rehabilitation to the point of employability, independent living program completed, and extended evaluation completed status.* Last day of attendance, or approved leave status, whichever is applicable.

(Authority: 38 U.S.C. 5113)

(g) *Discontinued.* Last day of attendance or approved leave status, whichever is applicable, except as follows:

(1) If VA places the veteran in ''discontinued'' status following the veteran's withdrawal from all courses with nonpunitive grades or following his or her completion of all courses with nonpunitive grades and the case manager does not find mitigating circumstances, VA will terminate subsistence allowance effective:

(i) The first date of the term, or

(ii) December 1, 1976, whichever is later.

(2) If VA places the veteran in ''discontinued'' status following a term in which the grades the veteran receives include both those that count in the grade point average and nonpunitive grades, and the case manager does not find mitigating circumstances:

(i) VA will terminate subsistence allowance for courses in which the veteran receives nonpunitive grades effective the first day of the term or December 1, 1976, whichever is later.

(ii) VA will terminate subsistence allowance for courses in which the veteran receives grades that will count in the grade point average effective the veteran's last day of attendance or approved leave status, whichever is applicable.

(Authority: 38 U.S.C. 3680(a))

(h) *Wages or salary received in apprentice or on-job training.* (1) If the sum of the training wage plus the scheduled subsistence allowance is more than the journeyman wage when the training commences, the subsistence allowance will be decreased by VA effective the first day of the second month following the month in which the veteran enters on-job training.

(2) Subsequent adjustments will be effective the first day of the second month following the month in which wages or salary changes are made which justify the adjustment under provisions of § 21.266(e).

(Authority: 38 U.S.C. 3108)

(i) *Reduction in rate of pursuit of the program.* End of month in which reduction occurs, except that if the rate of pursuit is reduced as a result of the veteran's withdrawal from a unit course or courses with nonpunitive grade(s) or as a result of the veteran's completion of a unit course or courses with nonpunitive grade(s) (§ 21.4200(j)), VA will reduce subsistence allowance as follows:

(1) If it is determined that there are mitigating circumstances:

(i) Withdrawal with nonpunitive grades: The end of the month or the end of the term in which the veteran withdraws, whichever is earlier; if the reduction occurs at the beginning of the term benefits will be reduced the

first day of the term in which the veteran withdraws.

(ii) Completion with nonpunitive grades. No reduction required.

(2) If it is determined there are no mitigating circumstances VA will reduce the veteran's subsistence allowance effective the first day of the term in which the veteran withdraws or which the veteran completes with nonpunitive grades. The term *mitigating circumstances* means circumstances beyond the veteran's or serviceperson's control which prevent him or her from continuously pursuing a rehabilitation program. The following circumstances are representative of those which are considered mitigating.

(i) An illness of the program participant;

(ii) An illness or death in the program participant's family;

(iii) An unavoidable change in the veteran's conditions of employment;

(iv) An unavoidable geographical transfer resulting from the veteran's employment;

(v) Immediate family or financial obligations beyond the control of the veteran which are found by VA to require the veteran to suspend pursuit of the rehabilitation program;

(vi) Discontinuance of the course by the educational institution;

(vii) In the first instance of withdrawal on or after June 1, 1989 by a program participant from a course or courses with respect to which such veteran has been paid subsistence allowance under the provisions of § 21.260(b), mitigating circumstances shall be considered to exist with respect to courses totaling not more than six semester hours or the equivalent thereof;

(viii) Difficulties in obtaining child care or changes in such arrangements which are beyond the control of the program participant and which require interruption of the rehabilitation program is order for the participant to provide or arrange for such care.

(Authority: 38 U.S.C. 3680(a))

(j) *Severance of service-connection.* Last day of the month in which the severance becomes final.

(Authority: 38 U.S.C. 5113)

(k) *Fraud.* The later of the following dates:

(1) The beginning date of the award of subsistence allowance, or

(2) The day preceding the date of the fraudulent act.

(Authority: 38 U.S.C. 6103(a))

(l) *Error*—(1) *Payee error.* Effective date of the award of subsistence allowance or day preceding the act, whichever is later, but not prior to the date the veteran's entitlement ceases, on an erroneous award based on an act of commission or omission by a payee with his or her knowledge.

(2) *Administrative error.* Except as provided in paragraph (j) of this section, date of last payment on an erroneous award based solely on administrative error or an error in judgment by a VA employee.

(m) *Treasonable acts, subversive activities.* The later of the following dates:

(1) Beginning date of the award of subsistence allowance, or

(2) Day preceding the date of commission of the treasonable act or subversive activities for which the veteran is convicted.

(Authority: 38 U.S.C. 5113)

(n) *Incarceration in prison or jail*—(1) *Felony conviction.* If a veteran's subsistence allowance must be reduced because of incarceration for a felony conviction under provisions of § 21.276, his or her rate of payment will be reduced the later of:

(i) The date of his or her incarceration in a prison or jail; or

(ii) The commencing date of his or her award as determined by § 21.322.

(2) *Halfway house or work-release program.* The subsistence allowance of a veteran in a halfway house or work release program as a result of conviction of a felony will not be reduced under the provisions of § 21.276 the date on which the Federal Government or a State or local government pays all of the veteran's living expenses.

(Authority: 38 U.S.C. 3108(g))

(o) *Specialized rehabilitation facility.* Date payment for room and board by

VA begins, reduce the rate paid to the amount payable for dependents.

(Authority: 38 U.S.C. 3108(i))

(p) *Termination of subsistence allowance while hospitalized at VA expense.* Date before the beginning date of the increased disability compensation award, which results in a reduced subsistence allowance under the provisions of § 21.266.

(Authority: 38 U.S.C. 3108(h))

[49 FR 40814, Oct. 18, 1984, as amended at 51 FR 22808, June 23, 1986; 51 FR 25525, July 15, 1986; 55 FR 48843, Nov. 23, 1990]

### § 21.326 Authorization of employment services.

(a) *General.* Authorization of employment services shall be based upon the services identified and goals established in an IEAP (Individualized Employment Assistance Plan) under provisions of § 21.88. The effective dates for the commencement, or termination of such services will be determined under this section.

(Authority: 38 U.S.C. 3117(a))

(b) *Commencing date.* The commencing date authorizing a period of employment services will be the later of:

(1) The date following completion of the period of rehabilitation to the point of employability; or

(2) The date of the original IEAP.

(Authority: 38 U.S.C. 3107, 3117(a))

(c) *Termination of the authorization of employment services.* Authorization for employment services will be terminated the earliest of:

(1) The last day employment services are provided under the terms of an IEAP when employment services are interrupted, discontinued, or the veteran is rehabilitated;

(2) The date the authorization is found to be erroneous because of an act of omission or commission by the veteran, or with his or her knowledge;

(3) The last day of the month in which severance of service connection becomes final;

(4) The day proceding the date of a fraudulent act;

(5) The date preceding the commission of a treasonable or subversive act for which the veteran is convicted.

(Authority: 38 U.S.C. 3108, 5113)

### § 21.328 Two veteran cases—dependents.

If both partners in a marriage are veterans, and if each is receiving either subsistence allowance for a vocational rehabilitation program or an educational assistance allowance under another VA program, each is entitled to receive the additional allowances payable for each other and for their children.

(Authority: 38 U.S.C. 3108(a))

### § 21.330 Apportionment.

(a) *General.* Where in order, VA will apportion subsistence allowance in accordance with § 3.451 of this title, subject to the limitations of § 3.458 of this title. If the veteran is in receipt of benefits at the Chapter 30 rate, VA will not apportion these benefits.

(Authority: 38 U.S.C. 5307(c))

(b) *Effective date.* The effective date of apportionment will be as prescribed in § 3.400(e) of this title.

(Authority: 38 U.S.C. 5307(c))

(c) *Child adopted out of family.* Where evidence establishes that a veteran is the natural parent of a child or children legally adopted outside of the veteran's family, VA will apportion in favor of the child or children only that additional amount of subsistence allowance payable on account of the existence of the child or children. The veteran is not entitled in his or her own right to the additional amount of subsistence allowance payable for the child because of the existence of the child unless the veteran is contributing to the child's support.

(Authority: 38 U.S.C. 5307(c))

(d) *Veteran convicted of a felony.* The subsistence allowance of a veteran in a rehabilitation program after October 17, 1980, may not be apportioned if the

veteran is incarcerated because of conviction for a felony.

(Authority: 38 U.S.C. 3108(g))

[49 FR 40814, Oct. 18, 1984, as amended at 54 FR 4284, Jan. 30, 1989; 57 FR 57108, Dec. 3, 1992]

### § 21.332 Payments of subsistence allowance.

(a) *Eligibility.* At the end of the month, VA shall pay to an eligible veteran enrolled in a rehabilitation program, subsistence allowance at the rates specified in § 21.260 for the type of program pursued during the month, unless advance payment is approved. VA will continue payments during those intervals described in § 21.270.

(Authority: 38 U.S.C. 3108)

(b) *Advance payment criteria.* VA will make an advance payment of subsistence allowance only when:

(1) The veteran specifically requests an advance payment; and

(2) The educational institution at which the veteran is accepted or enrolled has agreed to, and can carry out, satisfactorily, the provisions of 38 U.S.C. 3680(d) (4) and (5) pertaining to:

(i) Receipt, delivery or return of advance checks; and

(ii) Certifications of delivery and enrollment.

(c) *Advance payment.* (1) The amount of advance payment is not to exceed:

(i) The veteran's subsistence allowance for the month or part of a month in which his or her course will begin; plus

(ii) The veteran's subsistence allowance for the following month.

(2) Upon application and completion of arrangements for enrollment of a veteran who meets the criteria for an advance payment, VA shall mail a check payable to the veteran to the institution for delivery to the veteran upon registration.

(3) An institution shall not deliver an advance payment check to a veteran more than 30 days in advance of commencement of his or her program.

(d) *Certification for advance payment.* VA will authorize advance payment upon receipt of the institution's certification of the following information:

(1) The veteran is eligible for benefits;

(2) The institution has accepted the veteran or he or she is eligible to continue his or her training;

(3) The veteran has notified the institution of his or her intention to attend or to reenroll;

(4) The number of semester or clock hours the veteran will pursue; and

(5) The beginning and ending dates of the enrollment period.

(e) *Time of advance payment.* VA will authorize advance payment only:

(1) At the beginning of an ordinary school year; or

(2) At the beginning of any other enrollment period which begins after a break in enrollment of one full calendar month or longer.

(Authority: 38 U.S.C. 3680(d))

(f) *Other payments.* (1) VA will make all payments other than advance payments at the end of the month for the veteran's training during that month.

(2) VA may withhold final payment until:

(i) VA receives certification that the veteran has completed his or her course; and

(ii) VA makes all necessary adjustments in the veteran's award resulting from that certification.

(Authority: 38 U.S.C. 3680(g))

(g) *Payments for courses which are repeated.* VA may pay subsistence allowance to a veteran who repeats a course under conditions described in § 21.132.

(Authority: 38 U.S.C. 3680(a))

[49 FR 40814, Oct. 18, 1984; 50 FR 9622, Mar. 11, 1985]

### § 21.334 Election of payment at the Chapter 30 rate.

(a) *Election.* When the veteran elects payment of an allowance at the chapter 30 rate, the effective dates for commencement, reduction and termination of the allowance shall be in accordance with §§ 21.7130 through 21.7135 and § 21.7050 under chapter 30.

(Authority: 38 U.S.C. 1808(f), 1780)

(b) *Election of payment at the Chapter 30 rate subsequent to induction into a rehabilitation program.* Election of payment at the Chapter 30 rate subsequent to induction into training is permissible under provisions of § 21.264 (a) and (b). The effective date of the election is the latest of the following dates:

(1) The commencing date determined under § 21.7131 in the case of a veteran who has elected payment at the chapter 30 rate; or

(2) The day following the end of the period for which VA paid tuition, fees or other program charges under this Chapter.

(Authority: 38 U.S.C. 3108(f))

(c) *Reelection of subsistence allowance subsequent to induction.* If a veteran reelects subsistence allowance under provisions of § 21.264(b) of this part, the effective date of change is earliest of the following:

(1) The date following completion of the term, semester, quarter, or other period of instruction in which the veteran is currently enrolled;

(2) The veteran's Chapter 30 delimiting date;

(3) The day after exhaustion of Chapter 30 entitlement; or

(4) The day following the date of a VA determination that failure to approve reelection would prevent the veteran from continuing the rehabilitation program.

(Authority: 38 U.S.C. 3108(f))

(d) *Election or reelection during leave or between periods of instruction*—(1) *Payment at the Chapter 30 rate.* If an otherwise eligible veteran elects payment at the Chapter 30 rate during a period between periods of instruction, the effective date of the election shall be the first day of the next period of instruction.

(2) *Subsistence allowance.* If an otherwise eligible veteran reelects subsistence allowance during leave or between periods of instruction following election of payment at the Chapter 30 rate, the effective date of the change will be the date of the reelection or the beginning of the next period of training, whichever is to the veteran's benefit.

(Authority: 38 U.S.C. 3108(f))

(e) *Effect of Chapter 34 program termination.* (1) Since Chapter 34 benefits are not payable beyond December 31, 1989, any previous election of benefits at that rate is terminated as of that date;

(2) A veteran entitled to chapter 30 benefits based on his or her chapter 34 eligibility as of December 31, 1989, and whose election of chapter 34 rates terminated as of the date under paragraph (e)(1) of this section must, if the individual desires payment at the chapter 30 rate, elect such payment.

(Authority: 38 U.S.C. 1411(a))

[49 FR 40814, Oct. 18, 1984, as amended at 54 FR 4284, Jan. 30, 1989, 54 FR 13522, Apr. 4, 1989; 57 FR 57108, Dec. 3, 1992]

LEAVES OF ABSENCE

### § 21.340 Introduction.

(a) *General.* VA may approve leaves of absence under certain conditions. During approved leaves of absence, a veteran in receipt of subsistence allowance shall be considered to be pursuing a rehabilitation program. Leave may be authorized for a veteran during a period of:

(1) Rehabilitation to the point of employability;

(2) Extended evaluation; or

(3) Independent living services.

(b) *Election of subsistence allowance.* If a veteran elects to receive subsistence allowance and payment of rehabilitation services by VA, he or she may be authorized leave of absence under §§ 21.342 through 21.350.

(c) *Election of benefits at the chapter 30 rate.* If a veteran elects to receive a subsistence allowance paid at the chapter 30 rate, the effect of absences is determined under §§ 21.7139 and 21.7154.

(Authority: 38 U.S.C. 1508(f) and 1510)

[49 FR 40814, Oct. 18, 1984, as amended at 54 FR 4285, Jan. 30, 1989; 57 FR 57109, Dec. 3, 1992]

### § 21.342 Leave accounting policy.

(a) *Amount of leave.* A veteran pursuing one of the programs listed in § 21.340(a) may be authorized up to 30

days of leave by the case manager during a twelve-month period. The beginning date of the first twelve-month period is the commencing date of the original award, and the ending date is twelve months from the beginning date, with subsequent twelve-month periods running consecutively thereafter.

(b) *Additional leave under exceptional circumstances.* A veteran in a program may be authorized up to 15 additional days of leave during the twelve-month period by the case manager under exceptional circumstances, such as extended illness or family problems.

(c) *Absence.* For the purpose of determining when a leave of absence may be authorized, a veteran who elects subsistence allowance shall be considered absent during any period in which he or she is:

(1) Not in attendance under the rules and regulations of the educational institution, rehabilitation center, or sheltered workshop;

(2) Not considered at work under the rules of the training establishment; or

(3) Not present at a scheduled period of individual instruction.

(d) *System of records.* An educational institution, training establishment, rehabilitation center, or other facility or individual providing training and rehabilitation services under Chapter 31 may utilize the same system of records to determine absence as the one used for similarly circumstanced nonveterans.

(e) *Change in rate of pursuit.* The amount of approved leave is not affected by the veteran's rate of pursuit of a rehabilitation program.

(f) *Charging leave.* VA shall charge 1 day of leave for each day or part of a day of absence from pursuit of a rehabilitation program.

(g) *Limitation on carrying leave over to another period.* The veteran may not carry over unused days of leave from one twelve-month period to another.

(Authority: 38 U.S.C. 3110)

[49 FR 40814, Oct. 18, 1984; 50 FR 9622, Mar. 11, 1985, as amended by 56 FR 14649, Apr. 11, 1991]

### § 21.344 Facility offering training or rehabilitation services.

(a) *Approval of leaves of absence required.* Leaves of absence normally must be approved in advance by the case manager when the facility offering training or rehabilitation services arranges for the leave. The approval of the case manager is required:

(1) During periods in a rehabilitation program identified in § 21.342(c); or

(2) A period of hospitalization at VA expense during one of the periods identified in § 21.342(c).

(b) *Responsibility of the veteran in obtaining leave.* VA will not authorize leave without a verbal or written request by the veteran, and the approval of the facility.

(c) *Conditions permitting approval of leaves of absence.* (1) The case manager may approve leaves of absence up to a total of 30 days during a twelve-month period if the facility certifies that the use of the leave does not interfere materially with the veteran's progress;

(2) An additional period of up to 15 days of leave in the same twelve-month period under exceptional circumstances may be approved by the case manager if failure to approve leave will:

(i) Result in personal hardship, or

(ii) Adversely affect the veteran's ability to continue in his or her rehabilitation program.

(Authority: 38 U.S.C. 3110)

[49 FR 40814, Oct. 18, 1984, as amended by 56 FR 14649, Apr. 11, 1991]

### § 21.346 Facility temporarily not offering training or rehabilitation services.

(a) *Approval of leave of absence not required.* A veteran may receive subsistence allowance, during a period when the facility temporarily is not offering services, without the veteran's being charged with leave when:

(1) The facility is closed temporarily under an executive order of the President or due to an emergency situation;

(2) The veteran is pursuing on-job training and he or she receives holidays established by Federal or State law;

(3) The veteran is pursuing farm cooperative training and is required in the ordinary day to day conduct of farm business to be absent:

(i) From the farm; or

(ii) From that part of a farm cooperative course which is given at the educational institution.

(4) The veteran is pursuing a standard college degree; and

(i) There is an interval between consecutive semesters, terms, quarters or periods of instruction *within a certified enrollment period* which does not exceed a full calendar month;

(ii) There is an interval, which does not exceed a full calendar month between semesters, terms or quarters when the educational institution only certifies enrollment on a semester, term, or quarter basis; or

(iii) There is an interval, which does not exceed 30 days, when the veteran, as part of his or her approved program of vocational rehabilitation, transfers from one educational institution to another for the purpose of enrolling in and pursuing a similar program at the second institution;

(5) The veteran is pursuing a non-college-degree course and there is a period of up to 5 days per twelve-month period during which the school offering non-college-degree courses is not operating, because instructors are attending professional meetings.

(b) *Case manager responsibility.* The case manager may disapprove leave under paragraph (a)(4) of this section if:

(1) Approval would result in or lead to use of more than 48 months of entitlement under Chapter 31, alone; or

(2) Approval would require extension of the scheduled completion date of the veteran's program.

(c) *Approval of leaves of absence required.* A veteran, who wishes to receive subsistence allowance while the facility temporarily is not offering training under conditions other than those identified in paragraph (a) of this section, must seek an approved leave of absence and be charged leave.

(Authority: 38 U.S.C. 3110)

### § 21.348 Leave following completion of a period of training or rehabilitation services.

(a) *Leave following completion of training or rehabilitation services.* Leave may not be approved following completion of a period of rehabilitation services described in § 21.340(a).

(b) *Postponement of the date of completion of a period of rehabilitation services prohibited.* The date of completion of the veteran's program may not be extended for the purpose of allowing the veteran to use leave.

(Authority: 38 U.S.C. 3110)

### § 21.350 Unauthorized absences.

A veteran who is unable to obtain an authorized leave of absence in advance may seek to have the unauthorized absence excused.

(a) *Excusing unauthorized absences.* VA may excuse an unauthorized absence and make proper charges against the veteran's leave when:

(1) The veteran has absented himself or herself when advance approval from VA is impracticable; and

(2) Conditions for approval of leave are otherwise met.

(b) *Unexcused, unauthorized absences.* When an unauthorized absence is not satisfactorily explained, VA will take necessary action, including recoupment of subsistence allowance for that period of absence.

(Authority: 38 U.S.C. 3110)

CONDUCT AND COOPERATION

### § 21.362 Satisfactory conduct and cooperation.

(a) *General.* The successful development and implementation of a program of rehabilitation services require the full and effective participation of the veteran in the rehabilitation process.

(1) The veteran is responsible for satisfactory conduct and cooperation in developing and implementing a program of rehabilitation services under Chapter 31;

(2) The staff is responsible for insuring satisfactory conduct and cooperation on the veteran's part; and

(3) VA staff shall take required action when the veteran's conduct and cooperation are not satisfactory. (See § 21.364)

(b) *VA responsibility.* VA shall make a reasonable effort to inform the veteran and assure his or her understanding of:

(1) The services and assistance which may be provided under Chapter 31 to help the veteran maintain satisfactory cooperation and conduct and to cope with problems directly related to the

rehabilitation process, especially counseling services;

(2) Other services which VR&C staff can assist the veteran in securing through non-VA programs; and

(3) The specific responsibilities of the veteran in the process of developing and implementing a program of rehabilitation services, especially the specific responsibility for satisfactory conduct and cooperation.

(c) *Veteran's responsibility.* A veteran requesting or being provided services under Chapter 31 must:

(1) Cooperate with VA staff in carrying out the initial evaluation and developing a rehabilitation plan;

(2) Arrange a schedule which allows him or her to devote the time needed to attain the goals of the rehabilitation plan;

(3) Seek the assistance of VA staff, as necessary, to resolve problems which affect attainment of the goals of the rehabilitation plan;

(4) Conform to procedures established by VA governing pursuit of a rehabilitation plan including:

(i) Enrollment and reenrollment in a course;

(ii) Changing the rate at which a course is pursued;

(iii) Requesting a leave of absence;

(iv) Requesting medical care and treatment;

(v) Securing supplies; and

(vi) Other applicable procedures.

(5) Conform to the rules and regulations of the training or rehabilitation facility at which services are being provided.

(d) *Responsibility for determining satisfactory conduct and cooperation.* VR&C staff with case management responsibility in the veteran's case will:

(1) Monitor the veteran's conduct and cooperation as necessary to assure consistency with provisions of paragraph (c) of this section.

(2) Provide assistance which may be authorized under Chapter 31, or for which arrangements may be made under other programs to enable the veteran to maintain satisfactory conduct and cooperation.

(Authority: 38 U.S.C. 3111)

**§ 21.364 Unsatisfactory conduct and cooperation.**

(a) *General.* If VA determines that a veteran has failed to maintain satisfactory conduct or cooperation, VA may, after determining that all reasonable counseling efforts have been made and are found not reasonably likely to be effective, discontinue services and assistance to the veteran, unless the case manager determines that mitigating circumstances exist. In any case in which such services and assistance have been discontinued, VA may reinstitute such services and assistance only if the counseling psychologist determines that:

(1) The unsatisfactory conduct or cooperation of such veteran will not be likely to recur; and

(2) The rehabilitation program which the veteran proposes to pursue (whether the same or revised) is suitable to such veteran's abilities, aptitudes, and interests.

(b) *Unsatisfactory conduct or cooperation exists.* When the case manager determines that the veteran's conduct and/or cooperation are not in conformity with provisions of § 21.362(c), the case manager will:

(1) Discuss the situation with the veteran;

(2) Arrange for services, particularly counseling services, which may assist in resolving the problems which led to the veteran's unsatisfactory conduct or cooperation;

(3) Interrupt the program to allow for more intense efforts, if the unsatisfactory conduct and cooperation persist. If a reasonable effort to remedy the situation is unsuccessful during the period in which the program is interrupted, the veteran's case will be discontinued and assigned to ''discontinued'' status unless mitigating circumstances are found. When mitigating circumstances exist the case may be continued in ''interrupted'' status until VA staff determines the veteran may be reentered into the same or a different program because the veteran's conduct and cooperation will be satisfactory, or if a plan has been developed, to enable the veteran to reenter and try to maintain satisfactory conduct and cooperation. Mitigating circumstances include:

(i) The effects of the veteran's service and nonservice-connected condition;

(ii) Family or financial problems which have led the veteran to unsatisfactory conduct or cooperation; or

(iii) Other circumstances beyond the veteran's control.

(Authority: 38 U.S.C. 3111)

INTERREGIONAL AND INTRAREGIONAL TRAVEL OF VETERANS

### § 21.370 Intraregional travel at government expense.

(a) *Introduction.* VA may authorize transportation expenses for intraregional travel to a veteran in a rehabilitation program or a program of employment services for the purposes presented in paragraph (b) of this section. When approved for purposes stated in paragraph (b) of this section, authorization of travel is limited to the veteran's transportation, and does not include transportation for the veteran's dependents, or for moving personal effects.

(Authority: 38 U.S.C. 111, 3104(a)(13))

(b) *Necessary condition for intraregional travel at government expense.* VA may authorize a veteran to travel at government expense within the regional territory of the VA field station of jurisdiction when:

(1) VA determines that the travel is necessary in the discharge of the government's obligation to the veteran; and

(2) The veteran is instructed to travel for any of the following reasons:

(i) To report to the chosen school or training facility for the purpose of starting training;

(ii) To report to a prospective employer-trainer for an interview prior to induction into training, when there is definite assurance in advance of approving the travel that, upon interview, the employer will start the veteran in training, if the employer finds the veteran acceptable, or

(iii) To report to the chosen school for a personal interview prior to induction into training when:

(A) The school requires the interview as a condition of admission,

(B) There is assurance before the travel is approved that the veteran's records (school, counseling, etc.) show he or she meets all basic requirements for induction under § 21.282; and

(C) The veteran submits to the school a transcript of his or her high school credits and a transcript from any school he or she attended following high school.

(iv) To report to a rehabilitation facility or sheltered workshop;

(v) To return to his or her home from the training or rehabilitation facility when:

(A) Services are not available for a period of 30 days or more (including summer vacation periods), and

(B) Travel from his or her home to the training or rehabilitation facility was at government expense;

(vi) To return to the training or rehabilitation facility from his or her home, when:

(A) The purpose of the travel is to continue the rehabilitation program, and

(B) Travel from the training or rehabilitation facility to the veteran's home was at government expense;

(vii) To return to the point from which he or she was transported at government expense, upon being placed in ''discontinued'' or ''interrupted'' status for any reason, except abandonment of training by the veteran without good reason;

(viii) To report to a place of prearranged satisfactory employment upon completion of vocational rehabilitation for the purpose of beginning work;

(ix) To return to his or her home from the place of training following rehabilitation to the point of employability, when suitable employment is not available;

(x) To return from the place of training to the veteran's prior location, when VA could have approved travel to the place of training at government expense, but did not issue the necessary travel authorization; and

(xi) To report to a place to take a scheduled examination required to practice the trade or profession for which the veteran has been trained. This travel shall be limited to points within the state in which the veteran has pursued his or her training or, if the veteran returned to the state from

which he or she was sent to pursue training, he or she may be sent at government expense to a place within that state to take the examination. If there is more than one place within the state at which the veteran may take the examination, travel shall be limited to the nearest place.

(Authority: 38 U.S.C. 111)

(c) *Approval of intraregional transfer.* Intraregional travel must be approved by the case manager.

(Authority: 38 U.S.C. 3104(a)(13))

[49 FR 40814, Oct. 18, 1984; 50 FR 9622, Mar. 11, 1985]

### § 21.372 Interregional transfer at government expense.

(a) *Introduction.* A veteran may need to transfer from the jurisdiction of one VA facility to another in order to accomplish rehabilitation. This section states the conditions which will permit the transfer to be made at government expense. Authorization of travel is limited to the veteran's transportation, and does not include transportation for the veteran's dependents or for moving personal effects.

(Authority: 38 U.S.C. 111, 3104(a)(13))

(b) *Conditions which permit interregional transfers at government expense.* A veteran may be provided travel at government expense when it has been determined that such travel is necessary to accomplish rehabilitation. VA will authorize an interregional transfer at government expense only to allow the veteran:

(1) To enter training in the nearest satisfactory facility if:

(i) The nearest satisfactory facility is within the jurisdiction of another VA facility; or

(ii) There are no satisfactory facilities within the jurisdiction of the facility in which the veteran resides.

(2) To enter training in the state in which the veteran has long-standing family and social ties, and in which he or she plans to live following rehabilitation;

(3) To report to an employer-trainer when all necessary steps have been taken to establish an on-job training program;

(4) To report to rehabilitation facility or sheltered workshop;

(5) To return to his or her home from the place of training when:

(i) Training is not available for a period of 30 days or more (including summer vacation periods), and

(ii) Travel from his or her home to the place of training or rehabilitation services was at government expense;

(6) To return to the place of training or rehabilitation services from his or her home, when;

(i) The purpose of the travel is to continue training or rehabilitation services; and

(ii) Travel from the place of training or rehabilitation services to the veteran's home was at government expense;

(7) To return to the point from which he or she was transferred at government expense, upon being assigned to ''discontinued'' or ''interrupted'' status, for any reason, except abandonment of training by the veteran without good reason;

(8) To report to a place of prearranged satisfactory employment or for a prearranged employment interview following completion of his or her program of vocational rehabilitation, when:

(i) There is no satisfactory opportunity for employment in the veteran's occupation within the jurisdiction of the facility which has jurisdiction over his or her residence, and

(ii) The veteran has a serious employment handicap.

(9) To return to his or her home, from which he or she was transferred at government expense to pursue training, when, upon completion of his or her course, satisfactory employment is not available;

(10) To return to the location from which he or she traveled without authorization because VA did not issue the necessary travel authorization on a timely basis.

(Authority: 38 U.S.C. 111)

(c) *Approval of interregional transfer.* Interregional travel must be approved by the case manager.

(Authority: 38 U.S.C. 3104(a)(13))

### § 21.374 Authorization for travel of attendants.

(a) *Travel for attendants.* The services of an attendant to accompany a veteran while traveling for rehabilitation purposes may be provided when such services are necessitated by the severity of the veteran's disability. Attendants may only be used to enable a veteran to attend appointments for initial evaluation, counseling, or intraregional or interregional travel at government expense under § 21.370 and § 21.372.

(Authority: 38 U.S.C. 111)

(b) *Attendants not employed by the Federal government.* (1) VA may authorize persons not in regular civilian employment of the Federal government to act as attendants. Payment of travel expenses for attendants will be authorized on the same basis as for the veteran the attendant is accompanying. VA:

(i) Will furnish the attendant with common-carrier transportation, meal and lodging expenses; or

(ii) Will grant the attendant a mileage allowance in lieu of furnishing the assistance cited in paragraph (b)(1)(i) of this section.

(2) VA will not pay the attendant a fee if he or she is a relative of the veteran. A relative, for this purpose, is a person who by blood or marriage is the veteran's

(i) Spouse,

(ii) Parent,

(iii) Child,

(iv) Brother,

(v) Sister,

(vi) Uncle,

(vii) Aunt,

(viii) Niece, or

(ix) Nephew.

(c) *Attendant employed by the Federal government.* (1) VA may authorize a person in the regular civilian employment of the Federal government to act as an attendant. When assigned, the attendant:

(i) Will be entitled to transportation and expenses, or

(ii) May be allowed per diem in place of subsistence in accordance with the provisions of the Federal Travel Regulations (5 U.S.C. Chapter 57).

(2) VA will pay no fee to civilian employees of the Federal government who act as attendants.

[49 FR 40814, Oct. 18, 1984; 50 FR 9622, Mar. 11, 1985]

### § 21.376 Travel expenses for initial evaluation and counseling.

When VA asks a disabled veteran to report to a designated place for an initial evaluation, reevaluation or counseling (including personal or vocational adjustment counseling), the veteran will travel to and from the place of evaluation and counseling at government expense. When a veteran, because of a severe disability, requires the services of an attendant while traveling, VA will authorize payment of travel expenses for the attendant under the provisions of § 21.374.

(Authority: 38 U.S.C. 111)

## PERSONNEL TRAINING AND DEVELOPMENT

### § 21.380 Establishment of qualifications for personnel providing assistance under Chapter 31.

(a) *General.* Notwithstanding any other provision of law or regulation, VA shall establish qualification standards for VBA personnel providing evaluation, rehabilitation, and case management services to eligible veterans under chapter 31, including:

(1) Counseling psychologists;

(2) Vocational rehabilitation specialists; and

(3) Other staff providing professional and technical assistance.

(b) *Rehabilitation Act of 1973.* VA shall consider qualification standards established for comparable personnel under the Rehabilitation Act of 1973, when setting agency standards.

(Authority: 38 U.S.C. 3118(c))

**§ 21.382 Training and staff development for personnel providing assistance under Chapter 31.**

(a) *General.* VA shall provide a program of ongoing professional training and development for staff of the VR&E Service engaged in providing rehabilitation services under chapter 31. The objective of such training shall be to insure that rehabilitation services for disabled veterans are provided in accordance with the most advanced knowledge, methods, and techniques available for the rehabilitation of disabled persons. The areas in which training and development services may be provided to enhance staff skills include:

(1) Evaluation and assessment:

(2) Medical aspects of disability;

(3) Psychological aspects of disability;

(4) Counseling theory and techniques;

(5) Personal and vocational adjustment;

(6) Occupational information;

(7) Placement processes and job development;

(8) Special considerations in rehabilitation of the seriously disabled;

(9) Independent living services;

(10) Resources for training and rehabilitation; and

(11) Utilizing research findings and professional publications.

(Authority: 38 U.S.C. 3118)

(b) *Training and development resources.* For the purpose of carrying out the provisions of paragraph (a) of this section VA may:

(1) Employ the services of consultants;

(2) Make grants to and contract with public and private agencies, including institutions of higher learning, to conduct workshop and training activities;

(3) Authorize individual training at institutions of higher learning and other appropriate facilities; and

(4) Utilize chapter 41 of title 5, U.S.C., and related instructions to provide training and staff development activities on a group and individual basis.

(Authority: 38 U.S.C. 3118(b))

(c) *Interagency coordination.* VA shall coordinate with the Commissioner of the Rehabilitation Services Administration and the Assistant Secretary for Veterans' Employment in planning and carrying out personnel training in areas of mutual programmatic concern.

(Authority: 38 U.S.C. 3118(c))

REHABILITATION RESEARCH AND SPECIAL PROJECTS

**§ 21.390 Rehabilitation research and special projects.**

(a) *General.* VA shall carry out an ongoing program of activities for the purpose of advancing the knowledge, methods, techniques, and resources available for use in rehabilitation programs for veterans. For this purpose, VA may conduct research and development, provide support for research and development, or both conduct and provide support for the development and conduct of:

(1) Studies and research concerning the psychological, educational, social, vocational, industrial, and economic aspects of rehabilitation; and

(2) Projects which are designed to increase the resources and potential for accomplishing the rehabilitation of disabled veterans.

(Authority: 38 U.S.C. 3119(a))

(b) *Grants.* VA may make grants to, or contract with, public on nonprofit agencies, including institutions of higher learning, to carry out the provisions of paragraph (a) of this section.

(Authority: 38 U.S.C. 3119(b))

(c) *Research by Vocational Rehabilitation and Employment (VR&C) staff members.* VA will encourage research by VR&C staff members. This research will address problems affecting service delivery, initiation and continuation in rehabilitation programs, and other areas directly affecting the quality of VR&C services to veterans.

(Authority: 38 U.S.C. 3119(a))

(d) *Interagency coordination.* VA shall cooperate with the Commissioner of the Rehabilitation Services Administration and the Director of the National Institute of Handicapped Research in the Department of Education, the Assistant Secretary for Veterans'

Employment in the Department of Labor, and the Secretary of Health and Human Services regarding rehabilitation studies, research, and special projects of mutual programmatic concern.

(Authority: 38 U.S.C. 3119(c))

[49 FR 40814, Oct. 18, 1984, as amended at 62 FR 17710, Apr. 11, 1997]

VETERANS' ADVISORY COMMITTEE ON REHABILITATION

### § 21.400 Veterans' Advisory Committee on Rehabilitation.

(a) *General.* The Secretary shall appoint an advisory committee to be known as the Veterans' Advisory Committee on Rehabilitation.

(b) *Purpose.* The purposes of the Veterans' Advisory Committee on Rehabilitation, hereafter referred to as the committee, are to:

(1) Assess the rehabilitation needs of service and nonservice-disabled veterans; and

(2) Review the programs and activities of VA designed to meet such needs;

(Authority: 38 U.S.C. 3121(c))

(c) *Members.* The committee shall include:

(1) Members of the general public;

(2) Appropriate representation of veterans with service-connected disabilities; and

(3) Persons who have distinguished themselves in the public and private sectors in the fields of rehabilitation, and employment and training programs.

(d) *Members terms.* The Secretary shall appoint members of the committee for three-year terms. Members may be reappointed for additional three-year terms.

(e) *Chairperson.* The Secretary will designate one of the members of the committee to chair the committee.

(f) *Ex-officio members.* The committee shall also include ex-officio members named by the following agencies. The ex-officio members shall include one representative from:

(1) The Veterans Health Services and Research Administration;

(2) The Veterans Benefits Administration;

(3) The Rehabilitation Services Administration and one from the National Institute for Handicapped Research of the Department of Education; and

(4) The Assistant Secretary of Labor for Veterans' Employment of the Department of Labor.

(Authority: 38 U.S.C. 3121(a))

### § 21.402 Responsibilities of the Veterans' Advisory Committee on Rehabilitation.

(a) *Consultation with the Secretary.* The Secretary shall regularly, but not less than twice yearly, consult with and seek the advice of the committee with respect to the administration of veterans' rehabilitation programs authorized under Title 38, United States Code.

(b) *Submission of an annual report.* The committee shall:

(1) Submit to the Secretary an annual report on the rehabilitation programs and activities of the VA; and

(2) Submit such other reports and recommendations to the Secretary as the committee determines appropriate.

(c) *Contents of the committee's annual report.* The committee's annual report shall include:

(1) An assessment of the rehabilitation needs of veterans; and

(2) A review of the programs and activities of VA designed to meet needs identified in paragraph (c)(1) of this section.

(d) *Secretary's annual report.* The findings of the committee shall be incorporated in the Secretary's annual report submitted to the Congress under 38 U.S.C. 529. In addition the Secretary shall submit, together with this annual report, a copy of all reports and recommendations of the committee submitted to the Secretary since the previous annual report was submitted to the Congress.

(Authority: 38 U.S.C. 3121(c))

ADDITIONAL ADMINISTRATIVE CONSIDERATION

### § 21.410 Delegation of authority.

The Secretary delegates authority to the Under Secretary for Benefits to make findings and decisions under 38

U.S.C. chapter 31 and regulations, precedents, and instructions that affect vocational rehabilitation services for disabled veterans. The Under Secretary for Benefits may further delegate this authority to supervisory and non-supervisory Vocational Rehabilitation and Employment staff members.

(Authority: 38 U.S.C. 512(a))

[62 FR 17710, Apr. 11, 1997]

### § 21.412 Finality of decisions.

(a) *Facility of original jurisdiction.* The decision of a VA facility in a given veteran's case:

(1) Will be final and binding upon all field stations of VA as to conclusions based on evidence on file at that time; and

(2) Will not be subject to revision on the same factual basis except by duly constituted appellate authorities or except as provided in §§ 21.410 and 21.414. (See §§ 19.153, 19.154, and 19.155.

(Authority: 38 U.S.C. 512(a), 7103)

(b) *Adjudicative determinations.* Current determinations of line of duty, character of discharge, relationship, and other pertinent elements affecting eligibility for training and rehabilitation services or payment of subsistence allowance under Chapter 31, made by an adjudicative activity by application of the same criteria and based on the same facts, are binding upon all other adjudicative activities in the absence of clear and unmistakable error.

(Authority: 38 U.S.C. 512(a))

### § 21.414 Revision of decision.

The revision of a decision on which an action is based is subject to the following regulations:

(a) Clear and unmistakable error, § 3.105(a);

(b) Difference of opinion, § 3.105(b);

(c) Character of discharge, § 3.105(c);

(d) Severance of service-connection, § 3.105(d);

(e) Reduction to less than compensable evaluation, § 3.105(e). (See §§ 21.48, 21.322, and 21.324)

(Authority: 38 U.S.C. 5112)

INFORMING THE VETERAN

### § 21.420 Informing the veteran.

(a) *General.* VA will inform a veteran in writing of findings affecting receipt of benefits and services under Chapter 31. This includes veterans:

(1) Requesting benefits and services; or

(2) In receipt of benefits and services.

(b) *Notification.* (1) Each notification should include the decision or finding, the reasons, including fact and law, for the decision, the effective date of the decision or finding; and

(2) The veteran's appeal rights, if any.

(c) *Adverse action.* An adverse action is one, other than an interim action such as a suspension of benefits pending development, which:

(1) Denies Chapter 31 benefits, when such benefits have been requested;

(2) Reduces or otherwise diminishes benefits being received by the veteran; or

(3) Terminates receipt of benefits for reasons other than scheduled interruptions which are a part of the veteran's plan.

(d) *Prior notification of adverse action.* VA shall give the veteran a period of at least 30 days to indicate his or her disagreement with an adverse action other than one which arises as a consequence of a change in training time or other such alteration in circumstances. If the veteran disagrees, he or she shall be given the opportunity, before appealing the adverse action as provided in § 21.59 of this part, to:

(1) Meet informally with a representative of VA;

(2) Review the basis for VA decision, including any relevant written documents or material; and

(3) Submit to VA any material which he or she may have relevant to the decision.

(Authority: 38 U.S.C. 3102)

[49 FR 40814, Oct. 18, 1984, as amended at 54 FR 40872, Oct. 4, 1989]

### § 21.422 Reduction in subsistence allowance following the loss of a dependent.

(a) *Notice of reduction required when a veteran loses a dependent.* (1) Except as

provided in paragraph (a)(2) of this section, VA will not reduce an award of subsistence allowance following the veteran's loss of a dependent unless:

(i) VA has notified the veteran of the adverse action, and

(ii) VA has provided the veteran with a period of 60 days in which to submit evidence for the purpose of showing that subsistence allowance should not be reduced.

(2) When the reduction is based solely on written, factual, unambiguous information as to dependency provided by the veteran or his or her fiduciary with knowledge or notice that the information would be used to determine the monthly rate of subsistence allowance;

(i) VA is not required to send a pre-reduction notice as stated in paragraph (a)(1) of this section, but;

(ii) VA will send notice contemporaneous with the reduction in subsistence allowance.

(Authority: 38 U.S.C. 5112, 5113)

(b) *Pre-reduction notice.* Where a reduction in subsistence allowance is proposed by reason of information concerning dependency received from a source other than the veteran, VA will:

(1) Prepared a proposal for the reduction of subsistence allowance, setting forth material facts and reasons;

(2) Notify the veteran at his or her latest address of record of the proposed action;

(3) Furnish detailed reasons for the proposed reduction;

(4) Inform the veteran that he or she has an opportunity for a predetermination hearing, provided that VA receives a request for such a hearing within 30 days from the date of the notice; and

(5) Give the veteran 60 days for the presentation of additional evidence to show that the subsistence allowance should be continued at its present level.

(Authority: 38 U.S.C. 5112, 5113)

(c) *Predetermination hearing.* (1) If VA receives a timely request for a predetermination hearing as indicated in paragraph (b)(4) of this section:

(i) VA will notify the veteran in writing of the date, time and place for the hearing; and

(ii) Payments of subsistence allowance will continue at the previously established level pending a final determination concerning the proposed reduction.

(2) The hearing will be conducted by a VA employee who:

(i) Did not participate in the preparation of the proposal to reduce the veteran's subsistence allowance, and

(ii) Will bear the decision-making responsibility.

(Authority: 38 U.S.C. 5112, 5113)

(d) *Final action.* VA will take final action following the predetermination procedures specified in paragraph (c) of this section.

(1) If a predetermination hearing was not requested or if the veteran failed to report for a scheduled predetermination hearing, the final action will be based solely upon the evidence of record at the expiration of 60 days.

(2) If a predetermination hearing was conducted, VA will base final action upon:

(i) Evidence presented at the hearing;

(ii) Evidence contained in the claims file at the time of the hearing; and

(iii) Any additional evidence obtained following the hearing pursuant to necessary development.

(3) Whether or not a predetermination hearing was conducted, a written notice of the final action shall be issued to the veteran setting forth the reasons for the decison, and the evidence upon which it is based. The veteran will be informed of his or her appellate rights and right of representation. (For information concerning the conduct of the hearing see §3.103 (c) and (d) of this chapter).

(4) When a reduction of subsistence allowance is found to be warranted following consideration of any additional evidence submitted, the effective date of the reduction or discontinuance shall be as specified under the provisions of §21.324 of this part.

(Authority: 38 U.S.C. 5112, 5113)

[54 FR 40872, Oct. 4, 1989]

ACCOUNTABILITY

### § 21.430 Accountability for authorization and payment of training and rehabilitation services.

(a) *General.* VA shall maintain policies and procedures which provide accountability in the authorization and payment of program costs for training and rehabilitation services. The procedures established under this section are applicable to all program costs except subsistence allowance (or the optional allowance at Chapter 34 rates). Policies and procedures governing payment of subsistence allowance are governed by §§ 21.260 through 21.276, and §§ 21.320 through 21.334.

(b) *Determining necessary costs for training and rehabilitation services.* The estimates of program costs during a calendar year or lesser period shall be based upon the services necessary to carry out the veteran's rehabilitation plan during that period (§§ 21.80 through 21.98). The estimates will be developed by the VBA case manager. If additional approval is required, the VBA case manager shall secure such additional approval prior to authorization of services.

(c) *Vocational Rehabilitation and Employment (VR&C) Officer's review of program costs.* The VR&C Officer will review the program costs for the services in paragraphs (c)(1) through (c)(3) of this section if the case manager's program cost estimate for a calendar year exceeds $25,000. The VR&C Officer may not delegate this responsibility. The case manager will neither sign a rehabilitation plan nor authorize expenditures before the VR&C Officer approves the program costs. The services subject to this review are:

(1) Providing supplies to help establish a small business;

(2) A period of extended evaluation; or

(3) A program of independent living services.

(Authority: 38 U.S.C. 3115(b)(4))

CROSS-REFERENCES: See § 21.156. Other incidental goods and services. § 21.258. Special assistance for veterans in self-employment.

[49 FR 40814, Oct. 18, 1984, as amended at 51 FR 45767, Dec. 22, 1986; 55 FR 25975, June 26, 1990; 62 FR 17710, Apr. 11, 1997]

## Subpart B—Claims and Applications for Educational Assistance

AUTHORITY: 38 U.S.C. 501(a), ch. 51, unless otherwise noted.

EDITORIAL NOTE: The regulations formerly appearing under this subpart were revoked at 30 FR 14103, Nov. 9, 1965. That order provided in part, ''these regulations remain in force insofar as they are pertinent to any problems, appeals, litigation, or determinations of liability of educational institutions or training establishments for overpayments under 38 U.S.C. 1666.''

CLAIMS

### § 21.1029 Definitions.

These definitions apply to this subpart, and to subparts C, D, G, H, K, and L of this part.

(a) *Abandoned claim.* A claim is an *abandoned claim* if:

(1) In connection with a formal claim VA requests that the claimant furnish additional evidence, and the claimant—

(i) Does not furnish that evidence within one year of the date of the request; and

(ii) Does not show good cause why the evidence could not have been submitted within one year of the date of the request; or

(2) In connection with an informal claim, VA requests a formal claim, and—

(i) VA does not receive the formal claim within one year of the date of request; and

(ii) The claimant does not show good cause why he or she could not have filed the formal claim in sufficient time for VA to have received it within one year of the date of the request.

(Authority: 38 U.S.C. 5103(a))

(b) *Date of claim.* The *date of claim* is the date on which a valid claim or application for educational assistance is considered to have been filed with VA, for purposes of determining the commencing date of an award of that educational assistance.

(1) If an informal claim is filed and VA receives a formal claim within one year of the date VA requested it, or within such other period of time as

provided by §21.1032, the date of claim, subject to the provisions of paragraph (b)(3) of this section, is the date VA received the informal claim.

(2) If a formal claim is filed other than as described in paragraph (b)(1) of this section, the date of claim, subject to the provisions of paragraph (b)(3) of this section, is the date VA received the formal claim.

(3) If a formal claim itself is abandoned and a new formal or informal claim is filed, the date of claim is as provided in paragraph (b)(1) or (b)(2) of this section, as appropriate.

(Authority: 38 U.S.C. 5103)

(c) *Formal claim.* A claim is a *formal claim* when the claimant (or his or her authorized representative) files the claim with VA, and—

(1) The claim is a claim for—

(i) Educational assistance;

(ii) An increase in educational assistance; or

(iii) An extension of the eligibility period for receiving educational assistance; and

(2) If there is a form (either paper or electronic) prescribed under this part, the claim is filed on that form.

(Authority: 38 U.S.C. 5101(a))

(d) *Informal claim.* (1) If a form (either paper or electronic) has been prescribed under this part to use in claiming the benefit sought, the term *informal claim* means—

(i) Any communication from an individual, or from an authorized representative or a Member of Congress on that individual's behalf that indicates a desire on the part of the individual to claim or to apply for VA-administered educational assistance; or

(ii) A claim from an individual or from an authorized representative on that individual's behalf for a benefit described in paragraph (c)(1)(i) of this section that is filed in a document other than in the prescribed form.

(2) If a form (either paper or electronic) has not been prescribed to use in claiming the benefit sought, the term *informal claim* means any communication, other than a formal claim, from an individual, or from an authorized representative or a Member of Congress on that individual's behalf that indicates a desire on the part of the individual to claim or to apply for VA-administered educational assistance.

(3) When VA requests evidence in connection with a claim, and the claimant submits that evidence to VA after having abandoned the claim, the claimant's submission of the evidence is an informal claim.

(4) The act of enrolling in an approved school is not an informal claim.

(5) VA will not consider a communication received from a service organization, an attorney, or agent to be an informal claim if a valid power of attorney, executed by the claimant, is not in effect at the time the communication is written.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3471, 3513, 5101(a), 5102, 5901)

(e) *VA.* The term *VA* means the United States Department of Veterans Affairs.

(Authority: 38 U.S.C. 301)

[64 FR 23770, May 4, 1999]

### §21.1030 Claims.

An individual must file a formal claim for educational assistance for pursuit of a program of education, indicating the proposed place of training, the school or training establishment, the objective of the program of education, and such other information as the Secretary may require. A servicemember also must consult with his or her service education officer before filing a formal claim for educational assistance.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3471, 3513, 5101(a))

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0596.)

[64 FR 23771, May 4, 1999]

### §21.1031 VA responsibilities when a claim is filed.

(a) *VA will furnish forms.* VA will furnish all necessary claim forms, instructions, and, if appropriate, a description

of any supporting evidence required upon receipt of an informal claim.

(Authority: 38 U.S.C. 5102)

(b) *Request for additional evidence.* If a formal claim for educational assistance is incomplete, or if VA requires additional evidence or information to adjudicate the claim, VA will notify the claimant of the evidence and/or information necessary to complete or adjudicate the claim and of the time limit provisions of § 21.1032(a).

(Authority: 38 U.S.C. 5103)

[64 FR 23771, May 4, 1999]

**§ 21.1032 Time limits.**

The provisions of this section are applicable to informal claims and formal claims.

(a) *Failure to furnish form, information, or notice of time limit.* VA's failure to give a claimant or potential claimant any form or information concerning the right to file a claim or to furnish notice of the time limit for the filing of a claim will not extend the time periods allowed for these actions.

(Authority: 38 U.S.C. 5101, 5113)

(b) *Notice of time limit for filing evidence.* If a claimant's claim is incomplete, VA will notify the claimant of the evidence necessary to complete the claim. Unless payment of educational assistance is permitted by paragraph (e) of this section, if the evidence is not received within one year from the date of such notification, VA will not pay educational assistance by reason of that claim.

(Authority: 38 U.S.C. 5103)

(c) *Time limit for filing a claim for an extended period of eligibility under 38 U.S.C. chapter 30, 32, or 35.* VA must receive a claim for an extended period of eligibility provided by § 21.3047, § 21.5042, or § 21.7051 by the later of the following dates.

(1) One year from the date on which the spouse's, surviving spouse's, or veteran's original period of eligibility ended; or

(2) One year from the date on which the spouse's, surviving spouse's, or veteran's physical or mental disability no longer prevented him or her from beginning or resuming a chosen program of education.

(Authority: 38 U.S.C. 3031(d), 3232(a), 3512)

(d) *Time limit for filing for an extension of eligibility due to suspension of program (38 U.S.C. chapter 35).*

VA must receive a claim for an extended period of eligibility due to a suspension of an eligible child's program of education as provided in § 21.3043 by the later of the following dates.

(1) One year from the date on which the child's original period of eligibility ended; or

(2) One year from the date on which the condition that caused the suspension of the program of education ceased to exist.

(Authority: 38 U.S.C. 3512(c))

(e) *Extension for good cause.* (1) VA may extend for good cause a time limit within which a claimant or beneficiary is required to act to perfect a claim or challenge an adverse VA decision. VA may grant such an extension only when the following conditions are met:

(i) When a claimant or beneficiary requests an extension after expiration of a time limit, he or she must take the required action concurrently with or before the filing of that request; and

(ii) The claimant or beneficiary must show good cause as to why he or she could not take the required action during the original time period and could not have taken the required action sooner.

(2) Denials of time limit extensions are separately appealable issues.

(Authority: 38 U.S.C. 5101, 5113)

(f) *Computation of time limit.* (1) In computing the time limit for any action required of a claimant or beneficiary, including the filing of claims or evidence requested by VA, VA will exclude the first day of the specified period, and will include the last day. This rule is applicable in cases in which the time limit expires on a workday. When the time limit would expire on a Saturday, Sunday, or holiday, the VA will include the next succeeding day in the computation.

(2) The first day of the specified period referred to in paragraph (f)(1) of this section will be the date of the letter of notification to the claimant or beneficiary for purposes of computing time limits. As to appeals, see §§20.302 and 20.305 of this chapter.

(Authority: 38 U.S.C. 501(a))

[64 FR 23771, May 4, 1999]

## Subpart C—Survivors' and Dependents' Educational Assistance Under 38 U.S.C. Chapter 35

AUTHORITY: 38 U.S.C. 501(a), 512, 3500–3566, unless otherwise noted.

GENERAL

### §21.3001 Delegation of authority.

Except as otherwise provided, authority is delegated to the Under Secretary for Benefits and to supervisory or administrative personnel within the jurisdiction of the Education Service, Veterans Benefits Administration, designated by him or her to make findings and decisions under 38 U.S.C. chapter 35 and the applicable regulations, precedents and instructions, as to the program authorized by this subpart.

(Authority: 38 U.S.C. 512(a))

[61 FR 26108, May 24, 1996]

### §21.3002 Administration of Survivors' and Dependents' Educational Assistance Program.

Subpart D of this part applies to the Survivors' and Dependents' Educational Assistance Program, unless the provisions of a section in that subpart are explicitly limited to one or more of the other educational assistance programs VA administers.

(Authority: 38 U.S.C. 501, 3501–3566)

[61 FR 26108, May 24, 1996]

### §21.3020 Educational assistance.

The program of educational assistance under 38 U.S.C. Chapter 35 captioned Survivors' and Dependents' Educational Assistance, may be referred to as Dependents' Educational Assistance.

(Authority: Sec. 309, 90 Stat. 2383)

(a) *General.* A program of education or special restorative training may be authorized for an eligible person who meets the definition contained in §21.3021.

(b) *45 months limitation.* Educational assistance may not exceed a period of 45 months, or the equivalent in part-time training, unless it is determined that a longer period is required for special restorative training under the circumstances outlined in §21.3300(c) or except as specified in §21.3044(c).

(Authority: 38 U.S.C. 3511(a), 3533, 3541(b))

(c) *Courses in foreign countries.* A course to be pursued at a school not located in a State or in the Philippines may not be approved except under the circumstances outlined in §21.4260.

[30 FR 15631, Dec. 18, 1965, as amended at 31 FR 6773, May 6, 1966; 34 FR 841, Jan. 18, 1969; 38 FR 14931, June 7, 1973; 43 FR 35289, Aug. 9, 1978]

### §21.3021 Definitions.

(a) *Eligible person* means:

(1) A child of a:

(i) Veteran who died of a service-connected disability.

(ii) Veteran who died while having a disability evaluated as total and permanent in nature resulting from a service-connected disability.

(iii) Veteran, serviceman or servicewoman who has a total disability permanent in nature resulting from a service-connected disability.

(iv) Person who is on active duty as a member of the Armed Forces and who now is, and, for a period of more than 90 days, has been, listed by the Secretary concerned as missing in action, captured in line of duty by a hostile force, or forcibly detained or interned in line of duty by a foreign government or power.

(2) The surviving spouse of a:

(i) Veteran who died of a service-connected disability.

(ii) Veteran who died while having a disability evaluated as total and permanent in nature resulting from a service-connected disability, arising out of active military, naval or air service after the beginning of the Spanish-American War. (See §§3.6(a) and 3.807 of this chapter.)

(3) The spouse of a:

(i) Veteran, serviceman or servicewoman who has a total disability permanent in nature resulting from a service-connected disability.

(ii) Person who is on active duty as a member of the Armed Forces and who now is, and, for a period of more than 90 days, has been, listed by the Secretary concerned as missing in action, captured in line of duty by a hostile force, or forcibly detained or interned in line of duty by a foreign government or power.

(b) *Child* means a son or daughter of a veteran as defined in § 3.807(d) of this chapter. The term includes a child of a Philippine Commonwealth Army veteran and a Philippine Scout (designated as a *New* Philippine Scout under 38 U.S.C. 3566(b)), as defined in § 3.40(b), (c), or (d) of this chapter, but educational assistance allowance may not be authorized based on such service for any period before September 30, 1966.

(c) *Wife* and *widow, spouse* and *surviving spouse.* The terms *wife* and *widow* mean an individual as defined in § 3.807(d) of this chapter and the terms *spouse* and *surviving spouse* shall have the same respective meaning when used in the regulations in part 21, Title 38, Code of Federal Regulations. Educational assistance allowance may not be authorized for any such individuals for any period before December 1, 1968.

(Authority: 38 U.S.C. 3500, 3501, and 3511)

(d) *Parent or guardian* means a natural or adoptive parent, a fiduciary legally appointed by a court of competent jurisdiction or any person who is determined to be otherwise legally vested with the care of the eligible person (38 U.S.C. 3501(a)(4)) or it may be the eligible person if he or she has attained majority under laws applicable in his or her State of residence as shown on the application and is under no known legal disability. (38 U.S.C. 3501(b)) The eligible person may be designated as the person by whom required actions may be taken even though he or she has not attained majority, or having attained majority, is under a legal disability, when it is determined that to do otherwise would not be in his or her best interest, would result in undue delay or would not be administratively feasible. Where necessary to protect his or her interest and there is reason why the eligible person should not act for himself or herself, some other individual may be designated as the person by whom required actions should be taken.

(Authority: 38 U.S.C. 3501(c))

(e) *Armed Forces,* as to service by the eligible person, means the U.S. Army, Navy, Marine Corps, Air Force, and Coast Guard, including the Reserve components of each, the National Guard of the United States and the Air National Guard of the United States. (38 U.S.C. 3501 (a)(3) and (d) and 3512(a)) Effective December 31, 1970, the term includes the National Oceanic and Atmospheric Administration, the Environmental Science Services Administration and the Coast and Geodetic Survey, as to full-time duty of officers commissioned therein.

(Authority: 38 U.S.C. 101(21)(C))

(f) *Duty with the Armed Forces,* as to service by the eligible person, means active duty, active duty for training for a period of 6 or more consecutive months, or an initial period of active duty for training of not less than 3 months or more than 6 months in the Ready Reserve. (38 U.S.C. 3501(a)(3) and (d), 3512(a)) See §§ 21.3041 and 21.3042.

(g) *State* means each of the several States, territories, and possessions of the United States, the District of Columbia, and the Commonwealth of Puerto Rico, and the Canal Zone. (38 U.S.C. 101(20)) (Although the Republic of the Philippines is not included in the definition of a State, eligible persons may pursue courses of training in that country.)

(h) *Program of education.* The term *program of education* means any curriculum or any combination of unit courses or subjects pursued at an educational institution which is generally accepted as necessary to fulfill the requirements for the attainment of a predetermined and identified educational, professional, or vocational objective.

(Authority: 38 U.S.C. 3501(a)(5))

(i) *Educational objective.* An educational objective is one that leads to

the awarding of a diploma, degree, or certificate which reflects educational attainment.

(Authority: 38 U.S.C. 3501(a)(5))

(j) *Professional or vocational objective.* A professional or vocational objective is one that leads to an occupation. It may include educational objectives essential to prepare for the chosen occupation. When a program consists of a series of courses not leading to an educational objective, such courses must be directed toward attainment of a designated professional or vocational objective.

(Authority: 38 U.S.C. 3501(a)(5))

(k) *School, educational institution, institution.* The terms *school, educational institution* and *institution* mean:

(1) A vocational school or business school;

(2) A junior college, teachers' college, college, normal school, professional school, university, or scientific or technical institution;

(3) A public or private secondary school;

(4) A training establishment as defined in §21.4200(c); or

(5) An institution that provides specialized vocational training, generally recognized as on the secondary school level or above, for people with mental or physical disabilities.

(Authority: 38 U.S.C. 3501(a)(6), 3535)

(l) *Disabling effects of chronic alcoholism.* (1) The term *disabling effects of chronic alcoholism* means alcohol-induced physical or mental disorders or both, such as habitual intoxication, withdrawal, delirium, amnesia, dementia, and other like manifestations of chronic alcoholism which in the particular case:

(i) Have been medically diagnosed as manifestations of alcohol dependency or chronic alcohol abuse; and

(ii) Are determined to have prevented commencement or completion of the affected individual's chosen program of education.

(2) A diagnosis of alcoholism, chronic alcoholism, alcohol-dependency, chronic alcohol abuse, etc., in and of itself, does not satisfy the definition of this term.

(3) Injury sustained by an eligible spouse or surviving spouse as a proximate and immediate result of activity undertaken by the eligible spouse or surviving spouse while physically or mentally unqualified to do so due to alcoholic intoxication is not considered a disabling effect of chronic alcoholism.

(Authority: 38 U.S.C. 105, 3512(b))

(m) *Additional definitions.* The definitions of all terms that are defined in §§21.1029 and 21.4200 but that are not defined in this section apply to subpart C of this part.

(Authority: 38 U.S.C. 501, 3501)

CROSS REFERENCES: *Duty periods.* See §3.6 of this chapter.

*Persons included.* See §3.7 of this chapter.

*Philippine and insular forces.* See §3.40 of this chapter.

[36 FR 2508, Feb. 5, 1971, as amended at 38 FR 12110, May 9, 1973; 43 FR 35290, Aug. 9, 1978; 61 FR 26108, May 24, 1996; 61 FR 29295, June 10, 1996; 62 FR 51784, Oct. 3, 1997; 64 FR 23771, May 4, 1999]

### §21.3022 Nonduplication—programs administered by VA.

A person who is eligible for educational assistance under 38 U.S.C. chapter 35 and is also eligible for assistance under any of the provisions of law listed in this paragraph cannot receive such assistance concurrently. The eligible person must elect which benefit he or she will receive for the particular period or periods during which education or training is to be pursued. The election is subject to the conditions specified in §21.4022 of this part. The provisions of law are:

(a) 38 U.S.C. chapter 30,

(b) 38 U.S.C. chapter 31,

(c) 38 U.S.C. chapter 32,

(d) 38 U.S.C. chapter 34,

(e) 10 U.S.C. chapter 1606,

(f) 10 U.S.C. chapter 107,

(g) Section 903 of the Department of Defense Authorization Act, 1981,

(h) The Hostage Relief Act of 1980, and

(i) The Omnibus Diplomatic Security and Antiterrorism Act of 1986.

(Authority: 38 U.S.C. 3681)

[54 FR 33886, Aug. 17, 1989, as amended at 57 FR 29798, July 7, 1992; 61 FR 20728, May 8, 1996]

### § 21.3023 Nonduplication; pension, compensation, and dependency and indemnity compensation.

(a) *Child; age 18.* A child who is eligible for educational assistance and who is also eligible for pension, compensation or dependency and indemnity compensation based on school attendance must elect whether he or she will receive educational assistance or pension, compensation or dependency and indemnity compensation.

(1) An election of educational assistance either before or after the age of 18 years is a bar to subsequent payment or increased rates or additional amounts of pension, compensation or dependency and indemnity compensation on account of the child based on school attendance on or after the age of 18 years. The bar is equally applicable where the child has eligibility from more than one parent.

(2) Payment of pension, compensation or dependency and indemnity compensation to or on account of a child after his or her 18th birthday does not bar subsequent payments of educational assistance.

(3) An election of educational assistance will not preclude the allowance of pension, compensation, or dependency and indemnity compensation based on school attendance for periods, including vacation periods, prior to the commencement of educational assistance.

(b) *Child; under 18 or helpless.* Educational assistance allowance or special restorative training allowance may generally be paid concurrently with pension, compensation or dependency and indemnity compensation for a child under the age of 18 years or for a helpless child based on the service of one or more parents. Where, however, entitlement is based on the death of more than one parent in the same parental line, concurrent payments in two or more cases may not be authorized if the death of one such parent occurred on or after June 9, 1960. In the latter cases, an election of educational assistance and pension, compensation or dependency and indemnity compensation in one case does not preclude a reelection of benefits before attaining age 18 or while helpless based on the service of another parent in the same parental line.

(c) *Child; election.* An election by a child under this section must be submitted to VA in writing.

(1) Except as provided in paragraph (c)(2) of this section, an election to receive Survivors' and Dependents' Educational Assistance (DEA) is final when the eligible child commences a program of education under DEA (38 U.S.C. chapter 35). Commencement of a program of education under DEA will be deemed to have occurred for VA purposes on the date the first payment of DEA educational assistance is made, as evidenced by negotiation of the first check or receipt of the first payment by electronic funds transfer.

(2) An election based on erroneous information furnished by an authorized representative of the Department of Veterans Affairs is not considered final.

(3) A child other than a helpless child, whose eligibility was based on a finding that the veteran had a permanent total service-connected disability and who commenced a program of education under DEA may not thereafter qualify as a dependent for disability compensation purposes if the veteran is later found to be less than permanently and totally disabled, or for pension, compensation or dependency and indemnity compensation after the veteran's death.

(d) *Spouse or surviving spouse.* Educational assistance allowance may be paid for an eligible spouse or surviving spouse concurrently with pension, compensation or dependency and indemnity compensation.

(Authority: 38 U.S.C. 3562)

(The information collection requirements in this section have been approved by the Office of Management and Budget under control number 2900–0595)

CROSS REFERENCES: *Discontinuance.* See § 3.503(h) of this chapter.

*Concurrent payments.* See § 3.707 of this chapter.

*Certification.* See § 3.807 of this chapter.

[30 FR 15631, Dec. 18, 1965, as amended at 31 FR 6773, May 6, 1966; 34 FR 842, Jan. 18, 1969; 40 FR 42879, Sept. 17, 1975; 50 FR 27826, July 8, 1985; 63 FR 45718, Aug. 27, 1998]

### § 21.3024 Nonduplication; Federal Employees' Compensation Act.

(a) *Civilian employment.* The provisions of this paragraph are applicable to cases where there is eligibility for benefits from the Office of Workers' Compensation Programs, under the Federal Employees' Compensation Act (FECA) based on the disability or death as a result of civilian employment of the veteran from whom eligibility for educational assistance is derived.

(1) *Child, spouse or surviving spouse.* A person who is eligible for educational assistance and is also eligible for Office of Workers' Compensation Programs benefits, under the Federal Employees' Compensation Act (FECA) must elect which benefit he or she will receive.

(2) *Veteran, spouse and child—surviving spouse and child.* An eligible person may receive educational assistance notwithstanding that the Office of Workers' Compensation Programs benefits under the Federal Employees' Compensation Act (FECA) are being paid to a veteran, or surviving spouse.

(3) *Election.* An election of Office of Workers' Compensation Programs benefits, under the Federal employees' Compensation Act (FECA), by or for a child filed on or after July 4, 1966, is a bar to subsequent payments of Department of Veterans Affairs benefits during the period of concurrent eligibility. An election of Office of Workers' Compensation Programs benefits under the Federal Employees' Compensation Act (FECA) by a surviving spouse filed on or after December 1, 1968, is a bar to subsequent payments of Department of Veterans Affairs benefits during the period of concurrent eligibility.

(b) *Military service.* The provisions of this paragraph are applicable to cases where there is eligibility for benefits from Office of Workers' Compensation Program, under the Federal Employee's Compensation Act (FECA) based on the disability or death as a result of military service by the veteran from whom eligibility for educational assistance is derived.

(1) *Child, spouse or surviving spouse.* A person who is eligible for educational assistance and is also eligible for Office of Workers' Compensation Programs benefits, under the Federal Employees' Compensation Act (FECA) must elect which benefit he or she will receive. The election may be made at any time.

(2) *Veteran, spouse and child—surviving spouse and child.* An eligible person may receive educational assistance notwithstanding that the Office of Workers' Compensation Programs benefits, under the Federal Employees' Compensation Act (FECA) are being paid to a veteran, or surviving spouse.

CROSS REFERENCE: *Federal Employees' Compensation.* See § 3.708 of this chapter.

[40 FR 42879, Sept. 17, 1975, as amended at 50 FR 27826, July 8, 1985]

### § 21.3025 Nonduplication; Federal programs.

Payment of subsistence allowance and special training allowance is prohibited to an otherwise eligible person—

(a) Who is on active duty and is pursuing a course of education which is being paid for by the Armed Forces (or by the Department of Health and Human Services in the case of the Public Health Service); or

(b) For a unit course or courses which are being paid for under 5 U.S.C. chapter 41.

(Authority: 38 U.S.C. 3681(a))

[61 FR 26108, May 24, 1996]

## CLAIMS

### § 21.3030 Claims.

The provisions of subpart B of this part apply with respect to submission of a claim for educational assistance under 38 U.S.C. chapter 35, VA actions upon receiving a claim, and time limits connected with claims.

(Authority: 38 U.S.C. 3513, 5101, 5102, 5103)

[64 FR 23772, May 4, 1999]

## ELIGIBILITY AND ENTITLEMENT

### § 21.3040 Eligibility; child.

(a) *Commencement.* A program of education or special restorative training

may not be afforded prior to the eligible person's 18th birthday or the completion of secondary schooling, whichever is earlier, unless it is determined through counseling that the best interests of the eligible person will be served by entering training at an earlier date and the eligible person has passed:

(1) Compulsory school attendance age under State law; or

(2) His or her 14th birthday and due to physical or mental handicap may benefit by special restorative or specialized vocational training.

(b) *Secondary schooling. Completion of secondary schooling* means completion of a curriculum offered by a public or private school which satisfies the requirements for a high school diploma or its equivalent—usually completion of the 12th grade in the public school system.

(c) *Age limitation for commencement.* No person is eligible for educational assistance who reached his or her 26th birthday on or before the effective date of a finding of permanent total service-connected disability, or on or before the date the veteran's death occurred, or on or before the 91st day of listing by the Secretary concerned of the member of the Armed Forces on whose service eligibility is claimed as being in one of the missing status categories of § 21.3021 (a)(1)(iv) and (3)(ii).

(d) *Termination of eligibility.* No person is eligible for educational assistance beyond his or her 31st birthday, except as provided under § 21.3041(e)(2). In no event may educational assistance be provided after the period of entitlement has been exhausted. In an exceptional case special restorative training may be provided in excess of 45 months. See § 21.3300.

(Authority: 38 U.S.C. 3512(a))

[30 FR 15632, Dec. 18, 1965, as amended at 34 FR 842, Jan. 18, 1969; 39 FR 38227, Oct. 30, 1974; 40 FR 42879, Sept. 17, 1975; 41 FR 47929, Nov. 1, 1976; 43 FR 35290, Aug. 9, 1978]

## § 21.3041 Periods of eligibility; child.

(a) *Basic beginning date.* The basic beginning date of an eligible child's period of eligibility is his or her 18th birthday or successful completion of secondary schooling, whichever occurs first. See paragraph (b) of this section and § 21.3040 (a) and (b).

(Authority: 38 U.S.C. 3512(a))

(b) *Exceptions to basic beginning date.* (1) An eligible child may have a beginning date earlier than the basic beginning date when he or she has:

(i) Completed compulsory school attendance under applicable State law, or

(ii) Passed his or her 14th birthday and has a physical or mental handicap. See § 21.3040(a).

(2) The eligible child may have a beginning date later than the basic beginning date when any of the following circumstances exist.

(i) If the effective date of the permanent and total disability rating is before the child has reached 18 but the date of notification to the veteran from whom the child derives eligibility occurs after the child has reached 18, the beginning date of eligibility shall be the basic beginning date as determined in paragraph (a) of this section, or the date of notification to the veteran, whichever is more advantageous to the eligible child.

(ii) If the effective date of the permanent and total disability rating occurs after the child has reached 18 but before he or she has reached 26, the beginning date of eligibility will be the effective date of the rating or the date of notification to the veteran from whom the child derives eligibility, whichever is more advantageous to the eligible child.

(Authority: 38 U.S.C. 3512(a)(3), 3512(d))

(iii) If the child becomes eligible through the death of a veteran, the date of death will be the beginning date of eligibility if it occurs after the child's 18th birthday and before his or her 26th birthday.

(iv) The child may become eligible through qualifying as the veteran's adopted child (see § 3.57(c)) or by becoming a stepchild of the veteran and a member of the veteran's household. If either of these events occurs after the child's 18th birthday and before his or her 26th birthday, the effective date of eligibility will be whichever of the following is appropriate:

(A) The date the child qualifies as an adopted child under § 3.57(c), or

(B) The date the child becomes the veteran's stepchild and a member of his or her household.

(Authority: 38 U.S.C. 3501)

(c) *Basic ending date.* The eligible person's 26th birthday.

(d) *Modified ending date.* When one of the following occurs between ages 18 and 26, the ending date will be the eligible person's 26th birthday or 8 years from the date of happening specified in paragraphs (d) (1) to (7) of this section and 10 years in paragraph (d)(8); whichever is later. When paragraph (d)(9) is applicable, the ending date will be as stated in paragraph (d)(9). Where the ending date is subject to modification under more than one of paragraph (d) (3), (4), (5), (6) or (7) of this section, the more favorable date will apply. In no case will the modified ending date extend beyond the eligible person's 31st birthday.

(Authority: 38 U.S.C. 3512).

(1) Effective date of permanent total rating of veteran-parent or the date of notification to him or her of such rating, whichever is the more advantageous to the eligible person.

(Authority: 38 U.S.C. 3512)

(2) Death of veteran-parent.

(3) Date of first unconditional discharge or release from ''duty with the Armed Forces'' served as an eligible person if he or she served after age 18 and before age 26. See §21.3042.

(4) Enactment of Pub. L. 88–361 on July 7, 1964, providing eligibility based on permanent total disability; that is, July 6, 1969.

(5) Enactment of Pub. L. 89–349 on November 8, 1965, providing eligibility based on peacetime service after the Spanish-American War and prior to September 16, 1940; or during World War I or World War II solely by reason of the provisions of 38 U.S.C. 1101; that is, November 7, 1970.

(6) Enactment of Pub. L. 89–613 on September 30, 1966, providing eligibility based on service with the Philippine Commonwealth Army or as a Philippine Scout as defined in §3.40 (b), (c), or (d) of this chapter; that is, September 29, 1971. See §3.807 of this chapter.

(7) Effective date of Pub. L. 90–77, section 307, October 1, 1967, providing eligibility for persons solely by virtue of that section who were over age 23 and below age 26 on that date; that is September 30, 1972.

(8) Enactment of Pub. L. 92–540 (86 Stat. 1074) on October 24, 1972, providing for a course of apprentice or other on-the-job training approved under the provisions of §21.4261 or 21.4262; that is, October 24, 1982 or until age 31, whichever is earlier.

(9) The child may lose eligibility through ceasing to be the veteran's stepchild either because the veteran and the child's natural or adoptive parent divorce or because the veteran and the child's natural or adoptive parent separate and the child is no longer a member of the veteran's household. If this occurs, the ending date of the child's period of eligibility will be determined as follows:

(i) If the child ceases to be the veteran's stepchild while the child is not in training, the ending date of the child's eligibility shall be the date on which the child ceases to be the veteran's stepchild.

(ii) If the child ceases to be the veteran's stepchild while the child is in training in a school organized on a term, semester or quarter basis, the ending date of the child's eligibility will be the last date of the term, semester or quarter during which the child ceases to be the veteran's stepchild.

(iii) If the child ceases to be the veteran's stepchild while the child is in training in a school not organized on a term, semester or quarter basis, the ending date of the child's period of eligibility will be the end of the course or 12 weeks from the date on which the child ceases to be the veteran's stepchild, whichever is earlier. See §21.3135(g).

(Authority: 38 U.S.C. 101(4)(a), 3501).

(e) *Extensions to ending dates.* (1) Suspension of program due to conditions determined by the Department of Veterans Affairs to have been beyond the person's control (see §21.3043): extended

for length of period of suspension, but not beyond age 31. See § 21.3040(d).

(2) Period of eligibility as specified in paragraph (c) or (d) of this section ends while enrolled in an educational institution regularly operated on the quarter or semester system and such period ends during a quarter or semester, such period shall be extended to the end of the quarter or semester, or for courses at educational institutions operated on other than a quarter or semester system, if the period ends after a major portion of the course is completed, such period shall be extended to the end of the course, or until 12 weeks have expired, whichever first occurs. Extension may be authorized beyond age 31, but may not exceed maximum entitlement. See § 21.3044(a). No extension of the period of eligibility will be made where training is pursued in a training establishment as defined in § 21.4200(c).

(Authority: 38 U.S.C. 3512(a)(5))

(3) Child is enrolled and eligibility ceases because veteran is no longer rated permanently and totally disabled: extended to date specified in paragraph (e)(2) of this section without regard to whether the midpoint of the quarter, semester or term has been reached. See § 21.3135(h).

(4) Child is enrolled and eligibility ceases because the member of the Armed Forces upon whose service eligibility is based is no longer listed by the Secretary concerned in any of the categories specified in § 21.3021(a)(1)(iv): extended to date specified in paragraph (e)(2) of this section without regard to whether the midpoint of the quarter, semester or term has been reached. See § 21.3135(i).

[30 FR 15632, Dec. 18, 1965, as amended at 31 FR 6773, May 6, 1966; 31 FR 13993, Nov. 2, 1966; 32 FR 13402, Sept. 23, 1967; 34 FR 842, Jan. 18, 1969; 39 FR 38228, Oct. 30, 1974; 40 FR 42879, Sept. 17, 1975; 41 FR 47929, Nov. 1, 1976; 43 FR 35290, Aug. 9, 1978; 48 FR 57275, Dec. 29, 1983; 54 FR 31952, Aug. 3, 1989; 54 FR 42501, Oct. 17, 1989; 61 FR 26108, May 24, 1996; 62 FR 55760, Oct. 28, 1997]

### § 21.3042 Service with Armed Forces.

(a) No educational assistance under 38 U.S.C. chapter 35 may be provided an otherwise eligible person during any period he or she is on duty with the Armed Forces. See § 21.3021 (e) and (f). This does not apply to brief periods of active duty for training. See § 21.3135(f).

(Authority: 38 U.S.C. 3501(d))

(b) If the eligible person served with the Armed Forces, his or her discharge or release from each period of service must have been under conditions other than dishonorable.

(Authority: 38 U.S.C. 3501(d))

(c) The term *unconditional discharge*, as used in § 21.3041 means unconditional discharge or release from duty with the Armed Forces. See § 3.13 of this chapter.

[30 FR 15633, Dec. 18, 1965, as amended at 34 FR 842, Jan. 18, 1969; 36 FR 2508, Feb. 5, 1971; 41 FR 42929, Nov. 1, 1976; 61 FR 26109, May 24, 1996]

### § 21.3043 Suspension of program; child.

For an eligible person who suspends his program due to conditions determined by the Department of Veterans Affairs to have been beyond his or her control the period of eligibility may, upon his request, be extended by the number of months and days intervening the date the suspension began and the date the reason for suspension ceased to exist. The burden of proof is on the eligible person to establish that suspension of a program was due to conditions beyond his or her control. The period of suspension shall be considered to have ended as of the date of the person's first available opportunity to resume training after the condition which caused it ceased to exist. The following circumstances may be considered as beyond the eligible person's control:

(a) While in active pursuit of a program of education he or she is appointed by the responsible governing body of an established church, officially charged with the selection and designation of missionary representatives, in keeping with its traditional practice, to serve the church in an official missionary capacity and is thereby prevented from pursuit of his or her program of studies.

(b) Immediate family or financial obligations beyond his or her control require the eligible person to take employment, or otherwise preclude pursuit of his or her program.

(c) Unavoidable conditions arising in connection with the eligible person's employment which preclude pursuit of his or her program.

(d) Pursuit of his or her program is precluded because of the eligible person's own illness or illness or death in his or her immediate family.

(e) Active duty, including active duty for training in the Armed Forces.

[41 FR 47929, Nov. 1, 1976]

### §21.3044 Entitlement.

(a) *Limitations on entitlement.* Each eligible person in entitled to educational assistance not in excess of 45 months, or the equivalent thereof in part-time training. The Department of Veterans Affairs will not authorize an extension of entitlement except as provided in paragraph (c) of this section. The period of entitlement when added to education or training received under any or all of the laws cited in §21.4020 will not exceed 48 months of full-time educational assistance. The period of entitlement will not be reduced by any period during which employment adjustment allowance was paid after the eligible person completes a period of rehabilitation and reaches a point of employability.

(b) *Continuous pursuit is not required.* The 45-month period of entitlement is any 45 months within the period of eligibility. The eligible person is not required to pursue his or her program for 45 consecutive months.

(Authority: 38 U.S.C. 3511(a))

(c) *Exceeding the 45 months limitation.* The 45 months limitation may be exceeded only in the following cases:

(1) Where no charge against the entitlement is made based on a course or courses pursued by a spouse or surviving spouse under the special assistance for the educationally disadvantaged program (See §21.3344(d); or

(2) Where special restorative training authorized under §21.3300 exceeds 45 months.

(Authority: 38 U.S.C. 3541(b), 3533(b))

[49 FR 48692, Dec. 14, 1984, as amended at 61 FR 26109, May 24, 1996]

### §21.3045 Entitlement charges.

VA will make charges against an eligible person's entitlement only when required by this section. Charges for institutional training will be based upon the principle that an eligible person who trains full time for 1 day should be charged 1 day of entitlement.

(a) *No entitlement charge for eligible persons receiving tutorial assistance.* VA will make no charge against the entitlement of an eligible person for tutorial assistance received in accordance with §21.4236.

(Authority: 38 U.S.C. 3492, 3533(b))

(b) *Entitlement charges for elementary and secondary education.*

(1) When an eligible spouse or surviving spouse is pursuing a course leading to a secondary school diploma or an equivalency certificate as described in §21.3344, there are two sets of circumstances which will always result in VA's making no charge against his or her entitlement. These are as follows:

(i) Either the eligible spouse or surviving spouse completed training during the period beginning on October 1, 1980, and ending on August 14, 1989, and remained continuously enrolled from October 1, 1980, through the time the spouse or surviving spouse either completed training or August 14, 1989, whichever is earlier; or

(ii) The eligible spouse or surviving spouse completed training before August 15, 1989, and received educational assistance based upon the tuition and fees charged for the course.

(2) When an eligible spouse or surviving spouse is pursuing a course leading to a secondary school diploma or an equivalency certificate as described in §21.3344, the following circumstances will always result in VA's making a charge against his or her entitlement unless the provisions of paragraph (d) of this section would exempt the spouse or surviving spouse from receiving an entitlement charge.

(i) The spouse or surviving spouse elects to receive dependents' educational assistance at the rate described in § 21.3131(a), and

(ii) Either was not pursuing a course leading to a secondary school diploma or equivalency certificate on October 1, 1980, or has not remained continuously enrolled in such a course since October 1, 1980.

(3) When an eligible person pursues refresher, remedial or deficiency training before August 15, 1989, the following provisions govern the charge against the entitlement.

(i) VA will not make a charge against the entitlement of an eligible spouse or surviving spouse.

(ii) VA will make a charge against the entitlement of an eligible child.

(4) The following provisions apply to an eligible person for training received after August 14, 1989. When he or she is pursuing a course leading to a secondary school diploma or equivalency certificate or refresher, remedial or deficiency training.

(i) VA will make no charge against the entitlement of an eligible person for the first five months of full time pursuit (or its equivalent in part-time pursuit).

(ii) VA will make a charge against the entitlement of an eligible person for pursuit in excess of the pursuit described in paragraph (b)(4)(i) unless the provisions of paragraph (d) of this section would exempt the eligible person from receiving an entitlement charge.

(Authority: 38 U.S.C. 3511(a), 3533(a); Pub. L. 100–689, Pub. L. 102–127)(Oct. 10, 1991)

(c) *Other courses for which entitlement will be charged.* Except when the requirements of paragraph (d) of this section are met, VA will make a charge against the period of entitlement—

(1) An eligible person for pursuit of a program of apprenticeship or other on-job training;

(2) A spouse or surviving spouse for pursuit of a correspondence course; or

(3) An eligible person for the pursuit of any course not described in paragraph (a) or (b) of this section.

(Authority: 38 U.S.C. 3534)

(d) *Exemption from entitlement charge.* (1) VA will not make a charge against the entitlement of an eligible person for the pursuit of any course or courses when VA finds that the eligible person—

(i) Had to discontinue pursuit of the course or courses as the result of being ordered, in connection with the Persian Gulf War, to serve on active duty under section 672 (a), (d), or (g), 673, 673b, or 688 of title 10, U.S. Code; and

(ii) Failed to receive credit or training time toward completion of the eligible person's approved educational, professional or vocational objective as a result of having to discontinue, as described in paragraph (d)(1)(i) of this section, his or her course pursuit.

(2) The period for which VA will not make a charge against entitlement shall not exceed the portion of the period of enrollment in the course or courses for which the eligible person failed to receive credit or with respect to which the eligible person lost training time.

(Authority: 38 U.S.C. 3511(a); Pub. L. 102–127)(Oct. 10, 1991)

(e) *Determining entitlement charge.* The provisions of this paragraph apply to all courses except those courses for which VA is not making a charge against the eligible person's entitlement, apprenticeship or other on-job training, correspondence courses, and courses offered solely through independent study.

(1) After making any adjustments required by paragraph (e)(3) of this section, VA will make a charge against entitlement—

(i) On the basis of total elapsed time (one day for each day of pursuit) if the eligible person is pursuing the program of education on a full-time basis,

(ii) On the basis of a proportionate rate of elapsed time, if the eligible person is pursuing a program of education on a three-quarter, one-half or less than one-half time basis. For the purpose of this computation, training time which is less that one-half, but more than one-quarter time, will be treated as though it were one-quarter time training.

(2) VA will compute elapsed time from the commencing date of enrollment to date of discontinuance. If the eligible person changes his or her

training time after the commencing date of enrollment, VA will—

(i) Divide the enrollment period into separate periods of time during which the eligible person's training time remains constant; and

(ii) Compute the elapsed time separately for each time period.

(3) An eligible person may concurrently enroll in refresher, remedial or deficiency training for which paragraph (b)(3) or (b)(4)(i) of this section requires no charge against entitlement and in a course or courses for which paragraph (b)(2) or (b)(4)(ii) or (c) of this section requires a charge against entitlement. When this occurs, VA will charge entitlement for the concurrent enrollment based only on pursuit of the courses described in paragraph (b)(2) or (b)(4)(ii) or (c) of this section, measured in accordance with §§21.4270 through 21.4275 of this part, as appropriate.

(Authority: 38 U.S.C. 3533(a); Pub. L. 100–689)

(f) *Entitlement charge for pursuit solely by independent study.* For enrollments in terms, quarters, or semesters that begin after June 30, 1993, VA will make charges against the entitlement of an eligible person in the manner prescribed by paragraph (e) of this section, if he or she is pursuing a program of education solely by independent study. For all other enrollments where the eligible person is pursuing a program of education solely by independent study, the computation will be made as though the eligible person's training were one-quarter time.

(Authority: 38 U.S.C. 3482(b), 3532(a))

(g) *Entitlement charge for apprenticeship or other on-job training.* The charge against entitlement for pursuit of apprenticeship or other on-job training program shall be 1 month for each month of training assistance allowance paid to the eligible person for the program. If there is a reduction in the eligible person's monthly training assistance allowance due to his or her failure to complete 120 hours of training during the month, VA will combine the portions of those months for which a reduction was made. VA will make no charge against entitlement for the period of combined reductions.

(Authority: 38 U.S.C. 3534, 3687)

(h) *Entitlement charge for correspondence courses.* The charge against entitlement of a spouse or surviving spouse for pursuit of a course exclusively by correspondence will be 1 month for each of the following amounts paid as an educational assistance allowance:

(1) $680.00 paid after September 30, 2002, and before October 1, 2003;

(2) $695.00 paid after September 30, 2003, and before July 1, 2004; and

(3) $788.00 paid after June 30, 2004.

(Authority: 38 U.S.C. 3534(b), 3564, 3686(a)).

(i) *Overpayment cases.* VA will make a charge against entitlement for an overpayment only if the overpayment is discharged in bankruptcy, is waived and is not recovered, or is compromised.

(1) If the overpayment is discharged in bankruptcy or is waived and is not recovered, the charge against entitlement will be at the appropriate rate for the elapsed period covered by the overpayment (exclusive of interest, administrative costs of collection, court costs and marshal fees).

(2) If the overpayment is compromised and the compromise offer is less than the amount of interest, administrative costs of collection, court costs and marshal fees, the charge against entitlement will be at the appropriate rate for the elapsed period covered by the overpayment (exclusive of interest, administrative costs of collection, court costs and marshal fees).

(3) If the overpayment is compromised and the compromise offer is equal to or greater than the amount of interest, administrative costs of collection, court costs and marshal fees, the charge against entitlement will be determined by—

(i) Subtracting from the sum paid in the compromise offer the amount attributable to interest, administrative costs of collection, court costs and marshal fees,

(ii) Subtracting the remaining amount of the overpayment balance determined in paragraph (i)(3)(i) of this section from the amount of the original overpayment (exclusive of interest,

administrative costs of collection, court costs and marshal fees),

(iii) Dividing the result obtained in paragraph (h)(3)(ii) of this section by the amount of the original debt (exclusive of interest, administrative costs of collection, court costs and marshal fees), and

(iv) Multiplying the percentage obtained in paragraph (h)(3)(iii) of this section by the amount of the entitlement otherwise chargeable for the period of the original overpayment.

(Authority: 38 U.S.C. 3471, 3532)

(j) *Interruption to conserve entitlement.* An eligible person may not interrupt a certified period of enrollment for the purpose of conserving entitlement. An educational institution may not certify a period of enrollment for a fractional part of the normal term, quarter or semester, if the eligible person is enrolled for the term, quarter or semester. VA will make a charge against entitlement for the entire period of certified enrollment, if the eligible person is otherwise eligible for benefits, except when benefits are interrupted under any of the following conditions:

(1) Enrollment is actually terminated;

(2) The eligible person cancels his or her enrollment, and does not negotiate an educational benefits check for any part of the certified period of enrollment;

(3) The eligible person interrupts his or her enrollment at the end of any term, quarter, or semester within the certified period of enrollment, and does not negotiate a check for educational benefits for the succeeding term, quarter, or semester;

(4) The eligible person requests interruption or cancellation for any break when a school was closed during a certified period of enrollment, and VA continued payments under an established policy based upon an Executive Order of the President or an emergency situation. Whether the eligible person negotiated a check for educational benefits for the certified period is immaterial.

(Authority: 38 U.S.C. 3511)

(k) *Education loan after otherwise applicable delimiting date—spouse or surviving spouse.* VA will make a charge against the entitlement of a spouse or surviving spouse who receives an education loan pursuant to § 21.4501(c) at the rate of 1 day for each day of entitlement that would have been used had the spouse or surviving spouse been in receipt of educational assistance allowance for the period for which the loan was granted.

(Authority: 38 U.S.C. 3512)

[55 FR 28024, July 9, 1990, as amended at 57 FR 29799, July 7, 1992; 58 FR 26240, May 3, 1993; 61 FR 26109, May 24, 1996; 62 FR 55760, Oct. 28, 1997; 63 FR 67778, Dec. 9, 1998; 66 FR 32227, June 14, 2001; 68 FR 34320, June 9, 2003; 69 FR 62207, Oct. 25, 2004]

### § 21.3046 Periods of eligibility; spouses and surviving spouses.

This section states how VA will compute the beginning date, the ending date and the length of a spouse's or surviving spouse's period of eligibility. The period of eligibility of a spouse computed under the provisions of paragraph (a) of this section will be recomputed under the provisions of paragraph (b) of this section if her or his status changes to that of surviving spouse.

(Authority: 38 U.S.C. 3512(b))

(a) *Beginning date of eligibility period-spouses.* (1) If the permanent total rating is effective before December 1, 1968, the beginning date of the 10-year period of eligibility is December 1, 1968.

(2) The beginning date of eligibility—

(i) Shall be determined as provided in paragraph (a)(2) of this section when—

(A) The permanent total rating is effective after November 30, 1968, or the notification to the veteran of the rating was after that date, and

(B) Eligibility does not arise under § 21.3021(a)(3)(ii) of this part.

(ii) For spouses for whom VA made a final determination of eligibility before October 28, 1986, shall be—

(A) The effective date of the rating, or

(B) The date of notification, whichever is more advantageous to the spouse.

(iii) For spouses for whom VA made a final determination of eligibility after October 27, 1986, shall be—

(A) The effective date of the rating, or

(B) The date of notification, or

(C) Any date between the dates specified in paragraphs (a)(2)(iii) (A) and (B) of this section as chosen by the eligible spouse.

(iv) May not be changed once a spouse has chosen it as provided in paragraph (a)(2)(iii) of this section.

(3) If eligibility arises under §21.3021(a)(3)(ii) of this part, the beginning date of the 10-year eligibility period is—

(i) December 24, 1970, or

(ii) The date the member of the Armed Forces on whose service eligibility is based was so listed by the Secretary concerned, whichever last occurs.

(Authority: 38 U.S.C. 3501(a); Pub. L. 99–576)

(b) *Beginning date of eligibility period-surviving spouses.* (1) If VA determines before December 1, 1968, that the veteran died of a service-connected disability, the beginning date of the 10-year period is December 1, 1968.

(Authority: 38 U.S.C. 3512)

(2) If the veteran's death occurred before December 1, 1968, but VA does not determine that the veteran died of a service-connected disability until after November 30, 1968, the beginning date of the 10-year period is the date on which VA determines that the veteran died of a service-connected disability.

(3) If the veteran's death occurred before December 1, 1968, while a total, service-connected disability evaluated as permanent in nature was in existence, the beginning date of the 10-year period is December 1, 1968.

(4) If the veteran's death occurred after November 30, 1968, and VA makes a final decision concerning the surviving spouse's eligibility for dependents' educational assistance before October 28, 1986, the beginning date of the 10-year period is—

(i) The date of death of the veteran who dies while a total, service-connected disability evaluated as permanent in nature was in existence, or

(ii) The date on which VA determines that the veteran died of a service-connected disability.

(5) If the veteran's death occurred after November 30, 1968, and VA makes a final decision concerning the surviving spouse's eligibility for dependents educational assistance after October 27, 1986, VA will determine the beginning date of the 10-year period as follows.

(i) If the surviving spouse's eligibility is based on the veteran's death while a total, service-connected disability evaluated as permanent in nature was in existence, the beginning date of the 10-year period is the date of death.

(ii) If the surviving spouse's eligibility is based on the veteran's death from a service-connected disability, the surviving spouse will choose the beginning date of the 10-year period. That date will be no earlier than the date of death and no later than the date of the VA determination that the veteran's death was due to a service-connected disability.

(Authority: 38 U.S.C. 3512(b); Pub. L. 99–576)

(6) Once a surviving spouse has chosen a beginning date of eligibility as provided in paragraph (b)(5) of this section, the surviving spouse may not revoke that choice.

(Authority: 38 U.S.C. 3512(b); Pub. L. 99–576)

(c) *Ending date of eligibility period.* (1) The period of eligibility cannot exceed 10 years and can be extended only as provided in paragraph (d) of this section and §21.3047.

(2) If eligibility arises before October 24, 1972, educational assistance based on a course of apprentice or other on-job training or correspondence approved under the provisions §§21.4256, 21.4261, and 21.4262 of this part will not be afforded later than October 23, 1982, unless the eligible spouse or surviving spouse qualifies for the extended period of eligibility provided in paragraph (d) of this section.

(Authority: 38 U.S.C. 3512)

(d) *Extension to ending date.* (1) The ending date of a spouse's period of eligibility may be extended when the spouse is enrolled and eligibility ceases for one of the following reasons:

(i) The veteran is no longer rated permanently and totally disabled;

(ii) The spouse is divorced from the veteran without fault on the spouse's part; or

(iii) The spouse no longer is listed in any of the categories of § 21.3021(a)(3)(ii) of this part.

(2) If the spouse is enrolled in a school operating on a quarter or semester system, VA will extend the period of eligibility to the end of the quarter or semester, regardlesss of whether the spouse has reached the midpoint of the quarter, semester or term.

(3) If the spouse is enrolled in a school not operating on a quarter or semester system, VA will extend the period of eligibility to the earlier of the following:

(i) The end of the course, or

(ii) 12 weeks.

(4) If the spouse is enrolled in a course pursued exclusively by correspondence, VA will extend the period of eligibility to whichever of the following will result in the lessser expenditure:

(i) The end of the course, or

(ii) The total additional amount of instruction that—

(A) $1,904 will provide during the period October 1, 2002, through September 30, 2003;

(B) $1,946 will provide during the period October 1, 2003, through June 30, 2004; or

(C) $2,206 will provide after June 30, 2004.

(Authority: 38 U.S.C. 3511(b))

(5) VA will not extend the period of eligibility when the spouse is pursuing training in a training establishment as defined in § 21.4200(c) of this part.

(6) An extension may not—

(i) Exceed maximum entitlement, or

(ii) Extend beyond the delimiting date specified in paragraph (a) of this section or § 21.3047, as appropriate.

(Authority: 38 U.S.C. 3511(b), 3512(b), 3532, 3586)

[54 FR 33886, Aug. 17, 1989, as amended at 57 FR 29799, July 7, 1992; 57 FR 60735, Dec. 22, 1992; 62 FR 51784, Oct. 3, 1997; 62 FR 59579, Nov. 4, 1997; 69 FR 62207, Oct. 25, 2004]

## § 21.3047 Extended period of eligibility due to physical or mental disability.

(a) *General.* (1) An eligible spouse or surviving spouse shall be granted an extension of the applicable period of eligibility as otherwise determined by § 21.3046 provided the eligible spouse or surviving spouse:

(i) Applies for the extension within the appropriate time limit;

(ii) Was prevented from initiating or completing the chosen program of education within the otherwise applicable period of eligibility because of a physical or mental disability that did not result from the willful misconduct of the eligible spouse or surviving spouse;

(iii) Provides VA with any requested evidence tending to show that the requirement of paragraph (a)(1)(ii) of this section has been met; and

(iv) Is otherwise eligible for payment of educational assistance for the training pursuant to 38 U.S.C. chapter 35.

(2) In determining whether the eligible spouse or surviving spouse was prevented from initiating or completing the chosen program of education because of a physical or mental disability, VA will consider the following:

(i) It must be clearly established by medical evidence that such a program of education was medically infeasible.

(ii) An eligible spouse or surviving spouse who is disabled for a period of 30 days or less will not be considered as having been prevented from initiating or completing a chosen program, unless the evidence establishes that the eligible spouse or surviving spouse was prevented from enrolling or reenrolling in the chosen program of education, or was forced to discontinue attendance, because of the short disability.

(iii) VA will not consider the disabling effects of chronic alcoholism to be the result of willful misconduct and will consider those disabling effects as physical or mental disabilities.

(b) *Commencing date.* The eligible spouse or surviving spouse shall elect the commencing date of an extended period of eligibility. The date chosen—

(1) Must be on or after the original date of expiration of eligibility as determined by § 21.3046(c); and

(2) Must be on or before the ninetieth day following the date on which the eligible spouse's or surviving spouse's application for an extension was approved by VA, if the eligible spouse or surviving spouse is training during the extended period of eligibility in a course not organized on a term, quarter, or semester basis; or

(3) Must be on or before the first ordinary term, quarter, or semester following the ninetieth day after the eligible spouse's or surviving spouse's application for an extension was approved by VA if the eligible spouse or surviving spouse is training during the extended period of eligibility in a course organized on a term, quarter, or semester basis.

(Authority: 38 U.S.C. 3512(b))

(c) *Length of extended periods of eligibility.* An eligible spouse's or surviving spouse's extended period of eligibility shall be for the length of time that the individual was prevented from initiating or completing his or her chosen program of education. This shall be determined as follows:

(1) If the eligible spouse or surviving spouse is in training in a course organized on a term, quarter, or semester basis, his or her extended period of eligibility shall contain the same number of days as the number of days from the date during the eligible spouse's or surviving spouse's original period of eligibility that his or her training became medically infeasible to the earliest of the following dates:

(i) The commencing date of the ordinary term, quarter, or semester following the day the eligible spouse's or surviving spouse's training became medically feasible;

(ii) The ending date of the eligible spouse's or surviving spouse's period of eligibility as determined by §21.3046(c); or

(iii) The date the eligible spouse or surviving spouse resumed training.

(2) If the eligible spouse or surviving spouse is training in a course not organized on a term, quarter, or semester basis, his or her extended period of eligibility shall contain the same number of days from the date during the eligible spouse's or surviving spouse's original period of eligibility that his or her training became medically infeasible to the earlier of the following dates:

(i) The date the eligible spouse's or surviving spouse's training became medically feasible; or

(ii) The ending date of the eligible spouse's or surviving spouse's period of eligibility as determined by §21.3046.

(Paperwork requirements were approved by the Office of Management and Budget under control number 2900–0573)

(Authority: 38 U.S.C. 3512(b))

[62 FR 51784, Oct. 3, 1997]

COUNSELING

SOURCE: 61 FR 26109, May 24, 1996, unless otherwise noted.

## §21.3100 Counseling.

(a) *Purpose of counseling.* The purpose of counseling is to assist:

(1) In selecting an educational or training objective;

(Authority: 38 U.S.C. 3520)

(2) In developing a suitable program of education or training;

(Authority: 38 U.S.C. 3520)

(3) In selecting an educational institution or training establishment appropriate for the attainment of the educational or training objective;

(Authority: 38 U.S.C. 3561(a))

(4) In resolving any personal problems which are likely to interfere with successful pursuit of a program;

(Authority: 38 U.S.C. 3561(a))

(5) In selecting an employment objective for the eligible person that would be likely to provide the eligible person with satisfactory employment opportunities in light of his or her circumstances.

(Authority: 38 U.S.C. 3520, 3561(a))

(b) *Availability of counseling.* Counseling assistance is available for—

(1) Identifying and removing reasons for academic difficulties which may result in interruption or discontinuance of training; or

(2) In considering changes in career plans, and making sound decisions about the changes.

(Authority: 38 U.S.C. 3520, 3561(a))

(c) *Provision of counseling.* VA shall provide counseling as needed for the purposes identified in paragraphs (a) and (b) of this section upon the request of the eligible person.

(Authority: 38 U.S.C. 3520, 3561(a))

### § 21.3102 Required counseling.

(a) *Child.* The VA counseling psychologist will provide counseling and assist in preparing the educational plan only if the eligible child or his or her parent or guardian requests assistance, except that counseling is required for an eligible child if—

(1) The eligible child may require specialized vocational training or special restorative training; or

(2) The eligible child has reached the compulsory school attendance age under State law, but has neither reached his or her 18th birthday, nor completed secondary schooling. See § 21.3040(a).

(b) *Spouse or surviving spouse.* Counseling is required for a spouse or surviving spouse only if he or she desires specialized vocational training.

(Authority: 38 U.S.C. 3520, 3536, 3541, 3561)

### § 21.3103 Failure to cooperate.

VA will not act further on an eligible person's application for assistance under 38 U.S.C. chapter 35 when counseling is required for him or her and the eligible person—

(a) Fails to report;

(b) Fails to cooperate in the counseling process; or

(c) Does not complete counseling to the extent required under § 21.3102.

(Authority: 38 U.S.C. 3536, 3541, 3561(a))

### § 21.3104 Special training.

(a) *Initial counseling.* A counseling psychologist in the Vocational Rehabilitation and Employment Division will counsel a disabled child, spouse, or surviving spouse before referring the case to the Vocational Rehabilitation Panel (established under § 21.60) for consideration as to the child's, spouse's or surviving spouse's need for a course of specialized vocational training or the child's need for special restorative training. After consulting with the panel, and considering the panel's report, the counseling psychologist will determine if the disabled child, spouse, or surviving spouse needs a course of specialized vocational training or the disabled child needs special restorative training, and where need is found to exist will prescribe a course which is suitable to accomplish the goals of 38 U.S.C. chapter 35.

(Authority: 38 U.S.C. 3536, 3540–3543, 3561(a))

(b) *Counseling after special restorative training.* When an eligible child completes or discontinues a course of special restorative training without having selected an objective and a program of education, a counseling psychologist in the Vocational Rehabilitation and Employment Division will provide additional counseling to assist the child in selecting a program of education suitable to accomplish the purposes of 38 U.S.C. chapter 35.

(Authority: 38 U.S.C. 3561)

### § 21.3105 Travel expenses.

(a) *General.* VA shall determine and pay the necessary expense of travel to and from the place of counseling for an eligible person who is required to receive counseling as provided under 38 U.S.C. 111 (a), (d), (e), and (g).

(Authority: 38 U.S.C. 111 (a), (d), (e), and (g))

(b) *Restriction.* VA will not pay the necessary cost of travel to and from the place of counseling when counseling is not required, but is provided as a result of a voluntary request by the eligible person.

(Authority: 38 U.S.C. 111)

PAYMENTS

### § 21.3130 Educational assistance.

(a) *Approval of a program of education.* VA will approve a program of education selected by an eligible person if:

(1) The program is described in § 21.3021 (h) and (i) or (j);

(2) The individual is not already qualified for the objective of the program of education;

(3) The proposed educational institution or training establishment is in compliance with all the requirements of 38 U.S.C. chapters 35 and 36; and

(4) It does not appear that the enrollment in or pursuit of such person's program of education would violate any provision of 38 U.S.C. chapters 35 and 36.

(Authority: 38 U.S.C. 3521)

(b) *Payments.* VA will pay educational assistance at the rate specified in §21.3131 (subject to the reductions required by §21.3132) while the eligible person is pursuing an approved program of education or training.

(Authority: 38 U.S.C. 3521, 3532)

(c) *No payment for excessive training.* (1) VA will make no payment for:

(i) Training in an apprenticeship or other on-job training program in excess of the number of hours approved by the State approving agency or VA; or

(ii) Lessons completed in a correspondence course in excess of the number approved by the State approving agency.

(2) A school's standards of progress may permit a student to repeat a course or portion of a course in which he or she has done poorly. VA considers the repeated courses to be part of the program of education. VA will make no payment for courses or training if the courses or training are not part of the eligible person's program of education.

(Authority: 38 U.S.C. 3501(a)(5), 3521)

(d) *Courses precluded.* VA may not pay educational assistance:

(1) For pursuit of a course if approval of the enrollment in the course is precluded by §21.4252;

(2) For training in a foreign country unless the training is in the Philippines or is approved pursuant to the provisions of §21.4260; or

(3) For pursuit of a course offered by open-circuit television, unless the eligible person's pursuit meets the requirements of §21.4233(c).

(Authority: 38 U.S.C. 3523)

(e) *Commencing date.* In determining the commencing date of an award of educational assistance, VA will apply the provisions of §21.4131.

(Authority: 38 U.S.C. 5113)

[61 FR 26109, May 24, 1996]

### §21.3131 Rates—educational assistance allowance—38 U.S.C. chapter 35.

(a) *Rates.* Except as provided in §21.3132, educational assistance allowance is payable at the following rates for pursuit of education or training that occurs after September 30, 2002, and before October 1, 2003:

| Type of course | Monthly rate |
|---|---|
| Institutional: | |
| Full time | $680.00. |
| ¾ time | 511.00. |
| ½ time | 340.00. |
| Less than ½ but more than ¼ time [1] | 340.00. |
| ¼ time or less [1] | 170.00. |
| Cooperative training (other than farm cooperative) (Full time only). | 680.00. |
| Apprenticeship or on-the-job (full time only) [2]: | |
| First six months | 495.00. |
| Second six months | 370.00. |
| Third six months | 246.00. |
| Fourth six months and thereafter | 124.00. |
| Farm cooperative: | |
| Full time | 549.00. |
| ¾ time | 412.00. |
| ½ time | 275.00. |

| Type of course | Monthly rate |
|---|---|
| Correspondence | 55 percent of the established charge for the number of lessons completed by the eligible spouse or surviving spouse and serviced by the school—Allowance paid quarterly.[3] |

[1] If an eligible person under 38 U.S.C. chapter 35 pursuing independent study on a less than one-half-time basis completes his or her program before the designated completion time, his or her award will be recomputed to permit payment of tuition and fees not to exceed $340.00 or $170.00, as appropriate, per month, if the maximum allowance is not initially authorized.
[2] See footnote 5 of § 21.4270(c) for measurement of full time and § 21.3132(c) for proportionate reduction in award for completion of less than 120 hours per month.
[3] Established charge means the charge for the course or courses determined on the basis of the lowest extended time payment plan offered by the institution and approved by the appropriate State approving agency or the actual cost to the eligible spouse or surviving spouse, whichever is less. VA considers the continuity of an enrollment broken when there are more than 6 months between the servicing of the lessons.

(Authority: 38 U.S.C. 3532(a), 3542(a), 3687(b)(2), (d))

(b) *Rates.* Except as provided in § 21.3132, educational assistance allowance is payable at the following rates for pursuit of education or training that occurs after September 30, 2003, and before July 1, 2004:

| Type of course | Monthly rate |
|---|---|
| Institutional: | |
| Full time | $695.00. |
| ¾ time | 522.00. |
| ½ time | 347.00 |
| Less than ½ but more than ¼ time[1] | 347.00. |
| ¼ time or less[1] | 173.75. |
| Cooperative training (other than farm cooperative) (Full time only). | 695.00. |
| Apprenticeship or on-the-job (full time only)[2]: | |
| First six months | 506.00. |
| Second six months | 378.00. |
| Third six months | 251.00. |
| Fourth six months and thereafter | 127.00. |
| Farm cooperative: | |
| Full time | 561.00. |
| ¾ time | 421.00. |
| ½ time | 281.00. |
| Correspondence | 55 percent of the established charge for the number of lessons completed by the eligible spouse or surviving spouse and serviced by the school—Allowance paid quarterly.[3] |

[1] If an eligible person under 38 U.S.C. chapter 35 pursuing independent study on a less than one-half-time basis completes his or her program before the designated completion time, his or her award will be recomputed to permit payment of tuition and fees not to exceed $347.00 or $173.75, as appropriate, per month, if the maximum allowance is not initially authorized.
[2] See footnote 5 of § 21.4270(c) for measurement of full time and § 21.3132(c) for proportionate reduction in award for completion of less than 120 hours per month.
[3] Established charge means the charge for the course or courses determined on the basis of the lowest extended time payment plan offered by the institution and approved by the appropriate State approving agency or the actual cost to the eligible spouse or surviving spouse, whichever is less. VA considers the continuity of an enrollment broken when there are more than 6 months between the servicing of the lessons.

(Authority: 38 U.S.C. 3532(a), 3542(a), 3687(b)(2), (d))

(c) *Rates.* Except as provided in § 21.3132, educational assistance allowance is payable at the following rates for pursuit of education or training that occurs after June 30, 2004:

| Type of course | Monthly rate |
|---|---|
| Institutional: | |
| Full time | $788.00. |
| ¾ time | 592.00. |
| ½ time | 394.00. |
| Less than ½ but more than ¼ time[1] | 394.00. |
| ¼ time or less[1] | 197.00. |

| Type of course | Monthly rate |
|---|---|
| Cooperative training (other than farm cooperative) (Full time only). | 788.00. |
| Apprenticeship or on-the-job (full time only)[2]: | |
| First six months | 574.00. |
| Second six months | 429.00. |
| Third six months | 285.00. |
| Fourth six months and thereafter | 144.00. |
| Farm cooperative: | |
| Full time | 636.00. |
| ¾ time | 477.00. |
| ½ time | 319.00. |
| Correspondence | 55 percent of the established charge for the number of lessons completed by the eligible spouse or surviving spouse and serviced by the school—Allowance paid quarterly.[3] |

[1] If an eligible person under 38 U.S.C. chapter 35 pursuing independent study on a less than one-half-time basis completes his or her program before the designated completion time, his or her award will be recomputed to permit payment of tuition and fees not to exceed $394.00 or $197.00, as appropriate, per month, if the maximum allowance is not initially authorized.

[2] See footnote 5 of §21.4270(c) for measurement of full time and §21.3132(c) for proportionate reduction in award for completion of less than 120 hours per month.

[3] Established charge means the charge for the course or courses determined on the basis of the lowest extended time payment plan offered by the institution and approved by the appropriate State approving agency or the actual cost to the eligible spouse or surviving spouse, whichever is less. VA considers the continuity of an enrollment broken when there are more than 6 months between the servicing of the lessons.

(Authority: 38 U.S.C. 3532(a), 3542(a), 3687(b)(2), (d))

(d) *Less than half time.* The monthly rate for an eligible person who is pursuing an institutional course on less than one-half time basis may not exceed the monthly rate of the cost of the course computed on basis of the total cost for tuition and fees which the school requires similarly circumstanced individuals enrolled in the same course to pay. ''Cost of the course'' does not include the cost of books or supplies which the student is required to purchase at his or her own expense.

(Authority: 38 U.S.C. 3532(a)(2))

(e) *Courses leading to a secondary school diploma or equivalency certificate.* The monthly rate of Survivors' and Dependents' Educational Assistance payable for an eligible person enrolled in a course leading to a secondary school diploma or equivalency certificate shall be the rate for institutional training stated in paragraph (a) of this section.

(Authority: 38 U.S.C. 3532(d), 3533)

(f) *Payments made to eligible persons in the Republic of the Philippines or to certain Filipinos.* When the eligible person is pursuing training at an institution located in the Republic of the Philippines or when an eligible child's entitlement is based on the service of a veteran in the Philippine Commonwealth Army, or as a Philippine Scout as defined in §3.40 (b), (c), or (d) of this chapter, payments of educational assistance allowance made after December 31, 1994, will be made at the rate of 50 cents for each dollar authorized.

(Authority: 38 U.S.C. 3532(d), 3565)

[61 FR 26110, May 24, 1996, as amended at 63 FR 67778, Dec. 9, 1998; 66 FR 32227, June 14, 2001; 68 FR 34321, June 9, 2003; 68 FR 37206, June 23, 2003; 69 FR 62207, Oct. 25, 2004]

## §21.3132 Reductions in survivors' and dependents' educational assistance.

The monthly rates established in §21.3131 shall be reduced as stated in this section whenever the circumstances described in this section arise.

(a) *No educational assistance allowance for some incarcerated eligible persons.* VA will pay no educational assistance allowance to an eligible person who:

(1) Is incarcerated in a Federal, State, or local penal institution for conviction of a felony; and

(2) Is enrolled in a course:

(i) For which there are no tuition or fees, or charges for books, supplies, and equipment; or

(ii) For which tuition and fees are being paid by a Federal program (other

than one administered by VA) or by a State or local program, and the eligible person is incurring no charge for the books, supplies, and equipment necessary for the course.

(Authority: 38 U.S.C. 3532(e))

(b) *Reduced educational assistance allowance for some incarcerated eligible persons—felony conviction.* (1) VA will pay a reduced educational assistance allowance to an eligible person who:

(i) Is incarcerated in a Federal, State, or local penal institution for conviction of a felony; and

(ii) Is enrolled in a course:

(A) For which the eligible person pays some (but not all) of the charges for tuition and fees; or

(B) For which a Federal program (other than one administered by VA) or a State or local program pays all the charges for tuition and fees, but which requires the eligible person to pay for books, supplies, and equipment.

(2) The monthly rate of educational assistance allowance payable to such an eligible person who is pursuing a course on a half-time or greater basis shall be the lesser of the following:

(i) The monthly rate of the portion of the tuition and fees that the eligible person must pay plus the monthly rate of the charge to the eligible person for the cost of necessary supplies, books, and equipment; or

(ii) The monthly rate stated in § 21.3131.

(3) The monthly rate of educational assistance payable to such an eligible person who is pursuing the course on a less than half-time basis or on a one quarter-time basis shall be the lowest of the following:

(i) The monthly rate of the tuition and fees charged for the course;

(ii) The monthly rate of tuition and fees which the eligible person must pay plus the monthly rate of the charge to the eligible person for the cost of necessary supplies, books, and equipment; or

(iii) The monthly rate stated in § 21.3131.

(Authority: 38 U.S.C. 3482(g))

(c) *Reduction in training assistance allowance.* (1) For any month in which an eligible person pursuing an apprenticeship or on-job training program fails to complete 120 hours of training, VA shall reduce the rate specified in § 21.3131(a) proportionally. In this computation VA shall round the number of hours worked to the nearest multiple of eight.

(2) For the purpose of this paragraph *hours worked* include only:

(i) The training hours the eligible person worked; and

(ii) All hours of the eligible person's related training which occurred during the standard workweek and for which the eligible person received wages.

(Authority: 38 U.S.C. 3687(b)(3))

(d) *Mitigating circumstances.* (1) VA will not pay benefits to any eligible person for a course from which the eligible person withdraws or receives a nonpunitive grade which is not used in computing the requirements for graduation unless the provisions of this paragraph are met.

(i) The eligible person withdraws because he or she is ordered to active duty; or

(ii) All of the following criteria are met:

(A) There are mitigating circumstances;

(B) The eligible person submits a description of the circumstances in writing to VA either within one year from the date VA notifies the eligible person that he or she must submit the mitigating circumstances or at a later date if the eligible person is able to show good cause why the one-year time limit should be extended to the date on which he or she submitted the description of the mitigating circumstances; and

(C) The eligible person submits evidence supporting the existence of mitigating circumstances within one year of the date that evidence is requested by VA, or at a later date if the eligible person is able to show good cause why the one-year time limit should be extended to the date on which he or she submitted the evidence supporting the existence of mitigating circumstances.

(Authority: 38 U.S.C. 3680(a); Pub. L. 102–127)(Aug. 1, 1990)

(2) The following circumstances are representative of those which the Department of Veterans Affairs considers to be mitigating provided they prevent the eligible person from pursuing the program of education continuously. This list is not all inclusive.

(i) An illness of the eligible person,

(ii) An illness or death in the eligible person's family,

(iii) An unavoidable geographical transfer resulting from the eligible person's employment,

(iv) An unavoidable change in the eligible person's conditions of employment,

(v) Immediate family or financial obligations beyond the control of the eligible person which require him or her to suspend pursuit of the program of education to obtain employment,

(vi) Discontinuance of a course by a school,

(vii) Unanticipated active duty for training,

(viii) Unanticipated difficulties in caring for the eligible person's child or children.

(Authority: 38 U.S.C. 3680)

(3) If the eligible child fails to complete satisfactorily a course of special restorative training or if the eligible person fails to complete satisfactorily a course under section 3533, Title 38 U.S.C., without fault, the Department of Veterans Affairs will consider the circumstances which caused the failure to be mitigating. This will be the case even if the circumstances were not so severe as to preclude continuous pursuit of a program of education.

(4) In the first instance of a withdrawal after May 31, 1989, from a course or courses for which the eligible person received educational assistance under title 38 U.S.C. or under chapter 1606, title 10 U.S.C., VA will consider that mitigating circumstances exist with respect to courses totaling not more than six semester hours or the equivalent. Eligible persons to whom the provisions of this subparagraph apply are not subject to the reporting requirement found in paragraph (d)(1)(ii) of this section.

(Authority: 38 U.S.C. 3680(a)(4); Pub. L. 100–689)

(5) If an eligible person withdraws from a course during a drop-add period, VA will consider the circumstances which caused the withdrawal to be mitigating. Eligible persons who withdraw from a course during a drop-add period are not subject to the reporting requirement found in paragraph (d)(1)(ii) of this section.

(Authority: 38 U.S.C. 3680(a))

[31 FR 6774, May 6, 1966]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §21.4137, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

### §21.3133 Payment procedures.

(a) *Release of payments and payment procedures.* In determining whether payments of educational assistance allowance may be made in a lump sum, in advance, for an interval or if a certification is required from an eligible person before a payment may be made, VA will apply the provisions of §21.4138.

(Authority: 38 U.S.C. 3680)

(b) *Payee.* (1) VA will pay an educational assistance allowance to the eligible person if he or she has attained majority and has no known legal disability.

(2) If an eligible person has not attained majority, VA will pay an educational assistance allowance directly to an eligible person, a relative, or some other person for the use and benefit of the eligible person notwithstanding a legal disability on the part of the eligible person when VA determines:

(i) The best interest of the eligible person would be served;

(ii) Undue delay in payment would be avoided; or

(iii) Payment would otherwise not be feasible.

(Authority: 38 U.S.C. 3501(a)(4), 3501(c), 3531(a), 5502)

(c) *Payment of accrued benefits.* Educational assistance remaining due and

unpaid at the date of the eligible person's death is payable under the provisions of § 3.1000 of this chapter.

(Authority: 38 U.S.C. 5121)

(d) *Tutorial assistance.* An individual who is otherwise eligible to receive benefits under the Survivors' and Dependents' Educational Assistance program may receive supplemental monetary assistance to provide tutorial services. In determining whether VA will pay the individual this assistance, VA will apply the provisions of § 21.4236.

(Authority: 38 U.S.C. 3492, 3533(b))

(e) *Offsets: 38 U.S.C. chapter 35, compensation, pension and dependency and indemnity compensation.* Payment of dependents' educational assistance will be subject to offset of amounts of pension, compensation or dependency and indemnity compensation paid over the same period on behalf of a child based on school attendance.

(Authority: 38 U.S.C. 3562)

(f) *Final payment.* VA may withhold final payment until VA receives proof of continued enrollment and adjusts the eligible person's account.

(Authority: 38 U.S.C. 3680)

[61 FR 26111, May 24, 1996]

### § 21.3135 Reduction or discontinuance dates for awards of educational assistance allowance.

The reduction or discontinuance date of an award of educational assistance will be as stated in this section. If more than one basis for reduction or discontinuance is involved, the earliest date will control.

(a) *Ending date of course.* Educational assistance allowance will be discontinued on the ending date of the course or period of enrollment as certified by the school.

(Authority: 38 U.S.C. 3531, 3680(a))

(b) *Ending date of eligibility.* Educational assistance allowance will be discontinued on the ending date of the eligible person's eligibility as determined by § 21.3041, § 21.3042, § 21.3043, or § 21.3046.

(Authority: 38 U.S.C. 3512)

(c) *General reduction or discontinuance dates.* Educational assistance allowance will be reduced or discontinued on the date specified in § 21.4135.

(Authority: 38 U.S.C. 3482(g), 3531, 3671(g), 3672(a), 3680, 3683, 3690, 5112, 5113, 6103, 6104, 6105)

(d) *Divorce.* If the veteran and eligible spouse divorce, the discontinuance date for the eligible spouse's award of educational assistance will be:

(1) The end of the quarter or semester if the school is operated on a quarter or semester system, and the divorce was without fault on the eligible spouse's part;

(2) The end of the course or a 12-week period, whichever is earlier, if the school does not operate on a quarter or semester system, and the divorce was without fault on the eligible spouse's part; or

(3) In all other instances, the date the divorce decree becomes final.

(Authority: 38 U.S.C. 3501(a)(1)(D), 3511(b))

(e) *Remarriage or other relationship of spouse or surviving spouse.* (1) If an eligible surviving spouse remarries, the date of discontinuance of his or her award of educational assistance allowance will be the last date of attendance before remarriage.

(2) If a spouse or surviving spouse begins a relationship by living with another person and holding himself or herself out openly to the public to be the spouse of the other person, the date of discontinuance of his or her award of educational assistance allowance will be the last date of the month before the spouse's or surviving spouse's relationship began.

(Authority: 38 U.S.C. 101(3), 3501(a)(1)(B))

(f) *Entrance on active duty (§ 21.3042).* If an eligible person enters on active duty, VA will terminate his or her educational assistance allowance on the day before the day of entrance on active duty. Brief periods of active duty for training, if the school permits such an absence without interruption of

training, will not result in termination of the allowance under this paragraph.

(Authority: 38 U.S.C. 3501(d))

(g) *Eligible child ceases to be a stepchild.* When an eligible child loses eligibility because he or she ceases to be the stepchild of the veteran, VA will discontinue the dependent's educational assistance allowance on the last day of the child's eligibility as determined by §21.3041(d)(9).

(Authority: 38 U.S.C. 101(4)(A), 3501)

(h) *Veteran no longer rated permanently and totally disabled.* (1) If the veteran on whose service an eligible person's eligibility is based is no longer permanently and totally disabled, VA will discontinue the educational assistance allowance—

(i) On the last date of the quarter or semester during which VA rated the veteran as no longer permanently and totally disabled if the eligible person's educational institution is organized on a quarter or semester basis; or

(ii) On the earlier of the following dates when the eligible person's educational institution is not organized on a quarter or semester basis:

(A) The last date of the course;

(B) The end of a 12-week period beginning on the date VA rated the veteran as being no longer permanently and totally disabled.

(Authority: 38 U.S.C. 3511(b), 3512(a)(6)(A))

(i) Serviceperson is removed from ''missing status'' listing. (1) If the serviceperson on whose service an eligible person's eligibility is based is removed from the ''missing status'' listing, VA will discontinue the educational assistance allowance—

(i) On the last date of the quarter or semester during which the serviceperson was removed from the ''missing status'' listing if the eligible person's educational institution is organized on a quarter or semester basis; or

(ii) On the earlier of the following dates when the eligible person's educational institution is not organized on a quarter or semester basis:

(A) The last date of the course;

(B) The end of a 12-week period beginning on the date the serviceperson was removed from the ''missing status'' listing.

(Authority: 38 U.S.C. 3512(a)(6)(A))

(j) *Fugitive felons.* (1) VA will not award educational assistance allowance to an otherwise eligible person for any period after December 26, 2001, during which the—

(i) Eligible person is a fugitive felon; or

(ii) Veteran from whom eligibility is derived is a fugitive felon.

(2) The date of discontinuance of an award of educational assistance allowance to an eligible person is the later of—

(i) The date of the warrant for the arrest of the felon; or

(ii) December 27, 2001.

(Authority: 38 U.S.C. 5313B)

[61 FR 26111, May 24, 1996, as amended at 70 FR 25786, May 16, 2005]

SPECIAL RESTORATIVE TRAINING

## §21.3300 Special restorative training.

(a) *Purpose of special restorative training.* The Department of Veterans Affairs may prescribe special restorative training where needed to overcome or lessen the effects of a physical or mental disability for the purpose of enabling an eligible child to pursue a program of education, special vocational program or other appropriate goal. Medical care and treatment or psychiatric treatment are not included.

(b) *Special restorative training courses.* The counseling psychologist, after consulting with the Vocational Rehabilitation Panel, may prescribe for special restorative training purposes courses such as—

(1) Speech and voice correction or retention,

(2) Language retraining,

(3) Speech (lip) reading,

(4) Auditory training,

(5) Braille reading and writing,

(6) Training in ambulation,

(7) One-hand typewriting,

(8) Nondominant handwriting,

(9) Personal, social and work adjustment training,

(10) Remedial reading, and

(11) Courses at special schools for mentally and physically disabled or

(12) Courses provided at facilities which are adapted or modified to meet special needs of disabled students.

(Authority: 38 U.S.C. 3540)

(c) *Duration of special restorative training.* VA may provide special restorative training in excess of 45 months where an additional period of time is needed to complete the training. Entitlement, including any authorized in excess of 45 months, may be expended through an accelerated program requiring a rate of payment for tuition and fees in excess of—

(1) $213.00 a month for the period beginning October 1, 2002, and ending September 30, 2003;

(2) $218.00 a month for the period beginning October 1, 2003, and ending June 30, 2004; and

(3) $247.00 a month for months after June 30, 2004.

(Authority: 38 U.S.C. 3541(b), 3542)

(d) *Special restorative training precluded in Department of Veterans Affairs facilities.* Special restorative training will not be provided in Department of Veterans Affairs facilities.

(Authority: 38 U.S.C. 3543(b))

[48 FR 37973, Aug. 22, 1983, as amended at 49 FR 42725, Oct. 24, 1984; 50 FR 19934, May 13, 1985; 63 FR 67779, Dec. 9, 1998; 66 FR 32228, June 14, 2001; 68 FR 34322, June 9, 2003; 69 FR 62208, Oct. 25, 2004]

## § 21.3301 Need.

(a) *Determination of need.* When special restorative training has been requested or is being considered for a handicapped child, a counseling psychologist will obtain all information necessary to determine the need for and feasibility of special restorative training. After the counseling psychologist completes this task, he or she will refer the case to the Vocational Rehabilitation Panel. The panel will consider whether—

(1) There exists a handicap which will interfere with pursuit of a program of education;

(2) It is in the best interests of an eligible child to begin special restorative training after his or her 14th birthday;

(3) The period of special restorative training materially will improve the eligible child's ability to:

(i) Pursue a program of education,

(ii) Pursue a program of specialized vocational training,

(iii) Obtain continuing employment in a sheltered workshop, or

(iv) Adjust in his or her family or community;

(Authority: 38 U.S.C. 3541(a))

(4) The special restorative training may be pursued concurrently with a program of education; and

(5) Training will affect adversely the child's mental or physical condition;

(6) The Department of Veterans Affairs:

(i) Has considered assistance available under provisions of State-Federal programs for education of handicapped children, and

(ii) Has determined that it is in the child's interest to receive benefits under Chapter 35,

(Authority: 38 U.S.C. 3541(a))

(b) *Report.* The Vocational Rehabilitation Panel will prepare a written report of its findings and recommendations as to the need for assistance and the types of assistance which should be provided. The report will be sent to the counseling psychologist.

(c) *Development and implementation.* Following consultation with the panel or receipt of the panel's report, or both, the counseling psychologist will determine the need and feasibility of special restorative training. If an affirmative finding is made, an individualized, written plan comparable to that developed in cases of extended evaluation under 38 U.S.C. Chapter 31 will be prepared. The plan will be developed jointly with the eligible child and parent or guardian.

(Authority: 38 U.S.C. 3541(a))

(d) *Notification of disallowance.* When a parent or guardian has requested special restorative training on behalf of an eligible child, and the counseling psychologist finds that this training is not needed or will not materially improve the child's condition, the Department

of Veterans Affairs will inform the parent or guardian in writing of the finding. The Department of Veterans Affairs will also inform the parent or guardian of his or her appeal rights.

(e) *Reentrance after interruption.* The case of an eligible child shall be referred to the panel for consideration of whether the eligible child may be permitted reentrance into special restorative training following interruption. The panel will recommend approval to the counseling psychologist if there is a reasonable expectation that the purpose of special restorative training will be accomplished. See § 21.3306.

(Authority: 38 U.S.C. 3540)

[48 FR 37973, Aug. 22, 1983, as amended at 49 FR 42725, Oct. 24, 1984]

### § 21.3302 Agreements.

(a) *Agreements to provide training.* The Department of Veterans Affairs may make agreements with public or private educational institutions or others to provide suitable and necessary special restorative training for an eligible child.

(b) *Tuition charge.* When a customary tuition charge is not applicable, the agreement will include the fair and reasonable amounts which may be charged the parent or guardian for the training provided an eligible child.

(c) *Content of agreement.* Each agreement will include the same type of information required for special restorative training for disabled veterans under 38 U.S.C. Chapter 31, including the requirement that the educational institutions, or others with whom arrangements have been made, report to the Department of Veterans Affairs promptly the eligible child's enrollment in, interruption or termination of the course of special restorative training.

(Authority: 38 U.S.C. 3543)

[48 FR 37973, Aug. 22, 1983]

### § 21.3303 Extent of training.

(a) *Length of special restorative training.* Ordinarily, special restorative training may not exceed 12 months. When the counseling psychologist, after consulting with the Vocational Rehabilitation Panel, determines that more than 12 months of training is necessary, he or she will refer the program to the Director, Vocational Rehabilitation and Employment Service for prior approval. Where the plan for a program of special restorative training itself (not in combination with the program of education) will require more than 45 months (or its equivalent in accelerated payments) the plan will be included in the recommendation to the Director, Vocational Rehabilitation and Employment Service for approval.

(Authority: 38 U.S.C. 3543(b))

(b) *Age limitation.* No eligible child may receive special restorative training after reaching age 31.

(Authority: 38 U.S.C. 3512)

(c) *Full-time training.* An eligible child will pursue special restorative training on a full-time basis.

(1) Full-time training requires training for:

(i) That amount of time per week which commonly is required for a full-time course at the educational institution when, based on medical findings, the Department of Veterans Affairs determines that the eligible child's physical or mental condition permits training for that amount of time, or

(ii) The maximum time per week permitted by the child's disability, as determined by the Department of Veterans Affairs, based on medical findings, if the disability precludes the weekly training time stated in paragraph (c)(1)(i) of this section.

(2) If the hours per week that can reasonably be devoted to restorative training will not of themselves equal the time required by paragraph (c)(1) of this section, the course will be supplemented with subject matter which will contribute toward the objective of the program of education.

(Authority: 38 U.S.C. 3542(c))

[48 FR 37973, Aug. 22, 1983, as amended at 49 FR 42726, Oct. 24, 1984]

### § 21.3304 Assistance during training.

(a) *General.* A vocational rehabilitation specialist will provide the professional and technical assistance needed by the eligible child in pursuing special

restorative training. The assistance will be timely, sustained and personal.

(b) *Adjustments in the training situation.* The vocational rehabilitation specialist must be continually aware of the eligible child's progress. At frequent intervals he or she will determine whether the eligible child is progressing satisfactorily. When the vocational rehabilitation specialist determines that adjustments are needed in the course or in the training situation, he or she will act immediately to bring about the adjustments in accordance with the following:

(1) When the eligible child or his or her instructor indicates dissatisfaction with elements of the program, the vocational rehabilitation specialist, through personal discussion with the eligible child or his or her instructor or both, will, if possible, correct the difficulty through such means as making minor adjustments in the course or by persuading the eligible child to give more attention to performance.

(2) When major difficulties cannot be corrected, the vocational rehabilitation specialist will prepare a report of pertinent facts and recommendations for action by the counseling psychologist in consultation with the Vocational Rehabilitation Panel.

(3) Action will be taken to terminate the eligible child's course at the proper time so that his or her entitlement may be conserved when the vocational rehabilitation specialist determines that:

(i) The eligible child is progressing much faster than anticipated, and

(ii) The eligible child's course may be terminated with satisfactory results before the time originally planned.

(Authority: 38 U.S.C. 3541)

[48 FR 37973, Aug. 22, 1983, as amended at 49 FR 42726, Oct. 24, 1984]

### § 21.3305 "Interrupted" status.

(a) *Special restorative training should be uninterrupted.* An eligible child once entered into special restorative training should pursue his or her course to completion without interruption. Wherever possible, continuous training shall be provided for each eligible child, including training during the summer, except where, because of his or her physical condition or other good reason, it would not be to his or her best interest to pursue training. As long as the eligible child is progressing satisfactorily toward overcoming his or her handicap, the eligible child will be continued in his or her course of training without accounting for days of nonattendance within the authorized enrollment.

(Authority: 38 U.S.C. 3541)

(b) *Interrupting special restorative training.* Special restorative training will be interrupted as necessary under the following conditions:

(1) During summer vacations or periods when no instruction is given before and after summer sessions.

(2) During a prolonged period of illness or medical infeasibility.

(3) When the eligible child voluntarily abandons special restorative training.

(4) When the eligible child fails to make satisfactory progress in the special restorative training course.

(5) When the eligible child is no longer acceptable to the institution because of failure to maintain satisfactory conduct or progress in accordance with the rules of the institution.

(6) When the eligible child's progress is materially retarded because of his or her negligence, lack of application or misconduct.

(Authority: 38 U.S.C. 3541, 3543(b))

[48 FR 37973, Aug. 22, 1983]

### § 21.3306 Reentrance after interruption.

When a course of special restorative training has been interrupted and the eligible child presents himself or herself for reentrance, the Department of Veterans Affairs will act as follows:

(a) *Action by a vocational rehabilitation specialist.* A vocational rehabilitation specialist will approve reentrance when special restorative training was interrupted:

(1) For a scheduled vacation period, such as a summer break,

(2) For a short period of illness, or

(3) For other reasons which permit reentrance in the same course of special restorative training without corrective action.

(Authority: 38 U.S.C. 3543(b))

(b) *Referral to the counseling psychologist.* (1) The vocational rehabilitation specialist will refer the eligible child's case to the counseling psychologist when special restorative training was interrupted—

(i) By reason of failure to maintain satisfactory conduct or progress, or

(ii) For any other reason, which requires corrective action, such as changes of place of training, change of course, personal adjustment, etc.

(2) The counseling psychologist will consult with the Vocational Rehabilitation Panel. If he or she determines that the conditions which caused the interruption can be overcome, he or she will approve the necessary adjustment.

(3) The counseling psychologist will make a finding of infeasibility if—

(i) All efforts to effect proper adjustment in the case have failed; and

(ii) There is substantial evidence, resolving any reasonable doubt in favor of the child (as discussed in §3.102 of this chapter), that additional efforts will be unsuccessful.

(Authority: 38 U.S.C. 3541, 3543(b))

[48 FR 37973, Aug. 22, 1983, as amended at 49 FR 42726, Oct. 24, 1984]

### §21.3307 "Discontinued" status.

(a) *Placement in ''discontinued'' status.* If reentrance from *interrupted* status into a program of special restorative training is not approved by a counseling psychologist under the provisions of §21.3306, the vocational rehabilitation specialist will place the case in *discontinued* status.

(b) *Notification.* In any case of discontinuance the Department of Veterans Affairs will:

(1) Notify the eligible child's parent or guardian of the action taken, and

(2) Inform him or her of the eligible child's potential right to a program of education.

(c) *Effect of discontinuance.* An eligible child who has been placed in *discontinued* status is precluded from any further pursuit of special restorative training until a Department of Veterans Affairs counseling psychologist in the Vocational Rehabilitation and Employment Division determines that the cause of the discontinuance has been removed.

(Authority: 38 U.S.C. 3543(b))

[48 FR 37973, Aug. 22, 1983, as amended at 49 FR 42726, Oct. 24, 1984]

## PAYMENTS; SPECIAL RESTORATIVE TRAINING

### §21.3330 Payments.

(a) Payments will be made to the person designated to receive the payments under the provisions of §21.3133(b).

(b) VA will pay special training allowance only for the period of the eligible child's approved enrollment as certified by the vocational rehabilitation specialist. In no event, however, will VA pay such allowance for any period during which:

(1) The eligible child is not pursuing the prescribed course of special restorative training that has been determined to be full-time training with respect to his or her capacities.

(2) An educational assistance allowance is paid.

(Authority: 38 U.S.C. 3542)

(c) The provisions of §21.3133(e) apply to the payment of special restorative training allowance.

(Authority: 38 U.S.C. 3562)

[30 FR 15646, Dec. 18, 1965, as amended at 31 FR 6774, May 6, 1966; 50 FR 21606, May 28, 1985; 61 FR 26112, May 24, 1996]

### §21.3331 Commencing date.

The commencing date of an authorization of a special training allowance will be the date of entrance or reentrance into the prescribed course of special restorative training, or the date the counseling psychologist approved the course for the eligible child whichever is later. See also §21.3130(c).

(Authority: 38 U.S.C. 3542)

[49 FR 42726, Oct. 24, 1984, as amended at 61 FR 26112, May 24, 1996]

### § 21.3332 Discontinuance dates.

VA will discontinue special training allowance as provided in this section on the earliest date of the following:

(a) The ending date of the course.

(b) The ending date of the period of enrollment as certified by the vocational rehabilitation specialist.

(c) The ending date of the period of eligibility.

(d) The expiration of the eligible child's entitlement.

(e) Date of interruption of course as determined by the vocational rehabilitation specialist under § 21.3305.

(f) Date of discontinuance under the applicable provisions of § 21.3130(d).

(Authority: 38 U.S.C. 3543(b))

[50 FR 21606, May 28, 1985, as amended at 61 FR 26112, May 24, 1996]

### § 21.3333 Rates.

(a) *Rates.* Special training allowance is payable at the following monthly rates, except as provided in paragraph (c) of this section.

(1) For special restorative training that occurs after September 30, 2002, and before October 1, 2003.

| Course | Monthly rate | Accelerated charges |
|---|---|---|
| Special restorative training | $680.00 | If costs for tuition and fees average in excess of $213.00 per month, rate may be increased by such amount in excess of $213.00. |

(Authority: 38 U.S.C. 3542)

(2) For special restorative training that occurs after September 30, 2003, and before July 1, 2004:

| Course | Monthly rate | Accelerated charges |
|---|---|---|
| Special restorative training | $695.00 | If costs for tuition and fees average in excess of $218.00 per month, rate may be increased by such amount in excess of $218.00. |

(Authority: 38 U.S.C. 3542)

(3) For special restorative training that occurs after June 30, 2004:

| Course | Monthly rate | Accelerated charges |
|---|---|---|
| Special restorative training | $788.00 | If costs for tuition and fees average in excess of $247.00 per month, rate may be increased by training such amount in excess of $247.00. |

(Authority: 38 U.S.C. 3542)

(b) *Accelerated charges.* (1) VA may pay the additional monthly rate if the parent or guardian concurs in having the eligible child's period of entitlement reduced by 1 day for each—

(i) $22.67 that the special training allowance exceeds the basic monthly rate of $680.00 for the period October 1, 2002, through September 30, 2003;

(ii) $23.17 that the special training allowance exceeds the basic monthly rate of $695.00 for the period October 1, 2003, through June 30, 2004; and

(iii) $26.27 that the special training allowance exceeds the basic monthly rate of $788.00 for months after June 30, 2004.

(2) VA will:

(i) Charge fractions of more than one-half day as 1 day;

(ii) Disregard fractions of one-half or less; and

(iii) Record charges when the eligible child is entered into training.

(Authority: 38 U.S.C. 3542)

(c) *Payments made to eligible persons in the Republic of the Philippines or to certain Filipinos.* When the eligible person is pursuing training at an institution

located in the Republic of the Philippines or when an eligible child's entitlement is based on the service of a veteran in the Philippine Commonwealth Army, or as a Philippine Scout as defined in §3.40(b), (c), or (d) of this chapter, payments of special training allowance made after December 31, 1994, will be made at the rate of 50 cents for each dollar authorized.

(Authority: 38 U.S.C. 3532(d), 3542, 3565)

[35 FR 9814, June 16, 1970, as amended at 48 FR 37975, Aug. 22, 1983; 50 FR 19934, May 13, 1985; 57 FR 29799, July 7, 1992; 61 FR 29295, June 10, 1996; 63 FR 67779, Dec. 9, 1998; 66 FR 32228, June 14, 2001; 68 FR 34322, June 9, 2003; 68 FR 37206, June 23, 2003; 69 FR 62209, Oct. 25, 2004]

SPECIAL ASSISTANCE AND TRAINING

### §21.3344 Special assistance for the educationally disadvantaged.

(a) *Enrollment.* VA may approve the enrollment of an eligible person in an appropriate course or courses at the secondary school level. This approval may be made only if the eligible person—

(1) Has not received a secondary school diploma (or an equivalency certificate);

(2) Needs additional secondary school education, remedial, refresher, or deficiency courses, to qualify for admission to an appropriate educational institution in a State in order to pursue a program of education; and

(3) Is to pursue the course or courses in a State.

(Authority: 38 U.S.C. 3491(a), 3533)

(b) *Measurement.* VA will measure remedial, deficiency, or refresher courses offered at the secondary school level as provided in §§21.4270(a)(2) and 21.4272(k).

(Authority: 38 U.S.C. 3533)

(c) *Educational assistance.* VA will authorize educational assistance at the monthly rates specified in §21.3131.

(Authority: 38 U.S.C. 3491(a), 3533)

(d) *Entitlement charge.* The provisions of §21.3045 will determine whether VA will make a charge against the period of the entitlement of the eligible person because of enrollment in a course under the provisions of this section.

(Authority: 38 U.S.C. 3533)

(e) *Certifications.* (1) Certifications of the eligible person's need for deficiency or remedial courses in basic English language skills and mathematics skills may be made by:

(i) A VA counseling psychologist in the Vocational Rehabilitation and Employment Division;

(ii) The educational institution administering the course; or

(iii) The educational institution where the student has applied for admission.

(2) Certification of need for other refresher, remedial or deficiency course requirements are to be made by the educational institution—

(i) Administering the course which the eligible person is planning to enter; or

(ii) Where the eligible person has applied for admission.

(Authority: 38 U.S.C. 3533)

(f) *Basic skills.* Basic English language courses or mathematics courses will be authorized when it is found by accepted testing methods that the eligible person is lacking in basic reading, writing, speaking, or essential mathematics.

(Authority: 38 U.S.C. 3533)

[61 FR 26112, May 24, 1996]

## Subpart D—Administration of Educational Assistance Programs

AUTHORITY: 10 U.S.C. 2141 note, ch. 1606; 38 U.S.C. 501(a), chs. 30, 32, 34, 35, 36, unless otherwise noted.

SOURCE: 31 FR 6774, May 6, 1966, unless otherwise noted.

ADMINISTRATIVE

### §21.4001 Delegations of authority.

(a) Except as otherwise provided, authority is delegated to the Under Secretary for Benefits and to supervisory or adjudicative personnel within the jurisdiction of the Education Service, designated by him or her to make findings and decisions under 38 U.S.C. Chapters 34 and 36 and the applicable

regulations, precedents and instructions, as to programs authorized by these paragraphs.

(b) Authority is delegated to the Under Secretary for Benefits and the Director, Education Service, to enter into agreements for the reimbursement of State approving agencies under § 21.4153.

(Authority: 38 U.S.C. 512(a))

(c) Authority is delegated to the Director, Education Service, to exercise the functions required of the Secretary for:

(1) Waiver of penalties for conflicting interests as provided by § 21.4005;

(2) Actions otherwise required of State approving agencies under § 21.4150(c);

(3) Approval of courses under § 21.4250(c)(2).

(Authority: 38 U.S.C. 512(c))

(d) The Under Secretary for Benefits is delegated responsibility for obtaining evidence of voluntary compliance for vocational rehabilitation, education and special restorative training to implement Title VI, Civil Rights Act of 1964. Authority is delegated to him or her and his or her designee to take any necessary action as to programs of vocational rehabilitation, education or special restorative training under 38 U.S.C. Chapters 31, 34, 35 and 36 for the purpose of securing evidence of voluntary compliance directly or through the agencies to whom the Secretary has delegated responsibility for various schools or training establishments to implement §§ 18.1 through 18.13 of this chapter.

(e) The Under Secretary for Benefits is delegated responsibility for obtaining evidence of voluntary compliance from recognized national organizations whose representatives are afforded space and office facilities in facilities under his or her jurisdiction.

(f) The Under Secretary for Benefits is delegated responsibility to enter into an agreement with the Federal Trade Commission to utilize, where appropriate, its services and facilities, consistent with its available resources, to carry out investigations and make determinations as to enrollment of an eligible veteran or eligible person in any course offered by an institution which utilizes advertising, sales, or enrollment practices of any type which are erroneous, deceptive, or misleading either by actual statement, omission, or intimation.

(Authority: 38 U.S.C. 3696)

(g) Authority is delegated to the Director, Vocational Rehabilitation and Employment Service to exercise the functions required of the Secretary for approval of courses under § 21.4250(c)(1).

(Authority: 38 U.S.C. 512(a))

[31 FR 6774, May 6, 1966, as amended at 40 FR 31759, July 29, 1975; 48 FR 37975, Aug. 22, 1983; 50 FR 46764, Nov. 13, 1985; 61 FR 26112, May 24, 1996]

### § 21.4002 Finality of decisions.

(a) The decision of a duly constituted agency of original jurisdiction on which an action was predicated will be final and binding upon all field offices of the Department of Veterans Affairs as to conclusions based on evidence on file at that time and will not be subject to revision on the same factual basis except by duly constituted appellate authorities or except as provided in § 21.4003. (See §§ 19.192 and 19.183 of this chapter.)

(b) Current determinations of line of duty, character of discharge, relationship, and other pertinent elements of eligibility for a program of education or special restorative training, made by either an adjudicative activity or an insurance activity by application of the same criteria and based on the same facts are binding one upon the other in the absence of clear and unmistakable error.

[31 FR 6774, May 6, 1966, as amended at 48 FR 37976, Aug. 22, 1983]

### § 21.4003 Revision of decisions.

The revision of a decision on which an action was predicated will be subject to the following sections:

(a) Clear and unmistakable error, § 3.105(a) of this chapter;

(b) Difference of opinion, § 3.105(b) of this chapter;

(c) Character of discharge, § 3.105(c) of this chapter;

(d) Severance of service connection, §3.105(d) of this chapter;

(e) Veteran no longer totally and permanently disabled, §21.4135(o).

**§21.4005 Conflicting interests.**

(a) *General.* (1) An officer or employee of VA will be immediately dismissed from his or her office or employment, if while such an officer or employee he or she has owned any interest in, or received any wages, salary, dividends, profits, gratuities, or services from, any school operated for profit in which a veteran or eligible person was pursuing a course of education under 10 U.S.C. chapter 1606 or 38 U.S.C. chapters 30, 32, 34, 35 or 36.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3034(a), 3241, 3683(a))

(2) VA will discontinue payments under §21.4153 to a State approving agency when the Secretary finds that any person who is an officer or employee of a State approving agency has, while he or she was such an officer or employee, owned any interest in, or received any wages, salary, dividends, profits, gratuities, or services from a school operated for profit in which a veteran or eligible person was pursuing a course of education or training under 10 U.S.C. chapter 1606 or 38 U.S.C. chapters 30, 32, 34, 35 or 36 unless that agency takes, without delay such steps as may be necessary to terminate the employment of such a person. VA will not resume payments while such a person is an officer or employee of

(i) The State approving agency, or

(ii) State Department of Veterans' Affairs, or

(iii) State Department of Education.

(3) A State approving agency will not approve any course offered by a school operated for profit and, if any such course has been approved, will disapprove each such course, if it finds that any officer or employee of the Department of Veterans Affairs, or the State approving agency owns an interest in, or receives any wages, salary, dividends, profits, gratuities, or service from, such school.

(4) The Secretary may, after reasonable notice, and public hearings if requested, waive in writing the application of this paragraph in the case of any officer or employee of the Department of Veterans Affairs or of a State approving agency, if it is found that no detriment will result to the United States or to veterans or eligible persons by reason of such interest or connection of such officer or employee.

(Authority: 38 U.S.C. 3683)

(b) *Waiver.* (1) Where a request is made for waiver of application of paragraph (a)(1) of this section, it will be considered that no detriment will result to the United States or to veterans or eligible persons by reason of such interest or connection of such officer or employee of the Department of Veterans Affairs, if the officer or employee:

(i) Acquired his or her interest in the school by operation of law, or before the statute became applicable to the officer or employee, and his or her interest has been disposed of and his or her connection discontinued, or

(ii) Meets all of the following conditions:

(*a*) His or her position involves no policy determinations, at any administrative level, having to do with matters pertaining to payment of educational assistance allowance, or special training allowance.

(*b*) His or her position has no relationship with the processing of any veteran's or eligible person's application for education or training.

(*c*) His or her position precludes him or her from taking any adjudicative action on individual applications for education or training.

(*d*) His or her position does not require him or her to perform duties involved in the investigation of irregular actions on the part of schools or veterans or eligible persons in connection with 10 U.S.C. chapter 1606 or 38 U.S.C. chapters 30, 32, 34, 35 or 36.

(*e*) His or her position is not connected with the processing of claims by, or payments to, schools, or their students enrolled under the provisions of 10 U.S.C. chapter 1606 or 38 U.S.C. chapters 30, 32, 34, 35 or 36.

(*f*) His or her work is not connected in any way with the inspection, approval, or supervision of schools desiring to train veterans or eligible persons.

(2) Where a request is made for waiver of application of paragraph (a) (2) of this section, it will be considered that no detriment will result to the United States or to veterans or eligible persons by reason of such interest or connection of such officer or employee of a State approving agency, if the officer or employee:

(i) Acquired his or her interest in the school by operation of law, or before the statute became applicable to the officer or employee, and his or her interest has been disposed of and his or her connection discontinued, or

(ii) Meets all of the following conditions:

(*a*) His or her position does not require him or her to perform duties involved in the investigation of irregular actions on the part of schools or veterans or eligible persons in connection with 10 U.S.C. chapter 1606 or 38 U.S.C. chapters 30, 32, 34, 35 or 36.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3034(a), 3241, 3683(b))

(*b*) His or her work is not connected in any way with the inspection, approval, or supervision of schools desiring to train veterans or eligible persons.

(c) *Authority*. (1) Authority is delegated to the Director, Education Service, and to the facility head in the cases of VA employees under his or her jurisdiction, to waive the application of paragraph (a)(1) of this section in the case of any VA employee who meets the criteria of paragraph (b)(1) of this section, and to deny request for a waiver which do not meet those criteria. If the circumstances warrant, a waiver request may be submitted to the Secretary for a decision.

(2) Authority is delegated to the Director, Education Service, in cases of State approving agency employees to waive the application of paragraph (a)(2) of this section in the case of anyone who meets the criteria of paragraph (b)(2) of this section, and to deny requests for a waiver which do not meet those criteria. If the circumstances warrant, a waiver request may be submitted to the Secretary for a decision.

(Authority: 38 U.S.C. 512(a))

(3) Authority is reserved to the Secretary to waive the requirement of paragraphs (a) (1) and (2) of this section in the case of an officer of the Department of Veterans Affairs or a State approving agency and in the case of any employee of either who does not meet the criteria of paragraph (b) of this section.

(d) *Disapproval of courses.* Where it is found that an officer or employee of the Department of Veterans Affairs has any interest in, or receives any wages, salary, dividends, profits, gratuities, or services from any such school, and waiver has not been granted, the State approving agency and the school will be notified immediately that the courses offered by the school shall be disapproved, the reason for disapproval, and the conditions under which the disapproval may be lifted.

(e) *Notice to veterans and eligible persons.* The veteran or eligible person will be notified in writing sent to his or her latest address of record when:

(1) The course or courses are disapproved by the State approving agency, or

(2) The State approving agency fails to disapprove the course or courses within 15 days after the date of written notice to the agency, and no waiver has been requested, or

(3) Waiver has been denied.

The veteran or eligible person will be informed that he or she may apply for enrollment in an approved course in another school, but that in the absence of such transfer, educational assistance allowance payments will be discontinued effective the date of discontinuance of the course, or the 30th day following the date of such letter, whichever is earlier.

(f) *Definition of ''officer.''* For the purposes of this section a person will be considered to be an *officer* of the State approving agency or the Department of Veterans Affairs, when he or she has authority to exercise supervisory authority.

[31 FR 6774, May 6, 1966, as amended at 43 FR 3707, Jan. 27, 1978; 51 FR 16315, May 2, 1986; 61 FR 20728, May 8, 1996]

### §21.4006 False or misleading statements.

(a) *Payments may not be based on false statements.* Except as provided in this section payments may not be authorized based on a claim where it is found that the school or any person has willfully submitted a false or misleading claim, or that the veteran or eligible person with the complicity of the school or other person has submitted such a claim. A complete report of the facts will be made to the State approving agency, and if in order to the Attorney General of the United States.

(Authority: 38 U.S.C. 3690)

(1) Where it is determined prior to payment that a certification or claim is false or misleading, payment will be authorized for only that portion of the claim to which entitlement is established on the basis of other evidence of record.

(2) When the Department of Veterans Affairs discovers that a certification or claim is false after it has released payment, the Department of Veterans Affairs will establish an overpayment for only that portion of the claim to which the claimant was not entitled.

(Authority: 38 U.S.C. 3680)

(b) *Effect of false statements on subsequent payments.* A claimant's false or misleading statements are not a bar to payments based on further training.

(Authority: 38 U.S.C. 3680)

(c) *Forfeiture.* The provisions of this section do not apply when forfeiture of all rights has been or may be declared under the provisions of §21.4007.

(Authority: 38 U.S.C. 6103)

[31 FR 6774, May 6, 1966, as amended at 38 FR 14932, June 7, 1973; 48 FR 37976, Aug. 22, 1983]

### §21.4007 Forfeiture.

The rights of a veteran or eligible person to receive educational assistance allowance or special training allowance are subject to forfeiture under the provisions of §§3.900, 3.901 (except paragraph (c)), 3.902 (except paragraph (c)), 3.903, 3.904, 3.905 and 19.2 of this chapter.

(Authority: 38 U.S.C. 6103, 6104 and 6105)

[54 FR 4286, Jan. 30, 1989]

### §21.4008 Prevention of overpayments.

When approval of a course may be withdrawn, and overpayments may exist or be created, the Department of Veterans Affairs may suspend further payments to veterans or eligible persons enrolled in the school until the question of withdrawing approval is resolved. See §21.4210.

(Authority: 38 U.S.C. 3690(b))

[48 FR 37976, Aug. 22, 1983, as amended at 63 FR 35831, July 1, 1998]

### §21.4009 Overpayments; waiver or recovery.

(a) *General.* (1) The amount of the overpayment of educational assistance allowance or special training allowance paid to a veteran or eligible person constitutes a liability of that veteran or eligible person.

(2) The amount of the overpayment of educational assistance allowance or special training allowance paid to a veteran or eligible person constitutes a liability of the education institution if the Department of Veterans Affairs determines that the overpayment was made as the result of willful or negligent:

(i) Failure of the educational institution to report, as required by §§21.4203 and 21.4204, discontinuance or interruption of a course by a veteran, reservist or eligible person, or

(ii) False certification by the educational institution.

(3) If it appears that the falsity or misrepresentation was deliberate, the Department of Veterans Affairs may not pursue administrative collection pending a determination whether the matter should be referred to the Department of Justice for possible civil or criminal action. However, the Department of Veterans Affairs may recover the amount of the overpayment from the educational institution by administrative collection procedure when the Department of Veterans Affairs determines the false certification or misrepresentation resulted from an administrative error or a misstatement of

fact and that no criminal or civil action is warranted.

(4) If the Department of Veterans Affairs recovers any part of the overpayment from the educational institution, it may reimburse the educational institution, if the Department of Veterans Affairs subsequently collects the overpayment from a veteran or eligible person. The reimbursement—

(i) Will be made when the total amount collected from the educational institution and from the veterans and eligible persons (less any amount applied toward marshal fees, court costs, administrative cost of collection and interest) exceeds the total amount for which the educational institution is liable, and

(ii) Will be equal to the excess.

(5) This paragraph does not preclude the imposition of any civil or criminal liability under this or any other law.

(b) *Reporting.* (1) If a school is required to make periodic or other certifications, the Department of Veterans Affairs may consider the following in determining whether a school is potentially liable for an overpayment:

(i) The school's failure to report, or to report timely facts which resulted in an overpayment, or

(ii) The school's submission of an incorrect certification as to fact.

(2) In either instance the Department of Veterans Affairs will consider other pertinent factors such as:

(i) Allowing for occasional clerical error or occasional administrative error:

(ii) The school's past reliability in reporting;

(iii) The adequacy of the school's reporting system; and

(iv) The extent of noncompliance with reporting requirements.

(Authority: 38 U.S.C. 3685)

(c) *Committee on school liability.* Each field station having jurisdiction over schools with courses approved for training under Chapter 1606, Title 10 U.S.C., Chapters 30, 32, 34, 35 and/or 36, Title 38 U.S.C. shall establish a Committee on School Liability. The committee or a panel designated by the committee chairperson and drawn from the committee, is authorized to find whether a school is liable for an overpayment.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3034(a), 3241, 3685)

(d) *Initial determination.* The Adjudication Officer of the Department of Veterans Affairs facility of jurisdiction will determine whether there is evidence that would warrant a finding that the school is potentially liable for an overpayment. When the decision is in the affirmative, the Finance Officer of the Department of Veterans Affairs facility of jurisdiction will notify the school in writing of the Department of Veterans Affairs's intent to apply the liability provisions of paragraph (a) of this section. The notice will identify the students overpaid and will set out in each student's case the actions or omissions by the school which resulted in the finding that the school was potentially liable for the overpayment. The notice will also state that a determination of liability will be made on the basis of the evidence of record, unless additional evidence or a request for a hearing is received within 30 days of the date of receipt of such notice by the school.

(e) *Hearings.* A school is entitled to a hearing before a panel drawn from the Committee on School Liability before a decision is made as to whether it is liable for an overpayment. Every hearing will be preceded by a prehearing conference unless the conference is waived by the school. The Committee on School Liability will consider all evidence and testimony presented at the hearing.

(f) *Extent of liability.* Waiver of collection of an overpayment as to a veteran or eligible person will not relieve the school of liability for the overpayment. Recovery in whole or in part from the veteran or eligible person will limit such liability accordingly. If an overpayment has been recovered from the school and the veteran or eligible person subsequently repays the amount in whole or in part, the amount repaid will be reimbursed to the school.

(g) *Notice to school.* The school shall be notified in writing of the decision of the Committee on School Liability. If

the school is found liable for an overpayment, the school also will be notified of the right to appeal the decision to the Central Office School Liability Appeals Board within 60 days from the date of the letter to the school containing notice of the decision. The 60-day time limit may be extended to 90 days at the discretion of the chairperson of the Committee on School Liability. The appeal must be in writing setting forth fully the alleged errors of fact and law. If an appeal is not received within the 60-day time limit, the Committee decision is final.

(h) *Appeals.* An appeal will be forwarded to Central Office where it will be considered by the School Liability Appeals Board. The Board's decision will serve as authority for instituting collection proceedings, if appropriate, or for discontinuing collection proceedings instituted on the basis of the original decision of the Committee on School Liability in any case where the Board reverses a decision made by the Committee that the school is liable.

(i) *Review.* Review by the School Liability Appeals Board is limited to the issues raised by the school and shall be on the record and not de novo in character. The Board may affirm, modify or reverse a decision of the Committee on School Liability or may remand an appeal for further consideration by the appropriate Committee on School Liability. If new and material evidence is discovered while the School Liability Appeals Board is considering a case, the Board may remand the case to the appropriate Committee on School Liability.

(j) *Finality of decisions.* The School Liability Appeals Board has authority to act for the Secretary in deciding appeals concerning a school's liability for an overpayment. There is no right of additional administrative appeal of a decision of the School Liability Appeals Board.

[32 FR 4533, Mar. 25, 1967, as amended at 44 FR 15492, Mar. 14, 1979; 48 FR 37976, Aug. 22, 1983; 49 FR 35630, Sept. 11, 1984; 51 FR 16316, May 2, 1986; 61 FR 20728, May 8, 1996; 61 FR 26112, May 24, 1996; 62 FR 55760, Oct. 28, 1997]

GENERAL

### § 21.4020 Two or more programs.

(a) *Limit on training under two or more programs.* The aggregate period for which any person may receive assistance under two or more of the following laws may not exceed 48 months (or the part-time equivalent):

(1) Part VII or VIII, Veterans Regulations numbered 1(a), as amended:

(2) Title II of the Veterans' Readjustment Assistance Act of 1952;

(3) The War Orphans' Educational Assistance Act of 1956;

(4) 38 U.S.C. Chapters 30, 32, 34, 35 and 36 and the former Chapter 33;

(5) 10 U.S.C. Chapters 107 and 1606;

(6) Section 903 of the Department of Defense Authorization Act, 1981,

(7) The Hostage Relief Act of 1980, and

(8) The Omnibus Diplomatic Security and Antiterrorism Act of 1986.

(Authority: 38 U.S.C. 3695(a))

(b) *Limit on combining assistance received under Chapter 31 with assistance under another program.* No person may receive assistance under Chapter 31, Title 38 U.S.C. in combination with any provisions of law listed in paragraph (a) of this section in excess of 48 months (or the part-time equivalent) unless the Department of Veterans Affairs determines that additional months of benefits under Chapter 31 are necessary to accomplish the purpose of the veteran's rehabilitation program.

(Authority: 38 U.S.C. 3695(b))

[48 FR 37976, Aug. 22, 1983, as amended at 51 FR 16316, May 2, 1986; 57 FR 29800, July 7, 1992; 61 FR 20728, May 8, 1996]

### § 21.4022 Nonduplication—programs administered by VA.

A veteran or eligible person who is eligible for education or training benefits under more than one of the provisions of law listed in this paragraph based on his or her own service or based on the service of another person cannot receive such benefits concurrently. The individual must elect which benefit he or she will receive for the particular period or periods during which education or training is to be

pursued. Except for an election between 38 U.S.C. chapters 32 and 34 which is irrevocable once a check has been negotiated, the person may reelect at any time.

(a) 38 U.S.C. chapter 30,

(b) 38 U.S.C. chapter 31,

(c) 38 U.S.C. chapter 32,

(d) 38 U.S.C. chapter 34,

(e) 38 U.S.C. chapter 35,

(f) 10 U.S.C. chapter 1606,

(g) Section 903 of the Department of Defense Authorization Act, 1981

(h) The Hostage Relief Act of 1980, or

(i) The Omnibus Diplomatic Security and Antiterrorism Act of 1986.

(Authority: 38 U.S.C. 3681)

[34 FR 843, Jan. 18, 1969, as amended at 48 FR 37976, Aug. 22, 1983; 50 FR 27826, July 8, 1985; 51 FR 16316, May 2, 1986; 54 FR 33887, Aug. 17, 1989; 57 FR 29800, July 7, 1992; 61 FR 20728, May 8, 1996; 61 FR 26113, May 24, 1996]

PAYMENTS; EDUCATIONAL ASSISTANCE ALLOWANCE

## § 21.4131 Commencing dates.

VA will determine the commencing date of an award or increased award of educational assistance under this section. When more than one paragraph in this section applies, VA will award educational assistance using the latest of the applicable commencing dates.

(a) *Entrance or reentrance including change of program or educational institution: individual eligible under 38 U.S.C. chapter 32.* When an eligible veteran or servicemember enters or reenters into training (including a reentrance following a change of program or educational institution), the commencing date of his or her award of educational assistance will be determined as follows:

(1) If the award is the first award of educational assistance for the program of education the veteran or servicemember is pursuing, the commencing date of the award of educational assistance is the latest of:

(i) The date the educational institution certifies under paragraph (b) or (c) of this section;

(ii) One year before the date of claim as determined by § 21.1029(b);

(iii) The effective date of the approval of the course, or one year before the date VA receives the approval notice, whichever is later; or

(2) If the award is the second or subsequent award of educational assistance for the program of education the veteran or servicemember is pursuing, the effective date of the award of educational assistance is the later of—

(i) The date the educational institution certifies under paragraph (b) or (c) of this section; or

(ii) The effective date of the approval of the course, or one year before the date VA receives the approval notice, whichever is later.

(Authority: 38 U.S.C. 3672, 5103, 5110(b), 5113)

(b) *Certification by school—the course or subject leads to a standard college degree.* (1) When the student enrolls in a course offered by independent study, the commencing date of the award or increased award of educational assistance will be the date the student began pursuit of the course according to the regularly established practices of the educational institution.

(2) Except as provided in paragraphs (b)(3), (b)(4) and (b)(5) of this section when a student enrolls in a resident course or subject, the commencing date of the award or increased award of educational assistance will be the first scheduled date of classes for the term, quarter or semester in which the student is enrolled.

(3) When the student enrolls in a resident course or subject whose first scheduled class begins after the calendar week when, according to the school's academic calendar, classes are scheduled to commence for the term, quarter, or semester, the commencing date of the award or increased award of educational assistance allowance will be the actual date of the first class scheduled for that particular course or subject.

(4) When a student enrolls in a resident course or subject, the commencing date of the award will be the date the student reports to the school provided that—

(i) The published standards of the school require the student to register before reporting, and

(ii) The published standards of the school require the student to report no more than 14 days before the first

scheduled date of classes for the term, quarter or semester for which the student has registered, and no later than the first scheduled date of classes for the term, quarter or semester for which the student has registered.

(5) When the student enrolls in a resident course or subject and the first day of classes is more than 14 days after the date of registration, the commencing date of the award or the increased award of educational assistance will be the first day of classes.

(Authority: 38 U.S.C. 3481(a), 3680(a); Pub. L. 98–525)

(c) *Certification by school or establishment—course does not lead to a standard college degree.* (1) Residence school: See paragraph (b) of this section.

(2) Correspondence school: Date first lesson sent or date of affirmance whichever is later.

(3) Job training: First date of employment in training position.

(Authority: 38 U.S.C. 3481, 3687)

(d) *Entrance or reentrance including change of program or educational institution: individual eligible under 38 U.S.C. chapter 35.* When a person eligible to receive educational assistance under 38 U.S.C. chapter 35 enters or reenters into training (including a reentrance following a change of program or educational institution), the commencing date of his or her award of educational assistance will be determined as follows:

(1) If the award is the first award of educational assistance for the program of education the eligible person is pursuing, the commencing date of the award of educational assistance is the latest of:

(i) The beginning date of eligibility as determined by §21.3041(a) or (b) or by §21.3046(a) or (b), whichever is applicable;

(ii) One year before the date of claim as determined by §21.1029(b);

(iii) The date the educational institution certifies under paragraph (b) or (c) of this section;

(iv) The effective date of the approval of the course, or one year before the date VA receives the approval notice, whichever is later; or

(2) If the award is the second or subsequent award of educational assistance for that program, the effective date of the award of educational assistance is the later of—

(i) The date the educational institution certifies under paragraph (b) or (c) of this section; or

(ii) The effective date of the approval of the course, or one year before the date VA receives the approval notice, whichever is later.

(Authority: 38 U.S.C. 3014, 3023, 3034, 3672, 5103)

(e) [Reserved]

(f) *Liberalizing laws and Department of Veterans Affairs issues.* In accordance with facts found, but not earlier than the effective date of the act or administrative issue.

(g) *Correction of military records.* Eligibility of a veteran or eligible person may arise as the result of correction or modification of military records under 10 U.S.C. 1552, or a change, correction or modification of a discharge or dismissal under 10 U.S.C. 1553, or other competent military authority. In these cases the commencing date of educational assistance allowance will be in accordance with the facts found, but not earlier than the date the change, correction or modification was made by the service department.

(Authority: 38 U.S.C. 3462(b), 3501(d))

(h) *Individuals in a penal institution.* If a veteran or eligible person is paid a reduced rate of educational assistance or no educational assistance under §21.3132 (a) or (b) or §21.5139, the rate will be increased or benefits will commence effective the earlier of the following dates:

(1) The date the tuition and fees are no longer being paid under another Federal program, or a State or local program, or

(2) The date of the release from the prison or jail.

(Authority: 38 U.S.C. 3482(g), 3532(e))

(i) *Fugitive felons.* An award of educational assistance allowance to an otherwise eligible veteran or person

will begin effective the date the warrant for the arrest of the felon is cleared by—

(1) Arrest;

(2) Surrendering to the issuing authority;

(3) Dismissal; or

(4) Court documents (dated after the warrant for the arrest of the felon) showing the individual is no longer a fugitive.

(Authority: 38 U.S.C. 5313B)

(j) [Reserved]

[31 FR 6774, May 6, 1966, as amended at 39 FR 43220, Dec. 11, 1974; 41 FR 47929, Nov. 1, 1976; 46 FR 62060, Dec. 22, 1981; 48 FR 37977 and 37978, Aug. 22, 1983; 49 FR 5113, Feb. 10, 1984; 50 FR 48581, Nov. 26, 1985; 51 FR 16318, May 2, 1986; 54 FR 28677, July 7, 1989; 57 FR 40614, Sept. 4, 1992; 61 FR 6782, Feb. 22, 1996; 61 FR 26113, May 24, 1996; 64 FR 23772, May 4, 1999; 66 FR 38938, July 26, 2001; 70 FR 25786, May 16, 2005]

### § 21.4135 Discontinuance dates.

The effective date of reduction or discontinuance of educational assistance allowance will be as specified in this section. If more than one type of reduction or discontinuance is involved, the earliest date will control.

(a) *Death of veteran or eligible person.* (1) If the veteran or eligible person receives an advance payment pursuant to 38 U.S.C. 3680(d) and dies before the period covered by the advance payment ends, the discontinuance date of educational assistance shall be the last date of the period covered by the advance payment.

(2) In all other cases if the veteran or eligible person dies while pursuing a program of education, the discontinuance date of educational assistance shall be the last date of attendance.

(Authority: 38 U.S.C. 3680)

(b) *Election to receive educational assistance under the Montgomery GI Bill—Active Duty.* If a veteran makes a valid election, as provided in § 21.7045(d), to receive educational assistance under the Montgomery GI Bill—Active Duty in lieu of educational assistance under the Post-Vietnam Era Veterans' Educational Assistance Program, the discontinuance date of educational assistance under the Post-Vietnam Era Veterans' Educational Assistance Program shall be the date on which the election was made pursuant to procedures described in § 21.7045(d)(2).

(Authority: 38 U.S.C. 3018C(c)(1))

(c)–(d) [Reserved]

(e) *Course discontinued; course interrupted; course terminated; course not satisfactorily completed or withdrawn from.* (1) If the individual receives all nonpunitive grades, or withdraws from all courses other than because of being ordered to active duty, and no mitigating circumstances are found, VA will terminate the individual's educational assistance allowance effective the first date of the term in which the withdrawal occurs.

(2) If the individual withdraws from all other courses other than courses in paragraph (e)(3) of this section and with mitigating circumstances, or withdraws from all courses such that a punitive grade is or will be assigned for those courses:

(i) Residence training: Last date of attendance.

(ii) Independent study: Official date of change in status under the practices of the institution.

(3) If the individual withdraws from correspondence, flight, farm cooperative, cooperative or job training, benefits will be terminated effective:

(i) Correspondence training: Date last lesson is serviced.

(ii) Flight training: Date of last instruction.

(iii) Job training: Date of last training.

(iv) Farm cooperative training: Date of last class attendance.

(v) Cooperative training: Date of last training.

(Authority: 38 U.S.C. 3680(a))

(f) *Discontinued by VA (§§ 21.4215, 21.4216).* If VA discontinues payments of educational assistance as provided by §§ 21.4215(d) and 21.4216, the effective date of discontinuance will be as follows:

(1) The date on which payments first were suspended by the Director of a VA facility as provided in § 21.4210, if the discontinuance were preceded by such a suspension.

(2) End of the month in which the decision to discontinue is effective pursuant to §21.4215(d), if the Director of a VA facility did not suspend payments prior to the discontinuance.

(Authority: 38 U.S.C. 3690)

(g) *Unsatisfactory progress, conduct or attendance §21.4277.* The date the veteran's or eligible person's enrollment is discontinued by the school or the date determined under §21.4277, whichever is earlier.

(Authority: 38 U.S.C. 3474, 3524)

(h) *Required certifications not received after certification of enrollment* (*§§21.4203 and 21.4204*). (1) If required certification of attendance of a veteran or eligible person enrolled in a course not leading to a standard college degree is not timely received, payments will be terminated date of last certification. If certification is later received, adjustment will be made based on facts found.

(2) If verification of enrollment and certificate of delivery of the check is not received within 60 days, in the case of an advance payment, the actual facts will be determined and adjustment made, if required, on the basis of facts found. If student failed to enroll, termination will be effective the beginning date of the enrollment period.

(i) *False or misleading statements.* See §21.4006.

(j) *Disapproval by State approving agency (§21.4259(a)).* If a State approving agency disapproves a course, the date of discontinuance of payments to those receiving educational assistance while enrolled in the course will be as follows:

(1) The date on which payments first were suspended by the Director of a VA facility as provided in §21.4210, if disapproval were preceded by such a suspension.

(2) End of the month in which disapproval is effective or notice of disapproval is received in the Department of Veterans Affairs, whichever is later, provided that the Director of a Department of Veterans Affairs facility did not suspend payments prior to the disapproval.

(Authority: 38 U.S.C. 3672(a), 3690)

(k) *Disapproval by Department of Veterans Affairs (§§21.4215, 21.4259(c)).* If VA disapproves a course, the date of discontinuance of payments to those receiving educational assistance while enrolled in the course will be as follows:

(1) Date on which payments first were suspended by the Director of a VA facility as provided in §21.4210, if disapproval were preceded by such a suspension.

(2) End of the month in which disapproval occurred, provided that the Director of a Department of Veterans Affairs facility did not suspend payments prior to the disapproval.

(Authority: 38 U.S.C. 3671(b), 3672(a), 3690)

(l) *Conflicting interests* (*not waived*) (*§21.4005*). Thirty days after date of letter notifying veteran or eligible person, unless terminated earlier for other reason.

(m) *Incarceration in prison or penal institution for conviction of a felony.* (1) The provisions of this paragraph apply to a veteran or eligible person whose educational assistance must be discontinued or who becomes restricted to payment of educational assistance allowance at a reduced rate under §21.3132(a) or (b) or §21.5139.

(2) The reduced rate or discontinuance will be effective the latest of the following dates.

(i) The first day on which all or part of the veteran's or eligible person's tuition and fees were paid by a Federal, State or local program,

(ii) The date the veteran or eligible person is incarcerated in prison or penal institution, or

(iii) The commencing date of the award as determined by §21.4131.

(Authority: 38 U.S.C. 3482(g), 3532(e))

(n) *Fugitive felons: veterans eligible under 38 U.S.C. chapter 32.* VA will not award educational assistance allowance to an otherwise eligible veteran for any period after December 26, 2001, during which the veteran is a fugitive felon. The date of discontinuance of an award of educational assistance allowance to a veteran who is a fugitive felon is the later of—

(1) The date of the warrant for the arrest of the felon; or

(2) December 27, 2001.

(Authority: 38 U.S.C. 5313B)

(o) [Reserved]

(p) *Error; payee's or administrative.* (1) Effective date of award or day preceding act, whichever is later, but not prior to the date entitlement ceased, on an erroneous award based on an act of commission or omission by a payee or with his or her knowledge.

(2) Date of last payment on an erroneous award based solely on administrative error by VA or error in judgment by VA.

(Authority: 38 U.S.C. 5112(b)(10) and 5113)

(q) *Fraud; forfeiture resulting* (§ *21.4007*). Beginning date of award or day preceding date of fraudulent act whichever is later.

(r) *Treasonable acts or subversive activities; forfeiture* (§ *21.4007*). Beginning date of award or date preceding date of commission of treasonable act or subversive activities for which convicted, whichever is later.

(s) *Reduction in rate of pursuit of course (§ 21.4270).* (1) VA will reduce an individual's educational assistance allowance effective the first date of the term in which the individual reduces training by withdrawing from part of a course, if the reduction occurs at the beginning of the term.

(2) VA will reduce an individual's educational assistance allowance effective the earlier of the end of the month or end of the term in which an individual reduces training by withdrawing from part of a course when:

(i) The reduction does not occur at the beginning of the term;

(ii) The individual received a lump-sum payment for the quarter, semester, term or other enrollment period during which he or she reduced training; and

(iii) There are mitigating circumstances, or the individual receives a punitive grade for the portion of the course from which he or she withdrew.

(3) VA will reduce an individual's educational assistance allowance effective the date on which an individual reduces training when:

(i) The reduction does not occur at the beginning of the term;

(ii) The individual did not receive a lump-sum payment for the quarter, semester, term or other enrollment period during which he or she reduced training; and

(iii) There are mitigating circumstances, or the individual receives a punitive grade for the portion of the course from which he or she withdrew.

(4) If the individual reduces training by withdrawing from a part of a course and the withdrawal does not occur because the individual was ordered to active duty; there are no mitigating circumstances; and the individual receives a nonpunitive grade from that portion of the course from which he or she withdrew; VA will reduce the individual's educational assistance effective the later of the following:

(i) The first date of enrollment of the term in which the reduction occurs; or

(ii) December 1, 1976. See paragraphs (e) and (w) of this section also.

(5) An individual who enrolls in several subjects and reduces his or her rate of pursuit by completing one or more of them while continuing training in others, may receive an interval payment based on the subjects completed, if the requirements of § 21.4138(f) of this part are met. If those requirements are not met, VA will reduce the individual's educational assistance allowance effective the date the subject or subjects were completed.

(Authority: 38 U.S.C. 5113, 3680)

(t) *Change in law or Department of Veterans Affairs issue, or interpretation.* See § 3.114(b) of this chapter.

(u) *Except as otherwise provided.* On basis of facts found.

(v) [Reserved]

(w) *Nonpunitive grade assigned without a withdrawal from courses.* (1) If an individual receives a nonpunitive grade for a particular course for any reason other than a withdrawal from it, VA will reduce the individual's educational assistance allowance effective the last date of attendance when mitigating circumstances are found.

(2) If an individual receives a nonpunitive grade in a particular course for any reason other than a withdrawal from it, and there are no mitigating circumstances, VA will reduce his or

her educational assistance effective the later of the following:

(i) The first date of enrollment for the term in which the grade applies, or

(ii) December 1, 1976. See paragraphs (e) and (s) of this section.

(Authority: 38 U.S.C. 3680(a)(4))

(x) *Independent study course loses accreditation.* Except as otherwise provided in §21.4252(g), if the veteran or eligible person is enrolled in a course offered in whole or in part by independent study, and the course loses its accreditation (or the educational institution offering the course loses its accreditation), the date of reduction or discontinuance will be the effective date of the withdrawal of accreditation by the accrediting agency.

(Authority: 38 U.S.C. 3672, 3676, 3680A(a))

(y)–(aa) [Reserved]

CROSS REFERENCE: *Special restorative training.* See §21.3332.

[31 FR 6774, May 6, 1966]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §21.4135, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

### §21.4136 Withdrawals or nonpunitive grades may result in nonpayment.

(a) *General.* VA will not pay benefits to an individual for a course from which the individual withdraws or receives a nonpunitive grade which is not used in computing the requirements for graduation unless:

(1) The individual withdraws because he or she is ordered to active duty; or

(2) All of the following criteria are met:

(i) There are mitigating circumstances;

(ii) The individual submits a description of the circumstances in writing to VA either within one year from the date VA notifies the individual that he or she must submit the mitigating circumstances or at a later date if the individual is able to show good cause why the one-year time limit should be extended to the date on which he or she submitted the description of the mitigating circumstances; and

(iii) The individual submits evidence supporting the existence of mitigating circumstances within one year of the date that evidence is requested by VA, or at a later date if the individual is able to show good cause why the one-year time limit should be extended to the date on which he or she submitted the evidence supporting the existence of mitigating circumstances.

(Authority: 38 U.S.C. 3680(a))

(b) *Representative mitigating circumstances.* The following circumstances, which are not all inclusive, are representative of those that VA considers to be mitigating provided they prevent the individual from pursuing the program of education continuously:

(1) An illness of the individual;

(2) An illness or death in the individual's family;

(3) An unavoidable geographical transfer resulting from the individual's employment;

(4) An unavoidable change in the individual's conditions of employment;

(5) Immediate family or financial obligations beyond the control of the individual that require him or her to suspend pursuit of the program of education to obtain employment;

(6) Discontinuance of the course by the school;

(7) Unanticipated active duty for training;

(8) Unanticipated difficulties in caring for the individual's child or children.

(Authority: 38 U.S.C. 3680(a))

(c) *Failure to complete a course for the educationally disadvantaged.* If the individual fails to satisfactorily complete a course under 38 U.S.C. 3491(a) without fault, VA will consider the circumstances that caused the failure to be mitigating. This will be the case even if the circumstances were not so severe as to preclude continuous pursuit of a program of education.

(d) *Withdrawals after May 31, 1989.* In the first instance of a withdrawal after May 31, 1989, from a course or courses for which the individual received educational assistance under 38 U.S.C.

chapter 32, VA will consider that mitigating circumstances exist with respect to courses totaling not more than six semester hours or the equivalent, and paragraphs (a)(2)(ii) and (a)(2)(iii) of this section will not apply.

(Authority: 38 U.S.C. 3680(a)(3))

(e) *Withdrawals during a drop-add period.* If the individual withdraws from a course during a drop-add period, VA will consider the circumstances that caused the withdrawal to be mitigating, and paragraphs (a)(2)(ii) and (a)(2)(iii) of this section will not apply.

(Authority: 38 U.S.C. 3680(a))

[31 FR 8292, June 14, 1966]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 21.4136, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

## § 21.4138 Certifications and release of payments.

(a) *Advance payments.* (1) VA will make payments of educational assistance in advance when:

(i) The veteran, servicemember, reservist, or eligible person has specifically requested such a payment;

(ii) The student is enrolled for half time or more;

(iii) The educational institution at which the veteran, servicemember, reservist, or eligible person is accepted or enrolled has agreed to and can satisfactorily carry out the provisions of 38 U.S.C. 3680(d)(4)(B) and (C) and (5) pertaining to receipt, delivery, or return of checks and certifications of delivery and enrollment;

(iv) The Director of the VA field facility of jurisdiction has not acted under paragraph (a)(4) of this section to prevent advance payments being made to the veteran's, servicemember's, reservist's, or eligible person's educational institution;

(v) There is no evidence in the veteran's, servicemember's, reservist's, or eligible person's claim file showing that he or she is not eligible for an advance payment;

(vi) The period for which the veteran, servicemember, reservist, or eligible person has requested a payment either—

(A) Is preceded by an interval of nonpayment of 30 days or more; or

(B) Is the beginning of a school year that is preceded by a period of nonpayment of 30 days or more; and

(vii) The educational institution or the veteran, servicemember, reservist, or eligible person has submitted the certification required by § 21.7151.

(2) The amount of the advance payment to a veteran, reservist, or eligible person is the educational assistance for the month or fraction thereof in which the term or course will begin plus the educational assistance for the following month. The amount of the advance payment to a servicemember is the amount payable for the entire term, quarter, or semester, as applicable.

(3) VA will mail advance payments to the educational institution for delivery to the veteran, servicemember, reservist, or eligible person. The educational institution will not deliver the advance payment check more than 30 days in advance of the first date of the period for which VA makes the advance payment.

(4) The Director of the VA field station of jurisdiction may direct that advance payments not be made to individuals attending an educational institution if:

(i) The educational institution demonstrates an inability to comply with the requirements of paragraph (a)(3) of this section;

(ii) The educational institution fails to provide adequately for the safekeeping of the advance payment checks before delivery to the veteran, servicemember, reservist, or eligible person or return to VA; or

(iii) The Director determines, based on compelling evidence, that the educational institution has demonstrated its inability to discharge its responsibilities under the advance payment program.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034, 3680(d))

(b) *Lump-sum payments.* A lump-sum payment is a payment of all educational assistance due for an entire quarter, semester, or term. VA will make a lump-sum payment to:

(1) A veteran or servicemember pursuing a program of education at less than the half-time rate under 38 U.S.C. chapter 30;

(2) A servicemember pursuing a program of education at the half-time rate or greater under 38 U.S.C. chapter 30, provided that VA did not make an advance payment to the servicemember for the term for which a lump-sum payment would otherwise be due; and

(3) An eligible person pursuing a program of education at less than the half-time rate under 38 U.S.C. chapter 35.

(Authority: 38 U.S.C. 3034(c), 3680(f))

(c)–(d) [Reserved]

(e) *Other payments.* An individual must be pursuing a program of education in order to receive payments. To ensure that this is the case the provisions of this paragraph must be met.

(1) VA will pay educational assistance to an individual (other than one pursuing a program of apprenticeship or other on-job training or a correspondence course, one who qualifies for an advance payment or one who qualifies for a lump-sum payment) only after—

(i) The educational institution has certified his or her enrollment as provided in §21.4203; and

(ii) VA has received from the individual a verification of the individual's enrollment or verification of pursuit and continued enrollment, as appropriate. Generally, this verification will be required monthly, resulting in monthly payments.

(2) VA will pay educational assistance to an individual pursuing a program of apprenticeship or other on-job training only after—

(i) The training establishment has certified his or her enrollment in the training program as provided in §21.4203; and

(ii) VA has received from the individual and the training establishment a certification of hours worked.

(3) VA will pay educational assistance to an individual who is pursuing a correspondence course only after—

(i) The educational institution has certified his or her enrollment;

(ii) VA has received from the individual a certification as to the number of lessons completed and serviced by the educational institution; and

(iii) VA has received from the educational institution a certification or an endorsement on the individual's certificate, as to the number of lessons completed by the individual and serviced by the educational institution.

(Authority: 38 U.S.C. 5113, 3680(b), 3680(g))

(f) *Payment for intervals between terms.* A certification such as described by this section may result in payment for intervals between individual terms, quarters or semesters. In determining whether a veteran or eligible person will be paid for such an interval the Department of Veterans Affairs will first determine whether any of the provisions of paragraph (f)(1) of this section apply. If any do, the Department of Veterans Affairs will make no payment for the interval. If none of the provisions of paragraph (f)(1) of this section apply the Department of Veterans Affairs will examine the appropriate provisions of paragraphs (f)(2) and (3) of this section to determine if payments may be made for the interval.

(1) The Department of Veterans Affairs will make no payment for an interval described in paragraph (f)(2) of this section if:

(i) The student is training at less than the half-time rate on the last date of his or her training during the term, quarter, semester or summer term preceding the interval;

(ii) The student is on active duty;

(iii) The student requests, prior to authorization of an award or prior to negotiating the check, that no benefits be paid for the interval period;

(iv) The student will exhaust his or her entitlement by receipt of such payment, and it is to the advantage of the individual not to receive payment;

(v) The interval occurs between school years at a school which is not organized on a term, quarter or semester basis;

(vi) The veteran or eligible person withdraws from all his or her courses in the term, quarter, or semester or summer session preceding the interval, or discontinues training before the scheduled start of an interval in a

school not organized on a term, quarter or semester basis; or

(vii) The veteran receives an accelerated payment for the term, quarter, semester, or summer session preceding the interval.

(2) If none of the provisions of paragraph (f)(1) of this section apply, the Department of Veterans Affairs will use the provisions of this paragraph and paragraph (f)(3) of this section to determine if an interval payment should be made. In determining the length of a summer term the Department of Veterans Affairs will disregard a fraction of a week consisting of 3 days or less, and will consider 4 days or more to be a full week.

(i) The Director of the VA facility of jurisdiction may authorize payment to be made for breaks, including intervals between terms, within a certified period of enrollment during which the school is closed under an established policy based upon an order of the President or due to an emergency situation.

(A) If the Director has authorized payment due to an emergency school closing resulting from a strike by the faculty or staff of the school, and the closing lasts more than 30 days, the Director, Education Service will decide if payments may be continued. The decision will be based on a full assessment of the strike situation. Further payments will not be authorized if in his or her judgment the school closing will not be temporary.

(B) A school which disagrees with a decision made under this paragraph by a Director of a VA facility, has 1 year from the date of the letter notifying the school of the decision to request that the decision be reviewed. The request must be submitted in writing to the Director of the VA facility where the decision was made. The Director, Education Service shall review the evidence of record and any other pertinent evidence the school may wish to submit. The Director, Education Service has the authority either to affirm or reverse a decision of the Director of a VA facility.

(Authority: 38 U.S.C. 3680(a))

(ii) If a veteran or eligible person transfers from one approved educational institution for the purpose of enrolling in and pursuing a similar course at the second institution, the Department of Veterans Affairs may make payments for any intervals which do not exceed 30 days and which occur between consecutive terms, quarters or semesters. If the veteran or eligible person does not enroll in a similar course at the second institution, the Department of Veterans Affairs shall not make payments for the interval.

(iii) If the veteran or eligible person remains enrolled at the same educational institution, VA may make payment for an interval which does not exceed 8 weeks and which occurs between:

(A) Semesters or quarters as defined in § 21.4200(b);

(B) A semester or quarter and a term that is at least as long as the interval;

(C) A semester or quarter and a summer term that is at least as long as the interval;

(D) Consecutive terms (other than semesters or quarters as defined in § 21.4200(b)) provided that both terms are at least as long as the interval; or

(E) A term and a summer term provided that both the term and the summer term are at least as long as the interval.

(iv) If the veteran or eligible person remains enrolled at the same educational institution, VA may make payment for an interval which does not exceed 30 days and which occurs between summer sessions within a summer term.

(Authority: 38 U.S.C. 3680)

(3) If a veteran is enrolled in overlapping enrollment periods whether before or after an interval (either at the same or different schools), the Department of Veterans Affairs will determine whether the veteran or eligible person is entitled to a payment during an interval as follows:

(i) The Department of Veterans Affairs will treat the ending date of each enrollment period as though it were the veteran's or eligible person's last date of training before the interval.

(ii) The Department of Veterans Affairs will treat the beginning date of each enrollment period as though it

were the veteran's or eligible person's first date of training after the interval.

(iii) The Department of Veterans Affairs will examine the interval payment which would be made to the veteran or eligible person on the basis of the various combinations of beginning and ending dates. The ending date and beginning date of the enrollment periods which will result in payment for the interval at the highest rate will be chosen as the start and finish of the interval for Department of Veterans Affairs measurement purposes.

(iv) Payment for the interval will be made at the rate determined in paragraph (f)(4)(iii) of this section. The Department of Veterans Affairs shall not reduce the rate as the result of training the veteran or eligible person may take during the interval, but it shall increase the rate if warranted by such training.

(Authority: 38 U.S.C. 3680(a))

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0604)

[43 FR 35295, Aug. 9, 1978, as amended at 44 FR 62497, Oct. 31, 1979; 46 FR 20673, Apr. 7, 1981; 48 FR 37982, Aug. 22, 1983; 54 FR 33888, Aug. 17, 1989; 57 FR 24367, June 9, 1992; 64 FR 52651, Sept. 30, 1999; 68 FR 34328, June 9, 2003; 68 FR 35178, June 12, 2003]

### §21.4145 Work-study allowance.

(a) *Eligibility*. (1) A veteran or reservist pursuing a program of education under either 38 U.S.C. chapter 30 or 32 or 10 U.S.C. chapter 1606 at a rate of three-quarter time or full time is eligible to receive a work-study allowance.

(2) An eligible person is eligible to receive a work-study allowance when-

(i) The eligible person is pursuing a program of education under 38 U.S.C. chapter 35 on at least a three-quarter-time basis;

(ii) The eligible person is pursuing a program of education in a State; and

(iii) The eligible person is not pursuing a program of special restorative training.

(Authority: 10 U.S.C. 16136; 38 U.S.C. 3034, 3241, 3485, 3537)

(b) *Selection criteria*. Whenever feasible, the Department of Veterans Affairs will give priority in selection for this allowance to veterans with service-connected disabilities rated at 30 percent or more. The Department of Veterans Affairs shall consider the following additional selection criteria:

(1) Need of the veteran, reservist, or eligible person to augment his or her educational assistance allowance;

(2) Availability to the veteran, reservist, or eligible person of transportation to the place where his or her services are to be performed;

(3) Motivation of the veteran, reservist, or eligible person; and

(4) Compatibility of the work assignment to the veteran's, reservist's, or eligible person's physical condition.

(c) *Utilization*. Work-study services may be utilized in connection with:

(1) Outreach services program as carried out under the supervision of a Department of Veterans Affairs employee;

(2) Preparation and processing of necessary papers and other documents at educational institutions or regional offices or facilities of the Department of Veterans Affairs;

(3) Hospital and domiciliary care and medical treatment at VA facilities;

(4) For a reservist training under 10 U.S.C. chapter 1606, activities relating to the administration of 10 U.S.C. chapter 1606 at Department of Defense facilities, Coast Guard facilities, or National Guard facilities; and

(5) Any other appropriate activity of VA.

(Authority: 10 U.S.C. 16136; 38 U.S.C. 3034, 3241, 3485, 3537)

(d) *Rate of payment*. In return for the veteran's, reservist's, or eligible person's agreement to perform services for VA totaling not more than 25 hours times the number of weeks contained in an enrollment period, VA will pay an allowance in an amount equal to the higher of:

(1) The hourly minimum wage in effect under section 6(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)) times the number of hours the veteran, reservist, or eligible person has agreed to work; or

(2) The hourly minimum wage under comparable law of the State in which the services are to be performed times

the number of hours the veteran, reservist, or eligible person has agreed to work.

(Authority: 10 U.S.C. 16136; 38 U.S.C. 3034, 3241, 3485, 3537)

(e) *Payment in advance.* VA will pay in advance an amount equal to the lesser of the following:

(1) 40 percent of the total amount payable under the contract; or

(2) An amount equal to 50 times the applicable minimum hourly wage in effect on the date the contract is signed.

(Authority: 10 U.S.C. 16136; 38 U.S.C. 3034, 3241, 3485, 3537)

(f) *Veteran, reservist, or eligible person reduces rate of training.* In the event the veteran, reservist, or eligible person reduces his or her training to less than three-quarter-time before completing an agreement, the veteran, reservist, or eligible person, with the approval of the Director of the VA field station, or designee, may be permitted to complete the portions of an agreement in the same or immediately following term, quarter, or semester in which the veteran, reservist, or eligible person ceases to be a three-quarter-time student.

(Authority: 10 U.S.C. 16136; 38 U.S.C. 3034, 3241, 3485, 3537)

(g) *Veteran, reservist, or eligible person terminates training.* (1) If the veteran, reservist, or eligible person terminates all training before completing an agreement, the Director of the Department of Veterans Affairs facility or designee:

(i) May permit him or her to complete the portion of the agreement represented by the money the Department of Veterans Affairs has advanced to the veteran, reservist, or eligible person for which he or she has performed no services, but

(ii) Will not permit him or her to complete that portion of an agreement for which no advance has been made.

(2) The veteran, reservist, or eligible person must complete the portion of an agreement in the same or immediately following term, quarter or semester in which the veteran, reservist, or eligible person terminates training.

(h) *Indebtedness for unperformed service.* (1) If the veteran, reservist, or eligible person has received an advance for hours of unperformed service, and the Department of Veterans Affairs has evidence that he or she does not intend to perform that service, the advance:

(i) Will be a debt due the United States, and

(ii) Will be subject to recovery the same as any other debt due the United States.

(2) The amount of indebtedness for each hour of unperformed service shall equal the hourly wage that formed the basis of the contract.

(Authority: 38 U.S.C. 3485)

(i) *Survey.* The Department of Veterans Affairs will conduct an annual survey of its regional offices to determine the number of veterans, reservists, or eligible persons whose services can be utilized effectively.

(ii) [Reserved]

(Authority: 38 U.S.C. 3485)

[38 FR 12214, May 10, 1973, as amended at 48 FR 37983, Aug. 22, 1983; 61 FR 26113, May 24, 1996]

### § 21.4146 Assignments of benefits prohibited.

(a) *General.* Section 5301(a), Title 38 U.S.C., provides that payments of benefits due or to become due under the laws administered by the Department of Veterans Affairs shall not be assigned, except to the extent specifically authorized by law. No law specifically authorizes assignments of educational assistance allowances payable under 38 U.S.C. chapters 30, 32, 35, or 36, or 10 U.S.C. chapter 1606, and therefore none shall be made.

(b) *Designating an attorney-in-fact.* In any case where a payee of an educational assistance allowance has designated the address of an attorney-in-fact as the payee's address for the purpose of receiving his or her benefit check and has executed a power of attorney giving the attorney-in-fact authority to negotiate such benefit check, such action shall be deemed to be an assignment and is prohibited.

(c) *Arrangements amounting to an assignment.* Payments may be made to a

post office box address or a bank address only if the educational institution attests that it has not entered into an assignment agreement with the student, and is not the attorney-in-fact of the student with power to negotiate an educational assistance check on behalf of the student and is not otherwise able to control the proceeds of the benefits check. Such statements shall be subject to review and when determined to be false, may be cause for creation of an overpayment to the account of the veteran or other eligible person, for which the educational institution may be liable under the provisions of §21.4009.

(d) *Correspondence school addresses.* A request by a veteran or other eligible person to send the benefit check payable to him or her at an address which is an educational institution primarily engaged in correspondence course instruction will be presumed not to be the actual address of the veteran or other eligible person and will not be honored. Benefits checks will not be sent to the veteran or other eligible person in that event until a new address is provided designating the individual's mailing address.

(e) *Referral to Committee on Educational Allowances.* When the evidence of record indicates that an educational institution has violated the terms of this section, the matter will be referred to the facility Committee on Educational Allowances as provided in §§21.4210(g) and 21.4212.

(Authority: 38 U.S.C. 5301(a))

[43 FR 35296, Aug. 9, 1978, as amended at 44 FR 62498, Oct. 31, 1979; 61 FR 26114, May 24, 1996; 63 FR 35831, July 1, 1998]

STATE APPROVING AGENCIES

### §21.4150 Designation.

(a) The Chief Executive of each State is requested to create or designate a State department or agency as the *State approving agency* for his State, for the purpose of assuming the responsibilities delegated to the State under 38 U.S.C. chapter 36, or if the law of the State provides otherwise, to indicate the agency provided by such law (38 U.S.C. 3671(a)).

(b) The Chief Executive of each State will notify the Department of Veterans Affairs of any change in the designation of a State approving agency.

(c) The provisions of 38 U.S.C. chapter 36 and the sections in this part which refer to the State approving agency will, with respect to a State, be deemed to refer to VA when that State:

(1) Does not have and fails or declines to create or designate a State approving agency, or

(2) Fails to enter into an agreement as provided in §21.4153 of this part.

(Authority: 38 U.S.C. 3671(b)(1))

(d) Any function, power or duty otherwise required to be exercised by a State, or by an officer or agency of a State, will, with respect to the Republic of Philippines, be exercised by the station head.

(Authority: 38 U.S.C. 512(a), 3561(b))

(e) The Secretary shall act as State approving agency for programs of apprenticeship, the standards for which have been approved by the Secretary of Labor pursuant to section 50a of title 29 U.S.C. as a national apprenticeship program for operation in more than one State and the training establishment is a carrier directly engaged in interstate commerce which provides such training in more than one State.

(Authority: 38 U.S.C. 3672(c))

(f) Approval of a course of education offered by any agency or instrumentality of the Federal Government shall be under the authority of the Secretary.

(Authority: 38 U.S.C. 3672(b))

CROSS REFERENCE: *Approval of courses.* See §21.4250.

[31 FR 6774, May 6, 1966, as amended at 35 FR 9815, June 16, 1970; 37 FR 6679, Apr. 1, 1972; 54 FR 34987, Aug. 23, 1989; 54 FR 49756, Dec. 1, 1989]

### §21.4151 Cooperation.

(a) The Department of Veterans Affairs and the State approving agencies will take cognizance of the fact that definite duties, functions and responsibilities are conferred upon each of them. To assure that programs of education are administered effectively and

efficiently, the cooperation of the Department of Veterans Affairs and the State approving agencies is essential.

(Authority: 38 U.S.C. 3673(a))

(b) *State approving agency responsibilities.* State approving agencies are responsible for:

(1) Inspecting and supervising schools within the borders of their respective States;

(2) Determining those courses which may be approved for the enrollment of veterans and eligible persons;

(3) Ascertaining whether a school at all times complies with its established standards relating to the course or courses which have been approved; and

(4) Under an agreement with VA rendering services and obtaining information necessary for the Secretary's approval or disapproval under chapters 30 through 36, title 38 U.S.C. and chapters 107 and 1606, title 10 U.S.C., of courses of education offered by any agency or instrumentality of the Federal Government within the borders of their respective States.

(Authority: 38 U.S.C. 3672, 3673, 3674; Pub. L. 100–323)

(c) The Department of Veterans Affairs will furnish State approving agencies with copies of such Department of Veterans Affairs informational and instructional material as may aid them in carrying out the provisions of 38 U.S.C. chapter 36.

(Authority: 38 U.S.C. 3673(b))

[31 FR 6774, May 6, 1966, as amended at 37 FR 6679, Apr. 1, 1972; 54 FR 49756, Dec. 1, 1989; 61 FR 20728, May 8, 1996]

### § 21.4152 Control by agencies of the United States.

(a) *Control of educational institutions and State agencies generally prohibited.* No department, agency, or officer of the United States will exercise any supervision or control over any State approving agency or State educational agency, or any educational institution.

(Authority: 38 U.S.C. 3682; Pub. L. 100–323)

(b) *Authority retained by VA.* The provisions of paragraph (a) of this section do not restrict authority conferred on VA

(1) To define full-time training in certain courses.

(2) To determine whether overcharges were made by a school and to disapprove the school for enrollment of veterans or eligible persons not previously enrolled. See § 21.4210(d).

(3) To determine whether the State approving agencies under the terms of contract or reimbursement agreements are complying with the standards and provisions of the law.

(4) To examine the records and accounts of schools which are required to be made available for examination by duly authorized representatives of the Federal Government. See §§ 21.4209 and 21.4263.

(5) To disapprove schools or courses for reasons stated in the law and to approve schools or courses notwithstanding lack of State approval.

[31 FR 6774, May 6, 1966, as amended at 54 FR 49756, Dec. 1, 1989; 61 FR 29296, June 10, 1996; 63 FR 35831, July 1, 1998]

### § 21.4153 Reimbursement of expenses.

(a) *Expenses will be reimbursed under contract*—(1) *Scope of contracts.* (i) If a State or local agency requests payment for service contemplated by law, and submits information prescribed in paragraph (e) of this section, VA will negotiate a contract or agreement with the State or local agency to pay (subject to available funds and acceptable annual evaluations) reasonable and necessary expenses incurred by the State or local agency in—

(A) Determining the qualifications of educational institutions and training establishments to furnish programs of education to veterans and eligible persons,

(B) Supervising educational institutions and training establishments, and

(C) Furnishing any other services VA may request in connection with the law governing VA education benefits.

(ii) VA will take into account the results of annual evaluations carried out under § 21.4155 of this part when negotiating the terms and conditions of the contract or agreement.

(Authority: 38 U.S.C. 3674, 3674(a); Pub. L. 100–323)

(2) *Reimbursable supervision.* Supervision will consist of the services required:

(i) To determine that the programs are furnished in accordance with the law and with any other reasonable criteria as may be imposed by the State, and

(ii) To disapprove any programs which fail to meet the law and the established criteria.

(Authority: 38 U.S.C. 3674)

(b) *Reimbursement.* The Under Secretary for Benefits and the Director, Education Service, are authorized to enter into agreements necessary to fulfill the purpose of paragraph (a) of this section. See §21.4001(b).

(Authority: 38 U.S.C. 512(a))

(c) *Reimbursable expenses.* Reimbursement may be made from the funds provided in the existing contract with the State approving agency under the provisions of this section. No reimbursement may be authorized for expenses incurred by any individual who is not an employee of the State approving agency.

(1) *Salaries.* Salaries for which reimbursement may be authorized under a contract:

(i) Will not be in excess of the established rate of pay for other employees of the State with comparable or equivalent duties and responsibilities,

(ii) Will be limited to the actual salary expense incurred by the State, and

(iii) Will include the basic salary rate plus fringe benefits, such as social security, retirement, and health, accident, or life insurance, that are payable to all similarly circumstanced State employees.

(2) *Travel.* (i) Reimbursement will be made under the terms of the contract for travel of personnel engaged in activities in connection with the inspection, approval or supervision of educational institutions, including—

(A) Travel of personnel attending training sessions sponsored by VA and the State approving agencies.

(B) Expenses of attending out-of-State meetings and conferences only if the Director, Education Service, authorizes the travel.

(Authority: 38 U.S.C. 3674; Pub. L. 100–323)

(ii) Travel expenses for which reimbursement may be authorized under a contract will be limited to:

(A) Expenses allowable under applicable State laws or travel regulations of the State or agency;

(B) Expenses for travel actually performed by employees specified under the terms of the contract and;

(C) Either actual expenses for transportation, meals, lodging and local telephone calls, or the regular State or agency per diem allowance.

(iii) All claims for travel expenses payable under the terms of a contract must be supported by factual vouchers and all transportation allowances must be supported by detailed claims which can be checked against work assignments in the office of the State approving agency.

(Authority: 38 U.S.C. 3674)

(3) *Administrative expenses.* In determining the allowance for administrative expenses for which payment may be authorized, VA will apply the provisions of 38 U.S.C. 3674(b). In making that application, VA will determine reimbursable salary cost pursuant to paragraph (c)(1) of this section.

(Authority: 38 U.S.C. 3674(b))

(4) *Subcontracts.* The State approving agency may also be reimbursed for work performed by a subcontractor provided:

(i) The work has a direct relationship to the requirements of Chapter 1606 of Title 10 U.S.C. or Chapter 30, 32, 34, 35 or 36 of Title 38 U.S.C., and

(Authority: 10 U.S.C. 16136, 38 U.S.C. 3034, 3674)

(ii) The Contracting Officer has approved the subcontract in advance.

(Authority: 38 U.S.C. 3674; Pub. L. 94–502, Pub. 95–902)

(d) *Nonreimbursable expenses.* The Department of Veterans Affairs will not provide reimbursement under reimbursement contracts for:

(1) Expenditures other than salaries and travel of personnel required to perform the services specified in the contract and Department of Veterans Affairs regulations.

(2) Supplies, equipment, printing, postage, telephone services, rentals, and other miscellaneous items or a service furnished directly or indirectly.

(3) Except as provided in paragraph (c)(2) of this section, the salaries and travel of personnel while attending training sessions, or when they are engaged in activities other than those in connection with the inspection, approval, or supervision of educational institutions.

(4) The supervision of educational institutions which do not have veterans or eligible persons enrolled.

(5) Expenses incurred in the administration of an educational program which are costs properly chargeable as tuition costs, such as the development of course material or individual educational programs, teacher training or teacher improvement activities, expenses of coordinators, or administrative costs, such as those involving selection and employment of teachers. (This does not preclude reimbursement for expenses of the State agency incurred in the development of standards and criteria for the approval of courses under the law.)

(6) Expenses of a State approving agency for inspecting, approving or supervising courses when the agency is responsible for establishing, conducting or supervising those courses.

(7) Any expense for supervision or other services to be covered by contract which are already being reimbursed or paid from tuition funds under this law.

(e) *Agency operating plan.* A request by a State approving agency for reimbursement under the law will be subject to the requirements of 41 CFR 8–7.5101–8 as to ''Equal Opportunity''. The request will be accompanied by the proposed plan of operation and the specific duties and responsibilities of all personnel for which reimbursement of salaries and travel expense is required.

(1) The Department of Veterans Affairs will determine personnel requirements for which the Department of Veterans Affairs provides reimbursement on the basis of estimated workloads agreed upon between the Department of Veterans Affairs and the State agency. Agreements are subject to review and adjustment.

(2) Workloads will be determined upon three factors:

(i) Inspection and approval visits,

(ii) Supervisory visits, and

(iii) Special visits at the request of the Department of Veterans Affairs.

(f) *Contract compliance.* Reimbursement under each contract or agreement is conditioned upon compliance with the standards and provisions of the contract and the law. If the Contracting Officer determines that the State has failed to comply with the standards or provisions of the law or with terms of the reimbursement contract, he or she will withhold reimbursement for claimed expenses under the contract. If the State disagrees, the State may request the Contracting Officer to reconsider his or her decision or may initiate action under the Disputes clause of the contract. See 48 CFR 801.602.

(Authority: 38 U.S.C. 3674)

(g) *Contract disputes.* The State approving agency reimbursement contract is subject to the Contract Disputes Act of 1978. Disputes arising under, or relating to, the contract will be resolved in accordance with the disputes article of the contract and with appropriate procurement regulations.

(Authority: 41 U.S.C. 602)

[31 FR 6774, May 6, 1966, as amended at 40 FR 42880, Sept. 17, 1975; 43 FR 35296, Aug. 9, 1978; 44 FR 62498, Oct. 31, 1979; 48 FR 37983, Aug. 22, 1983; 51 FR 16316, May 2, 1986; 54 FR 49757, Dec. 1, 1989; 61 FR 20728, May 8, 1996; 61 FR 26114, May 24, 1996]

### § 21.4154 Report of activities.

(a) *State approving agencies must report their activities.* Each State approving agency entering into a contract or agreement under § 21.4153 of this part must submit a report of its activities to VA. The report may be submitted monthly or quarterly by the State approving agency as provided in the contract or agreement.

(Authority: 38 U.S.C. 3674; Pub. L. 100–323)

(b) *Content of the report.* The report:

(1) Shall be in the form prescribed by the Secretary;

(2) Shall detail the activities of the State approving agencies under the agreement or contract during the preceding month or quarter, as appropriate;

(3) May include, at the option of the State approving agency, a cumulative report of its activities from the beginning of the fiscal year to date;

(4) Shall describe the services performed and the determination made in supervising and ascertaining the qualifications of educational institutions in connection with the programs of the Department of Veterans Affairs; and

(5) Shall include other information as the Secretary may prescribe.

(Authority: 38 U.S.C. 3674)

(Approved by the Office of Management and Budget under control number 2900–0051)

[49 FR 26227, June 27, 1984, as amended at 54 FR 49757, Dec. 1, 1989; 57 FR 28087, June 24, 1992]

### §21.4155 Evaluations of State approving agency performance.

(a) *Annual evaluations required.* (1) VA shall conduct in conjunction with State approving agencies an annual evaluation of each State approving agency. The evaluation shall be based on standards developed by VA with State approving agencies. VA shall provide each State approving agency an opportunity to comment upon the evaluation.

(2) VA shall take into account the result of the annual evaluation of a State approving agency when negotiating the terms and conditions of a contract or agreement as provided in §21.4153(a) of this part.

(Authority: 38 U.S.C. 3674A(a); Pub. L. 100–323)

(b) *Development of a training curriculum.* (1) VA shall cooperate with State approving agencies in developing and implementing a uniform national curriculum, to the extent practicable, for—

(i) Training new employees of State approving agencies, and

(ii) Continuing the training of the employees of the State approving agencies.

(2) VA with the State approving agencies shall sponsor the training and continuation of training provided by this paragraph.

(Authority: 38 U.S.C. 3674A; Pub. L. 100–323)

(c) *Development, adoption and application of qualification and performance standards for employees of State approving agencies.* (1) VA shall:

(i) Develop with the State approving agencies prototype qualification and performance standards;

(ii) Prescribe those standards for State approving agency use in the development of qualification and performance standards for State approving agency personnel carrying out approval responsibilities under a contract or agreement as provided in §21.4153(a) of this part; and

(iii) Review the prototype qualification and performance standards with the State approving agencies no less frequently than once every five years.

(2) In developing and applying standards described in paragraph (d)(1) of this section, a State approving agency may take into consideration the State's merit system requirements and other local requirements and conditions. However, no State approving agency may develop, adopt or apply qualification or performance standards that do not meet the requirements of paragraph (d)(3) of this section.

(3) The qualification and performance standards adopted by the State approving agency shall describe a level of qualification and performance which shall equal or exceed the level of qualification and performance described in the prototype qualification and performance standards developed by VA with the State approving agencies. The State approving agency may amend or modify its adopted qualification and performance standards annually as circumstances may require.

(4) VA shall provide assistance in developing these standards to a State approving agency that requests it.

(5) After November 19, 1989, each State approving agency carrying out a contract or agreement with VA under §21.4153(a) shall:

(i) Apply qualification and performance standards based on the standards developed under this paragraph, and

(ii) Make available to any person, upon request, the criteria used to carry out its functions under a contract or agreement entered into under § 21.4153(a) of this part.

(6) A State approving agency may not apply these standards to any person employed by the State approving agency on May 20, 1988, as long as that person remains in the position in which the person was employed on that date.

(Authority: 38 U.S.C. 3674 A(b); Pub. L. 100–323)

[54 FR 49757, Dec. 1, 1989, as amended at 61 FR 29296, June 10, 1996]

SCHOOLS

### § 21.4200 Definitions.

(a) *School, educational institution, institution.* The terms *school, educational institution* and *institution* mean:

(1) A vocational school or business school;

(2) A junior college, teachers' college, college, normal school, professional school, university, or scientific or technical institution;

(3) A public or private elementary school or secondary school;

(4) A training establishment as defined in paragraph (c) of this section;

(5) Any entity during the period beginning on November 2, 1994, and ending on September 30, 1996, other than an institution of higher learning, that provides training for completion of a State-approved alternative teacher certification program; or

(Authority: 38 U.S.C. 3452)

(6) Any private entity that offers, either directly or indirectly under an agreement with another entity, a course or courses to fulfill requirements for the attainment of a license or certificate generally recognized as necessary to obtain, maintain, or advance in employment in a profession or vocation in a high technology occupation.

(Authority: 38 U.S.C. 3452, 3501(a)(6), 3689(d))

(b) *Divisions of the school year.* (1) *Ordinary School Year* is generally a period of 2 semesters or 3 quarters which is not less than 30 nor more than 39 weeks in total length.

(2) *Term,* any regularly established division of the ordinary school year under which the school operates.

(3) *Quarter,* a division of the ordinary school year, usually a period from 10 to 13 weeks long.

(4) *Semester,* a division of the ordinary school year, usually a period from 15 to 19 weeks long.

(5) *Summer term,* the whole of the period of instruction at a school which takes place between ordinary school years. A summer term may be divided into several summer sessions.

(Authority: 38 U.S.C. 3680(a))

(6) *Summer session,* any division of a summer term.

(Authority: 38 U.S.C. 3680(a))

(c) *Training establishment.* The term means any establishment providing apprentice or other training on-the-job, including those under the supervision of a college or university or any State department of education, or any State apprenticeship agency, or any State board of vocational education, or any joint apprenticeship committee, or the Bureau of Apprenticeship and Training established in accordance with 29 U.S.C. Chapter 4C, or any agency of the Federal Government authorized to supervise such training.

(Authority: 38 U.S.C. 3452(e), 3501(a)(9))

(d) *External degree.* This term means a standard college degree given by an accredited college or university based on satisfactory completion of a prescribed program of independent study. The program may require occasional attendance for a workshop or seminar and may include some regular residence course work.

(e) *Standard college degree.* The term means an associate or higher degree awarded by:

(1) An institution of higher learning that is accredited as a collegiate institution by a recognized regional or national accrediting agency; or

(2) An institution of higher learning that is a *candidate* for accreditation, as

that term is used by the regional or the national accrediting agencies; or

(3) An institution of higher learning upon completion of a course which is accredited by an agency recognized to accredit specialized degree-level programs.

(Authority: 38 U.S.C. 3452)

(f) *Undergraduate college degree.* The term means a college or university degree obtained through the pursuit of unit subjects which are below the graduate level. Included are associate degrees, bachelors' degrees and first professional degrees.

(g) *Standard class session.* The term *standard class session* means the time an educational institution schedules for class each week in a regular quarter or semester for one quarter or one semester hour of credit. It is not less than 1 hour (or one 50-minute period) of academic instruction, 2 hours (or two 50-minute periods) of laboratory instruction, or 3 hours (or three 50-minute periods) of workshop training.

(Authority: 38 U.S.C. 3688(c))

(h) *Institution of higher learning.* This term means:

(1) A college, university, or similar institution, including a technical or business school, offering postsecondary level academic instruction that leads to an associate or higher degree if the school is empowered by the appropriate State education authority under State law to grant an associate or higher degree.

(2) When there is no State law to authorize the granting of a degree, a school which:

(i) Is accredited for degree programs by a recognized accrediting agency, or

(ii) Is a recognized candidate for accreditation as a degree-granting school by one of the national or regional accrediting associations and has been licensed or chartered by the appropriate State authority as a degree-granting institution.

(3) A hospital offering medical-dental internships or residencies approved in accordance with §21.4265(a) without regard to whether the hospital grants a post-secondary degree.

(4) An educational institution which:

(i) Is not located in a State,

(ii) Offers a course leading to a standard college degree or the equivalent, and

(iii) Is recognized as an institution of higher learning by the secretary of education (or comparable official) of the country in which the educational institution is located.

(Authority: 38 U.S.C. 3452)

(i) *Audited course.* The term means any credit course which a student attends as a listener only with a prior understanding between school officials and the student that such attendance will not result in credit being granted toward graduation. See §21.4252(i).

(Authority: 38 U.S.C. 3680(a)(3))

(j) *Nonpunitive grade.* The term means any grade assigned for pursuit of a course, whether upon completion of the course or at the time of withdrawal from the course, which has the effect of excluding the course from any consideration in determining progress toward fulfillment of requirements for graduation. No credit toward the school's requirements for graduation is granted for such a grade, nor does the grade affect any other criteria for graduation by the policies of the school, such as a grade point average. Therefore, it has the same effect as an audited course. See §21.4135(e).

(k) *Punitive grade.* The term means a grade assigned for pursuit of a course which is used in determining the student's overall progress toward completion of the school's requirements for graduation. Unlike the nonpunitive grade, the punitive grade does affect the criteria to be met by the student for graduation, i.e., it is a factor in computing the student's grade average or grade point average, for example. For this reason it is not the same as an audited course, since it does have an effect upon the student's ability to meet the school's criteria for graduation. See §21.4135(e).

(l) *Drop-add period.* The term means a reasonably brief period at the beginning of a term, not to exceed 30 days, officially designated by a school for unrestricted enrollment changes by students.

(Authority: 38 U.S.C. 3680(a)(4))

(m) *Normal commuting distance.* Two locations that are within 55 miles of each other are within normal commuting distance. Furthermore, a branch, extension or additional facility of a school located more than 55 miles from the school's main campus or parent facility will be considered within normal commuting distance only if:

(1) School records show that, prior to the establishment of the additional teaching site, at least 20 students or 5 percent of the enrollment, whichever is the lesser, on the main campus or parent facility were regularly commuting from the area where the additional teaching site is located; or

(2) Other comparable evidence clearly shows that students commute regularly between the two locations.

(Authority: 38 U.S.C. 3689(c))

(n) *Enrollment.* This term means the state of being on that roll, or file of a school which contains the names of active students.

(o) *Pursuit of a program of education.* (1) This term means to work, while enrolled, toward the objective of a program of education. This work must be in accordance with approved institution policy and regulations and applicable criteria of Title 38 U.S.C.; must be necessary to reach the program's objective; and must be accomplished through:

(i) Resident courses,

(ii) Independent study courses,

(iii) Correspondence courses,

(iv) An apprenticeship or other on-the-job training program,

(v) Flight courses,

(vi) A farm cooperative course,

(vii) A cooperative course, or

(viii) A graduate program of research in absentia.

(2) The Department of Veterans Affairs will consider a veteran or eligible person who qualifies under § 21.4138 for payment during an interval or school closing, or who qualifies under § 21.4205 for payment during a holiday vacation to be in pursuit of a program of education during the interval, school closing or holiday vacation.

(p) *Enrollment period.* (1) This term means an interval of time during which a veteran or eligible person:

(i) Is enrolled in an educational institution; and

(ii) Is pursuing his or her program of education.

(2) This term applies to each unit course or subject in the veteran's or eligible person's program of education.

(q) *Attendance.* This term means the presence of a veteran or eligible person:

(1) In the class where the approved course is being taught in which he or she is enrolled;

(2) At a training establishment; or

(3) Any other place of instruction, training or study designated by the educational institution or training establishment where the veteran or eligible person is enrolled and is pursuing a program of education.

(Authority: 38 U.S.C. 3680(g))

(r) *In residence on a standard quarter- or semester-hour basis.* This term means study at a site or campus of a college or university, or off-campus at an official resident center, requiring pursuit of regularly scheduled weekly class instruction at the rate of one standard class session per week throughout a standard quarter or semester for one quarter- or one semester-hour credit.

(Authority: 38 U.S.C. 3688(c))

(s) *Deficiency course.* This term means any secondary level course or subject not previously completed satisfactorily which is specifically required for pursuit of a post-secondary program of education.

(t) *Remedial course.* This term means a special course designed to overcome a deficiency at the elementary or secondary level in a particular area of study, or a handicap, such as in speech.

(u) *Refresher course.* This term means a course at the elementary or secondary level to review or update material previously covered in a course that has been satisfactorily completed.

(Authority: 38 U.S.C. 3491(a)(2))

(v) *Reservist.* The term *reservist* means a member of the Selected Reserve of the Ready Reserve of any of the reserve components (including the Army National Guard of the United States and the Air National Guard of the United

States) of the Armed Forces who is eligible to receive educational assistance under 38 U.S.C. chapter 30 or 10 U.S.C. chapter 1606.

(Authority: 38 U.S.C. 3002)

(w) *Alternative teacher certification program.* The term *alternative teacher certification program,* for the purposes of determining whether an entity offering such a program is a school, educational institution, or institution as defined in paragraph (a)(5) of this section, means a program leading to a teacher's certificate that allows individuals with a bachelor's degree or graduate degree to obtain teacher certification without enrolling in an institution of higher learning.

(Authority: 38 U.S.C. 3452(c))

(x) *State.* The term *State* has the same meaning as provided in §3.1(i) of this chapter.

(Authority: 38 U.S.C. 101(20))

(y) *Pilot certificate.* A *pilot certificate* is a pilot certificate issued by the Federal Aviation Administration. The term means a pilot's license as that term is used in 10 U.S.C. chapter 1606 and 38 U.S.C. chapters 30 and 32.

(Authority: 10 U.S.C. 16136(c); 38 U.S.C. 3034(d), 3241(b))

(z) *Proprietary educational institution.* The term *proprietary educational institution* (including a proprietary profit or proprietary nonprofit educational institution) means an educational institution that:

(1) Is not a public educational institution;

(2) Is in a State; and

(3) Is legally authorized to offer a program of education in the State where the educational institution is physically located.

(Authority: 38 U.S.C. 3680A(e))

(aa) *High technology industry:* The term *high technology industry* includes the following industries:

(1) Biotechnology;

(2) Life science technologies;

(3) Opto-electronics;

(4) Computers and telecommunications;

(5) Electronics;

(6) Computer-integrated manufacturing;

(7) Material design;

(8) Aerospace;

(9) Weapons;

(10) Nuclear technology; and

(11) Any other identified advanced technologies in the biennial Science and Engineering Indicators report published by the National Science Foundation.

(Authority: 38 U.S.C. 3014A, 3452(c), 3501(a)(6))

(bb) *Employment in a high technology industry. Employment in a high technology industry* means employment in a high technology occupation specific to a high technology industry.

(Authority: 38 U.S.C. 3014A)

(cc) *High technology occupation.* The term *high technology occupation* means an occupation that leads to employment in a high technology industry. These occupations consist of:

(1) Life and physical scientists;

(2) Engineers;

(3) Mathematical specialists;

(4) Engineering and science technicians;

(5) Computer specialists; and

(6) Engineering, scientific, and computer managers.

(Authority: 38 U.S.C. 3014A, 3452(c), 3501(a)(6))

(dd) *Computer specialists.* The term *computer specialists* includes the following occupations:

(1) Database, system, and network administrators;

(2) Database, system, and network developers;

(3) Computer and network engineers;

(4) Systems analysts;

(5) Programmers;

(6) Computer, database, and network support specialists;

(7) All computer scientists;

(8) Web site designers;

(9) Computer and network service technicians;

(10) Computer and network electronics specialists; and

(11) All certified professionals, certified associates and certified technicians in the information technology field.

(Authority: 38 U.S.C. 3014A, 3452(c), 3501(a)(6))

(ee)–(jj) [Reserved]

(kk) *Fugitive felon.* The term *fugitive felon* means an individual identified as such by Federal, State, or local law enforcement officials and who is a fugitive by reason of—

(1) Fleeing to avoid prosecution for an offense, or an attempt to commit an offense, which is a felony under the laws of the place from which the person flees;

(2) Fleeing to avoid custody or confinement after conviction for an offense, or an attempt to commit an offense, which is a felony under the laws of the place from which the person flees; or

(3) Violating a condition of probation or parole imposed for commission of a felony under Federal or State law.

(Authority: 38 U.S.C. 5313B)

(ll) *Felony.* The term *felony* means a major crime or offense defined as such under the law of the place where the offense was committed or under Federal law. It includes a high misdemeanor under the laws of a State which characterizes as high misdemeanors offenses that would be felony offenses under Federal law.

(Authority: 38 U.S.C. 5313B)

[31 FR 6774, May 6, 1966]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 21.4200, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

### § 21.4201 Restrictions on enrollment; percentage of students receiving financial support.

(a) *General.* Except as otherwise provided in this section the Department of Veterans Affairs shall not approve an enrollment in any course for an eligible veteran, not already enrolled, for any period during which more than 85 percent of the students enrolled in the course are having all or part of their tuition, fees or other charges paid for them by the educational institution or by the Department of Veterans Affairs pursuant to Title 38 U.S.C. This restriction may be waived in whole or in part.

(Authority: 38 U.S.C. 3473(d))

(b) *Affected schools.* The requirements of paragraph (a) of this section apply to all courses not otherwise exempt or waived offered by all educational institutions, regardless of whether the institution is degree-granting, proprietary profit, proprietary nonprofit, eleemosynary, public and/or tax-supported.

(c) *Affected courses.* (1) The following courses or programs are exempt from the requirements of paragraph (a) of this section:

(i) Any farm cooperative course; and

(ii) Any course offered by a flying club established, organized and operated pursuant to regulations of a military department of the Armed Forces as *nonappropriated sundry fund activities* which are governmental instrumentalities.

(2) The provisions of paragraph (a) of this section apply to the enrollment of a serviceperson in a course leading to a high school diploma, equivalency cerificate, or a refresher, remedial or deficiency course, but they do not apply to the enrollment of a veteran in such a course.

(3) Except as provided in paragraph (c)(2) of this section, the provisions of paragraph (a) of this section do not apply to an approved course which:

(i) Is offered under contract with the Department of Defense,

(ii) Is on or immediately adjacent to a military base, or a facility of the National Guard (including the Air National Guard) or the Selected Reserve,

(iii) Has been approved by the State approving agency of the State:

(A) Where the base is located or

(B) Where the parent school is located if the course is oftered overseas, and

(iv) Is available only to:

(A) Military personnel and their dependents, or

(B) Military personnel, their dependents and civilian employees of a base located in a State, or

(C) Persons authorized by the base commander to attend the course provided the base is located outside the United States.

(D) In the case of a course offered on or immediately adjacent to a facility of the National Guard or the Selected Reserve, members of the National Guard, members of the Selected Reserve and their dependents.

(4) The provisions of paragraph (a) of this section generally do not apply to a course when the total number of veterans, eligible persons, and reservists receiving assistance under chapters 30, 31, 32, 34, 35 and 36, title 38, United States Code, and chapter 1606, title 10, United States Code, who are enrolled in the educational institution offering the course, equals 35 percent or less of the total student enrollment at the educational institution (computed separately for the main campus and any branch or extension of the institution). However, the provisions of paragraph (a) of this section will apply to such a course when—

(Authority: 38 U.S.C. 3473(d); Pub. L. 98–525, Pub. L. 100–689)

(i) The course is a course of Special Assistance for the Educationally Disadvantaged and a serviceperson enrolls in it, or

(ii) The Director of the Department of Veterans Affairs facility of jurisdiction has reason to believe that the enrollment of veterans and eligible persons in the course may exceed 85 percent of the total student enrollment in the course.

(Authority: 38 U.S.C. 3473, 3491(c))

(d) *Applications for exemptions.* No applications are required for any exemptions except that found in paragraph (c)(4) of this section. To obtain an exemption as stated in paragraph (c)(4) of this section schools must submit reports as required in paragraph (f)(1) of this section.

(Authority: 38 U.S.C. 3473)

(e) *Computing the 85–15 percent ratio*—(1) *Determining when separate computations are required.* Except as provided in paragraph (c) of this section and in paragraph (e)(3) of this section, an 85–15 percent ratio must be computed for each course of study or curriculum leading to a separately approved educational or vocational objective. Computations will not be made for unit subjects, unless only one unit subject is approved by the State approving agency to be offered at a separate branch or extension of a school. Courses or curricula which are offered at separately approved branches or extensions, as well as courses or curricula leading to a secondary school diploma or equivalency certificate offered at any branch or extention, must have an 85–15 percent ratio computed separately from the same course offered at the parent institution. The count of students attending the branch may not be added to those attending the parent institution even for the same courses or curricula. However, the count of those attending courses or curricula offered at an additional facility, as opposed to a branch or extension, must be added to those attending the same course at the parent institution. Pursuit of a course or curriculum that varies in any way from a similar course, although it may have the same designation as the other similar course or curriculum, will require a separate 85–15 percent computation. A course or curriculum will be considered to vary from another if there are different attendance requirements, required unit subjects are different, required completion length is different, etc.

(i) Separate courses for computation purposes in institutions of higher learning will be determined by general curriculum only until the point at which it is reasonable to assume a major field would be declared and after that point by specific curriculum.

(A) General 2-year curricula at 2-year institutions of higher learning, general curricula such as AA (Associate of Arts) or AS (Associate of Science) degrees with no major specified, will require separate computations for each curriculum. Terminal 2-year courses (i.e., AAS (Associate of Applied Science), dental technology or auto mechanics certificate) and other associate degree courses where a field is specified must be computed separately for each objective.

(B) Students attending 4–year institutions of higher learning and graduate schools may be counted in general curricula such as BA (Bachelor of Art) and BS (Bachelor of Science) only until the normal point at which the school requires the student to declare a major subject. Then the 85–15 percent computation must be made for each specific curriculum, i.e., BS (Bachelor of Science) in electrical engineering, MA (Master of Arts) in English, etc.

(ii) NCD (noncollege degree) courses must be computed separately by approved vocational objective. If several curricula lead to the same coded vocational objective, each must meet the 85–15 percent requirement separately, unless it can be shown that two or more courses are identical in all respects (scheduling, hours devoted to each unit subject, etc.). Branch or extension courses will be computed separately from courses at the parent facility. Courses offered on a full- and part-time basis which are identical in length and content will be combined for computing the ratio.

(2) *Assigning students to each part of the ratio.* Notwithstanding the provisions of paragraph (a) of this section, the following students will be considered to be nonsupported provided VA is not furnishing them with educational assistance under title 38, United States Code or under chapter 1606, title 10, United States Code:

(i) Students who are not veterans or reservists, and are not in receipt of institutional aid.

(Authority: 38 U.S.C. 3473(d); Pub. L. 98–525, Pub. L. 100–689)

(ii) All graduate students in receipt of institutional aid.

(iii) Students in receipt of any Federal aid (other than Department of Veterans Affairs benefits).

(iv) Undergraduates and non-college degree students receiving any assistance provided by an institution, if the institutional policy for determining the recipients of such aid is equal with respect to veterans and nonveterans alike.

(Authority: 38 U.S.C. 3473(d))

(3) *Calculation.* (i) To determine if the requirement of paragraph (a) of this section has been met for all courses except flight courses the full-time equivalent, nonsupported students as defined by paragraph (e)(2) of this section will be compared to the full-time equivalent students enrolled in the course. If the full-time equivalent, nonsupported students do not equal at least 15 percent of the total full-time enrollment, the 85-15 percent requirement has not been met for the course. If a non-Department of Veterans Affairs student in a correspondence course has not completed a lesson nor made a payment toward the cost of the course during the 6-month period immediately prior to the computation, the student will not be counted in computing the 85–15 percent ratio.

(ii) The 85–15 percent ratio for flight courses shall be computed by comparing the number of hours of training received by or tuition charged to nonsupported students in the preceding 30 days to the total number of hours of training received by or tuition charged to all students in the same period. All approved courses offered under 14 CFR parts 141 and 142 at a flight school will be considered to be one course for the purpose of making this computation. Similarly, all other approved courses offered at a flight school will be considered to be one course for the purpose of making this computation. In this computation hours of training or tuition charges for students enrolled—

(A) In the recreational pilot certification course and the private pilot certification course will be excluded;

(B) In a ground instructor certification course will be included;

(C) In courses approved under 14 CFR part 141, other than a ground instructor certification course, will be actual hours of logged instructional flight time or the charges for those hours; and

(D) In courses not approved under 14 CFR part 141, such as courses offered by flight simulator or courses for navigator or flight engineer, shall include ground training time or charges; actual logged instructional flight time or charges; and instructional time in a

flight simulator or charges for that training.

(Authority: 10 U.S.C. 16136(c); 38 U.S.C. 3034(d), 3680A(d))

(f) *Reports.* (1) Schools must submit to VA all calculations needed to support the exemption found in paragraph (c)(4) of this section. If the school is organized on a term, quarter, or semester basis, it shall make that submission no later than 30 days after the beginning of the first term for which the school wants the exemption to apply. If the school is not organized on a term, quarter or semester basis, it shall make that submission no later than 30 days after the beginning of the first calendar quarter for which the school wishes the exemption to apply. A school having received an exemption found in paragraph (c)(4) of this section shall not be required to certify that 85 percent or less of the total student enrollment in any course is receiving Department of Veterans Affairs assistance:

(Authority: 38 U.S.C. 3473)

(i) Unless the Director of the VA facility of jurisdiction has reason to believe that the enrollment of eligible veterans and eligible persons in a specific course may exceed 85 percent of the total enrollment in a specific course, or

(ii) Until such time as the total number of veterans, eligible persons and reservists receiving assistance under chapters 30, 31, 32, 34, 35, or 36, title 38 U.S.C., or chapter 1606, title 10 U.S.C., who are enrolled in the educational institution offering the course, equals more than 35 percent of the total student enrollment at the educational institution (computed separately for the main campus and any branch or extension of the institution). At that time the procedures contained in paragraph (f)(2) of this section shall apply.

(Authority: 38 U.S.C. 3473(d); Pub. L. 98–525, Pub. L. 100–689)

(2) The school must submit all calculations made under paragraph (e)(3) of this section to the Department of Veterans Affairs according to these time limits.

(i) If the school is organized on a term, quarter or semester basis, the calculations must be submitted no later than 30 days after the beginning of each regular school term (excluding summer sessions), or before the beginning date of the next term, whichever occurs first.

(ii) If a school is not organized on a term, quarter or semester basis, reports must be received by the Department of Veterans Affairs no later than 30 days after the end of each calendar quarter.

(Authority: 38 U.S.C. 3473)

(g) *Effect of the 85–15 percent ratio on processing new enrollments.* (1) The Department of Veterans Affairs will process new enrollments of eligible veterans (and servicepersons where this provision applies to them), in a course on the basis of the school's submission of the most recent computation showing that:

(i) The 85–15 percent ratio is satisfactory, or

(ii) The course is exempt under paragraph (c)(4) of this section.

(2) Except for those enrollments with a beginning date before or the same as the date the school completed the most recent computation, no benefits will be paid either under Chapter 1606, Title 10 U.S.C., or under Chapters 30, 32, 34, or 36, Title 38 U.S.C., when that computation establishes that the course:

(Authority: 10 U.S.C. 16136, 38 U.S.C. 3034, 3241, 3473(d); Pub. L. 98–525)

(i) Neither has a satisfactory 85–15 percent ratio, nor

(ii) Is exempt under paragraph (c)(4) of this section.

(Authority: 10 U.S.C. 16136, 38 U.S.C. 3034, 3241, 3473(d))

(3) If a school fails to submit a timely computation, no benefits will be paid for:

(i) The enrollment of a serviceperson in a course leading to a secondary school diploma or an equivalency certificate if the enrollment has beginning dates beyond the expiration of the allowable computation period, or

(ii) The enrollment of a veteran in any course to which the provisions of

paragraph (a) of this section apply if the enrollment has beginning dates beyond the expiration of the allowable computation period.

(4) Enrollments with later beginning dates may be processed only after the school certifies that:

(i) The proper ratio has been reestablished for the course, or

(ii) The course is exempt from the requirement under paragraph (c)(4) of this section.

(5) When a school shows a reestablished 85–15 percent ratio, each new veteran enrollment or enrollment of a serviceperson in a course leading to a secondary school diploma or an equivalency certificate which is submitted after reestablishment must be individually computed into the ratio to ensure that the 85 percent limitation is not again immediately exceeded. The Department of Veterans Affairs will require individual computations until:

(i) The end of the term for which the ratio was reestablished, or

(ii) The end of the calendar quarter during which the ratio was reestablished if the school is not operated on a term, quarter or semester basis.

(Authority: 38 U.S.C. 3473, 3491(c))

(6) Once a student is properly enrolled in a course which either meets the 85–15 percent requirement or which is exempt pursuant to paragraph (c) of this section, such a student may not have benefits for that course terminated because the 85–15 percent requirement subsequently is not met or because the course loses its exemption, as long as the student's enrollment remains continuous. A student enrolled in an institution organized on a term basis need not attend summer sessions in order to maintain continuous enrollment. An enrollment may also be considered continuous if a ''break'' in enrollment is wholly due to circumstances beyond the student's control such as serious illness.

(h) *Waivers.* Schools which desire a waiver of the provisions of paragraph (a) of this section for a course where the number of full-time equivalent students receiving VA education benefits equals or exceeds 85 percent of the total full-time equivalent enrollment in the course may apply for a waiver to the Director, Education Service, through the Director of the VA facility of jurisdiction. When applying, a school must submit sufficient information to allow the Director, Education Service, to judge the merits of the request against the criteria shown in this paragraph. This information and any other pertinent information available to VA shall be considered in relation to these criteria:

(1) Availability of comparable alternative educational facilities effectively open to veterans in the vicinity of the school requesting a waiver.

(2) Status of the school requesting a waiver as a developing institution primarily serving a disadvantaged population. The school should enclose a copy of its notice from the Department of Education that the school is eligible to be considered for a grant under the Strengthening Institutions Program or the Special Needs Program, if applicable. Otherwise the school should submit data sufficient to allow the Director, Education Service, to judge whether the school is similar to institutions which the Department of Education considers to be eligible to apply for a grant under these programs. The pertinent criteria and data categories are published in Title 34, Code of Federal Regulations, Chapter VI, part 624, subpart A; part 625, subpart A; and part 626, subpart A. The requirements of those criteria that a school be a ''public or nonprofit'' institution need not be met.

(3) Previous compliance history of the school, including such factors as false or deceptive advertising complaints, enrollment certification timeliness and accuracy, and amount of school liability indebtedness to VA.

(4) General effectiveness of the school's program in providing educational and employment opportunities to the particular veteran population it serves. Factors to be considered should include the percentage of veteran-students completing the entire

course, ratio of educational and general expenditures to full-time equivalency enrollment, etc.

(Authority: 38 U.S.C. 3473(d); Pub. L. 94–502, Pub. L. 95–202)

[44 FR 62498, Oct. 31, 1979, as amended at 48 FR 37985, Aug. 22, 1983; 51 FR 16316, May 2, 1986; 52 FR 45634, Dec. 1, 1987; 54 FR 4285, Jan. 30, 1989; 54 FR 34984, Aug. 23, 1989; 55 FR 28027, July 9, 1990; 57 FR 29800, July 7, 1992; 61 FR 20728, May 8, 1996; 61 FR 26114, May 24, 1996; 61 FR 29296, June 10, 1996; 62 FR 55760, Oct. 28, 1997; 63 FR 34129, June 23, 1998]

### § 21.4202 Overcharges; restrictions on enrollments.

(a)–(b) [Reserved]

(c) *Restrictions; proprietary schools.* Enrollment will not be approved for any veteran or eligible person under the provisions of Chapter 34 or 35 respectively, in any proprietary school of which the veteran or eligible person is an official authorized to sign certificates of enrollment or monthly certificates of attendance, an owner or an officer.

[31 FR 6774, May 6, 1966, as amended at 32 FR 13403, Sept. 23, 1967; 37 FR 6679, Apr. 1, 1972; 39 FR 43221, Dec. 11, 1974; 43 FR 35300, Aug. 9, 1978; 48 FR 37987, Aug. 22, 1983; 49 FR 5115, Feb. 10, 1984; 63 FR 35831, July 1, 1998]

### § 21.4203 Reports—requirements.

(a) *General.* All the reports required by this paragraph shall be in a form specified by the Secretary.

(1) Except as provided in paragraph (a)(2) of this section each educational institution, veteran and eligible person shall report without delay such information on enrollment, entrance, reentrance, change in the hours of credit or attendance, pursuit, interruption and termination of attendance of each veteran or eligible person enrolled in an approved course as the Secretary may require and using a form specified by the Secretary. See paragraphs (b) through (h) of this section.

(2) An educational institution may delay in reporting the enrollment or reenrollment of a veteran or an eligible person until the end of the term, quarter, or semester when—

(i) The veteran or eligible person is enrolled in a program of independent study;

(ii) The veteran or eligible person is pursuing the program on a less than half-time basis;

(iii) The educational institution has asked the Director of the VA facility of jurisdiction in writing for permission to delay in making the report; and

(iv) The Director of the VA facility of jurisdiction has determined that it is not feasible for the educational institution to monitor interruption or termination of the veteran's or eligible person's pursuit of the program.

(3) An educational institution which disagrees with a decision of a Director of a VA facility as to whether it may delay reporting enrollments or reenrollments as provided in paragraph (a)(2) of this section may ask to have that decision reviewed by the Director, Education Service. That request must be made in writing to the Director of the VA facility within one year of the date of the letter notifying the educational institution of the original decision.

(4) An educational institution which, under paragraph (a)(2) of this section, is delaying the reporting of the enrollment or reenrollment of a veteran shall provide the veteran with notice of the delay at the time that the veteran enrolls or reenrolls.

(5) In addition, educational institutions must—

(Authority: 38 U.S.C. 3685; Pub. L. 99–576)

(i) Verify enrollment for each veteran and eligible person receiving an advance payment; and

(ii) Verify the delivery of advance payment check and education loan check for each veteran and eligible person receiving an advance payment or loan.

(6) Nothing in this section or in any section in 38 CFR part 21 shall be construed as requiring any institution of higher learning to maintain daily attendance records for any course leading to a standard college degree.

(Authority: 38 U.S.C. 3680(d), 3684, 3685, 3698; Pub. L. 95–202, Pub. L. 96–466; Pub. L. 99–576)

(b) *Certifications of enrollment.* All the reports required by this paragraph shall be in a form specified by the Secretary.

(1) VA requires that educational institutions report all entrances and reentrances on a certification of enrollment.

(2) All educational institutions, regardlesss of the way in which they are organized, must clearly specify the course in which the veteran or eligible person is enrolled.

(3) Schools organized on a term, quarter or semester basis—

(i) May report enrollment for the term, quarter, semester, ordinary school year plus the following summer term.

(ii) May not report enrollment for a period that exceeds the ordinary school year plus the following summer term.

(iii) Must report the dates for the break between terms if—

(A) The certification covers two or more terms, and a term ends and the following term does not begin in the same or the next calendar month;

(B) The veteran or eligible person elects not to be paid for the intervals between terms;

(C) The certification covers two or more summer sessions; or

(D) The certification covers at least one summer session and at least one term which is not a standard semester or quarter.

(iv) Must submit a separate enrollment certification for each term, quarter or semester if the student—

(A) Is a veteran or eligible person pursuing a program on a less than halftime basis, or

(B) Is a serviceperson.

(Authority: 38 U.S.C. 3684(a); Pub. L. 99–576)

(v) Where a veteran or an eligible person, who is pursing a course leading to a standard college degree, transfers between consecutive school terms from one approved institution to another approved institution, for the purpose of enrolling in, and pursuing, a similar course at the second institution, the veteran or eligible person shall, for the purpose of entitlement to the payment of educational assistance allowance be considered to be enrolled at the first institution during the interval, if the interval does not exceed 30 days, following the termination date of the school term of the first institution.

(Authority: 38 U.S.C. 3680)

(c) *Nonpunitive grade.* A school may assign a nonpunitive grade for a course or subject in which the veteran or eligible person is enrolled even though the veteran or eligible person does not withdraw from the course or subject. When this occurs, the school must report the assignment of the nonpunitive grade in a form specified by the Secretary in time for VA to receive it before the earlier of the following dates is reached:

(1) Thirty days from the date on which the school assigns the grade, or

(2) Sixty days from the last day of the enrollment period for which the nonpunitive grade is assigned.

(d) *Interruptions, terminations and changes in hours of credit or attendance.* When a veteran or eligible person interrupts or terminates his or her training for any reason, including unsatisfactory conduct or progress, or when he or she changes the number of hours of credit or attendance, this fact must be reported to VA by the school in a form specified by the Secretary.

(1) If the change in status or change in number of hours of credit of attendance occurs on a day other than one indicated by paragraph (d)(2) or (3) of this section, the school will initiate a report of the change in time for the VA to receive it within 30 days of the date on which the change occurs. If the course in which the veteran or eligible person is enrolled does not lead to a standard college degree, and attendance must be certified for the course, the school may include the information on the monthly certification of attendance.

(Authority: 38 U.S.C. 3684(a), 1788(a); Pub. L. 99–576)

(2) If the enrollment of the veteran or eligible person has been certified by the school for more than one term, quarter or semester and the veteran or eligible person interrupts or terminates his or her training at the end of a term, quarter or semester within the certified period of enrollment, the school shall report the change in status to the Department of Veterans Affairs

in time for the Department of Veterans Affairs to receive the report within 30 days of the last officially scheduled registration date for the next term, quarter or semester.

(3) If the change in status or change in the number of hours of credit or attendance occurs during the 30 days of a drop-add period, the school must report the change in status or change in the number of hours of credit or attendance to the Department of Veterans Affairs in time for the Department of Veterans Affairs to receive the report within 30 days from the last date of drop-add period or 60 days from the first day of the enrollment period, whichever occurs first.

(Authority: 38 U.S.C. 3684(a))

(e) *Correspondence courses.* Where the course in which a veteran is enrolled under 38 U.S.C. chapter 34 or a spouse or surviving spouse is enrolled under 38 U.S.C. chapter 35 is pursued exclusively by correspondence, the school will report by an endorsement on the veteran's or eligible spouse's or surviving spouse's certification the number of lessons completed by the veteran, spouse or surviving spouse and serviced by the school. Such reports will be submitted quarterly in a form specified by the Secretary.

(Authority: 38 U.S.C. 3680)

(f) *Certification.* All reports required by this paragraph must be in a form specified by the Secretary.

(1) *Courses not leading to a standard college degree.*

(i) Except as provided in this paragraph VA requires that a certification of attendance be submitted monthly for each veteran or eligible person enrolled in a course not leading to a standard college degree. The fact that the course may be pursued on a quarter, semester or term basis will not relieve the veteran or eligible person and the school of this requirement. Unless exempted by this paragraph this requirement also applies to courses measured on a credit-hour basis. This requirement does not apply to—

(A) Courses measured on a credit-hour basis pursuant to footnote 6 of §21.4270(a),

(B) A course pursued on a less than one-half-time basis,

(C) A course pursued by a serviceperson while on active duty, or

(D) A correspondence course which must meet the requirements of paragraph (e) of this section.

(Authority: 38 U.S.C. 3680(a)(2), 3688(a)(7); Pub. L. 99–576)

(2) *Courses leading to a standard college degree.* Schools which have veterans or eligible persons enrolled in courses which lead to a standard college degree are not required to submit periodic certifications for students enrolled in such courses. Certifications are, however, required under paragraphs (b), (c), (d) and (h) of this section.

(3) *Apprentice or other on-the-job training.* A certification of attendance must be submitted monthly during the period of enrollment in the same manner as certifications required in paragraph (f)(1) of this section.

(g) *Flight training courses.* Where the course consists exclusively of flight training, the school will report by an endorsement on the veteran's certification the type and number of hours of actual flight training received by, and the cost thereof to, the veteran. Such reports may be submitted monthly.

(h) *Unsatisfactory progress, conduct or attendance.* At times the unsatisfactory progress, conduct or attendance of a veteran or eligible person is caused by or results in his or her interruption or termination of training. If this occurs, the interruption or termination shall be reported in accordance with paragraph (d) of this section. If the veteran or eligible person continues in training despite unsatisfactory progress, conduct, or despite having failed to meet the regularly prescribed standards of attendance at the school, the school must report the fact of his or her unsatisfactory progress, conduct or attendance to VA within the time limit allowed by paragraph (h) (1) and (2) of this section.

(Authority: 38 U.S.C. 3474, 3524)

(1) A veteran's or eligible person's progress may become unsatisfactory according to the regularly prescribed standards and practices of the school

as a result of the grades he or she receives The school shall report such unsatisfactory progress to VA in time for VA to receive it before the earlier of the following dates is reached:

(i) Thirty days from the date on which the school official, who is responsible for determining whether a student is making progress, first received the final grade report which establishes that the veteran either is not progressing satisfactorily, or

(ii) Sixty days from the last day of the enrollment period during which the veteran or eligible person earned the grades that caused him or her not to meet the satisfactory progress standards.

(2) If the unsatisfactory progress, conduct or attendance of the veteran or eligible person is caused by any factors other than the grades which he or she receives, the school shall report the unsatisfactory progress, conduct or attendance to VA in time for VA to receive it within 30 days of the date on which the progress, conduct or attendance of the veteran or eligible person becomes unsatisfactory. See also § 21.4277.

(Authority: 38 U.S.C. 3474, 3524)

(Approved by the Office of Management and Budget under control number 2900–0354)

[31 FR 6774, May 6, 1966]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 21.4203, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

### § 21.4204 Periodic certifications.

Educational assistance allowance is payable on the basis of a required certification concerning the pursuit of a course during the reporting period.

(a) *Reports by eligible persons.* An eligible person enrolled in a course which leads to a standard college degree, excepting eligible persons pursuing the course on a less than half-time basis, must verify each month his or her continued enrollment in and pursuit of his or her courses. In the case of an eligible person who completed, interrupted or terminated his or her course, any communication from the student or other authorized person notifying VA of the eligible person's completion of course as scheduled or earlier termination date, will be accepted to terminate payments accordingly. Reports by other eligible persons will be submitted in accordance with § 21.4203 (e), (f) or (g).

(Authority: 38 U.S.C. 1780(g), 3103)

(b) *Requirements.* The certifications required by § 21.4203 and paragraph (a) of this section will include a report on the following items when applicable:

(1) Continued enrollment in and pursuit of the course.

(2) Conduct and progress. See § 21.4277.

(3) Date of interruption or termination of training.

(4) Changes in number of semester hours or clock hours of attendance.

(5) Any other changes or modifications in the course as certified at enrollment.

(c) *Term, quarter, or semester.* For a course which does not lead to a standard college degree, if a school organized on a term, quarter, or semester basis has reported enrollment:

(1) For the ordinary school year or the complete course, the periodic certification will show the intervals between terms, quarters, or semesters as absences.

(2) By term, quarter, or semester, the periodic certification will not cover the intervals between terms, quarters, or semesters.

(d) *Year-round courses.* The periodic certifications will show any vacation period or interval between periods of instruction as absences. The periodic certification will not cover the period between school years.

(e) *Farm cooperative courses.* The monthly certification will cover only those periods of classroom instruction which are included in the prescheduled institutional portion of the course.

(Authority: 38 U.S.C. 3684(a))

(Approved by the Office of Management and Budget under control number 2900–0465)

[31 FR 6774, May 6, 1966, as amended at 32 FR 3452, Mar. 2, 1967; 35 FR 9816, June 16, 1970; 38 FR 14936, June 7, 1973; 39 FR 31903, Sept. 3, 1974; 41 FR 47929, Nov. 1, 1976; 49 FR 8609, Mar. 8, 1984; 54 FR 33889, Aug. 17, 1989; 54 FR 37108, Sept. 7, 1989; 57 FR 24367, June 9, 1992; 61 FR 26114, May 24, 1996]

### § 21.4206 Reporting fee.

VA may pay annually to each educational institution furnishing education or each joint apprenticeship training committee acting as a training establishment under 10 U.S.C. Chapter 1606 or 38 U.S.C. Chapters 30, 32, 34, 35 or 36 a reporting fee for required reports or certifications. The reporting fee will be paid as soon as feasible after the end of the calendar year.

(a) Except as provided in paragraph (b) of this section the reporting fee will be computed for each calendar year by multiplying $7.00 by the number of eligible veterans and eligible persons enrolled under 10 U.S.C. Chapter 1606, or 38 U.S.C. Chapters 30, 32, 34, 35 or 36 on October 31 of that year.

(Authority: 10 U.S.C. 16136, 38 U.S.C. 3034, 3241, 3684(c))

(b) For any school or joint apprenticeship training committee where the peak enrollment of veterans and eligible persons varies more than 15 percent from the enrollment on October 31, another date may be established as representative of peak enrollment.

(Authority: 38 U.S.C. 3684(c))

(c) An additional $4 will be paid to those institutions which have delivered to the veteran or eligible person at registration the educational assistance check representing an advance payment, or which have delivered educational loan checks in accordance with the provisions of Subpart F. If an institution delivers both an advance payment check and educational loan check(s) to the same veteran or eligible person within 1 calendar year, it shall receive only one additional $4 fee. In order to receive this fee, the institution shall submit to the Department of Veterans Affairs a certification of delivery of each check. If an advance payment check is not delivered within 30 days after commencement of the student's program, the check is to be returned to the Department of Veterans Affairs. If an education loan check is not delivered within 30 days of the date the educational institution received it, the check shall be returned to the Department of Veterans Affairs.

(Authority: 38 U.S.C. 3684, 3698)

(d) No reporting fee payable to an educational institution under this section shall be subject to offset by the Department of Veterans Affairs against any liability of the educational institution for any overpayment which the Department of Veterans Affairs has administratively determined to exist unless the liability of the educational institution was not contested by the educational institution or was upheld by a final decree of a court of appropriate jurisdiction.

(Authority: 38 U.S.C. 3684)

(e) Before payment of a reporting fee the Department of Veterans Affairs will require an educational institution to certify that:

(1) It has exercised reasonable diligence in determining whether it or any course offered by it approved for the enrollment of veterans or eligible persons meets all of the applicable requirements of chapter 1606 of title 10 U.S.C. or chapters 30, 32, 34, 35 and 36 of title 38 U.S.C.; and

(Authority: 10 U.S.C. 16136, 38 U.S.C. 3034, 3241, 3684(b); Pub. L. 98–525)

(2) It will, without delay, report any failure to meet any requirement to the Department of Veterans Affairs.

(Authority: 38 U.S.C. 3684(b))

[32 FR 13404, Sept. 23, 1967, as amended at 40 FR 31762, July 29, 1975; 44 FR 62501, Oct. 31, 1979; 48 FR 37988, Aug. 22, 1983; 51 FR 16317, May 2, 1986; 61 FR 20728, May 8, 1996]

### § 21.4209 Examination of records.

(a) *Availability of records.* Notwithstanding any other provision of law, educational institutions must make the following records and accounts available to authorized Government representatives:

(1) Records and accounts pertaining to veterans or eligible persons who received educational assistance under Chapter 1606 of Title 10 U.S.C. or Chapters 30, 32, 34, 35 or 36 of Title 38 U.S.C.

(2) Other students' records necessary for the Department of Veterans Affairs

to ascertain institutional compliance with the requirements of these chapters.

(Authority: 10 U.S.C. 16136; 38 U.S.C. 3034, 3244, 3690)

(b) *Type of records.* Each school will upon request of duly authorized representatives of the Government make available for examination all appropriate records and accounts, including but not limited to:

(1) Records and accounts which are evidence of tuition and fees charged to and received from or on behalf of all veterans and eligible persons and from other students similarly circumstanced.

(2) Records of previous education or training of veterans and eligible persons at the time of admission as students and records of advance credit, if any, granted by the school at the time of admission.

(3) Records of the veteran's or eligible person's grades and progress.

(4) Records of all advertising, sales or enrollment materials as required by § 21.4252(h) and section 3696(b), title 38 U.S.C.

(5) Records and computations showing compliance with the requirements of § 21.4201 regarding the 85–15 percent ratio of students for each course.

(6) Records necessary to demonstrate compliance with the requirements of § 21.4252(e) pertaining to the time necessary to complete a correspondence course.

(7) Records necessary to demonstrate compliance with the requirements of § 21.4252(g) pertaining to employment of graduates of the course.

(c) *Noncollege degree, apprentice, and other on-the-job.* The school having veterans, servicemembers, reservists, and/or eligible persons enrolled in a course that does not lead to a standard college degree will make available, in addition to the records and accounts required in paragraph (b) of this section, the records of leave, absences, class cuts, makeup work, and tardiness. Each training establishment that has enrolled veterans under 38 U.S.C. chapter 30 or 32, reservists under 10 U.S.C. chapter 1606, or eligible persons under 38 U.S.C. chapter 35 will also make available payroll records.

(Authority: 10 U.S.C. 16136; ;38 U.S.C. 3034, 3241, 3690(c))

(d) *Nonaccredited courses.* The school having veterans or eligible persons enrolled in nonaccredited courses will make available, in addition to the records and accounts required in paragraphs (b) and (c) of this section the following:

(1) Records of interruptions for unsatisfactory conduct or attendance.

(2) Records of refunds of tuition, fees and other charges made to a veteran or eligible person who fails to enter the course or withdraws or is discontinued prior to completion of the course.

(e) *Nonavailability.* Failure to make such records available as provided in this section will be grounds for discontinuing the payment of educational assistance allowance or special training allowance.

(f) *Retention of records.* The records and accounts, including those pertaining to students not receiving benefits from the Department of Veterans Affairs, as described in this section, pertaining to each period of enrollment of a veteran or eligible person, will be kept intact and in good condition at the school for at least 3 years following the termination of such enrollment period. Longer retention will not be required unless a written request is received from the General Accounting Office or the Department of Veterans Affairs not later than 30 days prior to the end of the 3–year period.

[31 FR 6774, May 6, 1966, as amended at 38 FR 14936, June 7, 1973; 43 FR 35300, Aug. 9, 1978; 48 FR 37988, Aug. 22, 1983; 51 FR 16317, May 2, 1986; 61 FR 20728, May 8, 1996; 61 FR 26114, May 24, 1996]

### § 21.4210 Suspension and discontinuance of educational assistance payments and of enrollments or reenrollments for pursuit of approved courses.

(a) *Overview.* (1) VA may pay educational assistance to an individual eligible for such assistance under 10 U.S.C. chapter 1606, or 38 U.S.C. chapter 30, 32, 35, or 36, only if the individual is pursuing a course approved in accordance with the provisions of 38

U.S.C. chapter 36. In general, courses are approved for this purpose by a State approving agency designated to do so (or by VA in some instances). Notwithstanding such approval, however, VA, as provided in paragraphs (b), (c), and (d) of this section, may suspend, discontinue, or deny payment of benefits to any or all otherwise eligible individuals for pursuit of courses or training approved under 38 U.S.C. chapter 36.

(2) For the purposes of this section and the purposes of §§21.4211 through 21.4216, except as otherwise expressly stated to the contrary—

(i) The term ''course'' includes an apprenticeship or other on-job training program;

(ii) The term ''educational institution'' includes a training establishment; and

(iii) Reference to action suspending, discontinuing, or otherwise denying enrollment or reenrollment means such action with respect to providing educational assistance under the chapters listed in paragraph (a)(1) of this section.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3452, 3671, 3690)

(b) *Denial of payment in individual cases.* VA may deny payment of educational assistance to a specific individual for pursuit of a course or courses if, following an examination of the individual's case, VA has credible evidence affecting that individual that—

(1) The course fails to meet any of the requirements of 10 U.S.C. chapter 1606, or 38 U.S.C. chapter 30, 32, 34, 35, or 36; or

(2) The educational institution offering the individual's course has violated any of those requirements of law.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3690(b)(1), 3690(b)(2))

(c) *Notice in individual cases.* Except as provided in paragraph (e) of this section, when VA denies payment of educational assistance to an individual under paragraph (b) of this section, VA will provide concurrent written notice to the individual. The notice shall state—

(1) The adverse action;

(2) The reasons for the action; and

(3) The individual's right to an opportunity to be heard thereon in accordance with part 19 of this title.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3690)

(d) *Actions affecting groups.* (1) The Director of the VA facility of jurisdiction may suspend payments of educational assistance to all veterans, servicemembers, reservists, or eligible persons already enrolled in a course, and may disapprove all further enrollments or reenrollments of individuals seeking VA educational assistance for pursuit of the course. The decision to take such action, except as provided in paragraph (d)(2) of this section, must be based on evidence of a substantial pattern of veterans, servicemembers, reservists, or eligible persons enrolled in the course receiving educational assistance to which they are not entitled because:

(i) One or more of the course approval requirements of 38 U.S.C. chapter 36 are not met, including the course approval requirements specified in §§21.4253, 21.4254, 21.4261, 21.4262, 21.4263, and 21.4264; or

(ii) The educational institution offering the course has violated one or more of the recordkeeping or reporting requirements of 10 U.S.C. chapter 1606, or of 38 U.S.C. chapters 30, 32, 34, 35, and 36. These violations may include, but are not limited to, the following:

(A) Willful and knowing submission of false reports or certifications concerning students or courses of education;

(B) Failure to report to VA a veteran's, servicemember's, reservist's, or eligible person's reduction, discontinuance, or termination of education or training; or

(C) Submission of improper or incorrect reports in such number, manner, or period of time as to indicate negligence on its part, including failure to maintain an adequate reporting or recordkeeping system.

(2) The Director also may make a decision to take the action described in paragraph (d)(1) of this section when the Director has evidence that one or

more prohibited assignments of benefits have occurred at an educational institution as a result of that educational institution's policy. This decision may be made regardless of whether there is a substantial pattern of erroneous payments at the educational institution. See § 21.4146.

(3) The Director may disapprove the enrollment of all individuals not already enrolled in an educational institution (which for the purposes of this paragraph does not include a training establishment) when the Director finds that the educational institution:

(i) Has charged or received from veterans, servicemembers, reservists, or eligible persons an amount for tuition and fees in excess of the amount similarly circumstanced nonveterans are required to pay for the same course; or

(ii) Has instituted a policy or practice with respect to the payment of tuition, fees, or other charges that substantially denies to veterans, servicemembers, reservists, or eligible persons the benefits of advance payment of educational assistance authorized to such individuals under §§ 21.4138(d), 21.7140(a), and 21.7640(d); or

(iii) Has used erroneous, deceptive, or misleading practices as set forth in § 21.4252(h).

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3680A(d), 3684, 3685, 3690, 3696, 5301)

(e) *Actions that must accompany a mass suspension of educational assistance payments or suspension of approval of enrollments and reenrollments in a course or educational institution.* (1) The Director of the VA facility of jurisdiction may suspend payment of educational assistance and may suspend approval of new enrollments and reenrollments as provided in paragraph (d) of this section, only after:

(i) The Director notifies in writing the State approving agency concerned and the educational institution of any failure to meet the approval requirements and any violation of recordkeeping or reporting requirements; and

(ii) The educational institution—

(A) Refuses to take corrective action; or

(B) Does not take corrective action within 60 days (or 90 days if permitted by the Director).

(2) Not less than 30 days before the Director acts to make a mass suspension of payments of educational assistance and/or suspend approval of new enrollments and reenrollments, the Director will, to the maximum extent feasible, provide written notice to each veteran, servicemember, reservist, and eligible person enrolled in the affected courses. The notice will:

(i) State the Director's intent to suspend payments and/or suspend approval of new enrollments and reenrollments unless the educational institution takes corrective action;

(ii) Give the reasons why the Director intends to suspend payments and/or suspend approval of new enrollments and reenrollments; and

(iii) State the date on which the Director intends to suspend payments and/or suspend approval of new enrollments and reenrollments.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3690(b))

(f) *Actions in cases indicating submission of false, misleading, or fraudulent claims or statements.* The Director of the VA facility of jurisdiction will take the following action, as indicated, that may be in addition to suspending payments or further approval of enrollments or reenrollments in a course or educational institution.

(1) If the Director has evidence indicating that an educational institution has willfully submitted a false or misleading claim, or that a veteran, servicemember, reservist, eligible person, or other person, with the complicity of an educational institution, has submitted such a claim, the Director will make a complete report of the facts of the case to the appropriate State approving agency and to the Office of Inspector General for appropriate action.

(2) If the Director believes that an educational institution has submitted a false, fictitious, or fraudulent claim or written statement within the meaning of the Program Fraud Civil Remedies Act (31 U.S.C. 3801–3812) or that a veteran, servicemember, reservist, eligible person, or other person, with the

complicity of an educational institution, has submitted such a claim or made such a written statement, the Director will follow the procedures in part 42 of this title.

(Authority: 10 U.S.C. 16136(b); 31 U.S.C. 3801–3812; 38 U.S.C. 3034(a), 3241(a), 3690(d))

(g) *Referral to the Committee on Educational Allowances.* If the Director of the VA facility of jurisdiction suspends payment of educational assistance to, or suspends approval of the enrollment or reenrollment of, individuals in any course or courses as provided in paragraph (d) of this section, the Director will refer the matter to the Committee on Educational Allowances as provided in §21.4212.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3690)

(h) *Withdrawal of referral to Committee on Educational Allowances.* (1) If, following a suspension of payments and/or of approval of enrollments or reenrollments, the Director of the VA facility of jurisdiction determines that the conditions which justified the suspension have been corrected, and the State approving agency has not withdrawn or suspended approval of the course or courses, the Director may resume payments to and/or approval of enrollments or reenrollments of the affected veterans, servicemembers, reservists, or eligible persons. If the case has already been referred to the Committee on Educational Allowances under paragraph (g) of this section at the time such action is taken, the Director will advise the Committee that the original referral is withdrawn.

(2) If, following a referral to the Committee on Educational Allowances, the Director finds that the State approving agency will suspend or withdraw approval, the Director may, if otherwise appropriate, advise the Committee that the original referral is withdrawn.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3690)

[63 FR 35831, July 1, 1998]

**§21.4211 Composition, jurisdiction, and duties of Committee on Educational Allowances.**

(a) *Authority.* VA is authorized by 38 U.S.C. 3690 to discontinue educational benefits to veterans, servicemembers, reservists, or eligible persons when VA finds that the program of education or course in which such individuals are enrolled fails to meet any of the requirements of 38 U.S.C. chapter 30, 32, 34, 35, or 36, or 10 U.S.C. chapter 1606, or the regulations in this part, or when VA finds an educational institution or training establishment has violated any such statute or regulation, or fails to meet any such statutory or regulatory requirement. Sections 21.4210 and 21.4216 implement that authority. This section provides for establishment of a Committee on Educational Allowances within each VA facility of jurisdiction whose findings of fact and recommendations will be provided to the Director of that VA facility, to whom such authority to discontinue educational benefits or disapprove enrollments or reenrollments has been delegated.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3690)

(b) *Purpose.* (1) The Committee on Educational Allowances is established to assist the Director of the VA facility of jurisdiction in reaching a conclusion as to whether, in a specific case, educational assistance to all individuals enrolled in any course or courses offered by the educational institution should be discontinued and, if appropriate, whether approval of all further enrollments or reenrollments in those courses should be denied to veterans, servicemembers, reservists, or other eligible persons pursuing those courses under programs administered by VA because a requirement of 38 U.S.C. chapter 30, 32, 34, 35, or 36, or 10 U.S.C. chapter 1606, or the regulations in this part, is not being met or a provision of such statute or regulation has been violated.

(2) The function of the Committee on Educational Allowances is to develop facts and recommend action to be taken on the basis of the facts found. A hearing before the Committee is not in the nature of a trial in a court of law.

Instead, it is an administrative inquiry designed to create a full and complete record upon which a recommendation can be made as to whether the Director should discontinue payment of educational benefits and/or deny approval of new enrollments or reenrollments. Both the interested educational institution and VA Regional Counsel, or designee, representing VA, will be afforded the opportunity to present to the Committee any evidence, argument, or other material considered pertinent.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3690)

(c) *Jurisdiction.* The Committee on Educational Allowances will consider only those cases which are referred in accordance with §§ 21.4210(g) and 21.4212.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3690)

(d) *Committee members.* The Committee on Educational Allowances will consist of three employees of the VA facility of jurisdiction, at least one of whom is familiar with the adjudication of claims for benefits administered by the Veterans Benefits Administration. The Director of the VA facility of jurisdiction will designate a Chairperson. In the event that any member becomes unable to serve for any reason, the Director may appoint a replacement member. Before the Committee resumes its proceedings, the new member will be given an opportunity to apprise himself or herself of the actions and testimony already taken by the Committee.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3690)

(e) *Duties and responsibilities of the Committee.* (1) The function of the Committee on Educational Allowances is to make recommendations to the Director of the VA facility of jurisdiction in connection with specific cases referred for consideration as provided in §§ 21.4210(g) and 21.4212.

(2) The performance of this function will include:

(i) Hearing testimony or argument from witnesses or representatives of educational institutions and VA, as appropriate, when such persons appear personally before the Committee;

(ii) Receiving and reviewing all the evidence, testimony, briefs, statements, and records included in each case; and

(iii) Furnishing the Director of the VA facility of jurisdiction a written statement setting forth specifically the question or questions considered, a summation of the essential facts of record, recommendations as to issues referred for consideration by the Committee, and the basis therefor. In any case where there is not unanimity, both the majority and the minority views and recommendations will be furnished.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3690)

[63 FR 35833, July 1, 1998]

### § 21.4212 Referral to Committee on Educational Allowances.

(a) *Form and content of referral to Committee.* When the Director of the VA facility of jurisdiction refers a case to the Committee on Educational Allowances, as provided in § 21.4210(g), the referral will be in writing and will—

(1) State the approval, reporting, recordkeeping, or other criteria of statute or regulation which the Director has cause to believe the educational institution has violated;

(2) Describe the substantial pattern of veterans, servicemembers, reservists, or eligible persons receiving educational assistance to which they are not entitled which the Director has cause to believe exists, if applicable;

(3) Outline the nature of the evidence relied on by the Director in reaching the conclusions of paragraphs (a)(1) and (a)(2) of this section;

(4) Describe the Director's efforts to obtain corrective action and the results of those efforts; and

(5) Ask the Committee on Educational Allowances to perform the functions described in §§ 21.4211, 21.4213, and 21.4214 and to recommend to the Director whether educational assistance payable to individuals pursuing the courses in question should be discontinued and approval of new enrollments or reenrollments denied.

(b) *Notice of the referral.* (1) At the time of referral the Director will—

(i) Send notice of the referral, including a copy of the referral document, by certified mail to the educational institution. The notice will include statements that the Committee on Educational Allowances will conduct a hearing; that the educational institution has the right to appear before the Committee and be represented at the hearing to be scheduled; and that, if the educational institution intends to appear at the hearing, it must notify the Committee within 60 days of the date of mailing of the notice;

(ii) Provide an information copy of the notice and referral document to the State approving agency of jurisdiction; and

(iii) Place a copy of the notice and referral document on display at the VA facility of jurisdiction for review by any interested party or parties.

(2) The Director will provide a copy of the notice and referral document to the VA Regional Counsel, or designee, of jurisdiction, who will represent VA before the Committee on Educational Allowances.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3690)

[63 FR 35834, July 1, 1998]

### §21.4213 Notice of hearing by Committee on Educational Allowances.

(a) *Content of hearing notice.* In any case referred to the Committee on Educational Allowances for consideration, a hearing will be held. If, as provided in §21.4212(b), the educational institution has timely notified the Committee of its intent to participate in the hearing, the educational institution will be notified by certified letter from the Chairperson of the date when the hearing will be held. This hearing notification will inform the educational institution of—

(1) The time and place of the hearing;

(2) The matters to be considered;

(3) The right of the educational institution to appear at the hearing with representation by counsel, to present witnesses, to offer testimony, to present arguments, and/or to submit a written statement or brief; and

(4) The complete hearing rules and procedures.

(b) *Expenses connected with hearing.* The notice also will inform the educational institution that VA will not pay any expenses incurred by the educational institution resulting from its participation in the hearing, including the expenses of counsel or witnesses on behalf of the educational institution.

(c) *Publication of hearing notice.* Notice of the hearing will be published in the FEDERAL REGISTER, which will constitute notice to any interested individuals, and will indicate that, while such individuals may attend and observe the hearing, they may not participate unless called as witnesses by VA or the educational institution.

(Authority: 10 U.S.C. 16136; 38 U.S.C. 3034(a), 3241(a), 3690)

[63 FR 35834, July 1, 1998]

### §21.4214 Hearing rules and procedures for Committee on Educational Allowances.

(a) *Rule 1.* The Chairperson of the Committee on Educational Allowances will be in charge of the proceedings, will administer oaths or affirmations to witnesses, and will be responsible for the official conduct of the hearing. A majority of the members of the Committee will constitute a quorum. No party to the proceedings may conduct a *voir dire* of the Committee members.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3690)

(b) *Rule 2.* At the opening of the hearing, the Chairperson of the Committee on Educational Allowances will inform the educational institution of the purpose of the hearing, the nature of the evidence of record relating to the asserted failures or violations, and the applicable provisions of law and VA regulations. The Chairperson will advise the VA Regional Counsel, or designee, representing VA, that the Committee on Educational Allowances will entertain any relevant evidence or witnesses which VA Counsel presents to the Committee and which would substantiate a decision by the Committee to recommend that the Director of the VA facility of jurisdiction take an adverse action on the issues submitted for its review. The educational institution will be advised of its right to

present any evidence, relevant to the issues submitted for the Committee's review, by oral or documentary evidence; to submit rebuttal evidence; to present and cross-examine witnesses; and to make such statements as may be appropriate on its behalf for a true and full disclosure of the facts. VA Counsel will be allowed to cross-examine any witnesses offered by the educational institution and to reply to any written briefs or arguments submitted to the Committee.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3690)

(c) *Rule 3.* Any testimony or evidence, either oral or written, which the Committee on Educational Allowances deems to be of probative value in deciding the question at issue will be admitted in evidence. While irrelevant, immaterial, or unduly repetitious evidence, testimony, or arguments should be excluded, reasonable latitude will be permitted with respect to the relevancy, materiality, and competency of evidence. In most instances the evidence will consist of official records of the educational institution and VA, and these documents may be attested to and introduced by affidavit; but the introduction of oral testimony by the educational institution or by VA will be allowed, as appropriate, in any instance where the educational institution or VA Counsel desires. VA, however, will neither subpoena any witness on behalf of the educational institution for such purposes nor bear any expenses in connection with the appearance of such witness. In instances where the evidence reasonably available consists of signed written statements, secondary or hearsay evidence, etc., such evidence may be introduced into the record and will be given the weight and consideration which the circumstances warrant.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3690)

(d) *Rule 4.* A verbatim stenographic or recorded transcript of the hearing will be made. This transcript will become a permanent part of the record, and a copy will be furnished to the educational institution and the VA Counsel at the conclusion of the proceeding, unless furnishing of the copy of the transcript is waived by the educational institution.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3690)

(e) *Rule 5.* The Chairperson of the Committee on Educational Allowances will identify all exhibits in the order of introduction or receipt (numerically for VA exhibits and alphabetically for exhibits introduced by the educational institution). All such original exhibits or documents shall be attached to the original of the transcript. VA shall make photocopies or certified copies and attach them to the copy of the transcript furnished to the educational institution and the VA Counsel. The original transcript will accompany the Committee's recommendation to the Director of the VA facility of jurisdiction along with all exhibits, briefs, or written statements received by the Committee during the course of the proceedings. Such documents should be clearly marked to indicate which were received into evidence and relied upon by the Committee in making its recommendations.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3690)

(f) *Rule 6.* The Committee on Educational Allowances, at its discretion, may reasonably limit the number of persons appearing at the hearing, including any affected individuals presented as witnesses by VA or the educational institution.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3690)

(g) *Rule 7.* Any person who is presented to testify will be required to be duly placed under oath or affirmation by the Chairperson of the Committee on Educational Allowances. If an official of the educational institution desires to present a statement personally, the individual will be required to be placed under oath or affirmation. The Chairperson will advise each witness that the Committee understands that he or she is voluntarily appearing before the Committee; that any testimony or statement given will be considered as being completely voluntary;

and that no one has authority to require the individual to make any statement or answer any question against his or her will before the Committee, except that a person called as a witness on behalf of either VA or the educational institution must be willing to submit to cross-examination with respect to testimony given. Each witness will also be advised that his or her testimony or statement, if false, even though voluntary, may subject him or her to prosecution under Federal statutes.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3690)

(h) *Rule 8.* Any member of the Committee on Educational Allowances may question any witness presented to testify at the hearing or either a representative of the educational institution or the VA Counsel concerning matters that are relevant to the question at issue. Generally, questioning by a Committee member will be limited to the extent of clarifying information on the facts and issues involved.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3690)

(i) *Rule 9.* If the educational institution fails to timely notify the Committee of its intent to participate in a hearing or if a representative of the educational institution is scheduled to appear for a hearing but, without good cause, fails to appear either in person or by writing, the Committee will proceed with the hearing and will review the case on the basis of the evidence of record which shall be presented by the VA Counsel.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3690)

(j) *Rule 10.* Any objection by an authorized representative of the educational institution or the VA Counsel on a ruling by the Chairperson of the Committee on Educational Allowances regarding the admissibility of testimony or other evidence submitted will be made a matter of record, together with the substance in brief of the testimony intended or other evidence concerned. If the other evidence concerned is in the form of an affidavit or other document, it may be accepted for filing as a future reference if it is later ruled admissible as part of the record of the hearing.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3690)

(k) *Rule 11.* Objections relating to the jurisdiction or membership of the Committee on Educational Allowances or the constitutionality of statutes or the constitutionality of, or statutory authority for, VA regulations, are not before the Committee for decision. The time of the Committee will not be used to hear arguments in this regard. However, any such matters outside the province of the Committee may be the subject of a brief or a letter for consideration by the VA Office of General Counsel upon completion of the hearing. The ruling of such authority upon such issues will be obtained and included in the record before the Committee's recommendations are submitted to the Director of the VA facility of jurisdiction. If the VA General Counsel's ruling on such legal issues necessitates reopening the proceeding, that shall be done before the Committee makes its recommendations to the Director of the VA facility of jurisdiction.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3690)

(l) *Rule 12.* The hearing will be open to the public.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3690)

(m) *Rule 13.* The hearing will be conducted in an orderly manner with dignity and decorum. The conduct of members of the Committee on Educational Allowances, the VA Counsel, and any representatives of the educational institution shall be characterized by appropriate impartiality, fairness, and cooperation. The Chairperson of the Committee shall take such action as may be necessary, including suspension of the hearing or the removal of the offending person from the hearing room for misbehavior, disorderly conduct, or the persistent disregard of the Chairperson's ruling. Where this occurs, the Chairperson will point out that the Committee is entitled to every possible consideration in

order that the case may be presented clearly and fully, which may be accomplished only through observance of orderly procedures.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3690)

(n) *Rule 14.* The Chairperson of the Committee on Educational Allowances will conduct the hearing proceedings in such a manner that will protect from disclosure information which tends to disclose or compromise investigative sources or methods or which would violate the privacy of any individual. The salient facts, which form the basis of charges, may be disclosed and discussed without revealing the source.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3690)

(o) *Rule 15.* At the close of the hearing, the Chairperson of the Committee on Educational Allowances shall inform the appropriate representative of the educational institution that the arguments and the evidence presented will be given careful consideration; and that notice of the decision of the Director of the VA facility of jurisdiction, together with the Committee's recommendations, will be furnished to the educational institution and the VA Counsel at the earliest possible time. The Chairperson will also indicate that notice of the Director's decision will be published in the FEDERAL REGISTER for the information of all other interested persons.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3690)

(p) *Rule 16.* In making its findings of facts and recommendations, the Committee on Educational Allowances will consider only questions which are referred to it by the Director of the VA facility of jurisdiction as being at issue and which are within the jurisdiction of the Committee.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3690)

[63 FR 35834, July 1, 1998]

## § 21.4215 Decision of Director of VA facility of jurisdiction.

(a) *Decision.* The Director of the VA facility of jurisdiction will render a written decision on the issue of discontinuance of payments of benefits and/or denial of further enrollments or reenrollments in the course or courses at the educational institution which was the subject of the Committee on Educational Allowances proceedings.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3690)

(b) *Basis of decision.* (1) The decision of the Director of the VA facility of jurisdiction will be based upon all admissible evidence of record, including—

(i) The recommendations of the Committee on Educational Allowances;

(ii) The hearing transcript and the documents admitted in evidence; and

(iii) The ruling on legal issues referred to appropriate authority.

(2) The decision will clearly describe the evidence and state the facts on which the decision is based and, in the event that the decision differs from the recommendations of the Committee on Educational Allowances, will give the reasons and facts relied upon by the Director in deciding not to follow the Committee majority's recommendations.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3690)

(c) *Correction of deficiencies.* If the Director of the VA facility of jurisdiction believes that the record provided for review is incomplete or for any reason should be reopened, before rendering a decision he or she will order VA staff to gather any additional necessary evidence and will notify the educational institution that it may comment upon the new evidence added. The Director will then notify the educational institution as to whether the matter will be resubmitted to the Committee on Educational Allowances for further proceedings, on the basis of the new circumstances. If the matter is referred back to the Committee, the Director will defer a decision until he or she has

received the Committee's new recommendations based upon all of the evidence of record.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3690)

(d) *Effective date.* If the decision of the Director of the VA facility of jurisdiction is adverse to the educational institution, the decision shall indicate specifically the effective date of each adverse action covered by the decision.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3690)

(e) *Notification of decision.* (1) The Director of the VA facility of jurisdiction shall send a copy of the decision to the educational institution by certified mail, return receipt requested. A copy of the decision also will be provided by regular mail to the institution's legal representative of record, if any. If the decision is adverse to the educational institution, the Director will enclose a notice of the educational institution's right to have the Director, Education Service review the decision.

(2) The Director of the VA facility of jurisdiction will also send a copy of the decision to:

(i) The State approving agency; and

(ii) VA Counsel.

(3) The Director of the VA facility of jurisdiction shall post a copy of the decision at the VA facility of jurisdiction. A copy of the decision shall be published in the FEDERAL REGISTER.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3690)

[63 FR 35836, July 1, 1998]

### § 21.4216 Review of decision of Director of VA facility of jurisdiction.

(a) *Decision is subject to review by Director, Education Service.* A review by the Director, Education Service of a decision of a Director of a VA facility of jurisdiction to terminate payments or disapprove new enrollments or reenrollments, when requested by the educational institution, will be based on the evidence of record when the Director of the VA facility of jurisdiction made that decision. It will not be de novo in nature and no hearing on review will be held.

(b) *Authority of Director, Education Service.* The Director, Education Service has the authority to affirm, reverse, or remand the original decision. In the case of such a review, the reviewing official's decision, other than a remand, shall become the final Department decision on the issue presented.

(c) *Notice of decision of Director, Education Service is required.* Notice of the reviewing official's decision will be provided to the interested parties and published in the FEDERAL REGISTER, in the same manner as is provided in § 21.4215(e) for decisions of the Director of the VA facility of jurisdiction, for the information of all concerned.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3690)

[63 FR 35836, July 1, 1998]

PROGRAMS OF EDUCATION

### § 21.4232 Specialized vocational training—38 U.S.C. Chapter 35.

(a) *Eligibility requirements for specialized vocational training.* (1) The Department of Veterans Affairs may provide a program of a specialized course of vocational training to an eligible person who:

(i) Is not in need of special restorative training, and

(ii) Requires specialized vocational training because of a mental or physical handicap.

(2) The counseling psychologist will:

(i) After consulting with the Vocational Rehabilation Panel, determine whether such a course is in the best interest of the eligible person; and

(ii) Deny the application for the program when the course is not in the eligible person's best interest.

(3) Both the counseling psychologist and the Vocational Rehabilitation Panel will assist in developing the program, if the counseling psychologist has previously determined that the course is in the eligible person's best interest.

(Authority: 38 U.S.C. 3521, 3536; Pub. L. 99–576)

(4) The Department of Veterans Affairs may authorize specialized vocational training for an eligible child only if the child has passed his or her

14th birthday at the time training is to begin.

(Authority: 38 U.S.C. 3536)

(b) *Program objective.* The objective of a program of specialized vocational training will be designated as a vocational objective.

(c) *Special assistance.* When needed, special assistance will be provided under § 21.4276.

(d) *Length of specialized vocational training.* When the program of specialized vocational training will exceed 45 months, the counseling psychologist will refer the program to the Director, Vocational Rehabilitation and Employment Service for prior approval.

(Authority: 38 U.S.C. 3543(b))

[48 FR 37989, Aug. 22, 1983, as amended at 49 FR 42726, Oct. 24, 1984; 54 FR 33889, Aug. 17, 1989]

### § 21.4233 Combination.

An approved program may consist of a combination of courses with instruction offered by a school alternating with instruction in a business or industrial establishment (a cooperative course); courses offered by two schools concurrently; or courses offered through class attendance and by television concurrently. A farm cooperative program may be approved which consists of a combination of institutional agricultural courses and concurrent agricultural employment (see § 21.4264). A school may contract the actual training to another school or entity, provided the course is approved by the State approving agency having approval jurisdiction of the school or entity which actually provides the training.

(a) *Cooperative courses.* A full-time program of education consisting of phases of school instruction alternated with training in a business or industrial establishment with such training being strictly supplemental to the school instruction may be approved. Alternating periods may be a part-day in school and a part-day on job or may be such periods which alternate on a daily, weekly, monthly or on a term basis. For purposes of approval the school offering the course must submit to the State approving agency, with its application, statements of fact showing at least the following:

(1) That the alternate in-school periods of the course are at least as long as the alternate periods in the business or industrial establishment; in determining this relationship between the two components of the course, training received in a business or industrial establishment during a vacation or officially scheduled school break period shall be excluded from the calculation; where the course is approved as continuous part-time work and part-time study in combination, it shall be measured on the basis of the ratio which each portion of the training bears to full time as defined in § 21.4270(c) of this part. The institutional portion must be at least equivalent to one-half time training and must be combined with a job training portion sufficient for the combined training to equal full time.

(Authority: 38 U.S.C. 3482(a)(2) and 3532(b))

(2) That the course is set up as a cooperative course in the school catalog or other literature of the school;

(3) That the school itself arranges with the employer's establishment for providing the alternate on-job periods of training on such basis that the on-job portion of the course will be training in a real and substantial sense and will supplement the in-school portion of the course;

(4) That the school arranges directly with the employer's establishment for placing the individual student in that establishment and exercises supervision and control over the student's activities at the establishment to an extent that assures training in a true sense to the student; and

(5) That the school grants credit for the on-job portion of the course for completion of a part of the work required for granting a degree or diploma.

(Authority: 38 U.S.C. 3482(a)(2) and 3532(b))

(b) *Concurrent enrollment.* Where a veteran or eligible person cannot successfully schedule his or her complete program at one school, a program of concurrent enrollment may be approved. When requesting such a program the veteran or eligible person must show that his or her complete

program of education or training is not available at the school in which he or she will pursue the major portion of his or her program (the primary school), or that it cannot be scheduled successfully within the period in which he or she plans to complete his or her program.

(1) If VA measures the courses pursued at both institutions on either a clock-hour basis or a credit-hour basis, VA will measure the veteran's or eligible person's enrollment by adding together the units of measurement in the second school to the units of measurement for the courses in the primary institution. The standard for full time will be the full-time standard for the courses at the primary institution.

(2) Where the standards for measurement of the courses pursued concurrently in the two schools are different, VA will measure the veteran's or eligible person's enrollment by converting the units of measurement for courses in the second school to the equivalent in value expressed in units of measurement required for the courses in the program of education which the veteran or eligible person is pursuing at the primary institution.

(Authority: 38 U.S.C. 3688)

(3) If the provisions of paragraph (b)(2) of this section require VA to convert clock hours to credit hours, it will do so by—

(i) Dividing the number of credit hours which VA considers to be full-time at the educational institution whose courses are measured on a credit-hour basis by the number of clock hours which are full-time at the educational institution whose courses are measured on a clock-hour basis; and

(ii) Multiplying each clock hour of attendance by the decimal determined in paragraph (b)(3)(i) of this section. VA will drop all fractional hours.

(4) If the provisions of paragraph (b)(2) of this section require VA to convert credit hours to clock hours, it will do so by—

(i) Dividing the number of clock hours which VA considers to be full-time at the educational institution whose courses are measured on a clock-hour basis by the number of credit hours which are full-time at the educational institution whose courses are measured on a credit-hour basis; and

(ii) Multiplying each credit hour by the number determined in paragraph (b)(4)(i) of this section. VA will drop all fractional hours.

(5) Periodic certifications of training will be required from the veteran and each of the schools where concurrent enrollment is approved in a course which does not lead to a standard college degree and to which the measurement provisions of §21.4270(b), of this part do not apply. (See §§21.4203 and 21.4204.)

(Authority: 38 U.S.C. 3688)

(c) *Television.* (1) A course offered by open-circuit television is an independent study course. In order for an eligible person to receive educational assistance while pursuing such a course, the course must meet all the requirements for independent study found in §21.4267.

(Authority: 38 U.S.C. 3523, 3680A)

(2) *Closed circuit telecast.* Instruction offered through closed circuit telecast which requires regular classroom attendance is to be recognized to the same extent as regular classroom and/or laboratory instruction.

(d) *Farm cooperative course.* A program of education consisting of institutional agricultural courses pursued by an eligible person who is concurrently engaged in agricultural employment which is relevant to such institutional course may be approved if the course meets the requirements of §21.4264.

(e) *Contract.* All or part of the program of education of a school may be provided by another school or entity under contract. Such school or entity actually providing the training must obtain approval of the course from the State approving agency in the State having jurisdiction of that school or entity. If the course is a course of flight training, the school or entity actually providing the training must also obtain approval of the course from the Federal Aviation Administration. Measurement of the course and payment of an allowance will be appropriate for the course as offered by the

school or entity actually providing the training.

(Authority: 10 U.S.C. 16136(c); 38 U.S.C. 3002(8), 3034(d), 3202(4), 3241(b), 3452(c), 3501(a)(6), 3675, 3676)

[31 FR 6774, May 6, 1966]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 21.4233, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

### § 21.4234 Change of program.

(a) *Definition.* (1) Except as provided in paragraph (a)(2) of this section, a change of program consists of a change in the educational professional or vocational objective for which the veteran or eligible person entered training.

(2) VA does not consider any of the following to be changes of program.

(i) A change in the type of courses needed to attain a vocational objective.

(ii) A change in the individual's educational, professional or vocational objective following the successful completion of the immediately preceding program of education,

(iii) A return to the individual's prior program of education following a change of program if the individual resumes training in the program without any loss of credit or standing in that program, or

(iv) An enrollment in a new program of education when that program leads to a vocational, educational or professional objective in the same general field as the immediately preceding program of education.

(Authority: 38 U.S.C. 3691)

(b) *Application.* A veteran or eligible person may request a change of program by any form of communication. However, if the veteran or eligible person does not furnish sufficient information to allow the Department of Veterans Affairs to process the request, the Department of Veterans Affairs will furnish the prescribed form for a change of program to him or her for completion.

(Authority: 38 U.S.C. 3471)

(c) *Optional change of program.* A veteran eligible to receive educational assistance under Chapter 34 or a spouse or surviving spouse eligible to receive educational assistance under Chapter 35 may make one optional change of program if his or her previous course was not interrupted due to his or her own misconduct, neglect or lack of application.

(Authority: 38 U.S.C. 3691(b))

(d) *Other changes of program.* (1) The following changes of program may not be made solely at the option of the veteran or eligible person. The Department of Veterans Affairs must approve them before paying educational assistance allowance:

(i) A second or subsequent change of program made by a veteran or eligible spouse or surviving spouse,

(ii) An initial change of program made by a veteran or eligible spouse or surviving spouse if the first program was interrupted or discontinued due to his or her own misconduct, neglect or lack of application, or

(iii) Any change of program made by a child.

(2) The Department of Veterans Affairs will approve a change of program listed in paragraph (d)(1) of this section if:

(i) The program of education which the veteran or eligible person proposes to pursue is suitable to his or her aptitudes, interests and abilities,

(ii) In any instance where the veteran or eligible person has interrupted, or failed to progress in his or her program due to his or her own misconduct, neglect or lack of application, there is a reasonable likelihood with respect to the program the veteran or eligible person proposes to pursue that there will not be a recurrence of such an interruption or failure to progress, and

(iii) In the case of an eligible child the new program meets the criteria applicable to final approval of an original application. See § 21.4230.

(3) The Department of Veterans Affairs may approve a third or subsequent change of program if applicable conditions of paragraph (d)(2) of this section are met and the additional change or changes are necessitated by circumstances beyond the control of the veteran or eligible person. Circumstances beyond the control of the

veteran or eligible person include, but are not limited to:

(i) The course being discontinued by the school when no other similar course leading to the same objective is available within normal commuting distance.

(ii) Unexpected financial difficulties preventing completion of the last program because of the overall cost of the program needed to reach the objective, or

(iii) The veteran or eligible person being required to relocate because of health reasons in an area where training for the last objective is not available within normal commuting distance.

(Authority: 38 U.S.C. 3691)

(4) Notwithstanding any provision of any other paragraph of this section, if a third or subsequent change of program occurs after May 31, 1991, VA will apply only the applicable provisions of paragraph (d)(2) of this section. If the applicable provisions of paragraph (d)(2) of this section are met, VA will approve the change of program. VA will not apply any of the provisions of paragraph (d)(3) of this section in determining whether the change of program should be approved.

(Authority: 38 U.S.C. 3691; Pub. L. 101–366) (June 1, 1991)

(e) *Adjustments; transfers.* A change in courses or places of training will not be considered a change of objective in the following instances:

(1) The pursuit of the first program is a prerequisite for entrance into and pursuit of a second program.

(2) A transfer from one school to another when the program at the second school leads to the same educational, professional or vocational objective, and does not involve a material loss of credit, or increase training time.

(3) Revision of a program which does not involve a change of objective or material loss of credit nor loss of time originally planned for completion of the veteran's or eligible person's program. For example, an eligible person enrolled for a bachelor of science degree may show a professional objective such as chemist, teacher or engineer. His or her objective for purposes of this paragraph shall be considered to be ''bachelor degree'' and any change of courses will be considered only an adjustment in the program, not a change, so long as the subjects he or she pursues lead to the bachelor degree and there is no extension of time in the attaining of that degree.

CROSS REFERENCE: *Counseling.* See §21.4100.

[31 FR 6774, May 6, 1966, as amended at 34 FR 845, Jan. 18, 1969; 39 FR 34036, Sept. 23, 1974; 39 FR 45237, Dec. 31, 1974; 45 FR 67093, Oct. 9, 1980; 57 FR 29027, June 30, 1992; 57 FR 40614, Sept. 4, 1992; 60 FR 32272, June 21, 1995; 61 FR 6783, Feb. 22, 1996]

## §21.4235 Programs of education that include flight training.

VA will use the provisions of this section to determine whether an individual may be paid educational assistance for pursuit of flight training. See §21.4263 for approval of flight courses for VA training.

(a) *Eligibility.* A veteran or servicemember who is otherwise eligible to receive educational assistance under 38 U.S.C. chapter 30 or 32, or a reservist who is eligible for expanded benefits under 10 U.S.C. chapter 1606 as provided in §21.7540(b), may receive educational assistance for flight training in an approved course provided that the individual meets the requirements of this paragraph. Except when enrolled in a ground instructor certification course or when pursuing flight training under paragraph (f) of this section, the individual must—

(1) Possess a valid private pilot certificate or higher pilot certificate such as a commercial pilot certificate;

(2) If enrolled in a course other than an Airline Transport Pilot (ATP) course, hold a second-class medical certificate on the first day of training and, if that course began before October 1, 1998, hold that certificate continuously during training; and

(3) If enrolled in an ATP certification course, hold a first-class medical certificate on the first day of training and, if that course began before October 1, 1998, hold that certificate continuously during training.

(Authority: 10 U.S.C. 16136(c); 38 U.S.C. 3034(d), 3241(b))

(b) *Approval of program.* VA may approve the individual's program of education as described on the individual's application if:

(1) The flight courses that constitute the program of education meet Federal Aviation Administration standards for such courses and the Federal Aviation Administration and the State approving agency approve them; and

(2) The flight training included in the program—

(i) Is generally accepted as necessary for the attainment of a recognized vocational objective in the field of aviation; or

(ii) Is given by an educational institution of higher learning for credit toward a standard college degree that the individual is pursuing.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3002(3)(A), 3034(a), 3202(2)(A), 3241(a), 3241(b), 3452(b), 3680A(a)(3))

(c) *Pursuit of flight courses.* (1) VA will pay educational assistance to an eligible individual for an enrollment in a commercial pilot certification course leading to Federal Aviation Administration certification for a particular category even if the individual has a commercial pilot certificate issued by the Federal Aviation Administration for a different category, since each category represents a different vocational objective.

(2) VA will pay educational assistance to an eligible individual for an enrollment in an instrument rating course only if the individual simultaneously enrolls in a course required for a commercial pilot certificate for the category for which the instrument rating course is pursued or if, at the time of enrollment in the instrument rating course, the individual has a commercial pilot certificate issued by the Federal Aviation Administration for such category. The enrollment in an instrument rating course alone does not establish that the individual is pursuing a vocational objective, as required for VA purposes, since that rating equally may be applied to an individual's private pilot certificate, only evidencing an intent to pursue a non-vocational objective.

(3) VA will pay educational assistance to an eligible individual for an enrollment in a flight course other than an instrument rating course or a ground instructor course, including courses leading to an aircraft type rating, only if the individual has a commercial pilot certificate issued by the Federal Aviation Administration for the category to which the particular course applies.

(4) VA will pay educational assistance to an eligible individual for an enrollment in a ground instructor certificate course, even though the individual does not have any other flight certificate issued by the Federal Aviation Administration, since the Federal Aviation Administration does not require a flight certificate as a prerequisite to ground instructor certification and ground instructor is a recognized vocational objective.

(5) VA will not pay an eligible individual for simultaneous enrollment in more than one flight course, except as provided in paragraph (c)(2) of this section.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3002(3)(A), 3034(a), 3202(2)(A), 3241(a), 3241(b), 3452(b), 3680A(a)(3))

(d) *Some individuals are already qualified for a flight course objective.* (1) The provisions of §§ 21.5230(a)(4), 21.7110(b)(4), and 21.7610(b)(4), prohibiting payment of educational assistance for enrollment in a course for whose objective the individual is already qualified, apply to enrollments in flight courses.

(2) A former military pilot with the equivalent of a commercial pilot certificate and an instrument rating may obtain a commercial pilot certificate and instrument rating from the Federal Aviation Administration without a flight exam within 12 months of release from active duty. Therefore, VA will consider such a veteran to be already qualified for the objectives of a commercial pilot certification course and an instrument rating course if begun within 12 months of the individual's release from active duty.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3241(b), 3471(4))

(e) *Some flight courses are refresher training.* The provisions of §§ 21.5230(c), 21.7020(b)(26), 21.7122(b), 21.7520(b)(20),

and 21.7610(b)(4) that provide limitations on payment for refresher training that is needed to update an individual's knowledge and skill in order to cope with technological advances while he or she was on active duty service apply to flight training.

(1) An individual who held a Federal Aviation Administration certificate before or during active duty service may have surrendered that certificate or the Federal Aviation Administration may have canceled it. The individual may receive the equivalent of the number of months of educational assistance necessary to complete the course that will qualify him or her for the same grade certificate.

(2) A reservist is not eligible for refresher training unless he or she has had prior active duty.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3002(3)(A), 3034(a)(3), 3202(2)(A), 3241(a), 3241(b))

(f) *Flight training at an institution of higher learning.* (1) An individual who is eligible for educational assistance under 10 U.S.C. chapter 1606 or 38 U.S.C. chapter 30, 32, or 35 is exempt from the provisions of paragraphs (a)(2) through (d) of this section when his or her courses include flight training that is part of a program of education that leads to a standard college degree.

(2) An individual described in paragraph (f)(1) of this section may pursue courses that may result in the individual eventually receiving recreational pilot certification or private pilot certification, provided that the courses also lead to a standard college degree.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3002(3)(A), 3034(a)(3), 3202(2)(A), 3241(a), 3241(b))

[63 FR 34129, June 23, 1998, as amended at 65 FR 12118, Mar. 8, 2000]

### § 21.4236 Tutorial assistance.

(a) *Enrollment.* A veteran or eligible person may receive supplemental monetary assistance to provide tutorial services if he or she:

(1) Is pursuing a post-secondary educational program on a half-time or more basis at an educational institution, and

(2) Has a deficiency in a subject which is indispensable to the satisfactory pursuit of an approved program of education.

(b) *Approval.* The Department of Veterans Affairs will grant approval when:

(1) The educational institution certifies that:

(i) Individualized tutorial assistance is essential to correct a deficiency in a specified subject or subjects required as a part of, or which is prerequisite to, or which is indispensable to the satisfactory pursuit of an approved program of education;

(ii) The tutor selected:

(A) Is qualified, and

(B) Is not the parent, spouse, child, brother or sister of the veteran or eligible person; and

(iii) The charges for this assistance do not exceed the customary charges for such tutorial assistance; and

(2) The assistance is furnished on an individual basis.

(Authority: 10 U.S.C. 16131(h); 38 U.S.C. 3019, 3234, 3492, 3533(b))

(c) *Limits on tutorial assistance.* (1) VA will authorize the cost of tutorial assistance in an amount not to exceed $100 per month.

(2) The total amount of all tutorial assistance provided under this section will not exceed $1200.

(Authority: 38 U.S.C. 3019, 3492, 3533(b))

(d) *Entitlement charge.* VA will make no charge against the veteran's or eligible person's entitlement to educational assistance for any amount of tutorial assistance authorized.

(Authority: 38 U.S.C. 3019, 3492, 3533(b))

[48 FR 37989, Aug. 22, 1983, as amended at 50 FR 19935, May 13, 1985; 55 FR 28027, July 9, 1990; 61 FR 26114, May 24, 1996]

## COURSES

### § 21.4250 Approval of courses.

(a) *General.* A course of education, including the class schedules of a resident course (other than a flight course) not leading to a standard college degree, offered by a school must be approved by the State approving agency

for the State in which the school is located, or by the State approving agency which has appropriate approval authority, or, where appropriate, by the Department of Veterans Affairs.

(Authority: 38 U.S.C. 3672)

(1) A course approved under 38 U.S.C. chapter 36 shall be deemed approved for purposes of 38 U.S.C. chapter 35.

(2) Any course which was approved under 38 U.S.C. chapter 33 (as in effect before February 1, 1965), or under 38 U.S.C. chapter 35 prior to March 3, 1966, and was not or is not disapproved for failure to meet any of the requirements of the applicable chapters will be deemed to be approved for purposes of 38 U.S.C. chapter 36.

(Authority: 38 U.S.C. 3670)

(b) *State approving agencies.* Approval by State approving agencies will be in accordance with the provisions of 38 U.S.C. Chapter 36 and such regulations and policies as the agency may adopt not in conflict therewith.

(1) *Notice of approval.* Each State approving agency will furnish to the Department of Veterans Affairs a current list of schools specifying courses which it has approved, and will furnish such other information as it and the Department of Veterans Affairs may determine to be necessary. See § 21.4258.

(2) *Notice of suspension of approval or disapproval.* Each State approving agency will notify the Department of Veterans Affairs of the suspension of approval or disapproval of any course previously approved and will set forth the reasons for such suspension of approval or disapproval. See § 21.4259.

(Authority: 38 U.S.C. 3672(a))

(3) *Failure to act.* If notice has been furnished that the State approving agency does not intend to act on the application of a school, the school may request approval by the Department of Veterans Affairs.

(c) *Department of Veterans Affairs approval.* (1) The Director, Vocational Rehabilitation and Employment Service may approve special restorative training in excess of 12 months to overcome or lessen the effects of a physical or mental disability to enable an eligible child to pursue a program of education under 38 U.S.C. chapter 35.

(2) The Director, Education Service may approve—

(i) A course of education offered by any agency of the Federal Government authorized under other laws to offer such a course;

(ii) A course of education to be pursued under 10 U.S.C. Chapter 1606 or 38 U.S.C. Chapters 30, 32, 35, or 36 offered by a school located in the Canal Zone, Guam or Samoa;

(Authority: 10 U.S.C. 16136, 38 U.S.C. 3034, 3241, 3672)

(iii) Except as provided in § 21.4150(d) as to the Republic of the Philippines, a course of education to be pursued under 10 U.S.C. chapter 1606 or 38 U.S.C. chapter 30, 32, or 35 offered by an institution of higher learning not located in a State;

(iv) Any course in any other school in accordance with the provisions of 38 U.S.C. chapter 36; and

(v) Any program of apprenticeship the standards for which have been approved by the Secretary of Labor pursuant to section 50a of Title 29 U.S.C. as a national apprenticeship program for operation in more than one State and for which the training establishment is a carrier directly engaged in interstate commerce and providing training in more than one State.

(Authority: 38 U.S.C. 3241, 3476, 3523, 3672(b), 3672(c))

CROSS REFERENCE: *State approving agencies.* See § 21.4150(e).

[31 FR 6774, May 6, 1966, as amended at 35 FR 9816, June 16, 1970; 41 FR 30640, July 26, 1976; 44 FR 54707, Sept. 21, 1979; 48 FR 37990, Aug. 22, 1983; 51 FR 16317, May 2, 1986; 61 FR 20728, May 8, 1996; 62 FR 55760, Oct. 28, 1997]

### § 21.4251 Minimum period of operation requirement for educational institutions.

(a) *Definitions.* The following definitions apply to the terms used in this section. The definitions in § 21.4200 apply to the extent that no definition is included in this paragraph.

(1) *Control.* The term *control* (including the term controlling) means the possession, direct or indirect, of the power to direct or cause the direction

of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

(2) *Person*. The term *person* means an individual, corporation, partnership, or other legal entity.

(Authority: 38 U.S.C. 3680A(e))

(b) *Some educational institutions must be in operation for 2 years.* Except as provided in paragraph (c) of this section, when a proprietary educational institution offers a course not leading to a standard college degree, VA may not approve an enrollment in that course if the proprietary educational institution—

(1) Has been operating for less than 2 years;

(2) Offers the course at a branch or extension and the branch or extension has been operating for less than 2 years; or

(3) Offers the course following either a change in ownership or a complete move outside its original general locality, and the educational institution does not retain substantially the same faculty, student body, and courses as before the change in ownership or the move outside the general locality unless the educational institution, after such change or move, has been in operation for at least 2 years.

(Authority: 38 U.S.C. 3680A(e) and (g))

(c) *Exception to the 2-year operation requirement.* Notwithstanding the provisions of paragraph (b) of this section, VA may approve the enrollment of a veteran, servicemember, reservist, or eligible person in a course not leading to a standard college degree approved under this subpart if it is offered by a proprietary educational institution that—

(1) Offers the course under a contract with the Department of Defense or the Department of Transportation; and

(2) Gives the course on or immediately adjacent to a military base, Coast Guard station, National Guard facility, or facility of the Selected Reserve.

(Authority: 38 U.S.C. 3680A(e) and (g))

(d) *Operation for 2 years.* VA will consider, for the purposes of paragraph (b) of this section, that a proprietary educational institution (or a branch or extension of such an educational institution) will be deemed to have been operating for 2 years when the educational institution (or a branch or extension of such an educational institution)—

(1) Has been operating as an educational institution for 24 continuous months pursuant to the laws of the State(s) in which it is approved to operate and in which it is offering the training; and

(2) Has offered courses continuously for at least 24 months inclusive of normal vacation or holiday periods, or periods when the institution is closed temporarily due to a natural disaster that directly affected the institution or the institution's students.

(Authority: 38 U.S.C. 3680A(e) and (g))

(e) *Move outside the same general locality.* A proprietary educational institution (or a branch or extension thereof) will be deemed to have moved to a location outside the same general locality of the original location when the new location is beyond normal commuting distance of the original location, i.e., 55 miles or more from the original location.

(Authority: 38 U.S.C. 3680A(e))

(f) *Change of ownership.* (1) A change of ownership of a proprietary educational institution occurs when—

(i) A person acquires operational management and/or control of the proprietary educational institution and its educational activities; or

(ii) A person ceases to have operational management and/or control of the proprietary educational institution and its educational activities.

(2) Transactions that may cause a change of ownership include, but are not limited to the following:

(i) The sale of the educational institution;

(ii) The transfer of the controlling interest of stock of the educational institution or its parent corporation;

(iii) The merger of 2 or more educational institutions; and

(iv) The division of one educational institution into 2 or more educational institutions.

(3) VA considers that a change in ownership of an educational institution does not include a transfer of ownership or control of the institution, upon the retirement or death of the owner, to:

(i) The owner's parent, sibling, spouse, child, spouse's parent or sibling, or sibling's or child's spouse; or

(ii) An individual with an ownership interest in the institution who has been involved in management of the institution for at least 2 years preceding the transfer.

(Authority: 38 U.S.C. 3680A(e))

(g) *Substantially the same faculty, student body, and courses.* VA will determine whether a proprietary educational institution has substantially the same faculty, student body, and courses following a change of ownership or move outside the same general locality by applying the provisions of this paragraph.

(1) VA will consider that the faculty remains substantially the same in an educational institution when faculty members who teach a majority of the courses after the move or change in ownership, were so employed by the educational institution before the move or change in ownership.

(2) VA will consider that the courses remain substantially the same at an educational institution when:

(i) Faculty use the same instructional methods during the term, quarter, or semester after the move or change in ownership as were used before the move or change in ownership; and

(ii) The courses offered after the move or change in ownership lead to the same educational objectives as did the courses offered before the move or change in ownership.

(3) VA considers that the student body remains substantially the same at an educational institution when, except for those students who have graduated, all, or a majority of the students enrolled in the educational institution on the last day of classes before the move or change in ownership are also enrolled in the educational institution after the move or change in ownership.

(Authority: 38 U.S.C. 3680A(e) and (f)(1))

[65 FR 81741, Dec. 27, 2000]

### § 21.4252 Courses precluded.

(a) *Bartending and personality development.* Enrollment will not be approved in any bartending or personality development course.

(b) *Avocational and recreational.* Enrollment will not be approved in any course which is avocational or recreational in character or the advertising for which contains significant avocational or recreational themes. The courses identified in paragraphs (b)(1), (2), and (3) of this section are presumed to be avocational or recreational in character and require justification for their pursuit.

(1) Any photography course or entertainment course, or

(2) Any music course, instrumental or vocal, public speaking course, or course in dancing, sports or athletics, such as horseback riding, swimming, fishing, skiing, golf, baseball, tennis, bowling, sports officiating, or other sport or athletic courses, except courses of applied music, physical education, or public speaking which are offered by institutions of higher learning for credit as an integral part of a program leading to an educational objective, or

(3) Any other type of course which the Department of Veterans Affairs determines to be avocational or recreational.

(Authority: 38 U.S.C. 3523(a), 3680A(b))

(4) To overcome the presumption that a course is avocational or recreational in character, the veteran or eligible person will be required to establish that the course will be of bona fide use in the pursuit of his or her present or contemplated business or occupation.

(c) *Flight training.* The Department of Veterans Affairs may approve an enrollment in any of the following types of courses of flight training if an institution of higher learning offers the course for credit toward the standard college degree the veteran or eligible person is pursuing. The Department of

Veterans Affairs otherwise will not approve an enrollment in:

(1) A course of flight training to obtain a private pilot's license or equivalent level training; or

(2) Any course of flight training under Chapter 35.

(Authority: 10 U.S.C. 16131(g); 38 U.S.C. 3034(d), 3241(b), 3523(b), 3680A(b))

(d) *Courses by radio.* Enrollment in such courses will not be approved.

(e) *Correspondence courses.* (1) VA will not approve the enrollment of an individual under 10 U.S.C. Chapter 1606 or 38 U.S.C. Chapter 30, 32, or 35 in a correspondence course or the correspondence portion of a correspondence-residence course unless the course is accredited and meets the requirements of §§21.4253, 21.4256, and 21.4279, as appropriate.

(2) VA will not approve the enrollment of an eligible child under 38 U.S.C. Chapter 35 in a correspondence course or the correspondence portion of a correspondence-residence course.

(Authority: 38 U.S.C. 3534(b))

(f) *Alternative teacher certification program.* VA will not approve the enrollment of an eligible person under 38 U.S.C. Chapter 35 in an alternative teacher certification program unless that program is offered by an institution of higher learning as defined in §21.4200(h).

(Authority: 38 U.S.C. 3452(c), 3501(a)(6))

(g) *Independent study.* (1) Effective October 29, 1992, VA may pay educational assistance to a veteran who is enrolled in a nonaccredited course or unit subject offered entirely or partly by independent study only if—

(i) Successful completion of the nonaccredited course or unit subject is required in order for the veteran to complete his or her program of education; and the veteran—

(A) Was receiving educational assistance on October 29, 1992, for pursuit of the program of education of which the nonaccredited independent study course or unit subject forms a part, and

(B) Has remained continuously enrolled in that program of education from October 29, 1992, to the date the veteran enrolls in the nonaccredited independent study course or unit subject; or

(ii) Was enrolled in and receiving educational assistance for the nonaccredited independent study course or unit subject on October 29, 1992, and remains continuously enrolled in that course or unit subject.

(2) Whether or not the veteran is enrolled will be determined by the regularly prescribed standards and practices of the educational institution.

(Authority: 38 U.S.C. 3680A; sec. 313(b), Pub. L. 102–568, 106 Stat. 4331–4332)

(h) *Erroneous, deceptive, misleading practices.* (1) The Department of Veterans Affairs will not approve an enrollment in any course offered by an institution which uses advertising, sales, or enrollment practices which are erroneous, deceptive, or misleading by actual statement, omission, or intimation. As provided by section 3696, Title 38 U.S.C., the Department of Veterans Affairs shall use the services and facilities of the Federal Trade Commission, where appropriate, under an agreement:

(i) To carry out investigations, and

(ii) To make determinations under this paragraph.

(2) To ensure compliance, any institution offering courses approved for the enrollment of veterans or eligible persons shall maintain a complete record of all advertising, sales, or enrollment materials (and copies of each) used by or on behalf of the institution during the preceding 12-month period. This record shall be available for inspection by the State approving agency or the Department of Veterans Affairs. These materials shall include, but are not limited to:

(i) Any direct mail pieces,

(ii) Brochures,

(iii) Printed literature used by sales people,

(iv) Films, video cassettes and audio tapes disseminated through broadcast media,

(v) Material disseminated through print media,

(vi) Tear sheets,

(vii) Leaflets,

(viii) Handbills,

(ix) Fliers, and

(x) Any sales or recruitment manuals used to instruct sales personnel, agents or representatives of the educational institution.

(Authority: 38 U.S.C. 3696)

(i) *Audited courses.* The school's certifications shall exclude courses which are being audited by the veteran or eligible person, since no educational assistance allowances shall be paid for such courses.

(Authority: 38 U.S.C. 3680(a))

(j) *Nonpunitive graded courses.* The school shall report any course for which a nonpunitive grade is assigned and no payment shall be authorized for such a course. If payment has already been made, in whole or in part, by the Department of Veterans Affairs at the time the grade is assigned, an overpayment shall be created against the account of the student for such a course, unless the Department of Veterans Affairs determines there are mitigating circumstances.

(Authority: 38 U.S.C. 3680(a))

(k) *Courses with suspended approval.* When a State approving agency has suspended the approval of a course for new enrollments, new enrollments in the course shall not be approved until the suspense is lifted. If the State approving agency does not lift the suspense, but disapproves the course instead, new enrollments beginning on or after the date the suspense was effective shall not be approved. See § 21.4259.

(Authority: 38 U.S.C. 3672(a))

(l) *Courses taken by a nonmatriculated student who is pursuing a degree.* The provisions of this paragraph apply to veterans and eligible persons who are pursuing a degree, but who have not matriculated. The Department of Veterans Affairs considers a student to have matriculated when he or she has been formally admitted to a college or university as a degree-seeking student.

(1) Some colleges or universities admit students provisionally, pending receipt of test results or transcripts. The Department of Veterans Affairs may approve such a veteran's or eligible person's enrollment in a course or subject only if the veteran or eligible person matriculates during the first two terms, quarters or semesters following his or her admission.

(2) The first portion of the courses leading to a single degree may be offered at one college or university. The remaining courses are not offered at the college or university, but are offered at a second college or university which grants the degree based upon the combined credits earned by the student. If the student is not required to matriculate during the portion of the program offered at the first college or university, VA may approve an enrollment in a course or subject that is part of that portion of the program only when the certifications described in either paragraph (l)(2)(i) or (ii) of this section are made.

(i) The college or university granting the degree certifies concurrently with the student's enrollment in the first portion of the program, that

(A) Full credit will be granted for the subjects taken in the portion of the curriculum offered at the first college or university;

(B) In the last 5 years at least three students who have completed the first part of the program have been accepted into the second part of the program;

(C) At least 90 percent of those who have applied for admission to the second part of the program, after successfully completing the first part, have been admitted;

(D) The student will be required to matriculate during the first two terms, quarters or semesters following his or her admission to the second part of the program.

(ii) The college or university offering the first part of the program:

(A) Certifies to the appropriate State approving agency that as a result of an agreement between that college or university and the college or university offering the second part of the program, all of the courses taken by the veteran or eligible person in the first part of the program, will be accepted by the college or university offering the second part of the program without any loss of credit in partial fulfillment of the requirements for an associate or higher degree. This certification may

be made once for each program for which an agreement exists.

(B) Certifies to VA that the veteran or eligible person has stated to an appropriate official of the college or university offering the first part of the program that he or she is pursuing the program.

(3) The first portion of the subjects or courses in a baccalaureate program beyond those necessary for an associate degree may be given at a 2-year college, while the remainder may be offered at a 4-year college or university. When the college or university does not require the student to matriculate while pursuing the additional study at the 2-year college, VA may approve an enrollment in a course offered in the program at the 2-year college only if the certifications described in either paragraph (l)(3)(i) or (ii) of this section are made.

(i) The college or university granting the baccalaureate degree certifies that:

(A) Full credit is granted for the course upon the student's transfer to the college or university granting the baccalaureate degree,

(B) The courses taken at the 2-year college will be acceptable in partial fulfillment for the baccalaureate degree, and

(C) The student will be required to matriculate during the first two terms, quarters or semesters following his or her admission to the college or university granting the baccalaureate degree.

(ii) Either the 2-year college or the college or university granting the baccalaureate degree:

(A) Certifies to the appropriate State approving agency that as a result of agreement between the 2-year college and the college or university offering the baccalaureate degree all of the courses pursued beyond the associate degree will be accepted without any loss of credit in partial fulfillment of the requirements for a baccalaureate degree. This certification may be made once for each program for which an agreement exists.

(B) Certifies to VA that the veteran or eligible person is enrolled in courses covered by the agreement.

(4) Except as provided in paragraphs (l)(1), (2), and (3) of this section, the Department of Veterans Affairs will not approve a veteran's or eligible person's enrollment in a course or subject if the veteran or eligible person:

(i) Is pursuing a degree, and

(ii) Is not matriculated.

(5) Nothing in this paragraph shall prevent a State approving agency from including more restrictive matriculation requirements in its approval criteria.

(Authority: 38 U.S.C. 3452)

(m) *Courses offered under contract.* VA may not approve the enrollment of a veteran, servicemember, reservist, or eligible person in a course as a part of a program of education offered by any educational institution if the educational institution or entity providing the course under contract has not obtained a separate approval for the course in the same manner as for any other course as required by §§21.4253, 21.4254, 21.4256, 21.4257, 21.4260, 21.4261, 21.4263, 21.4264, 21.4265, 21.4266, or 21.4267, as appropriate.

(Authority: 38 U.S.C. 3680A(f) and (g))

[31 FR 6774, May 6, 1966, as amended at 32 FR 13404, Sept. 23, 1967; 35 FR 9817, June 16, 1970; 40 FR 31763, July 29, 1975; 43 FR 35302, Aug. 9, 1978; 45 FR 31063, June 12, 1980; 48 FR 14379, Apr. 4, 1983; 48 FR 37991, Aug. 22, 1983; 49 FR 5116, Feb. 10, 1984; 49 FR 8439, Mar. 7, 1984; 51 FR 19331, May 29, 1986; 55 FR 28028, July 9, 1990; 61 FR 6783, Feb. 22, 1996; 61 FR 26114, May 24, 1996; 61 FR 29296, June 10, 1996; 65 FR 81742, Dec. 27, 2000]

### §21.4253 Accredited courses.

(a) *General.* A course may be approved as an accredited course if it meets one of the following requirements:

(1) The course has been accredited and approved by a nationally recognized accrediting agency or association. ''Candidate for accreditation'' status is not a basis for approval of a course as accredited.

(2) Credit for such course is approved by the State department of education for credit toward a high school diploma.

(3) The course is conducted under the Act of February 23, 1917 (20 U.S.C. 11 *et seq.*).

(4) The course is accepted by the State department of education for

credit for a teacher's certificate or teacher's degree.

(5) The course is approved by the State as meeting the requirement of regulations prescribed by the Secretary of Health and Human Services under sections 1819(f)(2)(A)(i) and 1919(f)(2)(A)(i) of the Social Security Act (42 U.S.C.1395i–3(f)(2)(A)(i) and 1396r(f)(2)(A)(i)).

(Authority: 38 U.S.C. 3675(a))

(b) *Course objective.* Any curriculum offered by an educational institution which is a member of one of the nationally recognized accrediting agencies or associations and which leads to a degree, diploma, or certificate will be accepted as an accredited course when approved as such by the State approving agency. Any curriculum accredited by one of the specialized nationally recognized accrediting agencies or associations and which leads to a degree, diploma, or certificate will also be accepted as an accredited course when approved as such by the State approving agency. Approval of the individual subjects, required or elective, which are designated as a part of a degree curriculum will not be necessary. Such approval may include noncredit subjects that are prescribed as a required part of the curriculum. The course objective may be educational (high school diploma or a standard college degree) or it may be vocational or professional (an occupation).

(c) *Accrediting agencies.* A nationally recognized accrediting agency or association is one that appears on the list published by the Secretary of Education as required by 38 U.S.C. 3675(a). The State approving agencies may use the accreditation of these accrediting agencies or associations for approval of the course specifically accredited and approved by the agency or association.

(d) *School qualification.* A school desiring to enroll veterans or eligible persons in accredited courses will make application for approval of such courses to the State approving agency. The State approving agency may approve the application of the school when the school and its accredited courses are found to have met the following criteria and additional reasonable criteria established by the State approving agency:

(1) The institution (other than an elementary or secondary school) has submitted to the State approving agency copies of its catalog or bulletin which are certified as true and correct in content and policy by an authorized representative, and the publication shall:

(i) State with specificity the requirements of the institution with respect to graduation;

(ii) Include institution policy and regulations relative to standards of progress required of the student by the institution (this policy will define the grading system of the institution, the minimum grades considered satisfactory, conditions for interruption for unsatisfactory grades or progress, a description of the probationary period, if any, allowed by the institution, conditions of reentrance for those students dismissed for unsatisfactory progress, and a statement regarding progress records kept by the institution and furnished the student);

(iii) Include institution policy and regulations relating to student conduct and conditions for dismissal for unsatisfactory conduct; and

(iv) Include any attendance standards of the institution if the institution has and enforces such standards.

(Authority: 38 U.S.C. 3675(a), 3676(b))

(2) Adequate records are kept by the school to show the progress of each veteran or eligible person. The records must be sufficient to show continued pursuit at the rate for which enrolled and the progress being made. They must include final grade in each subject for each term, quarter, or semester; record of withdrawal from any subject to include the last date of attendance for a resident course; and record of reenrollment in subjects from which there was a withdrawal; and may include such records as attendance for resident courses, periodic grades and examination results.

(3) The school maintains a written record of previous education and training of the veteran or eligible person which clearly indicates that appropriate credit has been given by the school for previous education and training, with the training period

shortened proportionately, and the person and the Department of Veterans Affairs so notified. The record must be cumulative in that the results of each enrollment period (term, quarter or semester) must be included so that it shows each subject undertaken and the final result, i.e., passed, failed, incomplete or withdrawn.

(Authority: 38 U.S.C. 3675(b))

(4) The school enforces a policy relative to standards of conduct and progress required of the student. The school policy relative to standards of progress must be specific enough to determine the point in time when educational benefits should be discontinued, pursuant to 38 U.S.C. 3474 when the veteran or eligible person ceases to make satisfactory progress. The policy must include the grade or grade point average that will be maintained if the student is to graduate. For example, a 4-year college may require a 1.5 grade point average the first year, a 1.75 average at mid-year the second year, and a cumulative average of 2.0 thereafter on the basis of 4.0 for an A.

(5) If the school has a standard of attendance, it maintains records of attendance for veterans and eligible persons enrolled in resident courses which are adequate to show the student meets the school's standard of attendance.

(Authority: 38 U.S.C. 3474, 3675)

(6) The accredited courses, the curriculum of which they form a part, and the instruction connected with those courses are consistent in quality, content, and length with similar courses in public educational institutions and other private educational institutions in the State with recognized accepted standards.

(7) There is in the educational institution offering the course adequate space, equipment, instructional material, and instructor personnel to provide training of good quality.

(8) The educational and experience qualifications of directors, and administrators of the educational institution offering the courses, and instructors teaching the courses for which approval is sought, are adequate.

(Authority: 38 U.S.C. 3675(b), 3676(c)(1), (2), (3))

(e) *College level.* Under the provisions of paragraph (a)(1) of this section, any course at college level approved by the State approving agency as an accredited course will be accepted by the Department of Veterans Affairs as an accredited course when all of the following conditions are met:

(1) The college or university is accredited by a nationally recognized regional accrediting agency listed by the Secretary of Education or the course is accredited at the college level by a specialized accrediting agency or association recognized by the Secretary of Education; and

(Authority: 38 U.S.C. 3675)

(2) The course has entrance requirements of not less than the requirements applicable to the college level program of the school; and

(3) Credit for the course is awarded in terms of standard semester or quarter hours or by recognition at completion by the granting of a standard college degree.

(f) *Courses not leading to a standard college degree.* Any course in a school approved by the State approving agency will be accepted as an accredited course when all of the following conditions are met:

(1) The course or the school offering such course is accredited by the appropriate accrediting agency; and

(2) The course offers training in the field for which the accrediting agency is recognized and at a level for which it is recognized; and

(3) The course leads to a high school diploma or a vocational objective.

(Paperwork requirements in §21.4253(d)(1) were approved by the Office of Management and Budget under control number 2900–0568.)

[31 FR 6774, May 6, 1966, as amended at 38 FR 14938, June 7, 1973; 40 FR 33825, Aug. 12, 1975; 43 FR 35302, Aug. 9, 1978; 48 FR 37992, Aug. 22, 1983; 50 FR 43135, Oct. 24, 1985; 60 FR 32272, June 21, 1995; 61 FR 6783, Feb. 22, 1996; 62 FR 35424, July 1, 1997; 65 FR 81742, Dec. 27, 2000]

**§ 21.4254 Nonaccredited courses.**

(a) *General.* Nonaccredited courses are courses which are not approved as accredited courses and which are offered by a public or private, profit or nonprofit, educational institution. These include nonaccredited courses offered by extension centers or divisions, or vocational or adult education departments of institutions of higher learning.

(b) *Application.* Any school desiring to enroll veterans or eligible persons in nonaccredited courses will submit a written application to the appropriate State approving agency for approval of such courses (38 U.S.C. 3676(a)). Such application will be accompanied by not less than two copies of the current catalog or bulletin which is certified as true and correct in content and policy by an authorized owner or official of the school and will include the following:

(1) Identifying data, such as volume number, and date of publication;

(2) Names of the school and its governing body, officials, and faculty;

(3) A calendar of the school showing legal holidays, beginning and ending date of each quarter, term, or semester, and other important dates;

(4) School policy and regulations on enrollment with respect to enrollment dates and specific entrance requirements for each course;

(5) School policy and regulations relative to leave, absences, class cuts, makeup work, tardiness, and interruptions for unsatisfactory attendance;

(6) School policy and regulations relative to standards of progress required of the student. This policy will define the grading system of the school, the minimum grades considered satisfactory conditions for interruption for unsatisfactory grades or progress, and a description of the probationary period, if any, allowed by the school, and conditions of reentrance for those students dismissed for unsatisfactory progress. A statement will be made regarding progress records kept by the school and furnished the student;

(7) School policy and regulations relating to student conduct and conditions for dismissal for unsatisfactory conduct;

(8) Detailed schedule of fees, charges for tuition, books, supplies, tools, student activities, laboratory fees, service charges, rentals, deposits, and all other charges;

(9) Policy and regulations relative to the refund of the unused portion of tuition, fees, and other charges in the event the student does not enter the course, or withdraws, or is discontinued therefrom;

(10) A description of the available space, facilities, and equipment;

(11) A course outline for each course for which approval is requested, showing subjects or units in the course, type of work, or skill to be learned, and approximate time and clock hours to be spent on each subject or unit; and

(12) Policy and regulations relative to granting credit for previous education and training.

(Authority: 38 U.S.C. 3676(b))

(c) *Approval criteria.* The appropriate State approving agency may approve the application of such school when the school and its nonaccredited courses are found upon investigation to have met the following criteria:

(1) The courses, curriculum, and instruction are consistent in quality, content, and length with similar recognized accepted standards.

(2) There is in the school adequate space, equipment, instructional material, and instructor personnel to provide training of good quality.

(3) Educational and experience qualifications of directors, administrators, and instructors are adequate.

(4) The school maintains a written record of the previous education and training of the veteran or eligible person and clearly indicates that appropriate credit has been given for previous education and training, with the training period shortened proportionately, and the veteran or eligible person and the Department of Veterans Affairs so notified.

(5) A copy of the course outline, schedule of tuition, fees, and other charges, regulations pertaining to absences, grading policy, and rules of operation and conduct will be furnished the veteran or eligible person upon enrollment.

(6) Upon completion of training, the veteran or eligible person is given a certificate by the school indicating the approved course and indicating that training was satisfactorily completed.

(7) Adequate records as prescribed by the State approving agency are kept to show attendance and progress or grades, and satisfactory standards relating to attendance, progress, and conduct are enforced.

(8) The school complies with all local, city, county, municipal, State, and Federal regulations, such as fire codes, building, and sanitation codes. The State approving agency may require such evidence of compliance as it deemed necessary.

(9) The school is financially sound and capable of fulfilling its commitments for training.

(10) The school does not utilize advertising of any type which is erroneous or misleading, either by actual statement, omission, or intimation. The school will not be deemed to have met this requirement until the State approving agency:

(i) Has ascertained from the Federal Trade Commission whether the Commission has issued an order to the school to cease and desist from any act or practice, and

(ii) Has, if such an order has been issued, given due weight to that fact.

(11) The school does not exceed its enrollment limitations as established by the State approving agency.

(12) The school administrators, directors, owners, and instructors are of good reputation and character.

(13) The school either: (i) Has and maintains a policy for the pro rata refund of the unused portion of tuition, fees and charges if the veteran or eligible person fails to enter the course or withdraws or is discontinued from it before completion, or

(ii) Has obtained a waiver of this requirement. See §21.4255.

(Authority: 38 U.S.C. 3676)

(14) Such additional reasonable criteria as may be deemed necessary by the State approving agency.

(Authority: 38 U.S.C. 3676(c))

(d) *Limitations on course approval.* Notwithstanding any other provision of this section, a State approving agency shall not approve a nonaccredited course if it is to be pursued in whole or in part by independent study.

(Authority: 38 U.S.C. 3676(e))

[31 FR 6774, May 6, 1966, as amended at 33 FR 9546, June 29, 1968; 47 FR 42733, Sept. 29, 1982; 61 FR 6783, Feb. 22, 1996]

### §21.4255 Refund policy; nonaccredited courses.

(a) *Acceptable refund policy.* A refund policy meets the requirements of §21.4254(c)(13), if it provides that the amount charged for tuition, fees, and other charges for a portion of the course does not exceed the approximate pro rata portion of the total charges for tuition, fees, and other charges that the length of the completed portion of the course bears to the total length. The school may make provision for refund within the following limitations:

(1) *Registration fee.* An established registration fee in an amount not to exceed $10 need not be subject to proration. Where the established registration fee is more than $10, the amount in excess of $10 will be subject to proration.

(2) *Breakage fee.* Where the school has a breakage fee, it may provide for the retention of only the exact amount of the breakage, with the remaining part, if any, to be refunded.

(3) *Consumable instructional supplies.* Where the school makes a separate charge for consumable instructional supplies, as distinguished from laboratory fees, the exact amount of the charges for supplies consumed may be retained but any remaining part must be refunded.

(4) *Books, supplies and equipment.* (i) A veteran or eligible person may retain or dispose of books, supplies and equipment at his or her discretion when:

(A) He or she purchased them from a bookstore or other source, and

(B) Their cost is separate and independent from the charge made by the school for tuition and fees.

(ii) The school will make a refund in full for the amount of the charge for unissued books, supplies and equipment when:

(A) The school furnishes the books, supplies and equipment.

(B) The school includes their cost in the total charge payable to the school for the course.

(C) The veteran or eligible person withdraws or is discontinued before completing the course.

(iii) The veteran or eligible person may dispose of issued items at his or her discretion even if they were included in the total charges payable to the school for the course.

(5) *Tuition and other charges.* Where the school either has or adopts an established policy for the refund of the unused portion of tuition, fees, and other charges subject to proration, which is more favorable to the veteran or eligible person than the approximate pro rata basis as provided in this paragraph, such established policy will be applicable. Otherwise, the school may charge a sum which does not vary more than 10 percent from the exact pro rata portion of such tuition, fees, and other charges that the length of the completed portion of the course bears to its total length. The exact proration will be determined on the ratio of the number of days of instruction completed by the student to the total number of instructional days in the course.

(6) *Prompt refund.* In the event that the veteran, spouse, surviving spouse or child fails to enter the course or withdraws or is discontinued therefrom at any time prior to completion of the course, the unused portion of the tuition, fees and other charges paid by the individual shall be refunded promptly. Any institution which fails to forward any refund due within 40 days after such a change in status, shall be deemed, prima facie, to have failed to make a prompt refund, as required by this paragraph.

(b) *Waiver.* (1) An educational institution may apply through the appropriate State approving agency to the Director of the VA facility of jurisdiction for a waiver of the requirements of paragraph (a) of this section as they apply to a veteran or eligible person. The State approving agency shall forward the application to the Director along with its recommendations. The Director shall consider the recommendations and shall grant a waiver only when he or she finds that the educational institution:

(i) Is a college, university, or similar institution offering post-secondary level academic instruction leading to an associate or higher degree;

(ii) Is operated by an agency of a State or a unit of local government;

(iii) If operated by an agency of a State, is located within that State;

(iv) If operated by a unit of local government, is located within the boundaries of the area over which that unit has taxing jurisdiction;

(v) Is a candidate for accreditation by a regional accrediting agency; and

(vi) Charges the veteran or eligible person no more than $120 per quarter, $180 per semester or $360 per school year in tuition, fees and other charges for the course.

(2) If an educational institution disagrees with a decision of a Director of a VA facility, it may ask that the Director, Education Service review the decision. In reviewing the decision the Director must consider the evidence of record. He or she may not grant a waiver unless all the criteria of paragraph (b)(1) of this section are met.

(Authority: 38 U.S.C. 3676(d))

[47 FR 42733, Sept. 29, 1982]

### § 21.4256 Correspondence programs and courses.

(a) *Approval of correspondence programs and courses.* (1) An educational institution desiring to enroll veterans under 38 U.S.C. chapter 30 or 32, spouses and/or surviving spouses under 38 U.S.C. chapter 35, and/or reservists under 10 U.S.C. chapter 1606 in a program of education to be pursued exclusively by correspondence, or in the correspondence portion of a combination correspondence-residence course, may have the program or course approved only when the educational institution meets the requirements of §§ 21.4252(e), 21.4253, and 21.4279, as applicable.

(The information collection requirements in this section have been approved by the Office of Management and Budget under control number 2900–0575)

(Authority: 38 U.S.C. 3672(e))

(2) The application of an educational institution for approval of a program of education to be pursued exclusively by correspondence or the correspondence

portion of a combined correspondence-residence course must demonstrate that the program or course is satisfactory in all elements. The educational institution must certify to the State approving agency that at least 50 percent of those pursuing the program or course require six months or more to complete it. For applications for approval that are pending approval by the State approving agency on February 2, 1995, and for applications received by the State approving agency after that date, the required certification shall be based on the experience of students who completed the program or course during the six-month period immediately preceding the educational institution's application for approval.

(Authority: 38 U.S.C. 3672(e))

(3) State approving agencies have the authority to review periodically the length of time needed to complete each approved correspondence program or approved correspondence-residence course in order to determine whether the program or course should continue to be approved. In implementing this authority, a State approving agency will examine the results over a prior two-year period reasonably related to the date on which such a review is conducted.

(Authority: 38 U.S.C. 3672(e))

(b) *Enrollment agreement.* (1) An educational institution offering a program of education to be pursued exclusively by correspondence must enter into an enrollment agreement with the veteran, spouse, surviving spouse, or reservist who wishes to receive educational assistance from VA while pursuing the program. The enrollment agreement shall disclose fully the obligations of the institution and the veteran, spouse, surviving spouse, or reservist, and shall display in a prominent place on the agreement the conditions for affirmance, termination, refund, and payment of the educational assistance by VA.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3686(a)(1), 3686(b))

(2) A copy of the agreement shall be given to the veteran, spouse, surviving spouse, or reservist when it is signed.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3686(b))

(3) The agreement shall not be effective unless the veteran, spouse, surviving spouse, or reservist after the expiration of 10 days after the agreement is signed, shall have signed and submitted to VA a written statement, with a signed copy to the institution, specifically affirming the agreement.

(The information collection requirements in this section have been approved by the Office of Management and Budget under control number 2900–0576)

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3686(b))

(c) *Mandatory refund policy.* (1) Upon notification of the educational institution by the veteran, spouse, surviving spouse, or reservist of an intention not to affirm the enrollment agreement, any fees paid by the individual shall be returned promptly in full to him or her.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3686(c))

(2) Upon termination of enrollment under an affirmed enrollment agreement for training in the accredited course by the veteran, spouse, surviving spouse, or reservist, without having completed any lessons, a registration fee not in excess of 10 percent of the tuition for the course or $50, whichever is less, may be charged him or her. When the individual terminates the agreement after completion of less than 25 percent of the lessons of the course, the institution may retain the registration fee plus 25 percent of the tuition. When the individual terminates the agreement after completing 25 percent but less than 50 percent of the lessons, the institution may retain the registration fee plus 50 percent of the tuition for the course. If 50 percent or more of the lessons are completed, no refund of tuition is required.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3686(c))

(3) Where the school either has or adopts an established policy for the refund of the unused portion of tuition, fees, and other charges subject to proration, which is more favorable to the veteran, spouse, surviving spouse, or reservist than the pro rata basis as provided in paragraph (b)(2) of this section, such established policy will be applicable.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3686(c))

(4) Any institution that fails to forward any refund due to the veteran, spouse, surviving spouse, or reservist within 40 days after receipt of a notice of termination or disaffirmance, shall be deemed, prima facie, to have failed to make a prompt refund as required by this section.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3686(c))

[62 FR 63849, Dec. 3, 1997]

### § 21.4257 Cooperative courses.

A cooperative course may be approved when the course meets the requirement of § 21.4233(a).

### § 21.4258 Notice of approval.

(a) The State approving agency, upon determining that a school has complied with all the requirements for approval will notify the school by letter setting forth the courses which have been approved, and will furnish to the Department of Veterans Affairs an official copy of the letter and attachments and any subsequent amendments. The letter of approval for each school will be accompanied by a copy of the catalog or bulletin of the school, as approved by the State approving agency, and will contain the following information:

(1) Date of letter and effective date of approval of courses;

(2) Proper address and name of each school;

(3) Authority for approval and conditions of approval, referring specifically to the approved catalog or bulletin published by the school;

(4) Name of each course approved;

(5) Where applicable, enrollment limitations, such as maximum number of students authorized and student-teacher ratio;

(6) Signature of responsible official of State approving agency; and

(7) Such other fair and reasonable provisions as are considered necessary by the appropriate State approving agency.

(Authority: 38 U.S.C. 3678)

(b) For institutions of higher learning, the letter of approval may identify approved courses and subjects by reference to page numbers in the school catalog or bulletin in lieu of a listing by name as required in paragraph (a)(4) of this section.

(c) For apprentice and other on-the-job training, the provisions of paragraph (a) of this section are applicable to approval of courses pursued in training establishments. The copy of the notice of approval furnished to the Department of Veterans Affairs will be accompanied by one copy of the application submitted by the training establishment.

(d) *Compliance with equal opportunity laws.* (1) The State approving agency shall solicit assurance of compliance with:

(i) Title VI, Civil Rights Act of 1964,

(ii) Title IX, Education Amendments of 1972, as amended,

(iii) Section 504, Rehabilitation Act of 1973,

(iv) The Age Discrimination Act of 1975, and

(v) All Department of Veterans Affairs regulations adopted to carry out these laws.

(2) The State approving agency shall solicit this assurance from:

(i) Proprietary vocational, trade, technical, or other institutions and such schools not a part of a public elementary or secondary school.

(ii) All other educational institutions which the Department of Education has not determined to be in compliance with the equal opportunity laws listed in paragraph (d)(1) of this section.

(3) Whenever a State approving agency forwards to VA a Notice of Approval for a course offered by an institution described in paragraph (d)(2) of this

section, it shall also forward the institution's signed statement of compliance with these equal opportunity laws.

(Authority: 42 U.S.C. 2000 *et seq.*, 20 U.S.C. 1681 *et seq.*, 29 U.S.C. 794, 42 U.S.C. 6101 *et seq.*)

[31 FR 6774, May 6, 1966, as amended at 32 FR 3979, Mar. 11, 1967; 32 FR 13405, Sept. 23, 1967; 51 FR 26158, July 21, 1986]

### §21.4259 Suspension or disapproval.

(a) The appropriate State approving agency, after approving any course:

(1) May suspend the approval of the course for new enrollments for a period not to exceed 60 days to allow the institution to correct any deficiencies, if the evidence of record establishes that the course fails to meet any of the requirements for approval.

(2) Will immediately disapprove the course, if any of the requirements for approval are not being met and the deficiency cannot be corrected within a period of 60 days.

(3) Upon suspension or disapproval, the State approving agency will notify the school by certified or registered letter with a return receipt secured (38 U.S.C. 3679). It is incumbent upon the State approving agency to determine the conduct of courses and to take immediate appropriate action in each case in which it is found that the conduct of a course in any manner fails to comply with the requirements for approval.

(b) Each State approving agency will immediately notify the Department of Veterans Affairs of each course which it has suspended or disapproved.

(c) The Department of Veterans Affairs will suspend approval for or disapprove courses under conditions specified in paragraph (a) of this section where it functions for the State approving agency. See §21.4150(c).

(d) The Department of Veterans Affairs will immediately notify the State approving agency in each case of Department of Veterans Affairs suspension or disapproval of any school under Chapter 31.

(Authority: 38 U.S.C. 3679)

[41 FR 30640, July 26, 1976]

### §21.4260 Courses in foreign countries.

(a) *Approval of postsecondary courses in foreign countries.* (1) In order to be approved a postsecondary course offered in a foreign country must meet all the provisions of this paragraph. A course offered by a foreign medical school (other than one located in Canada) must also meet all of the provisions of paragraph (b) of this section.

(i) The educational institution offering the course is an institution of higher learning, and

(ii) The course leads to a standard college degree or its equivalent.

(2) For the purpose of this paragraph, a degree is the equivalent of a standard college degree when the program leading to the degree has the same entrance requirements as one leading to a degree granted by a public degree-granting institution of higher learning in that country.

(b) *Approval of courses offered by a foreign medical school.* In addition to meeting all the criteria stated in paragraph (a) of this section, a course offered by a foreign medical school (other than one located in Canada) must also meet all of the following criteria:

(1) The school satisfies the criteria for listing as a medical school in the World Directory of Medical Schools published by the World Health Organization (WHO).

(2) The evaluating bodies (such as medical associations or educational agencies) whose views are considered relevant by the Director, Education Service, and which are located in the same country as the school—

(i) Recognize the school as a medical school, and

(ii) Approve the school.

(3) The school provides, and in the normal course requires its students to complete, a program of clinical and classroom instruction at least 32 months long. This program must be—

(i) Supervised closely by members of the school's faculty, and

(ii) Provided either.

(A) Outside the United States in facilities adequately equipped and staffed to afford students comprehensive clinical and classroom medical instruction, or

(B) Inside the United States, through a training program for foreign medical

students which has been approved by all the medical licensing boards and evaluating bodies whose views are considered relevant by the Director, Education Service.

(4) The school has graduated classes during each of the two 12-month periods immediately preceding the date on which VA receives the school's application for approval of its courses.

(5) The Director, Education Service, shall withdraw approval of any course when the course or the school offering it fails to meet any of the approval criteria in this section or in Chapter 36, Title 38 U.S.C.

(6) In making the decisions required by this paragraph, the Director, Education Service, may consult with the Secretary of Education. The Director may review any information about a foreign medical school which the Secretary may make available.

(c) *Approval of enrollments in foreign courses.* (1) Except as provided in paragraph (c)(2) of this section, the Department of Veterans Affairs will approve the enrollment of a veteran or eligible person in a course offered by an educational institution not located in a State when—

(i) The eligible person, serviceperson, veteran, or reservist meets the eligibility and entitlement requirements of either §§ 21.3040 through 21.3046, §§ 21.5040 and 21.5041, §§ 21.7040 through 21.7045, or § 21.7540, as appropriate;

(ii) The eligible person's, serviceperson's, veteran's, or reservist's program of education meets the requirements of either § 21.3021(h), § 21.5230, § 21.7020(b)(23), or § 21.7520(b)(17), as appropriate; and

(iii) The course meets the requirements of this section and all other applicable VA regulations.

(2) VA may deny or discontinue the payment of educational assistance allowance to a veteran, serviceperson, eligible person or reservist pursuing a course in an institution of higher learning not located in a State when VA finds that the veteran's, serviceperson's, eligible person's, or reservist's enrollment is not in his or her best interest or the best interest of the Federal Government.

(Authority: 38 U.S.C. 3687)

[52 FR 13239, Apr. 22, 1987, as amended at 61 FR 29296, June 10, 1996]

### § 21.4261 Apprentice courses.

(a) *General.* An apprentice course is any training on-the-job course which has been established as an apprentice course by a training establishment as defined in § 21.4200(c) and which has been approved as an apprentice course by the State approving agency.

(b) *Application.* Any training establishment desiring to furnish a course of apprentice training will submit a written application to the appropriate State approving agency setting forth the following:

(1) Title and description of the specific job objective for which the veteran or eligible person is to be trained;

(2) The length of the training period;

(3) A schedule listing various operations for major kinds of work or tasks to be learned and showing for each job operations or work, tasks to be performed, and the approximate length of time to be spent on each operation or task;

(4) The number of hours of supplemental related instruction required; and

(5) Any additional information required by the State approving agency.

(c) *Approval criteria.* The appropriate State approving agency may approve a course of apprentice training when the training establishment and its apprentice courses are found upon investigation to have met the following criteria:

(1) The standards of apprenticeship published by the Secretary of Labor pursuant to 29 U.S.C. 50a;

(2) A signed copy of the training agreement for each veteran or eligible person, making reference to the training program and wage schedule as approved by the State approving agency, is provided to the veteran or eligible person and the Department of Veterans Affairs and the State approving agency by the employer; and

(3) The course meets such other reasonable criteria as may be established by the State approving agency.

(Authority: 38 U.S.C. 3687)

(d) *Promotion.* As funding permits, Department of Veterans Affairs employees will promote the development of apprenticeships. They will:

(1) Visit employers and joint apprenticeship committees,

(2) Coordinate their efforts with activities of any State approving agencies that may choose to promote the development of apprenticeships, and

(3) Avoid duplicating the efforts of others by coordinating their promotional efforts with similar activities of the Department of Labor and State employment security agencies as provided by written agreements covering these activities, including utilization of disabled veterans' outreach program specialists.

(Authority: 38 U.S.C. 3672(d))

[32 FR 13405, Sept. 23, 1967, as amended at 33 FR 9546, June 29, 1968; 38 FR 14938, June 7, 1973; 47 FR 42731, Sept. 29, 1982]

### §21.4262 Other training on-the-job courses.

(a) *General.* An ''other training on-the-job'' course is any training on the job which does not qualify as an apprentice course, as defined in §21.4261, but which otherwise meets the requirements of paragraph (c) of this section.

(b) *Application.* Any training establishment desiring to furnish a course of other training on-the-job will submit to the appropriate State approving agency a written application setting forth the following:

(1) Title and description of the specific job objective for which the veteran or eligible person is to be trained;

(2) The length of the training period;

(3) A schedule listing various operations for major kinds of work or tasks to be learned and showing for each job operations or work, tasks to be performed, and the approximate length of time to be spent on each operation or task;

(4) The number of hours of supplemental related instruction required;

(5) The entrance wage or salary paid by the training establishment to employees already trained in the kind of work for which the veteran or eligible person is to be trained;

(6) A certification that the wages to be paid the veteran or eligible person upon entrance into training are not less than wages paid nonveterans in the same training position and are at least 50 percent of the wages paid for the job for which he or she is to be trained, and will be increased in regular periodic increments until, not later than the last full month of the scheduled training period they will be at least 85 percent of the wages paid for the job for which the veteran or eligible person is being trained;

(7) A certification that there is reasonable certainty that the job for which the veteran or eligible person is to be trained will be available to him or her at the end of the training period; and

(8) Any additional information required by the State approving agency.

(c) *Approval criteria.* The appropriate State approving agency may approve the application submitted under paragraph (b) of this section, when the training establishment and its courses are found upon investigation to have met the criteria outlined in this paragraph. Approval will not be granted for training in occupations which require a relatively short period of experience for a trainee to obtain and hold employment at the market wage in the occupation. This includes occupations such as automobile service station attendant or manager, soda fountain attendant, food service worker, salesman, window washer, building custodian or other unskilled or common labor positions as well as clerical positions for which on-the-job training is not the normal method of procuring qualified personnel.

(1) The job which is the objective of the training is one in which progression and appointment to the next higher classification are based upon skills learned through organized and supervised training on-the-job and not on such factors as length of service and normal turnover;

(2) The training content of the course is adequate to qualify the veteran or eligible person for appointment to the job for which he or she is to be trained;

(3) The job customarily requires a period of training of not less than 6 months and not more than 2 years of full-time training;

(4) The length of the training period is not longer than that customarily required by the training establishments in the community to provide the veteran or eligible person with the required skills, arrange for the acquiring of job knowledge, technical information, and other facts which the veteran or eligible person will need to learn in order to become competent on the job for which he or she is being trained;

(5) Provision is made for related instruction for the individual veteran or eligible person who may need it;

(6) There is in the training establishment adequate space, equipment, instructional material, and instructor personnel to provide satisfactory training on-the-job;

(7) Adequate records are kept to show the progress made by each veteran or eligible person toward his or her job objective;

(8) The veteran or eligible person is not already qualified by training and experience for the job;

(9) The requirements of paragraphs (b)(6) and (7) of this section are met;

(10) A signed copy of the training agreement for each veteran or eligible person, including the training program and wage schedule as approved by the State approving agency, is provided to the veteran or eligible person and the Department of Veterans Affairs and the State approving agency by the employer; and

(11) The course meets such other reasonable criteria as may be established by the State approving agency.

(Authority: 38 U.S.C. 3677)

(d) *Promotion.* As funding permits, Department of Veterans Affairs employees will promote the development of on-the-job training courses. They will:

(1) Visit employers,

(2) Coordinate their efforts with activities of any State approving agencies that may choose to promote the development of on-the-job training courses, and

(3) Avoid duplicating the efforts of others by coordinating their promotional efforts with similar activities of the Department of Labor and State employment security agencies as provided by written agreements covering these activities, including utilization of disabled veterans' outreach program specialists.

(Authority: 38 U.S.C. 3672(d))

[32 FR 13405, Sept. 23, 1967, as amended at 33 FR 9546, June 29, 1968; 35 FR 9817, June 16, 1970; 38 FR 14939, June 7, 1973; 45 FR 51778, Aug. 5, 1980; 47 FR 42731, Sept. 29, 1982; 60 FR 32272, June 21, 1995]

### § 21.4263 Approval of flight training courses.

(a) *A flight school or institution of higher learning are the only entities that can offer flight courses.* A State approving agency may approve a flight course only if a flight school or an institution of higher learning offers the course. A State approving agency may not approve a flight course if an individual instructor offers it. The provisions of § 21.4150 shall determine the proper State approving agency for approving a flight course.

(Authority: 10 U.S.C. 16136(c); 38 U.S.C. 3032(d), 3241(b), 3671, 3672, 3676)

(b) *Definition of flight school.* A *flight school* is a school, other than an institution of higher learning, or is an entity, such as an aero club; is located in a State; and meets one of the following sets of requirements:

(1) The Federal Aviation Administration has issued the school or entity either a pilot school certificate or a provisional pilot school certificate specifying each course the school is approved to offer under 14 CFR part 141;

(2) The entity is either a flight training center or an air carrier that does not have a pilot school certificate or provisional pilot school certificate issued by the Federal Aviation Administration under 14 CFR part 141, but pursuant to a grant of exemption letter issued by the Federal Aviation Administration under 14 CFR part 61 is permitted to offer pilot training by a flight simulator instead of an actual aircraft; or

(3) The Federal Aviation Administration has issued the school or entity a training center certificate under 14 CFR part 142.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3452(c))

(c) *Aero club courses.* An aero club, established, formed, and operated under authority of service department regulations as a nonappropriated sundry fund activity, is an instrumentality of the Federal government. Consequently, VA has exclusive jurisdiction over approval of flight courses offered by such aero clubs.

(Authority: 38 U.S.C. 3671, 3672)

(d) *Approval of flight training as part of a degree program.* A State approving agency may approve a flight training course that is part of a program of education leading to a standard college degree provided the course and program meet the requirements of §21.4253 or §21.4254, as appropriate. The institution of higher learning offering the course need not be a flight school.

(Authority: 38 U.S.C. 3675, 3676)

(e) *Approval of flight training courses that are not part of a degree program.* A flight course is subject to the same approval requirements as any other course. In addition, the State approving agency must apply the following provisions to the approval of flight courses:

(1) The Federal Aviation Administration must approve the course; and

(2)(i) The course must meet the requirements of 14 CFR part 63 or 141, and a flight school described in paragraph (b)(1) or (b)(3) of this section must offer it; or

(ii) The course must meet the requirements of 14 CFR part 61, and either be offered—

(A) By a flight school described in paragraph (b)(3) of this section; or

(B) In whole or in part by a flight simulator pursuant to a grant of exemption letter issued by the Federal Aviation Administration to the flight school offering the course.

(Authority: 10 U.S.C. 16136(c); 38 U.S.C. 3034(d), 3241(b), 3676, 3680A)

(f) *Application of 38 U.S.C. 3680A(e)(2) to flight training.* Notwithstanding the fact that the Federal Aviation Administration will permit flight schools to conduct training at a base other than the main base of operations if the requirements of either 14 CFR 141.91 or 14 CFR 142.17 are met, the satellite base is considered under 38 U.S.C. 3680A(e)(2) to be a branch of the principal school, and must meet the requirements of 38 U.S.C. 3680A(e)(2).

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3241(b), 3680A))

(g) *Providing a flight course under contract between schools or entities.* When a school or entity offers all or part of a flight course under a contract with another school or entity, the State approving agency must apply §21.4233 in the following manner:

(1) The requirements of §21.4233(e) must be met for all contracted flight instruction, instruction by flight training device, flight simulator instruction, and ground school training. Ground school training may be given through a ground school facility operated jointly by two or more flight schools in the same locality; and

(2) The responsibility for providing the instruction lies with the flight school. The degree of affiliation between the flight school and the entity or other school that actually does the instructing must be such that all charges for instruction are made by, and paid to, one entity having jurisdiction and control over both the flight and ground portions of the program.

(Authority: 10 U.S.C. 16136(c); 38 U.S.C. 3032(d), 3241(b))

(h) *Nonaccredited courses.* (1) *Application of §21.4254 to flight training.* The provisions of §21.4254 are applicable to approval of flight training courses.

(2) *Additional instruction requirements.* The State approving agency will apply the following additional requirements to a flight course:

(i) All flight instruction, instruction by flight training device, flight simulator instruction, preflight briefings and postflight critiques, and ground school training in a course must be given by the flight school or under suitable arrangements between the school and another school or entity such as a local community college.

(ii) All ground school training connected with the course must be in residence under the direction and supervision of a qualified instructor providing an opportunity for interaction

between the students and the instructor. Simply making provision for having an instructor available to answer questions does not satisfy this requirement.

(3) A flight school must keep at a minimum the following records for each eligible veteran, servicemember, or reservist pursuing flight training:

(i) A copy of his or her private pilot certificate;

(ii) Evidence of completion of any prior training that may be a prerequisite for the course;

(iii) A copy of the medical certificate required by paragraph (a)(2) of this section for the courses being pursued and copies of all medical certificates (expired or otherwise) needed to support all periods of prior instruction received at the current school;

(iv) A daily flight log or copy thereof;

(v) A permanent ground school record;

(vi) A progress log;

(vii) An invoice of flight changes for individual flights or flight lessons for training conducted on a flight simulator or advanced flight training device;

(viii) Daily flight sheets identifying records upon which the 85–15 percent ratio may be computed;

(ix) A continuous meter record for each aircraft;

(x) An invoice or flight tickets signed by the student and instructor showing hour meter reading, type of aircraft, and aircraft identification number;

(xi) An accounts receivable ledger;

(xii) Individual instructor records;

(xiii) Engine log books;

(xiv) A record for each student above the private pilot level stating the name of the course in which the student is currently enrolled and indicating whether the student is enrolled under 14 CFR part 61, part 63, part 141, or part 142;

(xv) Records of tuition and accounts which are evidence of tuition charged and received from all students; and

(xvi) If training is provided under 14 CFR part 141, the records required by that part, or if training is provided under 14 CFR part 142, the records required by that part.

(Authority: 38 U.S.C. 3671, 3672, 3676, 3690(c))

(i) *Hourly limitations.* A flight course approved pursuant to paragraph (e) of this section shall be approved only for those hours of instruction generally considered necessary for a student to obtain an identified vocational objective. This requirement is met only if the number of hours approved does not exceed the maximum set forth in paragraph (i)(1) through (3) of this section. Flight instruction may never be substituted for ground training.

(Authority: 10 U.S.C. 16136(c); 38 U.S.C. 3002(3), 3202(2), 3452(b))

(1) *Flight or flight simulator instruction.* Except as provided in paragraph (i)(4) of this section, the maximum number of hours of flight instruction or flight simulator instruction which may be approved for a flight course shall not exceed the number determined by this paragraph.

(i) The maximum number of hours of solo flight instruction shall not exceed the minimum number of hours required for the course provided by FAA regulations.

(ii) The maximum number of hours of dual flight instruction shall not exceed the lesser of—

(A) The number of hours of dual flight instruction in the course outline approved by the FAA, or

(B) 120% of the minimum number of hours of dual flight instruction required for the course by FAA regulations.

(iii) The maximum number of hours of instruction by flight simulator or flight training device that a State approving agency may approve is the maximum number of hours of instruction by flight simulator or flight training device permitted by 14 CFR part 61 for that course when:

(A) A course is offered in whole or in part by flight simulator or flight training device conducted by a training center certificated under 14 CFR part 142; and

(B) 14 CFR part 61 contains a maximum number of hours of instruction by flight simulator or flight training device that may be credited toward the requirements of the rating or certificate that is the objective of the course.

(iv) If a course is offered in whole or in part by flight simulator or flight

training device, and the course is not described in paragraph (i)(1)(iii) of this section, either because the course is offered by a flight training center with a grant of exemption letter, or because 14 CFR part 61 does not contain a maximum number of hours of instruction by flight simulator or flight training device, the maximum number of hours of instruction by flight simulator or flight training device that may be approved may not exceed the number of hours in the Federal Aviation Administration-approved outline.

(Authority: 10 U.S.C. 16131(g); 38 U.S.C. 3032(f), 3231(f))

(2) *Ground school.* The ground training portion of a flight course may include two forms of ground training instruction, ground school and preflight briefings and postflight critiques. The minimum hours for ground training, as specified in 14 CFR part 141, appendixes C through J refer only to ground school and not to preflight briefings and postflight critiques. If the ground school training consists of units using kits containing audiovisual equipment, quizzes and examinations, the maximum number of units approved shall not exceed the number on the course outline approved by the FAA. For all other ground school training, the number of hours of training shall not exceed the number of hours on the course outline approved by the FAA.

(Authority: 10 U.S.C. 16136(c); 38 U.S.C. 3002(3), 3202(2), 3452(b))

(3) *Preflight briefings and postflight critiques.* Hours spent in preflight briefings and postflight critiques need not be approved by the FAA.

(i) If these hours are on the FAA-approved outline, the maximum number of hours of preflight briefings and postflight critiques shall not exceed the number of hours on the outline exclusive of the preflight briefings and post-flight critiques which are attributable to solo flying hours that exceed the minimum number of solo flying hours for the course in 14 CFR part 141.

(ii) If these hours are not on the FAA-approved outline, they may not be approved unless the State approving agency finds that the briefings and critiques are an integral part of the course and do not precede or follow solo flying hours which exceed the minimum number of solo flying hours for the course in 14 CFR part 141. The maximum number of hours of preflight briefings and postflight critiques which may be approved for these courses may not, when added together, exceed 25 percent of the approved hours of flight instruction.

(Authority: 10 U.S.C. 16131(f)(4); 16136(c), 38 U.S.C. 3002(3), 3032(f)(4), 3202(2), 3231(f)(4), 3452(b))

(4) *Waiver of limitation in approvable course hours.* (i) Flight schools that wish to have a greater number of hours of dual flight instruction approved than are permitted by paragraph (i)(1)(ii) of this section, may seek an administrative review of their approval by the Director, Education Service. Requests for such a review should be made in writing to the Director of the VA facility having jurisdiction over the flight school. The request should—

(A) State the reasons why the flight school believes that the approval should extend to a greater number of hours, and

(B) Include any evidence tending to show that the greater number of hours should be approved.

(ii) The Director, Education Service shall base her or his decision upon the evidence submitted, the recommendation of the Director of the VA facility, and, if appropriate, the recommendation of the State approving agency having jurisdiction over the flight school.

(iii) The limit on the number of hours of solo flight instruction found in paragraph (i)(1)(i) of this section may not be waived.

(Authority: 10 U.S.C. 16131(f)(4); 38 U.S.C. 3032(f)(4), 3231(f)(4))

(j) *Charges.* The appropriate State approving agency shall approve charges for tuition and fees for each flight course exclusive of charges for tuition and fees for solo flying hours which exceed the maximum permitted under paragraph (i)(1)(i) of this section and for preflight briefings and postflight

critiques which precede or follow the excess solo hours.

(Authority: 38 U.S.C. 3672)

(1) The approved charges for tuition and fees shall be based upon the charges for tuition and fees which similarly circumstanced nonveterans enrolled in the same flight course are required to pay. Charges for books, supplies and lodging may not be reimbursed.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(d), 3241(c), 3690(a)(1))

(2) For the ground school portion of ground training, the State approving agency should approve group charges or unit prices if audio-visual equipment is used. For the preflight briefings and postflight critiques, the State approving agency should approve individual instructor rates for individual training flights. An average charge per hour based upon total hours and cost of all training given on the ground may not be approved.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(d), 3241(c), 3690(a)(1))

(3) A veteran, servicemember or reservist or group (all or part of whom are veterans, servicemembers or reservists) owning an airplane may lease it to an approved flight school and have exclusive use of the aircraft for flight training. The aircraft should meet the requirements prescribed for all airplanes to be used in the course, and should be shown in the approval by the State approving agency. The leasing arrangement should not result in charges for flight instruction for those owning the airplane greater than charges made to others not leasing an aircraft to the school.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(d), 3241(c), 3690(a)(1))

(4) If membership in a flight club entitles a veteran, servicemember or reservist to flight training at less than the standard rate, his or her educational allowance will be based on the reduced rate. No payments will be made for the cost of joining the flight club, since it is not a charge for the flight course.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(d), 3241(c), 3690(a)(1))

(k) *Substitute aircraft.* Except for minor substitutions a veteran, servicemember or reservist enrolled in a flight course may train only in the aircraft approved for that course. If a particular aircraft is not available for some compelling reason, the veteran, servicemember or reservist may be permitted to train in an aircraft different from that approved for the particular course, provided the aircraft substituted will adequately meet the training requirements for this particular phase of the course. Substitutions should be explained on the monthly certifications of flight training. If this shows that the charge for the substituted aircraft is different from the charge approved for the regular aircraft, the reimbursement will be based on the lesser charge. When substitution becomes the practice rather than the exception, VA will suspend payments and notify the veterans, servicemembers, reservists and the school. VA will refer the matter to the State approving agency for appropriate action.

(Authority: 10 U.S.C. 16136(b), 16136(c); 38 U.S.C. 3034(d), 3672(a))

(l) *Enrollment limitations.* A flight course must meet the 85–15 percent ratio requirement set forth in § 21.4201 before VA may approve new enrollments in the course. The contracted portion of a flight course must meet all the requirements of § 21.4201 for each subcontractor.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(d), 3241(c), 3680A(d))

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0613)

[45 FR 51778, Aug. 5, 1980, as amended at 48 FR 37992, Aug. 22, 1983; 57 FR 29801, July 7, 1992; 59 FR 21938, Apr. 28, 1994; 61 FR 20728, May 8, 1996; 63 FR 34130, June 23, 1998; 67 FR 12474, Mar. 19, 2002]

**§21.4264 Farm cooperative courses.**

(a) *Description of a farm cooperative course.* A farm cooperative course is an institutional agricultural course. It provides training on a reduced basis to those engaged in farming, compared to other types of training. Part-time benefits are provided for students whose farming operation will not permit them to attend class at least 10 hours per week.

(b) *Farm cooperative students must be farmers.* In order to receive educational assistance allowance an eligible person must be engaged concurrently in agricultural employment for an average of at least 40 hours per week. This agricultural employment must be relevant to the farm cooperative course.

(c) *Acceptable class schedules.* (1) The institutional portion of a farm cooperative course:

(i) May be on a term, quarter or semester basis, or

(ii) May consist of courses which:

(A) Are offered during at least 44 weeks of the year, and

(B) Require a minimum of 5 clock hours per week.

(2) The time involved in field trips and individual and group instruction, sponsored and conducted by the educational institution offering farm cooperative courses may be counted toward meeting the clock-hour requirements. See §21.4270(c) of this part for measurement of farm cooperative courses.

(Authority: 38 U.S.C. 3482, 3532)

(d) *Application.* (1) Any school desiring to enroll spouses or children in farm cooperative courses:

(i) Will submit to the appropriate State approving agency a written application for approval in accordance with §21.4253 or §21.4254 as appropriate; and

(ii) Must submit statements of fact showing at least the following:

(A) That the course is set up in the school catalog or other literature of the school;

(B) That the agricultural course is offered concurrently with agricultural employment; and

(C) That the school itself verifies on a continuing basis that students are engaged for an average of at least 40 hours per week in suitable agricultural employment which is relevant to the institutional agricultural course offered by the school and is in an area consistent with their institutional training program.

(2) For the purposes of this paragraph suitable agricultural employment must include employment on a farm or other agricultural establishment where the basic activity is either:

(i) The cultivation of the ground such as the raising and harvesting of crops including fruits, vegetables and pastures, or

(ii) The feeding, breeding and managing of livestock, including poultry and other specialized farming.

(3) The Department of Veterans Affairs does not consider employment in training establishments which are engaged primarily in the processing, distribution or sale of agricultural products or combinations thereof, such as dairy processing plants, grain elevators, packing plants, hatcheries, stockyards or florists shops to be suitable agricultural employment.

(e) *Approval criteria.* The appropriate State approving agency may approve the school's application when the agency finds upon investigation that the school and its courses have met the following conditions:

(1) The criteria specified in §21.4253 or §21.4254, as appropriate; and

(2) The requirements of paragraph (d) of this section.

(Authority: 38 U.S.C. 3482, 3532)

[46 FR 16101, Mar. 11, 1981, as amended at 54 FR 33890, Aug. 17, 1989; 61 FR 26115, May 24, 1996]

**§21.4265 Practical training approved as institutional training or on-job training.**

(a) *Medical-dental internships and residencies.* (1) Medical residencies (other than residencies in podiatric medicine), dental residencies, and osteopathic internships and residencies may be approved and recognized as institutional courses only when an appropriate accrediting agency accredits and approves them as leading to certification for a recognized professional objective.

(2) The appropriate accrediting agencies are:

(i) The Accreditation Council for Graduate Medical Education, or where the Accreditation Council for Graduate Medical Education has delegated accrediting authority, the appropriate Residency Review Committee,

(ii) The American Osteopathic Association, and

(iii) The Commission on Dental Accreditation of the American Dental Association.

(3) These residency programs—

(i) Must lead to certification by an appropriate Specialty or Subspecialty Board, the American Osteopathic Association, or the American Dental Association; and

(ii) Will not be approved to include a period of practice following completion of the education requirements even though the accrediting agency requires the practice.

(4) Except as provided in paragraph (a)(5) of this section, no other medical or dental residency or osteopathic internship or residency will be approved or recognized as institutional training.

(5) A residency in podiatric medicine may be approved and recognized as institutional training only when it has been approved by the Council on Podiatry Education of the American Podiatry Association.

(Authority: 38 U.S.C. 3688(b))

(b) *Nursing courses.* (1) Courses for the objective of registered nurse or registered professional nurse will be assessed as institutional training when they are provided in autonomous schools of nursing, hospital schools of nursing, or schools of nursing established in other schools or departments of colleges and universities, if they are accredited by a nationally recognized accrediting agency or if they meet the requirements of the licensing body of the State in which the school is located. The hospital or fieldwork phase of a nursing course, including a course leading to a degree in nursing, will be assessed as an institutional course when the hospital or fieldwork phase is an integral part of the course, the completion thereof is a prerequisite to the successful completion of the course, the student remains enrolled in the school during the period, and the training is under the direction and supervision of the school.

(2) Courses offered by schools which lead to the objective of practical nurse, practical trained nurse, or licensed practical nurse will be assessed as institutional training including both the academic subjects and the clinical training if the clinical training is offered by an affiliated or cooperating hospital and the student is enrolled in and supervised by the school during the period of such clinical training. Also they must be accredited by a nationally recognized accrediting agency or meet the requirements of the licensing body of the State in which the school is located.

(3) Except for enrollment in a nurse's aide course approved pursuant to § 21.4253(a)(5), VA shall not approve an enrollment in a nonaccredited nursing course which does not meet the licensing requirements of the State where the course is offered.

(Authority: 38 U.S.C. 3452, 3688)

(c) *Medical and dental specialty courses.* (1) Required clinical training included in a school course given in an affiliated hospital, clinic, laboratory, or medical center as a part of a medical or dental specialty course whether accredited or nonaccredited offered by a school such as X-ray technician, medical technician, medical records administrator, physical therapist or dental technician shall be assessed as institutional training provided:

(i) The student remains enrolled in the course during the clinical period;

(ii) The clinical training is;

(*a*) An integral part of the course;

(*b*) A prerequisite to the successful completion of the course; and

(*c*) Under the direction and supervision of the school; and

(iii) The course includes substantial technical or professional training and does not consist of training preliminarily directed to clerical, administrative, secretarial, or receptionist duties.

(2) Medical and dental specialty courses offered in hospitals, clinics, laboratories, or medical centers which are accredited as institutional courses by a nationally recognized accrediting agency will be assessed as institutional training.

(3) Clinical training included in a school course given in a physician's office or a dentist's office, also called externship, will be recognized as part of the institutional training if the course is accredited by a nationally recognized accrediting agency and meets the other requirements of paragraph (c)(1) of this section. If the course is not so accredited such practical or on-the-job training or experience in a physician's office may not be included unless the program is approved as a cooperative course.

(4) Nonaccredited courses offered in hospitals, clinics, laboratories, or medical centers will be considered on-the-job training when the courses meet the requirements of §21.4262.

(d) *Medical and dental assistants courses for the Department of Veterans Affairs.* A course prescribed by the Secretary for full-time physicians' assistants or for full-time expanded-function auxiliaries (formerly referred to as dentists' assistants) may be approved as institutional training, if the course is conducted at Department of Veterans Affairs facilities or in facilities operated by hospitals, medical schools, or medical installations pursuant to a contract with the Department of Veterans Affairs.

(Authority: 38 U.S.C. 7407)

(e) *Professional training courses.* (1) Any non-medically related professional internship program, such as a clinical pastoral course, will be recognized as an institutional course when it is accredited as an institutional course by a nationally recognized accrediting agency, and

(2) The approved facility for such a course must be the institution or other facility where the training is given.

(f) *Other practical training courses.* (1) Other off-campus job experience included in a school course, variously described by schools as internship, residency, practicum, externship, et cetera, may be included as a part of a cooperative program when the course meets the requirements of §21.4233(a).

(2) However, such off-campus courses may be considered as resident institutional training only if all of the following conditions are met. The course is:

(i) Accredited by a nationally recognized accrediting agency or is offered by a school that is accredited by one of the regional accrediting associations;

(ii) A part of the approved curriculum of the school;

(iii) Directly supervised by the school;

(iv) Measured in the same unit as other courses;

(v) Required for graduation; and

(vi) Has a planned program of activities described in the school's official publication which is approved by the State approving agency and which is institutional in nature as distinguished from training on-the-job. The description shall include at least:

(A) A unit subject description;

(B) A provision for an assigned instructor;

(C) A statement that the planned program of activities is controlled by the school, not by the officials of the job establishment;

(D) A requirement that class attendance on at least a weekly basis be regularly scheduled to provide for interaction between instructor and student;

(E) A statement that appropriate assignments are required for completion of the course;

(F) A grading system similar to the system used for other resident subjects offered by the school; and

(G) A schedule of time required for the training which demonstrates that the student shall spend at least as much time in preparation and training as is normally required by the school for its other resident courses.

(g) *Nonaccredited courses.* Any nonaccredited internship program not given in a school will be recognized as other on-the-job training when it meets the requirements of §21.4262 and when the program is required for licensure by the State in which it is offered. (See §21.4275 for measurement.)

[41 FR 26683, June 29, 1976, as amended at 43 FR 25429, June 13, 1978; 49 FR 39545, Oct. 9, 1984; 54 FR 34984, Aug. 23, 1989; 61 FR 6783, Feb. 22, 1996]

### § 21.4266 Courses offered at subsidiary branches or extensions.

(a) *General.* A State approving agency in approving a course offered at a subsidiary branch or extension of an educational institution may either approve the course separately from the course approved for the educational institution's parent facility (either its main campus or its principal teaching location in a State), or it may combine the approval for courses offered at the branch or extension with that for the courses offered at the educational institution's parent facility. The choice made by the State approving agency shall be governed by the provisions of this section.

(b) *Combined approval.* If the approval for the courses offered at a branch or extension is combined with the approval for the courses offered at the educational institution's parent facility, the branch or extension does not need to have its own administrative capability. In these cases the State approving agency will list the branches or extensions and the courses approved at each on the notice of approval sent to the educational institution pursuant to § 21.4258. The approval of courses offered at a branch or extension may be combined with the approval of courses offered at a parent facility only when the branch or extension is located in the same State as the parent facility and one of the following conditions exist:

(1) The course offering at the branch or extension consists of a small number of unit subjects which do not comprise a program of education or a set curriculum large enough to allow pursuit on a continuing basis;

(2) The course offering at the branch or extension is being given on a temporary basis (the educational institution is contemplating no more than a few cycles of training);

(3) The facilities at the branch or extension contain insufficient space for an administrative capability to be developed.

(c) *Separate approval.* If the course offered at a subsidiary branch or extension cannot qualify under paragraph (b) of this section for a combined approval with the courses offered at the educational institution's parent facility, the State approving agency can only approve the courses separately. Such a course may not be approved if the branch or extension neither has administrative capability nor can qualify for an exception to having administrative capability.

(1) A branch or extension is considered to have an administrative capability when:

(i) The branch or extension maintains all records and accounts required by § 21.4209;

(ii) The branch or extension designates a named certifying official;

(iii) The branch or extension is able to furnish to the Department of Veterans Affairs without resort to the parent school all reports and certifications required by §§ 21.4203 and 21.4204;

(iv) The branch or extension maintains a local mailing address.

(2) Notwithstanding any other provisions of this paragraph courses may be approved separately at a branch or extension without administrative capability if the parent facility within the same State:

(i) Maintains a centralized recordkeeping system;

(ii) Can identify the records of students at each branch;

(iii) Specifies the branch location when certifying enrollments.

(Authority: 38 U.S.C. 3672, 3689(c))

CROSS REFERENCE: *Period of operation of course.* See § 21.4251.

[43 FR 35303, Aug. 9, 1978, as amended at 44 FR 62503, Oct. 31, 1979; 61 FR 26115, May 24, 1996]

### § 21.4267 Approval of independent study.

(a) *Overview.* Except as provided in §§ 21.4252(g), 21.7120(c), and 21.7622(f), VA may not pay educational assistance for a nonaccredited course which is offered in whole or in part by independent study. Hence, it is necessary to differentiate independent study from similar courses.

(Authority: 38 U.S.C. 3014, 3523, 3672, 3676(e), 3680A(a))

(b) *Definition of independent study.* (1) VA considers a course to be offered entirely by independent study when—

(i) It consists of a prescribed program of study with provision for interaction between the student and the regularly employed faculty of the institution of higher learning. The interaction may be personally or through use of communications technology, including mail, telephone, videoconferencing, computer technology (to include electronic mail), and other electronic means;

(ii) It is offered without any regularly scheduled, conventional classroom or laboratory sessions; and

(iii) It is not a course listed in paragraph (c), (d), or (e) of this section.

(2) VA considers a course to be offered in part by independent study when—

(i) It is an undergraduate course;

(ii) It is not classified as one of the three types of courses listed in paragraph (c) of this section;

(iii) It has some weeks when standard class sessions are scheduled; and

(iv) It consists of independent study as defined in paragraph (b)(1) of this section during those weeks when there are no regularly scheduled class sessions.

(Authority: 38 U.S.C. 3523, 3676(e), 3680A(a))

(c) *Scope of independent study.* VA does not consider any of the following courses to be courses offered by independent study.

(1) A cooperative course as defined in §21.4233(a);

(2) A farm cooperative course; or

(3) A course approved as a correspondence course.

(Authority: 38 U.S.C. 3676(e), 3680A(a))

(d) *Undergraduate resident training.* VA considers the following undergraduate courses to be resident training.

(1) A course which meets the requirements for resident institutional training found in §21.4265(f);

(2) A course which requires regularly scheduled, standard class sessions at least once every two weeks and which has a total number of class sessions equal to the number of credit hours awarded for the course, times the number of weeks in a standard quarter or semester, as applicable;

(3) A course of student teaching; and

(4) Flight training which is an integral part of a standard undergraduate college degree.

(e) *Graduate resident training.* VA considers a graduate course to be resident training if the course—

(1) Is offered through regularly scheduled, conventional classroom or laboratory sessions; or

(2) Consists of research (either on campus or in absentia) necessary for the preparation of the student's—

(i) Master's thesis,

(ii) Doctoral dissertation, or

(iii) Similar treatise which is prerequisite to the degree being pursued; or

(3) Consists of a combination of training as described in paragraphs (e)(1) and (e)(2) of this section.

(Authority: 38 U.S.C. 3676(e), 3680A(a))

(f) *Course approval.* A State approving agency may approve a course offered by independent study or a combination of independent study and resident training only if—

(1) The course is accredited and leads to a standard college degree; and

(2) The course meets the requirements of §21.4253.

(Authority: 38 U.S.C. 3672, 3675, 3680A(a)(4))

[61 FR 6783, Feb. 22, 1996, as amended at 62 FR 40280, July 28, 1997]

ASSESSMENT AND PURSUIT OF COURSES

### §21.4270 Measurement of courses.

(a) *Measurement of trade, technical, and high school courses.* Trade, technical, high school, and high school preparatory courses shall be measured as stated in this paragraph.

(1) *Trade and technical courses.* (i) Except as provided in paragraph (b) of this section, if shop practice is an integral part of a trade or technical course not leading to a standard college degree—

(A) A full-time enrollment is 22 clock hours per week (exclusive of supervised study) with not more than 2½ hours rest period allowance;

(B) A three-quarter-time enrollment is 16 through 21 clock hours per week (exclusive of supervised study) with not more than 2 hours rest period allowance;

(C) A one-half-time enrollment is 11 through 15 clock hours per week (exclusive of supervised study) with not more than 1¼ hours rest period allowance;

(D) A less than one-half-time but more than one-quarter-time enrollment is 6 through 10 clock hours per week (exclusive of supervised study) with not more than ¾ hour rest period allowance; and

(E) A quarter-time enrollment is 1 through 5 clock hours per week (exclusive of supervised study).

(ii) Except as provided in paragraph (b) of this section, if theory and class instruction constitute more than 50 percent of the required hours in a trade or technical course not leading to a standard college degree, enrollments will be measured as follows. In measuring net instruction there will be included customary intervals not to exceed 10 minutes between classes. Shop practice and rest periods are excluded. Supervised instruction periods in a school's shops and the time involved in field trips and group instruction may be included in computing the clock hour requirements.

(A) A full-time enrollment is 18 clock hours net instruction per week (exclusive of supervised study);

(B) A three-quarter-time enrollment is 13 through 17 clock hours net instruction per week (exclusive of supervised study);

(C) A one-half-time enrollment is 9 through 12 clock hours net instruction per week (exclusive of supervised study);

(D) A less than one-half-time but more than one-quarter-time enrollment is 5 through 8 clock hours net instruction per week (exclusive of supervised study); and

(E) A quarter-time enrollment is 1 through 4 clock hours net instruction per week (exclusive of supervised study).

(2) *High school courses.* If a student is pursuing high school courses at a rate which would result in an accredited high school diploma in four ordinary school years, VA considers him or her to be enrolled full time. Otherwise, for high school enrollments, training time will be determined as follows. (For the purpose of this paragraph, a unit is not less than one hundred and twenty 60-minute hours or the equivalent of study in any subject in one academic year.)

(i) A full-time enrollment is 18 clock hours net instruction per week or four units per year or the equivalent;

(ii) A three-quarter-time enrollment is 13 through 17 clock hours net instruction per week or three units per year or the equivalent;

(iii) A one-half-time enrollment is 9 through 12 clock hours net instruction per week or two units per year or the equivalent;

(iv) A less than one-half-time but more than one-quarter-time enrollment is 5 through 8 clock hours net instruction per week or one unit per year or the equivalent; and

(v) A one-quarter-time enrollment is 1 through 4 clock hours net instruction per week.

(3) *Elementary school.* For a high school preparatory course pursued at the elementary school level—

(i) A full-time enrollment is 18 clock hours net instruction per week;

(ii) A three-quarter-time enrollment is 13 through 17 clock hours net instruction per week;

(iii) A one-half-time enrollment is 9 through 12 clock hours net instruction per week;

(iv) A less than one-half-time but more than one-quarter-time enrollment is 5 through 8 clock hours net instruction per week; and

(v) A one-quarter-time enrollment is 1 through 4 clock hours per week.

(Authority: 38 U.S.C. 3688(a))

(b) *Measurement of non-college degree courses offered by institutions of higher learning.* (1) Notwithstanding the provisions of paragraph (a)(1) of this section, if a student is enrolled in a course which is not leading to a standard college degree and which is offered by an institution of higher learning, VA will measure his or her enrollment in the same manner as collegiate undergraduate courses are measured according to the provisions of paragraph (c) of this section.

(2) Notwithstanding the provisions of paragraph (a)(1) of this section, if a student is enrolled in a course not leading to a standard college degree which

is offered on a standard quarter- or semester-hour basis by an educational institution which is not an institution of higher learning, VA shall measure his or her enrollment in the same manner as collegiate undergraduate courses are measured according to the provisions of paragraph (c) of this section, provided that the educational institution requires at least the same minimum number of hours of weekly attendance as are required by paragraph (a)(1) of this section for courses offered on a clock-hour basis. If the educational institution does not require at least the same minimum number of hours of weekly attendance as are required in paragraph (a)(1) of this section, VA will not apply the provisions of paragraph (c) of this section, but will measure the course according to the criteria in paragraph (a)(1) of this section.

(Authority: 38 U.S.C. 3688(a)(7))

(c) *Undergraduate, graduate, professional, and on-the-job training courses.* Collegiate graduate, professional and on-the-job training courses shall be measured as stated in this table. This shall be used for measurement of collegiate undergraduate courses subject to all the measurement criteria of §21.4272. Clock hours and sessions mentioned in this table mean clock hours and class sessions per week.

(Authority: 38 U.S.C. 3482, 3532, 3677, 3687, 3688)

COURSES

| Kind of school | Kind of course | Full time | ¾ time | ½ time | Less than ½ more than ¼ time | ¼ time or less |
|---|---|---|---|---|---|---|
| Collegiate undergraduate. | Standard collegiate courses including cooperative and external degree programs [1]. | 14 semester hours or equivalent [2]. | 10 through 13 semester hours or equivalent. | 7 through 9 semester hours or equivalent. | 4 through 6 semester hours or equivalent. | 1 through 3 semester hours or equivalent. |
| Collegiate graduate. | Standard collegiate graduate courses including law and external degree programs [1]. | 14 semester hours or equivalent or as certified by a responsible official of the school [2]. | 10 through 13 semester hours or as certified by a responsible official of the school. | 7 through 9 semester hours as certified by a responsible official of the school. | 4 through 6 semester hours or as certified by a responsible official of the school. | 1 through 3 semester hours or as certified by a responsible official of the school. |
| Professional nonaccredited. | Law only [3] ..... | 12 class sessions per week. | 9 through 11 class sessions per week. | 6 through 8 class sessions per week. | 4 through 5 class sessions per week. | 1 through 3 class sessions per week. |
| Professional accredited and equivalent. | Internships and residencies: Medical, Dental, Osteopathic. | As established by accrediting association. | As established by accrediting association or entity offering the internship or residency. | As established by accrediting association or entity offering the internship or residency. | As established by accrediting association or entity offering the internship or residency. | As established by accrediting association or entity offering the internship or residency |
| | Nursing, X-ray, medical technology, medical records librarian, physical therapy [4]. | 18 clock hours or 14 semester hours, as appropriate. | 13 through 17 clock hours or 10 through 13 semester hours, as appropriate. | 9 through 12 clock hours or 7 through 9 semester hours, as appropriate. | 5 through 8 clock hours or 4 through 6 semester hours, as appropriate. | 1 through 4 clock hours or less than 4 semester hours, as appropriate. |
| Training establishment. | Apprentice or other on-the-job [5]. | Standard workweek. | ..... | Full time only ... | . | |
| Agricultural ..... | Farm Cooperative [6]. | 10 clock hours net instruction [7]. | 7 clock hours net instruction. | 5 clock hours net instruction. | ..... | No provision. |

[1] Cooperative courses may be measured on a full-time basis only.

[2] When the institution certifies that all undergraduate students enrolled for a minimum of 12 or 13 semester hours or the equivalent are charged full-time tuition, or considered full time for other administrative purposes, such minimum hours will establish the criteria for full-time measurement. When 12 hours is properly certified as full time, VA will measure 9 through 11 hours as ¾ time, 6 through 8 hours as ½ time, 4 through 5 hours as less than ½ time and more than ¼ time, and 1 through 3 hours as ¼ time or less. VA will measure all other undergraduate courses as indicated in the table for undergraduate or professional courses, as appropriate, but when 13 credit hours or the equivalent is certified as full time, ¾ time will be 10 through 12 hours. When, in accordance with § 21.4273(a), a responsible official of a school certifies that a lesser number of hours constitute full time, ¾ time, ½ time, less than ½ time and more than ¼ time, or ¼ time or less, VA will accept the certification for measurement purposes.

To meet criteria for full-time measurement in standard collegiate courses which include required noncredit deficiency courses, in the absence of a certification under § 21.4272(k), VA will convert the noncredit deficiency courses on the basis of the applicable measurement criteria, as follows: 18 or 22 clock hours, 4 "Carnegie Units," or 12, 13, or 14 (as appropriate) semester hours equal full time. The credit-hour equivalent of such noncredit courses may constitute any portion of the required hours for full-time measurement.

[3] Class sessions measured on basis of not less than 50 minutes of classroom instruction. Supervised study periods, class breaks and rest periods are excluded.

[4] Supervised study must be excluded.

[5] Full-time training will consist of the number of hours which constitute the standard workweek of the training establishment, but not less than 30 hours unless a lesser number of hours is established as the standard workweek for the particular establishment through bona fide collective bargaining between employers and employees.

[6] In measuring net instruction there will be included customary intervals not to exceed 10 minutes between classes. Shop practice and rest periods are excluded. Supervised instruction periods in school's shops in farm cooperative programs and the time involved in field trips and individual and group instruction may be included in computing the clock hour requirements.

[7] For full-time training the 440 clock hours a year may be prescheduled to provide not less than 80 clock hours in any 3-month period.

[44 FR 62503, Oct. 31, 1979, as amended at 45 FR 73479, Nov. 5, 1980; 48 FR 37992, Aug. 22, 1983; 50 FR 21605, May 28, 1985; 50 FR 43135, Oct. 24, 1985; 54 FR 48549, Dec. 1, 1988; 54 FR 33891, Aug. 17, 1989; 57 FR 29804, July 7, 1992; 57 FR 35628, Aug. 10, 1992; 61 FR 6784, Feb. 22, 1996; 62 FR 55760, Oct. 28, 1997]

## § 21.4271 [Reserved]

## § 21.4272 Collegiate course measurement.

VA will measure a college level course in an institution of higher learning on a credit-hour basis provided all the conditions under paragraph (a) or (b) of this section are met. See also § 21.4273.

(Authority: 38 U.S.C. 3688)

(a) *Degree courses—accredited or candidate.* VA will measure a degree course on a credit-hour basis when—

(1) An institution of higher learning offers the course; and

(2) A nationally recognized accrediting association either—

(i) Accredits the institution of higher learning, or

(ii) Recognizes the institution as a candidate for accreditation; and

(3) The credits earned in the course can be applied towards an associate, baccalaureate or higher degree which is—

(i) Appropriate to the level of the institution of higher learning's accreditation, or

(ii) Appropriate to the level of the institution of higher learning's candidacy for accreditation; and

(4) The course is offered on a semester-hour or quarter-hour basis, and

(5) The degree to which the course credits are applicable either—

(i) Is granted by the institution of higher learning offering the course,

(ii) Is a part of a concurrent enrollment as described in § 21.4233(b), or

(iii) Is being pursued by a nonmatriculated student as provided in § 21.4252 (1), (2) or (3).

(b) *Degree courses—nonaccredited.* VA will measure on a credit-hour basis a degree course which does not meet the requirements of paragraph (a) of this section when—

(1) The course is offered on a semester- or quarter-hour basis, and

(2) The course leads to an associate, baccalaureate, or higher degree, which is granted by the school offering the degree under authority specifically conferred by a State education agency, and

(3) The school will furnish a letter from a State university or letters from three schools that are full members of a nationally recognized accrediting association. In each letter the State university or accredited school must certify either:

(i) That credits have been accepted on transfer at full value without reservation, in partial fulfillment of the requirements for a baccalaureate or higher degree for at least three students within the last 5 years, and that

at least 40 percent of the subjects within each curriculum, for which credit-hour measurement is sought, has been accepted without reservation by the certifying State university or accredited school, or

(ii) That in the last 5 years at least three students, who have received a baccalaureate or higher degree as a result of having completed the non-accredited course, have been admitted without reservation into a graduate or advanced professional program offered by the certifying State university or accredited school.

(Authority: 38 U.S.C. 3688(b))

(c) [Reserved]

(d) *Course measurement general.* When an undergraduate course qualifies for credit-hour measurement, VA will measure it according to the table contained in §21.4270(c) of this part.

(Authority: 38 U.S.C. 3688(a); Pub. L. 99–576)

(e)–(f) [Reserved]

(g) *Course measurement; nonstandard terms.* (1) When a term is not a standard semester or quarter as defined in §21.4200(b), the Department of Veterans Affairs will determine the equivalent for full-time training by:

(i) Multiplying the credits to be earned in the term by 18 if credit is granted in semester hours, or by 12 if credit is granted in quarter hours, and

(ii) Dividing the product by the number of whole weeks in the term.

(2) In determining whole weeks for this formula VA will—

(i) Determine the number of days from the beginning to the end of the term as certified by the educational institution, substracting any vacation period of 7 days or more;

(ii) Divide the number of days in the term by 7;

(iii) Disregard a remainder of 3 days or less, and

(iv) Consider 4 days or more to be a whole week.

(Authority: 38 U.S.C. 3688(b))

(3) The quotient resulting from the use of the formula is called equivalent credit hours. VA treats equivalent credit hours as credit hours for measurement purposes.

(Authority: 38 U.S.C. 3688(b))

(h)–(i) [Reserved]

(j) *Course measurement; credit course taken under special circumstances.* If a course is acceptable for credit, but the educational institution does not award credit to the veteran or eligible person because he or she has not met college entrance requirements or for some other valid reason, the Department of Veterans Affairs will measure the course as though it were pursued for credit, provided the veteran or eligible person performs all of the work prescribed for other students who are enrolled for credit.

(Authority: 38 U.S.C. 3688(b))

(k) *Course measurement; noncredit courses.* (1) Except for courses leading to a secondary school diploma or equivalent, the Department of Veterans Affairs will measure noncredit courses given by an institution of higher learning on a quarter- or semester-hour basis if the institution considers them to be the equivalent, for other administrative purposes, of undergraduate courses that lead to a standard college degree at the institution of higher learning.

(2) The Department of Veterans Affairs shall measure other noncredit courses under the appropriate criteria of §21.4270.

(3) Where a school requires a veteran or eligible person to pursue noncredit deficiency, remedial or refresher courses in order to meet scholastic or entrance requirements, the school will certify the credit-hour equivalent of the noncredit deficiency, remedial or refresher courses in addition to the credit hours for which the veteran or eligible person is enrolled. The Department of Veterans Affairs will measure

the course on the total of the credit hours and credit-hour equivalency.

(Authority: 38 U.S.C. 3688)

[31 FR 6774, May 6, 1966, as amended at 32 FR 13407, Sept. 23, 1967; 41 FR 47930, Nov. 1, 1976; 43 FR 35307, Aug. 9, 1978; 43 FR 49982, Oct. 26, 1978; 48 FR 37992, Aug. 22, 1983; 50 FR 21605, May 28, 1985; 51 FR 6412, Feb. 24, 1986; 54 FR 13065, Mar. 30, 1989; 54 FR 33894, Aug. 17, 1989; 61 FR 6784, Feb. 22, 1996]

### § 21.4273 Collegiate graduate.

(a) *In residence.* (1) The Department of Veterans Affairs will measure a nonaccredited graduate or advanced professional course (other than a law course) as provided in § 21.4272. The Department of Veterans Affairs will measure a nonaccredited law course as stated in § 21.4274.

(2) An accredited graduate or advanced professional course, including law as specified in § 21.4274, pursued in residence at an institution of higher learning will be measured in accordance with § 21.4272 unless it is the established policy of the school to consider less than 14 semester hours or the equivalent as full-time enrollment, or the course includes research, thesis preparation, or a comparable prescribed activity beyond that normally required for the preparation of ordinary classroom assignments. In either case a responsible official of the school will certify that the veteran or eligible person is pursuing the course full, three-quarter, one-half, less than one-half but more than one-quarter, or one quarter or less time.

(Authority: 38 U.S.C. 3688(b))

(b) *In absentia.* A responsible official of the school will certify a program of research pursued by a veteran or eligible person in absentia as full, three-fourths, one-half, less than one-half but more than one-quarter, or one-quarter or less time, and the activity will be assessed by the Department of Veterans Affairs accordingly when:

(1) The research activity is defined and organized so as to enable the certifying official to evaluate the time required for its successful pursuit, and

(2) The time certified for the research activity is independent of the time devoted to any employment situation in which the veteran or eligible person might be engaged.

(c) *Undergraduate or combination.* If a graduate student is enrolled in both graduate and undergraduate courses concurrently, or solely in undergraduate courses, VA will measure such an enrollment using the provisions of § 21.4272 or the graduate school's assessment of training time, whichever will result in a higher monthly rate for the veteran.

(Authority: 38 U.S.C. 3668(b); Pub. L. 102–568)

[31 FR 6774, May 6, 1966, as amended at 31 FR 8293, June 14, 1966; 32 FR 4411, Mar. 23, 1967; 50 FR 21606, May 28, 1985; 61 FR 28755, June 6, 1996]

### § 21.4274 Law courses.

(a) *Accredited.* A law course in an accredited law school leading to a standard professional law degree will be assessed as provided in § 21.4273(a).

(b) *Nonaccredited.* A law course leading to a professional law degree, completion of which will satisfy State educational requirements for admission to legal practice, pursued in a nonaccredited law school which requires for admission to the course at least 60 standard semester units of credit or the equivalent in quarter units of credit, will be assessed on the basis of 12 class sessions per week for full-time attendance. If the course does not meet these requirements it will be assessed on the basis of clock hours of attendance per week.

[36 FR 18304, Sept. 11, 1971, as amended at 38 FR 19371, July 20, 1973; 41 FR 47931, Nov. 1, 1976]

### § 21.4275 Practical training courses; measurement.

(a) *Medical and dental residencies and osteopathic internships and residencies.* VA will measure medical and dental residencies, and osteopathic internships and residencies as provided in § 21.4270(c) of this part if they are accredited and approved in accordance with § 21.4265(a) of this part.

(Authority: 38 U.S.C. 3688(b); Pub. L. 99–576)

(b) *Nursing courses.* (1) Courses for the objective of registered nurse or registered professional nurse will be measured on the basis of credit hours or

clock hours of attendance, whichever is appropriate. The clock hours of attendance may include academic class time, clinical training, and supervised study periods.

(2) Courses offered by schools which lead to the objective of practical nurse, practical trained nurse, or licensed practical nurse will be measured on credit hours or clock hours of attendance per week whichever is appropriate.

(c) *Medical and dental specialty courses.* (1) Medical and dental specialty courses offered by a school whether accredited or nonaccredited, shall be measured on the basis of credit hours or clock hours of attendance, whichever is appropriate.

(2) Medical and dental specialty courses offered in hospitals, clinics, laboratories or medical centers which are accredited by a nationally recognized accrediting agency shall be measured on the basis of clock hours of attendance per week.

(d) *Medical and dental assistants courses for the Department of Veterans Affairs.* Programs approved in accordance with the provisions of §21.4265(d) will be measured on a clock-hour basis as appropriate in accordance with §21.4270, however, the program will be regarded as full-time instructional training: *Provided,* The combined total of the classroom and other formal instruction portion of the program and on-job-training portion of the program requires 30 or more clock hours of attendance per week.

(e) *Professional training courses.* Nonmedically related professional training courses, such as the clinical pastoral course, shall be measured in semester hours of attendance or clock hours of attendance per week, whichever is appropriate.

(f) *Other practical training courses.* These courses will be measured in semester hours of credit or clock hours of attendance per week, whichever is appropriate, if approved under §21.4265(f). (See §21.4265 for approval.)

[41 FR 26684, June 29, 1976, as amended at 43 FR 25429, June 13, 1978; 49 FR 39545, Oct. 9, 1984; 54 FR 33894, Aug. 17, 1989]

**§21.4277 Discontinuance: unsatisfactory progress, conduct and attendance.**

(a) *Satisfactory pursuit of program.* Entitlement to benefits for a program of education is subject to the requirement that the veteran or eligible person, having commenced the pursuit of such program, continues to maintain satisfactory progress. If the veteran or eligible person does not maintain satisfactory progress, educational benefits will be discontinued by the Department of Veterans Affairs. Progress is unsatisfactory if the veteran or eligible person does not satisfactorily progress according to the regularly prescribed standards and practices of the institution he or she is attending.

(b) *Satisfactory conduct.* Entitlement to a program of education is subject to the requirement that the veteran or eligible person, having commenced the pursuit of such program, continues to maintain satisfactory conduct in accordance with the regularly prescribed standards and practices of the institution in which he or she is enrolled. If the veteran or eligible person will no longer be retained as a student or will not be readmitted as a student by the institution in which he or she is enrolled, educational benefits will be discontinued, unless further development establishes that the action of the school is of a retaliatory nature. See §21.4253.

(c) *Satisfactory attendance.* Entitlement to benefits for a program of education is subject to the requirement that the veteran or eligible person, having commenced the pursuit of such program, continues to maintain satisfactory attendance in accordance with the regularly prescribed standards and practices of the institution in which he or she is enrolled. If the veteran or eligible person will no longer be retained as a student or will not be readmitted as a student by the institution in which he or she is enrolled, educational benefits will be discontinued.

(Authority: 38 U.S.C. 3474, 3524)

CROSS REFERENCE. *Reports—requirements.* See §21.4203.

[48 FR 37994, Aug. 22, 1983, as amended at 57 FR 29804, July 7, 1992]

### § 21.4278 Reentrance after discontinuance.

(a) *Conditions permitting reentrance after discontinuance.* A veteran or eligible person may be reentered following discontinuance because of unsatisfactory conduct, progress or attendance only when either of the following sets of conditions exist:

(1) The veteran or eligible person is resuming enrollment at the same educational institution in the same program of education and the educational institution has—

(i) Approved the veteran's or eligible person's reenrollment, and

(ii) Certified it to the Department of Veterans Affairs; or

(2) All of the following exist:

(i) The cause of unsatisfactory conduct, progress or attendance has been removed,

(ii) VA determines that the program which the veteran or eligible person now proposes to pursue is suitable to his or her aptitudes, interests and abilities, and

(iii) If a proposed change of program is involved, the change meets the requirements for approval under §§ 21.4234, 21.5232, 21.7114 and 21.7614 of this part.

(Authority: 38 U.S.C. 3474 and 3524)

(b) *Programs which may be reentered after discontinuance.* Reentrance may be for the same program, for a revised program or for an entirely different program depending on the cause of the discontinuance and the removal of that cause.

(Authority: 38 U.S.C. 3474 and 3524)

CROSS REFERENCE: *Counseling.* See § 21.4100.

[45 FR 67093, Oct. 9, 1980, as amended at 57 FR 29804, July 7, 1992]

### § 21.4279 Combination correspondence-residence program.

(a) *Requirements for pursuit.* A program of education may be pursued partly in residence and partly by correspondence for the attainment of a predetermined and identified objective under the following conditions:

(1) The correspondence and residence portions are pursued sequentially; that is, not concurrently.

(2) It is the practice of the institution to permit a student to pursue a part of his or her course by correspondence in partial fulfillment of the requirements for the attainment of the specified objective.

(3) The total credit established by correspondence does not exceed the maximum for which the institution will grant credit toward the specified objective.

(4) The educational institution offering the course is accredited by an agency recognized by the Secretary of Education; and

(5) The State approving agency has approved the correspondence-residence course and has verified compliance with the requirement of 38 U.S.C. 3672(e) and § 21.4256(a) that at least 50 percent of those pursuing the correspondence-residence course require six months or more to complete it.

(The information collection requirements in this section have been approved by the Office of Management and Budget under control number 2900–0575.)

(Authority: 38 U.S.C. 3672(e))

(b) *Payment for pursuit of a correspondence-residence program.* The rate of educational assistance payable to a spouse or surviving spouse under 38 U.S.C. Chapter 35 for the residence portion of a correspondence-residence course or program shall be computed as set forth in §§ 21.3131(a) and 21.4270.

(1) The charges for that portion of the course or program pursued exclusively by correspondence will be in accordance with § 21.3131(a) with 1 month entitlement charged for each $404 of cost reimbursed.

(Authority: 38 U.S.C. 3534)

(2) The charges for the residence portion of the program must be separate from those for the correspondence portion.

[38 FR 7394, Mar. 21, 1973, as amended at 39 FR 45237, Dec. 31, 1974; 43 FR 35308, Aug. 9, 1978; 50 FR 19936, May 13, 1985; 61 FR 29296, June 10, 1996; 62 FR 63850, Dec. 3, 1997]

### § 21.4280 [Reserved]

## Subpart E [Reserved]

## Subpart F—Education Loans

AUTHORITY: 38 U.S.C. 501, 3537, 3698, 3699, unless otherwise noted.

### §21.4500 Definitions.

(a) *General.* These definitions shall be applicable for subpart F of part 21.

(b) *Education loan.* A loan made by the Department of Veterans Affairs to an eligible spouse or surviving spouse pursuant to 38 U.S.C. 3512(f) and 3698.

(c) *Academic year.* The 9 month period usually from August or September to May or June, which includes generally two semesters or three quarters.

(d) *Loan period.* (1) The Department of Veterans Affairs will make loans normally for a quarter, semester, summer term or two consecutive quarters.

(2) The Department of Veterans Affairs may grant a loan to an eligible spouse or surviving spouse attending a course not organized on a term, quarter or semester basis if the course requires at least 6 months at the full-time rate to complete. A loan will be granted for not more than 6 months at a time.

(Authority: 38 U.S.C. 3512(f), 3698)

(i) The Director of the Department of Veterans Affairs facility of jurisdiction may waive the requirement that such a course must take at least 6 months to complete. Such a waiver of the length of the course shall be granted by the Director only if a school requests one for a course and the Director finds that:

(A) During the previous 2 years at least 75 percent of the students enrolled in the course completed it.

(B) During the previous 2 years at least 75 percent of the persons completing the course found employment in the occupational category for which the course is designed to provide training.

(C) The default rate on all Department of Veterans Affairs education loans ever made to students at the educational institution does not exceed 5 percent or 5 cases, whichever is greater.

(D) The default rate on all loans ever made to students pursuant to loan programs administered by the Department of Education does not exceed 5 percent or five cases, whichever is greater.

(E) The course is at least 3 months long.

(F) The course is approved for full-time attendance only.

(G) No more than 35 percent of the students attending the course are receiving educational assistance from the Department of Veterans Affairs.

(H) The Field Director for the region in which the Department of Veterans Affairs facility is located concurs in the waiver.

(ii) If a school disagrees with a decision of a Director of a Department of Veterans Affairs facility, it may, within 1 year from the date of the letter from the Director informing the school of the decision, request that the decision be reviewed by the Director, Education Service. The Director of the Department of Veterans Affairs facility shall forward all requests to the Director, Education Service, who shall consider all evidence submitted by the school. He or she has the authority to affirm or reverse a decision of a Department of Veterans Affairs facility, but shall not grant a waiver if the requirements of paragraph (d)(2)(i) of this section are not met.

(iii) A waiver will remain in effect until the date on which the course fails to meet one of the requirements of paragraph (d)(2)(i) of this section. A school which has received a waiver for a course must notify the Director of the Department of Veterans Affairs facility of jurisdiction within 30 days of the date on which one of those requirements is not met.

(Authority: 38 U.S.C. 3512(f), 3698(c))

(e) *Total amount of financial resources.* This term means the total of the following:

(1) The annual adjusted effective income of the eligible spouse or surviving spouse, less Federal income taxes paid or payable by the veteran or other eligible person with respect to such income, as described in paragraph (h) of this section.

(2) The amount of cash assets of the eligible spouse or surviving spouse, as described in §21.4502(b)(2).

(3) The amount of financial assistance received by the eligible spouse or

surviving spouse under the provisions of Title IV of the Higher Education Act of 1965, as amended.

(4) Educational assistance received or receivable for the loan period by the eligible spouse or surviving spouse under 38 U.S.C. chapter 35. This amount shall be exclusive of an education loan.

(5) Financial assistance received by the eligible spouse or surviving spouse under any scholarship or grant other than the one specified in paragraph (e)(3) of this section.

(6) Department of Veterans Affairs work-study allowance received or receivable by the eligible spouse or surviving spouse under 38 U.S.C.3537.

(f) *Actual cost of attendance.* The term *actual cost of attendance* means:

(1) The actual charge per student for tuition, fees, and books;

(2) An allowance for commuting (this allowance will be based on 22.5¢ per mile for distances not exceeding normal commuting distance);

(3) An allowance for other expenses reasonably related to attendance at the institution at which the eligible spouse or surviving spouse is enrolled; and

(4) A room and board allowance that shall be determined as follows:

(i) If the educational institution actually provides the eligible spouse or surviving spouse with room and board, the allowance shall equal the actual charges to him or her for room and board;

(ii) If the educational institution provides some students with room and board, but does not provide room and board for the eligible spouse or surviving spouse, the room and board allowance shall equal either the actual expenses incurred by the eligible spouse or surviving spouse for room and board, or the amount for room and board that the educational institution would have charged the eligible spouse or surviving spouse, had the educational institution provided him or her with room and board, whichever is less; and

(iii) If the educational institution does not provide any students with room and board, the room and board allowance shall equal either the actual expenses incurred by the eligible spouse or surviving spouse for room and board or the amount the eligible spouse or surviving spouse would have been charged for room and board had he or she been provided room and board by the nearest State college or State university that provides room and board, whichever is less.

(g) *Loan fee.* This shall be a fee collected by discounting the amount of any loan granted to an eligible spouse or surviving spouse by an appropriate amount. The fee shall be collected for each separate loan authorized. The amount of the fee shall be 3 percent of the total loan amount.

(h) *Annual adjusted effective income.* This income shall include:

(1) Nontaxable income for the student only for the current tax year in which the application for the education loan is received by the Department of Veterans Affairs. This includes income from sources such as Department of Veterans Affairs compensation and pension, disability retirement, unemployment compensation, welfare payments, social security benefits, etc.

(2) Adjusted gross income (wages, salary, dividends, interest, rental, business, etc.) for the student only for the current tax year in which the application for the education loan is received by the Department of Veterans Affairs, less:

(i) Authorized deductions for exemptions;

(ii) Itemized or standard deduction, whichever is greater;

(iii) Mandatory withholdings such as Federal and State income taxes, social security taxes, etc.

(Authority: 38 U.S.C. 3512(f), 3698(b))

(i) *School term.* This phrase means:

(1) In the case of an institution of higher learning operating on a quarter system, three consecutive quarters within an ordinary school year;

(2) In the case of an institution of higher learning operating on a semester system, two consecutive semesters within an ordinary school year; or

(3) In the case of an educational institution not an institution of higher learning or in the case of an institution of higher learning not operating on a quarter or semester system, a period of 9 to 11 months provided:

(i) The program of education is divided into segments, and

(ii) At least one segment is completed prior to or during the 9 to 11-month period.

(Authority: 38 U.S.C. 1682A(e), (repealed, Pub. L. 100–689, section 124(a)))

[40 FR 31764, July 29, 1975, as amended at 44 FR 62505, Oct. 31, 1979; 48 FR 37995, Aug. 22, 1983; 54 FR 34984, Aug. 23, 1989; 61 FR 26115, May 24, 1996]

### §21.4501 Eligibility.

(a) *General.* Any eligible spouse or surviving spouse shall be eligible to receive an education loan if he or she meets the criteria of this section.

(Authority: 38 U.S.C. 3512(f), 3698)

(b) *Eligibility criteria.* To qualify for an education loan—

(1) The eligible spouse's or surviving spouse's delimiting period as determined by §21.3046 (a), (b), or (d), or §21.3047 must have expired;

(2) The eligible spouse or surviving spouse must—

(i) Have financial resources that may reasonably be expected to be expended for education needs and which are insufficient to meet the actual costs of attendance;

(ii) Execute a promissory note payable to the Department of Veterans Affairs, as provided by §21.4504;

(iii) Have unused entitlement provided under 38 U.S.C. 3511;

(iv) During the term, quarter, or semester for which the loan is granted, be enrolled on a full-time basis in pursuit of the approved program of education in which he or she was enrolled on the date his or her eligibility expired under §21.3046 (a), (b), or (d), or §21.3047; and

(v) Have been enrolled in a program of education on a full-time basis—

(A) On the date his or her period of eligibility expired under §21.3046 (a), (b), or (d), or §21.3047; or

(B) On the last date of the ordinary term, semester or quarter preceding the date his or her eligibility expired under §21.3046 (a), (b), or (d), or §21.3047, if the delimiting date fell during a school break or summer term.

(Authority: 38 U.S.C. 3512(f), 3698)

(c) *Limitations.* The period for which a loan may be granted shall not extend beyond the earliest of the following dates:

(1) Two years after the expiration of the period of eligibility as determined by §21.3046(a), (b), or (d), or §21.3047;

(2) The date on which the eligible spouse's or surviving spouse's entitlement is exhausted; or

(3) The date on which the eligible spouse or surviving spouse completes the approved program of education which he or she was pursuing on the date the delimiting period determined by §21.3046 (a), (b), or (d), or §21.3047 expired.

(Authority: 38 U.S.C. 3512(f), 3698)

(d) *Exclusions.* No eligible spouse or surviving spouse shall be authorized an education loan if he or she has defaulted on a previous education loan and there is a remaining unliquidated payment due VA.

(Authority: 38 U.S.C. 3512(f), 3698)

[61 FR 26115, May 24, 1996, as amended at 62 FR 51785, Oct. 3, 1997]

### §21.4502 Applications.

(a) *General.* An eligible spouse or surviving spouse shall make an application for an education loan in the manner prescribed and upon the forms prescribed by the Department of Veterans Affairs. The Department of Veterans Affairs must receive the application no later than the last date of the term, quarter, semester, or 6-month period to which all or part of the loan will apply. The application shall be certified by the school as to the date required from the school by the Department of Veterans Affairs.

(Authority: 38 U.S.C. 3471)

(b) *Information.* The application shall provide the Department of Veterans Affairs with the following information and such other information as may be reasonable upon specific request:

(1) A statement of nontaxable income for the student for the current tax year in which the application is received by the Department of Veterans Affairs; as well as a statement of adjusted gross income for the student for the current tax year in which the application for an education loan is received by the

Department of Veterans Affairs less authorized deductions for exemptions, itemized or standard deduction, whichever is greater, and mandatory withholdings such as Federal and State income taxes, social security taxes, etc.

(2) The amount of all funds of the eligible spouse or surviving spouse on hand on the date of the application including cash on hand, money in a bank or savings and loan association account, and certificates of deposit.

(3) The full amount of the tuition for the course to be paid by the eligible spouse or surviving spouse during the period for which the loan is sought.

(4) The amount of reasonably anticipated expenses for room and board to be expended by the eligible spouse or surviving spouse during the period for which the loan is sought, including a reasonable amount, not to exeed 22.5 cents per mile, for commuting normal distances to classes if the student does not reside on campus. Applications may also provide the Department of Veterans Affairs with a statement of the amount of charges for room and board which the school would have made had the school provided the eligible spouse or surviving spouse with room and board. If the school does not provide room and board, the application may provide the Department of Veterans Affairs with a statement of charges for room and board which the eligible spouse or surviving spouse would have received had he or she been provided room and board at the nearest State college or State university which provides room and board.

(Authority: 38 U.S.C. 3698(b))

(5) The anticipated reasonable cost of books and supplies required for the courses to be taken during the period for which the loan is sought.

[40 FR 31764, July 29, 1975, as amended at 44 FR 62507, Oct. 31, 1979; 48 FR 37996, Aug. 22, 1983; 49 FR 8920, Mar. 9, 1984; 61 FR 26116, May 24, 1996]

### § 21.4503 Determination of loan amount.

(a) *General.* The amount of the education loan shall be computed by:

(1) Determining the total amount of financial resources of the eligible spouse or surviving spouse, as defined in § 21.4500(e), which may be reasonably expected to be expended for education needs in any academic year or other loan period.

(2) Subtracting the available resources determined in paragraph (a)(1) of this section from the actual cost of attendance, as defined in § 21.4500(f), to obtain the net amount by which costs exceed the resources available for education needs. If the available resources and the costs are equal, or if the resources exceed the costs, no loan will be authorized.

(b) *Amount.* A loan shall be authorized in the amount of the excess of cost over available resources as determined in paragraph (a) of this section subject to the following limitations:

(1) If the costs exceed the available resources by $50 or less no loan shall be granted.

(2) The aggregate of the amounts any eligible spouse or surviving spouse may borrow for an education loan may not exceed $2,500 in any one academic year. It also may not exceed an amount determined by multiplying the number of months of educational assistance to which the eligible spouse or surviving spouse would be entitled were it not for the expiration of his or her delimiting period under 38 U.S.C. 3511 times $376.

(Authority: 38 U.S.C. 3512(f), 3698)

(3) If a student is enrolled in a course organized on a term, quarter or semester basis, no single loan shall be authorized at one time for a period that is longer than two consecutive quarters. If a student is enrolled in a course not organized on a term, quarter or semester basis, no single loan shall be authorized at one time for a period that is longer than 6 months.

(Authority: 38 U.S.C. 3698)

(4) The Department of Veterans Affairs shall pay the following maximum amounts for these loan periods:

(i) $1,250 for any semester.

(ii) $830 for any term of 8 weeks or more leading to a standard college degree which is not part of the normal academic year or for a quarter.

(iii) $1660 for two consecutive quarters.

(iv) $270 per month for a course not leading to a standard college degree if less than 6 months long.

(v) $1660 for a 6-month loan period based on a course not leading to a standard college degree which is 6 or more months long.

(vi) $270 per month for a loan period of less than 6 months based on a course not leading to a standard college degree which is 6 or more months long.

(Authority: 38 U.S.C. 3512(f), 3698(b))

(5) No amount authorized will be paid by the Department of Veterans Affairs until the eligible spouse or surviving spouse is certified as being enrolled and actually pursuing the course.

(6) An eligible spouse or surviving spouse may receive more than one loan covering separate loan periods, subject to paragraphs (b)(3) and (b)(7) of this section.

(7) If the spouse or surviving spouse has a material change in economic circumstances subsequent to the original application for a loan, he or she may reapply for an increase in an authorized loan or for a loan, if otherwise qualified, if no loan was originally granted. However, the Department of Veterans Affairs will not decrease or revoke a loan once granted, absent fraud in the application.

[40 FR 31765, July 29, 1975, as amended at 48 FR 37996, Aug. 22, 1983; 49 FR 8439, Mar. 7, 1984; 50 FR 19936, May 13, 1985; 61 FR 26116, May 24, 1996]

### § 21.4504 Promissory note.

(a) *General.* The agreement by VA to loan money pursuant to 38 U.S.C. 3512(f) and 3698 to any eligible spouse or surviving spouse shall be in the form of a promissory note which shall include:

(1) The full amount of the loan.

(2) Agreement to pay a fee not to exceed 3 percent for an insurance fund against defaults.

(3) A note or other written obligation providing for repayment of the principal amount, and interest on the loan in annual installments over a period beginning 9 months after the date on which the borrower first ceases to be at least a half-time student and ending:

(i) For loans of $600 or more, 10 years and 9 months after such date, or

(ii) For loans of less than $600, 1 year and 7 months after such date for the first $50 of the loan plus 1 additional month for each additional $5 of the loan.

(4) A provision for prepayment of all or part of the loan, without penalty, at the option of the borrower.

(b) *Interest.* The promissory note shall advise the student that the loan shall bear interest on the unpaid balance of the loan at a rate comparable to, but not in excess of, the rate of interest charged students at such time on loans insured by the Secretary of Education, Department of Education, under part B of Title IV of the Higher Education Act of 1965. The rate shall be determined as of the date the agreement is executed and shall be a fixed amount.

(Authority: 38 U.S.C. 3698)

(c) *Security.* The loan shall be made without security and without endorsement.

(d) *Default.* Whenever VA determines that a default, in whole or in part, has occurred on any such loan the eligible spouse or surviving spouse shall be notified that the amount of the default shall be recovered from the eligible spouse or surviving spouse concerned in the same manner as other debt due the United States. Once a default has occurred, the eligible spouse's or surviving spouse's subsequent reentrance into training at the half-time or greater rate shall not be the basis for rescinding the default. A default may only be rescinded when VA has been led to create the default as a result of a mistake of fact or law.

(Authority: 38 U.S.C. 3698 (e)(1))

(e) *Death or disability.* If the eligible spouse or surviving spouse dies or becomes permanently and totally disabled, even though he or she ceases to be permanently and totally disabled subsequent to the granting of the loan, the remaining liability of such person for an educational loan shall be discharged.

(f) *Fraud.* Material misrepresentation of fact by the eligible spouse or surviving spouse, including omissions of relevant information, shall render the

loan agreement null and void. The deferred payment provisions of the agreement shall not apply in such a case and the full amount of any loan balance shall become due and payable immediately. The amount due shall be recovered from the eligible spouse or surviving spouse in the same manner as any other debt due the United States.

(g) *Signature.* An eligible spouse or surviving spouse may sign both the loan application and the promissory note required and payment of the amounts authorized will be made to such person, notwithstanding his or her minority, unless the person has a legal guardian. In such cases the legal guardian must sign and will be paid the loan amounts.

[40 FR 31765, July 29, 1975, as amended at 48 FR 37997, Aug. 22, 1983; 52 FR 5963, Feb. 27, 1987; 52 FR 7276, Mar. 10, 1987; 61 FR 26116, May 24, 1996]

### § 21.4505 Check delivery.

(a) *General.* Education loans by the Department of Veterans Affairs shall be made by a check payable to the eligible spouse or surviving spouse and shall be mailed promptly to the educational institution in which the eligible spouse or surviving spouse is enrolled for delivery by the educational institution.

(b) *Delivery and certification.* (1) The educational institution, electing to participate in this program, shall deliver an education loan check to the eligible spouse or surviving spouse and shall certify the fact of delivery to the Department of Veterans Affairs immediately upon delivery. If the delivery is not made within 30 days after the institution receives the check, it shall return the check to the Department of Veterans Affairs.

(2) The Director of the Department of Veterans Affairs facility of jurisdiction may direct that education loan checks be sent directly to spouses or surviving spouses when:

(i) The educational institution demonstrates an inability to comply with these requirements; or

(ii) The educational institution fails to provide adequately for the safekeeping of the checks prior to the delivery to the student or return to the Department of Veterans Affairs; or

(iii) The educational institution elects not to participate in this program; or

(iv) There is compelling evidence that the institution is unable to discharge its responsibilities under this program.

(Authority: 38 U.S.C. 3512(f), 3698)

[44 FR 62508, Oct. 31, 1979, as amended at 61 FR 26116, May 24, 1996]

### § 21.4507 Advertising.

(a) *General.* No educational institution or training establishment shall include a statement in advertisements or brochures intended to solicit students as to the availability of education loans from the Department of Veterans Affairs for eligible spouses and surviving spouses, except as provided in paragraph (b) of this section.

(b) *Form.* The statement which is permitted shall be as follows: ''Certain eligible spouses and surviving spouses may qualify for a maximum educational loan of $2,500 per academic year from the Department of Veterans Affairs depending upon need. Applications for such loans shall be made to the Department of Veterans Affairs on forms prescribed by it.''

(Authority: 38 U.S.C. 3512(f), 3696, 3698(b))

[44 FR 62510, Oct. 31, 1979, as amended at 61 FR 26116, May 24, 1996]

## Subparts F–1—F–3 [Reserved]

## Subpart G—Post-Vietnam Era Veterans' Educational Assistance Under 38 U.S.C. Chapter 32

AUTHORITY: 38 U.S.C. 501(a), chs. 32, 36, unless otherwise noted.

SOURCE: 45 FR 31, Jan. 2, 1980, unless otherwise noted.

ADMINISTRATIVE

### § 21.5001 Administration of benefits: 38 U.S.C. Chapter 32.

(a) *Delegation of authority.* Except as otherwise provided, authority is delegated to the Under Secretary for Benefits and to supervisory or administrative personnel within the jurisdiction of the Education Service, Veterans Benefits Administration, designated by

him or her to make findings and decisions under 38 U.S.C. Chapter 32 and the applicable regulations, precedents, and instructions, as to the program authorized by subpart G of this part.

(Authority: 38 U.S.C. 512(a))

(b) *Administrative provisions.* In administering benefits payable under 38 U.S.C. Chapter 32, VA will apply the following sections:

(1) Section 21.4002—Finality of decisions;

(2) Section 21.4003 (except paragraphs (d) and (e))—Revision of decisions;

(3) Section 21.4005—Conflicting interests;

(4) Section 21.4006—False or misleading statements;

(5) Section 21.4007—Forfeiture;

(6) Section 21.4008—Prevention of overpayments; and

(7) Section 21.4009—Overpayments; waiver or recovery.

(Authority: 38 U.S.C. 3241(a), 3680, 3683, 3685, 3690, 6103)

[61 FR 29029, June 7, 1996]

GENERAL

### §21.5020 Post-Vietnam era veterans' educational assistance.

Title 38 U.S.C. Chapter 32 provides for a participatory program for educational assistance benefits to eligible veterans and servicepersons. The intent of the Congress for this program is stated in 38 U.S.C. 3201.

(Authority: 38 U.S.C. 3201)

[61 FR 29029, June 7, 1996]

### §21.5021 Definitions.

For the purpose of subpart G and payment of Chapter 32 benefits the following definitions apply:

(a) *Veteran*—means anyone whose service meets the requirements of §21.5040.

(Authority: 38 U.S.C. 3202(1))

(b) *Active duty*—means full-time duty in the Armed Forces or as a commissioned officer of the regular or Reserve Corps of the Public Health Service or of the National Oceanic and Atmospheric Administration. It does not include any period during which an individual:

(1) Was assigned full-time by the Armed Forces to a civilian institution for a course of education which was substantially the same as established courses offered to civilians,

(2) Served as a cadet or midshipman at one of the service academies,

(3) Served under the provisions of section 511(d) of Title 10, United States Code, pursuant to an enlistment in the military reserve or national guard,

(4) Served in an excess leave without pay status, or

(5) Served in a status specified in §3.15 of this chapter.

(Authority: 38 U.S.C. 3202)

(c) *State*—means each of the several States, territories and possessions of the United States, the District of Columbia, the Commonwealth of Puerto Rico and the Canal Zone.

(Authority: 38 U.S.C. 101(20))

(d) *School, educational institution, institution.* The terms, *school, educational institution,* and *institution* mean—

(1) Any vocational school, business school, correspondence school, junior college, teacher's college, college, normal school, professional school, university or scientific or technical institution;

(2) Any public or private elementary school or secondary school which offers courses for adults; and

(3) An entity, other than an institution of higher learning, that provides training required for completion of a State-approved alternative teacher certification program.

(Authority: 38 U.S.C. 3202(2), 3452(c))

(e) *Participant*—means a person who is participating in the educational benefits program established under Chapter 32. This includes:

(1) A person who has enrolled in and is making contributions by monthly payroll deduction to the *fund.*

(2) Those individuals who have contributed to the *fund* and have not disenrolled (i.e., users or potential users of benefits).

(Authority: 38 U.S.C. 3202)

(3) A person who has enrolled in and is having monthly contributions to the *fund* made for him or her by the Secretary of Defense.

(Authority: Sec. 903, Pub. L. 96–342, 94 Stat. 1115)

(4) A person who has made a lump-sum contribution to the fund in lieu of or in addition to monthly contributions deducted from his or her military pay.

(Authority: 38 U.S.C. 3222)

(5) Those individuals who have contributed to the *fund* and—

(i) Have been automatically disenrolled as provided in § 21.5060(b)(3) of this part,

(ii) Whose funds have been transferred to the Treasury Department as provided in § 21.5064(b)(4)(iii) of this part, and

(iii) Who are found to have qualified for an extended period of eligibility as provided in § 21.5042 of this part.

(Authority: 38 U.S.C. 3232;, Pub. L. 99–576)

(f) *Fund*—means that trust fund account established to maintain dollar contributions of the participant (and contributions, if any, from the Department of Defense).

(Authority: 38 U.S.C. 3222)

(g) *Suspends*—means a participant stops contributing to the *fund* (temporarily or permanently).

(h) *Disenrolls*—means a participant terminates participation and forfeits any entitlement to benefits except for a refund of his or her contributions previously made.

(Authority: 38 U.S.C. 3221)

(i) *Hardship* or *other good reasons*—means circumstances considered to be such by the Department of Defense and the Department of Veterans Affairs when referring to suspension or disenrollments, such as illness of the participant or a member of his or her immediate family, unexpected personal expense, etc.

(Authority: 38 U.S.C. 3221(b))

(j) *Benefit period* means:

(1) For a course leading to a standard college degree:

(i) The entire enrollment period certified by the school; or

(ii) That period of time from the beginning of an enrollment period until the end of the individual's delimiting period; or

(iii) That period of time from the beginning of an enrollment period to the date on which the individual's contributions in the fund are exhausted, whichever is the shortest.

(2) For a residence course not leading to a standard college degree or for a correspondence course that period of time from the beginning of the enrollment period as certified by the school or the date the school last certified on the quarterly certification of attendance, whichever is later, to:

(i) The end of the enrollment period;

(ii) The end of the quarter to be certified;

(iii) The last date of the individual's delimiting period; or

(iv) The date on which the individual's contributions to the fund are exhausted, whichever occurs first.

(3) [Reserved]

(4) For apprenticeship and other on-job training that period of time from the beginning date of training or the date last certified on the monthly certification of training to—

(i) The end of the month to be certified;

(ii) The last date of the veteran's delimiting period;

(iii) The date on which the veteran's entitlement is exhausted, whichever occurs first.

(Authority: 38 U.S.C. 3231; Pub. L. 99–576)

(k) *Benefit payment*—means all educational assistance allowance paid to a veteran for pursuit of a program of education during a benefit period.

(Authority: 38 U.S.C. 3231)

(l) *Spouse*—means a person of the opposite sex who is the wife or husband of the participant, and whose marriage to the participant meets the requirements of § 3.1(j) of this chapter.

(Authority: Sec. 903, Pub. L. 96–342, 94 Stat. 1115)

(m) *Surviving spouse*—means a person of the opposite sex who is a widow or widower of the participant, and whose marriage to the participant meets the requirements of §3.1(j) or §3.52 of this chapter.

(n) *Child*—(1) for the purposes of §21.5067(a) this term means a natural child, step-child or adopted child of the participant regardless of age or marital status.

(2) For all other purposes this term means a person whose relationship to the participant meets the requirements of §3.57 or §3.58 of this chapter.

(o) *Parent*—means a person whose relationship to the participant meets the requirements of §3.59 of this chapter.

(Authority: 38 U.S.C. 3224)

(p) *Training establishment*—means any establishment providing apprentice or other training on-the-job, including those under the supervision of a college or university or any State department of education, or any State apprenticeship agency, or any State board of vocational education, or any joint apprenticeship committee, or the Bureau of Apprenticeship and Training established in accordance with 29 U.S.C. Chapter 4C, or any agency of the Federal Government authorized to supervise such training.

(Authority: 38 U.S.C. 3202(5), 3452(e); Pub. L. 99–576)

(q) *Program of education*—means—

(1) Any curriculum or combination of subjects or unit courses pursued at a school which is generally accepted as necessary to meet requirements for a predetermined and identified educational, professional or vocational objective;

(2) Subjects or unit courses which fulfill requirements for more than one predetermined and identified objective if all objectives pursued are generally recognized as being related to a single career field;

(3) Any unit course or subject or combination of courses or subjects, pursued by an individual at an educational institution, required by the Administrator of the Small Business Administration as a condition to obtaining financial assistance under the provisions of 15 U.S.C. 636; or

(4) A full-time program of apprenticeship or other on-job training approved as provided in §§21.4261 or 21.4262 of this part as appropriate.

(Authority: 38 U.S.C. 3202(2), 3452(b); Pub. L. 99–576)

(r) *Educational objective*—An *educational objective* is one that leads to the awarding of a diploma, degree or certificate which is generally recognized as reflecting educational attainment.

(Authority: 38 U.S.C. 3202(2), 3452(b))

(s) *Professional or vocational objective*—A *professional or vocational objective* is one that leads to an occupation. It may include educational objectives essential to prepare for the chosen occupation. When a program of education consists of a series of courses not leading to an educational objective, these courses must be generally accepted as necessary for attainment of a designated professional or vocational objective.

(Authority: 38 U.S.C. 3202(2))

(t) *Deficiency course*—The term *deficiency course* means any secondary level course or subject not previously completed satisfactorily which is specifically required for pursuit of a post-secondary program of education.

(Authority: 38 U.S.C. 3241; Pub. L. 100–689)

(u) *Refresher course*—The term *refresher course* means—

(1) Either a course at the elementary or secondary level to review or update material previously covered in a course that has been satisfactorily completed, or

(2) A course which permits an individual to update knowledge and skills or be instructed in the technological advances which have occurred in the individual's field of employment during and since the individual's active military service and which is necessary to enable the individual to pursue an approved program of education.

(Authority: 38 U.S.C. 3241(a); Pub. L. 100–689, Pub. L. 101–237).

(v) *Disabling effects of chronic alcoholism.* (1) The term *disabling effects of*

*chronic alcoholism* means alcohol-induced physical or mental disorders or both, such as habitual intoxication, withdrawal, delirium, amnesia, dementia, and other like manifestations of chronic alcoholism which, in the particular case—

(i) Have been medically diagnosed as manifestations of alcohol dependency or chronic alcohol abuse, and

(ii) Are determined to have prevented commencement or completion of the affected individual's chosen program of education.

(2) A diagnosis of alcoholism, chronic alcoholism, alcohol-dependency, chronic alcohol abuse, etc., in and of itself, does not satisfy the definition of this term.

(3) Injury sustained by a veteran as a proximate and immediate result of activity undertaken by the veteran while physically or mentally unqualified to do so due to alcoholic intoxication is not considered a disabling effect of chronic alcoholism.

(Authority: 38 U.S.C. 105, 3232, 3462; Pub. L. 100–689)

(w) *Continuous service* means—

(1) Active duty served without interruption. A complete separation from active duty service will interrupt the continuity of active duty service.

(2) Time lost while on active duty will not interrupt the continuity of service. Time lost includes, but is not limited to, excess leave, noncreditable time and not-on-duty time.

(Authority: 38 U.S.C. 3232(a); Pub. L. 101–237)

(x) *Persian Gulf War.* The term ''Persian Gulf War'' means the period beginning on August 2, 1990, and ending on the date thereafter prescribed by Presidential proclamation or by law.

(Authority: 38 U.S.C. 101(33))

(y) *Alternative teacher certification program.* The term *alternative teacher certification program* for the purposes of determining whether an entity offering such a program is a school, educational institution or institution, as defined in paragraph (d)(3) of this section, means a program leading to a teacher certificate that allows individuals with a bachelor's degree or graduate degree to obtain teacher certification without enrolling in an institution of higher learning.

(Authority: 38 U.S.C. 3202(2), 3452(c))

[45 FR 31, Jan. 2, 1980, as amended at 47 FR 51743, Nov. 17, 1982; 52 FR 3429, Feb. 4, 1987; 53 FR 34495, Sept. 7, 1988; 55 FR 31581, Aug. 3, 1990; 57 FR 38614, Aug. 26, 1992; 58 FR 34369, June 25, 1993; 61 FR 1526, Jan. 22, 1996; 65 FR 5786, Feb. 7, 2000]

## § 21.5022 Eligibility under more than one program.

(a) *Concurrent benefits under more than one program.* An individual may not receive educational assistance under 38 U.S.C. Chapter 32 concurrently with benefits under any of the following provisions of law:

(1) 38 U.S.C. Chapter 31;

(2) 38 U.S.C. Chapter 35;

(3) 10 U.S.C. Chapter 107;

(4) 10 U.S.C. Chapter 1606;

(5) Section 903 of the Department of Defense Authorization Act, 1981 (10 U.S.C. 2141 note); or

(6) The Omnibus Diplomatic Security and Antiterrorism Act of 1986.

(Authority: 38 U.S.C. 3681(b))

(b) *Total eligibility under more than one program.* (1) No one may receive a combination of educational assistance benefits under 38 U.S.C. Chapter 32 and any of the following provisions of law for more than 48 months (or part-time equivalent):

(i) 38 U.S.C. Chapter 30;

(ii) 38 U.S.C. Chapter 35;

(iii) 10 U.S.C. Chapter 107;

(iv) 10 U.S.C. Chapter 1606;

(v) Section 903 of the Department of Defense Authorization Act, 1981 (10 U.S.C. 2141, note);

(vi) The Hostage Relief Act of 1980 (5 U.S.C. 5561 note); or

(vii) The Omnibus Diplomatic Security and Antiterrorism Act of 1986.

(2) No one may receive assistance under 38 U.S.C. Chapter 31 in combination with assistance under 38 U.S.C. Chapter 32 in excess of 48 months (or the part-time equivalent) unless VA determines that additional months of benefits under 38 U.S.C. Chapter 31 are

necessary to accomplish the purposes of a rehabilitation program.

(Authority: 38 U.S.C. 3231, 3695)

[51 FR 12852, Apr. 16, 1986; 51 FR 16517, May 5, 1986, as amended at 53 FR 34495, Sept. 7, 1988; 57 FR 38614, Aug. 26, 1992; 61 FR 29029, June 7, 1996]

### §21.5023 Nonduplication; Federal programs.

An individual may not receive educational assistance allowance under 38 U.S.C. Chapter 32, if the individual is:

(a) On active duty and is pursuing a course of education which is being paid for, in whole or in part, by the Armed Forces (or by the Department of Health and Human Services in the case of the Public Health Service), or

(Authority: 38 U.S.C. 3241, 3681)

(b) Attending a course of education or training paid for, in whole or in part, under the Government Employees' Training Act.

(Authority: 38 U.S.C. 3241, 3681)

[45 FR 31, Jan. 2, 1980, as amended at 47 FR 51744, Nov. 17, 1982; 61 FR 7217, Feb. 27, 1996]

## CLAIMS AND APPLICATIONS

### §21.5030 Applications, claims, and time limits.

(a) To become a participant an individual must apply to his or her Service Department on forms prescribed by the Service Department and/or the Secretary of Defense.

(b) Rules and regulations of the applicable Service Department and/or the Department of Defense shall determine if the application is timely.

(c) The provisions of the following sections shall apply to claims for educational assistance under 38 U.S.C. chapter 32:

(1) Section 21.1029—Definitions.

(2) Section 21.1030—Claims.

(3) Section 21.1031—VA responsibilities when a claim is filed.

(4) Section 21.1032—Time Limits

(Authority: 38 U.S.C. 3232, 3241, 3471; Pub. L. 94–502, Pub. L. 99–576)

[45 FR 31, Jan. 2, 1980, as amended at 48 FR 3368, Jan. 25, 1983; 53 FR 34495, Sept. 7, 1988; 64 FR 23772, May 4, 1999]

## ELIGIBILITY

### §21.5040 Basic eligibility.

(a) *Individuals not on active duty.* Whether an individual has basic eligibility under 38 U.S.C. Chapter 32 for educational assistance depends upon when he or she entered the military service, the length of that service, and the character of that service.

(Authority: 38 U.S.C. 3202).

(b) *Service requirements for all individuals not on active duty.* (1) An individual not on active duty:

(i) Must have entered the military service after December 31, 1976, and before July 1, 1985;

(Authority: 38 U.S.C. 3202, Pub. L. 99–576)

(ii) Must not have and except as provided in paragraph (g) of this section must not have had basic eligibility under 38 U.S.C. Chapter 34;

(iii) Must have received an unconditional discharge or release under conditions other than dishonorable from any period of service upon which eligibility is based;

(iv) Must either have:

(A) Served on active duty for a least 181 continuous days, or

(B) Been discharged or released from active duty for a service-connected disability.

(2) The Department of Veterans Affairs will consider that the veteran has an unconditional discharge or release if:

(i) The individual was eligible for complete separation from active duty on the date a discharge or release was issued to him or her, or

(ii) The provisions of §3.13(c) of this chapter are met.

(3) The provisions of §3.12 of this chapter as to character of discharge and §3.13 of this chapter as to conditional discharges are applicable.

(Authority: 38 U.S.C. 3202)

(c) *Additional active duty service requirements for some individuals not on active duty—Chapter 32.* (1) Unless exempted by paragraph (d) of this section, persons who originally enlist in a regular component of the Armed Forces after September 7, 1980, or who

enter on active duty after October 16, 1981 (either as an enlisted member or an officer) to be eligible under 38 U.S.C. Chapter 32, must first complete the shorter of:

(i) 24 continuous months of active duty, or

(ii) The full period for which the individual was called or ordered to active duty.

(2) For the purpose of paragraph (c)(1) of this section the Department of Veterans Affairs considers that an enlisted person originally enlisted in a regular component of the Armed Forces on the date he or she entered on active duty even through he or she may have signed a delayed-entry contract on an earlier date.

(3) In computing time served for the purpose of this paragraph, the Department of Veterans Affairs will exclude any period during which the individual is not entitled to credit for service as specified in § 3.15 of this chapter. However, those periods will be included in determining if the service was continuous.

(d) *Individuals exempt from additional active duty requirements.* (1) An individual who originally enlists in a regular component of the Armed Forces after September 7, 1980, or who enters on active duty after October 16, 1981 (either as an enlisted member or officer), will be eligible to receive benefits under 38 U.S.C. Chapter 32 based upon the ensuing period of active duty, and is exempt from the provisions of paragraph (c) of this section if he or she subsequently:

(i) Is discharged or released from active duty:

(A) Under 10 U.S.C. 1173 (hardship discharge), or

(B) Under 10 U.S.C. 1171 (early-out discharge), or

(C) For a disability incurred in or aggravated in line of duty; or

(ii) Is found by Department of Veterans Affairs to have a service-connected disability which gives the individual basic entitlement to disability compensation as described in § 3.4(b) of this chapter. Once the Department of Veterans Affairs makes this finding, the exemption will continue to apply even if the disability subsequently improves and becomes noncompensable.

(2) An individual who enters on a period of active duty after October 16, 1981, is also exempt from the provisions of paragraph (c) of this section if he or she:

(i) Previously completed a continuous period of active duty of at least 24 months, or

(ii) Was discharged or released from a previous period of active duty under 10 U.S.C. 1171 (early-out discharge).

(3) In computing time served for the purpose of this paragraph, the Department of Veterans Affairs will exclude any period during which the individual is not entitled to credit for service as specified in § 3.15 of this chapter. However, those periods will be included in determining if the service was continuous.

(e) *Savings provision.* An individual may become a participant and establish basic eligibility under the provisions of this section based upon a period of active duty service which began before October 16, 1981. He or she would not lose the basic eligibility based upon that period of service if, following a release from active duty, the individual reenters on active duty after October 16, 1981, and fails to meet the requirements of paragraph (c) of this section or qualify for an exemption under paragraph (d) of this section. He or she will receive a refund of any contributions he or she may make to the fund during the second period of active duty. See § 21.5065.

(Authority: 38 U.S.C. 3202, 5303A)

(f) *Individuals on active duty.* To establish basic eligibility under 38 U.S.C. Chapter 32 for educational assistance an individual on active duty:

(1) Must have entered into military service after December 31, 1976, and before July 1, 1985.

(Authority: 38 U.S.C. 3202, Pub. L. 96–466, Pub. L. 99–576)

(2) Must have served on active duty for a period of 181 or more continuous days after December 31, 1976, and

(3) If not enrolled in a course, courses or a program of education leading to a secondary school diploma or equivalency certificate, must have completed

the lesser of the following two periods of active duty:

(Authority: 38 U.S.C. 3231(b))

(i) The individual's first obligated period of active duty which began after December 31, 1976, or

(ii) The individual's period of active duty which began after December 31, 1976, and which is 6 years in length,

(4) If enrolled in a course, courses or a program of education leading to a seondary school diploma or equivalency certificate, the individual:

(i) Must be an enlisted member of the Armed Forces,

(ii) Must be a participant

(iii) Must be training during the last 6 months of his or her first period of active duty, or any time thereafter, and

(5) If he or she originally enlisted after September 7, 1980, must have completed at least 24 months of his or her original enlistment

(Authority: 38 U.S.C. 3231(b), 10 U.S.C. 977)

(g) *Election to receive educational assistance allowance under 38 U.S.C. chapter 32 instead of 10 U.S.C. chapter 1606.* An individual who serves in the Selected Reserves may not receive credit for that service under both 38 U.S.C. Chapter 32 and 10 U.S.C. Chapter 1606. If he or she wishes to receive educational assistance based upon this service, the veteran must elect the chapter under which he or she will receive benefits.

(1) This election must be in writing and submitted to VA.

(2) If a veteran elects to receive educational assistance under 38 U.S.C. Chapter 32, and negotiates an educational assistance check which is based upon the period of service for which the election was made, the election is irrevocable. Negotiation of an educational assistance check provided under either 38 U.S.C. chapter 32 or 10 U.S.C. chapter 1606, but based upon a period of service which preceded the period for which an election was made, will not serve to make the election irrevocable.

(Authority: 38 U.S.C. 3221(f); Pub. L. 101–237)

[48 FR 36577, Aug. 12, 1983, as amended at 51 FR 12852, Apr. 16, 1986; 53 FR 34496, Sept. 7, 1988; 57 FR 38614, Aug. 26, 1992; 61 FR 20728, May 8, 1996; 61 FR 29029, June 7, 1996]

### §21.5041 Periods of entitlement.

(a) *Ten-year delimiting period.* Except as provided in §21.5042 no educational assistance shall be afforded an eligible individual under chapter 32 beyond the date of 10 years after the later of the following:

(1) His or her last discharge or release from a period of active duty of 90 days or more of continuous service; or

(2) His or her last discharge or release from a period of active duty of any length when the eligible individual is discharged or released—

(i) For a service-connected disability;

(ii) For a medical condition which preexisted such service and which VA determines is not service-connected;

(iii) For hardship; or

(iv) Involuntarily for convenience of the government after October 1, 1987, as a result of a reduction in force, as determined by the Secretary of the military department concerned in accordance with regulations prescribed by the Secretary of Defense or by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy.

(Authority: 38 U.S.C. 3231; Pub. L. 94–502, Pub. L. 99–576, Pub. L. 101–237)

(b) *Use of entitlement.* The individual—

(1) May use his or her entitlement at anytime during the 10-year period after the last discharge or release from active duty or other period as provided pursuant to §21.5042 of this part;

(2) Is not required to use his or her entitlement in consecutive months.

(Authority: 38 U.S.C. 3232, Pub. L. 94–502, Pub. L. 99–576)

[53 FR 34496, Sept. 7, 1988, as amended at 57 FR 38614, Aug. 26, 1992]

**§ 21.5042 Extended period of eligibility.**

(a) *General.* A veteran shall be granted an extension of the applicable delimiting period, as otherwise determined by § 21.5041 of this part provided—

(1) The veteran applies for an extension.

(2) The veteran was prevented from initiating or completing the chosen program of education within the otherwise applicable delimiting period because of a physical or mental disability that did not result from the willful misconduct of the veteran. VA will not consider the disabling effects of chronic alcoholism to be the result of willful misconduct. See § 21.5021(v).

(Authority: 38 U.S.C. 105, 3232, 3462; Pub. L. 99–576, Pub. L. 100–689)

(b) *Application.* The veteran must apply for the extended period of eligibility in time for VA to receive the application by the later of the following dates:

(1) One year from the last date of the delimiting period otherwise applicable to the veteran under § 21.5401 of this part, or

(2) One year from the termination date of the period of the veteran's mental or physical disability.

(Authority: 38 U.S.C. 3232, Pub. L. 99–576)

(c) *Qualifying period of disability.* (1) A veteran's extended period of eligibility shall be based on the period of time that the veteran himself or herself was prevented by reason of physical or mental disability, not the result of the veteran's willful misconduct, from initiating or completing his or her chosen program of education.

(2) VA will not consider the disabling effects of chronic alcoholism to be the result of willful misconduct provided the last date of the time limit for filing a claim for the extension determined under § 21.5030(c)(3) of this part occurs after November 17, 1988.

(Authority: 38 U.S.C. 105; Pub. L. 100–689)

(3) Evidence must be presented which clearly establishes that the veteran's disability made pursuit of his or her program medically infeasible during the veteran's original period of eligibility as determined by § 21.5041 of this part. A period of disability following the end of the original disability period will not be a basis for extension.

(4) VA will not consider a veteran who is disabled for a period of 30 days or less as having been prevented from enrolling or reenrolling in the chosen program of education or was forced to discontinue attendance, because of the short disability.

(Authority: 38 U.S.C. 3232, Pub. L. 99–576)

(d) *Commencing date.* The veteran shall elect the commencing date of an extended period of eligibility. The date chosen—

(1) Must be on or after the original date of expiration of eligibility as determined by § 21.5041 of this part, and

(2) Must be on or before the 90th day following the date on which the veteran's application for an extension was approved by VA, if the veteran is training during the extended period of eligibility in a course not organized on a term, quarter or semester basis, or

(3) Must be on or before the first day of the first ordinary term, quarter or semester following the 90th day after the veteran's application for an extension was approved by VA if the veteran is training during the extended period of eligibility in a course organized on a term, quarter or semester basis.

(Authority: 38 U.S.C. 3232; Pub. L. 99–576)

(4) For a veteran whose entitlement to an extended period of eligibility is dependent upon the disabling effects of chronic alcoholism, may not begin before November 18, 1988.

(Authority: 38 U.S.C. 105, 3232; Pub. 99–576, Pub. L. 100–689)

(e) *Determining the length of extended periods of eligibility.* A veteran's extended period of eligibility shall be based upon the qualifying period of disability, and determined as follows:

(1) If the veteran is in training in a course organized on a term, quarter or semester basis, his or her extended period of eligibility shall contain the same number of days as the number of days from the date during the veteran's original delimiting period that his or

her training became medically infeasible to the earliest of the following dates:

(i) The commencing date of the ordinary term, quarter or semester following the day the veteran's training became medically feasible,

(ii) The veteran's delimiting date as determined by §21.5041 of this part, or

(iii) The date the veteran resumed training.

(2) If the veteran is training in a course not organized on a term, quarter or semester basis, his or her extended period of eligibility shall contain the same number of days as the number of days from the date during the veteran's original delimiting period that his or her training became medically infeasible to the earlier of the following dates:

(i) The date the veteran's training became medically feasible, or

(ii) The veteran's delimiting date as determined by §21.5041 of this part.

(Authority: 38 U.S.C. 3232; Pub. L. 99–576)

(f) *Discontinuance.* If the veteran is pursuing a course on the date an extended period of eligibility expires (as determined under this section), VA will discontinue the educational assistance allowance effective the day before the end of the extended period of eligibility.

(Authority: 38 U.S.C. 3232; Pub. L. 99–576)

[53 FR 34496, Sept. 7, 1988, as amended at 55 FR 31582, Aug. 3, 1990]

PARTICIPATION

### §21.5050 Application requirements for participation.

(a) An individual, who is otherwise eligible to become a participant, must apply to the Service Department under which he or she serves upon forms prescribed by the Service Department and/or Secretary of Defense.

(b) No application to participate may be made before entry upon active duty.

(c) Each application must be submitted in time to permit the Service Department to make the required deduction from the individual's military pay for at least 1 month before the applicant's discharge or release from active duty.

(Authority: 38 U.S.C. 3221)

### §21.5052 Contribution requirements.

(a) *Minimum period of participation.* Each individual who agrees to participate must do so for a minimum period of 12 consecutive months, unless the participant:

(1) Is allowed to disenroll for hardship reasons;

(2) Is permitted to suspend participation for hardship reasons;

(3) Is discharged or released from active duty;

(4) Otherwise ceases to be legally eligible to participate; or

(5) Elects to make a lump-sum contribution which, when taken together with his or her other contributions, equals the equivalent of at least 12 months' participation.

(Authority: 38 U.S.C. 3221, 3222)

(b) *Amount of monthly contribution.* The individual shall specify the amount of his or her contribution to the fund.

(1) The contribution shall be at least $25 per month but not more than $100 per month.

(2) The contribution shall be evenly divided by five. See §21.5292 for contributions made furing the 1-year pilot program.

(c) *Amount of total contribution.* An individual may contribute for the number of months required to reach a total contribution of $2,700.

(d) *Changing the monthly contribution.* An individual may increase or decrease the amount of the monthly contribution, but may not do so more than once a month.

(e) *Prohibition against contributing.* An individual may not make contributions to the fund after the date of his or her discharge. The VA does not consider the return of an unnegotiated refund check to be a contribution. A person who returns a refund check remains continuously eligible for benefits.

(Authority: 38 U.S.C. 3222)

(f) *Lump-sum contribution.* After September 30, 1980 an individual may make

a lump-sum contribution or contributions in place of or in addition to monthly contributions.

(1) A lump-sum contribution:

(i) Must be evenly divisible by five,

(ii) Must, when taken together with any monthly contributions the participant may have made or may agree to make, equal or exceed 12 months' participation, and

(iii) Must not exceed $2,700 when taken together with any monthly contributions the participant may have made or may agree to make.

(2) The Department of Veterans Affairs will consider the lump-sum contributions to have been made by monthly deductions from the participant's military pay at the rate of $100 per month unless the participant specifies a different rate which must be

(i) No lower than $25 per month,

(ii) No higher than $100 per month, and

(iii) Evenly divisible by five.

(3) If otherwise eligible to make contributions, a participant:

(i) May make a lump-sum contribution to cover any period of his or her active duty. This may entail a retroactive period, including one which—

(A) Begins after December 31, 1976, and before October 1, 1980, or

(B) Although made after October 27, 1986, includes all or part of the period beginning on July 1, 1985, and ending on October 27, 1986.

(Authority: Pub. L. 99–576, sec. 309(c))

(ii) May make a lump-sum contribution which has the effect of increasing the amount of a monthly contribution the participant made previously, but the payment cannot have the effect of increasing the monthly contribution to an amount greater than $100;

(iii) May make a lump-sum payment to cover a period for which he or she previously obtained a refund;

(iv) May not make a lump-sum payment to cover a period during which the participant was not on active duty or will not be on active duty.

(4) A participant may make as many lump-sum contributions as he or she desires, but he or she may not make more than one lump-sum contribution per month.

(Authority: 38 U.S.C. 3222(d)

[45 FR 31, Jan. 2, 1980, as amended at 47 FR 51744, Nov. 17, 1982; 48 FR 50530, Nov. 2, 1983; 53 FR 617, Jan. 11, 1988; 53 FR 34496, Sept. 7, 1988]

### § 21.5053 Restoration of contributions (Persian Gulf War).

(a) *Restoration of contributions when no entitlement is charged.* If the provisions of § 21.5072(i) require that a veteran's entitlement not be charged for a payment or payments he or she received, the amount of the veteran's contributions which were included in the payment or payments will be restored to the fund by the Department of Defense.

(Authority: 38 U.S.C. 3235; Pub. L. 102–127) (Oct. 10, 1991)

(b) *Restored contributions are treated like other contributions.* VA will treat contributions which have been restored under paragraph (a) of this section as though the veterans had contributed them for all purposes including—

(1) Computing the veteran's monthly rates and benefit payments under § 21.5138, and

(2) Determining any refund which may become due the veteran under §§ 21.5064 and 21.5065.

(Authority: 38 U.S.C. 3235; Pub. L. 102–127) (Oct. 10, 1991)

[58 FR 34369, June 25, 1993]

### § 21.5054 Dates of participation.

(a) *General.* An individual may participate after December 31, 1976. An individual was not eligible for benefits before July 1, 1977, unless discharged after January 1, 1977, for a service-connected condition. The first date on which an individual on active duty enrolled in a course, courses or a program of education leading to a secondary school diploma or equivalency certificate may receive benefits is subject to the eligibility requirements of § 21.5040(f)(4) and (5).

(Authority: 38 U.S.C. 3231 (a) and (b))

(b) *Termination of right to begin participation.* (1) Except as provided in

paragraph (b)(3) of this section, no individual on active duty in the Armed Forces may initially enroll after June 30, 1985.

(2) An initial enrollment occurs when a serviceperson who has never contributed to the fund—

(i) First makes a lump-sum payment to the fund, or

(ii) First authorizes an allotment to VA for deposit in the fund. See 32 CFR 59.3(b)(10).

(3) Notwithstanding the provisions of paragraph (b)(1) of this section, any individual on active duty in the Armed Forces who was eligible to enroll on June 30, 1985, may enroll at any time during the period beginning on October 28, 1986, and ending on March 31, 1987.

(Authority: 38 U.S.C. 3221(a), Pub. L. 99–576, sec. 309(c); Pub. L. 99–576)

[51 FR 2695, Jan. 21, 1986; 51 FR 12321, Apr. 10, 1986, as amended at 53 FR 34496, Sept. 7, 1988]

### §21.5058 Resumption of participation.

(a) *General.* An eligible individual, who remains otherwise eligible, may resume active contribution to the fund, if he or she has:

(1) Voluntarily elected to suspend following completion of minimum participation;

(2) Suspended at any time for reasons of hardship; or

(3) Received a discharge or release from active duty after participation and reenlisted.

(Authority: 38 U.S.C. 3221)

(b) *Disenrollment in order to participate in other educational programs.* A person who elects to disenroll in order to receive educational assistance allowance under 38 U.S.C. chapter 34 or to receive an officer adjustment benefit payable under sec. 207, Pub. L. 101–366, 104 Stat. 442, may not reenroll if he or she has negotiated a check under the provisions of law governing the program elected in lieu of the Post-Vietnam Era Veterans' Educational Assistance Program. A person who elects to disenroll in order to receive educational assistance under the Montgomery GI Bill—Active Duty, as provided in §21.7045, may not reenroll.

(Authority: 38 U.S.C. 3018A, 3018B, 3018C, 3202(l), 3222)

(c) *Reenrollment permitted following some disenrollments.* (1) Except as provided in paragraph (b) of this section, a person who has disenrolled may reenroll, but will have to qualify again for minimum participation as described in §21.5052(a).

(2) If a person does reenroll, he or she may ''repurchase'' entitlement by tendering previously refunded contributions which he or she received upon disenrollment, subject to the conditions of §21.5052(f).

(Authority: 38 U.S.C. 3221, 3222)

[45 FR 31, Jan. 2, 1980, as amended at 46 FR 29474, June 2, 1981; 47 FR 51745, Nov. 17, 1982; 51 FR 12853, Apr. 16, 1986; 58 FR 38058, July 15, 1993; 58 FR 40468, July 28, 1993; 61 FR 7217, 7218, Feb. 27, 1996; 61 FR 29029, June 7, 1996]

### §21.5060 Disenrollment.

(a) *Voluntary disenrollment.* (1) An individual may disenroll at anytime after the initial 12 months of participation.

(2) At any time within the initial 12 months of participation, an individual may elect to disenroll for reasons of personal hardship only.

(Authority: 38 U.S.C. 3221(a), (b))

(b) *Nonvoluntary disenrollment.* The Department of Veterans Affairs shall disenroll automatically an individual who meets any of the following sets of conditions:

(1) The individual is discharged or released from his or her initial obligated period of active service and:

(i) The discharge or release is under dishonorable conditions, or

(ii) A statutory bar to benefits administered by the Department of Veterans Affairs exists for the individual;

(2) The individual participated only after completion of the initial or subsequent period of active service; is discharged or released and:

(i) The discharge or release is under dishonorable conditions, or

(ii) A statutory bar to benefits exists for the individual; or

(3) The individual has not utilized all of his or her entitlement to benefits within the 10-year period stated in § 21.5041, and at the end of one year thereafter has not filed a claim for educational assistance allowance as provided in § 21.5030(c).

(Authority: 38 U.S.C. 101, 3225, 3232)

CROSS REFERENCE: *Refunds without disenrollment.* See § 21.5065.

[45 FR 31, Jan. 2, 1980, as amended at 46 FR 59247, Dec. 4, 1981; 51 FR 12853, Apr. 16, 1986; 58 FR 31910, June 7, 1993; 61 FR 29030, June 7, 1996]

### § 21.5062 Date of disenrollment.

An individual will be disenrolled effective:

(a) The date the Department of Veterans Affairs or the Service Department determines he or she has ceased to be legally entitled to participate; or

(b) The date the individual negotiates the check which represents a refund of his or her remaining contributions to the fund, whichever is earlier.

(Authority: 38 U.S.C. 3221(d))

### § 21.5064 Refund upon disenrollment.

(a) *General.* A disenrolled individual will be refunded all contributions made by him or her to the fund. He or she will be ineligible to receive benefits under §§ 21.5130 and 21.5138, unless the individual reenrolls as a participant and agrees to participate in a new period of 12 consecutive months as provided in § 21.5058. The amount of the contributions refunded upon disenrollment shall be limited to the amount of his or her contributions not utilized to receive benefits as of the date of disenrollment, less any outstanding debts resulting from overpayments of educational assistance allowance.

(Authority: 38 U.S.C. 3223)

(b) *Effective date of refund.* The date upon which the refund of contributions, if any, will be made shall be determined as follows:

(1) If an individual voluntarily disenrolls from the program before discharge or release from active duty, VA will refund the individual's unused contributions:

(i) On the date of the participant's discharge or release from active duty; or

(ii) Within 60 days of VA's receipt of notice of the individual's discharge or disenrollment; or

(iii) As soon as possible after VA's receipt of notice indicating that an earlier refund is needed due to hardship or for other good reasons.

(Authority: 38 U.S.C. 3223(b), 3232)

(2) If an individual voluntarily disenrolls from the program after discharge or release from active duty under other than dishonorable conditions, his or her contributions shall be refunded within 60 days of receipt by VA of an application for a refund from the individual.

(Authority: 38 U.S.C. 3202(1)(A), 3223(c), 3232(b))

(3) If an individual is disenrolled because he or she is discharged or released from active duty under dishonorable conditions, the individual's contributions remaining in the fund shall be refunded:

(i) On the date of the individual's discharge or release from active duty; or

(ii) Within 60 days of receipt of notice by the Department of Veterans Affairs of the individual's discharge or release, whichever is the later.

(4) If an individual is disenrolled because he or she has not utilized all of his or her entitlement to benefits within the 10-year delimiting period, the individual's contributions remaining in the fund shall be refunded.

(i) The Department of Veterans Affairs shall notify the individual that the delimiting period has expired and shall state the amount of unused contributions.

(ii) The Department of Veterans Affairs shall make the refund only if the individual requests it.

(iii) If VA does not receive a request within 1 year from the date that the individual is notified of his or her entitlement to a refund, VA will presume that the individual's whereabouts is unknown. The funds on deposit for that

individual will be transferred in accordance with the provisions of section 1322(a), Title 31, United States Code.

(Authority: 38 U.S.C. 101, 3223, 3232; Pub. L. 94–502, Pub. L. 99–576)

[45 FR 31, Jan. 2, 1980, as amended at 51 FR 46655, Dec. 24, 1986; 53 FR 617, Jan. 11, 1988; 53 FR 34497, Sept. 7, 1988; 58 FR 38058, July 15, 1993; 61 FR 29030, June 7, 1996]

**§21.5065 Refunds without disenrollment.**

(a) *Refunds made without disenrollment following a discharge or release under dishonorable conditions*—(1) *A discharge or release under dishonorable conditions may result in a partial refund of contributions.* If an individual who would have been eligible, but for the fact of his or her reenlistment, for the award of a discharge or release under conditions other than dishonorable at the time he or she completed an obligated period of service, later receives a discharge or release under dishonorable conditions, the Department of Veterans Affairs may refund a portion of his or her contribution.

(Authority: 38 U.S.C. 101, 3223)

(2) *Amount of refund.* The Department of Veterans Affairs shall refund to the individual all of his or her remaining contributions made to the fund after the individual completed the obligated period of service.

(Authority: 38 U.S.C. 101, 3223)

(3) *Date of refund.* The Department of Veterans Affairs shall refund all monies due the individual:

(i) On the date of the individual's discharge or release from active duty; or

(ii) Within 60 days of receipt by the Department of Veterans Affairs of notice of the individual's discharge or release, whichever is later.

(Authority: 38 U.S.C. 101, 3223, 3232)

(b) *Refunds made without disenrollment following a short period of active duty.* (1) An individual who has contributed to the fund during more than one period of active duty may be required to receive a refund of those contributions made during the most recent period of active duty. When an individual who meets all the criteria in paragraph (b)(2) of this section is discharged, the Department of Veterans Affairs will refund all contributions he or she made during the most recent period of active duty unless the individual meets one or more of the criteria stated in either paragraph (b)(4) or (5) of this section. If he or she meets one of those criteria, the contributions will not be refunded unless the individual voluntarily disenrolls.

(2) Unless a compulsory refund is prohibited by paragraph (b)(4) or (5) of this section, the Department of Veterans Affairs will refund all contributions made by an individual during the most recent period of active duty when the individual:

(i) Completed at least one period of active duty before the most recent one during which he or she established entitlement to Post-Vietnam Era Veterans' Educational Assistance;

(ii) Reentered on his or her most recent period of active duty after October 16, 1981;

(iii) Contributed to the fund during his or her most recent period of active duty; and

(iv) Is discharged.

(3) The circumstances which prohibit an automatic refund of monies contributed during the individual's most recent period of active duty do not relate only to the most recent period of active duty which began after October 16, 1981, but also the individual's prior periods of active duty regardless of whether they began before, after or on October 16, 1981.

(4) Meeting one or more of the following criteria concerning periods of active duty before the most recent one will be sufficient to prohibit a compulsory refund of contributions made during the most recent period of active duty. The individual:

(i) Before the most recent period of active duty began, completed at least one continuous period of active duty of at least 24 months, or

(ii) Was discharged or released under 10 U.S.C. 1171 (early-out discharge) from any period of active duty before the most recent one.

(5) Meeting one or more of the following criteria concerning the most recent period of active duty will be sufficient to prohibit a compulsory refund of contributions made during the most recent period of active duty. The individual:

(i) For the most recent period of active duty completes 24 months of continuous active duty, or the full period for which the individual was called or ordered to active duty, whichever is shorter; or

(ii) Is discharged or released from the most recent period of active duty under 10 U.S.C. 1171 (early-out discharge) or 1173 (hardship discharge); or

(iii) Is discharged or released from the most recent period of active duty for a disability incurred or aggravated in line of duty; or

(iv) Has a service-connected disability which give him or her basic entitlement to disability compensation as described in § 3.4(b) of this chapter.

(6) In computing time served for the purpose of this paragraph, the individual is not entitled for credit for service as specified in § 3.15 of this chapter. However, those periods will be included in determining if the service was continuous.

(7) The Department of Veterans Affairs shall refund all monies due the individual:

(i) On the date of the individual's discharge or release from active duty; or

(ii) Within 60 days of receipt of notice by the Department of Veterans Affairs of the individual's discharge or release, whichever is later.

(Authority: 38 U.S.C. 3202, 3223, 3232, 5303A)

(c) *Refunds following an election under § 21.5040(b).* If a veteran described in § 21.5040(h) makes an election to have a period of service credited toward his or her eligibility and entitlement under 10 U.S.C. Chapter 1606, he or she will be required to receive a refund of any contributions he or she made to the fund during that period of service.

(Authority: 38 U.S.C. 3221(f); Pub. L. 101–237)

[48 FR 36578, Aug. 12, 1983, as amended at 57 FR 38614, Aug. 26, 1992; 61 FR 20728, May 8, 1996]

**§ 21.5066 Suspension of participation.**

An individual may suspend participation in the program without disenrolling. If the individual suspends participation, he or she may resume participation at any time thereafter while on active duty.

(a) An individual may suspend participation any time after 12 months of participation.

(b) An individual who has participated for less than 12 consecutive months may not suspend unless the Secretary of Defense determines that the reason for the suspension is due to a personal hardship.

(Authority: 38 U.S.C. 3221)

**§ 21.5067 Death of participant.**

(a) *Disposition of unused contributions.* If an individual dies, the Department of Veterans Affairs shall pay the amount of his or her unused contributions to the fund to the living person or persons in the order listed in this paragraph.

(1) The beneficiary or beneficiaries designated by the individual under the individual's Servicemen's Group Life Insurance policy;

(2) The surviving spouse of the individual;

(3) The surviving child or children of the individual, in equal shares;

(4) The surviving parent or parents of the individual in equal shares.

(b) *Payments to the individual's estate.* If none of the persons listed in paragraph (a) of this section is living, the Department of Veterans Affairs shall pay the amount of the individual's unused contributions to the fund to the individual's estate.

(Authority: 38 U.S.C. 3224)

(c) *Payments of accrued benefits.* Educational assistance remaining due and unpaid at the date of the veteran's death is payable under the provisions of § 3.1000 of this chapter. For this purpose accrued benefits include the portion of the benefit represented by the individual's contribution as well as the portion included by the Department of Veterans Affairs and the Department of Defense.

(Authority: 38 U.S.C. 5121)

[47 FR 51745, Nov. 17, 1982]

ENTITLEMENT

### § 21.5070 Entitlement.

A participant is entitled to a monthly benefit for periods of time during which the individual is enrolled in, and satisfactorily pursuing, an approved program of education. The amount of the benefit will vary from individual to individual and, in some instances, from month to month as provided in § 21.5138.

(Authority: 38 U.S.C. 3231)

### § 21.5071 Months of entitlement allowed.

(a) *Entitlement based on monthly contributions.* The Department of Veterans Affairs will credit an individual with 1 month of entitlement for each month he or she contributes to the fund up to a maximum of 36 months or its equivalent in part-time training.

(Authority: 38 U.S.C. 3231)

(b) *Entitlement based on lump-sum contributions.* If an individual elects to make a lump-sum contribution, the Department of Veterans Affairs will credit an individual with 1 month of entitlement for:

(1) Every $100 included in the lump sum, or

(2) Every amount included in the lump sum which:

(i) Is at least $25 but no more than $100,

(ii) Is evenly divisible by five, and

(iii) Is specifically designated by the individual at the time he or she makes the contribution.

(Authority: 38 U.S.C. 3222(d))

(c) *Entitlement based on both monthly and lump-sum contributions.* (1) If the individual makes both monthly and lump-sum contributions, the Department of Veterans Affairs will:

(i) Compute the entitlement due to each type of contribution separately under paragraphs (a) and (b) of this section, and

(ii) Will combine the results of the computations to determine the individual's total entitlement.

(2) In no event will an individual's entitlement exceed 36 months or its equivalent in part-time training.

(Authority: 38 U.S.C. 3222(d), 3231)

[47 FR 51745, Nov. 17, 1982, as amended at 48 FR 50530, Nov. 2, 1983]

### § 21.5072 Entitlement charge.

The Department of Veterans Affairs shall determine the entitlement charge for each payment in the same manner for all individuals regardless of whether they are on active duty. Unless the circumstances described in paragraph (i) of this section apply to a servicemember or veteran, VA will use paragraphs (a) through (h) of this section to determine an entitlement charge.

(a) *General.* (1) Except as provided in paragraphs (b) through (i) of this section, VA will make a charge against entitlement as follows:

(i) The Department of Veterans Affairs will charge an individual who is a full-time student 1 month's entitlement for each monthly benefit paid to him or her.

(ii) The Department of Veterans Affairs will charge an individual who is other than a full-time student 1 month's entitlement for each sum of money paid equivalent to what the individual would have been paid had he or she been a full-time student for 1 month.

(2) When the computation results in a period of time other than a full month, the entitlement charge will be prorated.

(Authority: 38 U.S.C. 3231)

(b) *Secondary school program.* (1) The Department of Veterans Affairs will make no charge against the entitlement of an individual:

(i) Who is pursuing a course, courses or a program of education leading to a secondary school diploma or an equivalency certificate, and

(ii) Whose educational assistance allowance is the monthly rate of the tuition and fees being charged to him or her for the course.

(2) The Department of Veterans Affairs will make a charge (in the same manner as for any other residence

training) against the entitlement of an individual who:

(i) Is pursuing a course, courses or a program of education leading to a secondary school diploma or an equivalency certificate, and

(ii) Elects to receive educational assistance allowance calculated according to § 21.5136.

(Authority: 38 U.S.C. 3241, 3491)

(c) *Correspondence training courses.* (1) A charge against the period of entitlement for a program consisting exclusively of correspondence training will be made on the basis of 1 month for each sum of money paid equivalent to the dollar value of a month of entitlement as determined under § 21.5138(a)(2)(viii), which is paid to the individual as an educational assistance allowance for this training. When computation results in a period of time other than a full month, the charge will be prorated.

(2) If the individual is contributing to the fund at the same time that benefits are being used or subsequently contributes a sum or sums, the entitlement charges will not be recomputed. Thus, if the monthly rate arrived at by applying the formula is determined to be $150 at the time a benefit program for correspondence training is computed, the individual will be charged 1 month of entitlement for each $150 paid. If a different monthly rate is computed at the time of a subsequent payment for such training, no adjustment will be made in the entitlement charged for the previous payment(s) even though the value of each month's entitlement may vary from payment to payment.

(Authority: 38 U.S.C. 3231(c))

(d) *Apprenticeship or other on-job training.* (1) The VA will determine the entitlement charge for a veteran in apprenticeship or other on-job training as stated in this paragraph.

(2) The entitlement charge will be—

(i) 75 percent of a month for those months for which the veteran's monthly payment is based upon 75 percent of the monthly benefit otherwise payable to him or her;

(ii) 55 percent of a month for those months for which the veteran's monthly payment is based upon 55 percent of the monthly benefit otherwise payable to him or her; and

(iii) 35 percent of a month for those months for which the veteran's monthly payment is based upon 35 percent of the monthly benefit otherwise payable to him or her.

(3) The charge against the veteran's entitlement will be prorated if

(i) The veteran enrollment period ends in the middle of a month,

(ii) The veteran's monthly rate is reduced in the middle of a month, or

(iii) The veteran's monthly payment is reduced because he or she worked less than 120 hours during the month. In this instance the number of hours worked will be rounded to the nearest multiple of eight, and the entitlement charge will be reduced proportionately.

(Authority: 38 U.S.C. 3233(c); Pub. L. 99–576)

(e) *Cooperative training.* VA will make a charge against entitlement of 80 percent of a month for each month for which a veteran is paid educational assistance allowance at the cooperative training rate as provided in § 21.5138(a). If the veteran is paid for a partial month of training, the entitlement charge will be prorated.

(Authority: 38 U.S.C. 3231(d); Pub. L. 100–689)

(f) *Training while the veteran is incarcerated.* If the veteran must be paid educational assistance allowance at a reduced rate because he or she is incarcerated as provided in § 21.5139 of this part, VA will make a charge against entitlement of one month for each amount of educational assistance allowance paid to the veteran which is the equivalent of one month's benefits as provided in § 21.5138 of this part for the appropriate type of training pursued.

(Authority: 38 U.S.C. 3231(e); Pub. L. 100–689)

(g) *Tutorial assistance.* If an individual is paid tutorial assistance as provided in § 21.5141 of this part, the following provisions will apply.

(1) There will be no charge to entitlement for the first $600 of tutorial assistance paid to an individual.

(2) VA will make a charge against the period of entitlement for each amount

of tutorial assistance paid to the individual in excess of $600 that is equal to the amount of monthly educational assistance the individual is otherwise eligible to receive for full-time pursuit of a residence course as provided in §21.5138(c) of this part. When the amount of tutorial assistance paid to the individual in excess of $600 is less than the amount of monthly educational assistance the individual is otherwise eligible to receive, the entitlement charge will be prorated.

(Authority: 38 U.S.C. 3234; Pub. L. 100–689)

(h) *Flight training courses.* (1) A charge against the period of entitlement for pursuit of a flight training course will be one month for each sum of money paid equivalent to the dollar value of a month of entitlement as determined under §21.5138(a)(5)(viii). When this computation results in a period of time other than a full month, the charge will be prorated.

(2) If the individual is contributing to the fund at the same time that benefits are being used or subsequently contributes a sum or sums, the entitlement charges will not be recomputed. Thus, if the monthly rate arrived at under §21.5138(a)(5)(viii) is $150 at the time educational assistance allowance is paid for a period of flight training, the individual will be charged one month of entitlement for each $150 paid. If a different monthly rate is computed at the time of a subsequent payment for such training, no adjustment will be made in the entitlement charged for the previous payment(s) even though the value of each month's entitlement may vary from payment to payment.

(Authority: 38 U.S.C. 3231(f); Pub. L. 102–16)(Apr. 1, 1991)

(i) *Entitlement charge may be omitted for course discontinuance (Persian Gulf War).* VA will make no charge against the entitlement of a servicemember or veteran for a payment of educational assistance allowance when—

(1) A veteran not serving on active duty had to discontinue course pursuit as a result of being ordered, in connection with the Persian Gulf War, to serve on active duty under section 672 (a), (d), or (g), 673, 673b, or 688 of title 10; or

(2) A servicemember serving on active duty had to discontinue course pursuit as a result of being ordered, in connection with the Persian Gulf War, to a new duty location or assignment or to perform an increased amount of work; and

(3) The veteran or servicemember failed to receive credit or lost training time toward completion of his or her educational, professional or vocational objective as a result of having to discontinue course pursuit, as described in paragraphs (i)(1) or (i)(2) of this section.

(Authority: 38 U.S.C. 3235; Pub. L. 102–127) (Oct. 10, 1991)

[45 FR 31, Jan. 2, 1980, as amended at 47 FR 51745, Nov. 17, 1982; 48 FR 50530, Nov. 2, 1983; 52 FR 3429, Feb. 4, 1987; 53 FR 34497, Sept. 7, 1988; 55 FR 31582, Aug. 3, 1990; 58 FR 31910, June 7, 1993; 58 FR 34369, June 25, 1993; 58 FR 34526, June 28, 1993]

### §21.5076 Entitlement charge—overpayment cases.

(a) *Overpayment cases.* VA will make a charge against an individual's entitlement of an overpayment of educational assistance allowance only if:

(1) The overpayment is discharged in bankruptcy; or

(2) VA waives the overpayment and does not recover it; or

(3) The overpayment is compromised.

(Authority: 38 U.S.C. 3231)

(b) *Debt discharged in bankruptcy or is waived.* If the overpayment is discharged in bankruptcy or is waived and is not recovered, the entitlement charge will be at the appropriate rate for the elapsed period covered by the overpayment (exclusive of interest, administrative costs of collection, court costs and marshal fees).

(Authority: 38 U.S.C. 3231; Pub. L. 94–502)

(c) *Overpayment is compromised.* (1) If the overpayment is compromised and the compromise offer is less than the amount of interest, administrative costs of collection, court costs and marshal fees, the charge against entitlement will be at the appropriate rate for the elapsed period covered by the

overpayment (exclusive of interest, administrative costs of collection, court costs and marshal fees).

(2) If the overpayment is compromised and compromise offer is equal to or greater than the amount of interest, administrative costs of collection, court costs and marshal fees, the charge against entitlement will be determined by—

(i) Subtracting from the sum paid in the compromise offer the amount attributable to interest, administrative costs of collection, court costs and marshal fees.

(ii) Subtracting the remaining amount of the overpayment balance determined in paragraph (c)(2)(i) of this section from the amount of the original overpayment (exclusive of interest, administrative costs of collection, court costs and marshal fees),

(iii) Dividing the result obtained in paragraph (c)(2)(ii) of this section by the amount of the original debt (exclusive of interest, administrative costs of collection, court costs and marshal fees), and

(iv) Multiplying the percentage obtained in paragraph (c)(2)(iii) of this section by the amount of the entitlement otherwise chargeable for the period of the original overpayment.

(Authority: 38 U.S.C. 3231)

[45 FR 31, Jan. 2, 1980, as amended at 52 FR 45181, Nov. 25, 1987]

### § 21.5078 Interruption to conserve entitlement.

(a) *Interruption to conserve entitlement generally prohibited.* No one may interrupt a certified period of enrollment for the purpose of conserving entitlement. A school may not certify a period of enrollment for a fractional part of the normal term, quarter or semester if the individual actually is enrolled and is pursuing his or her program of education for the entire term, quarter or semester.

(b) *Exceptions.* The Department of Veterans Affairs will charge entitlement for the entire period of enrollment certified if the individual otherwise is eligible for benefits, except when benefits are interrupted under any of the following conditions:

(1) Enrollment actually is terminated.

(2) Enrollment is canceled and the individual has not negotiated an educational benefits check for any part of the certified period of enrollment.

(3) The individual:

(i) Interrupts his or her enrollment at the scheduled end of any term, quarter, semester or school year within the certified period of enrollment; and

(ii) Has not negotiated any check for educational benefits for the succeeding term, quarter, semester or school year.

(4) The individual requests interruption or cancellation for any break when a school was closed during a certified period of enrollment and payments were continued under an established policy based upon an Executive order of the President or due to an emergency situation. This exception applies whether or not the individual has negotiated a check for educational benefits for the certified period.

(Authority: 38 U.S.C. 3241, 3680)

## COUNSELING

### § 21.5100 Counseling.

(a) *Purpose.* The purpose of counseling is:

(1) To assist in selecting an objective:

(2) To develop a suitable program of education or training; and

(3) To resolve any personal problems which are likely to interfere with the successful pursuit of a program.

(b) *Availability of counseling.* Counseling assistance in available for—

(1) Identifying and removing reasons for academic difficulties which may result in interruption or discontinuance of training, or

(2) In considering changes in career plans, and making sound decisions about the changes.

(Authority: 38 U.S.C. 3697A(a))

(c) *Optional counseling.* VA shall provide counseling as needed for the purposes identified in paragraphs (a) and (b) of this section upon request of the individual. VA shall take appropriate steps (including individual notification

where feasible) to acquaint all participants with the availability and advantages of counseling services.

(Authority: 38 U.S.C. 3241, 3697A(a) and (b))

(d) *Required counseling.* (1) In any case in which VA has rated the veteran as being incompetent, VA must provide counseling as described in 38 U.S.C. 3697A prior to selection of a program of education or training.The counseling will follow the veteran's initial application for benefits or any communication from the veteran or guardian indicating that the veteran wishes to change his or her program. This requirement that counseling be provided is met when—

(i) The veteran has had one or more personal interviews with the counselor;

(ii) The counselor has jointly developed with the veteran recommendations for selecting a program;

(iii) These recommendations have been reviewed with the veteran.

(2) The veteran may follow the recommendations developed in the course of counseling, but is not required to do so.

(3) VA will take no further action on a veteran's application for assistance under 38 U.S.C. chapter 32 unless he or she—

(i) Reports for counseling;

(ii) Cooperates in the counseling process; and

(iii) Completes counseling to the extent required under paragraph (d)(1) of this section.

(Authority: 38 U.S.C. 3241, 3697A(c))

[45 FR 31, Jan. 2, 1980, as amended at 47 FR 51746, Nov. 17, 1982; 53 FR 34497, Sept. 7, 1988; 58 FR 31911, June 7, 1993; 61 FR 29030, June 7, 1996; 61 FR 36629, July 12, 1996]

### §21.5103 Travel expenses.

(a) *General.* VA shall determine and pay the necessary expense of travel to and from the place of counseling for a veteran who is required to receive counseling as provided under 38 U.S.C. 111 (a), (d), (e), and (g).

(Authority: 38 U.S.C. 111(a), (d), (e), and (g))

(b) *Restriction.* VA will not pay the necessary cost of travel to and from the place of counseling when counseling is not required, but is provided as a result of a voluntary request by the veteran.

(Authority: 38 U.S.C. 111)

[61 FR 29030, June 7, 1996]

PAYMENTS; EDUCATIONAL ASSISTANCE ALLOWANCE

### §21.5130 Payments; educational assistance allowance.

VA will apply the following sections in administering benefits payable under 38 U.S.C. Chapter 32:

(a) Section 21.4131—Commencing dates (except paragraph (d)).

(b) Section 21.4135—Discontinuance dates.

(c) Section 21.4138 (except paragraph (b)—Certifications and release of payments.

(d) Section 21.4146—Assignments of benefits prohibited.

(Authority: 38 U.S.C. 3241(a))

(e) Section 21.4136(k) (except paragraph (k)(3))—Mitigating circumstances.

(Authority: 38 U.S.C. 3241(a), 3680(a))

[45 FR 31, Jan. 2, 1980, as amended at 46 FR 32024, June 19, 1981; 53 FR 617, Jan. 11, 1988; 55 FR 31582, Aug. 3, 1990; 57 FR 38612, Aug. 26, 1992; 61 FR 29030, June 7, 1996; 63 FR 35836, July 1, 1998; 64 FR 23772, May 4, 1999; 65 FR 5786, Feb. 7, 2000]

### §21.5131 Educational assistance allowance.

VA will pay educational assistance allowance at the rate specified in §§21.5136 and 21.5138 of this part while the individual is pursuing either an approved program of education or a refresher or deficiency course or other preparatory or special education or training course which is necessary to enable the individual to pursue an approved program of education. VA will make no payment for pursuit of any course which either is not part of the veteran's program of education, or is not a refresher, deficiency or other preparatory or special education or training course which is necessary to enable the individual to pursue an approved program of education. VA may withhold a payment until it receives

verification or certification of the individual's continued enrollment and adjusts the individual's account. See § 21.5133.

(Authority: 38 U.S.C. 3241; Pub. L. 94–592, Pub. L. 99–576, Pub. L. 101–237)

[57 FR 38612, Aug. 26, 1992]

### § 21.5132 Criteria used in determining benefit payments.

(a) *Training time.* The amount of benefit payment to an individual in all types of training except cooperative training, correspondence training and apprenticeship and other on-job training depends on whether VA determines that the individual is a full-time student, three-quarter-time student, half-time student or one-quarter-time student.

(Authority: 38 U.S.C. 3241, 3688; Pub. L. 99–576, Pub. L. 100–689)

(b) *Contributions.* The amount of benefit payment to an individual also depends on:

(1) The amount the individual has contributed to the fund.

(2) The amount the Secretary of Defense has contributed to the fund for the individual.

(Authority: 38 U.S.C. 3231)

[45 FR 31, Jan. 2, 1980, as amended at 47 FR 51746, Nov. 17, 1982; 48 FR 3369, Jan. 25, 1983; 52 FR 3429, Feb. 4, 1987; 53 FR 34498, Sept. 7, 1988; 55 FR 31582, Aug. 3, 1990; 61 FR 29030, June 7, 1996]

### § 21.5133 Certifications and release of payments.

An individual must be pursuing a program of education in order to receive payments. To ensure that this is the case, the provisions of this paragraph must be met.

(a) *General.* VA will pay educational assistance to a veteran or servicemember (other than one who qualifies for an advance payment, or one pursuing a program of apprenticeship, other on-job training, or a correspondence course) only after—

(1) The educational institution has certified his or her enrollment as provided in § 21.5200(d) of this part; and

(2) VA has received from the individual a verification of the enrollment. Generally, this verification will be required monthly, resulting in monthly payments.

(b) *Apprenticeship and other on-job training.* VA will pay educational assistance to a veteran pursuing a program of apprenticeship or other on-job training only after—

(1) The training establishment has certified his or her enrollment in the training program as provided in § 21.5200(d); and

(2) VA has received from the veteran and the training establishment a certification of hours worked. Generally, this certification will be required monthly, resulting in monthly payments.

(c) *Correspondence training.* VA will pay educational assistance to a veteran or servicemember who is pursuing a correspondence course or the correspondence portion of a combined correspondence-residence course only after—

(1) The educational institution has certified his or her enrollment;

(2) VA has received from the veteran or servicemember a certification as to the number of lessons completed and serviced by the educational institution; and

(3) VA has received from the educational institution a certification or an endorsement on the veteran's or servicemember's certificate, as to the number of lessons completed by the veteran or servicemember and serviced by the educational institution. Generally, this certification will be required quarterly, resulting in quarterly payments.

(Authority: 38 U.S.C. 3680(g))

(Approved by the Office of Management and Budget under control number 2900–0465)

[57 FR 38612, Aug. 26, 1992]

### § 21.5134 Restrictions on paying benefits to servicepersons.

The Department of Veterans Affairs may not pay benefits to a serviceperson (other than one enrolled in a course, courses or a program of education leading to a secondary school diploma or an equivalency certificate) unless he or she:

(a) Has completed 3 months of contributions to the fund or has made a

lump-sum payment which is the equivalent of at least 3 months of contributions to the fund;

(b) Has agreed either to have a monthly deduction from his or her military pay, or has made a lump-sum contribution to the fund, or both, so that the 12 months participation requirement of §21.5052(a) of this part will be met; and

(c) Is serving on active duty in an enlistment period subsequent to the initial period of active duty defined in §21.5040(b)(3) of this part.

(Authority: 38 U.S.C. 3221, 3231, Pub. L. 94–502)

[45 FR 31, Jan. 2, 1980, as amended at 47 FR 51746, Nov. 17, 1982; 54 FR 49977, Dec. 4, 1989]

### §21.5135 Advance payments.

VA will apply the provisions of §21.4138(a) in making advance payments to veterans and servicemembers.

(Authority: 38 U.S.C. 3241, 3680)

[64 FR 52652, Sept. 30, 1999]

### §21.5136 Benefit payments—secondary school program.

(a) *Restrictions on payments.* (1) The Department of Veterans Affairs may authorize benefits to qualified enlisted servicepersons for a course, courses or program of education leading to a secondary school diploma or an equivalency certificate without charge to entitlement. Payments may be made only if:

(i) The individual has contributed to the fund for at least 1 month, and

(ii) The training is received while the individual is serving:

(A) The last 6 months of his or her first enlistment after December 31, 1976; or

(B) At any time after completing his or her first enlistment.

(2) An individual who is not on active duty must have been an enlisted serviceperson while he or she was on active duty in order to receive benefits while enrolled in a course, courses or program of education leading to a secondary school diploma or an equivalency certificate.

(Authority: 38 U.S.C. 3231(b))

(b) *Monthly rate.* An individual pursuing a course, courses or a program of education leading to a secondary school diploma or an equivalency certificate will receive one of two monthly rates.

(1) Unless the individual notifies the Department of Veterans Affairs to the contrary, the monthly rate of his or her educational assistance allowance will be based upon his or her tuition and fees. The Department of Veterans Affairs will make no charge against the entitlement of the individual who is receiving benefits at this monthly rate. The monthly rate will be the rate of tuition and fees being charged to the individual for the course, not to exceed:

(i) $376 for full-time training.

(ii) $283 for three-quarter time training.

(iii) $188 for half-time training.

(iv) $94 for quarter-time training.

(2) The individual may elect to receive educational assistance allowance at the monthly rate provided in §21.5138. The Department of Veterans Affairs will make an appropriate charge against the individual's entitlement if such an election is made.

(Authority: 38 U.S.C. 3241, 3491)

(c) *Method of payment.* (1) If the individual's educational assistance allowance is based upon the rate as determined in paragraph (b)(1) of this section, payment shall be made in a lump sum for the term, quarter or semester at the beginning of the month in which training begins.

(2) If the individual elects to have his or her educational assistance allowance computed as provided in §21.5138, payment will be made in the same manner as for any other residence training.

(Authority: 38 U.S.C. 3241)

[47 FR 51746, Nov. 17, 1982, as amended at 50 FR 19933, May 13, 1985]

### §21.5138 Computation of benefit payments and monthly rates.

The Department of Veterans Affairs will compute all monthly rates and benefit payments as stated in this section except for those individuals to whom §21.5136(b)(1) applies.

(a) *Computation of entitlement factor.* In computing monthly rates and benefit payments the Department of Veterans Affairs will compute an entitlement factor in all cases except for individuals in a secondary school program whose benefits are computed as provided in § 21.5136(b)(1).

(1) For residence training the entitlement factor will be computed as follows:

(i) Enter the number of full months in the applicable benefit period. (1)_____
(ii) Enter the number of full days in excess of the number of full months. (a)
(iii) Divide line a by 30. Enter the quotient. (2)_____
(iv) Total (lines 1 and 2) ..... (3)_____
(v) Multiply line 3 by 1 for a full-time student; by .75 for a three-quarter time student; by .5 for a half-time student; or by .25 for a one-quarter time student. Enter the result. (4)_____
(This is the entitlement factor.)

(2) For correspondence training the entitlement factor will be computed as follows:

(i) Enter the amount of the individual's contributions remaining in the fund. (b)
(ii) Enter the individual's remaining months of entitlement. (c)
(iii) Divide line b by line c. Enter the quotient. (5)_____
(iv) Enter two times the amount in line 5 (6)_____
(v) Enter the amount of the contributions, if any, remaining in the fund which the Secretary of Defense contributed for the individual. (d)
(vi) Enter the individual's remaining months of entitlement. (e)
(vii) Divide line d by line e. Enter the quotient. (7)_____
(viii) Total (lines 5, 6 and 7) ..... (8)_____
(ix) Enter the correspondence charges certified by the school. (9)_____
(x) Divide line 9 by line 8. Enter the quotient. (10)_____
(This is the entitlement factor.)

(3) For apprenticeship and other on-job training VA will compute the entitlement factor as follows:

(i) Enter the number of full days in the applicable benefit period. (Enter 30 if the benefit period is a full month.). (1)_____
(ii) Divide line 1 by 30. Enter the quotient:. (2)_____
(iii) Multiply line 2 by .75 if the veteran is in the first six months of training; by .55 if the veteran is in the second six months of training; by .35 if the veteran is in a subsequent month of training; and by a pro-rated fraction if one of the veteran's first two six-month periods of training ends during the benefit period. Enter the result. (3)_____
(This is the entitlement factor.)

(Authority: 38 U.S.C. 3231, 3233; Pub. L. 96–466, Pub. L. 97–306, Pub. L. 99–576)

(4) For cooperative training VA will compute the entitlement factor as follows:

(i) Enter the number of full months in the applicable benefit period. (1) _____
(ii) Enter the number of full days in excess of the number of full months. (a) _____
(iii) Divide line a by 30. Enter the quotient. (2) _____
(iv) Total lines 1 and 2 ..... (3) _____
(v) Multiply line 3 by .80. Enter the result. (4) _____
(This is the entitlement factor.)

(Authority: 38 U.S.C. 3231; Pub. L. 100–689)

(5) For flight training the entitlement factor will be computed as follows:

(i) Enter the amount of the individual's contributions remaining in the fund. (a) _____
(ii) Enter the individual's remaining months of entitlement. (b) ___
(iii) Divide line a by line b. Enter the quotient. (1) ___
(iv) Enter two times the amount in line 1 (2) ___
(v) Enter the amount of the contributions, if any, remaining in the fund which the Secretary of Defense contributed for the individual. (c) ___
(vi) Enter the individual's remaining months of entitlement. (d) ___
(vii) Divide line c by line d. Enter the quotient. (3) ___
(viii) Total (lines 1, 2 and 3) ..... (4) ___
(ix) Enter the charges for flight training certified by the school. (e) ___
(x) Multiply line e by .60 ..... (5) ___
(xi) Divide line 5 by line 4. Enter the quotient. (This is the entitlement factor.) (6) ___

(Authority: 38 U.S.C. 3231(f))

(b) *Computation of benefit payment.* The Department of Veterans Affairs will compute benefit payments as follows: for all training except for those

individuals to whom §21.5136(b)(1) applies:

(1) Enter the entitlement factor. (f)

(2) Enter the amount of the individual's contributions remaining in the fund. (g)

(3) Multiply line f by line g. Enter the result. (h)

(4) Enter the remaining months of the individual's entitlement. (i)

(5) Divide line h by line i. Enter the quotient. (11)_____

(This is the individual's portion.)

(6) Enter two times the amount in line 11 (12)_____

(This is the Department of Veterans Affairs's portion of benefit payments for training completed before January 1, 1982. The Secretary of Defense will contribute this portion of the benefit payment for training that occurs after December 31, 1981.)

(7) Enter the amount of the additional contributions, if any, remaining in the fund which the Secretary of Defense contributed for the individual. (j)

(8) Multiply line f by line j. Enter the result. (k)

(9) Enter the individual's remaining months of entitlement. (l)

(10) Divide line k by line 1. Enter the quotient. (13)_____

(This is the Department of Defense's portion for training completed before January 1, 1982. For training completed after December 31, 1981, this is the second part of the Department of Defense's portion.) (38 U.S.C. 3231)

(11) Total (add lines 11, 12 and 13) ..... (14)_____

(12) If the veteran is in an apprenticeship or other on-job training and fails to complete 120 hours of training in a month, reduce the amount on line 14 proportionately. In this computation round the number of hours worked to the nearest multiple of eight. Enter the result. (15)_____

(13) If the veteran is pursuing certain courses which do not lead to a standard college degree, has excessive absences, and incurred those absences before December 18, 1989, reduce the amount on line 14 sufficiently to avoid paying for any excessive absence. Enter the result. (16)____

(Authority: 38 U.S.C. 3233 (1989), 38 U.S.C. 3680(a)(2) (1974); Pub. L. 101–237)

(14) The benefit payment is either—

(i) The amount shown on line 14 unless the veteran is in apprenticeship or other on-job training and has failed to complete 120 hours of training in a month during the benefit period in which case the benefit payment is the amount shown on line 15, or the veteran is pursuing certain courses which do not lead to a standard college degree in which case the benefit payment is the amount shown on line 16, or

(Authority: 38 U.S.C. 3233; Pub. L. 99–576)

(ii) The total amount of the remaining contributions in the fund made by the individual and the VA and the Secretary of Defense on behalf of the individual, whichever is less.

(Authority: 38 U.S.C. 3231; Pub. L. 94–502)

(c) *Monthly rates.* The Department of Veterans Affairs will compute the monthly rates of payment for individuals in residence training by repeating the calculations in paragraphs (b)(1) through (11) of this section except that instead of entering the entitlement factor on line f, paragraph (b)(1), the Department of Veterans Affairs will enter 1 for a full-time student, .75 for a three-quarter time student, .5 for a half-time student, or .25 for a one-quarter time student.

(Authority: 38 U.S.C. 3231)

[45 FR 31, Jan. 2, 1980, as amended at 46 FR 32024, June 19, 1981; 47 FR 51747, Nov. 17, 1982; 48 FR 3369, Jan. 25, 1983; 48 FR 50530, Nov. 2, 1983; 52 FR 3429, Feb. 4, 1987; 53 FR 34498, Sept. 7, 1988; 55 FR 31582, Aug. 3, 1990; 57 FR 38615, Aug. 26, 1992; 58 FR 31911, June 7, 1993]

## §21.5139 Computation of benefit payments for incarcerated individuals.

Notwithstanding the provisions of §21.5138, some incarcerated individuals may have their educational assistance allowance terminated or reduced. The provisions of this section shall not apply in the case of any individual who is pursuing a program of education while residing in a halfway house or participating in a work-release program in connection with that individual's conviction of a felony.

(a) *No educational assistance allowance payable to some incarcerated individuals.* VA will pay no educational assistance allowance to an individual who—

(1) Is incarcerated in a Federal, State or local penal institution for conviction of a felony, and

(2) Is enrolled in a course where his or her tuition and fees are being paid by a Federal program (other than one administered by VA) or by a State or local program, and

(3) Has incurred no expenses for supplies, books or equipment.

(Authority: 38 U.S.C. 3231(e))

(b) *Reduced educational assistance allowance for some incarcerated individuals.* (1) VA will pay a reduced educational assistance allowance to a veteran who—

(i) Is incarcerated in a Federal, State or local penal institution of conviction of a felony, and

(ii) Is enrolled in a course—

(A) For which the individual pays some (but not all) of the charges for tuition and fees, or

(B) For which a Federal program (other than one administered by VA) or a State or local program pays all the charges for tuition and fees, but which requires the individual to pay for books, supplies and equipment.

(2) The monthly rate of educational assistance allowance payable to such an individual shall be the lesser of the following:

(i) The monthly rate determined by adding the tuition and fees that the veteran must pay and the charge to the veteran for the cost of necessary supplies, books and equipment and prorating the total on a monthly basis, or

(ii) The monthly rate for the individual as determined by § 21.5138(c) of this part.

(Authority: 38 U.S.C. 3231(e))

[55 FR 31583, Aug. 3, 1990]

### § 21.5141 Tutorial assistance.

An individual who is otherwise eligible to receive benefits under the Post-Vietnam Era Veterans' Educational Assistance Program may receive supplemental monetary assistance to provide tutorial services. In determining whether VA will pay the individual this assistance, VA will apply the provisions of § 21.4236.

(Authority: 38 U.S.C. 3234, 3492)

[61 FR 29030, June 7, 1996]

STATE APPROVING AGENCIES

### § 21.5150 State approving agencies.

In administering chapter 32, title 38, United States Code, VA will apply the provisions of the following sections:

(a) Section 21.4150 (except par. (e))—Designation;

(b) Section 21.4151—Cooperation;

(c) Section 21.4152—Control by agencies of the United States;

(d) Section 21.4153—Reimbursement of expenses;

(e) Section 21.4154—Report of activities;

(f) Section 21.4155—Evaluations of State approving agency performance.

(Authority: 38 U.S.C. 3241, 3670–3674, 3674A; Pub. L. 94–502, Pub. L. 100–323)

[55 FR 12483, Apr. 4, 1990, as amended at 61 FR 1526, Jan. 22, 1996]

SCHOOLS

### § 21.5200 Schools.

In the administration of benefits payable under the provisions of chapter 32, title 38, U.S.C., the Department of Veterans Affairs will apply the following sections:

(a) Section 21.4200—Definitions (with the exception of paragraph (a)).

(Authority: 38 U.S.C. 3241; Pub. L. 94–502, Pub. L. 99–576)

(b) Section 21.4201—Restrictions on enrollment; percentage of students receiving financial support.

(Authority: 38 U.S.C. 3241, 3473(d))

(c) Section 21.4202—Overcharges; restrictions on enrollments.

(Authority: 38 U.S.C. 3241, 3690)

(d) Section 21.4203—Reports by schools—Requirements.

(Authority: 38 U.S.C. 3241, 3684; Pub. L. 94–502, Pub. L. 99–576)

(e) Section 21.4204 (except paragraphs (a) and (e))-Periodic certifications.

(Authority: 38 U.S.C. 3241, 3684)

(f) [Reserved]

(g) Section 21.4206—Reporting fee.

(h) Section 21.4209—Examination of records.

(Authority: 38 U.S.C. 3241, 3690; Pub. L. 94–502, Pub. L. 99–576)

(i) Section 21.4210—Suspension and discontinuance of educational assistance payments and of enrollments or reenrollments for pursuit of approved courses.

(j) Section 21.4211—Composition, jurisdiction and duties of Committee on Educational Allowances.

(k) Section 21.4212—Referral to Committee on Educational Allowances.

(l) Section 21.4213—Notice of hearing by Committee on Educational Allowances.

(m) Section 21.4214—Hearing rules and procedures for Committee on Educational Allowances.

(n) Section 21.4215—Decision of Director of VA facility of jurisdiction.

(o) Section 21.4216—Review of decision of Director of VA facility of jurisdiction.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3034(a), 3241(a), 3690)

(Approved by the Office of Management and Budget under control number 2900–0178)

[45 FR 31, Jan. 2, 1980, as amended at 53 FR 34499, Sept. 7, 1988; 57 FR 38613, August 26, 1992; 61 FR 1526, Jan. 22, 1996; 61 FR 29030, June 7, 1996; 63 FR 35836, July 1, 1998]

PROGRAMS OF EDUCATION

### §21.5230 Programs of education.

(a) *Approving the selected program of education.* Except as provided in paragraphs (b) and (c) of this section, VA will approve a program of education under chapter 32, title 38 U.S.C, only if it—

(1) Meets the definition of a program of education stated in §21.5021(q) of this part;

(2) Has an objective as described in §21.5021 (r) or (s) of this part;

(3) The courses or subjects in the program are approved for VA training; and

(4) The veteran or serviceperson is not already qualified for the objective of the program.

(Authority: 38 U.S.C. 3202(2))

(b) *Programs which include secondary school training.* VA may approve the enrollment of a veteran or serviceperson in a refresher, remedial, deficiency or other preparatory or special educational assistance course when the veteran or eligible serviceperson needs the course in order to pursue an approved program of education.

(Authority: 38 U.S.C. 3241(a)(2))

(c) *Refresher training for those already qualified.* The refresher training referred to in paragraph (b) of this section includes training in a course or courses for which the veteran is already qualified provided the course or courses permit the veteran to update knowledge and skills or to be instructed in the technological advances which have occurred in the veteran's field of employment. The relevant field of employment may have been pursued either before, during or after the veteran's active duty.

(Authority: 38 U.S.C. 3241(a)(2); Pub. L. 100–689)

[55 FR 31583, Aug. 3, 1990]

### §21.5231 Combination.

In the administration of benefits payable under chapter 32, title 38, U.S.C., the Department of Veterans Affairs will apply §21.4233(b), (c), and (e).

(Authority: 38 U.S.C. 3241)

[45 FR 31, Jan. 2, 1980, as amended at 61 FR 7218, Feb. 27, 1996]

### §21.5232 Change of program.

In determining whether a change of program of education may be approved for the payments of educational assistance, VA will apply §21.4234 of this part.

(Authority: 38 U.S.C. 3241, 3691; Pub. L. 94-502, Pub. L. 101–366) (June 1, 1991)

[58 FR 46866, Sept. 3, 1993]

COURSES

### §21.5250 Courses.

(a) In administering benefits payable under 38 U.S.C. chapter 32, VA and, where appropriate, the State approving agencies shall apply the following sections.

(1) Section 21.4250 (except paragraph (c)(1))—Approval of courses.

(2) Section 21.4251—Period of operation of course.

(3) Section 21.4252—Courses precluded.

(4) Section 21.4253—Accredited courses.

(5) Section 21.4254—Nonaccredited courses.

(6) Section 21.4255—Refund policy; nonaccredited courses.

(7) Section 21.4256—Correspondence courses.

(8) Section 21.4257—Cooperative courses.

(9) Section 21.4258—Notice of approval.

(10) Section 21.4259—Suspension or disapproval.

(11) Section 21.4260—Courses in foreign countries.

(12) Section 21.4261—Apprentice courses.

(13) Section 21.4262—Other training on-the-job courses.

(14) Section 21.4265—Practical training approved as institutional training.

(15) Section 21.4266—Courses offered at subsidiary branches or extensions.

(16) Section 21.4267—Approval of independent study.

(Authority: 38 U.S.C. 3241, 3473, 3476, 3672, 3675, 3676, 3678, 3679, 3686, 3689)

(b) *Flight courses.* In administering benefits payable for flight training under chapter 32, title 38, U.S.C., VA and the State approving agencies will apply the provisions of § 21.4263 of this part. Educational assistance allowance is payable only for flight training undertaken by a veteran or serviceperson after March 31, 1991.

(Authority: 38 U.S.C. 3241; Pub. L. 102–16)(Apr. 1, 1991)

[58 FR 31911, June 7, 1993, as amended at 61 FR 1526, Jan. 22, 1996; 61 FR 7218, Feb. 27, 1996]

ASSESSMENT AND PURSUIT OF COURSE

### § 21.5270 Assessment and pursuit of course.

In the administration of benefits payable under 38 U.S.C. chapter 32, VA shall apply the following sections.

(a) Section 21.4270 (except those portions of the paragraph and footnotes dealing with farm cooperative training)—Measurement of courses. For the purpose of benefits payable under 38 U.S.C. chapter 32 that training identified in § 21.4270 as less than one-half and more than one-quarter time will be treated as one-quarter-time training.

(Authority: 38 U.S.C. 3241, 3688; Pub. L. 94–502, Pub. L. 99–576, Pub. L. 100–689)

(b) [Reserved]

(c) Section 21.4272—Collegiate course measurement.

(Authority: 38 U.S.C. 3241, 3688)

(d) Section 21.4273—Collegiate graduate.

(e) Section 21.4274—Law courses.

(f) Section 21.4275—Practical training courses; measurement.

(Authority: 38 U.S.C. 3241, 3688)

(g) Section 21.4277—Discontinuance; unsatisfactory progress, conduct, and attendance.

(h) Section 21.4278—Reentrance after discontinuance.

(Authority: 38 U.S.C. 3241, 3474)

(i) Section 21.4279—Combination correspondence-residence program.

(Authority: 38 U.S.C. 3241, 3688)

(j) [Reserved]

(Authority: 38 U.S.C. 3241, 3473)

[45 FR 31, Jan. 2, 1980, as amended at 53 FR 34499, Sept. 7, 1988; 55 FR 31584, Aug. 3, 1990; 61 FR 7218, Feb. 27, 1996; 62 FR 55760, Oct. 28, 1997]

EDUCATIONAL ASSISTANCE PILOT PROGRAM

### § 21.5290 Educational Assistance Pilot Program.

(a) *Purpose.* The Educational Assistance Pilot Program is designed to encourage enlistments and reenlistments in the Army, Navy, Air Force and Marine Corps.

(Authority: Sec. 903, Pub. L. 96–342; 94 Stat. 1115)

(b) *Outline of program.* This program allows some individuals:

(1) To participate while making contributions at a rate less than that prescribed in § 21.5052(b), and/or

(2) To transfer entitlement allowed in § 21.5071 to a spouse or child.

(Authority: Sec. 903, Pub. L. 96–342, 94 Stat. 1115)

[47 FR 51747, Nov. 17, 1982]

### § 21.5292 Reduced monthly contribution for certain individuals.

(a) *Qualifying for reduced monthly contributions.* Some individuals can become participants while making no

contributions. To qualify for this portion of the pilot program the individual must:

(1) Enlist or reenlist in the Army, Navy, Air Force or Marine Corps after November 30, 1980, and before October 1, 1981;

(2) Elect or have elected to participate in the Post-Vietnam Era Educational Assistance Program; and

(3) Be chosen for the pilot program by the Secretary of Defense or his or her designee.

(Authority: Sec. 903 Pub. L. 96–342, 94 Stat. 1115)

(b) *Monthly contributions made by the Secretary of Defense.* (1) The Secretary of Defense may pay $75 per month as the monthly contribution otherwise required under §21.5052(b) for an individual described in paragraph (a) of this section.

(2) The individual will not be required to make a contribution for any month to the extent that the contribution otherwise required by §21.5052(b) for that month is paid by the Secretary of Defense.

(3) The amount paid by the Secretary of Defense shall be deposited in the fund.

(Authority: Sec. 903, Pub. L. 96–342; 94 Stat. 1115)

(c) *Restrictions on monthly contributions.* The Secretary of Defense may not make a payment under the pilot program on behalf of any person for any month:

(1) Before the month in which the person enlisted or reenlisted in the Army, Navy, Air Force or Marine Corps, or

(2) Before December 1980.

(Authority: Sec. 903, Pub. L. 96–342, 94 Stat. 1115)

(d) *Refunds.* If an individual participating in the pilot program disenrolls, any monthly contributions made by the Secretary of Defense will be returned to the Secretary of Defense rather than refunded to the individual.

(Authority: Sec. 903, Pub. L. 96–342; 94 Stat. 1115)

(e) *Application of sections to this portion of the pilot program.* (1) The following sections apply to this portion of the pilot program with amendments as noted:

(i) In §21.5021(e) a participant includes someone whose contributions are being made by the Secretary of Defense.

(ii) In §21.5052(b) the Secretary of Defense may make contributions to the fund and may designate the amount of the contribution.

(iii) In §21.5052(d) the Secretary of Defense may increase or decrease the amount of the contribution.

(iv) In §§21.5064 and 21.5065 monthly contributions made by the Secretary of Defense will be returned to him or her instead of being refunded to the veteran.

(v) In §21.5071 the Department of Veterans Affairs will also credit the individual with 1 month of entitlement for each month the Secretary of Defense contributes to the fund on his or her behalf.

(vi) In §21.5138 the references to the individual's contributions include those contributions made on the individual's behalf by the Secretary of Defense.

(2) Except as amended in paragraph (e)(1) of this section §§21.5001 through 21.5041 and §§21.5050 through 21.5270 apply without change to this portion of the pilot program. See §21.5296.

(Authority: Pub. L., 96–342, sec. 903; 38 U.S.C. 3232, 3698(a)(2); Pub. L. 97–35, Pub. L. 99–576)

[47 FR 51747, Nov. 17, 1982, as amended at 49 FR 2109, Jan. 18, 1984; 53 FR 34499, Sept. 7, 1988; 61 FR 29030, June 7, 1996]

### §21.5294 Transfer of entitlement.

(a) *Qualifying for a transfer of entitlement.* Some participants may transfer their entitlement to their spouse or child. To qualify for this portion of the pilot program the individual must:

(1) After June 30, 1981 and before October 1, 1981, reenlist in the Army;

(2) Be a participant;

(3) Possess a critical military specialty as determined by the Secretary of Defense; and

(4) Be chosen for his portion of the pilot program by the Secretary of Defense or his or her designee.

(Authority: Sec. 903, Pub. L. 96–342; 94 Stat. 1115)

(b) *Persons who may receive transferred entitlement.* An individual meeting the requirements of paragraph (a) of this section may transfer entitlement earned under § 21.5071 for the purpose of allowing another person to receive educational assistance allowance. Entitlement may be transferred only:

(1) To a spouse or child of the participant,

(2) To one person at a time,

(3) If the participant is not receiving educational assistance allowance, and

(4) When the participant states in writing to the Department of Veterans Affairs that the entitlement should be transferred.

(Authority: Sec. 903(c), Pub. L. 96–342, 94 Stat. 1115)

(c) *Educational assistance allowance.* (1) The individual must specify in writing to the Department of Veterans Affairs the period of time he or she wishes the spouse or child to receive educational assistance allowance on the basis of the transfer of entitlement. The Department of Veterans Affairs will not pay educational assistance allowance to a spouse or child for training completed either before or after the period specified by the participant.

(2) The commencing date of an award of educational assistance allowance to a spouse or child will be the earlier of the following dates:

(i) The date of the spouse's or child's entrance or reentrance under § 21.4131;

(ii) The first day of the period authorized by the participant for the transfer of entitlement.

(3) The ending date of an award of educational assistance allowance to a spouse or child will be the earliest of the following dates:

(i) The ending date of the spouse's or child's course or period of enrollment as certified by the school or training establishment;

(Authority: 38 U.S.C. 3233; Pub. L. 99–576)

(ii) The ending date of the participant's eligibility as determined under § 21.5041;

(iii) The ending date specified in § 21.4135;

(iv) The date of the death of the participant on whom the spouse's or child's entitlement is based;

(v) The last day of the period authorized by the participant for the transfer of entitlement.

(Authority: Sec. 903, Pub. L. 96–342, 94 Stat. 1115)

(d) *Application of VA regulations to this portion of the pilot program.*

(1) Sections 21.5030 (a) and (b), 21.5040, 21.5041 and 21.5050 through 21.5067 and § 21.5145 apply to the individual who is participating in this portion of the pilot program, but they do not apply to the individual's spouse or child, per se.

(Authority: Pub. L. 96–342, sec. 903; Pub. L. 99–576)

(2) The following sections apply to this portion of the pilot program with amendments as noted:

(i) In § 21.5022 the entitlement used by the spouse or child counts toward the 48-month limitation on receiving benefits under more than one program which is imposed on the individual.

(ii) In § 21.5072 the charge against the individual's entitlement will be made on the basis of payments made to the individual's spouse or child.

(iii) In § 21.5100 the individual's spouse or child may request counseling, but an incompetent spouse or child is not required to be counseled before selecting a program of education.

(Authority: Pub. L. 96–342, sec. 903, Pub. L. 97–306, Pub. L. 99–576)

(iv) In §§ 21.5132 through 21.5138 references to payment to the individual apply equally to payment to the spouse or child.

(Authority: Sec. 903, Pub. L. 96–342; Pub. L. 97–306, 96 Stat. 1429)

(3) Except as amended in paragraph (d)(2) of this section the following sections apply without change to this portion of the pilot program:

(i) Sections 21.5001 through 21.5023,

(ii) Section 21.5030(c),

(iii) Sections 21.5070 through 21.5130,

(iv) The introductory portion of §21.5131,

(v) Sections 21.5132 through 21.5300.

(Authority: 38 U.S.C. 3698(a)(2))

(4) Section 21.5131 (a) and (b) does not apply to this portion of the pilot program.

(Authority: Sec. 903, Pub. L. 96–342, 94 Stat. 1115)

[47 FR 51748, Nov. 17, 1982; 48 FR 50530, Nov. 2, 1983; 49 FR 2110, Jan. 18, 1984; 53 FR 34499, Sept. 7, 1988]

### §21.5296 Extended period of eligibility.

(a) *General.* A veteran shall be granted an extension of the applicable delimiting period, as otherwise determined by §21.5041 provided—

(1) The veteran applies for an extension.

(2) The veteran was prevented from initiating or completing the chosen program of education within the otherwise applicable delimiting period because of a physical or metal disability that did not result from the willful misconduct of the veteran. VA will not consider the disabling effects of chronic alcoholism to be the result of willful misconduct.

(Authority: 38 U.S.C. 105, 3232; Pub. L. 99–576, Pub. L. 100–689)

(b) *Application.* (1) Only the veteran may apply for an extended period of eligibility pursuant to this section. A spouse or child to whom entitlement may be or has been transferred may not apply for, nor receive, an extension based upon disability of either the veteran or the spouse or child.

(2) The veteran must apply for the extended period of eligibility in time for VA to receive the application by the later of the following dates:

(i) One year from the last date of the delimiting period otherwise applicable to the veteran under §21.5041, or

(ii) One year from the termination date of the period of the veteran's mental or physical disability.

(3) No application for an extended period of eligibility should be submitted and none will be processed during any period when the veteran has transferred entitlement to a spouse or child, since eligibility cannot be fully determined as provided in paragraph (c)(4)(ii) of this section.

(Authority: 38 U.S.C. 3232; Pub. L. 99–576)

(c) *Qualifying period of disability.* A veteran's extended period of eligibility shall be based on the period of time that the veteran himself or herself was prevented by reason of physical or mental disability, not the result of the veteran's willful misconduct, from initiating or completing his or her chosen program of education. VA will not consider the disabling effects of chronic alcoholism to be the result of willful misconduct.

(Authority: 38 U.S.C. 105, 3232; Pub. L. 99–576, Pub. L. 100–689)

(1) Evidence must be presented which clearly establishes that the veteran's disability made pursuant of his or her program medically infeasible during the veteran's original period of eligibility as determined by §21.5041. A period of disability following the end of the original disability period will not be a basis for extension.

(2) VA will not consider a veteran who is disabled for a period of 30 days or less as having been prevented from enrolling or reenrolling in the chosen program of education or was forced to discontinue attendance, because of the short disability.

(3) Except as provided in paragraph (c)(4) of this section, a veteran's transfer of entitlement to a spouse or child during a period for which the veteran's disability prevented his or her pursuit of a program of education will not affect the veteran's entitlement to an extension of eligibility under this section.

(4) Since the act of entitlement transfer to a spouse or child indicates that the veteran did not intend to personally use his or her educational assistance during the specified transfer period, a veteran who becomes disabled after transferring entitlement will not be entitled to an extended period of eligibility based on any period of the disability which coincides with the specified transfer period unless—

(i) The transferee or transferees did not use any entitlement during this period, and

(ii) The veteran can clearly demonstrate that, notwithstanding his or her decision to transfer entitlement, the veteran would have used the entitlement during all or part of the transfer period and was prevented from doing so solely by reason of his or her disability.

(Authority: 38 U.S.C. 3232; Pub. L. 99–576)

(d) *Commencing date.* The veteran shall elect the commencing date of an extended period of eligibility. The date chosen—

(1) Must be on or after the original date of expiration of eligibility as determined by § 21.5041 of this part, and

(2) Must be on or before the 90th day following the date on which the veteran's application for an extension was approved by VA, if the veteran is training during the extended period of eligibility in a course not organized on a term, quarter or semester basis, or

(3) Must be on or before the first day of the first ordinary term, quarter or semester following the 90th day after the veteran's application for an extension was approved by VA if the veteran is training during the extended period of eligibility in a course organized on a term, quarter or semester basis.

(Authority: 38 U.S.C. 3232; Pub. L. 99–576)

(e) *Determining the length of extended periods of eligibility.* A veteran's extended period of eligibility shall be based on the qualifying period of disability, and determined as follows:

(1) If the veteran is in training in a course organized on a term, quarter or semester basis, his or her extended period of eligibility shall contain the same number of days as the number of days from the date during the veteran's original delimiting period that his or her training became medically infeasible to the earliest of the following dates:

(i) The commencing date of the ordinary term, quarter or semester following the day the veteran's training became medically feasible,

(ii) The veteran's delimiting date as determined by § 21.5041 of this part, or

(iii) The date the veteran resumed training.

(2) If the veteran is training in a course not organized on a term, quarter or semester basis, his or her extended period of eligibility shall contain the same number of days as the number of days from the date during the veteran's original delimiting period that his or her training became medically infeasible to the earlier of the following dates:

(i) The date the veteran's training became medically feasible, or

(ii) The veteran's delimiting date as determined by § 21.5041 of this part.

(Authority: 38 U.S.C. 3232; Pub. L. 99–576)

(f) *Discontinuance.* If the veteran is pursuing a course on the date an extended period of eligibility expires (as determined under this section), VA will discontinue the educational assistance allowance effective the day before the end of the extended period of eligibility.

(Authority: 38 U.S.C. 3232; Pub. L. 99–576)

(g) *No transfer of entitlement for use during the extended period of eligibility.* (1) The veteran may only transfer entitlement to a spouse or child for use during the original period of eligibility as determined by § 21.5041 of this part.

(2) If the veteran has established an extended period of eligibility with VA, only the veteran may use remaining entitlement during that period.

(3) If the veteran transfers his or her entitlement after having received an extension of eligibility, but before the last day of the delimiting period as determined by § 21.5041 of this part, the eligibility of the spouse or child to use entitlement ends on the veteran's otherwise applicable delimiting date as determined by § 21.5041 of this part.

(Authority: 38 U.S.C. 3232; Pub. L. 99–576)

[53 FR 34499, Sept. 7, 1988, as amended at 55 FR 31584, Aug. 3, 1990]

## Subpart H—Educational Assistance Test Program

AUTHORITY: 10 U.S.C. ch. 107; 38 U.S.C. 501(a), 3695, 5101, 5113, 5303A; 42 U.S.C. 2000;

sec. 901, Pub. L. 96–342, 94 Stat. 1111–1114, unless otherwise noted.

SOURCE: 51 FR 27026, July 29, 1986, unless otherwise noted.

### §21.5701 Establishment of educational assistance test program.

(a) *Establishment.* The Departments of Army, Navy and Air Force have established an educational assistance test program.

(Authority: 10 U.S.C. 2141(a))

(b) *Purpose.* The purpose of this program is to encourage enlistments and reenlistments for service on active duty in the Armed Forces of the United States during the period from October 1, 1980, through September 30, 1981.

(Authority: 10 U.S.C. 2141(a))

(c) *Funding.* The Department of Defense is bearing the costs of this program. Participants in the program do not bear any of the costs.

(Authority: 10 U.S.C. 2141(a))

### §21.5703 Overview.

This program provides subsistence allowance and educational assistance to selected veterans and servicemembers and, in some cases, to dependents of these veterans and servicemembers.

(Authority: 10 U.S.C. 2141(b))

### §21.5705 Transfer of authority.

The Secretary of Defense delegates the authority to administer the benefit payment portion of this program to the Secretary of Veterans Affairs and his or her designees. See §21.5901.

(Authority: 10 U.S.C. 2141(b))

GENERAL

### §21.5720 Definitions.

For the purpose of regulations in the §§21.5700, 21.5800 and 21.5900 series and payment of benefits under the educational assistance and subsistence allowance program, the following definitions apply:

(a) *Veteran.* This term means a person who—

(1) Is not on active duty.

(2) Served as a member of the Air Force, Army, Navy or Marine Corps.

(3) Enlisted or reenlisted after November 30, 1980, and before October 1, 1981, specifically for benefits under the provisions of 10 U.S.C. 2141 through 2149; Pub. L. 96–342; and

(4) Meets the eligibility requirements for the program as stated in §21.5740.

(Authority: 10 U.S.C. 2141(a))

(b) *Accredited institution.* This term means a civilian college or university or a trade, technical or vocational school in the United States (including the District of Columbia, the Commonwealth of Puerto Rico, Guam and the U.S. Virgin Islands) that—

(1) Provides education on a postsecondary level (including accredited programs conducted at overseas locations) and

(2) Is accredited by—

(i) A nationally recognized accrediting agency or association, or

(ii) An accrediting agency or association recognized by the Secretary of Education.

(Authority: 10 U.S.C. 2143(c))

(c) *Dependent child.* This means an unmarried legitimate child (including an adopted child or a stepchild) who either—

(1) Has not passed his or her 21st birthday; or

(2) Is incapable of self-support because of a mental or physical incapacity that existed before his or her 21st birthday and is, or was at the time of the veteran's or servicemember's death, in fact, dependent on him or her for over one-half of his or her support; or

(3) Has not passed his or her 23rd birthday; is enrolled in a full-time course of study in an institution of higher learning aproved by the Secretary of Defense or the Secretary of Education, as the case may be; and is, or was at the time of the veteran's or servicemember's death, in fact, dependent upon him or her for over one half of his or her support.

(Authority: 10 U.S.C. 1072(2)(D), 2147(d)(1))

(d) *Surviving spouse.* The term means a widow or widower who is not remarried.

(Authority: 10 U.S.C. 2147(d)(2))

(e) *Servicemember.* This term means anyone who—

(1) Meets the eligibility requirements for the program, and

(2) Is on active duty in the Air Force, Army, Navy or Marine Corps.

(Authority: 10 U.S.C. 2142)

(f) *Spouse.* This term means a person of the opposite sex who is the husband or wife of the veteran or servicemember.

(Authority: 10 U.S.C. 2147)

(g) *Divisions of the school year.* (1) *Standard academic year* is a period of 2 standard semesters or 3 standard quarters. It is 9 months long.

(2) *Standard quarter* is a division of the standard academic year. It is from 10 to 13 weeks long.

(3) *Standard semester* is a division of the standard academic year. It is 15 to 19 weeks long.

(4) *Term* is either

(i) Any regularly established division of the standard academic year, or

(ii) The period of instruction which takes place between standard academic years.

(Authority: 10 U.S.C. 2142)

(h) *Full-time training.* This term means training at the rate of 12 or more semester hours per semester, or the equivalent.

(Authority: 10 U.S.C. 2144)

(i) *Part-time training.* The term means training at the rate of less than 12 semester hours per semester or the equivalent.

(Authority: 10 U.S.C. 2144)

(j) *Enrollment period.* This term means an interval of time during which an eligible individual—

(1) Is enrolled in an accredited educational institution; and

(2) Is pursuing his or her program of education.

(Authority: 10 U.S.C. 2142)

### § 21.5725 Obtaining benefits.

(a) *Actions required of the individual.* In order to obtain benefits under the educational assistance and subsistence allowance program, an individual must—

(1) File a claim for benefits with VA, and

(2) Ensure that the accredited institution certifies his or her enrollment to VA.

(Authority: 10 U.S.C. 2149)

(b) *VA action upon receipt of a claim.* Upon receipt of a claim from an individual VA shall—

(1) Determine if the individual, or the veteran upon whose service the claim is based, has or had basic eligibility;

(2) Determine that the eligibility period has not expired;

(3) Determine that the individual has remaining entitlement;

(4) Verify that the individual is attending an accredited institution;

(5) Determine whether payments may be made for the course, and

(6) Make appropriate payments of educational assistance and subsistence allowance.

(Authority: 10 U.S.C. 2142–2149)

## CLAIMS AND APPLICATIONS

### § 21.5730 Applications, claims, and time limits.

The provisions of subpart B of this part apply with respect to claims for educational assistance under the educational program described in § 21.5701, VA actions upon receiving a claim, and time limits connected with claims.

(Authority: 10 U.S.C. 2141, 2149; 38 U.S.C. 5101, 5102, 5103)

[64 FR 23772, May 4, 1999]

## ELIGIBILITY AND ENTITLEMENT

### § 21.5740 Eligibility.

(a) *Establishing eligibility.* To establish eligibility to educational assistance under 10 U.S.C. Chapter 107 an individual must—

(1) Enlist or reenlist for service on active duty as a member of the Army, Navy, Air Force or Marine Corps after September 30, 1980 and before October 1, 1981 specifically for benefits under the provisions of 10 U.S.C. 2141 through 2149, Pub. L. 96–342,

(2) Have graduated from a secondary school,

(3) Meet other requirements as the Secretary of Defense may consider appropriate for the purpose of this chapter and the needs of the Armed Forces,

(4) Meet the service requirements stated in paragraph (b) of this section, and

(5) If a veteran, have been discharged under honorable conditions.

(Authority: 10 U.S.C. 2142(b), 38 U.S.C. 5303A)

(b) *Service Requirements.* (1) The individual must complete 24 continuous months of active duty of the enlistment or reenlistment described in paragraph (a)(1) of this section; or

(2) If the enlistment described in paragraph (a) of this section is the individual's initial enlistment for service on active duty, the individual must—

(i) Complete 24 continuous months of active duty, or

(ii) Be discharged or released from active duty—

(A) Under 10 U.S.C. 1173 (hardship discharge), or

(B) Under 10 U.S.C. 1171 (early-out discharge), or

(C) For a disability incurred in or aggravated in line of duty; or

(iii) Be found by the VA to have a service-connected disability which gives the individual basic entitlement to disability compensation as described in §3.4(b) of this title. Once the VA makes this finding, the individual's eligibility will continue notwithstanding that the disability becomes noncompensable.

(3) In computing time served for the purpose of this paragraph, VA will exclude any period during which the individual is not entitled to credit for service as specified in §3.15 of this title. However, those periods will not interrupt the individual's continuity of service.

(Authority: 10 U.S.C. 2142; 38 U.S.C. 5303A)

[45 FR 31, Jan. 2, 1980, as amended at 54 FR 34984, Aug. 23, 1989]

### §21.5741 Eligibility under more than one program.

(a) *Veterans and servicemembers.* A veteran or servicemember who is eligible for educational assistance under either 38 U.S.C. chapter 31 or 34, or subsistence allowance under 38 U.S.C. chapter 31 may also be eligible for the Educational Assistance Test Program. (See §21.5824 for restrictions on duplication of benefits.)

(b) *Spouse, surviving spouse or dependent child.* A spouse, surviving spouse or dependent child who is eligible to receive educational assistance under 38 U.S.C. Chapters 31, 32, 34 and 35 may also be eligible for the Educational Assistance Test Program. (See §21.5824 for restrictions on duplication of benefits.)

(Authority: 10 U.S.C. 2142)

(c) *Limitation on benefits.* (1) Before March 2, 1984 the 48 month limitation on benefits under two or more programs found in 38 U.S.C. 3695 does not apply to the Educational Assistance Test Program when taken in combination with any program authorized under title 38 U.S.C.

(2) After March 1, 1984 the aggregate period for which any person may receive assistance under the Educational Assistance Test Program and the provisions of any of the laws listed below may not exceed 48 months (or the part-time equivalent thereof):

(i) Part VII or VIII, Veterans Regulations numbered 1(a) as amended,

(ii) Title II of the Veterans' Readjustment Assistance Act of 1952,

(iii) The War Orphans' Educational Assistance Act of 1956,

(iv) Chapters 32, 34, 35 and 36 of title 38 U.S.C. and the former chapter 33,

(v) Section 903 of the Department of Defense Authorization Act, 1981.

(Authority: Pub. L. 96–342, 10 U.S.C. 2141 note)

(vi) The Hostage Relief Act of 1980.

(3) After October 19, 1984 the aggregate period for which any person may

receive assistance under the Educational Assistance Test Program and any of the laws listed in paragraph (c)(2) of this section, may not exceed 48 months (or the part-time equivalent thereof):

(i) Chapter 30 of title 38, U.S.C., and

(ii) Chapter 1606 of title 10, U.S.C.

(Authority: 38 U.S.C. 3695)

[51 FR 27026, July 29, 1986, as amended at 61 FR 20729, May 8, 1996]

### § 21.5742 Entitlement.

(a) *Educational assistance.* A veteran or servicemember shall be entitled to one standard academic year (or the equivalent) of educational assistance for each year of service following the first enlistment beginning after November 30, 1980 (up to a maximum of four years). If the veteran or servicemember completes two years of active duty in the term of enlistment, but fails to complete the enlistment or fails to complete four years of active duty in an enlistment of more than four years, his or her entitlement to educational assistance shall be calculated as follows:

(1) VA shall determine the number of years, months and days in the veteran's qualifying period of service by subtracting the entry on duty date from the release from active duty date. Any deductible time under § 3.15 of this chapter (during the period of service on which eligibility is based) will be excluded from the calculation.

(2) VA shall convert the number of years determined in paragraph (a)(1) of this section to months by multiplying them by 12.

(3) VA shall convert the number of days determined in paragraph (a)(1) of this section to 0 months if there are 14 days or less, and to 1 month is there are more than 14 days.

(4) VA shall determine the number of total months by adding the number of months determined in paragraph (a)(1) of this section (exclusive of years and days) to the number of months determined in paragraph (a)(2) of this section, and the number of months in paragraph (a)(3).

(5) VA shall multiply the number of total months in paragraph (a)(4) of this section by 75.

(Authority: 10 U.S.C. 2142(a)(2))

(b) *Subsistence allowance.* A veteran or servicemember shall be entitled to nine months of subsistence allowance for each standard academic year of entitlement to educational assistance. For each period of entitlement to educational assistance which is shorter than a standard academic year, a veteran or servicemember will be entitled to one month of subsistence allowance for each month of entitlement to educational assistance. This entitlement shall not exceed nine months.

(Authority: 10 U.S.C. 2144)

[51 FR 27026, July 29, 1986, as amended at 51 FR 29471, Aug. 18, 1986]

### § 21.5743 Transfer of entitlement.

(a) *Entitlement may be transferred.* (1) A veteran or servicemember may transfer all or part of his or her entitlement to educational assistance and subsistence allowance to a spouse or dependent child. He or she may not transfer entitlement to more than one person at a time.

(2) The Secretary of the Navy may authorize a member or veteran of the Navy or Marine Corps to make a transfer described in paragraph (a)(1) of this section provided:

(i) The servicemember or veteran has entitlement to educational assistance as provided in § 21.5742;

(ii) The enlistment that established the servicemember's or veteran's entitlement was his or her second reenlistment as a member of the Armed Forces;

(iii) The servicemember or veteran has completed at least four years of active service of that second reenlistment; and

(iv) The servicemember's or veteran's second reenlistment was for a period of at least six years.

(3) No transfer, other than one described in paragraph (a)(2) of this section, may be made until the veteran or servicemember—

(i) Has completed the enlistment upon which his or her entitlement is

based or has been discharged for reasons described in §21.5740(b)(2), and

(ii) Has thereafter reenlisted.

(4) The servicemember or veteran may revoke at any time a transfer described in either paragraph (a) (2) or (3) of this section.

(5) If a veteran attempts to transfer entitlement after 10 years have elapsed from the date he or she has retired, has been discharged or has otherwise been separated from active duty, the transfer shall be null and void.

(Authority: 10 U.S.C. 2147(a), 2148; Pub. L. 99–145)

(b) *Transfer of entitlement upon death of veteran or servicemember.* (1) A veteran's or servicemember's entitlement to educational assistance and subsistence allowance shall be transferred automatically subject to provisions of paragraph (b)(2) of this section, provided he or she—

(i) Completed the enlistment upon which the entitlement is based;

(ii) Thereafter reenlisted;

(iii) Never elected not to transfer entitlement; and

(iv) Dies while on active duty or within 10 years from the date he or she retired, was discharged, or was otherwise separated from active duty.

(2) The veteran's or servicemember's entitlement will be transferred to—

(i) The veteran's or servicemember's surviving spouse, or

(ii) If the veteran or servicemember has no surviving spouse, the veteran's or servicemember's dependent children.

(3) A surviving spouse who receives entitlement under paragraph (b)(2) of this section may elect to transfer that entitlement to the veteran's or servicemember's dependent children.

(4) If a servicemember transfers entitlement and then dies, and the effective date of the transfer is more than 10 years from the date of his or her death, the transfer shall be void. The entitlement will be transferred automatically as provided in paragraph (b)(2) of this section.

(Authority: 10 U.S.C. 2147(a))

(c) *Effect of transfer upon educational assistance and subsistence allowance: veteran or servicemember living.* (1) A person to whom a veteran or servicemember transfers entitlement is entitled to educational assistance and subsistence allowance in the same manner and at the same rate as the person from whom entitlement was transferred.

(2) The total entitlement transferred to the veteran's or servicemember's spouse and children shall not exceed the veteran's or servicemember's remaining entitlement. The veteran or servicemember may transfer entitlement to only one person at a time.

(Authority: 10 U.S.C. 2147)

(d) *Effect of transfer upon educational assistance and subsistence allowance: Veteran or servicemember deceased.* (1) A person to whom entitlement is transferred after the death of a veteran or servicemember is entitled to payment of educational assistance and subsistence allowance in the manner as the veteran or servicemember. The rate of educational assistance and subsistence allowance will be as stated in §§21.5820 and 21.5822.

(2) If entitlement is transferred to more than one person following the death of a veteran or servicemember, the total remaining entitlement to educational assistance and subsistence allowance of all is equal to the total entitlement of the person on whose service entitlement is based.

(Authority: 10 U.S.C. 2147)

(e) *Revocation of a transfer of entitlement.* A surviving spouse who has transferred entitlement to a dependent child may revoke the transfer by notifying VA in writing. A veteran or servicemember who has transferred entitlement may revoke that transfer by notifying VA in writing. The veteran, servicemember or surviving spouse may choose the effective date of the revocation subject to the following conditions:

(1) If the person to whom entitlement is transferred never enters training, the effective date of the revocation may be any date chosen by the veteran, servicemember or surviving spouse who transferred the entitlement.

(2) If the person to whom entitlement is transferred is not in training on the date the VA processes the revocation, but he or she has trained before that

date, the effective date of the revocation may be no earlier than the last date that person was in training for which educational assistance and subsistence allowance were payable.

(3) If the person to whom entitlement is transferred is in training (for which educational assistance and subsistence allowance are payable) on the date the VA processes revocation, the effective date of the revocation may be no earlier than—

(i) The last date of the term, quarter, or semester at the accredited institution where that person is enrolled, or

(ii) If the accredited institution is not organized on a term, quarter or semester basis, the last date of the course or the last date of the school year, whichever is earlier.

(Authority: 10 U.S.C. 2147)

[51 FR 27026, July 29, 1986, as amended at 53 FR 1779, Jan. 22, 1988]

### § 21.5744 Charges against entitlement.

(a) *Charges against entitlement to educational assistance.* (1) Except as provided in paragraph (a)(2) of this section VA will make a charge against an individual's entitlement to educational assistance of—

(i) One month for each month of a term, quarter or semester—

(A) For which the servicemember receives educational assistance, and

(B) During which the servicemember is a full-time student; and

(ii) One-half month for each month of a term, quarter or semester—

(A) For which the individual receives educational assistance, and

(B) During which the servicemember is a part-time student.

(2) VA will prorate the entitlement charge if the individual—

(i) Is a student for only part of a month, or

(ii) The individual is a full-time student for part of a month and a part-time student for part of the same month.

(3) The charge against entitlement to educational assistance should always equal the charge against entitlement to subsistence allowance for the same enrollment period.

(b) *Charges against entitlement to subsistence allowance.* (1) For each individual, except servicemembers, VA will make a charge against an individual's entitlement to subsistence allowance of—

(i) One month for each month the individual is a full-time student receiving subsistence allowance; and

(ii) One-half for each month the individual is a part-time student receiving subsistence allowance.

(2) Even though a servicemember may not receive subsistence allowance, VA will make a charge against a servicemember's entitlement to subsistence allowance of—

(i) One month for each month of a term, quarter or semester—

(A) For which the servicemember received educational assistance and

(B) During which the servicemember is a full-time student; and

(ii) One-half month for each month of a term, quarter or semester—

(A) For which the servicemember received educational assistance, and

(B) During which the individual is a part-time student.

(3) VA will prorate the entitlement charge as stated in paragraph (b) (1) or (2) of this section during any month for which a servicemember receives educational assistance or for which the individual receives subsistence allowance—

(i) For less than a full month, or

(ii) At the full-time rate for part of a month and at the part-time rate for part of the same month.

(Authority: 10 U.S.C. 2142)

### § 21.5745 Period of entitlement.

(a) *Veterans.* The period of entitlement of a veteran expires on the first day following ten years from the date the veteran retires or is discharged or otherwise separated from active duty.

(Authority: 10 U.S.C. 2148; Pub. L. 96–342)

(b) *Spouses, surviving spouses, and dependent children.* If the veteran's or servicemember's entitlement is transferred, the period of entitlement of the spouse, surviving spouse, or dependent child expires 10 years from—

(1) The date the veteran retires, is discharged or otherwise separated from active duty, or

(2) If the servicemember dies on active duty, the date of the servicemember's death.

(Authority: 10 U.S.C. 2148)

COURSES

### §21.5800 Courses.

(a) *Courses permitted.* An individual may receive educational assistance and subsistence allowance only while receiving instruction in a postsecondary course offered at any institution in the United States (including the District of Columbia, the Commonwealth of Puerto Rico, Guam and the U.S. Virgin Islands) that is accredited by a nationally recognized accrediting agency or association or by an accrediting agency or association recognized by the Secretary of Education.

(Authority: 10 U.S.C. 2142)

(b) *Courses precluded.* An individual shall receive neither educational assistance nor subsistence allowance while pursuing any of the following courses:

(1) A course offered at the secondary level or below;

(2) A course offered by an institution located outside the United States (except in Guam, the Commonwealth of Puerto Rico and the U.S. Virgin Islands);

(3) A course offered by a nonaccredited institution; and

(4) Courses which do not require the student to receive instruction at the institution. These include—

(i) Correspondence courses,

(ii) Combination correspondence—residence courses, and

(iii) Courses offered through independent study.

(Authority: 10 U.S.C. 2143)

CERTIFICATIONS

### §21.5810 Certifications of enrollment.

(a) *Enrollment certifications.* An individual who wishes to receive educational assistance and subsistence allowance shall ensure that the accredited institution he or she is attending certifies the individual's enrollment to VA.

(Authority: 10 U.S.C. 2141)

(b) *Content of certification.* The certification should include—

(1) The number of credit hours or clock hours in which the individual is enrolled;

(2) The amount of the cost of tuition, fees, books, laboratory fees, and shop fees for consumable materials used as part of classroom or laboratory instruction which the individual will incur during the period of enrollment; and

(3) The beginning and ending dates of the period of enrollment.

(Authority: 10 U.S.C. 2142)

(c) *Length of certification.* A school should not certify more than one term, quarter or semester at a time.

(Authority: 10 U.S.C. 2141)

(Approved by the Office of Management and Budget under control number 2900–0073)

### §21.5812 Reports of withdrawals and terminations of attendance and changes in training time.

(a) *Reports of withdrawals and terminations of attendance.* (1) An individual shall report to VA facility of jurisdiction whenever he or she withdraws from school or terminates his or her attendance. He or she shall report the last day of attendance. The individual may request that the school verify this information.

(2) The report shall include—

(i) The date of withdrawal or last date of attendance, as appropriate; and

(ii) The amount of educational expenses actually incurred by the individual during the period of enrollment before the date of withdrawal, or if the individual does not formally withdraw when he or she stops attending the amount of educational expenses actually incurred by the individual during the period of enrollment before the last date of attendance.

(Authority: 10 U.S.C. 2141)

(b) *Reports of changes in training.* (1) An individual shall report to the VA field station of jurisdiction each time

the individual increases or decreases the number of credit hours or clock hours of training in which he or she is enrolled or otherwise alters the duration of the enrollment.

(2) The report shall include—

(i) The new number of credit hours or clock hours in which the individual is enrolled;

(ii) The amount of educational expenses, enumerated in § 21.5810(b)(2), which the individual will incur during the revised period of enrollment; and

(iii) The effective date of the change in the number of credit hours or clock hours, including any revision in the term of the enrollment.

(3) The individual or VA may ask the school to verify the individual's reports of changes in training.

(Authority: 10 U.S.C. 2141)

(Approved by the Office of Management and Budget under control number 2900–0156)

### § 21.5816 False or fraudulent claims.

Each individual, or school officer or official shall be subject to civil penalties or criminal penalties, or both, under applicable Federal law for submitting a false or fraudulent report, revision to a report, or verification of accuracy of a report used to support an individual's claim, even though the report or verification is provided gratuitously or voluntarily to VA.

(Authority: 31 U.S.C. 3729–3731, 18 U.S.C. 1001)

## PAYMENTS—EDUCATIONAL ASSISTANCE AND SUBSISTENCE ALLOWANCE

### § 21.5820 Educational assistance.

(a) *Educational assistance.* Educational assistance will be paid to cover the educational expenses incurred by an eligible servicemember, veteran, spouse, surviving spouse or dependent child while attending an accredited institution. Educational assistance payments will be made to the eligible individual.

(1) The educational expenses are limited to—

(i) Tuition,

(ii) Fees,

(iii) Cost of books,

(iv) Laboratory fees, and

(v) Shop fees for consumable materials used as part of classroom or laboratory instruction.

(2) Educational expenses may not exceed those normally incurred by students at the same educational institution who are not eligible for benefits from the educational assistance test program.

(Authority: 10 U.S.C. 2143(a))

(b) *Amount of educational assistance.* (1) The amount of educational assistance will be adjusted annually by regulation. For the 2003–04 standard academic year the amount of this assistance may not exceed $4,219.

(2) The amount of educational assistance payable to a servicemember, veteran, spouse or dependent child of a living servicemember or veteran for an enrollment period will be the lesser of the following:

(i) The total charges for educational expenses the eligible individual incurs during the enrollment period, or

(ii) For the 2003–04 standard academic year an amount determined by:

(A) Multiplying the number of whole months in the enrollment period by $468.78 for a full-time student or by $234.39 for a part-time student;

(B) Multiplying any additional days in the enrollment period by $15.63 for a full-time student or by $7.81 for a part-time student; and

(C) Adding the two results. If the enrollment period is as long as or longer than the standard academic year, this amount will be decreased by 2 cents for a full-time student and decreased by 1 cent for a part-time student.

(3) The amount of educational assistance payable to each surviving spouse or dependent child of a deceased servicemember or veteran for an enrollment period will be the lesser of the following:

(i) The total charges for educational expenses the eligible individual incurs during the enrollment period, or

(ii) For the 2003–04 standard academic year an amount determined by:

(A) Multiplying the number of whole months in the enrollment period by $468.78 for a full-time student or by $234.39 for a part-time student;

(B) Multiplying any additional days in the enrollment period by $15.63 for a

full-time student or by $7.81 for a part-time student; and

(C) Adding the two results. If the enrollment period is as long as or longer than a standard academic year, this amount will be decreased by 2 cents for a full-time student and decreased by 1 cent for a part-time student; and

(D) Dividing the amount determined in paragraph (b)(3)(ii)(C) of this section by the number of the deceased veteran's dependents receiving educational assistance for that enrollment period. If one or more dependents is receiving educational assistance for part of the enrollment period, the amount calculated in paragraph (b)(3)(ii)(C) will be prorated on a daily basis. The amount for each day when more than one dependent is receiving educational assistance will be divided by the number of dependents receiving educational assistance on that day. The total amount for the days when only one dependent is receiving educational assistance will not be divided.

(Authority: 10 U.S.C. 2143, 2145)

(c) *Time of educational assistance payments.* VA will make payments of educational assistance at the end of the first month of each semester, quarter or term in which the individual is entitled to such a payment, provided VA receives a timely enrollment certification. If VA receives the enrollment certification so late that payment cannot be made at the end of the month in which the individual is enrolled, VA will make payment as soon as practicable.

(Authority: 10 U.S.C. 2143)

[51 FR 27026, July 29, 1986]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 21.5820, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

### § 21.5822 Subsistence allowance.

(a) *Subsistence allowance.* Except as provided in paragraph (a)(2) of this section, VA will pay subsistence allowance to a veteran, spouse, surviving spouse or dependent child during any period for which he or she is entitled to educational assistance. No subsistence allowance is payable to:

(1) A servicemember, even if he or she is entitled to educational assistance, or

(2) A spouse or dependent child of a servicemember, even if the spouse or dependent child is entitled to educational assistance.

(Authority: 10 U.S.C. 2144(a))

(b) *Amount of subsistence allowance.* (1) The following rules govern the amount of subsistence allowance payable to veterans and to spouses and dependent children of veterans who are alive during the period for which subsistence allowance is payable. As stated in paragraph (a) of this section, these amounts are payable only for periods during which the veterans, spouses or dependent children are entitled to educational assistance.

(i) If a person is pursuing a course of instruction on a full-time basis, his or her subsistence allowance is $1,051 per month for training pursued during the 2003–04 academic year.

(ii) If a person is pursuing a course of instruction on other than a full-time basis, his or her subsistence allowance is $525.50 per month for training pursued during the 2003–04 academic year.

(iii) If a person does not pursue a course of instruction for a complete month VA will prorate the subsistence allowance for that month on the basis of 1/30th of the monthly rate for each day the person is pursuing the course.

(2) The following rules govern the amount of subsistence allowance payable to surviving spouses and dependent children of deceased veterans and servicemembers.

(i) VA will determine the monthly rate of subsistence allowance payable to a person for a day during which he or she is pursuing a course of instruction full-time during the 2003–04 academic year by dividing $1,051 per month by the number of the deceased veteran's dependents pursuing a course of instruction on that day.

(ii) VA will determine the monthly rate of subsistence allowance payable to a person for a day during which he or she is pursuing a course of instruction on other than a full-time basis during the 2003–04 academic year by dividing $525.50 per month by the number of the deceased veteran's dependents

pursuing a course of instruction on that day.

(Authority: 10 U.S.C. 2144, 2145)

(iii) The total amount of subsistence allowance payable to a person for a month is the sum of the person's daily rates for the month.

(c) *Time of subsistence allowance payments.* VA will make payments of subsistence allowance on the first day of the month following the month for which subsistence allowance is due, provided that VA receives a timely enrollment certification. If VA receives the enrollment certification so late that payment cannot be made on the first day of the month following the month for which subsistence allowance is due, VA will make payment as soon as practicable.

(Authority: 10 U.S.C. 2144)

[51 FR 27026, July 29, 1986]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 21.5822, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

### § 21.5824 Nonduplication: Federal progams.

(a) *Duplication of some benefits prohibited.* An individual who is receiving educational assistance under programs authorized by 38 U.S.C. Chapters 30, 31, 32, 34, 35 or 36 may not receive concurrently either educational assistance or subsistence allowance under the §§ 21.5700, 21.5800 and 21.5900 series of regulations for the same program of education, but may receive them sequentially.

(b) *Debts may result from duplication.* (1) If an individual receives benefits under 38 U.S.C. Chapters 30, 31, 32, 34, 35 or 36 for training, and he or she has previously received educational assistance or subsistence allowance (or both) under §§ 21.5700, 21.5800, 21.5900 series of regulations the amount of the benefits received under 38 U.S.C. Chapters 30, 31, 32, 34 or 35 shall not constitute a debt due the United States.

(2) If an individual receives benefits under 38 U.S.C. Chapter 34, and had signed an agreement with the Department of Defense to waive those benefits in return for receiving benefits under the educational assistance test program:

(i) Any benefits already paid under the educational assistance test program will constitute a debt due the United States, and

(ii) No further benefits under the educational assistance test program will be paid to the individual or to anyone to whom entitlement may be transferred.

(Authority: 10 U.S.C. 2141)

### § 21.5828 False or misleading statements.

(a) *False statements.* An individual who attempts to obtain educational assistance or subsistance allowance or both through submission of false or misleading statements is subject to civil penalties or criminal penalties or both under applicable Federal law.

(Authority: 31 U.S.C. 3729–3731; 18 U.S.C. 1001)

(b) *Effect of false statements on subsequent payments.* A determination that false or misleading statements have been made will not constitute a bar to payments based on training to which the false or misleading statements do not apply.

(Authority: 10 U.S.C. 2141, 2144)

### § 21.5830 Payment of educational assistance.

(a) *Timing and release of payments.* VA will pay educational assistance to the individual on the last day of the calendar month during which the individual enters or reenters training.

(Authority: 10 U.S.C. 2143)

(b) *Period covered by payments.* The payments cover those expenses, listed in § 21.5820(a) incurred for the period beginning on the commencing date of the individual's subsistence allowance and ending on the ending date of the individual's subsistence allowance. See § 21.5831.

(Authority: 10 U.S.C. 2143)

**§21.5831 Commencing date of subsistence allowance.**

The commencing date of an award or increased award of subsistence allowance will be determined by this section

(a) *Entrance or reentrance.* Latest of the following dates:

(1) Date certified by school or establishment under paragraph (b) or (c) of this section.

(2) Date 1 year before the date of receipt of the application or enrollment certification.

(3) Date of reopened application under paragraph (d) of this section.

(4) In the case of a spouse, surviving spouse, or dependent child, the date that transfer of eligibility and entitlement to the individual was effective.

(Authority: 10 U.S.C. 2144)

(b) *Certification by the school-course leads to a standard college degree.* The date of registration or the date of reporting where the student is required by the school's published standard to report in advance of registration, but not later than the date the individual first reports for classes.

(Authority: 10 U.S.C. 2144)

(c) *Certification by school or establishment-course does not lead to a standard college degree.* First date of class attendance.

(Authority: 10 U.S.C. 2144(a))

(d) *Reopened application after abandonment.* Date of receipt in VA of application or enrollment certification, whichever is later.

(e) *Increase due to increased training time.* The date the school certifies the individual became a full-time student.

(f) *Liberalizing laws and administrative issues.* In accordance with facts found, but not earlier than the effective date of the act or administrative issue.

(Authority: 10 U.S.C. 2144)

(g) *Correction of military records.* When a veteran becomes eligible following corection or modification of military records under 10 U.S.C. 1552 or change, correction or modification of a discharge or dismissal under 10 U.S.C. 1553; or other competent military authority, the commencing date of subsistence allowance will be in accordance with the facts found, but not earlier than the date the change, correction or modification was made by the service department.

(Authority: 10 U.S.C. 2142)

**§21.5834 Discontinuance dates: General.**

(a) *Educational assistance.* Although educational assistance is paid only once in a term, quarter, or semester, VA may discontinue it under the circumstances stated in §21.5835. The discontinuance may cause an overpayment. (See also §21.5838.) If the individual dies during an enrollment period, the provisions of §21.5835(a) will apply, even if other types of discontinuances are involved. In all other cases where more than one type of reduction or discontinuance is involved, the earliest date found in §21.5835 will control.

(Authority: 10 U.S.C. 2143)

(b) *Subsistance allowance.* The effective date of a reduction or discontinuance of subsistence allowance will be as specified in §21.5835. If more than one type of discontinuance is involved, the earliest date will control.

(Authority: 10 U.S.C. 2144)

**§21.5835 Specific discontinuance dates.**

The following rules will govern reduction and discontinuance dates for educational assistance and subsistence allowance.

(a) *Death of individual.* If an individual dies—

(1) VA will discontinue educational assistance effective the last day of the most recent term, quarter, semester or enrollment period of which the individual received educational assistance.

(2) VA will discontinue subsistence allowance effective the individual's last date of attendance.

(Authority: 10 U.S.C. 2144)

(b) *Lump-sum payment.* When a servicemember accepts a lump-sum payment in lieu of educational assistance, VA will discontinue educational assistance effective the date on which

he or she elects to receive the lump-sum payment.

(Authority: 10 U.S.C. 2146)

(c) *Reduction due to decreased training time.* (1) If a decrease in an individual's training time requires a decrease in educational assistance, the decrease is effective the end of the month in which the individual become a part-time student or the end of the term, whichever is earlier.

(2) When an individual decreases his or her training time from full-time to part-time, VA will decrease his or her subsistence allowance effective the end of the month in which the individual became a part-time student, or the end of the term, whichever is earlier.

(Authority: 10 U.S.C. 2143, 2144)

(d) *Course discontinued, interrupted, terminated or withdrawn from.* If an individual withdraws, discontinues, ceases to attend, interrupts or terminates all courses, VA will discontinue educational assistance and subsistence allowance effective the last date of attendance.

(Authority: 10 U.S.C. 2143)

(e) *False claim.* VA will discontinue educational assistance and subsistence allowance effective the first day of the term for which the false claim is submitted.

(Authority: 10 U.S.C. 2141)

(f) *Withdrawal of accreditation.* If an accrediting agency withdraws accreditation from a course in which an individual is enrolled, VA will discontinue educational assistance and subsistence allowance effective the end of the month in which the accrediting agency withdrew accreditation, or the end of the term, whichever is earlier.

(Authority: 10 U.S.C. 2143(c), 2144)

(g) *Remarriage of surviving spouse.* VA will discontinue educational assistance and subsistence allowance effective the last date of attendance before the date on which the surviving spouse remarries.

(Authority: 10 U.S.C. 2147(d))

(h) *Divorce.* If entitlement has been transferred to the veteran's or servicemember's spouse, and the spouse is subsequently divorced from the veteran or servicemember, the spouse's award of educational assistance and subsistence allowance will end on the last date of attendance before the divorce decree becomes final.

(Authority: 10 U.S.C. 2147(d))

(i) *Revocation of transfer.* If a veteran or servicemember revokes a transfer of entitlement, the spouse's or dependent child's award of educational assistance will end on the effective date of the revocation. See § 21.5743(e).

(Authority: 10 U.S.C. 2147)

(j) *Dependent child ceases to be dependent: veteran or servicemember living.* If a veteran or servicemember is living and has transferred entitlement to his or her dependent child who is not incapable of self support due to physical or mental incapacity, VA will discontinue the dependent child's award of educational assistance and subsistence allowance whenever the child does not meet the definition of a *dependent child* found in § 21.5720(c). The effective date of discontinuance is the earliest of the following:

(1) The child's 21st birthday, if on that date—

(i) The veteran or servicemember is not providing over one-half the child's support, or

(ii) The child is not enrolled in a full-time course of study in an institution of higher learning approved by the Secretary of Defense or the Secretary of Education, as the case may be;

(2) The date, following the child's 21st birthday, on which the veteran or servicemember stops providing over one-half the child's support;

(3) The date, following the child's 21st birthday, on which he or she is no longer enrolled in a full-time course of study in an institution of higher learning approved by the Secretary of Defense or the Secretary of Education, as the case may be;

(4) The child's 23rd birthday;

(5) the date the child marries.

(Authority: 10 U.S.C. 2147(d))

(k) *Dependent child ceases to be dependent: veteran or servicemember deceased.* If a veteran or servicemember is deceased and his or her dependent child is not incapable of self support due to physical or mental incapacity, VA will discontinue the dependent child's award of educational assistance whenever the child does not meet the definition of a *dependent child* found in §21.5720(c). The effective date of discontinuance is the earliest of the following:

(1) The day after the child's 21st birthday, if on that date the child is not enrolled in a full-time course of study in an institution of higher learning approved by the Secretary of Defense or the Secretary of Education, as the case may be;

(2) The date following the child's 21st birthday on which he or she is no longer enrolled in a full-time course of study in an institution of higher learning approved by the Secretary of Defense or the Secretary of Education, as the case may be;

(3) The child's 21st birthday; or

(4) The date the child marries.

(Authority: 10 U.S.C. 2147(d))

### §21.5838 Overpayments.

(a) *Educational assistance.* If an individual receives educational assistance but the educational assistance must be discontinued according to §21.5835, the amount of educational assistance attributable to the portion of the term, quarter or semester following the effective date of discontinuance shall constitute a debt due the United States.

(1) The amount of the debt is equal to the product of—

(i) The number of days the individual was entitled to receive subsistence allowance during the enrollment period for which educational assistance was paid, divided by the total number of days in that enrollment period, and

(ii) The amount of educational assistance provided for that enrollment period.

(2) Nothing in this method of calculation shall change the fact that the number of months of educational assistance to which the individual remains entitled shall always be the same as the number of months of subsistence allowance to which the individual is entitled.

(Authority: 10 U.S.C. 2143)

(b) *Subsistence allowance.* If an individual receives subsistence allowance under any of the following conditions, the amount of that subsistence allowance shall constitute a debt due the United States unless the debt is waived as provided by §§1.955 through 1.970 of this chapter.

(1) Subsistence allowance received for courses pursued while on active duty;

(2) Subsistence allowance received for courses which are precluded under §21.5800(b);

(3) Subsistence allowance received by a person who is not eligible for educational assistance under §21.5740;

(4) Subsistence allowance received by an individual who has exhausted all entitlement provided under §21.5742;

(5) Subsistence allowance received by an individual for a period before the commencing date determined by §21.5831.

(6) Subsistence allowance received by an individual for a period following a discontinuance date determined by §21.5835.

(7) Subsistence allowance received by an individual in excess of the part-time rate for a period following a reduction date determined by §21.5835.

(Authority: 10 U.S.C. 2144)

MEASUREMENT OF COURSES

### §21.5870 Measurement of courses.

(a) *Credit hour measurement: undergraduate, standard term.* An individual who enrolls in a standard quarter or semester for 12 undergraduate credit hours is a full-time student. An individual who enrolls in a standard quarter or semester for less than 12 undergraduate credit hours is a part-time student.

(Authority: 10 U.S.C. 2144(c))

(b) *Credit hour measurement: Undergraduate, nonstandard term.* (1) If an individual enrolls in a nonstandard term, quarter or semester, and the school measures the course on a credit-hour basis, VA will determine whether that individual is a full-time student by—

(i) Multiplying the credits earned in the term by 18 if credit is granted in semester hours, or by 12 if credit is granted in quarter hours, and

(ii) Dividing the product by the number of whole weeks in the term.

(2) In determining whole weeks VA will—

(i) Divide the number of days in the term by 7;

(ii) Disregard a remainder of 3 days or less, and

(iii) Consider 4 days or more to be a whole week.

(3) If the number obtained by using the formula in paragraphs (b)(1) and (2) of this section is 12 or more, the individual is a full-time student. If that number is less than 12, the individual is a part-time student.

(c) *Credit hour measurement: graduate.* (1) If it is the established policy of a school to consider less than 12 credit hours to be full-time for graduate students, VA will accept the statement of a responsible school offical as to whether the student is a full-time or part-time student. If the school does not have such a policy, VA will measure the student's enrollment according to the provisions of paragraphs (a) and (b) of this section.

(2) VA will measure undergraduate courses required by the school according to the provisions of paragraphs (a) and (b) of this section, even though the individual is enrolled as a graduate student. If the individual is taking both graduate and undergraduate courses, the school will report the credit-hour equivalent of the graduate work. VA will first measure the undergraduate courses according to the provisions of paragraphs (a) and (b) of this section and combine the result with the credit-hour equivalent of the graduate work in order to determine the extent of training.

(d) *Clock hour measurement.* (1) If an individual enrolls in a course measured in clock hours and shop practice is an integral part of the course, he or she is a full-time student when enrolled in 22 clock hours or more per week with not more than a 2½ hour rest period allowance per week. For all other enrollments the individual is a part-time student. VA will exclude supervised study in determining the number of clock hours in which the individual is enrolled.

(2) If an individual enrolls in a course measured in clock hours and theory and class instruction predominate in the course, he or she is a full-time student enrolled in 18 clock hours or more per week. He or she is a part-time student when enrolled in less than 18 clock hours per week. Customary intervals not to exceed 10 minutes between classes will be included in measuring net instruction. Shop practice, rest periods, and supervised study are excluded. Supervised instruction periods in schools' shops and the time involved in field trips and individual and group instruction may be included in computing the clock hour requirements.

(Authority: 10 U.S.C. 2144(c))

ADMINISTRATIVE

## § 21.5900 Administration of benefits program—chapter 107, title 10 U.S.C.

In administering benefits payable under Chapter 107, Title 10 U.S.C, VA will be bound by the provisons of the §§ 21.5700, 21.5800 and 21.5900 series of regulations.

(Authority: 10 U.S.C. 2144(c))

## § 21.5901 Delegations of authority.

(a) *General delegation of authority.* Except as otherwise provided, authority is delegated to the Under Secretary for Benefits and to supervisory or adjudication personnel within the jurisdiction of the Education Service of VA, designated by him or her to make findings and decisions under 10 U.S.C. chapter 107 and the applicable regulations, precedents and instructions concerning the program authorized by these regulations.

(Authority: 10 U.S.C. 2144(c))

(b) *Delegation of authority concerning the Civil Rights Act of 1984.* The Under Secretary for Benefits is delegated the responsibility to obtain evidence of voluntary compliance with title VI of

the Civil Rights Act of 1964 from educational institutions and from recognized national organizations whose representatives are afforded space and office facilities under his or her jurisdiction. See part 18 of this title.

(Authority: 42 U.S.C. 2000)

[51 FR 27026, July 29, 1986, as amended at 62 FR 55761, Oct. 28, 1997]

## Subpart I—Temporary Program of Vocational Training for Certain New Pension Recipients

AUTHORITY: Pub. L. 98–543, 38 U.S.C. 501 and chapter 15, sections specifically cited, unless otherwise noted.

SOURCE: 53 FR 4397, Feb. 16, 1988, unless otherwise noted.

NOTE: This subpart includes regulations governing the determination of eligibility, and the services which may be provided to veterans under this program. The numbering of the regulations follows the numbering of regulations under 38 U.S.C. chapter 31 to the extent possible. Additional regulations affecting this program are found in part 3 and part 17, Title 38 Code of Federal Regulations.

GENERAL

### § 21.6001 Temporary vocational training program for certain pension recipients.

This program provides certain veterans awarded pension with an evaluation and, if feasible, with vocational training, employment assistance and other services to enable them to achieve a vocational goal.

(Authority: 38 U.S.C. 1524, Pub. L. 100–687).

[55 FR 17271, Apr. 24, 1990]

### § 21.6005 Definitions.

(a) *Temporary program.* The term *temporary program* means the program of vocational training for certain pension recipients authorized by section 1524, chapter 15, title 38 U.S.C.

(Authority: 38 U.S.C. 1524, Pub. L. 100–687).

(b) *Program period.* The term *program period* means the period beginning on February 1, 1985, and ending on December 31, 1992.

(Authority: 38 U.S.C. 1524(a)(4); Pub. L. 102–291).

(c) *Qualified veteran.* The term *qualified veteran* means—

(1) A veteran awarded disability pension during the program period; or

(2) A veteran who was awarded disability pension prior to the beginning of the program period on February 1, 1985, has been continuously in receipt of pension since that time, and is in receipt of pension on the date his or her claim for assistance under the vocational training program is received by VA.

(Authority: 38 U.S.C. 1524(a), Pub. L. 100–687).

(d) *Program participant.* The term *program participant* means a qualified veteran as defined in paragraph (c) of this section who, following an evaluation in which VA finds achievement of a vocational goal is reasonably feasible for the veteran, elects to participate in a vocational training program.

(Authority: 38 U.S.C. 1524(a), Pub. L. 100–687).

(e) *Vocational training program.* The term *vocational training program* means vocationally oriented services and assistance of the kind provided under chapter 31 of the title 38 U.S.C. and such other services and assistance of the kind provided under that chapter as are necessary to enable the veteran to prepare for, and participate in, vocational training or employment.

(Authority: 38 U.S.C. 1524(b))

(f) *Employment assistance.* The term *employment assistance* means employment counseling and placement and postplacement services, and personal and work adjustment training.

(Authority: 38 U.S.C. 1524(d)(3))

(g) *Program of employment services.* The term *program of employment services* is used when the veteran's entire program is limited to employment assistance as that term is defined in paragraph (f) of this section.

(Authority: 38 U.S.C. 1524(b)(4))

(h) *Job development.* The term *job development* means comprehensive professional services to assist the individual veteran to actually obtain a suitable

job, and not simply the solicitation of jobs on behalf of the veteran.

(Authority: 38 U.S.C. 1524(b)(3)).

(i) *Institution of higher learning.* The term *institution of higher learning* shall have the same definition as is provided in § 21.4200(a) of this part.

(Authority: 38 U.S.C. 1524(b)(2))

(j) *Other terms.* The following terms shall have the same meaning or explanation provided in § 21.35 of this part.

(1) Vocational goal.

(2) Program of education.

(3) Rehabilitation to the point of employability.

(4) Counseling psychologist.

(5) Vocational rehabilitation specialist.

(6) School, educational institution or institution.

(7) Training establishment.

(8) Rehabilitation facility.

(9) Workshop.

(Authority: 38 U.S.C. 1524)

[53 FR 4397, Feb. 16, 1988, as amended at 55 FR 17271, Apr. 24, 1990; 57 FR 28086, June 24, 1992; 58 FR 41637, Aug. 5, 1993]

### § 21.6010 Applicability of rules and administrative procedures under 38 U.S.C., Chapter 31.

(a) *General.* Title 38 U.S.C., section 1524(b)(2)(A) provides, in part, that a vocational training program shall consist of vocationally oriented services and assistance of the kind provided service-disabled veterans under chapter 31, Title 38 U.S.C., and other services and assistance of the kind provided under that chapter as are necessary to enable the veteran to prepare for and participate in vocational training or employment.

(Authority: 38 U.S.C. 1524(b)(2)(A))

(b) *Applicable chapter 31 rules—general.* The rules and procedures in force for administration of the chapter 31 program (§ 21.1–§21.430) are deemed to be applicable to administration of this program in so far as their use shall not conflict with 38 U.S.C. 1524 or the rules under this subpart. Where a particular grouping of chapter 31 rules are generally applicable, without modification, the rules under this subpart will be deemed to incorporate the chapter 31 rules. The chapter 31 rules may be read as written, but terms such as *chapter 31* and *service-connected disability* shall be understood to read *chapter 15* and *disabilities* whenever used. References in the chapter 31 rules to benefits (subsistence allowances, loans) or eligibility (dependents, service-connection, serious employment handicap) are to be considered inapplicable to this program and do not confer benefits or rights not provided by 38 U.S.C. 1524.

(Authority: 38 U.S.C. 1524)

### § 21.6015 Claims and elections.

(a) *Claims by veterans under age 45 for whom participation in an evaluation is required.* A veteran under age 45 who is awarded pension during the program period will be scheduled for an evaluation to determine whether achievement of a vocational goal is reasonably feasible, unless it is determined that the veteran is unable to participate in an evaluation for reasons beyond his or her control. If VA, as a result of the evaluation, determines that achievement of a vocational goal is reasonably feasible, the veteran may elect to pursue a vocational training prgoram. To make this election, the veteran must file a claim, in a form prescribed by VA, for services under this temporary program.

(Authority: 38 U.S.C. 1524(b); Pub. L. 100–687, Pub. L. 100–687, Pub. L. 101–237).

(b) *Claims by qualified veterans for whom participation in an evaluation is not required.* Qualified veterans in the following categories will be provided an evaluation if they request assistance under the temporary program, and are found to have good employment potential. These veterans include:

(1) Veterans age 45 and more who are awarded pension during the program period;

(2) Veterans awarded pension prior to the beginning of the program period on

February 1, 1985, who meet the conditions contained in §21.6005(c) of this part.

(Authority: 38 U.S.C. 1524(b), Pub. L. 100–687, Pub. L. 101–237).

(c) *Filing a claim.* A veteran in one of the categories identified in paragraph (b) of this section must file a claim in the form prescribed by VA in order to be considered for an evaluation of his or her ability to achieve a vocational goal through participation in this temporary program. The veteran's claim is considered a request for both the evaluation, and if achievement of a vocational goal is found reasonably feasible, for participation in the vocational training program.

(Authority: 38 U.S.C. 1524, Pub. L. 100–687).

(d) *Claims following failure to timely pursue a vocational training program.* (1) If a veteran for whom achievement of a vocational goal is found reasonably feasible does not undertake a vocational training program within the time limits specified in §21.32, he or she must file an original or reopened claim, as appropriate, in a form prescribed by VA in order to be considered for such services to determine if achievement of the previous vocational goal or a new vocational goal is reasonably feasible.

(2) If a veteran has been placed in discontinued case status by the VA, he or she must file a new claim in a form prescribed by the VA to reopen the case.

(Authority: 38 U.S.C. 1524(b))

(e) *Informal claims.* Informal claims shall be governed by §21.31 of this part.

(Authority: 38 U.S.C. 1524(a))

(f) *Time limit.* The time limit for making a claim to pursue a vocational training program shall be governed by §21.32 of this part.

(Authority: 38 U.S.C. 1524(a))

[53 FR 4397, Feb. 16, 1988, as amended at 55 FR 17271, Apr. 24, 1990; 56 FR 21448, May 9, 1991]

## §21.6021 Nonduplication—38 U.S.C., chapters 30, 31, 32, 34 and 35.

(a) *Election between this temporary program and chapter 31 required.* A service-disabled veteran awarded VA pension who is offered a vocational training program under 38 U.S.C. chapter 15 and is also eligible for such assistance under chapter 31, must elect which benefit he or she will receive. The veteran may reelect at any time if he or she is still eligible for the benefit desired.

(Authority: 38 U.S.C. 1524(b)(2); Pub. L. 100–687).

(b) *VA educational assistance programs.* A veteran who is eligible under this program may receive an educational assistance allowance under chapter 30, 32, 34 or 35 if he or she is otherwise eligible under one of these programs.

(Authority: 38 U.S.C. 1524(b)(2))

(c) *Prior training under VA programs.* If a veteran has pursued an educational or training program under chapter 30, 32, 34 or 35, or a vocational rehabilitation program under chapter 31, the training received in the earlier program shall be considered, to the extent feasible, in determining the character and duration of the services to be furnished under this program.

(Authority: 38 U.S.C. 1524(b)(1))

(d) *Other prior training.* If a veteran has pursued other significant training under non-VA programs or on his or her own, such training will be considered in determining the character and duration of services to be furnished.

(Authority: 38 U.S.C. 1524(b)(1))

(e) *Not limited by use of other entitlement.* The number of months of services provided under this program are not subject to the provisions of §21.4020 of this part which limit the aggregate months of VA benefits to be provided.

(Authority: 38 U.S.C. 1524(b)(2))

[53 FR 4397, Feb. 16, 1988, as amended at 55 FR 17272, Apr. 24, 1990]

BASIC ELIGIBILITY REQUIREMENTS

**§ 21.6040 Eligibility for vocational training and employment assistance.**

(a) *Basic eligibility requirements.* A veteran may be provided vocational training, employment assistance and related services to achieve a vocational goal under this program, if the following basic requirements are met:

(1) The veteran is a qualified veteran as described in § 21.6005(c) of this part;

(2) The veteran participates in a VA evaluation of his or her rehabilitation potential to determine whether achievement of a vocational goal is reasonably feasible;

(3) Achievement of a vocational goal is found reasonably feasible, following evaluation by VA;

(4) The veteran elects to pursue a vocational training program;

(5) The veteran and VA develop and agree to an Individualized Written Rehabilitation Plan (IWRP) identifying the vocational goal and the means through which this goal will be achieved.

(Authority: 38 U.S.C. 1524(a)(1))

(b) *Eligibility for employment assistance.* (1) As provided in this paragraph, a veteran who is a participant in this program shall be eligible to receive counseling, placement, postplacement, work and personal adjustment services furnished under § 21.6060(a)(2) of this part for a period not to exceed 18 months. These services are further described in §§ 21.140(d)(2), 21.250(a), (b)(2), (c)(3), and (4), and 21.252, 21.254, 21.256, 21.257, and 21.258 of this part.

(2) The participants who qualify for the services described in paragraph (a) of this section include a veteran who:

(i) Has completed a vocational rehabilitation training program;

(Authority: 38 U.S.C. 1524(b)(3))

(ii) Undertakes a vocational training program, but voluntarily terminates training. If VA determines the veteran to be employable at the time participation in training ends, the veteran shall be deemed to have completed the vocational training program and may be provided the employment services described in paragraph (b)(1) of this section if he or she requests such assistance;

(Authority: 38 U.S.C. 1524(b)(3))

(iii) Does not require a vocational training program because VA determines as a result of an evaluation that he or she already possesses the training necessary for suitable employment and is able to achieve a vocational goal without further training; and

(Authority: 38 U.S.C. 1524(b)(2))

(iv) Has been a prior participant in a vocational training program, is currently employable, but needs employment assistance to obtain employment in a suitable occupation.

(Authority: 38 U.S.C. 1524(b)(2))

(3) The 18-month period of employment services allowed under this section shall begin upon the date that a veteran under paragraph (b)(2)(i) of this section completes the vocational training program or in the case of a veteran under paragraphs (b)(2)(ii), (iii), and (iv) of this section is found to be employable. If a veteran has been provided such services and obtains suitable employment, but is later found to require additional services of this kind, the veteran may be provided such additional services during any portion of the original 18-month period remaining.

(Authority: 38 U.S.C. 1524(b); Pub. L. 100–687).

(c) *Eligibility if pension is terminated.* A qualified veteran for whom a program of vocational training has been found reasonably feasible shall remain eligible for the temporary program, subject to the rules of this subpart and section 1524 of 38 U.S.C. ch. 15, even if his or her pension award is subsequently terminated, except when the veteran's award of VA pension was the result of fraud or administrative error.

(Authority: 38 U.S.C. 1524(a); Pub. L. 100–687).

[53 FR 4397, Feb. 16, 1988, as amended at 55 FR 17272, Apr. 24, 1990]

**§ 21.6042 Entry, reentry and completion.**

(a) *Dates of entry.* A veteran found eligible under the provisions of § 21.6040 of

this part may not begin pursuit of a vocational training program before February 1, 1985, or later than December 31, 1992, except under the following circumstances:

(1) The veteran receives a pension award less than 120 days before December 31, 1992;

(2) Illness or other circumstance beyond the veteran's control prevent earlier entry.

(Authority: 38 U.S.C. 1524(b)(4); Pub. L. 102–291)

(b) *Entry precluded.* In no event may a veteran begin a vocational training program after August 1, 1993.

(Authority: 38 U.S.C. 1524(b)(4); Pub. L. 100–687; Pub. L. 102–291)

(c) *Reentry.* The provisions of paragraphs (a) and (b) of this section are also applicable to veterans reentering a vocational training program following a redetermination of eligibility.

(Authority: 38 U.S.C. 1524(b)(4); Pub. L. 102–291)

(d) *Final termination of services.* No veteran may receive assistance under this temporary program after January 31, 1998.

(Authority: 38 U.S.C. 1524(b)(4); Pub. L. 100–687; Pub. L. 102–291)

(e) *Provision of vocational training and services during the period beginning February 1, 1992 and ending May 20, 1992.* The provision of a vocational training program (including related evaluations and other related services) to a veteran under the provisions of subpart I of this part, and related determinations during the period beginning February 1, 1992, and ending May 20, 1992, is ratified.

(Authority: Pub. L. 102–291)

[53 FR 4397, Feb. 16, 1988, as amended at 55 FR 17272, Apr. 24, 1990; 58 FR 41637, Aug. 5, 1993]

EVALUATION

## §21.6050 Participation of eligible veterans in an evaluation.

(a) *Veterans under age 45.* A veteran under age 45 awarded pension during the program period shall be provided an evaluation of his or her rehabilitation potential to determine whether achievement of a vocational goal is reasonably feasible. The veteran must report for and participate in the evaluation unless the failure to do so is for reasons beyond the veteran's control. Failure to report for and participate in the evaluation, for reasons other than those beyond the veteran's control, will result in suspension of the veteran's pension under §3.342 of this chapter. See §21.6056.

(Authority: 38 U.S.C. 1524(a)(1), Pub. L. 101–237)

(b) *Evaluating other qualified veterans.* An evaluation shall be accorded each qualified veteran as described in §21.6005(c) of this part who seeks to become a program participant provided VA first determines the veteran has good potential for achieving employment. Failure to choose to participate in an evaluation shall have no adverse effect upon the veteran's continued receipt of pension under §3.342 of this chapter.

(Authority: 38 U.S.C. 1524(a)(2); Pub. L. 100–687)

(c) *Notice to eligible veteran.* (1) A qualified veteran under age 45 awarded pension during the program period for whom participation in an evaluation is not clearly precluded by reasons beyond the veteran's control shall be sent a notice at the time he or she is awarded pension. The notice will inform the veteran of the provisions of this temporary program, the conditions under which participation in an evaluation is required, and the consequences of nonparticipation.

(2) A qualified veteran age 45 or older awarded pension during the program period will be informed of the provisions of this temporary program and the procedure for requesting an evaluation.

(Authority: 38 U.S.C. 1524(a); Pub. L. 100–687, Pub. L. 101–237)

(d) *Scheduling the evaluation.* (1) An evaluation will be arranged as promptly as practicable for each qualified veteran:

(i) Under age 50 who is sent the notice required under paragraph (c)(1) of this secton; and

(ii) [Reserved]

(2) Other qualified veterans identified in § 21.6005(c) who are found to have good employment potential under § 21.6054.

(Authority: 38 U.S.C. 1524(a); Pub. L. 100–687)

(e) *Followup of qualified veterans who do not complete an evaluation.* The case of each qualified veteran under age 45 awarded pension during the program period for whom an evaluation was not scheduled or who does not complete an evaluation shall be reviewed for followup action by Vocational Rehabilitation and Employment (VR&C) staff as provided in §§ 21.197(c)(4) and 21.198(d).

(Authority: 38 U.S.C. 1524(a); Pub. L. 100–687, Pub. L. 101–237)

(f) *Limitation on the number of evaluations.* Notwithstanding the provisions of paragraphs (a) through (e) of this section, the number of evaluations which may be provided under this temporary program is subject to the limitations contained in § 21.6059 of this part.

(Authority: 38 U.S.C. 1524(a)(3))

[53 FR 4397, Feb. 16, 1988, as amended at 55 FR 17272, Apr. 24, 1990; 56 FR 21448, May 9, 1991]

### § 21.6052 Evaluations.

(a) *Scope and nature of evaluation.* The scope and nature of the evaluation under this program shall be the same as for an evaluation of the reasonable feasibility of achieving a vocational goal under the procedures described for chapter 31 benefits. *See § 21.50(b)(5) and § 21.53 (d) and (f).*

(Authority: 38 U.S.C. 1524(a)(1)(2))

(b) *Specific services which may be provided in the course of evaluation in determining the reasonable feasibility of achieving a vocational goal.* The following specific services may be provided as a part of the evaluation of reasonable feasibility of achieving a vocational goal, as appropriate:

(1) Assessment of feasibility by a counseling psychologist;

(2) Review of feasibility assessment and of need for special services by the Vocational Rehabilitation Panel;

(3) Provision of medical and other diagnostic services;

(4) Evaluation of employability, for a period not to exceed 30 days, by professional staff of an educational or rehabilitation facility.

(Authority: 38 U.S.C. 1524(b))

(c) *Responsibility for evaluation.* All determinations as to the reasonable feasibility of vocational training and entitlement to assistance under 38 U.S.C. 1524 shall be made by a counseling psychologist in the Vocational Rehabilitation and Employment Division.

(Authority: 38 U.S.C. 1524(b))

### § 21.6054 Criteria for determining good employment potential.

(a) *Determining good employment potential.* Before scheduling an evaluation of feasibility to pursue a vocational goal for a qualified veteran under § 21.6005(c)(2), VA will first determine whether the veteran has good potential for achieving employment if provided a vocational training or employment program. This determination shall be made on the basis of the information of record, including information submitted by the veteran at the time of the veteran's request to participate in this temporary program.

(Authority: 38 U.S.C. 1524(a)(2); Pub. L. 100–687).

(b) *Criteria.* The criteria contained in paragraphs (c) and (d) of this section are to be applied by Vocational Rehabilitation and Employment professional staff members to determine whether information of record supports a determination that a veteran age 50 or older has good potential for employment. Any reasonable doubt shall be resolved in the veteran's favor.

(Authority: 38 U.S.C. 1524(a)(2))

(c) *Indicators of good potential for employment.* Indicators of good potential for employment include one or more of the following:

(1) A period of stable employment prior to the onset of disability.

(2) Strong motivation to return to the work force.

(3) Successful pursuit of education or training.

(4) Cooperation in treatment of disabling conditions.

(5) Stabilization of medical conditions or substance abuse problems.

(6) Participation in therapeutic work programs.

(7) Evidence of recent sustained job-seeking.

(Authority: 38 U.S.C. 1524(b)(1))

(d) *Contraindications of good potential for employment.* Contraindications of good potential for employment include one or more of the following:

(1) A lifelong history of unstable employment with long periods of employment before the onset of disability.

(2) Being out of the labor market for five years or more preceding the evaluation.

(3) Unsuccessful pursuit of education or training.

(4) Noncooperation in the treatment of disability.

(5) Need for an additional period of medical care or treatment before training would be feasible.

(6) Nonparticipation in prescribed or recommended therapeutic work programs.

(7) Failure of previous vocational rehabilitation programs to achieve employability.

(Authority: 38 U.S.C. 1524(a)(2))

(e) *Negative determinations.* If VA does not find good employment potential, VA will notify the veteran that he or she is not eligible to receive an evaluation. Since this finding will preclude program participation, the veteran will be informed of his or her appellate rights as described in §21.59 of this part.

(1) If the determination cannot be made on the evidence of record, VA shall advise the veteran and may provide him or her with an opportunity to submit additional information within a reasonable time.

(2) A veteran's disagreement with a negative finding shall be considered evidence of motivation for employment, and may, when considered in relation to other information, provide a basis for finding that good employment potential exists;

(3) If the final VA determination, following a review of a contested negative finding, is that good potential for achieving employment does not exist, a personal interview will be scheduled, and the reasons for VA's determination shall be discussed with the veteran.

(Authority: 38 U.S.C. 1524(a)(2))

[53 FR 4397, Feb. 16, 1988, as amended at 55 FR 17272, Apr. 24, 1990]

## §21.6056 Cooperation of the veteran in an evaluation.

(a) *Cooperation of the veteran.* The cooperation of the veteran is essential to a successful evaluation. The purpose of the evaluation and the steps in the process shall be explained to the veteran, and the importance of his or her cooperation shall be stressed. If the veteran does not cooperate in the initiation or completion of the evaluation, the counseling psychologist shall make a reasonable effort through counseling to secure the veteran's cooperation.

(Authority: 38 U.S.C. 1524(a)(3))

(b) *Consequences of noncooperation when evaluation is required.* If the veteran fails to report for or cooperate in a required evaluation and the counseling psychologist has made a reasonable effort to secure his or her participation, VA shall take appropriate action, including discontinuance of the evaluation under the provisions of §21.364 of this part. If the veteran's case is discontinued under §21.364 of this part, the Adjudication Division will be notified. The Adjudication Division also will be informed if the reason for discontinuance is subsequently removed and the evaluation process is resumed.

(Authority: 38 U.S.C. 1524(a)(1))

(c) *Consequences of noncooperation when evaluation is not required.* If the veteran fails to report for or cooperate in an optional evaluation and the counseling psychologist has made a reasonable effort to secure the veteran's participation, VA shall take appropriate

action, including discontinuance of the evaluation under the provisions of § 21.364 of this part. The evaluation may be resumed if the reason for the discontinuance is removed and the veteran is otherwise eligible.

(Authority: 38 U.S.C. 1524(a)(2))

### § 21.6058 Consequences of evaluation.

(a) *Eligible veteran may choose to participate.* If VA finds, based on the evaluation, that achievement of a vocational goal by the veteran is reasonably feasible, the veteran shall be offered and may elect to pursue a vocational training program. If the veteran elects to pursue such a program, the program shall be designed in consultation with the veteran in order to meet the veteran's individual needs, and shall be set forth in an Individualized Written Rehabilitation Plan (IWRP) under the provisions of § 21.84 of this part or an Individualized Employment Assistance Plan (IEAP) under § 21.88 of this part.

(Authority: 38 U.S.C. 1524(b)(1))

(b) *Veteran ineligible to participate.* A veteran for whom achievement of a vocational goal is not found reasonably feasible shall be notified of this finding and be informed of his or her appellate rights as described in § 21.59 of this part. The veteran shall be provided the assistance described in § 21.50(b)(9) of this part.

(Authority: 38 U.S.C. 1524(b)(1))

### § 21.6059 Limitations on the number of evaluations.

(a) *Number of evaluations.* No more than 3,500 evaluations of the reasonable feasibility of achieving a vocational goal may be given during any 12-month period, beginning on February 1, 1985, and each subsequent February 1 during the program period.

(Authority: 38 U.S.C. 1524(a)(3); Pub. L. 100–227)

(b) *Cases counted as evaluation.* An evaluation is deemed to be countable against the 3,500 limit permitted during each 12-month period when the following conditions are met:

(1) The veteran is provided one or more personal interviews by a counseling psychologist; and

(2) A determination of the reasonable feasibility of achieving a vocational goal is made by the counseling psychologist.

(Authority: 38 U.S.C. 1524(a)(3); Pub. L. 100–227)

(c) *Cases not counted as evaluations.* Computation of the number of evaluations which may be provided in a 12-month period shall exclude cases in which:

(1) The veteran under age 45 awarded pension during the program period is unable to participate for reasons beyond his or her control;

(2) Review of available information does not indicate a good potential for employment of other qualified veterans.

(3) The veteran either fails to keep a scheduled appointment to complete the evaluation or withdraws the claim for an evaluation, or

(4) The veteran who has completed an evaluation requires or requests a reevaluation.

(Authority: 38 U.S.C. 1524(a)(3); Pub. L. 100–227, Pub. L. 101–237)

(d) *Priority.* If a veteran below age 45 for whom an evaluation is required cannot be provided an evaluation during a particular 12-month period because of the limitation on the number of evaluations, the veteran will be given first priority for evaluation during the following 12-month period, or first available subsequent 12-month period, if otherwise eligible.

(Authority: 38 U.S.C. 1524(a)(3), Pub. L. 101–237)

[53 FR 4397, Feb. 16, 1988, as amended at 55 FR 17272, Apr. 24, 1990; 56 FR 21448, May 9, 1991]

## SERVICES AND ASSISTANCE TO PROGRAM PARTICIPANTS

### § 21.6060 Services and assistance.

(a) *General.* VA may provide to program participants:

(1) Vocationally oriented services and assistance of the kind provided veterans under chapter 31, title 38 U.S.C.;

(2) Employment assistance during the 18 month period following completion of a vocational training program, including:

(i) Educational, vocational, psychological, employment and personal adjustment counseling;

(ii) Placement services to effect suitable placement in employment, and post-placement services to attempt to insure satisfactory adjustment in employment; and

(iii) Personal adjustment and work adjustment training.

(Authority: 38 U.S.C. 1524(b))

(3) Such other services and assistance of the kind provided veterans under chapter 31, except as provided in paragraph (b) of this section, as are necessary to enable the veteran to prepare for, and participate in, vocational training or employment.

(b) *Services and assistance not provided.* VA will not provide to a participant under this program any:

(1) Loan;

(2) Subsistence allowance;

(3) Automobile adaptive equipment of the kind provided eligible veterans under 38 U.S.C., chapter 39 or chapter 31;

(4) Training at an institution of higher learning in a program of education that is not predominantly vocational in content;

(5) Employment adjustment allowance;

(6) Room and board in a special rehabilitation facility for a period in excess of 30 days;

(7) Independent living services, except those which are indispensable to the pursuit of the vocational training program during the period of rehabilitation to the point of employability under §21.6160 of this part; or

(8) Period of extended evaluation under 38 U.S.C. 3106(e).

(Authority: 38 U.S.C. 1524(b))

DURATION OF TRAINING

### §21.6070 Basic duration of a vocational training program.

(a) *Basic duration of a vocational training program.* The duration of a vocational training program may not exceed 24 calendar months of full-time training except as provided in §21.6072 of this part.

(Authority: 38 U.S.C. 1524(b)(2))

(b) *Responsibility for estimating the duration of a vocational training program.* The counseling psychologist is responsible for estimating the time needed by the veteran to complete a vocational training program. The estimate is made in consultation with the veteran and the vocational rehabilitation specialist during the preparation of the IWRP.

(Authority: 38 U.S.C. 1524(b)(1))

(c) *Duration of training prescribed must meet general requirements for entry into the occupation selected.* The veterans will be provided training for a period sufficient for the veteran to reach the level generally recognized as necessary for entry into employment in a suitable occupational objective. Where a particular degree, diploma or certificate is generally necessary for entry into employment, the veteran may be trained to that level.

(Authority: 38 U.S.C. 1524(b))

(d) *When duration of the training period may be expanded beyond the entry level.* If the amount of training the particular veteran needs in order to qualify for employment in a particular occupation will exceed the amount generally needed for employment in that occupation, VA may provide the necessary additional training under one or more of the following conditions:

(1) Training requirements for employment in the area in which the veteran lives or will seek employment exceed those generally needed for employment;

(2) The veteran is preparing for a type of work in which he or she will be at a definite disadvantage in competing with nondisabled persons for a job or business, and the additional training will offset the competitive disadvantage;

(3) The choice of a feasible occupation is limited and additional training will enhance the veteran's employability in one of the feasible occupations; or

(4) The number of employment opportunities within a feasible occupation is restricted.

(Authority: 38 U.S.C. 1524(b)(2))

(e) *Estimating the duration of the training period needed.* The counseling psychologist, in estimating duration of the training period needed, must determine that:

(1) The proposed vocational training program must be one which, when pursued full-time by a nondisabled person, would not normally require more than 24 calendar months of pursuit for successful completion;

(2) The program of training and other services needed by the veteran, based upon VA's evaluation, will not exceed 24 calendar months, if training is pursued on a full-time basis, or 36 calendar months if pursued on a less than full-time basis. In making this determination the following criteria will be applied:

(i) The number of actual months and days of the period during which the veteran will pursue the training program will be counted;

(ii) Days of authorized leave and other periods during which the veteran wlll not be pursuing training, such as periods between terms will also be counted;

(iii) The period of evaluation prior to determination of reasonable feasibility will be excluded but the actual number of months and days needed to evaluate and improve rehabilitation potential during the training program will be included;

(iv) The time required, as determined in months and days under paragraph (e)(2)(i) through (iii) of this section, will be the total period that would be required for the veteran to accomplish the vocational program under consideration;

(v) If the total period the veteran requires exceeds 24 calendar months, when pursued on a full-time basis, and an extension of the basic training period may not be approved under § 21.6072 of this part, another suitable vocational goal must be selected for which training can be completed within that period.

(3) If the veteran's vocational training program would require more than 36 calendar months when pursued on a less than full-time basis, the program must be reevaluated to select a vocational goal for which a suitable vocational training program can be completed within that period.

(Authority: 38 U.S.C. 1524(b)(2))

(f) *Effect of change in the vocational goal on duration of training period.* The veteran's vocational goal may be changed during the program in accordance with § 21.94 (a) through (d) of this part. The extent to which such changes may be made is limited by the following considerations:

(1) A change of the vocational goal from one field or occupational family to another field or occupational family may only be approved before the end of the first 24 months of training, whether training is pursued on a full-time or a less than full-time basis; and

(2) A change from one occupational objective to another within the same field or occupational family shall not be considered a change in the vocational goal identified in the veteran's IWRP.

(Authority: 38 U.S.C. 1524(b)(2))

### § 21.6072 Extending the duration of a vocational training program.

(a) *Extension of the duration of a vocational training program.* An extension of a vocational training program as formulated in the IWRP may only be approved to enable the veteran to achieve a vocational goal identified before the end of the first 24 calendar months of the program.

(Authority: 38 U.S.C. 1524(b)(2))

(b) *Maximum number of months for which a program for new participants may be approved.* If a veteran had never participated in this temporary program of vocational training, the originally planned period of training may be extended to a total period consisting of the number of months necessary to attain the vocational goal, but in no case will a program be extended for:

(1) More than 24 calendar months beyond the originally planned period; or

(2) A period which, when added to the originally planned period, totals more

than 48 months, as provided in §21.6074(c) of this part.

(Authority: 38 U.S.C. 1524(b))

(c) *Maximum number of months by which a program may be extended for prior participants in the temporary program.* (1) A veteran who has previously participated in this program, but who was not *rehabilitated to the point of employability,* may be provided additional training under this program to complete the prior vocational goal or a different vocational goal, subject to the same provisions as apply to new participants;

(2) If a finding of prior *rehabilitation to the point of employability* is set aside to enable a veteran to pursue a program of on-job training or work experience, including the provision of employer incentives under §21.256 of this part, the number of months for which assistance may be authorized under this program shall be established as provided in §21.256 of this part to the extent consistent with the rules of this section;

(3) If the determination of *rehabilitation to the point of employability* has been set aside under §21.6284 (a) or (b) of this part, additional training may be provided subject to the same provisions as apply to new participants.

(Authority: 38 U.S.C. 1524(b))

(d) *Who may authorize an extension to a vocational training program.* (1) The Vocational Rehabilitation Specialist (VRS) may authorize an extension of up to 3 calendar months of full-time or up to 6 calendar months of less than full-time training to the period of an existing vocational training program, if the VRS determines that the additional time is needed to successfully complete training and the following conditions are met:

(i) The veteran is in *rehabilitation to the point of employability* status under §21.190 of this part;

(ii) The veteran has completed more than half of the prescribed training;

(iii) The veteran is making satisfactory progress;

(iv) The extension is necessary to complete training;

(v) Training can be completed with 3 months of full-time training or not more than 6 calendar months of less than full-time training; and

(vi) The extension plus the original program period will not result in a program of vocational training greater than 36 total calendar months;

(2) The counseling psychologist may approve any other extensions of the vocational training program, except as provided in paragraph (d)(3) of this section, if it is determined that the additional time is needed and the conditions for extension under paragraphs (a) and (b) of this section are met;

(3) The VR&C Officer must also concur in an extension of the vocational training program beyond 24 months when paragraphs (a) through (c) of this section are met.

(Authority: 38 U.S.C. 1524(b)(2))

**§21.6074 Computing the period of vocational training program participation.**

(a) *Computing the participation period.* The number of months and days used in a vocational training program shall be computed on the basis of calendar months and days during which the program participant is receiving services under the plan developed in accordance with §21.6080 of this part, whether training is pursued on a full-time or less than full-time basis. Leaves of absence during a period of instruction and periods in which the veteran does not pursue actual training, such as breaks between periods of instruction, are included.

(Authority: 38 U.S.C. 1524(b))

(b) *Period of employment services separate.* The period during which employment services may be provided pursuant to §21.6040(b) of this part is not included in computing the period used for vocational training under this program.

(Authority: 38 U.S.C. 1524(b))

(c) *Limitations.* (1) A program participant may receive the services necessary to carry out the vocational training program during a maximum period of 48 months. The 48-month period begins to run on the day the veteran begins to receive the services needed to carry out the vocational

training program as specified in the IWRP, and ends 48 months from that date.

(2) Employment services which begin before the end of the 48-month period may be continued for the period specified in the IEAP, or may be provided after the end of the 48 month period if so specified in the IWRP or IEAP, subject to the provisions of § 21.6040(b) of this part.

(Authority: 38 U.S.C. 1524(b)(2), (3))

INDIVIDUALIZED WRITTEN REHABILITATION PLAN

### § 21.6080 Requirement for an individualized written rehabilitation or employment assistance plan.

(a) *General.* An Individualized Written Rehabilitation Plan (IWRP) and/or Individualized Employment Assistance Plan (IEAP) will be developed for each program participant for services under 38 U.S.C. 1524. These plans shall be developed in the same manner as for chapter 31 purposes. *See §§ 21.80, 21.84, 21.88, 21.90, 21.92, 21.94 (a) through (d), 21.96 and 21.98.*

(Authority: 38 U.S.C. 1524(b)(2))

(b) *Selecting the type of training to include in the plan.* The use of on-job training, including non-pay training, a combination of on-job and institutional training, or institutional training to accomplish the goals of the program should be explored in each case. On-job training, or a combination of on-job and institutional training, should generally be used:

(1) When these options are available;

(2) When these options are as suitable as institutional training for accomplishing the goals of the program; and

(3) The veteran agrees that such training will meet his or her needs.

(Authority: 38 U.S.C. 1524(b))

(c) *Changes in the plan.* Any change amending the duration of a veteran's plan is subject to provisions governing duration of a vocational training program described in § 21.6070 and § 21.6072 of this part.

(Authority: 38 U.S.C. 1524(b)(1))

(d) *Change in the vocational goal after 24 months of training.* If a veteran seeks to change the vocational goal after receipt of 24 months of training and the change is not permitted under § 21.6070(f) of this part, the counseling psychologist shall inform the veteran that:

(1) No change of goal may be authorized but training for the vocational goal previously established may be continued, if it is still reasonably feasible for the veteran to pursue the training under appropriate extensions of the program pursuant to § 21.6072 of this part;

(2) If the veteran elects to terminate the planned vocational training program, he or she shall be provided assistance, to the extent provided under § 21.80(d) of this part, in identifying other resources through which the training desired may be secured;

(3) If the veteran disagrees with the decision, the veteran's case shall be considered under the provisions of § 21.98 of this part.

(Authority: 38 U.S.C. 1524(b)(2))

### § 21.6082 Completing the plan.

(a) *Completing the plan.* If the VA determines that the veteran is unable to complete the program within the time limits of the plan after training has begun and the conditions for extension are not met, the long-range vocational goal of the veteran must be reevaluated, and another vocational goal selected which can be completed within the limits prescribed in § 21.6054 and § 21.6072 of this part.

(Authority: 38 U.S.C. 1524(b)(1))

(b) *Employment assistance when training is not completed under 38 U.S.C. chapter 15.* A plan for employment assistance may be implemented under § 21.6040(b) of this part even though the veteran's vocational training program has not been, or will not be, completed under this temporary program, provided the other requirements for participation in the program are met.

(Authority: 38 U.S.C. 1524(b)(3))

COUNSELING

**§21.6100 Counseling.**

*General.* A veteran requesting or being furnished assistance under this temporary program shall be provided professional counseling services by the Vocational Rehabilitation and Employment (VR&C) Division and other qualified staff as necessary, and in the same manner as such services are provided veterans participating in a chapter 31 program. *See §§21.100, 21.380.*

(Authority: 38 U.S.C. 1524(a)(1), (2) and (b)(2))

EDUCATIONAL AND VOCATIONAL TRAINING SERVICES

**§21.6120 Educational and vocational training services.**

(a) *Purposes.* Educational and vocational training services are to be provided to a veteran eligible for services and assistance under this temporary program to enable the veteran to:

(1) Become employable in the occupational objective established in an IWRP; and

(2) Receive incidental training necessary to achieve the employment objective established in an IEAP.

(Authority: 38 U.S.C. 1524(b)(1))

(b) *Selection of courses.* VA and the veteran will select vocationally oriented courses of study and training, completion of which usually results in a diploma, certificate, degree, qualification for licensure, or employment. The educational and training services to be provided include:

(1) Remedial, deficiency and refresher training; and

(2) Training which leads to a vocational objective. All of the forms of program pursuit presented in §21.122 through §21.132 of this part may be authorized. Education and training programs in institutions of higher learning are authorized provided the courses are part of a program which is predominantly vocational in content. The program of education and training shall be considered to be predominantly vocational in content if the majority of the instruction offered provides the technical skills and knowledge generally regarded as specific to, and required for, entry into the vocational goal approved for the veteran. Such education and training may generally be authorized at an undergraduate or advanced degree level. However the following are excluded:

(i) An associate degree program in which the content of the majority of the instruction provided is not vocationally oriented;

(ii) The first two years of a 4-year baccalaureate degree program;

(iii) The last two or more years of a 4-year baccalaureate degree program except in degree programs with majors in engineering, teaching, or other similar degree programs with vocational content which ordinarily lead directly to employment in an occupation that is usually available to persons holding such a degree; or

(iv) An advanced degree program, except for a degree program required for entry into the veteran's employment objective, such as a master's degree in social work.

(Authority: 38 U.S.C. 1524(b))

(c) *Charges for education and training services.* The cost of education and training services will be considered in selecting a facility when:

(1) There is more than one facility in the area in which the veteran resides which:

(i) Meets the requirements for approval under §21.290 through §21.299 of this part;

(ii) Can provide the education and training services and other supportive services specified in the veteran's plan; and

(iii) Is within reasonable commuting distance; or

(2) The veteran wishes to train at a suitable facility in another area, even though training can be provided at a suitable facility in the area in which the veteran resides. See §§21.120, 21.370, 21.372.

(Authority: 38 U.S.C. 1524(b)(2)

(d) *Courses not available.* If suitable educational and training courses are not available in the area in which the veteran resides, or if they are available but not accessible to the veteran, other arrangements may be made. Such arrangements may include, but are not limited to:

(1) Relocation of the veteran to another area in which necessary services are available, or

(2) Use of an individual instructor to provide necessary training as provided under § 21.146 of this part.

(Authority: 38 U.S.C. 1524(b))

EVALUATION AND IMPROVEMENT OF REHABILITATION POTENTIAL

### § 21.6140 Evaluation and improvement of rehabilitation potential.

(a) *General.* The services described in paragraph (d) of this section may be used to:

(1) Evaluate rehabilitation potential;

(2) Provide a basis for planning:

(i) A program of services and assistance to improve the veteran's potential for vocational rehabilitation; or

(ii) A vocational training program; and

(3) Reevaluate the vocational training potential of a veteran participating in a rehabilitation program.

(Authority: 38 U.S.C. 1524(a))

(b) *Periods during which evaluation and improvement services may be provided.* Services described in paragraph (d) of this section may be provided during:

(1) An evaluation or reevaluation;

(2) Rehabilitation to the point of employability;

(3) Employment services.

(Authority: 38 U.S.C. 1524(b)(2))

(c) *Duration of services.* The duration of services needed to improve rehabilitation potential, furnished on a full-time basis either as a preliminary part of the period of rehabilitation to the point of employability or as the total program, may not exceed 9 months. If these services are furnished on a less than full-time basis the duration will be for the period necessary, but may not exceed the equivalent of 9 months of full-time training. See § 21.6310.

(Authority: 38 U.S.C. 1524(b)(2))

(d) *Scope of services.* Evaluation and improvement services include:

(1) Diagnostic services;

(2) Personal and work adjustment training;

(3) Medical care and treatment;

(4) Independent living services indispensable to pursuing a vocational training program;

(5) Language training, speech and voice correction, training in ambulation, and one-hand typewriting;

(6) Orientation, adjustment, mobility and related services; and

(7) Other appropriate services.

(Authority: 38 U.S.C. 1524(b)(2))

(e) *Applicability of chapter 31 rules.* the provisions of § 21.140 of this part are not applicable to this temporary program. The provisions of § 21.142 through § 21.156 of this part are applicable, subject to provisions of this section.

(Authority: 38 U.S.C. 1524(b)(2))

INDEPENDENT LIVING SERVICES

### § 21.6160 Independent living services.

(a) *Services must be part of a vocational training program.* Independent living services may be provided as a part of a veteran's IWRP when such services are indispensable to the achievement of the vocational goal, but may not be provided as the sole program of rehabilitation for the veteran, since a vocational training program for the veteran must be found reasonably feasible before the IWRP is prepared.

(Authority: 38 U.S.C. 1524(b)(2))

(b) *Independent living services which may be furnished under this program.* The independent living services which may be furnished include:

(1) Training in independent living skills;

(2) Health management programs;

(3) Identification of appropriate housing accommodations; and

(4) Personal care service for a transitional period not to exceed two months.

(Authority: 38 U.S.C. 1524(b))

(c) *Coordination with other VA elements and other Federal, State, and local programs.* Provision of independent living services and assistance will generally require extensive coordination with other VA and non-VA programs. The resources of VA medical centers shall be utilized as prescribed in

§21.6242 of this part. If appropriate arrangements cannot be made to provide these services through VA medical centers, other governmental and private nonprofit programs may be used to secure necessary services if the facility or individual providing services meets the requirements of §21.294 of this part.

(Authority: 38 U.S.C. 523, 1524(b))

(d) *Applicability of chapter 31 rules.* Neither §21.160 nor §21.162 of this part are applicable to provision of independent living services under this program.

(Authority: 38 U.S.C. 1524(b))

CASE STATUS SYSTEM

**§21.6180 Case status system.**

(a) *General.* The case status system used in administering benefits under the chapter 31 program, as provided in §21.180 through §21.198 of this part, will be utilized in a similar manner in this program subject to the provisions of paragraph (b) of this section.

(Authority: 38 U.S.C. 1524(b)(2))

(b) *Limitations of applicability of chapter 31 rules.* (1) The provisions of §21.180(e)(2) and (3), §21.188, and §21.192 of this part are not applicable to this temporary program;

(2) Other incidental references to service-connected disability Chapter 31, *extended evaluation* status, or *independent living* status or other services precluded under §21.6060(b) of this part, found in §21.180 to §21.198 of this part, are not for application to this temporary program.

(Authority: 38 U.S.C. 1524(b)(2))

[53 FR 4397, Feb. 16, 1988, as amended at 54 FR 8189, Feb. 27, 1989]

SUPPLIES

**§21.6210 Supplies.**

(a) *Purpose of furnishing supplies.* Supplies are furnished to enable a veteran to pursue training, obtain and maintain employment and achieve the goals of his or her program.

(Authority: 38 U.S.C. 1524(b)(2))

(b) *Definition.* The term *supplies* includes books, tools and other supplies and equipment which VA determines are necessary for the veteran's vocational training program.

(Authority: 38 U.S.C. 3104(a))

(c) *Periods during which supplies may be furnished.* Supplies may be furnished to a veteran receiving:

(1) An evaluation or reevaluation;

(2) Rehabilitation to the point of employability; or

(3) Employment services.

(Authority: 38 U.S.C. 1524(b)(2))

(d) *Applicability of 38 U.S.C. chapter 31 regulations.* The provisions of §21.210 of this part are not applicable to veterans in this temporary program. The provisions of §21.212 through §21.224 of this part are applicable to veterans pursuing vocational training and employment under this program in a similar manner as under chapter 31, except the portions thereof noted as follows:

(1) Section 21.216(a)(3) of this part pertaining to special modifications, including automobile adaptive equipment;

(2) Section 21.220(a)(1) of this part pertaining to advancements from the revolving fund loan;

(3) Section 21.222(b)(x) of this part pertaining to a veteran discontinued from an independent living services program.

(Authority: 38 U.S.C. 1524(b)(2))

MEDICAL AND RELATED SERVICES

**§21.6240 Medical treatment, care and services.**

(a) *General.* A participant in a vocational training program or receiving employment assistance shall be furnished medical treatment, care and services which VA determines are necessary to develop, carry out and complete the veteran's plan.

(Authority: 38 U.S.C. 1524(b)(2))

(b) *Scope of services.* The services which may be furnished include the medical treatment, care and dental services described in part 17 of this chapter. In addition, the following

services may be authorized even if not included or described in part 17:

(1) Prosthetic appliances, eyeglasses, and other corrective or assistive devices;

(2) Services to a veteran's family as necessary for the effective rehabilitation of the veteran;

(3) Special services (including services related to blindness and deafness) including:

(i) Language training, speech and voice correction, training in ambulation, and one-hand typewriting;

(ii) Orientation, adjustment, mobility and related services; and

(iii) Telecommunications, sensory and other technical aids and devices.

(Authority: 38 U.S.C. 1524(b)(2))

(c) *Periods of eligibility*. A veteran is eligible for the services described in paragraph (b) of this section during:

(1) Evaluation;

(2) Rehabilitation to the point employability;

(3) Employment services; and

(4) Other periods, to the extent that services are needed to begin or continue in any of the periods described in paragraphs (c)(1) through (3) of this section. Such periods include, but are not limited to, those when services are needed to facilitate reentry into training following:

(i) Interruption; or

(ii) Discontinuance because of illness or injury.

(Authority: 38 U.S.C. 1524(b)(2))

### § 21.6242 Resources for provision of medical treatment, care and services.

(a) *General.* VA medical centers are the primary resources for the provision of medical treatment, care and services for program participants which may be authorized under the provisions of § 21.6240 of this part. The availability of necessary services in VA facilities shall be ascertained in each case.

(Authority: 38 U.S.C. 1524(b)(2))

(b) *Hospital care and medical services.* Hospital care and medical services provided to program participants shall only be furnished in facilities over which VA has direct jurisdiction, except as authorized on a contract or fee basis under the provisions of part 17 of this chapter.

(Authority: 38 U.S.C. 1524(b)(2))

CROSS REFERENCES: See § 17.30(1) Hospital care. § 17.30(m) Medical services.

(c) *Provisions of § 21.240 and § 21.242.* The provisions of §§ 21.240 and 21.242 of this part are not applicable to this temporary program.

(Authority: 38 U.S.C. 1524(b))

FINANCIAL ASSISTANCE

### § 21.6260 Financial assistance.

(a) *Direct financial assistance prohibited.* The provisions of § 21.260 and § 21.264 through § 21.276 of this part are not applicable to veterans pursuing training and employment under this temporary program, except as indicated in paragraph (b) of this section.

(Authority: 38 U.S.C. 1524(b)(2)(B)(ii))

(b) *Training costs.* The provisions of § 21.262 of this part pertaining to reimbursement for training costs will be followed to reimburse vendors for servics provided under this temporary program.

(Authority: 38 U.S.C. 1524(d))

ENTERING VOCATIONAL TRAINING

### § 21.6282 Effective dates of induction into and termination of vocational training.

(a) *Induction.* Subject to the limitations set forth in § 21.6042 of this part, the date a veteran is inducted into vocational training shall be the earlier of:

(1) The date of the facility requires the veteran to report for prescribed activities; or

(2) The date the program begins at the faciliity providing services.

(Authority: 38 U.S.C. 1524(b)(2))

(b) *Termination.* A veteran's training program shall be terminated under the provisions of § 21.6180. of this part.

(Authority: 38 U.S.C. 1524(b)(2))

### §21.6284 Reentrance into a training program.

(a) *Reentrance into rehabilitation to the point of employability following a determination of rehabilitation.* A veteran in a vocational training program under this temporary program who has been found *rehabilitated* under provisions of §21.196 of this part may be provided an additional period of training or services only if the following conditions are met and the veteran is otherwise eligible.

(1) Current facts, including any relevant medical findings, establish that the veteran's disability has worsened to the extent that he or she is precluded from performing the duties of the occupation for which the veteran previously was found rehabilitated; or

(2) The occupation for which the veteran previously was found rehabilitated under this temporary program is found to be unsuitable.

(Authority: 38 U.S.C. 1524(b)(1))

(b) *Reentrance into rehabilitation to the point of employability during a period of employment services.* A finding of rehabilitation to the point of employability by VA may be set aside during a period of employment services and an additional period of training and related services provided if any of the conditions in paragraph (a) of this section or one of the following conditions are met and the veteran is otherwise eligible:

(1) The services originally given to the veteran are now inadequate to make the veteran employable in the occupation for which he or she pursued training;

(2) Experience during the period of employment services has demonstrated that employment in the objective or field for which the veteran was rehabilitated to the point of employability should not reasonably have been expected at the time the program was originally developed; or

(3) The veteran, because of technological change which occurred subsequent to the declaration of rehabilitation to the point of employability, is no longer able:

(i) To perform the duties of the occupation for which he or she trained, or in a related occupation; or

(ii) To secure employment in the occupation for which he or she trained, or in a related occupation.

(Authority: 38 U.S.C. 1524(b)(3))

[53 FR 4397, Feb. 16, 1988, as amended at 54 FR 8189, Feb. 27, 1989]

### §21.6290 Training resources

(a) *Applicable 38 U.S.C. chapter 31 provisions.* The provisions of §21.290 through §21.299 are applicable to veterans pursuing vocational training and employment under this program in the same manner as under 38 U.S.C. chapter 31, except as specified in paragraph (b).

(Authority: 38 U.S.C. 1524(b)(2))

(b) *Limitations.* The provisions of §21.294(b)(1)(i) and (ii) of this part pertaining to independent living services are not applicable to this temporary program. The provisions of §21.294(b)(1)(iii) of this part pertaining to authorization of independent living services as a part of an Individualized Written Rehabilitation Plan (IWRP) are applicable to this temporary program to the extent provided under §21.6160 of this part.

(Authority: 38 U.S.C. 1524(b)(2))

## RATE OF PURSUIT

### §21.6310 Rate of pursuit.

(a) *General requirements.* A veteran should pursue a vocational training program at a rate which is consistent with his or her ability to successfully pursue training, considering:

(1) Effects of his or her disability;

(2) Family responsibilities;

(3) Travel;

(4) Reasonable adjustment to training; and

(5) Other circumstances which affect the veteran's ability to pursue training.

(Authority: 38 U.S.C. 1524(b)(1))

(b) *Continuous pursuit.* A veteran should pursue a program of vocational training with as little interruption as necessary, considering the factors described in paragraph (a) of this section.

(Authority: 38 U.S.C. 1524(b)(1))

(c) *Responsibility for determining the rate of pursuit.* VR&C staff, in consultation with the veteran, will determine the rate and continuity of pursuit of training. Consultation with the medical consultant and the Vocational Rehabilitation Panel should be utilized as necessary. This determination will be made in the course of developing the plan, but may be changed later, as necessary to enable the veteran to complete his or her training.

(Authority: 38 U.S.C. 1524(b)(1))

(d) *Measurement of training time used.* The rate of pursuit shall be measured on the basis of the provisions of § 21.310 of this part. A veteran may not pursue training on a less than half-time basis as measured under § 21.310 of this part, except for brief periods, after which training must be resumed on a half-time or greater basis. Brief periods are limited to all or part of a semester, term or quarter, or up to 90 days in a course not conducted on a semester, term, or quarter basis.

(Authority: 38 U.S.C. 1524(b)(1))

(e) *Reduced work tolerance.* The provisions of § 21.312 of this part are not applicable to this temporary program.

(Authority: 38 U.S.C. 1524(b))

(f) *Pursuit of training under special circumstances.* The provisions of § 21.314 of this part are not applicable to this temporary program.

(Authority: 38 U.S.C. 1524(b)(2))

AUTHORIZATION OF SERVICES

### § 21.6320 Authorization of services under Chapter 31 rules.

(a) *General.* Sections 21.320 through 21.334 of this part are not applicable to a veteran pursuing a vocational training program except as specified in paragraph (b) of this section.

(Authority: 38 U.S.C. 1524(b)(2))

(b) *Applicable rule.* Section 21.326 of this part pertaining to the beginning and ending dates of a period of employment services is applicable to veterans under this temporary program.

(Authority: 38 U.S.C. 1524(b)(2))

LEAVES OF ABSENCE

### § 21.6340 Leaves of absence.

(a) *General.* VA may approve leaves of absence under vertain conditions. During approved leaves of absence, a ceteran shall be considered to be pursuing training for purposes of computing the duration of a vocational training program under §§ 21.6070 through 21.6074. Leave may only be authorized for a veteran during a period of rehabilitation to the point of employability.

(Authority: 38 U.S.C. 1524(b))

(b) *Purpose.* The purpose of the leave system is to enable the veteran to maintain his or her status as an active participant and avoid interruption or discontinuance of training.

(Authority: 38 U.S.C. 1524(b)(2))

(c) *Applicability of chapter 31 rules.* The provisions of § 21.340 of this part are not applicable to this temporary program. The provisions of § 21.342 through § 21.350 of this part are applicable except for § 21.346 of this part.

(Authority: 38 U.S.C. 1524(b))

SATISFACTORY CONDUCT AND COOPERATION

### § 21.6362 Satisfactory conduct and cooperation.

The provisions of § 21.362 and § 21.364 of this part are applicable to veterans pursuing vocational training under this program in the same manner as under 38 U.S.C. chapter 31.

(Authority: 38 U.S.C. 1524)

TRANSPORTATION SERVICES

### § 21.6370 Authorization of transportation services.

(a) *General.* VA shall authorize transportation services necessary for a veteran to pursue a vocational training program under this temporary program. Transportation services include:

(1) Transportation for evaluation, reevaluation or counseling authorized under §21.376 of this part;

(2) Inter- and intraregional travel which may be authorized under §21.370 (except for (b)(2)(iii)(B)) and §21.372 of this part;

(3) Special transportation allowance authorized under §21.154 of this part;

(4) Commuting to and from training and seeking employment as authorized under paragraphs (c) and (d) of this section.

(Authority: 38 U.S.C. 1524(b))

(b) *Reimbursement.* Payment of transportation services authorized by VA shall normally be made in arrears and in the same manner as tuition, fees and other services authorized under this program.

(Authority: 38 U.S.C. 1524(b))

(c) *Transportation payment.* A veteran may be reimbursed for the costs of commuting to and from training and seeking employment if he or she requests such assistance and VA determines after careful examination of the veteran's situation, and subject to the limitation contained in paragraph (d) of this section, that the veteran would be unable to pursue training without such assistance. VA may:

(1) Reimburse the facility at which the veteran is training if the facility provides transportation or related services;

(2) Reimburse the veteran for his or her actual commuting expense.

(Authority: 38 U.S.C. 1524(b))

(d) *Limitations.* Payment of commuting expenses may not be made for any period:

(1) Except during the period of training and the first three months of employment services;

(2) When a program participant is employed;

(3) In which a program participant is eligible for, and entitled to, payment of commuting costs through other VA and non-VA programs;

(4) In which it becomes feasible for the veteran to commute to school with family, friends or fellow students.

(Authority: 38 U.S.C. 1524(b))

(e) *Amount which may be paid.* VA will reimburse the veteran for his or her actual cost, not to exceed $70 per month. Necessary supportive documentation must be submitted with each request for reimbursement. Payment will be made monthly or at longer intervals as may be agreed to in the IWRP.

(Authority: 38 U.S.C. 1524(b))

(f) *Nonduplication.* A veteran eligible for reimbursement of transportation services under this section and §21.154 of this part may only receive the benefit provided under §21.154 of this part.

(Authority: 38 U.S.C. 1524(b))

ADDITIONAL APPLICABLE REGULATIONS

### §21.6380 Additional applicable Chapter 31 regulations.

The following regulations are applicable to veterans pursuing the vocational training under this program in the same manner as they apply to 38 U.S.C. chapter 31: §21.380, §21.390, §21.400, §21.402, §21.412, §21.414 (except (d) and (e)), §21.420, and §21.430 (except (a)) of this part.

(Authority: 38 U.S.C. 1524)

DELEGATION OF AUTHORITY

### §21.6410 Delegation of authority.

(a) *General.* Authority is delegated to the Under Secretary for Benefits and to supervisory or non-supervisory personnel within the jurisdiction of the Vocational Rehabilitation and Employment Service, to make findings and decisions under 38 U.S.C. 1524 and the applicable regulations, precedents and instructions pertaining to this program. See §2.6(b).

(Authority: 38 U.S.C. 512(a))

(b) *Applicability of §§21.412 and 21.414.* The provisions of §§21.412 and 21.414 (except for (d) and (e)) are applicable to this temporary program.

(Authority: 38 U.S.C. 512(a))

COORDINATION WITH THE ADJUDICATION DIVISION

### § 21.6420 Coordination with the Adjudication Division.

It is the responsibility of the VR&C Division to inform the Adjudication Division in writing of the following changes in the veteran's circumstances contained in the following paragraphs.

(Authority: 38 U.S.C. 1524, Pub. L. 101–237)

(a) *Evaluation.* (1) The date an evaluation being provided a veteran under age 45, who is required to participate in such evaluation, is suspended because of unsatisfactory conduct or cooperation; and

(2) The date the evaluation is resumed.

(Authority: 38 U.S.C. 1524, Pub. L. 101–237)

(b) *Income information.* Any information relating to income from work or training which may affect the veteran's continued entitlement to pension, including participation in:

(1) A work adjustment program, incentive or therapeutic work program, vocational training in a rehabilitation facility, or employment in a rehabilitation facility or sheltered workshop;

(2) On-job training;

(3) The work portion of a cooperative or combination program;

(4) Internships; and

(5) Full- or part-time employment.

(Authority: 38 U.S.C. 1524)

(c) *Dependency changes.* Information regarding dependency changes if the case manager learns of such changes in the normal course of performing his or her duties.

(Authority: 38 U.S.C. 1524)

(d) *Information to determine if the veteran's permanent and total disability rating is protected under § 3.343.* The information provided by the case manager includes:

(1) The employment was within the scope of the vocational goal identified in the veteran's individualized written plan of vocational rehabilitation, or in a related field, and the employment secured by the veteran requires the use of the training or services furnished under the rehabilitation plan.

(2) Employment was secured not later than one year after the date the veteran's eligibility for counseling expired. A veteran's eligibility for counseling expires on the date employment services are terminated by VA or the veteran completes rehabilitation to the point of employability and terminates program participation, whichever is later; and

(3) The veteran maintained his or her employment for 12 consecutive months.

(Authority: 38 U.S.C. 1524, Pub. L. 101–237)

[53 FR 4397, Feb. 16, 1988, as amended at 56 FR 21449, May 9, 1991]

## Subpart J—Temporary Program of Vocational Training and Rehabilitation

AUTHORITY: Pub. L. 98–543, sec. 111; 38 U.S.C. 1163; Pub. L. 100–687, sec. 1301, unless otherwise noted.

SOURCE: 51 FR 19333, May 29, 1986, unless otherwise noted. Redesignated at 53 FR 4397, Feb. 16, 1988.

### § 21.6501 Overview.

(a) *Purpose.* The temporary program for trial work periods and vocational rehabilitation is intended to test the extent to which a veteran, who has been awarded a VA compensation rating of total disability by reason of inability to secure or follow a substantially gainful occupation as a result of service-connected disability, may benefit from vocational rehabilitation services which may be authorized under 33 U.S.C. chapter 31, and 38 U.S.C. 1163. See §§ 3.340 and 3.341 of this title.

(b) *Chapter 31 evaluations.* All veterans participating in this temporary program are to be evaluated to determine whether:

(1) They are eligible for and entitled to receive assistance under chapter 31; and

(2) Achievement of a vocational goal is reasonably feasible.

(Authority: 38 U.S.C. 1163; Pub. L. 100–687).

(c) *Applicability of chapter 31 provisions.* The provisions of §§ 21.1 through

21.430, generally applicable to veterans eligible for benefits under chapter 31, apply except as added to or modified by the provisions of the following sections. Participants not found eligible for chapter 31 benefits may nevertheless receive counseling services under 38 U.S.C. 3104(a)(2) and placement and postplacement services under 38 U.S.C. 3104(a)(5).

(Authority: 38 U.S.C. 1163)

[51 FR 19333, May 29, 1986. Redesignated at 53 FR 4397, Feb. 16, 1988, as amended at 55 FR 17272, Apr. 24, 1990]

### §21.6503 Definitions.

(a) *Program period.* The term *program period* means the period beginning on February 1, 1985, and ending December 31, 1992.

(Authority: 38 U.S.C. 1163(a)(2)(B); Pub. L. 102–291)

(b) *Qualified veteran.* The term *qualified veteran* means a veteran who has a service-connected disability, or service-connected disabilities, not rated as total, but who has been awarded a rating of total disability by reason of inability to secure or follow a substantially gainful occupation as a result of such disability or disabilities. Such a rating is referred to as an IU (individual unemployability) rating. See §§3.340, 3.341, and 4.16 of this title.

(c) *Receives an IU rating.* The phrase *receives an IU rating* refers to the date of the rating decision authorizing total disability compensation based upon individual unemployability.

(Authority: 38 U.S.C. 1163(a)(2)(A))

[51 FR 19333, May 29, 1986. Redesignated at 53 FR 4397, Feb. 16, 1988, as amended at 55 FR 17272, Apr. 24, 1990; 58 FR 41637, Aug. 5, 1993]

### §21.6505 Participation in the temporary program.

Participation in this temporary program of trial work periods and vocational rehabilitation is limited to qualified veterans.

(Authority: 38 U.S.C. 1163(a)(2)(A)).

[55 FR 17272, Apr. 24, 1990]

### §21.6507 Special benefits for qualified veterans under test program.

(a) *Protection of IU rating under 38 CFR 3.343(c)(2).* The total disability rating of any qualified veteran who begins to engage in a substantially gainful occupation during the program period is protected from reduction by VA on the basis of the veteran's having secured and followed a substantially gainful occupation under the provisions of §3.343(c)(2) of this title.

(Authority: 38 U.S.C. 1163(a))

(b) *Counseling and employment services for qualified veterans.* During the program period, VA will make the counseling services described in 38 U.S.C. 3104(a)(2), and the placement and postplacement services described in 38 U.S.C. 3104(a)(5), available to each qualified veteran for whom achievement of a vocational goal is reasonably feasible. These services will be made available regardless of the veteran's entitlement to or desire to participate in a vocational rehabilitation program under chapter 31. See §21.6519.

(Authority: 38 U.S.C. 1163(b))

### §21.6509 Notice to qualified veterans.

(a) At the time notice is provided to a qualified veteran of an award of an IU rating, VA shall provide the veteran with an additional statement. These statements shall contain the following information:

(1) Notice of the provisions of 38 U.S.C. 1163;

(2) Information explaining the purposes and availability of, as well as eligibility requirements and procedures for pursuing a vocational rehabilitation program under Chapter 31; and

(3) A summary description of the scope of services and assistance available under that chapter.

(Authority: 38 U.S.C. 1163(c)(1)).

(b) *Opportunity for evaluation.* After providing the notice required under paragraph (a) of this section, VA shall offer the veteran the opportunity for an evaluation under §21.50 of this part.

(Authority: 38 U.S.C. 1163(c); Pub. L. 100–687).

(c) *Evaluation.* The term *evaluation* hereinafter shall be understood to mean the same evaluation accorded in an *initial evaluation* and an *extended evaluation* as those terms are described in §§ 21.50 and 21.57 of this part.

(d) *Responsible staff member.* The evaluation or reevaluation will be provided by a counseling psychologist in the Vocational Rehabilitation and Employment (VR&C) Division.

(Authority: 38 U.S.C. 1163(c)).

[55 FR 17273, Apr. 24, 1990]

### §§ 21.6511–21.6513 [Reserved]

### § 21.6515 Formulation of rehabilitation plan.

(a) *Formulation of plan.* Following an evaluation, the counseling psychologist will formulate an IWRP (individualized written rehabilitation plan) or an IEAP (individualized employment assistance plan) for each participating qualified veteran for whom achievement of a vocational goal is reasonably feasible. These plans shall be prepared in accordance with § 21.84 (IWRP) or § 21.88 (IEAP).

(b) *Existing plan.* If the veteran already has undertaken a rehabilitation program under Chapter 31, a new plan shall not be developed unless circumstances indicate that the existing plan should be modified or replaced.

(Authority: 38 U.S.C. 1163(c); Pub. L. 100–687).

[51 FR 19333, May 29, 1986. Redesignated at 53 FR 4397, Feb. 16, 1988, and amended at 55 FR 17272, Apr. 24, 1990]

### § 21.6517 [Reserved]

### § 21.6519 Eligibility of qualified veterans for employment and counseling services.

(a) *General.* A qualified veteran for whom vocational rehabilitation and achievenment of a vocational goal are reasonably feasible may be provided the employment and counseling services to which he or she may be entitled under chapter 31. If the qualified veteran is not eligible for such assistance under chapter 31, he or she may be provided, nevertheless, the counseling, placement and postplacement services provided under 38 U.S.C. 3104(a)(2) and (5). The specific services which may be authorized are discussed in §§ 21.100, 21.252 and 21.254(a).

(b) *Services under other VA and non-VA programs.* Veterans being provided counseling, placement and postplacement services under §§ 21.100, 21.252, and 21.254(a) will also be aided in identifying services of other VA and non-VA programs which may be of assistance in securing employment. All elements of a program of these services shall be incorporated in the IEAP.

(c) *Veteran elects counseling, placement and postplacement services.* If a qualified veteran elects not to undertake the IWRP and is otherwise eligible for counseling, placement and postplacement services under 38 U.S.C. 3104(a)(2) and (5), he or she may be provided those services.

(Authority: 38 U.S.C. 1163(b)).

(d) *Duration of services under 38 U.S.C. 3104(a) (2) and (5).* The services provided under 38 U.S.C. 3104(a)(2) and (5), are limited to an 18-month period of employment assistance as described in § 21.73.

(Authority: 38 U.S.C. 1163(b))

[51 FR 19333, May 29, 1986. Redesignated at 53 FR 4397, Feb. 16, 1988, as amended at 55 FR 17273, Apr. 24, 1990]

### § 21.6521 Employment of qualified veterans.

(a) *Provisions of the IEAP (Individualized Employment Assistance Plan).* Each IEAP of a qualified veteran shall require that the:

(1) Case manager maintain close contact with qualified veterans who become employed to help assure adjustment to employment;

(2) Veteran discuss any plan to leave employment during the trial work period with the case manager.

(Authority: 38 U.S.C. 1163(c))

(b) *Coordination with the Adjudication Division.* The VR&C Division will inform the Adjudication Division in writing upon employment of the participating qualified veteran during a program of either vocational rehabilitation services or counseling and employment services and when such employment has continued for 12 consecutive months. See § 3.343(c)(2) of this title.

(Authority: 38 U.S.C. 1163(a))

### § 21.6523 Entry and reentry into a program of counseling and employment services under 38 U.S.C. 3104(a) (2) and (5).

(a) *Dates of entry.* A qualified veteran, not eligible to receive Chapter 31 benefits, may not enter or pursue a program of counseling and employment services under 38 U.S.C. 3104(a) (2) and (5), before February 1, 1985, or later than December 31, 1992.

(Authority: 38 U.S.C. 1163; Pub. L. 100–687; Pub. L. 102–291)

(b) *Reentry.* The provisions of paragraph (a) of this section are also applicable to veterans being provided additional counseling and employment services following a redetermination of eligibility and entitlement to such services.

(Authority: 38 U.S.C. 1163; Pub. L. 100–687; Pub. L. 102–291)

[51 FR 19333, May 29, 1986. Redesignated at 53 FR 4397, Feb. 16, 1988, as amended at 55 FR 17273, Apr. 24, 1990; 58 FR 41637, Aug. 5, 1993]

### § 21.6525 [Reserved]

## Subpart K—All Volunteer Force Educational Assistance Program (Montgomery GI Bill—Active Duty)

AUTHORITY: 38 U.S.C. 501(a), chs. 30, 36, unless otherwise noted.

SOURCE: 53 FR 1757, Jan. 22, 1988, unless otherwise noted.

### § 21.7000 Establishment of educational assistance program.

(a) *Establishment.* An educational assistance program for certain veterans and servicemembers is established.

(Authority: 38 U.S.C. 3001(1); Pub. L. 98–525)

(b) *Purpose.* The purpose of this program is as stated in 38 U.S.C. 3001.

(Authority: 38 U.S.C. 3001)

[53 FR 1757, Jan. 22, 1988, as amended at 55 FR 28383, July 11, 1990; 61 FR 26116, May 24, 1996]

DEFINITIONS

### § 21.7020 Definitions.

For the purposes of regulations from § 21.7000 through § 21.7499 and the payment of basic educational assistance and supplemental educational assistance under 38 U.S.C. chapter 30, the following definitions apply. (*See* also additional definitions in § 21.1029).

(a) *Definitions of participants*—(1) *Servicemember.* The term *servicemember* means anyone who:

(i) Meets the eligibility requirements of § 21.7042 or § 21.7044, and

(ii) Is on active duty with the Army, Navy, Air Force, Marine Corps, Coast Guard, Public Health Service or National Oceanographic and Atmospheric Administration.

(Authority: 38 U.S.C. 3016; Pub. L. 98–525)

(2) *Veteran.* The term *veteran* means anyone who—

(i) Meets the eligibility requirements of § 21.7042, § 21.7044, or § 21.7045, and

(ii) Is not on active duty. The term *veteran* includes an individual who is actively participating in the Selected Reserve.

(Authority: 38 U.S.C. 3011, 3012; Pub. L. 98–525)

(b) *Other definitions*—(1) *Active duty.*

(i) The term *active duty* means—

(A) Full-time duty in the Armed Forces, other than active duty for training,

(B) Full-time duty (other than for training purposes) as a commissioned officer of the Regular or Reserve Corps of the Public Health Service,

(C) Full-time duty as a commissioned officer of the National Oceanic and Atmospheric Administration, and

(D) Authorized travel to or from such duty or service.

(ii) The term *active duty* does not include any period during which an individual:

(A) Was assigned full time by the Armed Forces to a civilian institution for a course of education which was substantially the same as established courses offered to civilians,

(B) Served as a cadet or midshipman at one of the service academies, or

(C) Served under the provisions of 10 U.S.C. 511(d) pursuant to an enlistment in the Army National Guard or the Air National Guard, or as a Reserve for service in the Army Reserve, Naval Reserve, Air Force Reserve, Marine Corps Reserve, or Coast Guard Reserve.

(Authority: 38 U.S.C. 101(21), 3002(6); Pub. L. 98–525)

(iii) When referring to individuals who, before November 30, 1989, had never served on active duty (as that term is defined by § 3.6b of this title), the term ''active duty'' when used in this subpart includes full-time National Guard duty first performed after November 29, 1989, by a member of the Army National Guard of the United States or the Air National Guard of the United States in the servicemember's status as a member of the National Guard of a State for the purpose of organizing, administering, recruiting, instructing or training the National Guard.

(Authority: 38 U.S.C. 3002(7); Pub. L. 101–510, sec. 563(b)) (Nov. 5, 1990)

(iv) When referring to individuals who, before June 30, 1985, had never served on active duty (as that term is defined by § 3.6(b) of this chapter) and who made the election described in § 21.7042(a)(7) or (b)(10), the term *active duty* when used in this subpart includes full-time National Guard duty under title 32, U.S. Code first performed after June 30, 1985, by a member of the Army National Guard of the United States or the Air National Guard of the United States for the purpose of organizing, administering, recruiting, instructing, or training the National Guard.

(Authority: 38 U.S.C. 3002(7); sec. 107, Pub. L. 104–275, 110 Stat. 3329–3330)

(2) *Attendance* The term *attendance* means the presence of a veteran or servicemember—

(i) In the class where the approved course is being taught in which he or she is enrolled, or

(ii) At a training establishment, or

(iii) Any other place of instruction, training or study designated by the educational institution or training establishment where the veteran or servicemember is enrolled and is pursuing a program of education.

(Authority: 38 U.S.C. 3034, 3680(g))

(3) *Audited course.* The term *audited course* has the same meaning as provided in § 21.4200(i) of this part.

(Authority: 38 U.S.C. 3034, 3680(a); Pub. L. 98–525)

(4) *Basic educational assistance.* The term *basic educational assistance* means a monetary benefit payable to all individuals who meet basic requirements for eligibility under chapter 30, title 38 U.S.C., for pursuit of a program of education.

(Authority: 38 U.S.C. 3002(1); Pub. L. 98–525)

(5) *Break in service.* (i) Except as provided in paragraph (b)(5)(ii) of this section, the term *break in service* means a period of more than 90 days between the date when an individual is released from active duty or otherwise receives a complete separation from active duty service and the date he or she reenters on active duty.

(ii) A period during which an individual is assigned full time by the Armed Forces to a civilian institution for a course of education substantially the same as established courses offered to civilians is not a break in service.

(Authority: 38 U.S.C. 3011, 3021)

(6) *Continuous active duty.* (i) The term *continuous active duty* means active duty served without interruption. An interruption in service will only be found when the individual receives a complete separation from active duty.

(ii) A period during which an individual on active duty is assigned full time by the Armed Forces to a civilian institution for a course of education substantially the same as established courses offered to civilians will not interrupt the continuity of the individual's active duty.

(iii) If an individual, during an obligated period of active-duty service, is separated from active duty to pursue a course of education at a service academy or a post-secondary school preparatory to enrollment at a service academy, no interruption in service will be found and the individual's service will be considered continuous active-duty service, provided he or she—

(A) Commences pursuit of a course of education at a service academy or post-secondary school,

(B) Fails to complete the course of education, and

(C) Immediately reenters on a period of active duty.

(iv) An individual who is discharged or released from active duty for a reason stated in paragraph (b)(6)(iv) of this section after serving not more than 12 months of an obligated period of active duty, and who subsequently reenlists or reenters on a period of active duty, will not be considered to have an interruption in service. Except as provided in paragraph (b)(6)(vi) of this section, the individual's service during the two periods will be considered continuous active-duty service for the aggregate length of the two service periods. However, the individual's discharge or release from the earlier obligated period of service must have been:

(A) For a service-connected disability;

(B) For hardship;

(C) For a medical condition which preexisted such active-duty service and is not service connected;

(D) For a physical or mental condition not characterized as a disability and not resulting from the individual's own willful misconduct which interfered with the individual's performance of duty as determined by the Secretary concerned; or

(E) Involuntary, for the convenience of the Government as a result of a reduction in force as determined by the Secretary concerned.

(v) VA will not consider an individual to have an interruption of service when he or she:

(A) Serves a period of active duty without interruption (without a complete separation from active duty), as an enlisted member or warrant officer;

(B) While serving on such active duty is assigned to officer training school; and

(C) Following successful completion of the officer training school is discharged to accept, without a break in service, a commission as an officer in the Armed Forces for a period of active duty.

(vi) If the second period of active-duty service referred to in paragraph (b)(6)(iv) or (b)(6)(v) of this section is of such nature or character that, when aggregated with the earlier period of service referred to in that paragraph, it would cause the individual to be divested of entitlement to educational assistance otherwise established by the earlier period of active duty, the two periods of service will not be aggregated and will not be considered a single period of continuous active duty.

(vii) Time lost will not be considered to interrupt the continuity of service. For the purpose of this section, ''time lost'' includes excess leave, noncreditable time and not-on-duty time.

(Authority: 38 U.S.C. 3011, 3012)

(7) *Cost of course.* The term *cost of course* means the total cost for tuition and fees for a course which an educational institution charges to nonveterans whose circumstances are similar to veterans enrolled in the same course. *Cost of course* does not include the cost of supplies which the student is required to purchase at his or her own expense.

(Authority: 38 U.S.C. 3032; Pub. L. 98–525)

(8) *Deficiency course.* The term *deficiency course* means any secondary level course or subject not previously completed satisfactorily which is specifically required for pursuit of a post-secondary program of education.

(Authority: 38 U.S.C. 3034; Pub. L. 98–525)

(9) *Dependent.* The term *dependent* means:

(i) A spouse as defined in § 3.50(c) of this chapter,

(ii) A child who meets the requirements of § 3.57 of this chapter, or

(iii) A parent who meets the requirements of § 3.59 of this chapter.

(Authority: 38 U.S.C. 3015(d); Pub. L. 98–525)

(10) *Divisions of the school year.* The term *divisions of the school year* has the same meaning as provided in § 21.4200(b) of this part.

(Authority: 38 U.S.C. 3034, 3680(a); Pub. L. 98–525)

(11) *Drop-add period.* The term *drop-add period* has the same meaning as provided in § 21.4200(1) of this part.

(Authority: 38 U.S.C. 3034, 3680(a); Pub. L. 98–525)

(12) *Educational assistance.* The term *educational assistance* means basic educational assistance, supplemental educational assistance, and all additional amounts payable, commonly called *kickers.*

(Authority: 38 U.S.C. 3002; Pub. L. 98–525)

(13) *Educational objective.* An educational objective is one that leads to the awarding of a diploma, degree or certificate which reflects educational attainment.

(Authority: 38 U.S.C. 3002(3), 3452(b); Pub. L. 98–525)

(14) *Enrollment.* The term *enrollment* has the same meaning as provided in § 21.4200(n) of this part.

(Authority: 38 U.S.C. 3034, 3680(g); Pub. L. 98–525)

(15) *Enrollment period.* The term *enrollment period* has the same meaning as provided § 21.4200(p) of this part.

(Authority: 38 U.S.C. 3034, 3680(g); Pub. L. 98–525)

(16) *Holiday vacation.* The term *holiday vacation* means a customary, reasonable vacation period connected with a Federal or State legal holiday which is identified as a holiday vacation in the educational institution's approved literature. Generally, VA will interpret a reasonable period as not more than one calendar week at Christmas and one calendar week at New Year's and shorter periods of time in connection with other legal holidays.

(Authority: 38 U.S.C. 3034, 3680; Pub. L. 98–525)

(17) *In residence on a standard quarter- or semester-hour basis.* The term *in residence on a standard quarter- or semester-hour basis* has the same meaning as provided in § 21.4200(r) of this part.

(Authority: 38 U.S.C. 3034, 3688(c); Pub. L. 98–525)

(18) *Institution of higher learning.* The term *institution of higher learning* has the same meaning as provided in § 21.4200(h) of this part.

(Authority: 38 U.S.C. 3034, 3688; Pub. L. 98–525)

(19) *Mitigating circumstances.* (i) The term *mitigating circumstances* means circumstances beyond the veteran's or servicemember's control which prevent him or her from continuously pursuing a program of education. The following circumstances are representative of those which VA considers to be mitigating. This list is not all-inclusive.

(A) An illness of the veteran or servicemember,

(B) An illness or death in the veteran's or servicemember's family,

(C) An unavoidable change in the veteran's conditions of employment,

(D) An unavoidable geographical transfer resulting from the veteran's employment,

(E) Immediate family or financial obligations beyond the control of the veteran which require him or her to suspend pursuit of the program of education to obtain employment.

(F) Discontinuance of the course by the educational institution,

(G) Unanticipated active duty for training,

(H) Unanticipated difficulties in caring for the veteran's or eligible person's child or children.

(ii) In the first instance of a withdrawal after May 31, 1989, from a course or courses for which the veteran received educational assistance under title 38, U.S. Code, VA will consider that mitigating circumstances exist with respect to courses totaling not

more than six semester hours or the equivalent.

(Authority: 38 U.S.C. 3034, 3680(a)(1); Pub. L. 100–689) (June 1, 1989)

(20) *Nonpunitive grade.* The term *nonpunitive grade* has the same meaning as provided in §21.4200(j) of this part.

(Authority: 38 U.S.C. 3034, 3680(a); Pub. L. 98–525)

(21) *Normal commuting distance.* The term *normal commuting distance* has the same meaning as provided in §21.4200(m) of this part.

(Authority: 38 U.S.C. 3034, 3680; Pub. L. 98–525)

(22) *Professional or vocational objective.* A professional or vocational objective is one that leads to an occupation. It may include educational objectives essential to prepare for the chosen occupation. When a program consists of a series of courses not leading to an educational objective, these courses must be directed toward attainment of a designated professional or vocational objective.

(Authority: 38 U.S.C. 3002(3); Pub. L. 98–525)

(23) *Program of education.* A program of education—

(i) Is any unit course or subject or combination of courses or subjects which is pursued by a veteran or servicemember at an educational institution, and which is required by the Secretary of the Small Business Administration as a condition to obtaining financial assistance under the provisions of 15 U.S.C. 636; or

(ii) Is a combination of subjects or unit courses pursued at an educational institution. The combination generally is accepted as necessary to meet requirements for a predetermined educational, professional or vocational objective. It may consist of subjects or courses which fulfill requirements for more than one objective if all objectives pursued are generally recognized as being related to a single career field;

(iii) Includes an approved full-time program of apprenticeship or of other on-job training; and

(iv) Effective November 30, 1999, includes a preparatory course for a test that is required or used for admission to—

(A) An institution of higher education; or

(B) A graduate school.

(Authority: 38 U.S.C. 3002(3), 3452(b))

(24) *Punitive grade.* The term *punitive grade* has the same meaning as provided in §21.4200(k) of this part.

(Authority: 38 U.S.C. 3034, 3680(a); Pub. L. 98–525)

(25) *Pursuit.* (i) The term *pursuit* means to work, while enrolled, towards the objective of a program of education. This work must be in accordance with approved institutional policy and regulations, and applicable criteria of title 38 U.S.C.; must be necessary to reach the program's objective; and must be accomplished through—

(A) Resident courses (including teacher training courses and similar courses which VA considers to be resident training),

(B) Independent study courses,

(C) Correspondence courses,

(D) An apprenticeship or other on-job training program,

(E) A graduate program of research in absentia,

(F) Medical-dental internships and residencies, nursing courses and other medical-dental specialty courses, or

(G) A flight training course beginning on or after September 30, 1990.

(ii) VA will consider a veteran who qualifies for payment during an interval between terms or school closing, or who qualifies for payment during a holiday vacation to be in pursuit of a program of education during the interval, school closing, or holiday vacation.

(Authority: 38 U.S.C. 3034, 3680(g); Pub. L. 98–525)

(26) *Refresher course.* The term ''refresher course'' means—

(i) Either a course at the elementary or secondary level to review or update material previously covered in a course that has been satisfactorily completed, or

(ii) A course which permits an individual to update knowledge and skills or be instructed in the technological advances which have occurred in the individual's field of employment during

and since the period of the individual's active military service.

(Authority: 38 U.S.C. 3034(a))

(27) *Remedial course.* The term *remedial course* means a course designed to overcome a deficiency at the elementary or secondary level in a particular area of study, or a handicap, such as in speech.

(Authority: 38 U.S.C. 3034, 38 U.S.C. 3491(a)(2); Pub. L. 98–525)

(28) *Secretary.* The term *Secretary* means the Secretary of Defense with respect to members of the Armed Forces under the jurisdiction of the Secretary of a military department, and the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy.

(Authority: 38 U.S.C. 3002(5); Pub. L. 98–525)

(29) *School, educational institution, institution.* The terms *school, educational institution,* and *institution* mean—

(i) Any vocational school, correspondence school, business school, junior college, teachers' college, college, normal school, professional school, university or scientific or technical institution;

(ii) Any public or private elementary school or secondary school which offers courses for adults, provided that the courses lead to an objective other than an elementary school diploma, a high school diploma or their equivalents; and

(iii) An entity, other than an institution of higher learning, that provides training required for completion of a State-approved alternative teacher certification program.

(Authority: 38 U.S.C. 3002(7); sec. 107, Pub. L. 104–275, 110 Stat. 3329–3330)

(30) *School year.* The term *school year* means generally a period of 2 semesters or 3 quarters which is not less than 30 nor more than 39 weeks in total length.

(Authority: 38 U.S.C. 3034; Pub. L. 98–525)

(31) *Selected Reserve.* The term *Selected Reserve* means the Selected Reserve of the Ready Reserve of any of the reserve components (including the Army National Guard of the United States and the Air National Guard of the United States) of the Armed Forces, as required to be maintained under section 268(b), 10 U.S.C.

(Authority: 38 U.S.C. 3002(4); Pub. L. 98–525)

(32) *Standard class session.* The term *standard class session* has the same meaning as provided in § 21.4200(g) of this part.

(Authority: 38 U.S.C. 3034; 3688(c); Pub. L. 98–525)

(33) *Standard college degree.* The term *standard college degree* has the same meaning as provided in § 21.4200(e) of this part.

(Authority: 38 U.S.C. 3034, 3688; Pub. L. 98–525)

(34) *Supplemental educational assistance.* The term *supplemental educational assistance* means a benefit payable to a veteran or servicemember as a supplement to his or her basic educational assistance for pursuit of a program of education under 38 U.S.C. ch. 30.

(Authority: 38 U.S.C. 3002(2); Pub. L. 98–525)

(35) *Established charge.* The term *established charge* means the lesser of—

(i) The charge for the correspondence course or courses determined on the basis of the lowest extended time payment plan offered by the educational institution and approved by the appropriate State approving agency, or

(ii) The actual cost to the servicemember or veteran.

(Authority: 38 U.S.C. 3034, 3686(a)(1))

(36) *Date of affirmance.* The term *date of affirmance* means the date (after the expiration of ten days after a veteran or servicemember signs an enrollment agreement for a correspondence course), on which the veteran or servicemember signs and submits to VA a written agreement affirming the enrollment agreement.

(Authority: 38 U.S.C. 3034, 3686)

(37) *Training establishment.* The term *training establishment* means any establishment providing apprentice or other on-job training, including those under

the supervision of a college or university or any State department of education, or any State apprenticeship agency or any State board of vocational education, or any joint apprenticeship committee, or the Bureau of Apprenticeship and Training established in accordance with 29 U.S.C. Chapter 4C, or any agency of the Federal Government authorized to supervise such training.

(Authority: 38 U.S.C. 1434, 3687)

(38) *Disabling effects of chronic alcoholism.* (i) The term *disabling effects of chronic alcoholism* means alcohol-induced physical or mental disorders or both, such as habitual intoxication, withdrawal, delirium, amnesia, dementia, and other like manifestations of chronic alcoholism which, in the particular case—

(A) Have been medically diagnosed as manifestations of alcohol dependency or chronic alcohol abuse, and

(B) Are determined to have prevented commencement or completion of the affected individual's chosen program of education.

(ii) A diagnosis of alcoholism, chronic alcoholism, alcohol-dependency, chronic alcohol abuse, etc., in and of itself, does not satisfy the definition of this term.

(iii) Injury sustained by a veteran as a proximate and immediate result of activity undertaken by the veteran while physically or mentally unqualified to do so due to alcoholic intoxication is not considered a disabling effect of chronic alcoholism.

(Authority: 38 U.S.C. 105, 3031(d); Pub. L. 100–689) (Nov. 18, 1988)

(39) *Cooperative course.* The term *cooperative course* means a full-time program of education which consists of institutional courses and alternate phases of training in a business or industrial establishment with the training in the business of industrial establishment being strictly supplemental to the institutional portion.

(Authority: 38 U.S.C. 3002, 3482(a); Pub. L. 100–689) (Jan. 1, 1989)

(40) *Open period.* The term ''open period'' means a period of time beginning on December 1, 1988, and ending on June 30, 1989.

(Authority: 38 U.S.C. 3018; Pub. L. 100–689) (Nov. 18, 1988)

(41) *Persian Gulf War.* The term ''Persian Gulf War'' means the period beginning on August 2, 1990, and ending on the date thereafter prescribed by Presidential proclamation or by law.

(Authority: 38 U.S.C. 101(33); Pub. L. 102–25)

(42) *Continuously enrolled.* The term *continuously enrolled* means being in an enrolled status at an educational institution for each day during the school year, and for consecutive school years. Continuity of enrollment is not broken by holiday vacations; vacation periods; periods during the school year between terms, quarters, or semesters; or by nonenrollment during periods of enrollment outside the school year (e.g., summer sessions).

(Authority: Sec. 313(b), Pub. L. 102–568, 106 Stat. 4333)

(43) *Alternative teacher certification program.* The term *alternative teacher certification program,* for the purposes of determining whether an entity offering such a program is a school, educational institution or institution as defined in paragraph (b)(29)(iii) of this section, means a program leading to a teacher's certificate that allows individuals with a bachelor's degree or graduate degree to obtain teacher certification without enrolling in an institution of higher learning.

(Authority: 38 U.S.C. 3452(c))

(44) *Date of election.* The term *date of election* means:

(i) For an election that must be made in the form and manner determined by the Secretary of Defense, the date determined by the Secretary of Defense; and

(ii) For an election that must be submitted to VA, the date VA receives the written election.

(45) *Institution of higher education.* The term *institution of higher education* means either:

(i) An educational institution, located in a State, that—

(A) Admits as regular students only persons who have a high school diploma, or its recognized equivalent, or persons who are beyond the age of compulsory school attendance in the State in which the educational institution is located;

(B) Offers postsecondary level academic instruction that leads to an associate or baccalaureate degree; and

(C) Is empowered by the appropriate State education authority under State law to grant an associate or baccalaureate degree, or where there is no State law to authorize the granting of a degree, is accredited for associate or baccalaureate degree programs by a recognized accrediting agency; or

(ii) An educational institution, not located in a State, that—

(A) Offers a course leading to an undergraduate standard college degree or the equivalent; and

(B) Is recognized as an institution of higher education by the secretary of education (or comparable official) of the country or other jurisdiction in which the educational institution is located.

(Authority: 38 U.S.C. 3002(3))

(46) *Graduate school.* The term *graduate school* means either:

(i) An educational institution, located in a State, that—

(A) Admits as regular students only persons who have a baccalaureate degree or the equivalent in work experience;

(B) Offers postsecondary level academic instruction that leads to a master's degree, doctorate, or professional degree; and

(C) Is empowered by the appropriate State education authority under State law to grant a master's degree, doctorate, or professional degree, or, where there is no State law to authorize the granting of a degree, is accredited for master's degree, doctorate, or professional degree programs by a recognized accrediting agency; or

(ii) An educational institution, not located in a State, that—

(A) Offers a course leading to a master's degree, doctorate, or professional degree; and

(B) Is recognized as an institution of higher education by the secretary of education (or comparable official) of the country or other jurisdiction in which the educational institution is located.

(Authority: 38 U.S.C. 3002(3)).

(47) *High technology industry.* The term *high technology industry* has the same meaning as provided in § 21.4200(aa).

(Authority: 38 U.S.C. 3014A, 3452(c), 3501(a)(6))

(48) *Employment in a high technology industry. Employment in a high technology* industry has the same meaning as provided in § 21.4200(bb).

(Authority: 38 U.S.C. 3014A)

(49) *High technology occupation.* The term *high technology occupation* has the same meaning as provided in § 21.4200(cc).

(Authority: 38 U.S.C. 3014A, 3452(c), 3501(a)(6))

(50) *Computer specialist.* The term *computer specialist* has the same meaning as provided in § 21.4200(dd).

(Authority: 38 U.S.C. 3014A, 3452(c), 3501(a)(6))

(51) *Accelerated payment.* An *accelerated payment* is a lump sum payment of a maximum of 60 percent of the charged tuition and fees for an individual's enrollment for a term, quarter, or semester in an approved program of education leading to employment in a high technology industry. In the case of a program of education not offered on a term, quarter, or semester basis, the accelerated payment is a lump sum payment of a maximum of 60 percent of the charged tuition and fees for the entire such program.

(Authority: 38 U.S.C. 3014A)

(52)–(55) [Reserved]

(56) *Fugitive felon.* The term *fugitive felon* has the same meaning as provided in § 21.4200(kk).

(Authority: 38 U.S.C. 5313B)

(57) *Felony*. The term *felony* has the same meaning as provided in § 21.4200(ll).

(Authority: 38 U.S.C. 5313B)

[53 FR 1757, Jan. 22, 1988, as amended at 55 FR 28383, July 11, 1990; 56 FR 20130, May 2, 1991; 57 FR 15023, Apr. 24, 1992; 58 FR 26241, May 3, 1993; 59 FR 24051, May 10, 1994; 61 FR 6785, Feb. 22, 1996; 61 FR 29297, June 10, 1996; 62 FR 55761, Oct. 28, 1997; 64 FR 23772, May 4, 1999; 65 FR 5786, Feb. 7, 2000; 65 FR 67266, Nov. 9, 2000; 66 FR 39279, July 30, 2001; 68 FR 34328, June 9, 2003; 68 FR 35179, June 12, 2003; 70 FR 25787, May 16, 2005]

CLAIMS AND APPLICATIONS

### § 21.7030 Applications, claims, and time limits.

The provisions of subpart B of this part apply with respect to claims for educational assistance under 38 U.S.C. chapter 30, VA actions upon receiving a claim, and time limits connected with claims.

(Authority: 38 U.S.C. 3018B, 3034(a), 3471, 5101, 5102, 5103)

[64 FR 23773, May 4, 1999]

### § 21.7032 Time limits for making elections.

(a) *Scope of this section*. The provisions of this section are applicable to certain elections to receive educational assistance under 38 U.S.C. ch. 30. For time limits governing formal and informal claims for educational assistance under 38 U.S.C. ch. 30, see § 21.1032.

(Authority: 38 U.S.C. 3018B)

(b) *Time limit for completing certain elections.* An individual who seeks to establish eligibility to receive educational assistance under § 21.7045 must—

(1) Within one year of the date of the VA letter or other written notice to the individual indicating that additional evidence is needed in order to complete the claim, submit that evidence to VA. This time limit may be extended if the individual is able to show good cause for an extension of the period to the date on which he or she actually submits the additional evidence; and

(2) Submit the $1,200 VA is required pursuant to § 21.7045(c)(2) to collect before educational assistance can be awarded. A delay in submitting the $1,200 may result in a later effective date for the award to the individual, and in no event will VA accept payment of the $1,200 from the individual after the last date of eligibility as determined by § 21.7050 or § 21.7051. See § 21.7131(k).

(Authority: 38 U.S.C. 3018B)

[53 FR 1757, Jan. 22, 1988, as amended at 56 FR 11671, Mar. 20, 1991; 58 FR 63530, Dec. 2, 1993; 61 FR 6785, Feb. 22, 1996; 64 FR 23773, May 4, 1999]

ELIGIBILITY

### § 21.7040 Categories of basic eligibility.

Eligibility for basic educational assistance can be established by:

(a) Some individuals who first become members of the Armed Forces or who first enter on active duty as a member of the Armed Forces after June 30, 1985, and

(b) Some individuals who are eligible for educational assistance allowance under 38 U.S.C. chapter 34.

(Authority: 38 U.S.C. 3011, 3012; Pub. L. 98–525)

[53 FR 1757, Jan. 22, 1988, as amended at 55 FR 28384, July 11, 1990]

### § 21.7042 Basic eligibility requirements.

An individual must meet the requirements of this section, § 21.7044, or § 21.7045 in order to be eligible for basic educational assistance. This section requires an individual to complete certain academic requirements before applying for educational assistance. If the individual applies before completing those requirements, VA will disallow the application. However, the individual's premature application will not prevent the individual from establishing eligibility at a later time by applying for educational assistance again after having completed those academic requirements. In determining whether

an individual has met the service requirements of this section, VA will exclude any period during which the individual is not entitled to credit for service for the periods of time specified in § 3.15.

(Authority: 38 U.S.C. 3011, 3012, 3018(b), 3018A)

(a) *Eligibility based solely on active duty*. An individual may establish eligibility for basic educational assistance based on service on active duty under the following terms, conditions and requirements.

(1) The individual must after June 30, 1985, either—

(i) First become a member of the Armed Forces, or

(ii) First enter on active duty as a member of the Armed Forces;

(2) Except as provided in paragraph (a)(5) of this section, the individual must—

(i) If his or her obligated period of active duty is three years or more, serve at least three years of continuous active duty in the Armed Forces; or

(ii) If his or her obligated period of active duty is less than three years, serve at least two years of continuous active duty in the Armed Forces;

(3) The individual, before applying for educational assistance, must either—

(i) Complete the requirements of a secondary school diploma (or an equivalency certificate), or

(ii) Successfully complete (or otherwise receive academic credit for) 12 semester hours (or the equivalent) in a program of education leading to a standard college degree; and

(Authority: 38 U.S.C. 3011, 3016)

(4) After completing the service requirements of this paragraph the individual must—

(i) Continue on active duty, or

(ii) Be discharged from service with an honorable discharge, or

(iii) Be released after service on active duty characterized by the Secretary concerned as honorable service, and

(A) Be placed on the retired list, or

(B) Be transferred to the Fleet Reserve or Fleet Marine Corps Reserve, or

(C) Be placed on the temporary disability retired list, or

(iv) Be released from active duty for further service in a reserve component of the Armed Forces after service on active duty characterized by the Secretary concerned as honorable service.

(5) An individual who does not meet the requirements of paragraph (a)(2) of this section is eligible for basic educational assistance when he or she is discharged or released from active duty—

(i) For a service-connected disability, or

(ii) For a medical condition which preexisted service on active duty and which VA determines is not service connected, or

(iii) Under 10 U.S.C. 1173 (hardship discharge), or

(iv) For convenience of the government—

(A) After completing at least 20 continuous months of active duty of an obligated period of active duty that is less than three years, or

(B) After completing 30 continuous months of active duty of an obligated period of active duty that is at least three years, or

(v) Involuntarily for the convenience of the government as a result of a reduction in force, as determined by the Secretary of the military department concerned in accordance with regulations prescribed by the Secretary of Defense or by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, or

(vi) For a physical or mental condition that was not characterized as a disability and did not result from the individual's own willful misconduct but did interfere with the individual's performance of duty, as determined by the Secretary of each military department in accordance with regulations prescribed by the Secretary of Defense or by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy.

(Authority: 38 U.S.C. 3011)

(6) An individual whose active duty meets the definition of that term found in § 21.7020(b)(1)(iv), and who wishes to become entitled to basic educational assistance, must have elected to do so

before July 9, 1997. For an individual electing while on active duty, this election must have been made in the manner prescribed by the Secretary of Defense. For individuals not on active duty, this election must have been submitted in writing to VA.

(Authority: Sec. 107(b), Pub. L. 104–275, 110 Stat. 3329–3330)

(b) *Eligibility based on active duty service and service in the Selected Reserve.* An individual may establish eligibility for basic educational assistance based on a combination of service on active duty and service in the Selected Reserve under the following terms, conditions and requirements.

(1) The individual must, after June 30, 1985, either—

(i) First become a member of the Armed Forces, or

(ii) First enter on active duty as a member of the Armed Forces;

(2) The individual, before applying for educational assistance, must either—

(i) Complete the requirements of a high school diploma (or an equivalency certificate),

(ii) Successfully complete (or otherwise receive academic credit for) 12 semester hours (or the equivalent) in a program of education leading to a standard college degree;

(Authority: 38 U.S.C. 3011, 3012, 3016)

(3) Except as provided in paragraph (b)(6) of this section, the individual must serve at least two years of continuous active duty in the Armed Forces characterized by the Secretary concerned as honorable service.

(4) Except as provided in paragraph (b)(7) of this section, after completion of active duty service, the individual must serve at least four continuous years of service in the Selected Reserve. An individual whose release from active duty service occurs after December 17, 1989, must begin this service in the Selected Reserve within one year from the date of his or her release from active duty. During this period of service in the Selected Reserve the individual must satisfactorily participate in training as prescribed by the Secretary concerned.

(Authority: 38 U.S.C. 3012(a)(1); Pub. L. 100–689, Pub. L. 101–237)

(5) The individual must, after completion of all service described in this paragraph

(i) Be discharged from service with an honorable discharge, or

(ii) Be placed on the retired list, or

(iii) Be transferred to the Standby Reserve or an element of the Ready Reserve other than the Selected Reserve after service in the Selected Reserve characterized by the Secretary concerned as honorable service, or

(iv) Continue on active duty, or

(v) Continue in the Selected Reserve.

(6) An individual is exempt from serving two years on active duty as provided in paragraph (b)(3) of this section when the individual is discharged or released from the Armed Forces during those two years—

(i) For a service-connected disability, or

(ii) For a medical condition which preexisted such service on active duty and which VA determines is not service connected, or

(iii) Under 10 U.S.C. 1173 (hardship discharge), or

(iv) In the case of an individual discharged or released after 20 months of such service, for the convenience of the Government, or

(v) Involuntarily, for convenience of the Government as a result of a reduction in force as determined by the Secretary of the military department concerned in accordance with regulations prescribed by the Secretary of Defense or by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, or

(vi) For a physical or mental condition that was not characterized as a disability and did not result from the individual's own willful misconduct but did interfere with the individual's performance of duty, as determined by the Secretary of each military department in accordance with regulations prescribed by the Secretary of Defense or by the Secretary of Transportation with respect to the Coast Guard when

it is not operating as a service in the Navy.

(Authority: 38 U.S.C. 3011; Pub. L. 98–525, Pub. L. 99–576, Pub. L. 100–689, Pub. L. 101–510) (Oct. 19, 1984)

(7) An individual is exempt from serving four years in the Selected Reserve as provided in paragraph (b)(4) of this section when—

(i) After completion of the active duty service required by this paragraph the individual serves a continuous period of service in the Selected Reserve and is discharged or released from service in the Selected Reserve—

(A) For a service-connected disability, or

(B) For a medical condition which preexisted the individual's becoming a member of the Selected Reserve and which VA determines is not service connected, or

(C) Under 10 U.S.C. 1173 (hardship discharge), or

(D) After a minimum of 30 months of such service for the convenience of the Government, or

(E) Involuntarily for the convenience of the Government as a result of a reduction in force, as determined by the Secretary of the military department concerned in accordance with regulations prescribed by the Secretary of Defense or by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, or

(F) For a physical or mental condition that was not characterized as a disability and did not result from the individual's own willful misconduct but did interfere with the individual's performance of duty, as determined by the Secretary of each military department in accordance with regulations prescribed by the Secretary of Defense or by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy.

(Authority: 38 U.S.C. 3011; Pub. L. 98–525, Pub. L. 99–576, Pub. L. 100–689, Pub. L. 101–510) (Oct. 19, 1984)

(ii) The individual is obligated at the beginning of the two years active duty described in paragraph (b)(3) of this section to serve the four years in the Selected Reserve as described in subparagraph (b)(4) of this section, and during the two years of active duty service he or she is discharged or released from active duty in the Armed Forces—

(A) For a service-connected disability;

(B) For a medical condition which preexisted that period of active duty and which VA determines is not service connected; or

(C) For a physical or mental condition that was not characterized as a disability and did not result from the individual's own willful misconduct but did interfere with the individual's performance of duty, as determined by the Secretary of each military department in accordance with regulations prescribed by the Secretary of Defense or by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy.

(Authority: 38 U.S.C. 3012(b)(1)(B)(i))

(iii) Before completing four years service in the Selected Reserve, the individual ceases to be a member of the Selected Reserve during the period beginning on October 1, 1991, and ending on September 30, 1999, by reason of the inactivation of the individual's unit of assignment or by reason of involuntarily ceasing to be designated as a member of the Selected Reserve pursuant to 10 U.S.C. 268(b). However, this exemption from the four-year service requirement does not apply to a reservist who ceases to be a member of the Selected Reserve under adverse conditions as characterized by the Secretary of the military department concerned, or to a reservist who after having involuntarily ceased to be a member of the Selected Reserve is involuntarily separated from the Armed Forces under adverse conditions as characterized by the Secretary of the military department concerned.

(Authority: 10 U.S.C. 16133(b)(1); 38 U.S.C. 3012(b)(1)(B); sec. 4421(b) and (c), Pub. L. 102–484, 106 Stat. 2718)

(8) For purposes of determining continuity of Selected Reserve service, the Secretary concerned may prescribe by regulation a maximum period of time

during which the individual is considered to have continuous service in the Selected Reserve even though he or she—

(i) Is unable to locate a unit of the Selected Reserve of the individual's Armed Force that the individual is eligible to join or that has a vacancy, or

(ii) Is not attached to a unit of the Selected Reserve for any reason prescribed by the Secretary concerned by regulation other than those stated in paragraph (b)(8)(i) of this section.

(9) Any decision as to the continuity of an individual's service in the Selected Reserve made by the Department of Defense or the Department of Transportation under regulations described in paragraph (b)(8) of this section shall be binding upon VA.

(Authority: 38 U.S.C. 3011, 3012; Pub. L. 98–525, Pub. L. 100–689) (July 1, 1985, Oct. 1, 1987)

(10) An individual whose active duty meets the definition of that term found in §21.7020(b)(1)(iv), and who wishes to become entitled to basic educational assistance, must have elected to do so before July 9, 1997. For an individual electing while on active duty, this election must have been made in the manner prescribed by the Secretary of Defense. For individuals not on active duty, this election must have been submitted in writing to VA.

(Authority: Sec. 107(b), Pub. L. 104–275, 110 Stat. 3329–3330)

(c) *Eligibility based on withdrawal of election not to enroll.* As stated in paragraph (f) of this section, a veteran or servicemember who elects not to enroll in this educational assistance program is generally not eligible for educational assistance. However, such a person may establish eligibility by meeting the requirements of this paragraph.

(1) The individual must withdraw an election not to enroll. Only someone who meets the provisions of this subparagraph may make this withdrawal. Such a withdrawal is irrevocable. The withdrawal may only be made during the period beginning on December 1, 1988, and ending on June 30, 1989, by a servicemember who—

(i) Must have first become a member of the Armed Forces or first entered on active duty as a member of the Armed Forces during the period beginning July 1, 1985, and ending June 30, 1988;

(ii) As of the day of withdrawal of the election must have served continuously on active duty without a break in service since the date the individual first became a member of the Armed Forces or first entered on active duty as a member of the Armed Forces;

(iii) Must be serving on active duty on the day he or she withdraws the election;

(iv) Withdraws the election in the form prescribed by the Secretary of Defense or in the case of the Coast Guard by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy.

(2) The individual must continue to serve the period of service that the individual was obligated to serve on December 1, 1988.

(3) The individual must:

(i) Complete the period of service that he or she was obligated to serve on December 1, 1988, which will include completion of a period of extension or reenlistment if an individual's initial obligated period of service was scheduled to end after November 30, 1988, but he or she extended an enlistment or reenlisted before December 1, 1988; or

(ii) Before completing the period of service he or she was obligated to serve on December 1, 1988, have been discharged or released from active duty for—

(A) A service-connected disability, or

(B) A medical condition which preexisted that period of service and which the Secretary determines is not service connected, or

(C) Hardship (10 U.S.C. 1173); or

(iii) Before completing the period of service he or she was obligated to serve on December 1, 1988, have been—

(A) Discharged or released from active duty for the convenience of the Government after completing not less than 20 months of that period of service if such period was less than three years, or 30 months, if that period was at least three years;

(B) Involuntarily discharged or released from active duty for the convenience of the Government as a result of a reduction in force as determined by the Secretary concerned in accordance

with regulations prescribed by the Secretary of Defense; or

(C) Discharged or released from active duty for a physical or mental condition that was not characterized as a disability and did not result from the individual's own willful misconduct but did interfere with the individual's performance of duty, as determined by the Secretary of the military department concerned in accordance with regulations prescribed by the Secretary of Defense (or by the Secretary of Transportation for the Coast Guard when the Coast Guard is not operating as a service of the Navy).

(4) Before applying for educational assistance, the individual—

(i) Must complete the requirements of a secondary school diploma (or an equivalency certificate) or

(ii) Successfully complete (or otherwise receive academic credit for) 12 semester hours (or the equivalent) in a program of education leading to a standard college degree.

(5) Upon completion of the period of service he or she was obligated to serve on December 1, 1988, the individual must—

(i) Be discharged from service with an honorable discharge, be placed on the retired list, be transferred to the Fleet Reserve or Fleet Marine Corps Reserve, or be placed on the temporary disability retired list; or

(ii) Continue on active duty; or

(iii) Be released from active duty for further service in a reserve component of the Armed Forces after service on active duty characterized by the Secretary concerned as honorable service.

(Authority: 38 U.S.C. 3018; Pub. L. 102–16) (Mar. 22, 1991)

(d) *Dual eligibility*. (1) An individual who has established eligibility under paragraph (a) of this section through serving at least two years of continuous active duty of an obligated period of active duty of less than three years, as provided in paragraph (a)(2) of this section, may attempt to establish eligibility under paragraph (b) of this section through service in the Selected Reserve. If this veteran fails to establish eligibility under paragraph (b) of this section, he or she will retain eligibility established under paragraph (a) of this section.

(2) An individual must elect, in writing, whether he or she wishes service in the Selected Reserve to be credited towards establishing eligibility under 38 U.S.C. chapter 30 or under 10 U.S.C. chapter 1606 when:

(i) The individual:

(A) Is a veteran who has established eligibility for basic educational assistance through meeting the provisions of paragraph (b) of this section; and

(B) Also is a reservist who has established eligibility for benefits under 10 U.S.C. chapter 1606 through meeting the requirements of § 21.7540; or

(ii) The individual is a member of the National Guard or Air National Guard who has established eligibility for basic educational assistance under 38 U.S.C. chapter 30 through activation under a provision of law other than 32 U.S.C. 316, 502, 503, 504, or 505.

(3) An election under this paragraph (d) to have Selected Reserve service credited towards eligibility for payment of educational assistance under 38 U.S.C. chapter 30 or under 10 U.S.C. chapter 1606 is irrevocable when the veteran either negotiates the first check or receives the first payment by electronic funds transfer of the educational assistance elected.

(4) If a veteran is eligible to receive educational assistance under both 38 U.S.C. chapter 30 and 10 U.S.C. chapter 1606, he or she may receive educational assistance alternately or consecutively under each of these chapters to the extent that the educational assistance is based on service not irrevocably credited to one or the other chapter as provided in paragraphs (d)(1) through (d)(3) of this section.

(Authority: 10 U.S.C. 16132, 38 U.S.C. 3033(c))

(e) *Eligibility to receive educational assistance while serving a qualifying period of active duty*.

(1) An individual on active duty who does not have sufficient active duty service to establish eligibility under paragraph (a) of this section, nevertheless is eligible to receive basic educational assistance when he or she

(i) After June 30, 1985, either—

(A) First becomes a member of the Armed Forces, or

(B) First enters on active duty as a member of the Armed Forces;

(ii) Has completed the requirements of a secondary school diploma (or an equivalency certificate) before beginning training;

(iii) Serves at least two years of continuous active duty in the Armed Forces; and

(iv) Remains on active duty.

(2) Subject to paragraph (e)(3) of this section, VA will consider an individual to have met the requirements of paragraph (b) of this section when he or she—

(i) Has met the active duty requirements of paragraph (b) of this section;

(ii) Is committed to serve 4 years in the Selected Reserve; and

(iii) Before beginning the training for which he or she wishes to receive educational assistance—

(A) Has completed the requirements of a high school diploma (or equivalency certificate), or

(B) Has successfully completed the equivalent of 12 semester hours or the equivalent in a program of education leading to a standard college degree.

(Authority: 38 U.S.C. 3011, 3012, 3016)

(3) An individual who establishes basic eligibility under this paragraph shall lose that eligibility if, upon discharge or release from active duty, he or she is unable to establish eligibility under any of the other paragraphs of this section. The effective date for that loss of eligibility is the date the veteran was discharged or released from active duty.

(Authority: 38 U.S.C. 3011, 3012, 3016; Pub. L. 98–525)

(f) *Restrictions on establishing eligibility*. (1) An individual who, after June 30, 1985, first becomes a member of the Armed Forces or first enters on active duty as a member of the Armed Forces, may elect not to receive educational assistance under 38 U.S.C. ch. 30. This election must be made at the time the individual initially enters on active duty as a member of the Armed Forces. An individual who makes such an election is not eligible for educational assistance under 38 U.S.C. ch. 30 unless he or she withdraws the election as provided in paragraph (c) of this section or in §21.7045(b) or (c) of this part.

(Authority: 38 U.S.C. 3018, 3018A; Pub. L. 100–689, Pub. L. 101–510) (Nov. 5, 1990)

(2) Except as provided in paragraph (f)(4) of this section, an individual is not eligible for educational assistance under 38 U.S.C. chapter 30 if after December 31, 1976, he or she receives a commission as an officer in the Armed Forces upon graduation from:

(i) The United States Military Academy;

(ii) The United States Naval Academy;

(iii) The United States Air Force Academy; or

(iv) The United States Coast Guard Academy.

(3) Except as provided in paragraph (f)(4) of this section, an individual who after December 31, 1976, receives a commission as an officer in the Armed Forces upon completion of a program of educational assistance under 10 U.S.C. 2107 is not eligible for educational assistance under 38 U.S.C. chapter 30, if the individual enters on active duty—

(i) Before October 1, 1996; or

(ii) After September 30, 1996, and while participating in that program received more than $2,000 for each year of participation.

(Authority: 38 U.S.C. 3011(c), 3012(d))

(4) Paragraphs (f)(2) and (f)(3) of this section do not apply to a veteran who has met the requirements for educational assistance under paragraph (a), (b) or (c) of this section before receiving a commission in the Armed Forces upon graduation from the United States Military Academy, the United States Naval Academy, the United States Air Force Academy, the United States Coast Guard Academy; or upon completion of a program of educational assistance under 10 U.S.C. 2107 (the Senior Reserve Officers Training Corps Scholarship Program).

(Authority: 38 U.S.C. 3011, 3012, 3018)

(g) *Reduction in basic pay*. (1) Except as elsewhere provided in this paragraph, the basic pay of any individual

described in paragraph (a), (b), or (c) of this section shall be reduced by $100 for each of the first 12 months that the individual is entitled to basic pay. If the individual does not serve 12 months, it shall be reduced by $100 for each month that the individual is entitled to basic pay.

(2) The basic pay of an individual who withdraws an election not to receive educational assistance under 38 U.S.C. ch. 30 as described in paragraph (c) of this section shall be reduced by

(i) $1,200, or

(ii) In the case of an individual whose discharge or release from active duty prevents the reduction of the individual's basic pay by $1,200, an amount less than $1,200.

(3) The basic pay of any individual who makes the election described in paragraph (e)(1) of this section and who does not withdraw that election will not be subject to the reduction described in either paragraph (g)(1) or paragraph (g)(2) of this section.

(4) The individual who makes the election described in either paragraph (a)(7) or (b)(10) of this section shall have his or her basic pay reduced by $1,200 in a manner prescribed by the Secretary of Defense. To the extent that basic pay is not so reduced before the individual's discharge or release from active duty, VA will collect from the individual an amount equal to the difference between $1,200 and the total amount of the reductions described in this paragraph. If the basic pay of an individual is not reduced and/or VA does not collect from the individual an amount equal to the difference between $1,200 and the total amount of the pay reductions, that individual is ineligible for educational assistance.

(Authority: Sec. 107(b)(3), Pub. L. 104–275, 110 Stat. 3329–3330)

(5) If through administrative error, or other reason—

(i) The basic pay of an individual described in paragraph (a)(1) through (a)(6), (b)(1) through (b)(9), (c), or (d) of this section is not reduced as provided in paragraph (g)(1) or (g)(2) of this section, the failure to make the reduction will have no effect on his or her eligibility, but will negate or reduce the individual's entitlement to educational assistance under 38 U.S.C. chapter 30 determined as provided in § 21.7073 for an individual described in paragraph (c) of this section;

(ii) The basic pay of an individual, described in paragraph (a)(7) or (b)(10) of this section, is not reduced as described in paragraph (g)(4) of this section and/or VA does not collect from the individual an amount equal to the difference between $1,200 and the total amount of the pay reductions described in paragraph (g)(4) of this section, that individual is ineligible for educational assistance. If the failure to reduce the individual's basic pay and/or the failure to collect from the individual was due to administrative error on the part of the Federal government or any of its employees, the individual may be considered for equitable relief depending on the facts and circumstances of the case. See § 2.7 of this chapter.

(Authority: 38 U.S.C. 3002, 3011, 3012, 3018)

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0594)

[53 FR 1757, Jan. 22, 1988]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 21.7042, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

### § 21.7044 Persons with eligibility under 38 U.S.C. chapter 34.

Certain individuals with 38 U.S.C. chapter 34 eligibility may establish eligibility for educational assistance under 38 U.S.C. chapter 30. This section requires an individual to complete certain academic requirements before applying for educational assistance. If the individual applies before completing those requirements, VA will disallow the application. However, the individual's premature application will not prevent the individual from establishing eligibility at a later time by applying for educational assistance again after having completed those academic requirements. In determining whether

an individual has met the service requirements of this section, VA will exclude any period during which the individual is not entitled to credit for service for periods of time specified in §3.15.

(a) *Eligibility based solely on active duty*. An individual may establish eligibility for basic educational assistance based on service on active duty under the following terms, conditions, and requirements—

(1) The individual must have met the requirements of 38 U.S.C. chapter 34, as in effect on December 31, 1989, establishing eligibility for educational assistance allowance under that chapter;

(2) As of December 31, 1989, the individual must have entitlement remaining for educational assistance allowance under 38 U.S.C. chapter 34;

(3) The individual, before applying for educational assistance, must:

(i) Complete the requirements for a secondary school diploma or an equivalency certificate; or

(ii) Successfully complete (or otherwise receive academic credit for) 12 semester hours (or the equivalent) in a program of education leading to a standard college degree;

(4) After June 30, 1985—

(i) The individual must serve at least three years continuous active duty in the Armed Forces, or

(ii) The individual must be discharged or released from active duty—

(A) For a service-connected disability, or

(B) For a medical condition which preexisted the individual's service on active duty and which VA determines is not service connected, or

(C) Under 10 U.S.C. 1173 (Hardship discharge), or

(D) For the convenience of the Government provided the individual completes at least 30 months of active duty, or

(E) Involuntarily for convenience of the government as a result of a reduction in force, as determined by the Secretary of the military department concerned in accordance with regulations prescribed by the Secretary of Defense or by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, or

(F) For a physical or mental condition that was not characterized as a disability and did not result from the individual's own willful misconduct but did interfere with the individual's performance of duty, as determined by the Secretary of each military department in accordance with regulations prescribed by the Secretary of Defense or by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy;

(5) Upon completion of the requisite active duty service the individual must either—

(i) Continue on active duty, or

(ii) Be discharged from active duty with an honorable discharge, or

(iii) Be released after service on active duty characterized by the Secretary concerned as honorable service and

(A) Be placed on the retired list, or

(B) Be transferred to the Fleet Reserve or Fleet Marine Corps Reserve, or

(C) Be placed on the temporary disability retired list, or

(iv) Be released from active duty for further service in a reserve component of the Armed Forces after service on active duty characterized by the Secretary concerned as honorable service; and

(6) The individual must have been on active duty at any time during the period beginning on October 19, 1984, and ending on July 1, 1985, and continued on active duty without a break in service.

(Authority: 38 U.S.C. 3011)

(b) *Eligibility based on combined active duty service and service in the Selected Reserve*. An individual may establish eligibility for basic educational assistance based on a combination of service on active duty and service in the Selected Reserve under the following terms, conditions and requirements.

(1) The individual must have met the requirements of 38 U.S.C. chapter 34, as in effect on December 31, 1989, establishing eligibility for educational assistance allowance under that chapter;

(2) As of December 31, 1989, the individual must have entitlement remaining for educational assistance allowance under 38 U.S.C. chapter 34;

(3) The individual, before applying for educational assistance, must:

(i) Complete the requirements for a secondary school diploma or an equivalency certificate; or

(ii) Successfully complete (or otherwise receive academic credit for) 12 semester hours (or the equivalent) in a program of education leading to a standard college degree.

(4) The individual must have been on active duty on October 19, 1984, and have served without a break in service from October 19, 1984 through June 30, 1985.

(5) After June 30, 1985, the individual must—

(i) Except as provided in paragraph (b)(6) of this section, serve at least two years of continuous active duty in the Armed Forces characterized by the Secretary concerned as honorable service, and

(ii) Except as provided in paragraph (b)(7) of this section, after completion of this active duty service, the individual must serve at least four continuous years service in the Selected Reserve, during which the individual must participate satisfactorily in training as prescribed by the Secretary concerned.

(Authority: 38 U.S.C. 3012(b))

(6) The individual also must—

(i) Be discharged from service with an honorable discharge, or

(ii) Be placed on the retired list, or

(iii) Be transferred to the Standby Reserve or an element of the Ready Reserve other than the Selected Reserve after service in the Selected Reserve characterized by the Secretary concerned as honorable service, or

(iv) Continue on active duty, or

(v) Continue in the Selected Reserve.

(7) An individual is exempt from serving two years on active duty as provided in paragraph (b)(3) of this section when he or she is discharged or released during those two years—

(i) For a service-connected disability, or

(ii) For a medical condition which preexisted such service on active duty and which VA determines is not service-connected, or

(iii) Under 10 U.S.C. 1173 (hardship discharge), or

(iv) For convenience of the government provided the individual completes at least 20 months of active duty, or

(v) Involuntarily, for the convenience of the government as a result of a reduction in force as determined by the Secretary of the military department concerned in accordance with regulations prescribed by the Secretary of Defense or by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, or

(vi) For a physical or mental condition that was not characterized as a disability and did not result from the individual's own willful misconduct but did interfere with the individual's performance of duty, as determined by the Secretary of each military department in accordance with regulations prescribed by the Secretary of Defense or by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy.

(Authority: 38 U.S.C. 3012; Pub. L. 98–525, Pub. L. 99–576, Pub. L. 100–689, Pub. L. 101–510) (Oct. 19, 1984)

(8) An individual is exempt from serving four years in the Selected Reserve as provided in paragraph (b)(5) of this section when—

(i) After completion of the active duty required by this paragraph he or she serves a continuous period of service in the Selected Reserve, and

(A) Is discharged for a service-connected disability, or

(B) Is discharged for a medical condition which preexisted the individual's becoming a member of the Selected Reserve and which VA determines is not service connected, or

(C) Is discharged for hardship, or

(D) Is discharged or released after a minimum of 30 months service in the Selected Reserve for convenience of the Government, or

(E) Is discharged involuntarily for the convenience of the government as a result of a reduction in force, as determined by the Secretary of the military department concerned in accordance with regulations prescribed by the Secretary of Defense or by the Secretary of Transportation with respect to the

Coast Guard when it is not operating as a service in the Navy, or

(F) Is discharged for a physical or mental condition that was not characterized as a disability and did not result from the individual's own willful misconduct but did interfere with the individual's performance of duty, as determined by the Secretary of each military department in accordance with regulations prescribed by the Secretary of Defense or by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy; or

(Authority: 38 U.S.C. 3012; Pub. L. 98–525, Pub. L. 99–576, Pub. L. 100–689, Pub. L. 101–510) (Oct. 19, 1984)

(ii) The individual is obligated at the beginning of the two years active duty described in paragraph (b)(3) of this section to serve the four years in the Selected Reserve as described in paragraph (b)(5) of this section, and during the two years of active duty service he or she is discharged or released from active duty in the Armed Forces—

(A) For a service-connected disability, or

(B) For a medical condition which preexisted that period of active duty and which VA determines is not service connected, or

(iii) Before completing four years service in the Selected Reserve the individual ceases to be a member of the Selected Reserve during the period beginning on October 1, 1991, and ending on September 30, 1999, by reason of the inactivation of the individual's unit of assignment or by reason of involuntarily ceasing to be designated as a member of the Selected Reserve pursuant to 10 U.S.C. 268(b). However, this exemption from the four years service requirement does not apply to a reservist who ceases to be a member of the Selected Reserve under adverse conditions as characterized by the Secretary of the military department concerned, or to a reservist who after having involuntarily ceased to be a member of the Selected Reserve is involuntarily separated from the Armed Forces under adverse conditions as characterized by the Secretary of the military department concerned.

(Authority: 10 U.S.C. 16133(b)(1); sec. 4421(b) and (c), Pub. L. 102–484, 106 Stat. 2718)

(9) A veteran who has completed the active duty service required by this paragraph and has made a commitment (as determined by the Secretary concerned) to serve four continuous years in the Selected Reserve may pursue a program of education with basic educational assistance while performing the required Selected Reserve service.

(10) For the purpose of determining continuity of Selected Reserve service, the Secretary concerned may prescribe by regulation a maximum period of time during which the individual is considered to have continuous service in the Selected Reserve even through he or she—

(i) Is unable to locate a unit of the Selected Reserve of the individual's Armed Force that the individual is eligible to join or that has a vacancy, or

(ii) Is not attached to a unit of the Selected Reserve for any reason prescribed by the Secretary concerned by regulation other than those stated in subdivision (i) of this subparagraph.

(11) Any decision as to the continuity of an individual's service in the Selected Reserve made by the Department of Defense or the Department of Transportation under regulations described in paragraph (b) (9) or (10) of this section shall be binding upon VA.

(Authority: 38 U.S.C. 3011, 3012, 3016; Pub. L. 98–525, Pub. L. 100–689) (July 1, 1985)

(12) The individual must have been on active duty at any time during the period beginning on October 19, 1984, and ending on July 1, 1985, and continued on active duty without a break in service.

(Authority: 38 U.S.C. 3012(a)(1)(B))

(c) *Restrictions on establishing eligibility*. Except as provided in paragraph (d) of this section, an individual, who would otherwise be eligible for educational assistance under paragraphs (a) or (b) of this section, is not eligible for educational assistance under 38 U.S.C. ch. 30, if after December 31, 1976,

he or she receives a commission as an officer in the Armed Forces—

(1) Upon graduation from—

(i) The United States Military Academy, or

(ii) The United States Naval Academy, or

(iii) The United States Air Force Academy, or

(iv) The Coast Guard Academy; or

(2) Upon completion of a program of educational assistance under 10 U.S.C. 2107 (the Reserve Officers Training Corps Scholarship Program).

(Authority: 38 U.S.C. 3011, 3012; Pub. L. 98–525)

(d) *Exception to restrictions on establishing eligibility.* Paragraph (c) of this section does not apply to a veteran who has met the requirements for educational assistance under paragraph (a) or (b) of this section before receiving a commission as an officer in the Armed Forces upon graduation from the United States Military Academy, the United States Naval Academy, the United States Air Force Academy, or the Coast Guard Academy; or upon completion of a program of educational assistance under 10 U.S.C. 2107 (the Reserve Officers Training Corps Scholarship Program).

(Authority: 38 U.S.C. 3011, 3012, 3018)

[53 FR 1757, Jan. 22, 1988, as amended at 55 FR 28384, July 11, 1990; 56 FR 20132, May 2, 1991; 57 FR 29026, June 30, 1992; 59 FR 24050, 24051, May 10, 1994; 61 FR 6786, Feb. 22, 1996; 61 FR 26116, May 24, 1996; 62 FR 55761, Oct. 28, 1997; 65 FR 20745, Apr. 18, 2000; 65 FR 67266, Nov. 9, 2000; 68 FR 34329, June 9, 2003]

## § 21.7045 Eligibility based on involuntary separation, voluntary separation, or participation in the Post-Vietnam Era Veterans' Educational Assistance Program.

An individual who fails to meet the eligibility requirements found in § 21.7042 or § 21.7044 nevertheless will be eligible for educational assistance as provided in this subpart if he or she meets the requirements of paragraphs (a) and (b) of this section; paragraphs (a) and (c) of this section; or paragraph (d) or (e) of this section.

(a) *Service requirements.* The individual must meet one of the following sets of service requirements.

(1) The individual—

(i) If not a member of the Coast Guard, must be on active duty or full-time National Guard duty either on September 30, 1990, or after November 29, 1993, or if a member of the Coast Guard, must be on active duty after September 30, 1994, and

(ii) After February 2, 1991, must be involuntarily separated, as that term is defined in 10 U.S.C. 1141, with an honorable discharge; or

(2) The individual must—

(i) Be separated from active military, naval, or air service with an honorable discharge, and

(ii) Receive voluntary separation incentives under 10 U.S.C. 1174a or 1175.

(Authority: 10 U.S.C. 1141; 38 U.S.C. 3018A)

(b) *Additional requirements for those individuals voluntarily separated after October 23, 1992, or involuntarily separated.* An individual who meets the requirements of paragraph (a)(1) of this section; or an individual who meets the requirements of paragraph (a)(2) of this section and who either was not a member of the Coast Guard and was separated after October 22, 1992, or who was a member of the Coast Guard and was separated after September 30, 1994, must meet the following additional requirements in order to establish eligibility for educational assistance:

(1) *Required election.* (i) If, under § 21.7042(f), the individual elected not to receive educational assistance under 38 U.S.C. ch. 30, he or she must irrevocably withdraw that election and make an election to receive educational assistance under 38 U.S.C. ch. 30. The withdrawal and the election must be made:

(A) Before the involuntary or voluntary separation as the case may be, and

(B) Pursuant to procedures which the Secretary of the military department concerned provides in accordance with regulations prescribed by the Secretary of Defense or which the Secretary of Transportation provides with respect to the Coast Guard when it is not operating as a service in the Navy; and

(ii) If the individual is a participant (as defined in § 21.5021(e)) in the educational program provided in 38 U.S.C.

ch. 32, the individual must make an irrevocable election to receive educational assistance under 38 U.S.C. ch. 30 rather than under 38 U.S.C. ch. 32. Such an election must be made:

(A) Before the individual is involuntarily or voluntarily separated as the case may be, and

(B) Pursuant to procedures which the Secretary of the military department concerned provides in accordance with regulations prescribed by the Secretary of Defense or which the Secretary of Transportation provides with respect to the Coast Guard when it is not operating as a service in the Navy; or

(iii) If the individual is not described in either paragraph (b)(1)(i) or (b)(1)(ii) of this section, he or she must make an irrevocable election to receive educational assistance under 38 U.S.C. ch. 30. This election must be made:

(A) Before the individual is involuntarily or voluntarily separated as the case may be, and

(B) Pursuant to procedures which the Secretary of the military department concerned provides in accordance with regulations prescribed by the Secretary of Defense or which the Secretary of Transportation provides with respect to the Coast Guard when it is not operating as a service in the Navy.

(2) *Reduction in basic pay.* The basic pay of anyone who makes one of the irrevocable elections described in paragraph (b)(1) of this section is required by 38 U.S.C. 3018B to be reduced by $1,200.

(i) If for any reason the basic pay of an individual who received an involuntary separation is not so reduced by $1,200, the failure to make the reduction will not affect the individual's eligibility for educational assistance under 38 U.S.C. ch. 30.

(ii) If the individual is voluntarily separated, such reduction of the individual's basic pay by $1,200 is a precondition to establishing eligibility. Hence, educational assistance under 38 U.S.C. ch. 30 may not be paid to such an individual when the reduction does not occur.

(3) *Educational requirement.* (i) Before the date on which VA receives the individual's application for educational assistance under subpart K of this part, the individual must have:

(A) Successfully completed the requirements of a secondary school diploma (or equivalency certificate); or

(B) Successfully completed (or otherwise received academic credit for) 12 semester hours (or the equivalent) in a program of education leading to a standard college degree.

(ii) If a veteran's application for educational assistance is denied due to failure to meet the requirements of paragraph (b)(3)(i) of this section at the time of his or her application for educational assistance, the veteran may reapply if the requirements are subsequently met.

(Authority: 38 U.S.C. 3018B)

(c) *Additional requirements for individuals who are voluntarily discharged before October 23, 1992.* If an individual meets the requirements of paragraph (a)(2) of this section and is voluntarily discharged before October 23, 1992, he or she must also meet the following requirements in order to establish eligibility for educational assistance.

(1) *Required election.* (i) If, under §21.7042(f), the individual elected not to receive educational assistance under 38 U.S.C. ch. 30, he or she must irrevocably withdraw that election and make an election to receive educational assistance under 38 U.S.C. ch. 30. The withdrawal and the new election must be made:

(A) Before October 23, 1993, and

(B) In the form and manner prescribed by the Secretary of Veterans Affairs; and

(ii) If the individual is a participant (as defined in §21.5021(e)) in the educational program provided in 38 U.S.C. ch. 32, the individual must make an irrevocable election to receive educational assistance under 38 U.S.C. ch. 30 rather than under 38 U.S.C. ch. 32. Such an election must be made:

(A) Before October 23, 1993, and

(B) In the form and manner prescribed by the Secretary of Veterans Affairs.

(iii) If the individual is not described in either paragraph (c)(1)(i) or (ii) of this section, he or she must make an irrevocable election to receive educational assistance under 38 U.S.C. ch. 30. This election must be made:

(A) Before October 23, 1993, and

(B) In the form and manner prescribed by the Secretary of Veterans Affairs.

(2) *$1,200 collection.* VA must collect $1,200 from the individual before awarding educational assistance under 38 U.S.C. ch. 30. Collection of $1,200 is a precondition to establishing eligibility.

(3) *Educational requirement.* (i) Before the date on which VA receives the individual's application for educational assistance under subpart K of this part, the individual must have:

(A) Successfully completed the requirements of a secondary school diploma (or equivalency certificate); or

(B) Successfully completed (or otherwise received academic credit for) 12 semester hours (or the equivalent) in a program of education leading to a standard college degree.

(ii) If a veteran's application for educational assistance under subpart K of this part is denied due to failure to meet the requirements of paragraph (c)(3)(i) of this section at the time of his or her application for educational assistance, the veteran will be permitted to apply at a later date.

(Authority: 38 U.S.C. 3018B)

(d) *Alternate eligibility requirements for participants in the Post-Vietnam Era Veterans' Educational Assistance Program*—(1) *Making an election.* To receive educational assistance under the authority of paragraph (d) of this section, a veteran or servicemember must—

(i) Have elected to do so before October 9, 1997;

(ii) Have been a participant (as that term is defined in § 21.5021(e)) in the Post-Vietnam Era Veterans' Educational Assistance Program on October 9, 1996;

(iii) Have been on active duty on October 9, 1996; and

(iv) Receive an honorable discharge.

(2) *Election.* The election to receive educational assistance payable under this subpart in lieu of educational assistance payable under the Post-Vietnam Era Veterans' Educational Assistance Program is irrevocable. The election must have been made before October 9, 1997, pursuant to procedures provided by the Secretary of the military department concerned in accordance with regulations prescribed by the Secretary of Defense or provided by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy.

(3) *$1,200 collection.* An individual who has made the election described in paragraph (d)(2) of this section shall have his or her basic pay reduced by $1,200 in a manner prescribed by the Secretary of Defense. To the extent that basic pay is not so reduced before the individual's discharge or release from active duty, VA will collect from the individual an amount equal to the difference between $1,200 and the total amount of the reductions. Reduction in basic pay by $1,200 or collection of $1,200 is a precondition to establishing eligibility.

(4) *Educational requirement.* Before applying for benefits that may be payable as the result of making a valid election, an individual must have—

(i) Completed the requirements of a secondary school diploma (or equivalency certificate); or

(ii) Successfully completed the equivalent of 12 semester hours in a program of education leading to a standard college degree.

(Authority: 38 U.S.C. 3018C)

(e) *Alternate eligibility requirements for former participants in the Post-Vietnam Era Veterans' Educational Assistance Program.* (1) *Definition.* For the purpose of this paragraph a *participant* is a veteran or servicemember who:

(i) Had enrolled in the Post-Vietnam Era Veterans' Educational Assistance Program, contributed to the fund described in § 21.5021(f), and either—

(A) Is making contributions by monthly payroll deduction to that fund;

(B) Has some or all of the contributions remaining in that fund;

(C) Has disenrolled, and received a refund of contributions; or

(D) Has used all of his or her entitlement to benefits under the Post-Vietnam Era Veterans' Educational Assistance Program; or

(ii) Had enrolled in the Post-Vietnam Era Veterans' Educational Assistance Program, and has had the Secretary of Defense make contributions to the fund described in § 21.5021(f) for him or her.

(2) *Making an election.* To receive educational assistance under authority of this paragraph, a veteran or servicemember must:

(i) Have elected before November 1, 2001, to receive educational assistance payable under 38 U.S.C. chapter 30 in lieu of educational assistance payable under the Post-Vietnam Era Veterans' Educational Assistance Program;

(ii) Have been a participant in the Post-Vietnam Era Veterans' Educational Assistance Program on or before October 9, 1996;

(iii) Have served continuously on active duty since October 9, 1996, through at least April 1, 2000;

(iv) Receive an honorable discharge when discharged or released from the period of active duty during which the servicemember made the election described in paragraph (e)(3) of this section.

(3) *Election.* The election to receive educational assistance payable under 38 U.S.C. chapter 30 in lieu of educational assistance payable under the Post-Vietnam Era Veterans' Educational Assistance Program is irrevocable. The election must have been made before November 1, 2001, pursuant to procedures provided by the Secretary of the military department concerned.

(4) *$2,700 collection.* (i) An individual who has made the election described in paragraph (e)(3) of this section must have his or her basic pay reduced by $2,700 in a manner prescribed by the Secretary of the military department concerned. To the extent that basic pay is not so reduced before the individual's discharge or release from active duty, the Secretary of the military department concerned will collect from the individual an amount equal to the difference between $2,700 and the amount that the individual's basic pay has been reduced. The individual may choose how the $2,700 is to be collected. The Secretary of the military department concerned, according to the choice the individual makes, will collect this amount—

(A) From the individual; or

(B) By reducing the individual's retired or retainer pay.

(ii) The individual must pay $2,700 to the Secretary of the military department concerned, as provided for by that Secretary, during an 18-month period beginning on the date the individual made the election described in paragraph (e)(3) of this section.

(iii) Educational assistance under authority of paragraph (e) of this section to an individual who was discharged or released from active duty before the Secretary of the military department concerned had collected the full $2,700 described in paragraph (e)(4) of this section is not payable until that Secretary either—

(A) Collects in full the $2,700; or

(B) Has made the first reduction in retired or retainer pay for the purpose of the $2,700 payment described in paragraph (e)(4) of this section. Thus, a veteran who is making the $2,700 payment through having retired or retainer pay reduced may be eligible before the Secretary of the military department concerned collects the full $2,700.

(5) *Educational requirement.* Before applying for benefits that may be payable as the result of making a valid election, an individual must have—

(i) Completed the requirements of a secondary school diploma (or equivalency certificate); or

(ii) Successfully completed the equivalent of 12 semester hours in a program of education leading to a standard college degree.

(Authority: 38 U.S.C. 3018C(e))

[61 FR 6786, Feb. 22, 1996, as amended at 61 FR 29297, June 10, 1996; 65 FR 5787, Feb. 7, 2000; 65 FR 20745, Apr. 18, 2000; 68 FR 34329, June 9, 2003]

### §21.7046 Eligibility for supplemental educational assistance.

The Secretary concerned, pursuant to regulations prescribed by that Secretary, has the discretion to provide for the payment of supplemental educational assistance to certain veterans and servicemembers eligible for basic educational assistance.

(a) *Service requirements: eligibility based only on active duty service.* The Secretary concerned may authorize supplemental educational assistance to an individual who is eligible for basic educational assistance under §21.7042 or §21.7044 of this part based solely on

active duty service only if the individual meets the provisions of this paragraph.

(1) An individual may establish eligibility for supplemental educational assistance by serving five or more consecutive years of active duty in the Armed Forces in addition to the years counted to qualify the individual for basic educational assistance without a break in any such service.

(2) After completion of the service described in paragraph (a)(1) of this section the individual must either—

(i) Continue on active duty without a break,

(ii) Be discharged from service with an honorable discharge,

(iii) Be placed on the retired list,

(iv) Be transferred to the Fleet Reserve or the Fleet Marine Corps Reserve,

(v) Be placed on the temporary disability retired list, or

(vi) Be released from active duty for further service in a reserve component of the Armed Forces after service on active duty characterized by the Secretary concerned as honorable service.

(Authority: 38 U.S.C. 3021(a); Pub. L. 98–525)

(b) *Service requirements: eligibility based on service in the Selected Reserve.* The Secretary concerned (pursuant to regulations which he or she may prescribe) has the discretion to authorize supplemental educational assistance to an individual who is eligible for basic educational assistance under § 21.7042 or § 21.7044 of this part through consideration of additional active duty service and additional service in the Selected Reserve only if the individual meets the provisions of this paragraph.

(1) The individual must serve—

(i) Two or more consecutive years of active duty in the Armed Forces in addition to the years on active duty counted to qualify the individual for basic educational assistance, and

(ii) Four or more consecutive years of duty in the Selected Reserve in addition to the years of duty in the Selected Reserve counted to qualify the individual for basic educational assistance.

(2) The individual after completion of the service described in paragraph (b)(1) must—

(i) Be discharged from service with an honorable discharge, or

(ii) Be placed on the retired list, or

(iii) Be transferred to the Fleet Reserve or Fleet Marine Corps Reserve, or

(iv) Be placed on the temporary disability retired list, or

(v) Continue on active duty, or

(vi) Continue in the Selected Reserve.

(3) The Secretary concerned may prescribe by regulation a maximum period of time during which the individual is considered to have continuous service in the Selected Reserve even though he or she is unable to locate a unit of the Selected Reserve of the individual's Armed Force that the individual is eligible to join or that has a vacancy.

(4) The Secretary concerned may prescribe by regulation a maximum period of time during which the individual is considered to have continuous service in the Selected Reserve even though he or she is not attached to a unit of the Selected Reserve for any reason (also to be prescribed by the Secretary concerned by regulation) other than those stated in paragraph (b)(3) of this section.

(5) Any decision as to the continuity of an individual's service in the Selected Reserve made by the Department of Defense or the Department of Transportation under regulations described in paragraph (b) (3) or (4) of this section shall be binding upon VA.

(Authority: 38 U.S.C. 3021(a); Pub. L. 98–525)

### § 21.7050 Ending dates of eligibility.

The ending date of eligibility will be determined as follows:

(a) *Ten-year time limitation.* (1) Except as provided in paragraphs (c), (d), and (e) of this section and in § 21.7051, VA will not provide basic educational assistance or supplemental educational assistance to a veteran or service member beyond 10 years from the later of—

(i) The date of the veteran's last discharge or release from a period of active duty of 90 days or more of continuous service;

(ii) The date of the veteran's last discharge or release from a shorter period of active duty if the discharge or release is—

(A) For a service-connected disability, or

(B) For a medical condition which preexisted such service and which VA determines is not service-connected, or

(C) For hardship, or

(D) Involuntary, for the convenience of the government after October 1, 1987, as a result of a reduction in force, as determined by the Secretary of the military department concerned, in accordance with regulations prescribed by the Secretary of Defense or by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy; or

(iii) The date on which the veteran meets the requirement for four years service in the Selected Reserve found in §21.7042(b) and §21.7044(b).

(2) In determining whether a veteran was discharged or released from active duty for a medical condition which preexisted that active duty, VA will be bound by a decision made by a competent military authority.

(Authority: 38 U.S.C. 3031(a), 3031(g))

(b) *Reduction of ten-year eligibility period.* (1) Except as provided in paragraph (b)(2) of this section, a veteran who had eligibility for educational assistance under 38 U.S.C. ch. 34 and who is eligible for educational assistance under 38 U.S.C. ch. 30 as provided in §21.7044 of this part shall have his or her ten-year period of eligibility reduced by the number of days he or she was not on active duty during the period beginning on January 1, 1977, and ending on June 30, 1985.

(2) A veteran's ten-year period of eligibility shall not be reduced by any period in 1977 before the veteran began serving on active duty when the veteran qualified for educational assistance under 38 U.S.C. ch. 34 through service on active duty which—

(i) Commenced within 12 months of January 1, 1977, and

(ii) Resulted from a contract with the Armed Forces in a program such as the DEP (Delayed Enlistment Program) or an ROTC (Reserve Officers' Training Corps) program for which a person enlisted in, or was assigned to, a reserve component before January 1, 1977.

(Authority: 3031(e))

(c) *Time limit for some members of the Army and Air National Guard.* (1) If a veteran or servicemember establishes eligibility for the educational assistance payable under this subpart by making the election described in §21.7042(a)(7) or (b)(10), VA will not provide basic educational assistance or supplemental educational assistance to that veteran or servicemember beyond 10 years from the later of:

(i) The date determined by paragraph (a) or (b) of this section, as appropriate; or

(ii) The effective date of the election described in §21.7042(a)(7) or (b)(10), as appropriate.

(2) The effective date of election is the date on which the election is made pursuant to the procedures described in §21.7045(d)(2).

(Authority: Sec. 107(b)(3), Pub. L. 104–275, 110 Stat. 3329–3330)

(d) *Individual is eligible due to combining active duty as an enlisted member or warrant officer with active duty as a commissioned officer.* If a veteran would not be eligible but for the provisions of §21.7020(b)(6)(v), VA will not pay basic educational assistance or supplemental educational assistance to that veteran beyond 10 years after the veteran's last discharge or release from a period of active duty of 90 days or more of continuous service, or November 30, 2009, whichever is later.

(Authority: 38 U.S.C. 3011(f), 3031(a)).

(e) *Some veterans have a later ending date.* (1) The ending date of the eligibility period of a veteran described in paragraph (e)(2) of this section is the later of:

(i) November 1, 2010; or

(ii) 10 years after the date of the veteran's last discharge from a period of active duty of 90 days or more.

(2) The ending date of a veteran's eligibility period will be the date described in paragraph (e)(1) of this section if the veteran would have been prevented from establishing eligibility by one or more of the former requirements described in paragraphs (e)(2)(i) through (e)(2)(iv) of this section and the veteran is enabled to establish eligibility by the removal of the statutory bases for those requirements. (For

the purposes of this paragraph, the applicable provisions of those former requirements appear in the July 1, 2002 revision of the Code of Federal Regulations, title 38.)

(i) *A period of active duty other than the initial period was used to establish eligibility.* The veteran was enabled to establish eligibility by the removal of the former eligibility requirement in 38 CFR 21.7042(a)(2)(ii), 21.7042(a)(5)(iv)(A), and 21.7042(a)(5)(iv)(B), revised as of July 1, 2002, that a veteran had to use his or her initial period of active duty to establish eligibility for educational assistance;

(ii) *High school education eligibility criterion met after the qualifying period of active duty.* The veteran was enabled to establish eligibility by the removal of the former eligibility requirement in 38 CFR 21.7042(a)(3), 21.7042(b)(2), and 21.7042(c)(4), revised as of July 1, 2002, that before completing the period of active duty used to establish eligibility for educational assistance, a veteran had to complete the requirements for a secondary school diploma (or an equivalency certificate) or successfully complete (or otherwise receive academic credit for) 12 semester hours (or the equivalent) in a program of education leading to a standard college degree;

(iii) *High school education eligibility criterion met after October 29, 1994.* The veteran was enabled to establish eligibility by the removal of the former eligibility requirement in 38 CFR 21.7042(a)(6), 21.7042(b)(11), and 21.7044(b)(13), revised as of July 1, 2002, that certain veterans meet the requirements for a secondary school diploma (or an equivalency certificate) before October 29, 1994, in order to establish eligibility for educational assistance;

(iv) *High school education eligibility criterion for veterans formerly eligible under 38 U.S.C. chapter 34 met after January 1, 1990.* The veteran was enabled to establish eligibility by the removal of the former eligibility requirement in 38 CFR 21.7044(a)(3) and 21.7044(b)(3), revised as of July 1, 2002, that, as one of the two ways that certain veterans could meet the educational criteria for establishing eligibility for educational assistance, the veteran must before January 1, 1990, meet the requirements for a secondary school diploma (or equivalency certificate).

(Authority: 38 U.S.C. 3031 note; secs. 102(e), 103(e), Pub. L. 106–419, 114 Stat. 1825; 1826–27)

(f) *Correction of military records.* A veteran may become eligible for educational assistance as the result of a correction of military records under 10 U.S.C. 1552, or change, correction or modification of a discharge or dismissal under 10 U.S.C. 1553, or other corrective action by competent military authority. When this occurs, the VA will not provide educational assistance later than 10 years from the date his or her dismissal or discharge was changed, corrected or modified (except as provided in § 21.7051 of this part).

(Authority: 38 U.S.C. 3031(e))

(g) *Periods excluded.* VA will not include in computing the 10-year period of eligibility for educational assistance under this section, any period during which the veteran after his or her last discharge or release from active duty—

(1) Was captured and held as a prisoner of war by a foreign government or power, or

(2) Immediately following the veteran's release from this detention during which he or she was hospitalized at a military, civilian or VA medical facility.

(Authority: 38 U.S.C. 3031(c); Pub. L. 98–525)

[53 FR 1757, Jan. 22, 1988, as amended at 55 FR 28384, July 11, 1990; 56 FR 20133, May 2, 1991; 57 FR 15024, Apr. 24, 1992; 61 FR 6787, Feb. 22, 1996; 65 FR 5787, Feb. 7, 2000; 66 FR 39280, July 30, 2001; 68 FR 34330, June 9, 2003]

## § 21.7051 Extended period of eligibility.

(a) *Period of eligibility may be extended.* VA shall grant an extension of the applicable delimiting period, as otherwise determined by § 21.7050 of this part provided:

(1) The veteran applies for an extension within the time specified in § 21.1032(c) of this part.

(2) The veteran was prevented from initiating or completing the chosen program of education within the otherwise applicable eligibility period because of a physical or mental disability that did not result from the veteran's

willful misconduct. VA will not consider the disabling effects of chronic alcoholism to be the result of willful misconduct. (See §21.7020(b)(38)) It must be clearly established by medical evidence that such a program of education was medically infeasible. VA will not consider a veteran who is disabled for a period of 30 days or less as having been prevented from initiating or completing a chosen program, unless the evidence establishes that the veteran was prevented from enrolling or reenrolling in the chosen program or was forced to discontinue attendance, because of the short disability.

(Authority: 38 U.S.C. 105, 3031(d); Pub. L. 98–525, Pub. L. 100–689) (Nov. 18, 1988)

(b) *Commencing date.* The veteran shall elect the commencing date of an extended period of eligibility. The date chosen—

(1) Must be on or after the original date of expiration of eligibility as determined by §21.7050 of this part, and

(2) Must either be—

(i) On or before the 90th day following the date on which the veteran's application for an extension was approved by VA, if the veteran is training during the extended period of eligibility in a course not organized on a term, quarter or semester basis, or

(ii) On or before the commencing date of the first ordinary term, quarter or semester following the 90th day after the veteran's application for an extension was approved by VA, if the veteran is training during the extended period of eligibility in a course organized on a term, quarter or semester basis.

(Authority: 38 U.S.C. 3031(d); Pub. L. 98–525)

(c) *Length of extended periods of eligibility.* A veteran's extended period of eligibility shall be for the length of time that the individual was prevented from initiating or completing his or her chosen program of education. This shall be determined as follows:

(1) If the veteran is in training in a course organized on a term, quarter or semester basis, his or her extended period of eligibility shall contain the same number of days as the number of days from the date during the veteran's original eligibility period that his or her training became medically infeasible to the earliest of the following date.

(i) The commencing date of the ordinary term, quarter or semester following the day the veteran's training became medically infeasible,

(ii) The last date of the veteran's delimiting date as determined by §21.7050 of this part, or

(iii) The date the veteran resumed training.

(2) If the veteran is training in a course not organized on a term, quarter or semester basis, his or her extended period of eligibility shall contain the same number of days as the number of days from the date during the veteran's original delimiting period that his or her training became medically infeasible to the earlier of the following dates:

(i) The date the veteran's training became medically feasible, or

(ii) The veteran's delimiting date as determined by §21.7050 of this part.

(Authority: 38 U.S.C. 3031(d); Pub. L. 98–525)

[53 FR 1757, Jan. 22, 1988, as amended at 56 FR 20133, May 2, 1991; 64 FR 23773, May 4, 1999]

ENTITLEMENT

## §21.7070 Entitlement.

An eligible servicemember or veteran is entitled to a monthly benefit for periods of time during which he or she is enrolled in, and satisfactorily pursuing, an approved program of education.

(Authority: 38 U.S.C. 3014; Pub. L. 98–525)

## §21.7072 Entitlement to basic educational assistance.

The provisions of this section apply to all veterans and servicemembers except to those to whom §21.7073 applies.

(a) *Most individuals are entitled to 36 months of assistance.* Except as provided in paragraphs (b), (c), and (d) of this section and in §21.7073, a veteran or servicemember who is eligible for basic educational assistance is entitled to 36 months of basic educational assistance

(or the equivalent thereof in part-time educational assistance).

(Authority: 38 U.S.C. 3013; Pub. L. 98–525) (Nov. 18, 1988).

(b) *Entitlement: individual discharged for service-connected disability, a medical condition which preexisted service, hardship, or involuntarily for the convenience of the Government as a result of a reduction in force.* (1) Except as provided in § 21.7073, when the provisions of paragraph (b) of this section are met, an eligible individual is entitled to one month of basic educational assistance (or equivalent thereof in part-time basic educational assistance) for each month of the individual's continuous active duty service that is after June 30, 1985, and that, in the case of an individual who had no previous eligibility under 38 U.S.C. ch. 34, is part of the individual's qualifying obligated period of active duty. In the case of a veteran to whom the definition of continuous active duty found in either § 21.7020(b)(6)(iii) or § 21.7020(b)(6)(iv) applies, the length of the continuous active duty will be the aggregate length of the periods of active duty referred to in those paragraphs. Except as provided in § 21.7073, VA will apply paragraph (b) of this section when the individual:

(i) Establishes eligibility through meeting the eligibility requirements of § 21.7042 or § 21.7044,

(ii) Serves less than 36 months of continuous active duty service after June 30, 1985 (or less than 24 continuous months of a qualifying obligated period of active duty service after June 30, 1985, if his or her qualifying obligated period of active duty is less than 3 years), and

(iii) Is discharged or released from active duty either—

(A) For a service-connected disability, or

(B) For a medical condition which preexisted the individual's service on active duty and which VA determines is not service connected,

(C) Under 10 U.S.C. 1173 (hardship discharge), or

(D) Involuntarily for convenience of the government as a result of a reduction in force, as determined by the Secretary of the military department concerned in accordance with regulations prescribed by the Secretary of Defense or by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, or;

(E) For a physical or mental condition that was not characterized as a disability and did not result from the individual's own willful misconduct but did interfere with the individual's performance of duty, as determined by the Secretary of each military department in accordance with regulations prescribed by the Secretary of Defense or by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy.

(Authority: 38 U.S.C. 3011(f), 3013(a))

(2) Entitlement will be calculated in whole months.

(3) The following types of time lost are not countable in determining the extent of a veteran's or servicemember's entitlement:

(i) Excess leave,

(ii) Noncreditable time, and

(iii) Not-on-duty time.

(Authority: 38 U.S.C. 3013(a); Pub. L. 98–525)

(c) *Entitlement based on service in the Selected Reserve.* (1) Except as provided in § 21.7073, when the provisions of paragraph (c) of this section are met, an individual is entitled to one month of basic educational assistance (or the equivalent thereof in part-time basic educational assistance) for each month of the individual's active duty service that is after June 30, 1985, and that, in the case of an individual who had no previous eligibility under 38 U.S.C. chapter 34, is part of the individual's qualifying obligated period of active duty. An individual is entitled to one month of basic educational assistance (or the equivalent thereof in part-time basic educational assistance) for each four months served by the individual in the Selected Reserve after June 30, 1985 (other than a month in which the individual serves on active duty). Except as provided in § 21.7073, VA will apply the provisions of paragraph (c) of this section when the individual—

(i) Establishes eligibility through meeting the eligibility requirements of §21.7042 or §21.7044, and

(ii) Bases his or her eligibility upon a combination of service on active duty and service in the Selected Reserve as described in §21.7042(b) and §21.7044(b).

(Authority: 38 U.S.C. 3013(b))

(2) Entitlement will be calculated in whole months.

(3) The following types of time lost are not countable in determining the extent of a veteran's or servicemember's entitlement:

(i) Excess leave,

(ii) Noncreditable time, and

(iii) Not-on-duty time.

(4) A veteran described in this paragraph is not entitled to any basic educational assistance for service in the Selected Reserve in excess of the number of months of service in the Selected Reserve which is evenly divisible by four.

(5) VA will consider a veteran to be entitled to 36 months of basic educational assistance when he or she—

(i) Initially enters on active duty after June 30, 1985;

(ii) Is attempting to establish eligibility through service in the Selected Reserve;

(iii) Has completed the active duty service required in §21.7042 of this part; and

(iv) Is participating in the Selected Reserve, but has not participated for the length of time required in §21.7042 of this part.

(Authority: 38 U.S.C. 3011, 3012; Pub. L. 98–525)

(d) *Entitlement affected by failure to complete required Selected Reserve service.* If a veteran attempts to establish eligibility through a combination of active duty service and service in the Selected Reserves, but fails to do so, his or her entitlement shall be the number of months to which he or she is entitled on the basis of his or her active duty service.

(Authority: 38 U.S.C. 3011, 3012; Pub. L. 98–525)

(e) *Repayment of an education loan affects entitlement.* A period of service counted for the purpose of repayment under section 902 of the Department of Defense Authorization Act, 1981, of an education loan may not also be counted for the purposes of determining the number of months of the veteran's or servicemember's entitlement to basic educational assistance. Therefore, in determining a veteran's or servicemember's entitlement, VA will—

(1) Determine his or her entitlement as provided in paragraph (a), (b), (c) or (d) of this section, as appropriate, and

(2) Subtract from the figure determined in paragraph (e)(1) of this section the number of months of service counted for the purposes of repayment of an educational loan under section 902 of the Department of Defense Authorization Act, 1981.

(Authority: 38 U.S.C. 3033(b); Pub. L. 98–525)

(f) *Limitation on entitlement.* Except as provided in §21.7076(e) and §21.7135(s) of this part no one is entitled to more than 36 months of full-time basic educational assistance (or its equivalent in part-time educational assistance).

(Authority: 38 U.S.C. 3013(c), 3013(f); Pub. L. 98–525, Pub. L. 102–127)(Oct. 10, 1991)

[53 FR 1757, Jan. 22, 1988, as amended at 56 FR 20134, May 2, 1991; 58 FR 26241, May 3, 1993; 59 FR 24052, May 10, 1994; 61 FR 6788, Feb. 22, 1996; 68 FR 34330, June 9, 2003]

### §21.7073 Entitlement for some individuals who establish eligibility during the open period or who establish eligibility before involuntary separation.

(a) *Individuals who establish eligibility during the open period.* (1) The provisions of this paragraph apply to a veteran or servicemember who:

(i) Establishes eligibility by withdrawing an election not to enroll as provided in §21.7042(c);

(ii) Has less than $1,200 deducted from his or her military pay; and

(iii) Before completing the period of service which the individual was obligated to serve on December 1, 1988, the individual:

(A) Is discharged or released from active duty for a service-connected disability, a medical condition which preexisted that service, or hardship; or

(B) For a physical or mental condition that was not characterized as a disability and did not result from the individual's own willful misconduct but did interfere with the individual's performance of duty, as determined by the Secretary of each military department in accordance with regulations prescribed by the Secretary of Defense or by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy.

(C) Is discharged or released from active duty for the convenience of the Government after completing not less than 20 months of that period of service, if that period was less than three years, or 30 months, if that period was at least three years; or

(D) Is involuntarily discharged or released from active duty for convenience of the Government as a result of a reduction in force, as determined by the Secretary concerned in accordance with regulations prescribed by the Secretary of Defense or by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy.

(Authority: 38 U.S.C. 3018(b)(3))

(2) A veteran described in paragraph (a)(1) of this section is entitled to a number of months of basic educational assistance (or equivalent thereof in part-time basic educational assistance) equal to the lesser of:

(i) A number of months determined by multiplying 36 by a fraction the numerator of which is the amount by which the basic pay of the individual has been reduced as provided in § 21.7042(e)(2) and the denominator of which is $1,200, or

(ii) The number of months the veteran has served on continuous active duty after June 30, 1985.

(Authority: 38 U.S.C. 3013(c))

(b) *Individuals who establish eligibility following involuntary separation.* (1) The provisions of this paragraph apply to a veteran who establishes eligibility by meeting the provisions of § 21.7045 of this part.

(Authority: 38 U.S.C. 3018A)

(2) A veteran described in paragraph (b)(1) of this section is entitled to a number of months of basic educational assistance (or equivalent thereof in part-time basic educational assistance) equal to the lesser of—

(i) 36 months, or

(ii) The number of months the veteran served on active duty.

(Authority: 38 U.S.C. 3013)

[59 FR 24053, May 10, 1994, as amended at 65 FR 67266, Nov. 9, 2000]

### § 21.7074 Entitlement to supplemental educational assistance.

In determining the entitlement of a veteran or servicemember who is eligible for supplemental educational assistance VA shall—

(a) Calculate the veteran's or servicemember's entitlement to basic educational assistance on the day he or she establishes eligibility for supplemental educational assistance, and

(b) Credit the veteran or servicemember with the same number of months and days entitlement to supplemental educational assistance as the number calculated in paragraph (a) of this section.

(Authority: 38 U.S.C. 3023; Pub. L. 98–525)

### § 21.7076 Entitlement charges.

(a) *Overview.* VA will make charges against entitlement as stated in this section.

(1) Charges will be made against the entitlement the veteran or servicemember has to educational assistance under 38 U.S.C. chapter 30 as the assistance is paid.

(2) There will be a charge (for record purposes only) against the remaining entitlement, under 38 U.S.C. chapter 34, of an individual who is receiving the educational assistance under § 21.7137 of this part. The record-purpose charges against entitlement under 38 U.S.C. chapter 34 will not count against the 48 months of total entitlement under both 38 U.S.C. chapters 30 and 34 to which the veteran or service member may be entitled. (*See* § 21.4020(a) of this part).

(3) Generally, VA will base those entitlement charges on the principle that a veteran or service member who trains full time for one day should be charged one day of entitlement. However, this

general principle does not apply to a veteran or servicemember who:

(i) Is pursuing correspondence training;

(ii) Is pursuing flight training;

(iii) Is pursuing an apprenticeship or other on-job training; or

(iv) Is paid an accelerated payment.

(4) The provisions of this section apply to:

(i) Veterans and service members training under 38 U.S.C. chapter 30; and

(ii) Veterans training under 38 U.S.C. chapter 31 who make a valid election under §21.21 of this part to receive educational assistance equivalent to that paid to veterans under 38 U.S.C. chapter 30.

(Authority: 38 U.S.C. 3013, 3014(A), 3014(b))

(b) *Determining entitlement charge.* This paragraph states how VA generally will determine the charge against the entitlement of a servicemember or veteran who is receiving educational assistance. However, when the circumstances described in paragraph (e) apply to a servicemember or veteran, VA will use that paragraph to determine an entitlement charge instead of this paragraph.

(1) Except for those pursuing correspondence training, flight training, apprenticeship or other on-the-job training, those who are receiving tutorial assistance, and those who receive an accelerated payment, VA will make a charge against entitlement:

(i) On the basis of total elapsed time (one day for each day of pursuit) if the servicemember or veteran is pursuing the program of education on a full-time basis,

(ii) On the basis of a proportionate rate of elapsed time, if the veteran or servicemember is pursuing the program of education on a three-quarter, one-half or less than one-half time basis. For the purpose of this computation, training time which is less than one-half, but more than one-quarter time, will be treated as though it were one-quarter time training.

(2) VA will compute elapsed time from the commencing date of the award to date of discontinuance. If the veteran or servicemember changes his or her training time after the commencing date of the award, VA will—

(i) Divide the enrollment period into separate periods of time during which the veteran's or servicemember's training time remains constant, and.

(ii) Compute the elapsed time separately for each time period.

(Authority: 38 U.S.C. 3013; Pub. L. 98–525)

(3) For each month that a veteran is paid a monthly educational assistance allowance while undergoing apprenticeship or other on-job training, VA will make a charge against chapter 30 entitlement of—

(i) .75 of a month in the case of payments made during the first six months of the veteran's pursuit of the program of apprenticeship or other on-job training,

(ii) .55 of a month in the case of payments made during the second six months of the veteran's pursuit of the program of apprenticeship or other on-job training, and

(iii) .35 of a month in the case of payments made following the first twelve months of the veteran's pursuit of apprenticeship or other on-job training.

(4) For each month that a veteran is paid a monthly educational assistance allowance while undergoing apprenticeship or other on-job training, VA will make a record purpose charge against chapter 34 entitlement, if any, of one month for each month of benefits paid to him or her.

(5) When a veteran or servicemember is pursuing a program of education by correspondence, VA will make a charge against entitlement for each payment made to him or her. The charge—

(i) Will be made in months and decimal fractions of a month, and

(ii) Will be determined by dividing the amount of the payment by an amount equal to the rate of educational assistance otherwise applicable to him or her for full-time training (disregarding in the case of a servicemember the cost of course comparison).

(6) When a veteran or servicemember is pursuing a program of education partly in residence and partly by correspondence, VA will make a charge against entitlement—

(i) For the residence portion of the program as provided in paragraphs (b)(1) and (2) of this section, and

(ii) For the correspondence portion of the program as provided in paragraph (b)(5) of this section.

(Authority: 38 U.S.C. 3032(c), 3034(c); Pub. L. 99–576)

(7) When a veteran or servicemember is paid an accelerated payment, VA will make a charge against entitlement for each accelerated payment made to him or her. The charge—

(i) Will be made in months and decimal fractions of a month; and

(ii) Will be determined by dividing the amount of the accelerated payment by an amount equal to the rate of basic educational assistance otherwise applicable to him or her for full-time institutional training. If the rate of basic educational assistance increases during the enrollment period, VA will charge entitlement for the periods covered by the initial rate and the increased rate, respectively.

(Authority: 38 U.S.C. 3014A)

(8) If an individual is paid tutorial assistance as provided in § 21.7141, the following provisions will apply.

(i) There will be no charge to entitlement for the first $600 of tutorial assistance paid to an individual under 38 U.S.C. ch. 30.

(ii) VA will make a charge against the period of entitlement of one month for each amount of tutorial assistance paid under 38 U.S.C. ch. 30, to the individual in excess of $600 that is equal to the amount of monthly educational assistance the individual is otherwise eligible to receive for full-time pursuit of a residence course as provided in §§ 21.7136, 21.7137 and 21.7138, as appropriate. When the amount of tutorial assistance paid to the individual in excess of $600 is less than the amount of monthly educational assistance the individual is otherwise eligible to receive, the entitlement charge will be prorated.

(Authority: 38 U.S.C. 3019; Pub. L. 100–689) (Nov. 18, 1988)

(9) When a veteran or servicemember is pursuing a program of education through flight training, VA will make a charge against entitlement for each payment made to him or her. The charge—

(i) Will be made in months and decimal fractions of a month, and

(ii) Will be determined by dividing the amount of the payment by an amount equal to the rate of basic educational assistance otherwise applicable to him or her for full-time institutional training.

(Authority: 38 U.S.C. 3031(f))

(c) *Overpayment cases.* VA will make a charge against entitlement for an overpayment only if the overpayment is discharged in bankruptcy; is waived, and is not recovered; or is compromised.

(1) If the overpayment is discharged in bankruptcy or is waived and is not recovered, the charge against entitlement will be at the appropriate rate for the elapsed period covered by the overpayment (exclusive of interest, administrative costs of collection, court costs and marshal fees).

(2) If the overpayment is compromised and the compromise offer is less than the amount of interest, administrative costs of collection, court costs and marshal fees, the charge against entitlement will be at the appropriate rate for the elapsed period covered by the overpayment (exclusive of interest, administrative costs of collection, court costs and marshal fees).

(3) If the overpayment is compromised and the compromise offer is equal to or greater than the amount of interest, administrative costs of collection, court costs and marshal fees, the charge against entitlement will be determined by—

(i) Subtracting the portion of the debt attributable to interest, administrative costs of collection, court costs and marshal fees from the compromise offer,

(ii) Subtracting the amount determined in paragraph (c)(3)(i) of this section from the amount of the original debt (exclusive of interest, administrative costs of collection, court costs and marshal fees),

(iii) Dividing the result obtained in paragraph (c)(3)(ii) of this section by the amount of the original debt (exclusive of interest, administrative costs of

collection, court costs and marshal fees), and

(iv) Multiplying the percentage obtained in paragraph (c)(3)(iii) of this section by the amount of the entitlement which represents the whole overpaid period.

(Authority: 38 U.S.C. 3013; Pub. L. 98–525)

(d) *Interruption to conserve entitlement.* A veteran may not interrupt a certified period of enrollment for the purpose of conserving entitlement. An educational institution may not certify a period of enrollment for a fractional part of the normal term, quarter or semester, if the veteran or servicemember is enrolled for the entire term, quarter or semester. VA will make a charge against entitlement for the entire period of certified enrollment, if the veteran or servicemember is otherwise eligible for educational assistance, except when educational assistance is interrupted under any of the following conditions:

(1) Enrollment is terminated;

(2) The veteran or servicemember cancels his or her enrollment, and does not negotiate an educational assistance check for any part of the certified period of enrollment;

(3) The veteran or servicemember interrupts his or her enrollment at the end of any term, quarter or semester within the certified period of enrollment, and does not negotiate a check for educational assistance for the succeeding term, quarter or semester;

(4) The veteran or servicemember requests interruption or cancellation for any break when a school was closed during a certified period of enrollment, and VA continued payments under an established policy based upon an Executive Order of the President or an emergency situation. Whether the veteran or servicemember negotiated a check for educational assistance for the certified period is immaterial.

(Authority: 38 U.S.C. 3013; Pub. L. 98–525)

(e) *No entitlement charge for some individuals.* When the criteria described in this paragraph are met, VA will make no charges against entitlement as described in paragraph (b) of this section.

(1) VA will make no charge against an individual's entitlement when the individual—

(i) Either—

(A) While not serving on active duty, had to discontinue pursuit of a course or courses as a result of being ordered, in connection with the Persian Gulf War, to serve on active duty under section 672 (a), (d), or (g), 673, 673b, or 688 of title 10, U.S. Code; or

(B) While serving on active duty, had to discontinue pursuit of a course or courses as a result of being ordered, in connection with the Persian Gulf War, to a new duty location or assignment or to perform an increased amount of work.

(ii) Failed to receive credit or lost training time toward completion of the individual's approved educational, professional or vocational objective as a result of having to discontinue his or her course pursuit.

(2) The period for which receipt of educational assistance allowance is not charged against the entitlement of an individual described in paragraph (e)(1) of this section shall not exceed the portion of the period of enrollment in the course or courses for which the individual failed to receive credit or with respect to which the individual lost training time.

(Authority: 38 U.S.C. 3013(f); Pub. L. 102–127)(Oct. 10, 1991))

[53 FR 1757, Jan. 22, 1988, as amended at 55 FR 28385, July 11, 1990; 56 FR 20134, May 2, 1991; 56 FR 26035, June 6, 1991; 56 FR 31332, July 10, 1991; 57 FR 15024, Apr. 24, 1992; 58 FR 26241, May 3, 1993; 68 FR 35179, June 12, 2003]

COUNSELING

## §21.7100 Counseling.

A veteran or servicemember may receive counseling from VA before beginning training and during training.

(a) *Purpose.* The purpose of counseling is

(1) To assist in selecting an objective;

(2) To develop a suitable program of education;

(3) To select an educational institution appropriate for the attainment of the educational objective;

(4) To resolve any personal problems which are likely to interfere with the successful pursuit of a program; and

(5) To select an employment objective for the veteran that would be likely to provide the veteran with satisfactory employment opportunities in light of his or her personal circumstances.

(Authority: 38 U.S.C. 3034, 3463; Pub. L. 98–525)

(b) Required counseling. (1) In any case in which VA has rated the veteran as being incompetent, the veteran must be counseled before selecting a program of education or training. The requirement that counseling be provided is met when—

(i) The veteran has had one or more personal interviews with the counselor;

(ii) The counselor has jointly developed with the veteran recommendations for selecting a program; and

(iii) These recommendations have been reviewed with the veteran.

(2) The veteran may follow the recommendations developed in the course of counseling, but is not required to do so.

(3) VA will take no further action on a veteran's application for assistance under 38 U.S.C. chapter 30 when he or she—

(i) Fails to report;

(ii) Fails to cooperate in the counseling process; or

(iii) Does not complete counseling to the extent required under paragraph (b)(1) of this section.

(4) Counseling is not required for any other individual eligible for educational assistance established under 38 U.S.C. chapter 30.

(Authority: 38 U.S.C. 3032, 3463; Pub. L. 98–525, Pub. L. 99–576)

(c) *Availability of counseling.* Counseling is available for—

(1) Identifying and removing reasons for academic difficulties which may result in interruption or discontinuance of training, or

(2) In considering changes in career plans and making sound decisions about the changes.

(Authority: 38 U.S.C. 3034, 3463; Pub. L. 98–525)

(d) *Provision of counseling.* VA shall provide counseling as needed for the purposes identified in paragraphs (a) and (c) of this section upon request of the individual. In addition, VA shall provide counseling as needed for the purposes identified in paragraph (b) of this section following the veteran's request for counseling, the veteran's initial application for benefits or any communication from the veteran or guardian indicating that the veteran wishes to change his or her program. VA shall take appropriate steps (including individual notification where feasible) to acquaint all participants with the availability and advantages of counseling services.

(Authority: 38 U.S.C. 3034, 3463; Pub. L. 98–525, Pub. L. 99–576)

[53 FR 1757, Jan. 22, 1988, as amended at 55 FR 28385, July 11, 1990]

### § 21.7103 Travel expenses.

(a) *Travel for veterans and servicemembers.* (1) Except as provided in paragraph (a)(2) of this section, VA shall determine and pay the necessary cost of travel to and from the place of counseling for individuals who are required to receive counseling if—

(i) VA determines that the individual is unable to defray the cost based upon his or her annual declaration and certification; or

(ii) The individual has a compensable service-connected disability.

(2) VA shall not pay for the travel expenses for a veteran who is not residing in a State.

(Authority: 38 U.S.C. 111)

(b) *Travel for attendants.* (1) VA will authorize payment of travel expenses for an attendant while the individual is traveling when—

(i) The individual, because of a severe disability requires the services of an attendant when traveling, and

(ii) VA is paying the necessary cost of the individual's travel on the basis of the criteria stated in paragraph (a) of this section.

(2) VA will not pay the attendant a fee for travel expenses if he or she is a relative as defined in § 21.374 of this part.

(Authority: 38 U.S.C. 111)

(c) *Payment of travel expenses prohibited for most veterans.* VA shall not pay

for any costs of travel to and from the place of counseling for anyone who requests counseling under 38 U.S.C. Chapter 30.

(Authority: 38 U.S.C. 111)

CROSS REFERENCE: 21.374, Authorization for travel of attendants.

[55 FR 28385, July 11, 1990]

PROGRAMS OF EDUCATION

### §21.7110 Selection of a program of education.

(a) *General requirement.* In order to receive educational assistance an individual must either be pursuing an approved program of education or be pursuing refresher or deficiency courses, or other preparatory or special education or training courses necessary to enable the individual to pursue an approved program of education.

(Authority: 38 U.S.C. 3014, 3023; 3034; Pub. L. 98–525, Pub. L. 100–689 (Aug. 15, 1989)

(b) *Approval of a program of education.* VA will approve a program of education under 38 U.S.C. chapter 30 selected by an eligible veteran or servicemember if—

(1) It meets the definition of a program of education found in §21.7020(b)(23) of this part,

(2) It has an objective as described in §21.7020(b) (13) or (22) of this part,

(3) The courses and subjects in the program are approved for VA training, and

(4) The veteran or servicemember is not already qualified for the objective of the program.

(Authority: 38 U.S.C. 3002(3), 3034, 3471; Pub. L. 98–525)

[53 FR 1757, Jan. 22, 1988, as amended at 53 FR 3207, Feb. 4, 1988; 56 FR 20135, May 2, 1991]

### §21.7112 Programs of education combining two or more types of courses.

(a) *Concurrent enrollment.* (1) When a veteran or servicemember cannot successfully schedule his or her complete program at one educational institution, VA may approve a program of concurrent enrollment. When requesting such a program, the veteran or servicemember must show that his or her complete program of education is not available at the educational institution in which he or she will pursue the major portion of his or her program (the primary educational institution), or that it cannot be scheduled successfully within the period in which he or she plans to complete his or her program. When the standards for measurement of the courses pursued concurrently in the two educational institutions are different, the concurrent enrollment shall be measured by converting the measurement of courses being pursued at the second educational institution under the standard applicable to such institution to its equivalent measurement under the standard required for full-time courses applicable to the primary educational institution. For a complete discussion of measurement of concurrent enrollments see §21.7172 of this part.

(Authority: 38 U.S.C. 3034, 3688; Pub. L. 99–576)

(2) The veteran or servicemember must submit the monthly certification of attendance and pursuit. Each educational institution where concurrent enrollment is approved must either endorse that certification, or submit a separate certification showing the veteran's or servicemember's enrollment and pursuit.

(Authority: 38 U.S.C. 3034(b); Pub. L. 98–525)

(b) *Courses offered under contract.* In administering benefits payable under 38 U.S.C. chapter 30, the VA will apply the provisions of §21.4233(e) of this part in the same manner as they are applied under 38 U.S.C. chapter 34.

(Authority: 38 U.S.C. 3034(a); Pub. L. 98–525)

(c) *Television.* In determining whether a veteran or servicemember may pursue all or part of a program of education under 38 U.S.C. chapter 30 by television, VA will apply the provisions of §21.4233(c).

(Authority: 38 U.S.C. 3034(a))

[53 FR 1757, Jan. 22, 1988, as amended at 55 FR 28386, July 11, 1990; 62 FR 40280, July 28, 1997]

### § 21.7114 Change of program.

In determining whether a veteran or servicemember may change his or her program of education under 38 U.S.C. ch. 30, VA will apply the provisions of § 21.4234 of this part. VA will not consider programs of education a veteran or servicemember may have pursued under 38 U.S.C. ch. 34 or 36 before January 1, 1990, if he or she wishes to change programs of education under 38 U.S.C. ch. 30.

(Authority: 38 U.S.C. 3034, 3691; Pub. L. 98–525, Pub. L. 101–366) (June 1, 1991)

[57 FR 29027, June 30, 1992]

COURSES

### § 21.7120 Courses included in programs of education.

(a) *General.* Generally, VA will approve, and will authorize payment of educational assistance, for the individual's enrollment in any course or subject which a State approving agency has approved as provided in § 21.7220 of this part and which forms a part of a program of education as defined in § 21.7020(b)(23) of this part. Restrictions on this general rule are stated in § 21.7222(b) of this part, however.

(Authority: 38 U.S.C. 3002(3), 3452; Pub. L. 98–525)

(b) *Avocational and recreational courses are restricted.*

(1) VA will not pay educational assistance for an enrollment in any course—

(i) Which is avocational or recreational in character, or

(ii) The advertising for which contains significant avocational or recreational themes.

(2) VA presumes that the following courses are avocational or recreational in character unless the veteran or servicemember justifies their pursuit to VA as provided in paragraph (b)(3) of this section. The courses are:

(i) Any photography course or entertainment course, or

(ii) Any music course, instrumental or vocal, public speaking course or courses in dancing, sports or athletics, such as horseback riding, swimming, fishing, skiing, golf, baseball, tennis, bowling, sports officiating, or other sport or athletic courses, except courses of applied music, physical education, or public speaking which are offered by institutions of higher learning for credit as an integral part of a program leading to an educational objective, or

(iii) Any other type of course which VA determines to be avocational or recreational.

(3) To overcome the presumption that a course is avocational or recreational in character, the veteran or servicemember must establish that the course will be of bona fide use in the pursuit of his or her present or contemplated business or occupation.

(Authority: 38 U.S.C. 3034, 3473; Pub. L. 98–525)

(c) *Flight training.* (1) VA may pay educational assistance for an enrollment in a flight training course—

(i) When an institution of higher learning offers the course for credit toward the standard college degree the veteran or servicemember is pursuing; or

(ii) When—

(A) A flight school is offering the course,

(B) The State approving agency and the Federal Aviation Administration have approved the course,

(C) The course of flight training is generally accepted as necessary to attain a recognized vocational objective in the field of aviation which the veteran or servicemember is pursuing, and

(D) The training for which payment is made occurred after September 29, 1990.

(2) VA will not pay educational assistance for an enrollment in a flight training course which the veteran or servicemember is pursuing as ancillary training for a vocation other than aviation.

(Authority: 38 U.S.C. 3034(f))

(d) *Independent study.* (1) Except as provided in paragraph (d)(2) of this section, effective October 29, 1992, VA may pay educational assistance to a veteran or servicemember who is enrolled in a nonaccredited course or unit subject offered entirely or partly by independent study only if—

(i) Successful completion of the nonaccredited course or unit subject is required in order for the veteran or servicemember to complete his or her program of education,

(ii) On October 29, 1992, the veteran or servicemember was receiving educational assistance for pursuit of the program of education of which the nonaccredited independent study course or unit subject forms a part, and

(iii) The veteran or servicemember has remained continuously enrolled in the program of education of which the nonaccredited independent study course or unit subject forms a part from October 29, 1992, to the date of enrollment by the veteran or servicemember in the nonaccredited independent study course or unit subject.

(2) Notwithstanding the provisions of paragraph (d)(1) of this section, VA may pay educational assistance to a veteran or servicemember for enrollment in a course or unit subject offered by independent study which, though part of an approved program of education, is not required in order for the veteran or servicemember to complete the program of education (i.e., an elective) when—

(i) The veteran or servicemember was enrolled in and receiving educational assistance for the course or unit subject on October 29, 1992, and

(ii) The veteran or servicemember remains continuously enrolled in the course or unit subject.

(3) Whether or not the veteran or servicemember is enrolled will be determined by the regularly prescribed standards and practices of the educational institution offering the course or unit subject.

(Authority: 38 U.S.C. 3014, 3034, 3076, 3680A(a); sec. 313(b), Pub. L. 102–568, 106 Stat. 4333)

[53 FR 1757, Jan. 22, 1988, as amended at 53 FR 3207, Feb. 4, 1988; 57 FR 15024, Apr. 24, 1992; 61 FR 6788, Feb. 22, 1996; 61 FR 29297, June 10, 1996]

### §21.7122 Courses precluded.

(a) *Unapproved courses.* VA will not pay educational assistance for an enrollment in any course which has not been approved by a State approving agency or by the VA when that agency acts as a State approving agency. VA will not pay educational assistance for a new enrollment in a course when a State approving agency has suspended the approval of the course for new enrollments, nor for any period within any enrollment after the date the State approving agency disapproves a course. See §21.7220 of this part.

(Authority: 38 U.S.C. 3034, 3672; Pub. L. 98–525)

(b) *Courses outside a program of education.* VA will not pay educational assistance for an enrollment in any course which is not part of a veteran's or servicemember's program of education unless the veteran or servicemember is enrolled in refresher courses (including courses which will permit the veteran or servicemember to update knowledge and skills or be instructed in the technological advances which have occurred in the veteran's or servicemember's field of employment), deficiency courses, or other preparatory or special education or training courses necessary to enable the veteran or servicemember to pursue an approved program of education.

(Authority: 38 U.S.C. 3002(3), 3034, 3452(b); Pub. L. 98–525) (Aug. 15, 1989)

(c) *Erroneous, deceptive, misleading practices.* VA will not pay educational assistance for an enrollment in any course offered by an educational institution which uses advertising, sales or enrollment practices which are erroneous, deceptive or misleading by actual statement, omission or intimation. VA will apply the provisions of §21.4252(h) of this part in making these decisions with regard to enrollments under 38 U.S.C. chapter 30 as it does in making similar decisions with regard to enrollments under 38 U.S.C. chapter 34.

(Authority: 38 U.S.C. 3034, 3696; Pub. L. 98–525)

(d) *Restrictions on enrollment: percentage of students receiving financial support.* Except as otherwise provided VA shall not approve an enrollment in any course for a veteran or servicemember, not already enrolled for any period during which more than 85 percent of the

students enrolled in the course are having all or part of their tuition, fees or other charges paid for them by the educational institution or by VA pursuant to title 38, United States Code. This restriction may be waived in whole or in part. In determining which courses to apply this restriction to and whether to waive this restriction, VA will apply the provisions of § 21.4201 of this part to enrollments under 38 U.S.C. chapter 30 in the same manner as it does to enrollments under 38 U.S.C. chapter 34.

(Authority: 38 U.S.C. 3034, 3473(d); Pub. L. 98–525)

(e) *Other courses.* VA shall not pay educational assistance for—

(1) An enrollment in an audited course (see § 21.4252(i));

(2) An enrollment in a course for which the veteran or servicemember received a nonpunitive grade in the absence of mitigating circumstances (see § 21.4252(j));

(3) New enrollments in a course where approval has been suspended by a State approving agency;

(4) An enrollment in certain courses being pursued by nonmatriculated students as provided in § 21.4252(l);

(5) Except as provided in § 21.4252(j), an enrollment in a course from which the veteran or servicemember withdrew without mitigating circumstances;

(6) An enrollment in a course offered by a proprietary school when the veteran or servicemember is an official of the school authorized to sign certificates of enrollment or monthly certificates of attendance or monthly certifications of pursuit, an owner of the school, or an operator of the school;

(7) Except as provided in § 21.7120(d), an enrollment in a nonaccredited independent study course; or

(8) An enrollment in a course offered under contract for which VA approval is prohibited by § 21.4252(m).

(Authority: 38 U.S.C. 3002(3), 3034, 3672(a), 3676, 3680(a), 3680A(a), 3680A(f), 3680A(g))

[53 FR 1757, Jan. 22, 1988, as amended at 55 FR 28386, July 11, 1990; 56 FR 20135, May 2, 1991; 61 FR 6788, Feb. 22, 1996; 65 FR 81742, Dec. 27, 2000]

### § 21.7124 Overcharges.

VA may disapprove an educational institution for further enrollments, when the educational institution charges or receives from a veteran or servicemember tuition and fees that exceed the established charges which the educational institution requires from similarly circumstanced nonveterans enrolled in the same course.

(Authority: 38 U.S.C. 3034, 3690; Pub. L. 98–525)

PAYMENTS—EDUCATIONAL ASSISTANCE

### § 21.7130 Educational assistance.

VA will pay educational assistance to an eligible veteran or servicemember while he or she is pursuing approved courses in a program of education at the rates specified in §§ 21.7136, 21.7137 and 21.7139 of this part.

(Authority: 38 U.S.C. 3015, 3022, 3032; Pub. L. 98–525)

### § 21.7131 Commencing dates.

VA will determine the commencing date of an award or increased award of educational assistance under this section. When more than one paragraph in this section applies, VA will award educational assistance using the latest of the applicable commencing dates.

(a) *Entrance or reentrance including change of program or educational institution.* When an eligible veteran or servicemember enters or reenters into training (including a reentrance following a change of program or educational institution), the commencing date of his or her award of educational assistance will be determined as follows:

(1) If the award is the first award of educational assistance for the program of education the veteran or servicemember is pursuing, the commencing date of the award of educational assistance is the latest of:

(i) The date the educational institution certifies under paragraph (b) or (c) of this section;

(ii) One year before the date of claim as determined by § 21.1029(b);

(iii) The effective date of the approval of the course;

(iv) One year before the date VA receives approval notice for the course; or

(v) November 1, 2000, if paragraph (p) of this section applies to the individual.

(2) If the award is the second or subsequent award of educational assistance for the program of education the veteran or servicemember is pursuing, the effective date of the award of educational assistance is the later of—

(i) The date the educational institution certifies under paragraph (b) or (c) of this section; or

(ii) The effective date of the approval of the course, or one year before the date VA receives the approval notice, whichever is later.

(Authority: 38 U.S.C. 3014, 3023, 3034, 3672)

(b) *Certification by school—the course or subject leads to a standard college degree.* (1) When the student enrolls in a course offered by independent study, the commencing date of the award or increased award of educational assistance will be the date the student began pursuit of the course according to the regularly established practices of the educational institution.

(2) When a student enrolls in a resident course or subject, the commencing date of the award or increased award of educational assistance will be the first scheduled date of classes for the term, quarter or semester in which the student is enrolled, except as provided in paragraphs (b)(3), (b)(4), and (b)(5) of this section.

(3) When the student enrolls in a resident course or subject whose first scheduled class begins after the calendar week when, according to the school's academic calendar, classes are scheduled to commence for the term, quarter, or semester, the commencing date of the award or increased award of educational assistance allowance will be the actual date of the first class scheduled for that particular course or subject.

(4) When a student enrolls in a resident course or subject, the commencing date of the award will be the date of reporting provided that—

(i) The published standards of the school require the student to register before reporting, and

(ii) The published standards of the school require the student to report no more than 14 days before the first scheduled date of classes for the term, quarter or semester for which the student has registered.

(5) When the student enrolls in a resident course or subject and the first day of classes is more than 14 days after the date of registration, the commencing date of the award or the increased award of educational assistance will be the first day of classes.

(Authority: 38 U.S.C. 3014, 3023; Pub. L. 98–525)

(c) *Certification by educational institution or training establishment—course does not lead to a standard college degree.* (1) When a veteran or servicemember enrolls in a course which does not lead to a standard college degree and which is offered in residence, the commencing date of the award of educational assistance will be as stated in paragraph (b) of this section.

(2) When a veteran or servicemember enrolls in a course which is offered by correspondence, the commencing date of the award of educational assistance shall be the later of—

(i) The date the first lesson was sent, or

(ii) The date of affirmance.

(3) When a veteran enrolls in a program of apprenticeship or other on-the-job training, the commencing date of the award of educational assistance shall be the first date of employment in the training position.

(Authority: 38 U.S.C. 3014, 3023; Pub. L. 98–525, Pub. L. 99–576)

(d) *Individual is eligible due to combining active duty as an enlisted member or warrant officer with active duty as a commissioned officer.* If a veteran served in the Armed Forces both as an enlisted member or warrant officer and as a commissioned officer, and that service was such that he or she is eligible only through application of §21.7020(b)(6)(v), the commencing date of the award of educational assistance will be no earlier than November 30, 1999.

(Authority: Sec. 702(c), Pub. L. 106–117, 113 Stat. 1583).

(e) *Increase for a dependent.* A veteran who was eligible for educational assistance allowance under 38 U.S.C. chapter 34 on December 31, 1989, is entitled to additional educational assistance for dependents. No other veteran or servicemember is eligible for additional educational assistance. The effective date for the additional educational assistance is determined as follows.

(1) The veteran may acquire one or more dependents before he or she enters or reenters a program of education. When this occurs, the following rules apply.

(i) The effective date of the increase will be the date of entrance or reentrance if—

(A) VA receives the claim for the increase within 1 year of the date of entrance or reentrance, and

(B) VA receives necessary evidence within 1 year of its request, or the veteran shows that good cause exists for VA's not receiving the necessary evidence within 1 year of its request. See § 21.7032.

(ii) The effective date of the increase will be the date the VA receives notice of the dependent's existence if—

(A) VA receives the claim for the increase more than 1 year after the date of entrance or reentrance, and

(B) VA receives notice of the dependent's existence if evidence is received either within 1 year of VA request, or the veteran shows that there is good cause to extend the one-year time limit to the date on which VA received notice of the dependent's existence.

(iii) The effective date will be the date VA receives all necessary evidence, if that evidence is received more than 1 year from the date VA requests it, unless the veteran is able to show that there is good cause to extend the one-year time limit to the date on which VA received notice of the dependent's existence. If the veteran shows good cause, the provisions of paragraph (e)(1)(ii)(B) of this section will apply.

(2) If the veteran acquires a dependent after he or she enters or reenters a program of education, the increase will be effective on the latest of the following dates:

(i) Date of the veteran's marriage, or birth of his or her child, or his or her adoption of a child, if the evidence of the event is received within 1 year of the event.

(ii) Date notice is received of the dependent's existence if evidence is received either within 1 year of the VA request, or the veteran shows that there is good cause to extend the one-year time limit to the date on which VA received notice of the dependent's existence.

(iii) The date VA receives evidence if this date is more than 1 year after the VA request, and the veteran is not able to show that there is good cause to extend the one-year time limit to the date on which VA received notice of the dependent's existence.

(Authority: 38 U.S.C. 5110(n))

(See § 3.667 of this chapter as to effective dates with regard to children age 18 and older who are attending school)

(f) *Liberalizing laws and VA issues.* When a liberalizing law or VA issue affects the commencing date of a veteran's or servicemember's award of educational assistance, that commencing date shall be in accordance with facts found, but not earlier than the effective date of the act or administrative issue.

(Authority: 38 U.S.C. 5112(b), 5113; Pub. L. 98–525)

(g) *Correction of military records (§ 21.7050(b)).* The eligibility of a veteran may arise because the nature of the veteran's discharge or release is changed by appropriate military authority. In these cases the commencing date of educational assistance will be in accordance with facts found, but not earlier than the date the nature of the discharge or release was changed.

(Authority: 38 U.S.C. 3031(b); Pub. L. 98–525)

(h) *Individuals in a penal institution.* If a veteran or servicemember is paid a reduced rate of educational assistance under § 21.7139 (c), (d), (e), (f) and (g) of this part, the rate will be increased or assistance will commence effective the earlier of the following dates:

(1) The date the tuition and fees are no longer being paid under another

Federal program or a State or local program, or

(2) The date of the release from the prison or jail.

(Authority: 38 U.S.C. 3034, 3482(g); Pub. L. 98–525)

(i) *Commitment to service in the Selected Reserve.* If a veteran has established eligibility to educational assistance through two years' active duty service, and he or she establishes entitlement to an increased monthly rate through commitment to serve four years in the Selected Reserve, the effective date of the increase is the date on which he or she—

(1) Is committed to serve four years in the Selective Reserve, and

(2) Is attached to a unit of the Selected Reserve.

(Authority: 38 U.S.C. 3012; Pub. L. 98–525)

(j) *Increase due a servicemember due to monetary contributions.* (1) If a servicemember is contributing additional amounts as provided in §21.7136(h), and is enrolled in an educational institution operated on a term, quarter, or semester basis, the monthly rate payable to the servicemember will increase on the first day of the term, quarter, or semester following the term, quarter, or semester in which the servicemember made the contribution(s).

(2) If a servicemember is contributing additional amounts as provided in §21.7136(h), and is enrolled in an educational institution not operated on a term, quarter, or semester basis, the monthly rate payable to the servicemember will increase on the first day of the enrollment period following the enrollment period in which the servicemember made the contribution.

(Authority: 38 U.S.C. 3011(e), 3012(f))

(k) *Increase (''kicker'') due to service in the Selected Reserve.* If a veteran is entitled to an increase (''kicker'') in the monthly rate of basic educational assistance because he or she has met the requirements of §21.7136(g) or §21.7137(e), the effective date of that increase (''kicker'') will be the latest of the following dates:

(1) The commencing date of the veteran's award as determined by paragraphs (a) through (j) of this section;

(2) The first date on which the veteran is entitled to the increase (''kicker'') as determined by the Secretary of the military department concerned; or

(3) February 10, 1996.

(Authority: 10 U.S.C. 16131)

(l) *Eligibility established under §21.7042 (a)(7) or (b)(10).* This paragraph must be used to establish the effective date of an award of educational assistance when the veteran or servicemember has established eligibility under either §21.7042 (a)(7) or (b)(10). The commencing date of an award of educational assistance for such a veteran or servicemember is the latest of the following:

(1) The commencing date as determined by paragraphs (a) through (c) and (f) through (j) of this section;

(2) The date of election provided that—

(i) The servicemember initiated the $1,200 reduction in basic pay required by §21.7042(g)(4) and the full $1,200 was collected through that pay reduction;

(ii) Within one year of the date of election VA both collected from the veteran $1,200 or the difference between $1,200 and the amount collected through a reduction in the veteran's military pay, as provided in §21.7042(g)(4), and received from the veteran any other evidence necessary to establish a valid election; or

(iii) VA received from the veteran $1,200 or the difference between $1,200 and the amount collected through a reduction in the veteran's military pay and any other evidence necessary to establish a valid election within one year of the date VA requested the money and/or the evidence.

(3) If applicable, the date VA collected the difference between $1,200 and the amount by which the servicemember's military pay was reduced, if the provisions of paragraph (l)(2)(ii) or (l)(2)(iii) of this section are not met; or

(4) If applicable, the date VA collected $1,200, if the provisions of paragraph (l)(2)(ii) or (l)(2)(iii) of this section are not met.

(Authority: 38 U.S.C. 5113; sec. 107, Pub. L. 104–275, 110 Stat. 3329–3330)

(m) *Eligibility established under 21.7045(d).* This paragraph must be used to establish the effective date of an award of educational assistance when the veteran or servicemember has established eligibility under § 21.7045(d). The commencing date of an award of educational assistance for such a veteran or servicemember is the latest of the following:

(1) The commencing date as determined by paragraphs (a) through (c) and (f) through (j) of this section;

(2) The date of election provided that—

(i) The servicemember initiated the $1,200 reduction in basic pay required by § 21.7045(d)(3) and the full $1,200 was collected through that pay reduction;

(ii) Within one year of the date of election VA both collected from the veteran $1,200 or the difference between $1,200 and the amount collected through a reduction in the veteran's military pay, as provided in § 21.7045(d)(3), and received from the veteran any other evidence necessary to establish a valid election; or

(iii) VA received from the veteran $1,200 or the difference between $1,200 and the amount collected through a reduction in the veteran's military pay and any other evidence necessary to establish a valid election within one year of the date VA requested the money and/or the evidence.

(3) If applicable, the date VA collected the difference between $1,200 and the amount by which the servicemember's military pay was reduced, if the provisions of paragraph (m)(2)(ii) or (m)(2)(iii) of this section are not met; or

(4) If applicable, the date VA collected $1,200, if the provisions of paragraph (m)(2)(ii) or (m)(2)(iii) of this section are not met.

(Authority: 38 U.S.C. 3018C(a), (b), 5113)

(n) *Eligibility established under § 21.7045(c).* The effective date of an award of educational assistance when the veteran has established eligibility under § 21.7045(c) is as follows:

(1) If the veteran is not entitled to receive educational assistance under 38 U.S.C. ch. 32 on the date he or she made a valid election to receive educational assistance under 38 U.S.C. ch. 30, the effective date of the award of educational assistance will be the latest of the following.

(i) The commencing date as determined by paragraphs (a) through (c) and (f) through (j) of this section; or

(ii) October 23, 1992, provided that VA received the $1,200 required to be collected pursuant to § 21.7045(c)(2) and any other evidence necessary to establish that the election is valid before the later of:

(A) October 23, 1993; or

(B) One year from the date VA requested the $1,200 or the evidence necessary to establish a valid election; or

(iii) The date VA received the $1,200 required to be collected pursuant to § 21.7045(c)(2) and all other evidence needed to establish that the election is valid, if the provisions of paragraph (n)(1)(ii) of this section are not met.

(2) If the veteran is entitled to receive educational assistance under 38 U.S.C. ch. 32 on the date he or she made a valid election to receive educational assistance under 38 U.S.C. ch. 30, the effective date of the award of educational assistance will be the latest of the following:

(i) The commencing date as determined by paragraphs (a) through (c) and (f) through (j) of this section; or

(ii) The date on which the veteran made a valid election to receive educational assistance under 38 U.S.C. chapter 30 provided that VA received the $1,200 required to be collected pursuant to § 21.7045(c)(2) and any other evidence necessary to establish that the election is valid before the later of:

(A) One year from the date VA received the valid election; or

(B) One year from the date VA requested the $1,200 or the evidence necessary to establish a valid election; or

(iii) The date VA received the $1,200 required to be collected pursuant to § 21.7045(c)(2) and all other evidence needed to establish that the election is

valid, if the provisions of paragraph (n)(2)(ii) of this section are not met.

(Authority: 38 U.S.C. 3018B)

(o) *Eligibility established under §21.7045(e).* This paragraph must be used to establish the effective date of an award of educational assistance when the veteran or servicemember has established eligibility under §21.7045(e). The commencing date of an award of educational assistance for such a veteran or servicemember is the later of the following:

(1) The commencing date as determined by paragraphs (a) through (c) and (f) through (k) of this section; or

(2) The date on which—

(i) The servicemember's basic pay is reduced by $2,700;

(ii) The Secretary of the military department concerned collected the difference between $2,700 and the amount by which the military department concerned reduced the veteran's basic pay following the veteran's election under §21.7045(e), provided that this collection was accomplished through a method other than reducing the veteran's retired or retainer pay; or

(iii) The Secretary of the military department concerned first reduced the veteran's retired or retainer pay in order to collect the difference between $2,700 and the amount by which the military department concerned reduced the veteran's basic pay following the election under §21.7045(e).

(Authority: 38 U.S.C. 3018C(e))

(p) *Eligibility established due to changes to §§21.7042 and 21.7044.* The commencing date of educational assistance will be no earlier than November 1, 2000, if a veteran would have been prevented from establishing eligibility by one or more of the former requirements described in paragraphs (p)(1) through (p)(4) of this section and the veteran is enabled to establish eligibility due to the removal of the statutory bases for those requirements. (For the purposes of this paragraph, the applicable provisions of those former requirements appear in the July 1, 2002 revision of the Code of Federal Regulations, title 38.)

(1) *A period of active duty other than the initial period was used to establish eligibility.* The veteran was enabled to establish eligibility by the removal of the former eligibility requirement in 38 CFR 21.7042(a)(2)(ii), 21.7042(a)(5)(iv)(A), and 21.7042(a)(5)(iv)(B), revised as of July 1, 2002, that a veteran had to use his or her initial period of active duty to establish eligibility for educational assistance.

(Authority: Sec. 102(e), Pub. L. 106–419, 114 Stat. 1825)

(2) *High school education eligibility criterion met after the qualifying period of active duty.* The veteran was enabled to establish eligibility by the removal of the former eligibility requirement in 38 CFR 21.7042(a)(3), 21.7042(b)(2), and 21.7042(c)(4), revised as of July 1, 2002, that before completing the period of active duty used to establish eligibility for educational assistance, a veteran had to complete the requirements for a secondary school diploma (or an equivalency certificate) or successfully complete (or otherwise receive academic credit for) 12 semester hours (or the equivalent) in a program of education leading to a standard college degree.

(Authority: Sec. 103(e), Pub. L. 106–419, 114 Stat. 1826–27)

(3) *High school education eligibility criterion met after October 29, 1994.* The veteran was enabled to establish eligibility by the removal of the former eligibility requirement in 38 CFR 21.7042(a)(6), 21.7042(b)(11), and 21.7044(b)(13), revised as of July 1, 2002, that certain veterans meet the requirements for a secondary school diploma (or an equivalency certificate) before October 29, 1994, in order to establish eligibility for educational assistance.

(Authority: Sec. 103(e), Pub. L. 106–419, 114 Stat. 1826–27)

(4) *High school education eligibility criterion for veterans formerly eligible under 38 U.S.C. chapter 34 met after January 1, 1990.* The veteran was enabled to establish eligibility by the removal of the former eligibility requirement in 38 CFR 21.7044(a)(3) and 21.7044(b)(3), revised as of July 1, 2002, that, as one of the two ways that certain veterans could meet the educational criteria for establishing eligibility, the veteran

must before January 1, 1990, meet the requirements for a secondary school diploma (or equivalency certificate).

(Authority: Sec. 103(e), Pub. L. 106–419, 114 Stat. 1826–27)

(The Office of Management and Budget has approved information collection requirements in this section under control number 2900–0607.)

(q) *Fugitive felons.* (1) An award of educational assistance allowance to an otherwise eligible veteran may begin effective the date the warrant for the arrest of the felon is cleared by—

(i) Arrest;

(ii) Surrendering to the issuing authority;

(iii) Dismissal; or

(iv) Court documents (dated after the warrant) showing the veteran is no longer a fugitive.

(2) An award of educational assistance allowance to a dependent who is otherwise eligible to transferred entitlement may begin effective the date the warrant is cleared by—

(i) Arrest;

(ii) Surrendering to the issuing authority;

(iii) Dismissal; or

(iv) Court documents (dated after the warrant) showing the individual is no longer a fugitive.

(Authority: 38 U.S.C. 5313B)

[53 FR 1757, Jan. 22, 1988, as amended at 55 FR 28386, July 11, 1990; 56 FR 11672, Mar. 20, 1991; 57 FR 40615, Sept. 4, 1992; 61 FR 6788, Feb. 22, 1996; 62 FR 55519, Oct. 27, 1997; 63 FR 34132, June 23, 1998; 64 FR 23773, May 4, 1999; 65 FR 5788, Feb. 7, 2000; 66 FR 38939, July 26, 2001; 66 FR 39280, July 30, 2001; 66 FR 42586, Aug. 13, 2001; 68 FR 34331, June 9, 2003; 70 FR 25787, May 16, 2005]

### § 21.7133 Suspension or discontinuance of payments.

VA may suspend or discontinue payments of educational assistance. In doing so, VA will apply §§ 21.4210 through 21.4216.

(Authority: 38 U.S.C. 3034, 3690)

[63 FR 35837, July 1, 1998]

### § 21.7135 Discontinuance dates.

The effective date of reduction or discontinuance of educational assistance will be as stated in this section. Reference to reduction of educational assistance due to the loss of a dependent only applies to veterans who were eligible to receive educational assistance allowance under 38 U.S.C. chapter 34 on December 31, 1989. No other veteran or servicemember will have his or her educational assistance reduced due to a loss of a dependent. If more than one type of reduction or discontinuance is involved, the earliest date will control.

(a) *Death of veteran or servicemember.* (1) If the veteran or servicemember receives an advance payment pursuant to 38 U.S.C. 3680(d) and dies before the period covered by the advance payment ends, the discontinuance date of educational assistance shall be the last date of the period covered by the advance payment.

(2) In all other cases if the veteran or servicemember dies while pursuing a program of education, the discontinuance date of educational assistance shall be the last date of attendance.

(Authority: 38 U.S.C. 3014, 3023, 3680)

(b) *Death of dependent.* When a veteran's dependent dies, and the veteran has been receiving additional educational assistance based on the dependent, the effective date of reduction of the veteran's educational assistance shall be the last day of the month in which the death occurs.

(Authority: 38 U.S.C. 5112(b), 5113; Pub. L. 98–525)

(c) *Divorce.* If the veteran becomes divorced, the effective date of reduction of his or her educational assistance is the last day of the month in which the divorce occurs.

(Authority: 38 U.S.C. 5112(b), 5113; Pub. L. 98–525)

(d) *Dependent child.* If the veteran's award of educational assistance must be reduced because his or her dependent child ceases to be dependent, the effective date of reduction will be as follows.

(1) If the veteran's child marries, the effective date of reduction will be the last day of the month in which the marriage occurs.

(2) If the veteran's child reaches age 18, the effective date of reduction will

be the day preceding the dependent child's 18th birthday.

(3) If the veteran is receiving additional educational assistance based on a child's school attendance between the child's 18th and 23rd birthdays, the effective date of reduction of the veteran's educational assistance will be the last day of the month in which the dependent child stops attending school, or the day before the dependent child's 23rd birthday, whichever is earlier.

(4) If the veteran is receiving additional educational assistance because his or her child is helpless, the effective date of reduction will be the last day of the month following 60 days after VA notifies the veteran that the dependent child's helplessness has ceased.

(Authority: 38 U.S.C. 5112(b) 5113; Pub. L. 98–525)

(e) *Course discontinued; course interrupted; course terminated; course not satisfactorily completed or withdrawn from.* (1) If the veteran or servicemember, for reasons other than being called or ordered to active duty, withdraws from all courses or receives all nonpunitive grades, and in either case there are no mitigating circumstances, VA will terminate or reduce educational assistance effective the first date of the term in which the withdrawal occurs or the first date of the term for which nonpunitive grades are assigned.

(Authority: 38 U.S.C. 3680(a); Pub. L. 102–127)(Aug. 1, 1990))

(2) If the veteran or servicemember withdraws from all courses with mitigating circumstances or withdraws from all courses such that a punitive grade is or will be assigned for those courses or the veteran withdraws from all courses because he or she is ordered to active duty, VA will terminate educational assistance for—

(i) Residence training: last date of attendance; and

(ii) Independent study: official date of change in status under the practices of the educational institution.

(3) When a veteran or servicemember withdraws from a correspondence course, VA will terminate educational assistance effective the date the last lesson is serviced.

(4) When a veteran or servicemember withdraws from an apprenticeship or other on-the-job training, VA will terminate educational assistance effective the date of last training.

(Authority: 38 U.S.C. 3034, 3680(a); Pub. L. 98–525, Pub. L. 99–576)

(5) When a veteran or servicemember withdraws from a flight course, VA will terminate educational assistance effective the date of last instruction.

(Authority: 38 U.S.C. 3034(f))

(f) *Reduction in the rate of pursuit of the course.* If the veteran or servicemember reduces the rate of training by withdrawing from part of a course, but continues training in part of the course, the provisions of this paragraph apply.

(1) If the reduction in the rate of training occurs other than on the first date of the term, VA will reduce the veteran's or servicemember's educational assistance effective the date on which the withdrawal occurs when either:

(i) A nonpunitive grade is assigned for the part of the course from which he or she withdraws; and

(A) The veteran or servicemember withdraws because he or she is ordered to active duty; or

(B) The withdrawal occurs with mitigating circumstances; or

(ii) A punitive grade is assigned for the part of the course from which the reservist withdraws.

(2) VA will reduce educational assistance effective the first date of the enrollment in which the reduction occurs when—

(i) The reduction occurs on the first date of the term; or

(ii) The veteran or servicemember—

(A) Receives a nonpunitive grade for the part of the course from which he or she withdraws; and

(B) Withdraws without mitigating circumstances; and

(C) Does not withdraw because he or she is ordered to active duty.

(Authority: 38 U.S.C. 3680(a))

(3) A veteran or servicemember, who enrolls in several subjects and reduces

his or her rate of pursuits by completing one or more of them while continuing training in the others, may receive an interval payment based on the subjects completed if the requirements of § 21.7140(d) are met. If those requirements are not met, VA will reduce the individual's educational assistance effective the date the subject or subjects were completed.

(Authority: 38 U.S.C. 3034, 3680(a), 5113(b))

(g) *End of course or period of enrollment.* If a veteran's or servicemember's course or period of enrollment ends, the effective date of reduction or discountinuance of his or her award of educational assistance will be the ending date of the course or period of enrollment as certified by the educational institution.

(Authority: 38 U.S.C. 3034(b), 3680; Pub. L. 98–525)

(h) *Nonpunitive grade.* (1) If the veteran or servicemember does not withdraw, but nevertheless receives a nonpunitive grade in a particular course, VA will reduce his or her educational assistance effective the first date of enrollment for the term in which the grade applies, when no mitigating circumstances are found.

(2) If an individual does not withdraw, but nevertheless receives a nonpunitive grade in a particular course, VA will reduce his or her educational assistance effective the last date of attendance when mitigating circumstances are found.

(3) If an individual receives a nonpunitive grade through nonattendance in a particular course, VA will reduce the individual's educational assistance effective the last date of attendance when mitigating circumstances are found.

(4) If an individual receives a nonpunitive grade through nonattendance in a particular course, VA will reduce the individual's educational assistance effective the first date of enrollment in which the grade applies, when no mitigating circumstances are found.

(Authority: 38 U.S.C. 3034, 3680; Pub. L. 98–525)

(i) *Discontinued by VA.* If VA discontinues payment to a veteran or servicemember following the procedures stated in § 21.4211(d) and (g), the date of discontinuance of payment of educational assistance will be—

(1) Date on which payments first were suspended by the Director of a VA facility as provided in § 21.4210, if the discontinuance was preceded by such a suspension.

(2) End of the month in which the decision to discontinue, made by VA under § 21.7133 or § 21.4211(d) and (g), is effective, if the Director of a VA facility did not suspend payments before the discontinuance.

(Authority: 38 U.S.C. 3034, 3680; Pub. L. 98–525)

(j) *Disapproval by State approving agency.* If a State approving agency disapproves a course in which a veteran or servicemember is enrolled, the date of discontinuance of payment of educational assistance will be—

(1) Date on which payments first were suspended by the director of a VA facility as provided in § 21.4210, if disapproval was preceded by such a suspension.

(2) End of the month in which disapproval is effective or VA receives notice of the disapproval, whichever is later, provided that the Director of a VA facility did not suspend payments before the disapproval

(Authority: 38 U.S.C. 3034, 3672(a), 3690; Pub. L. 98–525)

(k) *Disapproval by VA.* If VA disapproves a course in which a veteran or servicemember is enrolled, the effective date of discontinuance of payment of educational assistance will be—

(1) The date on which the Director of a VA facility first suspended payments, as provided in § 21.4210, if such a suspension preceded the disapproval.

(2) The end of the month in which the disapproval occurred, provided that the Director of a VA facility did not suspend payments before the disapproval.

(Authority: 38 U.S.C. 3034, 3671(b), 3672(a), 3690; Pub. L. 98–525)

(l) *Unsatisfactory progress, conduct or attendance.* If a veteran's or servicemember's progress, conduct or

attendance is unsatisfactory, his or her educational assistance shall be discontinued effective the earlier of the following:

(1) The date the educational institution discontinues the veteran's or servicemember's enrollment, or

(2) The date on which the veteran's or servicemember's progress, conduct or attendance becomes unsatisfactory according to the educational institution's regularly established standards of progress, conduct or attendance.

(Authority: 38 U.S.C. 3034, 3474)

(m) *Required certifications not received after certification of enrollment.* If VA does not timely receive the veteran's or servicemember's certification of attendance or does not timely receive the educational institution's endorsement of the certification or the educational institution's certification of attendance or pursuit, VA will assume that the veteran or servicemember has withdrawn. VA will apply the provisions of paragraph (e) of this section. VA considers the receipt of a certificate of attendance to be timely if it is received within 60 days of the last day of the month for which attendance is to be certified.

(Authority: 38 U.S.C. 3034(b); Pub. L. 98–525)

(n) *False or misleading statements.* If educational assistance is paid as the result of false or misleading statements, see §21.7158:

(Authority: 38 U.S.C. 3034, 3690; Pub. L. 98–525)

(o) *Conflicting interests (not waived).* If an educational institution and VA have conflicting interests as provided in §21.4005 and §21.7305, and VA does not grant the veteran a waiver, the date of discontinuance shall be 30 days after the date of the letter notifying the veteran.

(Authority: 38 U.S.C. 3034, 3683, Pub. L. 98–525)

(p) *Incarceration in prison or penal institution for conviction of a felony.* (1) The provisions of this paragraph apply to a veteran or servicemember whose educational assistance must be discontinued or who becomes restricted to payment of educational assistance at a reduced rate under §21.7139 (c) , (d), (e), (f), or (g).

(2) The reduced rate or discontinuance will be effective the latest of the following dates:

(i) The first day on which all or part of the veteran's or servicemember's tuition and fees were paid by a Federal, State or local program.

(ii) The date the veteran or servicemember is incarcerated in prison or penal institution, or

(iii) The comencing date of the award as determined by §21.7131.

(Authority: 38 U.S.C. 3034, 3482(g); Pub. L. 98–525)

(q) *Active duty.* If a veteran reenters on active duty, the effective date of reduction of his or her award of educational assistance shall be the day before the veteran's entrance on active duty. (This reduction does not apply to brief periods of active duty for training if the educational institution permits absence for active duty for training without considering the veteran's pursuit of a program of education to be interrupted).

(Authority: 38 U.S.C. 3032)

(r) *Record-purpose charge against entitlement under 38 U.S.C. chapter 34 equals entitlement that remained on December 31, 1989.* A veteran who is receiving basic educational assistance at the rates stated in §21.7137(a), will have his or her award reduced to the rates found in §21.7136(a) effective the date the total of the veteran's record-purpose charges against his or her entitlement under 38 U.S.C. chapter 34 equals the entitlement to that benefit which the veteran had on December 31, 1989.

(Authority: 38 U.S.C. 3015(c); Pub. L. 98–525)

(s) *Exhaustion of entitlement under 38 U.S.C. chapter 30.* (1) If an individual who is enrolled in an educational institution regularly operated on the quarter or semester system exhausts his or her entitlement under 38 U.S.C. chapter 30, the discontinuance date shall be the last day of the quarter or semester in which entitlement is exhausted.

(2) If an individual who is enrolled in an educational institution not regularly operated on the quarter or semester system exhausts his or her entitlement under 38 U.S.C. chapter 30 after more than half of the course is completed, the discontinuance date shall be the earlier of the following:

(i) The last day of the course, or

(ii) 12 weeks from the day the entitlement is exhausted.

(3) If an individual who is enrolled in an educational institution not regularly operated on the quarter or semester system exhausts his or her entitlement under 38 U.S.C. chapter 30 before completing the major portion of the course, the discontinuance date will be the date the entitlement is exhausted.

(Authority: 38 U.S.C. 3031(e); Pub. L. 98–525)

(t) *Eligibility expires.* If the veteran is pursuing a course on the date of expiration of eligibility as determined under § 21.7050 or § 21.7051 VA will discontinue educational assistance effective the day preceding the end of the eligibility period.

(Authority: 38 U.S.C. 3034(a); Pub. L. 98–525)

(u) *Veteran fails to participate satisfactorily in the Selected Reserve.* If a veteran is attempting to establish eligibility through service on active duty combined with service in the Selected Reserve, and he or she fails to participate satisfactorily in the Selected Reserve before completing the required service in the Selected Reserve, the effective date of reduction of the award of educational assistance will be the date the Secretary determines that he or she failed to participate satisfactorily.

(Authority: 38 U.S.C. 3012; Pub. L. 98–525)

(v) *Error-payee's or administrative.* (1) When an act of commission or omission by a payee or with his or her knowledge results in an erroneous award of educational assistance, the effective date of the reduction or discontinuance will be the effective date of the award, or the day before the act, whichever is later, but not before the date on which the award would have ended had the act not occurred.

(2) When VA, the Department of Defense, or the Department of Transportation makes an administrative error or an error in judgment that is the sole cause of an erroneous award, VA must reduce or terminate the award effective the date of last payment.

(Authority: 38 U.S.C. 5112(b), 5113)

(w) *Forfeiture for fraud.* If a veteran's or servicemember's educational assistance must be forfeited due to fraud, the effective date of discontinuance shall be the later of—

(1) The effective date of the award, or

(2) The day before the date of the fraudulent act.

(Authority: 38 U.S.C. 6103; Pub. L. 98–525)

(x) *Forfeiture for treasonable acts or subversive activities.* If a veteran's or servicemember's educational assistance must be forfeited due to treasonable acts or subversive activities, the effective date of discontinuance shall be the later of—

(1) The effective date of the award, or

(2) The date before the date the veteran or servicemember committed the treasonable act or subversive activities for which he or she was convicted.

(Authority: 38 U.S.C. 6104, 6105; Pub. L. 98–525)

(y) *Change in law or VA issue or interpretation.* If there is a change in applicable law or VA issue, or in the Department of Veterans Affairs's application of the law or VA issue, VA will use the provisions of §3.114(b) of this chapter to determine the date of discontinuance of the veteran's or servicemember's educational assistance.

(Authority: 38 U.S.C. 5112, 5113; Pub. L. 98–525)

(z) *Independent study course loses accreditation.* Except as otherwise provided in § 21.7120(d), if the veteran or servicemember is enrolled in a course offered in whole or in part by independent study, and the course loses its accreditation (or the educational institution offering the course loses its accreditation), the date of reduction or discontinuance will be the effective

date of the withdrawal of accreditation by the accrediting agency.

(Authority: 38 U.S.C. 3014, 3034, 3676, 3680A(a))

(aa) *Fugitive felons.* (1) VA will not award educational assistance allowance to an otherwise eligible veteran for any period after December 26, 2001, during which the veteran is a fugitive felon. The date of discontinuance of an award of educational assistance allowance to a veteran who is a fugitive felon is the later of—

(i) The date of the warrant for the arrest of the felon; or

(ii) December 27, 2001.

(2) VA will not award educational assistance allowance to a dependent who is otherwise eligible to transferred entitlement if the dependent is a fugitive felon or if the veteran who transferred the entitlement is a fugitive felon. The date of discontinuance of an award of educational assistance allowance to a dependent is the later of—

(i) The date of the warrant; or

(ii) December 27, 2001.

(Authority: 38 U.S.C. 5313B)

(bb) *Reduction following loss of increase (''kicker'') for Selected Reserve service.* If a veteran is entitled to an increase (''kicker'') in the monthly rate of basic educational assistance as provided in §21.7136(g) or §21.7137(e), due to service in the Selected Reserve, and loses that entitlement, the effective date for the reduction in the monthly rate payable is the date, as determined by the Secretary of the military department concerned, that the veteran is no longer entitled to the increase (''kicker'').

(Authority: 10 U.S.C. 16131)

(cc) *Except as otherwise provided.* If a veteran's or servicemember's educational assistance must be discontinued for any reason other than those stated in the other paragraphs of this section, VA will determine the date of discontinuance of educational assistance on the basis of facts found.

(Authority: 38 U.S.C. 5112(a), 5113; Pub. L. 98–525)

[53 FR 1757, Jan. 22, 1988, as amended at 55 FR 28386, July 11, 1990; 57 FR 15024, Apr. 24, 1992; 58 FR 26242, May 3, 1993; 61 FR 6788, Feb. 22, 1996; 61 FR 26116, May 24, 1996; 62 FR 55519, Oct. 27, 1997; 63 FR 35837, July 1, 1998; 64 FR 38577, July 19, 1999; 64 FR 51901, Sept. 27, 1999; 66 FR 38939, July 26, 2001; 66 FR 42586, Aug. 13, 2001; 70 FR 25787, May 16, 2005]

## §21.7136 Rates of payment of basic educational assistance.

The monthly rate of educational assistance payable to a veteran or servicemember depends in part upon the service requirements he or she met to establish eligibility for that educational assistance.

(a) *Service requirements for higher rates.* The monthly rate of basic educational assistance payable to a veteran or servicemember shall be the rate stated in paragraph (b) of this section when—

(1) The veteran has established eligibility for educational assistance under §21.7045; or

(2) The veteran has established eligibility under §21.7042, and one of the following sets of circumstances exist.

(i) The veteran's qualifying obligated period of active duty is at least three years; or

(ii) The veteran's qualifying obligated period of active duty is at least two years and less than three years and either the veteran has served or is committed to serve in the Selected Reserve for a period of at least four years, or the veteran was committed to serve in the Selected Reserve for a period of at least four years but failed to complete four years service for one of the reasons stated in §21.7042(b)(7)(i) or (iii); or

(iii) The veteran's qualifying obligated period of active duty is at least two years and less than three years and—

(A) The basic educational assistance is payable for training received after August 31, 1993;

(B) The veteran's continuous active duty service beginning on the date of the commencement of his or her qualifying obligated period of active duty is

at least three years and upon completion of that continuous period of active duty the veteran either—

(*1*) Continues on active duty; or

(*2*) Is discharged from active duty with an honorable discharge; or

(*3*) Is released after service on active duty characterized by the Secretary concerned as honorable service and is placed on the retired list, transferred to the Fleet Reserve or the Fleet Marine Corps Reserve, placed on the temporary disability retired list; or

(*4*) Is released from active duty for further service in a reserve component of the Armed Forces after service on active duty characterized by the Secretary concerned as honorable service.

(Authority: 38 U.S.C. 3015(a))

(b) *Rates.* (1) Except as elsewhere provided in this section or in § 21.7139, the monthly rate of basic educational assistance payable for training that occurs after September 30, 2004, to a veteran whose service is described in paragraph (a) of this section, is the rate stated in the following table:

| Training | Monthly rate |
|---|---|
| Full time | $1004.00 |
| ¾ time | 753.00 |
| ½ time | 502.00 |
| Less than ½ but more than ¼ | 502.00 |
| ¼ time | 251.00 |

(Authority: 38 U.S.C. 3015.)

(2) If a veteran's service is described in paragraph (a) of this section, the monthly rate of basic educational assistance payable to the veteran for pursuit of apprenticeship or other on-the-job training that occurs after September 30, 2004, is the rate stated in the following table:

| Training period | Monthly rate |
|---|---|
| First six months of training | $753.00 |
| Second six months of training | 552.20 |
| Remaining pursuit of training | 351.40 |

(Authority: 38 U.S.C. 3015, 3032(c).)

(3) If a veteran's service is described in paragraph (a) of this section, the monthly rate of basic educational assistance payable to the veteran for pursuit of a cooperative course is $1004.00 for training that occurs after September 30, 2004.

(Authority: 38 U.S.C. 3015.)

(c) *Rates for some veterans whose qualifying obligated period of active duty is less than three years.* If a veteran has established eligibility under § 21.7042, but the veteran's service is not described in paragraph (a)(2) of this section, the monthly rate of educational assistance payable to the veteran will be determined by this paragraph.

(1) Except as elsewhere provided in this section or in § 21.7139, the monthly rate of basic educational assistance payable to a veteran for training that occurs after September 30, 2004 is the rate stated in the following table:

| Training | Monthly rate |
|---|---|
| Full time | $816.00 |
| ¾ time | 612.00 |
| ½ time | 408.00 |
| Less than ½ but more than ¼ | 408.00 |
| ¼ time or less | 204.00 |

(Authority: 38 U.S.C. 3015.)

(2) The monthly rate of basic educational assistance payable to a veteran for pursuit of apprenticeship or other on-the-job training that occurs after September 30, 2004 is the rate stated in the following table:

| Training period | Monthly rate |
|---|---|
| First six months of training | $612.00 |
| Second six months of training | 448.80 |
| Remaining pursuit of training | 285.60 |

(Authority: 38 U.S.C. 3015, 3032(c).)

(3) The monthly rate of basic educational assistance payable to a veteran for pursuit of a cooperative course is $816.00 for training that occurs after September 30, 2004.

(Authority: 38 U.S.C. 3015.)

(d) *Increase in basic educational assistance rates (''kicker'').* The Secretary concerned may increase the amount of basic educational assistance payable to an individual who has a skill or specialty which the Secretary concerned designates as having a critical shortage of personnel or for which it is difficult

to recruit. The amount of the increase is set by the Secretary concerned, but (except as provided in paragraphs (f) and (g) of this section)—

(1) For individuals, other than those pursuing cooperative training before October 9, 1996, or apprenticeship or other on-job training, it may not exceed:

(i) $400 per month for full-time training,

(ii) $300 per month for three-quarter-time training,

(iii) $200 per month for one-half-time training, or for training which is less than one-half, but more than one-quarter-time, or

(iv) $100 per month for one-quarter-time training or less.

(2) For individuals who first become members of the Armed Forces after November 28, 1989 (other than those pursuing cooperative training before October 9, 1996, or apprenticeship or other on-job training), it may not exceed:

(i) $700 per month for full-time training,

(ii) $525 per month for three-quarter-time training,

(iii) $350 per month for one-half-time training or for training which is less than one-half, but more than one-quarter-time, or

(iv) $175 per month for one-quarter-time training or less.

(3) For individuals who first become members of the Armed Forces before November 29, 1989, and who are pursuing an apprenticeship or other on-job training, it may not exceed—

(i) $300 per month during the first six months of training,

(ii) $220 per month during the second six months of training, and

(iii) $140 per month during the remaining months of training.

(4) For individuals who first become members of the Armed Forces after November 28, 1989, and who are pursuing an apprenticeship or other on-job training, it may not exceed—

(i) $525 per month during the first six months of training,

(ii) $385 per month during the second six months of training, and

(iii) $245 per month during the remaining months of training.

(5) For individuals who first become members of the Armed Forces before November 29, 1989, and who are pursuing cooperative training, it may not exceed $320 per month for training received before October 9, 1996.

(6) For individuals who first become members of the Armed Forces after November 28, 1989, and who are pursuing cooperative training, it may not exceed $560 per month for training received before October 9, 1996.

(Authority: Sec. 108(a)(2), Pub. L. 100–689, 102 Stat. 4170; Sec. 5(a), Pub. L. 102–83, 105 Stat. 406)

(e) *Less than one-half-time training and rates for servicemembers.* Except as provided in paragraph (g) or (h) of this section, the monthly rate for a veteran who is pursuing a course on a less than one-half-time basis or the monthly rate for a servicemember who is pursuing a program of education is the lesser of:

(1) The monthly rate stated in either paragraph (b) or (c) of this section (as determined by the veteran's or servicemember's initial obligated period of active duty) plus any additional amounts that may be due under paragraph (d) or (e) of this section, or

(2) The monthly rate of the cost of the course.

(3) For individuals pursuing cooperative training, it may not exceed $320 per month.

(Authority: 38 U.S.C. 3015, 3032)

(f) *Increase in basic educational assistance rates (''kicker'') for those eligible under §21.7045.* A veteran who formerly was eligible to receive educational assistance under 38 U.S.C. ch. 32, and becomes eligible for educational assistance under 38 U.S.C. ch. 30 as described in §21.7045(b)(1)(ii), (c)(1)(ii), or (e)(2), may receive an increase in basic educational assistance allowance (kicker). The increase will be determined as follows.

(1) The basis of the increase will be that portion of the amount of money—

(i) Which remains in the VEAP fund after the veteran has been paid all assistance due him or her under 38 U.S.C. ch. 32 and refunded all of his or her contributions to the VEAP fund, and—

(ii) Which represents the Secretary of Defense's additional contributions for the veteran as stated in §21.5132(b)(3) of this part.

(2) For a student pursuing a program of education by residence training—

(i) VA will determine the monthly rate of the increase by dividing the amount of money described in paragraph (e)(1) of this section by the number of months of entitlement to educational assistance under 38 U.S.C. chapter 30 which the veteran has at the time his eligibility for benefits under 38 U.S.C. chapter 30 is first established;

(ii) VA will use the monthly rate of the increase determined in paragraph (e)(2)(i) of this section if the veteran is pursuing his or her program full time;

(iii) VA will multiply the monthly rate determined by paragraph (e)(2)(i) of this section by .75 for a student pursuing his or her program three-quarter time;

(iv) VA will multiply the monthly rate determined by paragraph (e)(2)(i) of this section by .5 for a student pursuing his or her program half time; and

(v) VA will multiply the monthly rate determined by paragraph (e)(2)(i) of this section by .25 for a student pursuing his or her program less than one-half time.

(3) For a veteran pursuing cooperative training VA will multiply the rate determined by paragraph (e)(2)(i) of this section by .8 for training received before October 9, 1996.

(4) For a veteran pursuing a program of apprenticeship or other on-job training VA will multiply the monthly rate determined by paragraph (e)(2)(i) of this section

(i) By .75 for a veteran in the first six months of pursuit of training,

(ii) By .55 for a veteran in the second six months of pursuit of training, and

(iii) By .35 for a veteran in the remaining months of pursuit of training.

(Authority: 38 U.S.C. 3015(e))

(g) *Increase (''kicker'') in basic educational assistance rates payable for service in the Selected Reserve.* (1) The Secretary of the military department concerned may increase the amount of basic educational assistance payable under paragraph (b), (c), (d), (e), or (f) of this section, as appropriate. The increase (''kicker'') is payable to a veteran who has a skill or specialty in which there is a critical shortage of personnel or for which it is difficult to recruit, or, in the case of critical units, retain personnel, if the veteran:

(i) Establishes eligibility for educational assistance under § 21.7042(a) or § 21.7045; and

(ii) Meets the criteria of § 21.7540(a)(1) with respect to service in the Selected Reserve.

(2) The Secretary of the military department concerned—

(i) Will, for such an increase (''kicker''), set an amount of the increase (''kicker'') for full-time training, but the increase (''kicker'') may not exceed $350 per month; and

(ii) May set the amount of the increase (''kicker'') payable, for a veteran pursuing a program of education less than full time or pursuing a program of apprenticeship or other on-job training, at an amount less than the amount described in paragraph (g)(2)(i) of this section.

(Authority: 10 U.S.C. 16131(i)(2))

(h) *Increase in monthly rates due to contributions.* Effective May 1, 2001, a servicemember who establishes eligibility under § 21.7042(a), (b), or (c) may contribute up to $600 to the Secretary of the military department concerned in multiples of $20.

(1) VA will increase the monthly rate provided in paragraph (b)(2) or (c)(2) of this section by:

(i) $5 for every $20 an individual pursuing a program of education full time has contributed;

(ii) $3.75 for every $20 an individual pursuing a program of education three-quarter time has contributed;

(iii) $2.50 for every $20 an individual pursuing a program of education half time or less than one-half time but more than one-quarter time has contributed; and

(iv) $1.25 for every $20 an individual pursuing a program of education one-quarter time has contributed.

(2) If a veteran is pursuing an apprenticeship or other on-job training—

(i) During the first six months of the veteran's pursuit of training, VA will increase the monthly rate provided in paragraph (b)(4) or (c)(4) of this section by $3.75 for every $20 the individual has contributed;

(ii) During the second six months of the veteran's pursuit of training, VA

will increase the monthly rate provided in paragraph (b)(4) or (c)(4) of this section by $2.75 for every $20 the veteran has contributed; and

(iii) During the remaining months of the veteran's pursuit of training, VA will increase the monthly rate proved in paragraph (b)(4) or (c)(4) of this section by $1.75 for every $20 the veteran has contributed.

(3) VA will increase the monthly rate provided in paragraph (b)(5)(iii) or (c)(5)(iii) of this section by $5 for every $20 the veteran has contributed.

(Authority: 38 U.S.C. 3015(g))

[55 FR 28386, July 11, 1990]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §21.7136, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

## §21.7137 Rates of payment of basic educational assistance for individuals with remaining entitlement under 38 U.S.C. chapter 34.

(a) *Minimum rates.* (1) Except as elsewhere provided in this section, the monthly rate of basic educational assistance for training that occurs after September 30, 2004 is the rate stated in the following table:

| Training | Monthly rate | | | |
|---|---|---|---|---|
| | No dependents | One dependent | Two dependents | Additional for each additional dependent |
| Full time | $1,192.00 | $1,228.00 | $1,259.00 | $16.00 |
| ¾ time | 894.50 | 921.00 | 944.50 | 12.00 |
| ½ time | 596.00 | 614.00 | 629.50 | 8.50 |
| Less than ½ but more than ¼ time | 596.00 | 596.00 | 596.00 | 0 |
| ¼ time or less | 298.00 | 298.00 | 298.00 | 0 |

(Authority: 38 U.S.C. 3015.)

(2) For veterans pursuing apprenticeship or other on-the-job training, the monthly rate of basic educational assistance for training that occurs after September 30, 2004 is the rate stated in the following table:

| Training | Monthly rate | | | |
|---|---|---|---|---|
| | No dependents | One dependent | Two dependents | Additional for each additional dependent |
| 1st six months of pursuit of program | $855.75 | $868.13 | $879.00 | $5.25 |
| 2nd six months of pursuit of program | 608.58 | 617.93 | 625.63 | 3.85 |
| 3rd six months of pursuit of program | 375.20 | 381.33 | 386.05 | 2.45 |
| Remaining pursuit of program | 363.30 | 369.08 | 374.33 | 2.45 |

(Authority: 38 U.S.C. 3015.)

(3) The monthly rate of basic educational assistance payable to a veteran who is pursuing a cooperative course after September 30, 2004, is the rate stated in the following table:

| Monthly rate | | | |
|---|---|---|---|
| No dependents | One dependent | Two dependents | Additional for each additional dependent |
| $1192.00 | $1228.00 | $1259.00 | $16.00 |

(Authority: 38 U.S.C. 3015.)

(b) *Less than one-half-time training.* Except as provided in paragraphs (d) and (e) of this section, the monthly rate of basic educational assistance for a veteran who is pursuing a course on a less than one-half-time basis is the lesser of:

(1) The monthly rate in paragraph (a)(1) of this section, or

(2) The monthly rate of the cost of the course.

(Authority: 38 U.S.C. 3032; Pub. L. 98–525, Pub. L. 99–576)

(c) *Rates for servicemembers.* The monthly rate of basic educational assistance for a servicemember may not exceed the lesser of the following rates (except as provided in paragraph (d) of this section):

(1) The monthly pro-rated cost of the course.

(2) The following monthly rates for training that occurs after September 30, 2004—

(i) $1,192.00 for full-time training;

(ii) $894.50 for three-quarter-time training;

(iii) $596.00 for one-half-time training and training that is less than one-half-time training but more than one-quarter-time training; and

(iv) $298.00 for one-quarter-time training.

(Authority: 38 U.S.C. 3015.)

(d) *Increase in basic educational assistance rates (''kicker'').* The Secretary concerned may increase the amount of basic educational assistance payable to an individual who has a skill or specialty which the Secretary concerned designates as having a critical shortage of personnel or for which it is difficult to recruit. The increase may not be applied to a servicemember whose monthly rate is determined by paragraph (c)(1) of this section, but it can serve to raise the ceiling on monthly rates stated in paragraphs (b)(1) and (c)(2) of this section. The amount of the increase is set by the Secretary concerned, but—

(1) For individuals, other than those pursuing cooperative training before October 9, 1996, or apprenticeship or other on-job training, it may not exceed:

(i) $400 per month for full-time training,

(ii) $300 per month for three-quarter-time training.

(iii) $200 per month for one-half-time training or for training which is less than one-half but more than one-quarter-time, or

(iv) $100 per month for one-quarter-time training or less.

(2) For individuals pursuing an apprenticeship or other on-job training it may not exceed—

(i) $300 per month for the first six months of training.

(ii) $220 per month for the second six months of training, and

(iii) $140 per month for the remaining months of training.

(Authority: 38 U.S.C. 3015, 3032)

(3) For individuals pursuing cooperative training, it may not exceed $320 per month for training received before October 9, 1996.

(Authority: Sec. 108(a)(2), Pub. L. 100–689, 102 Stat. 4170; sec. 5(a), Pub. L. 102–83, 105 Stat. 406)

(e) *Increase (''kicker'') in basic educational assistance rates for service in the Selected Reserve.* (1) The Secretary of the military department concerned may increase the amount of basic educational assistance payable under paragraph (a), (b), or (d) of this section, as appropriate. The increase (''kicker'') is payable to a veteran who has a skill or specialty in which there is a critical shortage of personnel or for which it is difficult to recruit, or, in the case of critical units, retain personnel, if the veteran:

(i) Establishes eligibility for educational assistance under § 21.7044(a); and

(ii) Meets the criteria of § 21.7540(a)(1) with respect to service in the Selected Reserve.

(2) The Secretary of the military department concerned—

(i) Will, for such an increase, set the amount of the increase (''kicker'') payable for full-time training, but the increase (''kicker'') may not exceed $350 per month;

(ii) May set the amount of the ''kicker'' payable, for a veteran pursuing a program of education less than full time or pursuing an apprenticeship or other on-job training, at an amount less than the amount described in paragraph (e)(2)(i) of this section.

(Authority: 10 U.S.C. 16131(i)(2))

(f) *Concurrent benefits.* VA may pay additional educational assistance to a veteran for a dependent concurrently

with additional pension or compensation for the same dependent.

(Authority: 38 U.S.C. 3015(d), Pub. L. 98–525)

(g) *Two veteran cases.* VA may pay additional educational assistance to a veteran for a spouse who is also a veteran. This will not bar the payment of additional educational assistance or subsistence allowance under §21.260 of this part to the spouse for the veteran. If the veteran is paid additional educational assistance for a child, that will not bar payment of additional educational assistance or subsistence allowance under §21.260 of this part to the spouse for the same child.

(Authority: 38 U.S.C. 3015(d); Pub. L. 98–525)

[53 FR 1757, Jan. 22, 1988]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §21.7137, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

## §21.7138 Rates of supplemental educational assistance.

In addition to basic educational assistance, a veteran or servicemember who is eligible for supplemental educational assistance and entitled to it shall be paid supplemental educational assistance at the rate described in this section unless a lesser rate is required by §21.7139 of this part.

(a) *Rates for veterans.* (1) Except for a veteran pursuing apprenticeship or other on-job training, the rate of supplemental educational assistance payable to a veteran is at least the rate stated in this table.

| TRAINING | MONTHLY RATE |
|---|---|
| Full time | $300. |
| ¾ time | 225. |
| ½ time | 150. |
| Less than ½ but more than ¼ time. | 150 See paragraph (c). |
| ¼ time or less | 75 See paragraph (c). |
| Cooperative | 240. |

(Authority: 38 U.S.C. 3015(d), 3022, 3032(d); Pub. L. 98–525, Pub. L. 100–689) (Jan. 1, 1989)

(2) For a veteran pursuing apprenticeship or other on-job training the rate of supplemental educational assistance payable to a veteran is as provided in this table.

| Training period | Monthly rate |
|---|---|
| First 6 months of pursuit of program. | $225.00 |
| Second 6 months of pursuit of program. | 165.00 |
| Remaining pursuit of program | 105.00 |

(Authority: 38 U.S.C. 3015(c), 3032(c); Pub. L. 99–576)

(b) *Increase in supplemental educational assistance rates (''kicker'').* The Secretary concerned may increase the amount of supplemental educational assistance payable to an individual who has a skill or specialty which the Secretary concerned designates as having a critical shortage of personnel or for which it is difficult to recruit. The amount of the increase is set by the Secretary concerned, but—

(1) For an individual other than one pursuing an apprenticeship or other on-job training or cooperative training it may not exceed—

(Authority: 38 U.S.C. 3032(d)) (Jan. 1, 1989)

(i) $300 per month for full-time training.

(ii) $225 per month for three-quarter-time training,

(iii) $150 per month for one-half-time training and for training which is less than one-half-time, but more than one-quarter-time, or

(iv) $75 per month for one-quarter-time training or less.

(2) For an individual pursuing an apprenticeship or other on-job training it may not exceed—

(i) $225 per month for the first six months of training,

(ii) $165 per month for the second six months of training, and

(iii) $105 per month for the remaining months of training.

(Authority: 38 U.S.C. 3022(b), 3032(c); Pub. L. 99–576)

(3) For an individual pursuing cooperative training, it may not exceed $240 per month.

(Authority: 38 U.S.C. 3022(b), 3032(d)) (Jan. 1, 1989)

(c) *Rates of supplemental educational assistance for less than one-half-time training and for servicemembers.* The

monthly rate of supplemental educational assistance payable to a veteran who is training less than half-time or to a servicemember is determined as follows:

(1) The monthly rate of the veteran's or servicemember's basic educational assistance is determined as provided in §§ 21.7136(d), and 21.7137 (b), (c) and (d) of this part.

(2) If the monthly rate of basic educational assistance equals or is greater than the monthly rate of the cost of the course, no supplemental educational assistance is payable.

(3) If the monthly rate of basic educational assistance is less than monthly rate of the cost of the course, the monthly rate of supplemental educational assistance is the lesser of—

(i) The monthly rate provided in paragraph (a) of this section, plus the monthly rate provided in paragraph (b) of this section, if appropriate, or

(ii) The difference between the monthly rate of the cost of the course and the monthly rate of the veteran's or servicemember's basic educational assistance.

(Authority: 38 U.S.C. 3022, 3032; Pub. L. 98–525)

[53 FR 1757, Jan. 22, 1988, as amended at 55 FR 28388, July 11, 1990; 56 FR 20136, May 2, 1991]

### § 21.7139 Conditions which result in reduced rates or no payment.

The monthly rates established in §§ 21.7136, 21.7137 and 21.7138 shall be reduced as stated in this section whenever the circumstances described in this section arise.

(a) *Withdrawals and nonpunitive grades.* Withdrawal from a course or receipt of a nonpunitive grade affects payments to a veteran or servicemember. VA will not pay benefits to a veteran or servicemember for pursuit of a course from which the veteran or servicemember withdraws or receives a nonpunitive grade which is not used in computing requirements for graduation unless the provisions of this paragraph are met.

(1) The veteran withdraws because he or she is ordered to active duty; or

(2) All of the following exist.

(i) There are mitigating circumstances; and

(ii) The veteran or servicemember submits a description of the mitigating circumstances in writing to VA within one year from the date VA notifies the veteran or servicemember that he or she must submit a description of the mitigating circumstances, or at a later date if the veteran or servicemember is able to show good cause why the one-year time limit should be extended to the date on which he or she submitted the description of the mitigating circumstances; and

(iii) The veteran or servicemember submits evidence supporting the existence of mitigating circumstances within one year of the date that evidence is requested by VA, or at a later date if the veteran or servicemember is able to show good cause why the one-year time limit should be extended to the date on which he or she submitted the evidence supporting the existence of mitigating circumstances.

(Authority: 38 U.S.C. 3034, 3680(a); Pub. L. 98–525, Pub. L. 102–127)(Aug. 1, 1990)

(b) *No educational assistance for some incarcerated servicemembers.* As with servicemembers who are not incarcerated, VA will not pay educational assistance to an incarcerated servicemember enrolled in a course for which there are no tuition and fees. Furthermore, VA will not pay educational assistance to a servicemember who—

(1) Is enrolled in a course where his or her tuition and fees are being paid for by a Federal program (other than one administered by VA) or by a State or local program, and

(2) Is incarcerated in a Federal, State or local prison or jail for conviction of a felony, and has incurred no expenses for supplies, books or equipment.

(Authority: 38 U.S.C. 3034, 3482(g))

(c) *No educational assistance for some incarcerated veterans.* The VA will pay no educational assistance to a veteran who—

(1) Is incarcerated in a Federal, State or local penal institution for conviction of a felony, and

(2) Is enrolled in a course—

(i) For which there are no tuition and fees, or

(ii) For which tuition and fees are being paid by a Federal program (other than one administered by the VA) or by a State or local program, and

(3) Is incurring no charge for the books, supplies and equipment necessary for the course.

(Authority: 38 U.S.C. 3034, 3482(g))

(d) *Reduced educational assistance for some incarcerated servicemembers.*

(1) VA will pay reduced educational assistance to a servicemember who—

(i) Is incarcerated in a Federal, State or local penal institution for conviction of a felony, and

(ii) Is enrolled in a course where his or her tuition and fees are being paid for entirely or partly by a Federal program (other than one administered by VA) or by a State or local program, and

(iii) If all the tuition and fees are paid for by such a program, must buy books, supplies or equipment for the course.

(2) The monthly rate of educational assistance payable to a servicemember described in this paragraph shall equal the lowest of the following:

(i) The monthly rate of the portion of the tuition and fees that are not paid by a Federal program (other than one administered by VA) or a State or local program plus the monthly rate of any charges to the servicemember for the cost of necessary supplies, books and equipment;

(ii) The monthly rate of the portion of the tuition and fees paid by the servicemember plus the monthly rate of the portion of tuition and fees paid by the Federal, State or local program; or

(iii) The monthly rate found in §21.7136(d) or §21.7137(c), as appropriate.

(Authority: 38 U.S.C. 3034, 3482(g))

(e) *Reduced educational assistance for some incarcerated veterans.* (1) VA will pay reduced educational assistance to a veteran who—

(i) Is incarcerated in a Federal, State or local penal institution for conviction of a felony, and

(ii) Is enrolled in a course for which the veteran pays some (but not all) of the charges for tuition and fees, or for which a Federal program (other than one administered by VA) or a State or local program pays all the charges for tuition and fees, but which requires the veteran to pay for books, supplies and equipment.

(2) The monthly rate of educational assistance payable to such a veteran who is pursuing the course on a one-half time or greater basis shall be the lesser of the following:

(i) The monthly rate of the portion of the tuition and fees that are not paid by a Federal program (other than one administered by VA) or a State or local program plus the monthly rate of the charge to the veteran for the cost of necessary supplies, books and equipment, or

(ii) If the veteran has remaining entitlement under 38 U.S.C. chapter 34, monthly rate stated in §21.7137(a) for a veteran with no dependents and the increase provided in §21.7137(d) or (e), if appropriate, plus the monthly rate stated in §21.7138 (a) and (b) for a veteran if the veteran is entitled to supplemental educational assistance, or

(iii) If the veteran has no entitlement under 38 U.S.C. chapter 34, the monthly rate stated in §21.7136 (a) or (b), as appropriate, and the increase provided in §21.7136(d), (f), or (g), if appropriate, plus the monthly rate stated in §21.7138 (a) and (b) for a veteran if the veteran is entitled to supplemental educational assistance.

(3) The monthly rate of educational assistance payable to such a veteran who is pursuing the course on a less than one-half time basis or on a one-quarter time basis shall be the lowest of the following:

(i) The monthly rate of the tuition and fees charged for the course,

(ii) The monthly rate of the tuition and fees which the veteran must pay plus the monthly rate of the charge to the veteran for the cost of necessary supplies, books and equipment, or

(iii) The monthly rate determined by §21.7136(d) or §21.7137(b), as appropriate, plus the monthly rate stated in

§ 21.7138(c) if the veteran is entitled to supplemental educational assistance.

(Authority: 38 U.S.C. 3034, 3482(g))

(f) *Payment for correspondence courses.* The amount of payment due a veteran or servicemember who is pursuing a correspondence course or the correspondence portion of a correspondence-residence course is 55 percent of the established charge which the educational institution requires nonveterans to pay for the lessons that the veteran or servicemember has had completed and serviced and for which payment is due.

(Authority: 38 U.S.C. 3034, 3686(a)(2))

(g) *Failure to work sufficient hours of apprenticeship and other on-job training.* (1) For any month in which an eligible veteran pursuing an apprenticeship or other on-job training program fails to complete 120 hours of training, VA will reduce proportionally—

(i) The rates specified in §§ 21.7136(b)(2), (c)(2), (d)(3), and (d)(4), and 21.7137(a)(2) and (d)(2); and

(ii) Any increase (''kicker'') set by the Secretary of the military department concerned as described in §§ 21.7136(g) and 21.7137(e).

(2) In making the computations required by paragraph (g)(1) of this section, VA will round the number of hours worked to the nearest multiple of eight.

(3) For the purpose of this paragraph ''hours worked'' include only—

(i) The training hours the veteran worked, and

(ii) All hours of the veteran's related training which occurred during the standard workweek and for which the veteran received wages. (See § 21.4270(c), footnote 5, as to the requirements for full-time training.)

(Authority: 38 U.S.C. 3034, 3687(b)(3)

[53 FR 1757, Jan. 22, 1988, as amended at 55 FR 28388, July 11, 1990; 56 FR 11672, Mar. 20, 1991; 57 FR 15025, Apr. 24, 1992; 58 FR 26242, May 3, 1993; 60 FR 32272, June 21, 1995; 62 FR 55520, Oct. 27, 1997]

## § 21.7140 Certifications and release of payments.

(a) *Advance payments and lump-sum payments.* VA will apply the provisions of § 21.4138(a) and (b) in making advance payments and lump-sum payments to veterans and servicemembers.

(Authority: 38 U.S.C. 3034 and 3680)

(b) *Accelerated payments.* VA will apply the provisions of §§ 21.7151(a), (c), and 21.7154(d) in making accelerated payments.

(c) *Other payments.* An individual must be pursuing a program of education in order to receive payments. To ensure that this is the case the provisions of this paragraph must be met.

(1) VA will pay educational assistance to a veteran or servicemember (other than one pursuing a program of apprenticeship or other on-job training, a correspondence course, one who qualifies for advance payment, one who qualifies for an accelerated payment, or one who qualifies for a lump sum payment) only after—

(i) The educational institution has certified his or her enrollment as provided in § 21.7152; and

(ii) VA has received from the individual a verification of the enrollment.

(Authority: 38 U.S.C. 3680(g))

(2) VA will pay educational assistance to a veteran pursuing a program of apprenticeship or other on-job training only after—

(i) The training establishment has certified his or her enrollment in the training program as provided in § 21.7152; and

(ii) VA has received from the veteran and the training establishment a certification of hours worked.

(3) VA will pay educational assistance to a veteran or servicemember who is pursuing a correspondence course only after-

(i) The educational institution has certified his or her enrollment;

(ii) VA has received from the veteran or servicemember a certification as to the number of lessons completed and serviced by the educational institution; and

(iii) VA has received from the educational institution a certification or an endorsement on the veteran's or servicemember's certificate, as to the number of lessons completed by the

veteran or servicemember and serviced by the educational institution.

(Authority: 38 U.S.C. 3034, 3680(b))

(d) *Payment for intervals between terms.* (1) In administering 38 U.S.C. chapter 30, VA will apply the provisions of §21.4138(f) when determining whether a veteran is entitled to payment for an interval between terms. References to §21.4205 in §21.4138(f) shall be deemed to refer to §21.7136.

(2) The Director of the VA facility of jurisdiction may authorize payment to be made for breaks, including intervals between terms within a certified period of enrollment, during which the educational institution is closed under an established policy based upon an order of the President or due to an emergency situation.

(i) If the Director has authorized payment due to an emergency school closing resulting from a strike by the faculty or staff of the school, and the closing lasts more than 30 days, the Director, Education Service, will decide if payments may be continued. The decision will be based on a full assessment of the strike situation. Further payments will not be authorized if in his or her judgment the school closing will not be temporary.

(ii) An educational institution, which disagrees with a decision made under this paragraph by a Director of a VA facility, has one year from the date of the letter notifying the educational institution of the decision to request that the decision be reviewed. The request must be submitted in writing to the Director of the VA facility where the decision was made. The Director, Education Service, shall review the evidence of record and any other pertinent evidence the educational institution may wish to submit. The Director, Education Service, has the authority either to affirm or reverse a decision of the Director of a VA facility.

(3) A veteran, who is pursuing a course leading to a standard college degree, may transfer between consecutive school terms from one approved educational institution to another for the purpose of enrolling in, and pursuing, a similar course at the second educational institution. If the interval between terms does not exceed 30 days, VA shall, for the purpose of paying educational assistance, consider the veteran to be enrolled in the first educational institution during the interval.

(Authority: 38 U.S.C. 3034, 3680)

(e) *Payee.* (1) VA will make payment to the veteran or servicemember or to a duly appointed fiduciary. The VA will make direct payment to the veteran or servicemember even if he or she is a minor.

(2) The assignment of educational assistance is prohibited. In administering this provision, VA will apply the provisions of §21.4146 to 38 U.S.C. chapter 30.

(Authority: 38 U.S.C. 3034, 3680)

(f) *Limitations on payments.* VA will not apportion educational assistance.

(Authority: 38 U.S.C. 3034, 3680)

(g) *Payments of accrued benefits.* Educational assistance remaining due and unpaid at the date of the servicemember's or veteran's death is payable under the provisions of §3.1000 of this chapter.

(Authority: 38 U.S.C. 5121)

[53 FR 1757, Jan. 22, 1988, as amended at 55 FR 28388, July 11, 1990; 56 FR 20136, May 2, 1991; 56 FR 31332, July 10, 1991; 57 FR 15025, Apr. 24, 1992; 61 FR 26117, May 24, 1996; 62 FR 55761, Oct. 28, 1997; 64 FR 52652, Sept. 30, 1999; 68 FR 35180, June 12, 2003]

### §21.7141 Tutorial assistance.

An individual who is otherwise eligible to receive benefits under the Montgomery GI Bill - Active Duty may receive supplemental monetary assistance to provide tutorial services. In determining whether VA will pay the individual this assistance, VA will apply the provisions of §21.4236.

(Authority: 38 U.S.C. 3019, 3492)

[61 FR 26117, May 24, 1996

### §21.7142 Accelerated payments.

The accelerated payment will be the lesser of—

(a) The amount equal to 60 percent of the charged tuition and fees for the term, quarter or semester (or the entire program of education for those

programs not offered on a term, quarter, or semester basis), or

(b) The aggregate amount of basic education assistance to which the individual remains entitled under this chapter at the time of the payment.

(Authority: 38 U.S.C. 3014A)

[68 FR 35180, June 12, 2003]

### § 21.7143 Nonduplication of educational assistance.

(a) *Payments of educational assistance shall not be duplicated.* An individual, entitled to educational assistance under 38 U.S.C. chapter 34, who establishes entitlement under 38 U.S.C. chapter 30, shall not be eligible to receive educational assistance under 38 U.S.C. chapter 30 before January 1, 1990. An individual who is entitled to educational assistance under 38 U.S.C. chapter 30 and any of the provisions of law listed in this paragraph must elect which benefit he or she will receive for the program of education he or she wishes to pursue. The provisions of law are:

(1) 38 U.S.C. chapter 31,

(2) 38 U.S.C. chapter 32,

(3) 38 U.S.C. chapter 35,

(4) 10 U.S.C. chapter 1606,

(5) 10 U.S.C. chapter 107,

(6) The Hostage Relief Act of 1980, (Pub. L. 96–499, 94 Stat. 1967–1974, and 5 U.S.C. 5561 note), and

(7) The Omnibus Diplomatic Security and Antiterrorism Act of 1986 (Pub. L. 99–399, 100 Stat. 887–889 (10 U.S.C. 2181–2185)).

(Authority: 38 U.S.C. 3033, 3681)

(b) *Election of benefits.* The veteran must elect in writing which benefit he or she wishes to receive. The veteran may make a new election at any time, but may not elect more than once in a calendar month.

(Authority: 38 U.S.C. 3033; Pub. L. 98–525)

(c) *Nonduplication—Federal program.* Payment of educational assistance is prohibited to an otherwise eligible veteran or servicemember—

(1) For a unit course or courses which are being paid for entirely or partly by the Armed Forces during any period he or she is on active duty;

(2) For a unit course or courses which are being paid for entirely or partly by the Department of Health and Human Services during any period that he or she is on active duty with the Public Health Service; or

(3) For a unit course or courses which are being paid for entirely or partly by the United States under the Government Employees' Training Act.

(Authority: 38 U.S.C. 3034, 3681)

[53 FR 1757, Jan. 22, 1988, as amended at 55 FR 28389, July 11, 1990; 57 FR 15025, Apr. 24, 1992; 58 FR 46867, Sept. 3, 1993; 61 FR 20729, May 8, 1996. Redesignated at 68 FR 35180.]

### § 21.7144 Overpayments.

(a) *Prevention of overpayments.* In administering benefits payable under 38 U.S.C. chapter 30, VA will apply the provisions of § 21.4008. See § 21.7133.

(Authority: 38 U.S.C. 3034, 3690(b))

(b) *Liability for overpayments.* (1) The amount of the overpayment of educational assistance paid to a veteran or servicemember constitutes a liability of that veteran or servicemember.

(2) The amount of the overpayment of educational assistance paid to a veteran or servicemember constitutes a liability of the educational institution if VA determines that the overpayment was made as the result of willful or negligent:

(i) False certification by the educational institution; or

(ii) Endorsement of a veteran's or servicemember's false certification of his or her actual attendance.

(Authority: 38 U.S.C. 3034, 3685)

(c) *Recovery of overpayments.* In determining whether an overpayment should be recovered from an educational institution, VA will apply the provisions of § 21.4009 (except paragraph (a)(1)) to overpayments of educational assistance under 38 U.S.C. chapter 30.

(Authority: 38 U.S.C. 3034, 3685)

CROSS REFERENCE: Entitlement charges. See § 21.7076(c).

[62 FR 55761, Oct. 28, 1997. Redesignated at 68 FR 35180, June 12, 2003.]

PURSUIT OF COURSES

### §21.7150 Pursuit.

The veteran's or servicemember's educational assistance depends upon his or her pursuit of a program of education. Verification of this pursuit is accomplished by various certifications.

(Authority: 38 U.S.C. 3034(b); Pub. L. 98–525)

### §21.7151 Advance payment and accelerated payment certifications.

All certifications required by this paragraph shall be in a form and shall contain such information as specified by the Secretary.

(a) *Certification needed before an advance payment can be made.* In order for a veteran or service member to receive an advance payment of educational assistance, the application or other document must be signed by the veteran or the enrollment certification must be signed by an authorized official of the educational institution.

(Authority: 38 U.S.C. 3034, 3680(d))

(b) *Advance payments.* All verifications required by this paragraph shall be in a form and shall contain such information as specified by the Secretary.

(1) For each individual receiving an advance payment an educational institution must—

(i) Verify enrollment for the individual; and

(ii) Verify the delivery of the advance payment check to the individual.

(2) Once the educational institution has initially verified the enrollment of the individual, the individual, not the educational institution, must make subsequent verifications in order to release further payment for that enrollment as provided in §21.7154(a) of this part.

(Authority: 38 U.S.C. 3034, 3680(d))

(c) *Accelerated payments.* (1) A veteran or servicemember is eligible for an accelerated payment only if—

(i) The veteran or servicemember submits a signed statement to the school or to VA that states ''I request accelerated payment'';

(ii) The veteran or servicemember is enrolled in a course or program of education or training beginning on or after October 1, 2002;

(iii) The veteran is enrolled in an approved program as defined in §21.4200 (aa);

(iv) The charged tuition and fees for the term, quarter, or semester (or entire program for those programs not offered on a term, quarter or semester basis) divided by the number of months (and fractions thereof) in the enrollment period, exceeds the amount equal to 200 percent of the monthly rate of basic educational assistance allowance otherwise payable under §§21.7136 or 21.7137, as applicable;

(v) The veteran or servicemember requesting the accelerated payment has not received an advance payment under §21.7140(a) for the same enrollment period; and

(vi) The veteran or servicemember has submitted all certifications required under §21.7154(d) for any previous accelerated payment he or she received.

(2) Except as provided in paragraph (c)(5) of this section, VA will make the accelerated payment directly to the educational institution, in the veteran's or servicemember's name, for delivery to the veteran or servicemember if:

(i) The educational institution submits the enrollment certification required under §21.7152 before the actual start of the term, quarter or semester (or the start of the program for a program not offered on a term, quarter or semester basis); and

(ii) The educational institution at which the veteran or servicemember is accepted or enrolled agrees to—

(A) Provide for the safekeeping of the accelerated payment check before delivery to the veteran or servicemember;

(B) Deliver the payment to the veteran or servicemember no earlier than the start of the term, quarter or semester (or the start of the program if the program is not offered on a term, quarter or semester basis);

(C) Certify the enrollment of the veteran or servicemember and the amount of tuition and fees therefor; and

(D) Certify the delivery of the accelerated payment to the veteran or servicemember.

(3) VA will make accelerated payments directly to the veteran or servicemember if the enrollment certification required under § 21.7152 is submitted on or after the first day of the enrollment period. VA will electronically deposit the accelerated payment in the veteran's or servicemember's bank account unless—

(i) The veteran or servicemember does not have a bank account; or

(ii) The veteran or servicemember objects to payment by electronic funds transfer.

(4) VA must make the accelerated payment no later than the last day of the month immediately following the month in which VA receives a certification from the educational institution regarding—

(i) The veteran's or servicemember's enrollment in the program of education; and

(ii) The amount of the charged tuition and fees for the term, quarter or semester (or for a program that is not offered on a term, quarter, or semester basis, the entire program).

(5) The Director of the VA field station of jurisdiction may direct that accelerated payments not be made in advance of the first day of the enrollment period in the case of veterans or servicemembers attending an educational institution that demonstrates its inability to discharge its responsibilities for accelerated payments. In such a case, the accelerated payment will be made directly to the veteran or servicemember as provided in paragraph (a)(3).

(Authority: 38 U.S.C. 3014A)

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0636.)

[55 FR 28390, July 11, 1990, as amended at 68 FR 35180, June 12, 2003]

### § 21.7152 Certification of enrollment.

As stated in § 21.7140 of this part, the educational institution must certify the veteran's or servicemember's enrollment before he or she may receive educational assistance.

(a) *Certification of enrollment is required.* Except as provided in § 21.7151 of this part, the educational institution must certify the veteran's or servicemember's enrollment before he or she may receive educational assistance. This certification shall be in a form and shall contain such information as specified by the Secretary.

(Authority: 38 U.S.C. 3032, 3034, 3482(g), 3680, 3687)

(b) *Length of the enrollment period covered by the enrollment certification.* (1) Educational institutions organized on a term, quarter or semester basis generally shall report enrollment for the term, quarter, semester, ordinary school year or ordinary school year plus summer term. If the certification covers two or more terms, the educational institution will report the dates for the break between terms if a term ends and the following term does not begin in the same or the next calendar month or if the veteran elects not be paid for the intervals between terms. The educational institution must submit a separate enrollment certification for each term, quarter or semester when the certification is for—

(i) A servicemember, or

(ii) A veteran who—

(A) Is training on a less than one-half time basis, or

(B) Is incarcerated in a Federal, State or local prison or jail for conviction of a felony.

(2) Educational institutions organized on a year-round basis will report enrollment for the length of the course. The certification will include a report of the dates during which the educational institution closes for any intervals designated in its approval data as breaks between school years.

(3) When a veteran enrolls in independent study leading to a standard college degree, the educational institution's certification will include—

(i) The enrollment date, and

(ii) The ending date for the period being certified. If the educational institution has no prescribed maximum time for completion, the certification must include an ending date based on

the educational institution's estimate for completion.

(Authority: 38 U.S.C. 3034, 3684; Pub. L. 98–525)

(Approved by the Office of Management and Budget under control number 2900–0073)

[53 FR 1757, Jan. 22, 1988, as amended at 55 FR 28390, July 11, 1990; 61 FR 6790, Feb. 22, 1996]

### §21.7153 Progress and conduct.

(a) *Satisfactory pursuit of program.* In order to receive educational assistance for pursuit of a program of education, an individual must maintain satisfactory progress. VA will discontinue educational assistance if the individual does not maintain satisfactory progress. Progress is unsatisfactory if the individual does not satisfactorily progress according to the regularly prescribed standards of the educational institution he or she is attending.

(Authority: 38 U.S.C. 3034, 3474; Pub. L. 98–525)

(b) *Satisfactory conduct.* In order to receive educational assistance for pursuit of a program of education, an individual must maintain satisfactory conduct according to the regularly prescribed standards and practices of the educational institution in which he or she is enrolled. If the individual will be no longer retained as a student or will not be readmitted as a student by the educational institution in which he or she is enrolled, VA will discontinue educational assistance, unless further development establishes that the educational institution's action is retaliatory.

(Authority: 38 U.S.C. 3034, 3474; Pub. L. 98–525)

(c) *Satisfactory attendance.* In order to receive educational assistance for pursuit of a program of education, an individual must maintain satisfactory attendance. VA will discontinue educational assistance if the individual does not maintain satisfactory attendance. Attendance is unsatisfactory if the individual does not attend according to the regularly prescribed standards of the educational institution in which he or she is enrolled.

(Authority: 38 U.S.C. 3034, 3474)

(d) *Reentrance after discontinuance.* (1) An individual may be reentered following discontinuance because of unsatisfactory attendance, conduct or progress when either of the following sets of conditions exists:

(i) The individual resumes enrollment at the same educational institution in the same program of education and the educational institution has both approved the individual's reenrollment and certified it to VA; or

(ii) VA determines that—

(A) The cause of the unsatisfactory attendance, conduct or progress has been removed, and

(B) The program which the individual now proposes to pursue is suitable to his or her aptitudes, interests and abilities.

(2) Reentrance may be for the same program, for a revised program, or for an entirely different program depending on the cause of the discontinuance and the removal of that cause.

(Authority: 38 U.S.C. 3034, 3474)

[53 FR 1757, Jan. 22, 1988, as amended at 57 FR 15025, Apr. 24, 1992]

### §21.7154 Pursuit and absences.

Except as provided in this section, an individual must submit a verification to VA each month of his or her enrollment during the period for which the individual is to be paid. This verification shall be in a form prescribed by the Secretary.

(a) *Exceptions to the monthly verification requirement.* An individual does not have to submit a monthly verification as described in the introductory text of this section when the individual—

(1) Is enrolled in a correspondence course;

(2) Has received a lump-sum payment for the training completed during a month; or

(3) Has received an advance payment for the training completed during a month.

(Authority: 38 U.S.C. 3014A, 3034, 3684)

(4) Has received an accelerated payment for the enrollment period.

(b) *Items to be reported on all monthly verifications.* (1) The monthly verification for all veterans and servicemembers will include a report on the following items when applicable:

(i) Continued enrollment in and actual pursuit of the course;

(ii) The individual's unsatisfactory conduct, progress, or attendance;

(iii) The date of interruption or termination of training;

(iv) Changes in the number of credit hours or in the number of clock hours of attendance other than those described in § 21.7156(a);

(v) Nonpunitive grades; and

(vi) Any other changes or modifications in the course as certified at enrollment.

(2) The verification of enrollment must—

(i) Contain the information required for release of payment;

(ii) If required or permitted by the Secretary to be submitted on paper, be signed by the veteran or servicemember on or after the final date of the reporting period, or if permitted by the Secretary to be submitted by telephone in a manner designated by the Secretary, be submitted in the form and manner prescribed by the Secretary on or after the final date of the reporting period; and

(iii) If submitted on paper, clearly show the date on which it was signed.

(Authority: 38 U.S.C. 3034, 3684; Pub. L. 98–525, Pub. L. 99–576)

(c) *Additional requirements for apprenticeships and other on-job training programs.*

(1) When a veteran is pursuing an apprenticeship or other on-job training he or she must certify training monthly by reporting the number of hours worked.

(2) The information provided by the veteran must be verified by the training establishment.

(Authority: 38 U.S.C. 3034, 3680(a))

(d) *Additional requirements for individuals receiving an accelerated payment.*

(1) When an individual receives an accelerated payment as provided in § 21.7151(c) and (d), he or she must certify the following information within 60 days of the end of the term, quarter or semester (or entire program when the program is not offered on a term, quarter, or semester basis) for which the accelerated payment was made:

(i) The course or program was successfully completed, or if the course was not completed—

(A) The date the veteran or servicemember last attended; and

(B) An explanation why the course was not completed;

(ii) If the veteran or servicemember increased or decreased his or her training time—

(A) The date the veteran or servicemember increased or decreased training time; and

(B) The number of credit/clock hours pursued before and after each such change in training time; and

(iii) The accelerated payment was received and used.

(2) VA will establish an overpayment equal to the amount of the accelerated payment if the required certifications in paragraph (c)(1) of this section are not timely received.

(3) VA will determine the amount of the overpayment of benefits for courses not completed in the following manner—

(i) For a veteran or servicemember who does not complete the full course, courses, or program for which the accelerated payment was made, and who does not substantiate mitigating circumstances for not completing, VA will establish an overpayment equal to the amount of the accelerated payment.

(ii) For a veteran or servicemember who does not complete the full course, courses, or program for which the accelerated payment was made, but who substantiates mitigating circumstances for not completing, VA will prorate the amount of the accelerated payment to which he or she is entitled based on the number of days from the beginning date of the enrollment period through the date of last attendance. VA will determine the prorated amount by dividing the accelerated payment amount by the number of days in the enrollment period, and multiplying the result by the number

of days from the beginning date of the enrollment period through the date of last attendance. The result of this calculation will equal the amount the individual is due. The difference between the accelerated payment and the amount the individual is due will be established as an overpayment.

(Authority: 38 U.S.C. 3014A(g))

(The Office of Management and Budget has approved the information collection requirements in this section under control numbers 2900–0465 and 2900–0636.)

[55 FR 28390, July 11, 1990, as amended at 57 FR 15026, Apr. 24, 1992; 57 FR 24368, June 9, 1992; 61 FR 26117, May 24, 1996; 63 FR 14038, Mar. 24, 1998; 68 FR 35180, June 12, 2003]

### §21.7156 Other required reports.

(a) *Reports from veterans and servicemembers.* (1) A veteran or servicemember enrolled full time in a program of education for a standard term, quarter, or semester must report without delay to VA:

(i) A change in his or her credit hours or clock hours of attendance if that change would result in less than full-time enrollment;

(ii) Any change in his or her pursuit that would result in less than full-time enrollment; and

(iii) Any interruption or termination of his or her attendance.

(2) A veteran or servicemember not described in paragraph (a)(1) of this section must report without delay to VA:

(i) Any change in his or her credit hours or clock hours of attendance;

(ii) Any change in his or her pursuit; and

(iii) Any interruption or termination of his or her attendance.

(Authority: 38 U.S.C. 3680(g))

(b) *Interruptions, terminations, or changes in hours of credit or attendance.* (1) Except as provided in paragraph (b)(2) of this section, an educational institution must report without delay to VA each time a veteran or servicemember:

(i) Interrupts or terminates his or her training for any reason; or

(ii) Changes his or her credit hours or clock hours of attendance.

(2) An educational institution does not need to report a change in a veteran's or servicemember's hours of credit or attendance when:

(i) The veteran or servicemember is enrolled full time in a program of education for a standard term, quarter, or semester before the change;

(ii) The veteran or servicemember continues to be enrolled full time after the change; and

(iii) The tuition and fees charged to the servicemember have not been adjusted as a result of the change.

(Authority: 38 U.S.C. 3034, 3684)

(3) If the change in status or change in number of credit hours or clock hours of attendance occurs on a day other than one indicated by paragraph (b)(4) or (b)(5) of this section, the educational institution will initiate a report of the change in time for VA to receive it within 30 days of the date on which the change occurs.

(4) If the educational institution has certified the veteran's or servicemember's enrollment for more than one term, quarter or semester and the veteran or servicemember interrupts his or her training at the end of a term, quarter or semester within the certified enrollment period, the educational institution shall report the change in status to VA in time for VA to receive the report within 30 days of the last officially scheduled registration date for the next term, quarter or semester.

(Authority: 38 U.S.C. 3034, 3680(a), 3684)

(5) If the change in status or change in the number of hours of credit or attendance occurs during the 30 days of a drop-add period, the educational institution must report the change in status or change in the number of hours of credit or attendance to VA in time for VA to receive the report within 30 days from the last date of the drop-add period or 60 days from the first day of the enrollment period, whichever occurs first.

(Authority: 38 U.S.C. 3034, 3684)

(c) *Nonpunitive grades.* (1) An educational institution may assign a nonpunitive grade for a course or subject

in which the veteran or servicemember is enrolled even though the veteran or eligible person does not withdraw from the course or subject. When this occurs, the educational institution must report the assignment of the nonpunitive grade in a form prescribed by the Secretary in time for VA to receive it before the earlier of the following dates is reached:

(i) Thirty days from the date on which the educational institution assigns the grade, or

(ii) Sixty days from the last day of the enrollment period for which the nonpunitive grade is assigned.

(2) If the veteran or servicemember is enrolled in a course which does not lead to a standard college degree and for which a monthly certification of attendance is required, the educational institution may use the monthly certification of attendance to report nonpunitive grades provided VA will receive the report within the time period stated in paragraph (c)(1) of this section.

(Authority: 38 U.S.C. 3034, 3684)

(d) *Attendance records.* Nothing in this section or in any section in 38 CFR part 21 shall be construed as requiring any institution of higher learning to maintain daily attendance records for any course leading to a standard college degree.

(Authority: 38 U.S.C. 3034, 3685)

(The information collection requirements in paragraphs (a) and (b) of this section have been approved by the Office of Management and Budget under control numbers 2900–0465 and 2900–0156, respectively.)

[55 FR 28391, July 11, 1990, as amended at 57 FR 15026, Apr. 24, 1992; 63 FR 14038, Mar. 24, 1998]

### § 21.7158 False, late, or missing reports.

(a) *Veteran.* Payments may not be based on false or misleading statements, claims or reports. VA will apply the provisions of §§ 21.4006 and 21.4007 of this part to a veteran or servicemember or any other person who submits false or misleading claims, statements or reports in connection with benefits payable under 38 U.S.C. chapter 30 in the same manner as they are applied to people who make similar false or misleading claims for benefits payable under 38 U.S.C. chapter 34 or 36.

(Authority: 38 U.S.C. 3034, 3680, 3690, 6103; Pub. L. 98–525)

(b) *Educational institution or training establishment.* (1) VA may hold an educational institution or training establishment liable for overpayments which result from the educational institution's or training establishment's willful or negligent failure to report excessive absences from a course or discontinuance or interruption of a course by a veteran or servicemember or from willful or negligent false certification by the educational institution or training establishment. See § 21.7144(b).

(2) If an educational institution or training establishment willfully and knowingly submits a false report or certification, VA may disapprove that institution's or establishment's courses for further enrollments and may discontinue educational assistance to veterans and servicemembers already enrolled. In doing so, VA will apply §§ 21.4210 through 21.4216.

(Authority: 38 U.S.C. 3034, 3690)

[53 FR 1757, Jan. 22, 1988, as amended at 55 FR 28391, July 11, 1990; 61 FR 26117, May 24, 1996; 63 FR 35837, July 1, 1998]

### § 21.7159 Reporting fee.

In determining the amount of the reporting fee payable to educational institutions or joint apprenticeship training committees acting as training establishments for furnishing required reports, VA will apply the provisions of § 21.4206 of this part in the same manner as they are in the administration of 38 U.S.C. chapters 34 and 36.

(Authority: 38 U.S.C. 3034, 3684; Pub. L. 98–525, Pub. L. 99–576)

[55 FR 28391, July 11, 1990]

## COURSE ASSESSMENT

### § 21.7170 Course measurement.

In administering benefits payable under 38 U.S.C. chapter 30, VA will apply the following sections:

(a) §21.4270 (except paragraphs (a)(2) and (a)(3) and those portions of paragraph (c) and footnotes dealing with farm cooperative training)—Measurement of courses;

(b) §21.4272—Collegiate course measurement;

(c) §21.4273—Collegiate graduate;

(d) §21.4274—Law courses; and

(e) §21.4275—Practical training courses; measurement.

(Authority: 38 U.S.C. 3034, 3688)

[62 FR 55761, Oct. 28, 1997]

**§21.7172 Measurement of concurrent enrollments.**

(a) *Conversion of units of measurement required.* Where a veteran enrolls concurrently in courses offered by two schools and the standards for the measurement of the courses pursued concurrently in the two schools are different, VA will measure the veteran's enrollment by converting the units of measurement for courses in the second school to their equivalent in units of measurement required for the courses in the program of education which the veteran is pursuing at the primary institution. This conversion will be accomplished as follows:

(1) If VA measures the courses at the primary institution on a credit-hour basis (including a course which does not lead to a standard college degree, which is being measured on a credit-hour basis), and VA measures the courses at the second school on a clock-hour basis, the clock hours will be converted to credit hours.

(2) If VA measures the courses pursued at the primary institution on a clock-hour basis, and VA measures the courses pursued at the second school on a credit-hour basis, VA will convert the credit hours to clock hours to determine the veteran's training time.

(Authority: 38 U.S.C. 3034, 3688)

(3) If VA measures the courses pursued at the primary institution on a clock-hour basis, and

(i) VA measures the courses pursued at the second school on a mixed basis, the courses pursued at the second school which VA can measure on credit-hour basis for at least one program at the second school will be converted to clock hours and the resulting clock hours added to determine the veteran's training time; or

(ii) VA measures the courses pursued at the second school on a credit-hour basis, VA will convert the credit hours to clock hours to determine the veteran's training time.

(Authority: 38 U.S.C. 3034, 3688)

(b) *Conversion of clock hours to credit hours.* If the provisions of paragraph (a) of this section require VA to convert clock hours to credit hours, it will do so by—

(1) Dividing the number of credit hours which VA considers to be full-time at the educational institution whose courses are measured on a credit-hour basis by the number of clock hours which are full-time at the educational institution whose courses are measured on a clock-hour basis; and

(2) Multiplying each clock hour of attendance by the decimal determined in paragraph (b)(1) of this section. VA will drop all fractional hours.

(Authority: 38 U.S.C. 3034, 3688)

(c) *Conversion of credit hours to clock hours.* If the provisions of paragraph (a) of this section require VA to convert credit hours to clock hours, it will do so by—

(1) Dividing the number of clock hours which VA considers to be full-time at the educational institution whose courses are measured on a clock-hour basis by the number of credit hours which are full-time at the educational institution whose courses are measured on a credit-hour basis; and

(2) Multiplying each credit hour by the number determined in paragraph (c)(1) of this section. VA will drop all fractional hours.

(Authority: 38 U.S.C. 3034, 3688)

(d) *Both courses measured on a credit hour basis or both courses measured on a clock hour basis.* If VA measures the courses pursued at both institutions on a credit hour basis or on a clock hour basis, VA will measure the veteran's enrollment by adding together the units of measurement for the courses at the second school and the units of measurement for the courses at the

primary institution. The standard for full time will be the full-time standard for the courses at the primary institution.

(Authority: 38 U.S.C. 3034, 3688)

[55 FR 28392, July 11, 1990, as amended at 57 FR 15026, Apr. 24, 1992; 61 FR 6790, Feb. 22, 1996; 62 FR 55761, Oct. 28, 1997]

STATE APPROVING AGENCIES

### § 21.7200 State approving agencies.

State approving agencies have the same general responsibilities for approving courses for training under 38 U.S.C. chapter 30 as they do for approving courses for training under 38 U.S.C. chapter 34. Accordingly, in administering 38 U.S.C. chapter 30, VA will apply the provisions of the following sections in the same manner, as they are applied for the administration of 38 U.S.C. chapters 34 and 36.

(a) Section 21.4150 (except paragraph (e))—Designation,

(b) Section 21.4151—Cooperation,

(c) Section 21.4152—Control by agencies of the United States,

(d) Section 21.4153—Reimbursement of expenses;

(e) Section 21.4154—Report of activities; and

(f) Section 21.4155—Evaluation of State approving agency performance.

(Authority: 38 U.S.C. 3034, 3670, 3671, 3672, 3673, 3674, 3674A; Pub. L. 98–525, Pub. L. 100–323)

[53 FR 1757, Jan. 22, 1988, as amended at 54 FR 49760, Dec. 1, 1989]

APPROVAL OF COURSES

### § 21.7220 Course approval.

(a) *Courses must be approved.* (1) A course of education, including the class schedules of a resident course not leading to a standard college degree, offered by an educational institution must be approved by—

(i) The State approving agency for the State in which the educational institution is located, or

(ii) The State approving agency which has appropriate approval authority, or

(iii) VA, where appropriate. In determining when it is appropriate for VA to approve a course, VA will apply the provisions of § 21.4250(b)(3) and (c) of this part.

(2) A course approved under 38 U.S.C. chapter 36 is approved for the purposes of 38 U.S.C. chapter 30 unless it is one of the types of courses listed in § 21.7222 of this part.

(Authority: 38 U.S.C. 3034, 3672; Pub. L. 98–525)

(b) *Course approval criteria.* In administering benefits payable under 38 U.S.C. chapter 30, VA and, where appropriate, the State approving agencies, shall apply the following sections.

(1) Section 21.4250 (except paragraphs (a) and (c)(1))—Approval of courses,

(2) Section 21.4251—Period of operation of course,

(3) Section 21.4253 (except that portion of paragraph (f)(3) which permits approval of a course leading to a high school diploma)—Accredited courses,

(4) Section 21.4254—Nonaccredited courses,

(5) Section 21.4255—Refund policy—nonaccredited courses,

(6) Section 21.4258—Notice of approval,

(7) Section 21.4259—Suspension or disapproval,

(8) Section 21.4260—Courses in foreign countries,

(9) Section 21.4265—Practical training approved as institutional training or on-job training,

(10) Section 21.4266—Courses offered at subsidiary branches or extensions,

(11) Section 21.4267—Approval of independent study.

(Authority: 38 U.S.C. 3034, 3476, 3672, 3675, 3676, 3678, 3679, 3680A, 3689)

(c) *Flight training.* VA and the State approving agencies shall apply the provisions of § 21.4263 when approving flight training under 38 U.S.C. ch. 30.

(Authority: 38 U.S.C. 3034)

[53 FR 1757, Jan. 22, 1988, as amended at 55 FR 28392, July 11, 1990; 56 FR 20136, May 2, 1991; 57 FR 15026, Apr. 24, 1992; 61 FR 6790, Feb. 22, 1996; 63 FR 34131, June 23, 1998]

### § 21.7222 Courses and enrollments which may not be approved.

The Secretary may not approve an enrollment by a veteran or

servicemember in, and a State approving agency may not approve for training under 38 U.S.C. chapter 30—

(a) A bartending or personality development course;

(b) A flight training course unless the course meets the requirements of §21.4263.

(Authority: 38 U.S.C. 3034(d))

(c) A course offered by radio;

(d) A course, or a combination of courses consisting of institutional agricultural courses and concurrent agricultural employment commonly called a farm cooperative course; or

(e) Except as provided in §21.7120(d), an independent study course which—

(1) Does not lead to a standard college degree, or

(2) Is a nonaccredited course.

(Authority: 38 U.S.C. 3676, 3680A)

[53 FR 1757, Jan. 22, 1988, as amended at 55 FR 28392, July 11, 1990; 56 FR 20136, May 2, 1991; 56 FR 26035, June 6, 1991; 57 FR 15026, Apr. 24, 1992; 61 FR 6791, Feb. 22, 1996]

**§21.7280 Death benefit.**

(a) *Overview.* VA will pay a death benefit under 38 U.S.C. ch. 30 when an individual's death meets the criteria of this section; the individual is survived by someone described in this section; and the amount of educational assistance paid or payable to the individual is less than the amount reduced from the individual's basic pay.

(Authority: 38 U.S.C. 3017; Pub. L. 100–689) (July 1, 1985)

(b) *Necessary criteria for death benefit.* VA may pay a death benefit under 38 U.S.C. ch. 30 only if—

(1) The individual either—

(i) Dies while on active duty, or

(ii) Dies after October 28, 1992, and his or her date of death is within one year after the date of his or her last discharge or release from active duty; and

(2) The death of the individual is service connected. In determining if the death is service connected, VA will apply the provisions of §3.312 of this chapter; and

(3) Either—

(i) At the time of the individual's death he or she is entitled to basic educational assistance through having met the eligibility requirements of §21.7042, or

(ii) At the time of the individual's death he or she is on active duty with the Armed Forces and but for the minimum service requirements of §21.7042(a)(2) or §21.7042(b)(3) or (4) or the educational requirements of §21.7042(a)(3) or §21.7042(b)(2) or both would be entitled to basic educational assistance through having met the eligibility requirements of §21.7042.

(Authority: 38 U.S.C. 3017(a))

(c) *Payee.* (1) VA shall pay a death benefit to the living person or persons in the order listed in this paragraph.

(i) The beneficiary or beneficiaries designated by the individual under the individual's Servicemen's Group Life Insurance Policy,

(ii) The surviving spouse of the individual,

(iii) The surviving child or children of the individual, in equal shares,

(iv) The surviving parent or parents of the individual in equal shares.

(2) If none of the persons listed in this paragraph is living, VA shall not pay a death benefit under this section.

(Authority: 38 U.S.C. 3017(a)(2); Pub. L. 100–689) (July 1, 1985)

(d) *Amount of death benefit.* (1) The amount of any payment made under this section shall be equal to—

(i) The amount reduced from the individual's basic pay as provided in §21.7042(f) less—

(ii) The total of—

(A) The amount of educational assistance that has been paid to the individual under 38 U.S.C. ch. 30, and

(B) The amount of accrued benefits paid or payable with respect to the individual.

(2) VA shall pay no death benefit when the amount determined by subparagraph (1) of this paragraph is zero or less than zero.

(Authority: 38 U.S.C. 3017 (b) and (c); Pub. L. 100–689) (July 1, 1985)

[56 FR 20136, May 2, 1991, as amended at 57 FR 15026, Apr. 24, 1992; 61 FR 6791, Feb. 22, 1996]

ADMINISTRATIVE

### § 21.7301 Delegations of authority.

(a) *General delegation of authority.* Except as otherwise provided, authority is delegated to the Under Secretary for Benefits of VA, and to supervisory or adjudication personnel within the jurisdiction of the Education Service of VA designated by him or her, to make findings and decisions under 38 U.S.C. chapter 30 and the applicable regulations, precedents and instructions concerning the program authorized by that chapter.

(Authority: 38 U.S.C. 512(a))

(b) *Other delegations of authority.* In administering benefits payable under 38 U.S.C. chapter 30, VA shall apply § 21.4001(b), (c)(1) and (2) and (f) of this part in the same manner as those paragraphs are applied in the administration of 38 U.S.C. chapter 34.

(Authority: 38 U.S.C. 512(a), 3034, 3696; Pub. L. 98–525)

### § 21.7302 Finality of decisions.

(a) *Agency decisions generally are binding.* The decision of a VA facility of original jurisdiction on which an action is based—

(1) Will be final,

(2) Will be binding upon all field offices of the VA as to conclusions based on evidence on file at that time, and

(3) Will not be subject to revision on the same factual grounds except by duly constituted appellate authorities or except as provided in § 21.7303 of this part. (See §§ 19.192 and 19.193 of this chapter).

(Authority: 38 U.S.C. 511)

(b) *Decisions of an activity within VA.* Current determinations of line of duty and other pertinent elements of eligibility for a program of education made by either an Adjudicative activity or an Insurance activity by application of the same criteria and based on the same facts are binding one upon the other in the absence of clear and unmistakable error.

(Authority: 38 U.S.C. 511)

(c) *Character of discharge determinations.* (1) A determination of the character of a veteran's discharge made by a competent military or naval authority or by the Coast Guard is binding upon VA.

(2) Any determination of the character of a veteran's discharge made by VA in connection with the veteran's eligibility for a benefit other than educational assistance under 38 U.S.C. chapter 30, shall not affect his or her eligibility for educational assistance.

(Authority: 38 U.S.C. 3011(a), 3012(a); Pub. L. 98–525)

### § 21.7303 Revision of decisions.

The revision of a decision on which an action was predicated is subject to the following sections:

(a) Clear and unmistakable error, § 3.105(a) of this chapter; and

(b) Difference of opinion, § 3.105(b) of this chapter.

(Authority: 38 U.S.C. 511; Pub. L. 98–525)

### § 21.7305 Conflicting interests.

In administering benefits payable under 38 U.S.C. chapter 30, VA will apply the provisions of § 21.4005.

(Authority: 38 U.S.C. 3034, 3036)

[62 FR 55761, Oct. 28, 1997]

### § 21.7307 Examination of records.

In administering benefits payable under 38 U.S.C. chapter 30, VA will apply the provisions of § 21.4209.

(Authority: 38 U.S.C. 3034, 3690)

[62 FR 55761, Oct. 28, 1997]

### § 21.7310 Civil rights.

(a) *Delegation of authority concerning Federal equal opportunity laws.* The Under Secretary for Benefits is delegated the responsibility to obtain evidence of voluntary compliance with Federal equal opportunity laws from educational institutions and from recognized national organizations whose representatives are afforded space and office facilities under his or her jurisdiction. See part 18 of this chapter. These equal opportunity laws are:

(1) Title VI, Civil Rights Act of 1964;

(2) Title IX, Education Amendments of 1972, as amended;

(3) Section 504, Rehabilitation Act of 1973; and

(4) The Age Discrimination Act of 1975.

(b) *Role of State approving agencies.* In obtaining evidence from educational institutions of compliance with Federal equal opportunity laws, the Under Secretary for Benefits may use the State approving agencies as provided in § 21.4258(d).

(Authority: 42 U.S.C. 2000)

[62 FR 55761, Oct. 28, 1997]

### § 21.7320 Procedural protection; reduction following loss of dependent.

(a) *Notice of reduction required when a veteran loses entitlement to additional educational assistance for a dependent.* Except as provided in paragraph (b) of this section, VA will not reduce an award of educational assistance following the veteran's loss of a dependent unless:

(1) VA has notified the veteran of the adverse action; and

(2) VA has provided the veteran with a period of 60 days in which to submit evidence for the purpose of showing that the educational assistance should not be reduced.

(b) *No advance notice required in certain situations.* When the reduction is based solely on written, factual, unambiguous information as to dependency or marital status provided by the veteran or his or her fiduciary with knowledge or notice that the information would be used to determine the monthly rate of educational assistance allowance:

(1) VA will not send either an advance or a prereduction notice as stated in paragraph (a) of this section; but

(2) VA will send notice of the adverse action contemporaneous with the reduction in educational assistance.

(Authority: 38 U.S.C. 5112, 5113)

[58 FR 63530, Dec. 2, 1993]

## Subpart L—Educational Assistance for Members of the Selected Reserve

AUTHORITY: 10 U.S.C. ch. 1606; 38 U.S.C. 501(a), 512, ch. 36, unless otherwise noted.

SOURCE: 53 FR 34740, Sept. 8, 1988, unless otherwise noted.

### § 21.7500 Establishment and purpose of educational assistance program.

An educational assistance program for certain members of the Selected Reserve is established to encourage membership in the Selected Reserve of the Ready Reserve.

(Authority: 10 U.S.C. 16131(a); Pub. L. 98–525)

DEFINITIONS

### § 21.7520 Definitions.

For the purposes of regulations from § 21.7500 through § 21.7999, governing the administration and payment of educational assistance under 10 U.S.C. chapter 1606, the Selected Reserve Educational Assistance Program, the following definitions apply. (See also additional definitions in § 21.1029).

(a) *Definitions of participants*—(1) *Reservist.* The term *reservist* means a member of the Selected Reserve who is eligible for educational assistance under 10 U.S.C. chapter 1606.

(2) *Selected Reserve.* The term *Selected Reserve* means the Selected Reserve of the Ready Reserve of any of the reserve components (including the Army National Guard of the United States and the Air National Guard of the United States) of the Armed Forces of the United States, as required to be maintained under section 268(b), 10 U.S.C.

(Authority: 10 U.S.C. 16131; Pub. L. 98–525)

(b) *Other definitions.* (1) *Attendance.* The term *attendance* means the presence of a reservist—

(i) In the class where the approved course in which he or she is enrolled is taught;

(ii) At a training establishment; or

(iii) In any other place of instruction, training, or study designated by the educational institution or training establishment where the reservist is enrolled and is pursuing a program of education.

(Authority: 10 U.S.C. 2131(c)(1), 2136(b); 38 U.S.C. 3474; sec. 705(a)(1), Pub. L. 98–525, 98 Stat. 2565, 2567; sec. 642, Pub. L. 101–189, 103 Stat. 1456–1458)

(2) *Audited course.* The term *audited course* has the same meaning as provided in § 1.4200(i) of this part.

(Authority: 10 U.S.C. 16136(b) 38 U.S.C. 3680(a); Pub. L. 98–525)

(3) *Deficiency course.* The term *deficiency course* means any secondary level course or subject not previously completed satisfactorily which is specifically required for pursuit of a postsecondary program of education.

(Authority: 10 U.S.C. 16136(b); Pub. L. 98–525)

(4) *Divisions of the school year.* The term *divisions of the school year* has the same meaning as provided in § 21.4200(b) of this part.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3680(a); Pub. L. 98–55)

(5) *Drop-add period.* The term *drop-add period* has the same meaning as provided in § 21.4200(l) of this part.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3680(a); Pub. L. 98–525)

(6) *Educational assistance.* The term *educational assistance* means the monthly payment made to members of the Selected Reserve for pursuit of a program of education.

(Authority: 10 U.S.C. 16131(b); Pub. L. 98–525)

(7) *Educational objective.* An approvable educational objective is one that leads to the awarding of an associated degree, a bachelor's degree or the equivalent.

(Authority: 10 U.S.C. 16131(b), 38 U.S.C. 3680(a); Pub. L. 98–525)

(8) *Enrollment.* The term *enrollment* means the state of being on that roll or file of an educational institution which contains the names of active students.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3680(g); Pub. L. 98–525)

(9) *Enrollment period.* The term *enrollment period* has the same meaning as provided in § 21.4200(p) of this part.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3680(g); Pub. L. 98–525)

(10) *In residence on a standard quarter- or semester-hour basis.* The term *in residence on a standard quarter- or semester-hour basis* has the same meaning as provided in § 21.4200(r) of this part.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3688(c); Pub. L. 98–525)

(11) *Independent study.* The term *independent study* has the same meaning as provided in § 21.4267(b) of this part.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3688(c); Pub. L. 98–525)

(12) *Independent study-resident training.* The term *independent study-resident training* means:

(i) The state of being enrolled concurrently in one or more undergraduate courses or subjects offered by independent study as defined in paragraph (b)(11) of this section and one or more courses or subjects offered by resident training as defined by paragraph (b)(22) of this section, or

(ii) The state of being enrolled in one or more undergraduate level subjects which

(A) Do not meet the requirements of either paragraphs (b)(22)(i), (b)(22)(ii) or (b)(22)(iii) of this section,

(B) Have some weeks when standard class sessions are scheduled, and

(C) Consist of independent study as defined in paragraph (b)(11) of this section during those weeks when there are no regularly scheduled standard class sessions.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3688(c); Pub. L. 98–525)

(13) *Institution of higher learning.* The term *institution of higher learning* means

(i) A college, university or similar institution, including a technical or business school, offering postsecondary level academic instruction that leads to an associate or higher degree, if the educational institution is empowered by the appropriate State education authority under State law to grant an associate or higher degree.

(ii) When there is no state law to authorize the granting of a degree, an educational institution which

(A) Is accredited for degree programs by a recognized accrediting agency, or

(B) Is a recognized candidate for accreditation as a degree-granting school

by one of the national or regional accrediting associations and has been licensed or chartered by the appropriate State authority as a degree-granting institution.

(iii) A hospital offering educational programs at the postsecondary level without regard to whether the hospital grants a postsecondary degree.

(iv) An educational institution which

(A) Is not located in a State,

(B) Offers a course leading to a standard college degree or the equivalent, and

(C) Is recognized as an institution of higher learning by the secretary of education (or comparable official) of the country in which the educational institution is located.

(Authority: 10 U.S.C. 16131; Pub. L. 98–525)

(14) *Mitigating circumstances.*

(i) Mitigating circumstances are circumstances beyond the reservist's control which prevent him or her from continuously pursuing a program of education. The following circumstances are representative of those which VA considers to be mitigating. This list is not all-inclusive.

(A) An illness of the reservist;

(B) An illness or death in the reservist's family;

(C) An unavoidable change in the reservist's conditions of employment;

(D) An unavoidable geographical transfer resulting from the reservist's employment;

(E) Immediate family or financial obligations beyond the control of the reservist which require him or her to suspend pursuit of the program of education to obtain employment;

(F) Discontinuance of the course by the educational institution;

(G) Unanticipated active duty for training; and

(H) Unanticipated difficulties in providing for child care for the reservist's child or children.

(ii) If a reservist withdraws from a course during a drop-add period, VA will consider the circumstances which caused the withdrawal to be mitigating.

(iii) In the first instance of a withdrawal after May 31, 1989, from a course or course for which the reservist received educational assistance under chapter 1606, title 10, U.S. Code, VA will consider that mitigating circumstances exist with respect to courses totaling not more than six semester hours or the equivalent. In determining whether a withdrawal is the first instance of withdrawal, VA will not consider courses dropped during an educational institution's drop-add period as provided in paragraph (b)(14)(ii) of this section.

(Authority: 38 U.S.C. 3034, 3680(a)(1); Pub. L. 100–689)(June 1, 1989)

(15) *Nonpunitive grade.* The term *nonpunitive grade* has the same meaning as provided in §21.4200(j) of this part.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3680(a); Pub. L. 98–525)

(16) *Normal commuting distance.* The term *normal commuting distance* has the same meaning as provided in §21.4200(m) of this part.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3680; Pub. L. 98–525)

(17) *Program of education.* A program of education—

(i) Is any unit course or subject or combination of unit courses or subjects pursued by a reservist at an educational institution, required by the Administrator of the Small Business Administration as a condition to obtaining financial assistance under the provisions of 15 U.S.C. 636; or

(ii) Is a combination of subjects or unit courses pursued at an educational institution, which combination is generally accepted as necessary to meet requirements for a predetermined educational, professional, or vocational objective. It may consist of subjects or courses which fulfill requirements for more than one objective if all objectives pursued are generally recognized as being related to a single career field; and

(iii) Includes an approved full-time program of apprenticeship or of other on-job training.

(Authority: 10 U.S.C. 2131; 38 U.S.C. 3452(b); sec. 705(a)(1), Pub. L. 98–525, 98 Stat. 2565, 2567; secs. 642(a), (b), (d), 645, Pub. L. 101–189, 103 Stat. 1456–1458)

(18) *Punitive grade.* The term *punitive grade* has the same meaning provided in § 21.4200(k) of this part.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3680(a); Pub. L. 98–525)

(19) *Pursuit.*

(i) The term *pursuit* means work, while enrolled, toward the objective of a program of education. This work must be in accordance with approved institutional policy and regulations, and with applicable criteria of 10 U.S.C. and 38 U.S.C.; must be necessary to reach the program's objective; and must be accomplished through—

(A) Resident courses;

(B) Independent study;

(C) Correspondence courses;

(D) An apprenticeship or other on-job training program; or

(E) Flight courses.

(Authority: 10 U.S.C 2131, 2136; 38 U.S.C. 3680(g); sec. 705(a)(1), Pub. L. 98–525, 98 Stat. 2565, 2567; secs. 642, 645, Pub. L. 101–189, 103 Stat. 1456–1458)

(ii) VA will consider a reservist who qualifies for payment during an interval, school closing, or holiday vacation to be in pursuit of a program of education during the interval, school closing, or holiday vacation.

(Authority: 10 U.S.C. 2136(b); 38 U.S.C. 3680(g); sec. 705(a)(1), Pub. L. 98–525, 98 Stat. 2565, 2567; sec. 642(c), (d), Pub. L. 101–189, 103 Stat. 1457–1458)

(20) *Refresher course.* The term *refresher course* means either:

(i) A course at the elementary or secondary level to review or update material previously covered in a course that has been satisfactorily completed; or

(ii) A course which permits an individual to update knowledge and skills or be instructed in the technological advances which have occurred in the reservist's field of employment since his or her entry on active duty and which is necessary to enable the individual to pursue an approved program of education.

(Authority: 10 U.S.C. 2131(b), (c); sec. 705(a)(1), Pub. L. 98–525, 98 Stat. 2565; secs. 642(a), (b), (d), 645(a), (b), Pub. L. 101–189, 103 Stat. 1456–1458))

(21) *Remedial course.* The term *remedial course* means a course designed to overcome a deficiency at the elementary or secondary level in a particular area of study, or a handicap, such as in speech.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3491(a)(2); Pub. L. 98–525)

(22) *Resident training.* The term *resident training* means—

(i) A course or subject, leading to a standard college degree, offered in residence on a standard quarter- or semester-hour basis;

(ii) A course of subject leading to a standard college degree at the undergraduate level which requires regularly scheduled, weekly classroom or laboratory sessions but does not require them in sufficient number to meet the provision of paragraph (23)(i) of this section,

(iii) A course or subject leading to standard college degree at the undergraduate level which

(A) Would qualify as a course under paragraph (b)(22)(i) of this section except that it does not have weekly class instruction,

(B) Requires pursuit of standard class sessions for each credit at a rate not less frequent than every 2 weeks,

(C) Requires monthly pursuit of a total number of standard class sessions which, during the month, is required by a course meeting the provisions of paragraph (b)(22)(i) of this section,

(D) Is considered by the institution offering it as fully equivalent to a course described in paragraph (b)(22)(i) of this section including payment of tuition and fees; the awarding of academic credit for the purpose of meeting graduation requirements; and the transfer of credits to a course meeting the provision of paragraph (b)(22)(i) of this section, and

(E) Together with all other similar courses offered by the institution of higher learning, has an enrollment representing less than 50 percent of persons at that institution receiving educational assistance under either chapter 31, 32, 34, 35 or 36 of title 38 U.S.C.,

(iv) The hospital or fieldwork phase of a course with the objective of registered professional nurse or registered nurses, including a course leading to a degree in nursing when—

(A) The hospital or fieldwork phase of the course is an integral part of the course,

(B) The completion of the hospital or fieldwork course is a prerequisite to the successful completion of the course,

(C) The student remains enrolled in the institution of higher learning during the hospital or fieldwork phase, and

(D) The training is under the direct supervision of the institution of higher learning.

(v) The clinical training portion of a course leading to the objective of practical nurse, practical trained nurse, or licensed practical nurse when—

(A) The clinical training is offered by an affiliated or cooperating hospital,

(B) The student is enrolled in and supervised by the institution of higher learning during the clinical training, and

(C) The course is accredited by a nationally recognized accrediting agency or meets the requirements of the licensing body of the State in which the institution of higher learning is located.

(vi) An off-campus job experience included in a course offered by an institution of higher learning is resident training only if the course is—

(A) Accredited by a nationally recognized accrediting agency or is offered by a school that is accredited by one of the regional accrediting agencies;

(B) A part of the approved curriculum of the institution of higher learning;

(C) Directly supervised by the institution of higher learning;

(D) Measured in the same unit as other courses;

(E) Required for graduation; and

(F) Has a planned program of activities described in the institution of higher learning's official publication which is approved by the State approving agency and which is institutional in nature as distinguished from training on-the-job. The description shall include at least a unit subject description; a provision for an assigned instructor; a statement that the planned program of activities is controlled by the institution of higher learning, not by the officials of the job establishment; a requirement that class attendance on at least a weekly basis be regularly scheduled to provide for interaction between instructor and student; a statement that appropriate assignments are required for completion of the course; a grading system similar to the system used for other resident subjects offered by the institution of higher learning; and a schedule of time required for the training which demonstrates that the student shall spend at least as much time in preparation and training as is normally required by the institution of higher learning for its other resident courses.

(vii) A course including student teaching, or

(viii) A flight training course when included as a creditable part of an undergraduate course leading to a standard college degree.

(Authority: 10 U.S.C. 16131(b); Pub. L. 98–525)

(23) *School, educational institution, institution.* The terms *school, educational institution,* and *institution* mean:

(i) A vocational school or business school;

(ii) A junior college, teachers' college, college, normal school, professional school, university, or scientific or technical institution;

(iii) A public or private elementary school or secondary school which offers courses for adults, provided that the courses lead to an objective other than an elementary school diploma, a high school diploma, or their equivalents; or

(iv) Any entity, other than an institution of higher learning, that provides training required for completion of a State-approved alternative teacher certification program.

(Authority: 10 U.S.C. 16131(a), (c); 38 U.S.C. 3002, 3452)

(24) *School year.* The term *school year* means generally a period of 2 semesters or 3 quarters which is not less than 30 nor more than 39 weeks in total length.

(Authority: 10 U.S.C. 16136(b); Pub. L. 98–525)

(25) *Standard class session.* The term *standard class session* has the same

meaning as provided in § 21.4200(g) of this part.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3688(c); Pub. L. 98–525)

(26) *Standard college degree.* The term *standard college degree* has the same meaning as provided in § 21.4200(e) of this part.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3688; Pub. L. 98–525)

(27) *State.* The term *State* has the same meaning as provided in § 21.1021(c) of this part.

(Authority: 38 U.S.C. 101(20); Pub. L. 98–525)

(28) *Vocational or professional objective.* A vocational or professional objective is one that leads to an occupation. It may include educational objectives essential to prepare for the chosen occupation, but not include any educational objectives beyond the bachelor's degree. When a program of education consists of series of courses not leading to an educational objective, these courses must be pursued at an institution of higher learning and must be required for attainment of a designated vocational or professional objective.

(Authority: 10 U.S.C. 16131(b); Pub. L. 98–525)

(29) *Disabling effects of chronic alcoholism.*

(i) The term *disabling effects of chronic alcoholism* means alcohol-induced physical or mental disorders or both, such as habitual intoxication, withdrawal, delirium, amnesia, dementia, and other like manifestations of chronic alcoholism which, in the particular case,—

(A) Have been medically diagnosed as manifestations of alcohol dependency or chronic alcohol abuse; and

(B) Are determined to have prevented commencement or completion of the affected individual's chosen program of education.

(ii) A diagnosis of alcoholism, chronic alcoholism, alcohol-dependency, chronic alcohol abuse, etc., in and of itself, does not satisfy the definition of this term.

(iii) Injury sustained by a reservist as a proximate and immediate result of activity undertaken by the reservist while physically or mentally unqualified to do so due to alcoholic intoxication is not considered a disabling effect of chronic alcoholism.

(Authority: 38 U.S.C. 105, 3031(d); Pub. L. 100–689)(Nov. 18, 1988)

(30) *Cooperative course.* The term *cooperative course* means a full-time program of education which consists of institutional courses and alternate phases of training in a business or industrial establishment with the training in the business or industrial establishment being strictly supplemental to the institutional portion.

(Authority: 10 U.S.C. 2131(e); 38 U.S.C. 3686; sec. 642(b), (d), Pub. L. 101–189, 103 Stat. 1456–1458)

(31) *Established charge.* The term *established charge* means the lesser of—

(i) The charge for the correspondence course or courses determined on the basis of the lowest extended time payment plan offered by the educational institution and approved by the appropriate State approving agency; or

(ii) The actual charge to the reservist.

(Authority: 10 U.S.C. 2131(f); sec. 642(b), (d), Pub. L. 101–189, 103 Stat. 1456–1458)

(32) *Training establishment.* The term *training establishment* means any establishment providing apprentice or other on-job training, including those under the supervision of a college, university, any State department of education, any State apprenticeship agency, any State board of vocational education, any joint apprenticeship committee, the Bureau of Apprenticeship and Training established in accordance with 29 U.S.C. chapter 4C, or any agency of the Federal government authorized to supervise such training.

(Authority: 10 U.S.C. 2131(d), 16136(b); 38 U.S.C. 3452(e); sec. 642(b), (d), Pub. L. 101–189, 103 Stat. 1456–1458)

(33) *Continuously enrolled.* The term *continuously enrolled* means being in an enrolled status at an educational institution for each day during the ordinary school year, and for consecutive school years. Consequently, continuity of enrollment is not broken by holiday vacations, vacation periods, periods during the school year between terms,

quarters, or semesters, or by nonenrollment during periods of enrollment outside the ordinary school year (e.g., summer sessions).

(Authority: 10 U.S.C. 16136(b))

(34) *Persian Gulf War.* The term ''Persian Gulf War'' means the period beginning on August 2, 1990, and ending on the date thereafter prescribed by Presidential proclamation or by law.

(Authority: 38 U.S.C. 101(33))

(35) *Alternative teacher certification program.* The term *alternative teacher certification program,* for the purposes of determining whether an entity offering such a program is a school, educational institution, or institution as defined in paragraph (b)(23)(iv) of this section, means a program leading to a teacher's certificate that allows individuals with a bachelor's degree or graduate degree to obtain teacher certification without enrolling in an institution of higher learning.

(Authority: 10 U.S.C. 16136; 38 U.S.C. 3452(c))

[53 FR 34740, Sept. 8, 1988, as amended at 57 FR 57105, Dec. 3, 1992; 58 FR 51782, Oct. 5, 1993; 61 FR 20729, May 8, 1996; 61 FR 29300, June 10, 1996; 64 FR 23773, May 4, 1999; 65 FR 5788, Feb. 7, 2000]

CLAIMS AND APPLICATIONS

### § 21.7530 Applications, claims, and time limits.

The provisions of subpart B of this part apply with respect to claims for educational assistance under 10 U.S.C. chapter 1606, VA actions upon receiving a claim, and time limits connected with claims.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3472)

[64 FR 23773, May 4, 1999]

ELIGIBILITY

### § 21.7540 Eligibility for educational assistance.

(a) *Basic eligibility requirements.* The Armed Forces will determine whether a reservist is eligible to receive benefits pursuant to 10 U.S.C. chapter 1606 (or 10 U.S.C. chapter 106 as in effect before December 1, 1994). To be eligible a reservist—

(1) Shall:

(i) Enlist, reenlist, or extend an enlistment as a Reserve for service in the Selected Reserve so that the total period of obligated service is at least six years from the date of such enlistment, reenlistment, or extension; or

(ii) Be appointed as, or be serving as, a reserve officer and agree to serve in the Selected Reserve for a period of not less than six years in addition to any other period of obligated service in the Selected Reserve to which the person may be subject;

(2) Must complete his or her initial period of active duty for training;

(3) Must be participating satisfactorily in the Selected Reserve; and

(4) Must not have elected to have his or her service in the Selected Reserve credited toward establishing eligibility to benefits provided under 38 U.S.C. chapter 30.

(Authority: 10 U.S.C. 2132; 38 U.S.C. 3033(c); sec. 705(a)(1), Pub. L. 98–525, 98 Stat. 2565; sec. 4, Pub. L. 100–48, 101 Stat. 331; secs. 643, 645, Pub. L. 101–189, 103 Stat. 1458)

(b) *Eligibility requirements for expanded benefits.* (1) A reservist shall be eligible to pursue all types of training described in subpart L of this part regardless of whether he or she has received a baccalaureate degree or equivalent evidence of completion of study if—

(i) After September 30, 1990, he or she takes one of the actions described in paragraph (a)(1)(i) or (a)(1)(ii) of this section;

(ii) The reservist meets the criteria of paragraphs (a)(2) through (a)(4) of this section; and

(iii) The reservist does not have his or her eligibility limited as described in paragraph (c) of this section.

(2) A reservist shall be eligible to pursue all types of training described in subpart L of this part except the training described in paragraph (b)(3) of this section if—

(i) After June 30, 1985, but not after September 30, 1990, he or she takes one of the actions described in paragraph (a)(1) or (a)(2) of this section;

(ii) The reservist has not received a baccalaureate degree or the equivalent evidence of completion of study;

(iii) The reservist meets all the other eligibility criteria of paragraph (a) of this section; and

(iv) The reservist does not have his or her eligibility limited by paragraph (c) of this section.

(3) The types of training which a reservist described in paragraph (b)(1) of this section may pursue, but which may not be pursued by a reservist described in paragraph (b)(2), are:

(i) A course which is offered by an educational institution which is not an institution of higher learning (to determine if a nursing course is offered by an institution of higher learning, see § 21.7622(f));

(ii) A correspondence course;

(iii) An accredited independent study course leading to a standard college degree. (See § 21.7622(f) concerning enrollment in a nonaccredited independent study course after October 28, 1992);

(iv) An accredited independent study course leading to a certificate that reflects educational attainment from an institution of higher learning. This provision applies to enrollment in an independent study course that begins on or after December 27, 2001. (See § 21.7622(f) concerning enrollment in a nonaccredited independent study course after October 28, 1992);

(v) A refresher, remedial or deficiency course;

(vi) A cooperative course;

(vii) An apprenticeship or other on-job training; and

(viii) A flight course.

(Authority: 10 U.S.C. 16131, 16132, 16136; sec. 705(a)(1), Pub. L. 98–525, 98 Stat. 2565, 2567; 38 U.S.C. 3680A)

(c) *Limitations on establishing eligibility*. (1) An individual must elect in writing whether he or she wishes service in the Selected Reserve to be credited towards establishing eligibility under 38 U.S.C. chapter 30 or under 10 U.S.C. chapter 1606 when:

(i) The individual is a reservist who is eligible for basic educational assistance provided under 38 U.S.C. 3012, and has established eligibility to that assistance partially through service in the Selected Reserve; or

(ii) The individual is a member of the National Guard or Air National Guard who has established eligibility for basic educational assistance provided under 38 U.S.C. 3012 through activation under a provision of law other than 32 U.S.C. 316, 502, 503, 504, or 505 followed by service in the Selected Reserve.

(2) An election under this paragraph (c) to have Selected Reserve service credited towards eligibility for payment of educational assistance under 38 U.S.C. chapter 30 or under 10 U.S.C. chapter 1606 is irrevocable when the reservist either negotiates the first check or receives the first payment by electronic funds transfer of the educational assistance elected.

(3) If a reservist is eligible to receive educational assistance under both 38 U.S.C. chapter 30 and 10 U.S.C. chapter 1606, he or she may receive educational assistance alternately or consecutively under each of these chapters to the extent that the educational assistance is based on service not irrevocably credited to one or the other chapter as provided in paragraphs (c)(1) and (c)(2) of this section.

(Authority: 10 U.S.C. 16132; 38 U.S.C. 3033(c))

(d) *Dual eligibility*. An individual who has established eligibility for basic educational assistance under 38 U.S.C. chapter 30 solely through service on active duty may establish eligibility for educational assistance under 10 U.S.C. chapter 1606 by meeting the requirements of paragraph (a) of this section.

(Authority: 10 U.S.C. 16132(d), 16134)

(The information collection requirements in this section have been approved by the Office of Management and Budget under control number 2900–0594)

[53 FR 34740, Sept. 8, 1988, as amended at 56 FR 9628, Mar. 7, 1991; 57 FR 57106, Dec. 3, 1992; 61 FR 20729, May 8, 1996; 61 FR 29301, June 10, 1996; 63 FR 45718, Aug. 27, 1998; 68 FR 59731, Oct. 17, 2003]

## § 21.7550 Ending dates of eligibility.

(a) *Time limit on eligibility*. Except as provided in § 21.7551 and paragraphs (a)(3), (b), (c), and (d) of this section, a reservist's period of eligibility expires effective the earlier of the following dates:

(1) The last day of the 10-year period beginning on the date the reservist becomes eligible for educational assistance; or

(2) The date the reservist is separated from the Selected Reserve.

(Authority: 10 U.S.C. 16133; Pub. L. 100–689)

(3) If the reservist serves on active duty pursuant to an order to active duty issued under sections 12301(a),(d),(g), 12302, or 12304 of title 10, U.S. Code, the period of this active duty plus 4 months shall not be considered in determining the time limit on eligibility found in paragraphs (a)(1) and (a)(2) of this section.

(Authority: 10 U.S.C. 16133)

(b) *Completion of term of program.* (1) If a reservist is enrolled in an educational institution regularly operated on the quarter or semester system, and the reservist's period of eligibility as defined in paragraph (a) of this section would expire during a quarter or semester, the period of eligibility shall be extended to the end of the quarter or semester.

(2) If a reservist is enrolled in an educational institution not regularly operated on the quarter or semester system, and the reservist's period of eligibility as defined in paragraph (a) of this section would expire after a major portion of the course is completed, the period of eligibility shall be extended until the earlier of the following occurs:

(i) The end of the course, or

(ii) 12 weeks from the date on which the reservist's eligibility otherwise would have expired.

(Authority: 10 U.S.C. 16133(b)(1); Pub. L. 98–525)

(c) *Discharge for disability*. In the case of a reservist separated from the Selected Reserve because of a disability which was not the result of the individual's own willful misconduct and which was incurred on or after the date on which the reservist became entitled to educational assistance, the reservist's period of eligibility expires effective the last day of the 10-year period beginning on the date the reservist becomes eligible for educational assistance.

(Authority: 10 U.S.C. 16133(b); Pub. L. 100–689)(Nov. 18, 1988)

(d) *Unit deactivated.* (1) Except as provided in paragraph (d)(3) or (d)(4) of this section, the period of eligibility of a reservist, eligible for educational assistance under this subpart, who ceases to be a member of the Selected Reserve during the period beginning October 1, 1991, and ending December 31, 2001, under either of the conditions described in paragraph (d)(2) of this section, will expire on the date 10 years after the date the reservist becomes eligible for educational assistance.

(2) The conditions referred to in paragraph (d)(1) of this section for ceasing to be a member of the Selected Reserve are:

(i) The deactivation of the reservist's unit of assignment; and

(ii) The reservist's involuntarily ceasing to be designated as a member of the Selected Reserve pursuant to 10 U.S.C. 10143(a).

(3) The provisions of paragraphs (d)(1) and (d)(2) of this section do not apply if the reservist ceases to be a member of the Selected Reserve under adverse conditions, as characterized by the Secretary of the military department concerned. The expiration of such a reservist's period of eligibility will be on the date the reservist ceases, under adverse conditions, to be a member of the Selected Reserve.

(4) A reservist's period of eligibility will expire if he or she is a member of a reserve component of the Armed Forces and (after having involuntarily ceased to be a member of the Selected Reserve) is involuntarily separated from the Armed Forces under adverse conditions, as characterized by the Secretary of the military department concerned. The expiration of such a reservist's period of eligibility will be on the date the reservist is involuntarily separated under adverse conditions from the Armed Forces.

(Authority: 10 U.S.C. 16133)

[53 FR 34740, Sept. 8, 1988, as amended at 57 FR 57106, Dec. 3, 1992; 58 FR 51783, Oct. 5, 1993; 61 FR 29302, June 10, 1996; 68 FR 59731, Oct. 17, 2003]

**§ 21.7551 Extended period of eligibility.**

(a) *Period of eligibility may be extended.* VA shall grant an extension of a delimiting period determined by § 21.7550(a)(1) of this part provided:

(1) The individual applies for an extension within the time period specified in § 21.7532(e) of this part.

(2) The individual was prevented from initiating or completing the chosen program of education within the otherwise applicable eligibility period, because of a physical or mental disability, which is not the result of the reservist's own willful misconduct, and which was incurred in or aggravated by service in the Selected Reserve. VA will not consider the disabling effects of chronic alcoholism to be the result of willful misconduct. (See § 21.7520(b)(29)). Evidence must establish that such a program of education was medically infeasible. VA will not grant a reservist an extension for a period of disability which was 30 days or less unless the evidence establishes that the reservist was prevented from enrolling or reenrolling in the chosen program, or was forced to discontinue attendance, because of the short disability.

(Authority: 10 U.S.C. 16133(b)(2), 38 U.S.C. 105, 3031(d); Pub. L. 98–525, Pub. L. 100–689)(Nov. 18, 1988)

(b) *Commencing date.* The reservist shall elect the commencing date of an extended period of eligibility. The date chosen—

(1) Must be on or after the original date of expiration of eligibility as determined by § 21.7550(a)(1) of this part, and

(2) Must either be—

(i) On or before the 90th day following the date on which the reservist's application for an extension was approved by VA if the reservist is training during the extended period of eligibility in a course not organized on a term, quarter or semester basis, or

(ii) On or before the first day of a term, quarter or semester within an ordinary school year following the 90th day after the reservist's application for an extension was approved in VA, if the reservist is training during the extended period of eligibility in a course organized on a term, quarter or semester basis.

(Authority: 10 U.S.C. 16133(b)(2), 38 U.S.C. 3031(d); Pub. L. 98–525)

(c) *Length of extended period of eligibility.* A reservist's extended period of eligibility shall be for the length of time that the reservist was prevented from initiating or completing his or her chosen program of education, except that it must end when the reservist is separated from the Selected Reserve. VA shall determine the length of time the reservist was prevented from initiating or completing his or her chosen program of education as follows:

(1) If the reservist is in training in a course organized on a term, quarter or semester basis, his or her extended period of eligibility shall contain the same number of days as the number of days from the date during the reservist's original eligibility period that his or her training became medically infeasible to the earliest of the following dates:

(i) The commencing date of the ordinary term, quarter or semester following the day the reservist's training became medically infeasible,

(ii) The last date of the reservist's delimiting date as determined by § 21.7550(a)(1) of this part, or

(iii) The date the reservist resumed training.

(2) If the reservist is training in a course not organized on a term, quarter or semester basis, his or her extended period of eligibility shall contain the same number of days as the number of days from the date during the reservist's original delimiting period that his or her training became medically infeasible to the earlier of the following dates:

(i) The date the reservist's training became medically feasible, or

(ii) The reservist's delimiting date as determined by § 21.7550(a)(1) of this part.

(Authority: 10 U.S.C. 16133(b)(2), 38 U.S.C. 3031(d); Pub. L. 98–525)

[53 FR 34740, Sept. 8, 1988, as amended at 57 FR 57106, Dec. 3, 1992]

ENTITLEMENT

### §21.7570 Entitlement.

Except as provided in §21.7576(e) each reservist is entitled to a maximum of 36 months of educational assistance (or its equivalent in part-time educational assistance) under this program, but is also subject to the provisions of §21.4020 (a) and (b).

(Authority: 10 U.S.C. 16131(c); Pub. L. 98–525, Pub. L. 102–127) (Oct. 10, 1991)

[58 FR 51783, Oct. 5, 1993]

### §21.7576 Entitlement charges.

(a) *Overview*. VA will make charges against entitlement as stated in this section. Charges are based upon the principle that a reservist who trains full time for one day should be charged one day of entitlement, except for those pursuing:

(1) Flight training;

(2) Correspondence training;

(3) Cooperative training; or

(4) Apprenticeship or other on-job training.

(Authority: 10 U.S.C. 2131(c); sec. 705(a)(1), Pub. L. 98–525, 98 Stat. 2565; sec. 642(a), (b), (d), Pub. L. 101–189, 103 Stat. 1456–1458)

(b) *Determining entitlement charge*. This paragraph states how VA will generally determine the charge against the entitlement of a reservist who is receiving educational assistance. However, when the circumstances described in paragraph (e) of this section apply to a reservist, VA will use that paragraph to determine an entitlement charge instead of this paragraph.

(1) Except for those pursuing flight training, correspondence training, cooperative training, apprenticeship or other on-job training, VA will make a charge against entitlement—

(i) On the basis of total elapsed time (one day for each day of pursuit for which the reservist is paid educational assistance) if the reservist is pursuing the program of education on a full-time basis; or

(ii) On the basis of a proportionate rate of elapsed time, if the reservist is pursuing the program of education on a three-quarter, one-half, or one-quarter-time basis.

(2) VA will compute elapsed time from the commencing date of the award of educational assistance to the date of discontinuance. If the reservist changes his or her training time after the commencing date of the award, VA will—

(i) Divide the enrollment period into separate periods of time during which the reservist's training time remains constant; and

(ii) Compute the elapsed time separately for each time period.

(3) For each month that a reservist is paid a monthly educational assistance allowance while undergoing apprenticeship or other on-job training, VA will make a charge against entitlement of—

(i) .75 of a month in the case of payments made during the first six months of the reservist's pursuit of the program of apprenticeship or other on-job training;

(ii) .55 of a month in the case of payments made during the second six months of the reservist's pursuit of the program of apprenticeship or other on-job training; and

(iii) .35 of a month in the case of payments made following the first twelve months of the reservist's pursuit of the program of apprenticeship or other on-job training.

(4) When a reservist is pursuing a program of education by correspondence, VA will make a charge against entitlement for each payment made to him or her. The charge will be made in months and decimal fractions of a month, as determined by dividing the amount of the payment by an amount equal to the rate stated in §21.7636(a)(1) as the rate otherwise applicable to the reservist for full-time training.

(5) When a reservist is pursuing a program of education partly in residence and partly by correspondence, VA will make a charge against entitlement—

(i) For the residence portion of the program as provided in paragraphs (b)(1) and (b)(2) of this section; and

(ii) For the correspondence portion of the program as provided in paragraph (b)(4) of this section.

(6) When a reservist is pursuing a program of education through cooperative training, VA will make a charge

against entitlement of .8 of a month for each month in which the reservist is receiving payment at the rate for cooperative training. If the reservist is pursuing cooperative training for a portion of a month, VA will make a charge against entitlement on the basis of total elapsed time (.8 of a day for each day of pursuit).

(Authority: 10 U.S.C. 2131(c), (d); sec. 705(a)(1), Pub. L. 98–525, 98 Stat. 2565; sec. 642(b), (d), Pub. L. 101–189, 103 Stat. 1456–1458)

(7) When a reservist is pursuing a program of education through flight training, VA will make a charge against entitlement at the rate of one month for each amount equal to the monthly rate stated in § 21.7636(a)(1) as applicable for the month in which the training occurred.

(Authority: 10 U.S.C. 16136(c))

(c) *Overpayment cases.* VA will make a charge against entitlement for an overpayment only if the overpayment is discharged in bankruptcy; is waived and is not recovered; or is compromised.

(1) If the overpayment is discharged in bankruptcy or is waived and is not recovered, the charge against entitlement will be at the appropriate rate for the elapsed period covered by the overpayment (exclusive of interest, administrative costs of collection, court costs and marshal fees).

(2) If the overpayment is compromised and the compromise offer is less than the amount of interest, administrative costs of collection, court costs and marshal fees, the charge against entitlement will be at the appropriate rate for the elapsed period covered by the overpayment (exclusive of interest, administrative costs of collection, court costs and marshal fees).

(3) If the overpayment is compromised and the compromise offer is equal to or greater than the amount of interest administrative costs of collection, court costs and marshal fees, the charge against entitlement will be determined by—

(i) Subtracting from the sum paid in the compromise offer the amount attributable to interest, administrative costs of collection, court costs and marshal fees,

(ii) Subtracting the remaining amount of the overpayment balance determined in paragraph (c)(3)(i) of this section from the amount of the original overpayment (exclusive of interest, administrative costs of collection, court costs and marshal fees),

(iii) Dividing the result obtained in paragraph (c)(3)(i) of this section by the amount of the original overpayment (exclusive of interest, administrative costs of collection, court costs and marshal fees), and

(iv) Multiplying the percentage obtained in paragraph (c)(3)(iii) of this section by the amount of the entitlement otherwise chargeable for the period of the original overpayment.

(Authority: 10 U.S.C. 16133(c); Pub. L. 98–525)

(d) *Interruption to conserve entitlement.* A reservist may not interrupt a certified period of enrollment for the purpose of conserving entitlement. An institution of higher learning may not certify a period of enrollment for a fractional part of the normal term, quarter or semester if the reservist is enrolled for the entire term, quarter or semester. VA will make a charge for the entire period of certified enrollment, if the reservist is otherwise eligible for educational assistance, except when educational assistance is interrupted under any of the following conditions:

(1) Enrollment is terminated;

(2) The reservist cancels his or her enrollment, and does not negotiate an educational assistance check for any part of the certified period of enrollment;

(3) The reservist interrupts his or her enrollment at the end of any term, quarter or semester within the certified period of enrollment, and does not negotiate a check for educational assistance for the succeeding term, quarter or semester; and

(4) The reservist requests interruption or cancellation for any break when an institution of higher learning was closed during a certified period of enrollment, and VA continued payments under an established policy based upon an Executive Order of the President or an emergency situation. In such a case entitlement will be restored unless the reservist negotiated a

check for educational assistance for the certified period and does not repay the amount received.

(Authority: 10 U.S.C. 16133(c); Pub. L. 98–525)

(e) *No entitlement charge for some reservists.* When the criteria described in this paragraph are met, there is an exception to the charges against entitlement described in paragraph (b) of this section.

(1) VA will make no charge against a reservist's entitlement when the reservist—

(i) While not serving on active duty, had to discontinue pursuit of a course or courses as a result of being ordered to serve on active duty under sections 12301(a),(d),(g), 12302, or 12304 of title 10, U. S. Code; and

(ii) Failed to receive credit or lost training time toward completion of the reservist's approved educational, professional or vocational objective as a result of having to discontinue his or her course pursuit.

(2) The period for which receipt of educational assistance allowance is not charged against a reservist's entitlement shall not exceed the portion of the period of enrollment in the course or courses for which the reservist failed to receive credit or with respect to which the reservist lost training time.

(Authority: 10 U.S.C. 16131(c)(3))

[53 FR 34740, Sept. 8, 1988, as amended at 58 FR 51783, Oct. 5, 1993; 61 FR 29302, June 10, 1996; 68 FR 59731, Oct. 17, 2003]

COUNSELING

## § 21.7600 Counseling.

A reservist may receive counseling from VA before beginning training and during training.

(a) *Purpose.* The purpose of counseling is—

(1) To assist in selecting an objective;

(2) To develop a suitable program of education;

(3) To select an institution of higher learning appropriate for the educational or training objective;

(4) To resolve any personal problems which are likely to interfere with the successful pursuit of a program; and

(5) To select an employment objective for the reservist that would be likely to provide the reservist with satisfactory employment opportunities in light of his or personal circumstances.

(Authority: 38 U.S.C. 16136(b), 3233; Pub. L. 98–525)

(b) *Required counseling.* (1) In any case in which the Department of Veterans Affairs has rated the reservist as being incompetent, the reservist must be counseled before selecting a program of education. The requirement that counseling be provided is met when—

(i) The reservist has had one or more personal interviews with the counselor;

(ii) The counselor and the reservist have jointly developed recommendations for selecting a program of education; and

(iii) The counselor has reviewed the recommendations with the reservist.

(2) The veteran may follow the recommendations developed in the course of counseling, but is not required to do so.

(3) The Department of Veterans Affairs will take no further action on a reservist's application for assistance under this chapter when he or she—

(i) Fails to report for counseling;

(ii) Fails to cooperate in the counseling process; or

(iii) Does not complete counseling to the extent required under paragraph (b)(1) of this section.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3967(a); Pub. L. 98–525, Pub. L. 99–576)

(c) *Availability of counseling.* Counseling is available for

(1) Identifying and removing reasons for academic difficulties which may result in interruption of discontinuance of training, or

(2) Considering changes in career plans and making sound decisions about the changes.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3967(a); Pub. L. 98–525)

(d) *Provision of counseling.* The Department of Veterans Affairs shall provide counseling as needed for the purposes identified in paragraphs (a) and (c) of this section upon request of the reservist. In addition, the Department of Veterans Affairs shall provide counseling as needed for the purposes identified in paragraph (b) of this section

following the reservist's request for counseling, the reservist's initial application for benefits or any communication from the reservist or guardian indicating that the reservist wishes to change his or her program. The Department of Veterans Affairs shall take appropriate steps (including individual notification where feasible) to acquaint reservists with the availability and advantages of counseling services.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3967(a); Pub. L. 98–525, Pub. L. 99–576)

[53 FR 34740, Sept. 8, 1988, as amended at 56 FR 9628, Mar. 7, 1991]

### § 21.7603 Travel expenses.

The Department of Veterans Affairs will not pay for any costs of travel to and from the place of counseling for anyone who requests counseling under 10 U.S.C. chapter 1606 or for whom counseling is required under that chapter.

(Authority: 38 U.S.C. 111)

[56 FR 9628, Mar. 7, 1991, as amended at 61 FR 20729, May 8, 1996]

PROGRAMS OF EDUCATION

### § 21.7610 Selection of a program of education.

(a) *General requirement.* An individual must be pursuing an approved program of education in order to receive educational assistance.

(Authority: 10 U.S.C. 16131; Pub. L. 98–525)

(b) *Approval of a program of education.* VA will approve a program of education selected by a reservist for payment of educational assistance under 10 U.S.C. chapter 1606 if—

(1) The program accords with the definition of a program of education found in § 21.7520(b)(17) of this part,

(2) It has an educational, professional or vocational objective (as defined in §§ 21.7520(b)(7) and (28) of this part), and

(3) The courses and subjects in the program are approved for VA purposes as provided in § 21.7720 of this part.

(4) The reservist is not already qualified for the objective of the program.

(Authority: 10 U.S.C. 16136(b), 1671; Pub. L. 98–525)

[53 FR 34740, Sept. 8, 1988, as amended at 61 FR 20729, May 8, 1996]

### § 21.7612 Programs of education combining two or more types of courses.

An approved program may consist of courses offered by two educational institutions concurrently, or courses offered through class attendance and by television concurrently. An educational institution may contract the actual training to another educational institution, provided the course is approved by the State approving agency having approval jurisdiction over the educational institution actually providing the training.

(a) *Concurrent enrollment.* When a reservist cannot schedule his or her complete program at one educational institution, VA may approve a program of concurrent enrollment. When requesting such a program, the reservist must show that his or her complete program of education is not available at the educational institution in which he or she will pursue the major portion of his or her program (the primary educational institution), or that it cannot be scheduled within the period in which he or she plans to complete his or her program. A reservist who is limited in the types of courses he or she may pursue, as provided in § 21.7540 (b)(2) and (b)(3), may pursue courses only at an institution of higher learning. If such a reservist cannot complete his or her program at one institution of higher learning, VA may approve a concurrent enrollment only if both the educational institutions the reservist enrolls in are institutions of higher learning.

(Authority: 10 U.S.C. 2131(c), 2136(b); 38 U.S.C. 3680(g); sec. 705(a)(1), Pub. L. 98–525, 98 Stat. 2565, 2567; sec. 642, Pub. L. 101–189, 103 Stat. 1456–1458)

(b) *Television.* In determining whether a reservist may pursue all or part of a

program of education by television, VA will apply the provisions of §21.4233(c).

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3680A)

[53 FR 34740, Sept. 8, 1988, as amended at 61 FR 20729, May 8, 1996; 61 FR 29303, June 10, 1996; 62 FR 40280, July 28, 1997]

### §21.7614 Changes of program.

In determining whether a change of program of education may be approved for the payments of educational assistance, VA will apply §21.4234 of this part.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3691; Pub. L. 98–525, Pub. L. 101–366) (June 1, 1991)

[58 FR 50846, Sept. 29, 1993]

COURSES

### §21.7620 Courses included in programs of education.

(a) *General.* Generally, VA will approve, and will authorize payment of educational assistance for the reservist's enrollment in any course or subject which a State approving agency has approved as provided in §21.7720 of this part, and which forms a part of a program of education as defined in §21.7520(b)(17). Restrictions on this general rule are stated in the other paragraphs in this section and in §21.7722(b) of this part, however.

(Authority: 10 U.S.C. 16131; Pub. L. 98–525)

(b) *Flight training.* (1) VA may pay educational assistance for an enrollment in a flight training course when—

(i) An institution of higher learning offers the course for credit toward the standard college degree the reservist is pursuing; or

(ii) When:

(A) The reservist is eligible to pursue flight training as provided in §21.7540(b)(1) and (b)(3);

(B) The State approving agency has approved the course;

(C) A flight school is offering the course;

(D) The reservist's training meets the requirements of §21.4263(b)(1);

(E) The reservist meets the requirements of §21.4263(a); and

(F) The training for which payment is made occurs after September 29, 1990.

(2) VA will not pay educational assistance for an enrollment in a flight training course when the reservist is pursuing an ancillary flight objective.

(Authority: 10 U.S.C. 16131, 16136(c)(1); 38 U.S.C. 3034)

(c) *Independent study.* (1) VA will pay educational assistance to a reservist who is limited in the types of courses he or she may pursue, as provided in §21.7540(b)(2) and (b)(3), for an enrollment in any course or unit subject offered by independent study only when the reservist is enrolled concurrently in one or more courses or unit subjects offered by resident training.

(2) Only a reservist who meets the requirements of §21.7540(b)(1) may be paid educational assistance for an enrollment in an independent study course or unit subject without a simultaneous enrollment in a course or unit subject offered by resident training. The independent study course or unit subject must be accredited and lead to a standard college degree. Beginning with enrollments on or after December 27, 2001, a reservist may receive educational assistance for an independent study course that leads to a certificate. The certificate must reflect educational attainment and must be offered by an institution of higher learning.

(Authority: 38 U.S.C. 3680A(a)(4))

(3) Except as provided in paragraph (c)(4) of this section and subject to the restrictions found in paragraph (c)(1) of this section, effective October 29, 1992, VA may pay educational assistance to a reservist who is enrolled in a nonaccredited course or unit subject offered entirely or partly by independent study only if—

(i) Successful completion of the nonaccredited course or unit subject is required in order for the reservist to complete his or her program of education and the reservist:

(A) Was receiving educational assistance on October 29, 1992, for pursuit of the program of education of which the nonaccredited independent study course or unit subject forms a part; and

(B) Has remained continuously enrolled in the program of education of which the nonaccredited independent study course or unit subject forms a part from October 29, 1992, to the date

the reservist enrolls in the nonaccredited independent study course or unit subject; or

(ii)(A) Was enrolled in and receiving educational assistance for the nonaccredited independent study course or unit subject on October 29, 1992; and

(B) Remains continuously enrolled in that course or unit subject.

(4) Whether or not the reservist is enrolled will be determined by the regularly prescribed standards and practices of the educational institution offering the course or unit subject.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3680A(a)(4); sec. 313(b), Pub. L. 102–568, 106 Stat. 4332)

(d) *Graduate study.* VA will pay educational assistance for an enrollment in a course or subject leading to a graduate degree or certificate when the training occurs after November 29, 1993.

(Authority: 10 U.S.C. 16131(c))

[53 FR 34740, Sept. 8, 1988, as amended at 61 FR 29303, June 10, 1996; 68 FR 59731, Oct. 17, 2003]

### § 21.7622 Courses precluded.

(a) *Unapproved courses.* VA will not pay educational assistance for an enrollment in any course which has not been approved by a State approving agency or by VA when that agency acts as a State approving agency. VA will not pay educational assistance for a new enrollment in a course when a State approving agency has suspended the approval of the course for new enrollments, nor for any period within any enrollment after the date that the State approving agency disapproves a course. See § 21.7720 of this part.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3672; Pub. L. 98–525)

(b) *Courses not part of a program of education.* VA will not pay educational assistance for an enrollment in any course which is not part of a program of education.

(Authority: 10 U.S.C. 16131; Pub. L. 98–525)

(c) *Erroneous, deceptive, misleading practices.* VA will not pay educational assistance for an enrollment in any courses offered at an educational institution that uses advertising, sales, or enrollment practices that are erroneous, deceptive, or misleading by actual statement, omission, or intimation. VA will apply the provisions of § 21.4252(h) in making these decisions with regard to enrollments under 10 U.S.C. chapter 1606.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3696)

(d) *Avocational and recreational.* (1) VA will not pay educational assistance for an enrollment in any course—

(i) Which is avocational or recreational in character, or

(ii) The advertising for which contains significant avocational or recreational themes.

(2) VA presumes that the following courses are avocational or recreational in character unless the reservist justifies their pursuit to VA as provided in paragraph (3) of this section. The courses are:

(i) Any photography course or entertainment course; or

(ii) Any music course, instrumental or vocal, public speaking course, or course in dancing, sports or athletics, such as horseback riding, swimming, fishing, skiing, golf, baseball, tennis, bowling, sports officiating, or other sport or athletic courses, except courses of applied music, physical education, or public speaking which are offered by institutions of higher learning for credit as an integral part of a program leading to an educational objective; or

(iii) Any other type of course which VA determines to be avocational or recreational.

(3) To overcome a presumption that a course is avocational or recreational in character, the reservist must establish that the course will be of bona fide use in the pursuit of his or her present or contemplated business or occupation.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3473(d); Pub. L. 98–525)

(e) *Mitigating circumstances.* The reservist is not entitled to receive payment of educational assistance from VA for a course from which the reservist withdraws or receives a nonpunitive grade which is not used in computing the requirements for graduation unless—

(1) There are mitigating circumstances, and

(2) The reservist submits the circumstances in writing to VA within 1 year from the date VA notifies the reservist that he or she must submit the mitigating circumstances.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3680(a); Pub. L. 98–525)

(f) *Other courses.* (1) A reservist who is limited in the types of courses he or she may pursue, as provided in §21.7540(b)(2) and (b)(3), may not receive any educational assistance for pursuit of any of the types of training listed in §21.7540(b)(3).

(2) VA will not consider the hospital or field work phase of a nursing course, including a course leading to a degree in nursing, to be provided by an institution of higher learning unless—

(i) The hospital or fieldwork phase is an integral part of the course;

(ii) Completion of the hospital or fieldwork phase of the course is a prerequisite to the successful completion of the course;

(iii) The student remains enrolled in the institution of higher learning during the hospital or fieldwork phase of the course; and

(iv) The training is under the direction and supervision of the institution of higher learning.

(3) A reservist who is limited in the types of courses he or she may pursue, as provided in §21.7540(b)(2) and (b)(3), may not receive educational assistance for an enrollment in a course pursued after the reservist has completed the course of instruction required for the award of a baccalaureate degree or the equivalent evidence of completion of study, unless the reservist is pursuing a course or courses leading to a graduate degree or graduate certificate. Such a reservist may receive educational assistance while pursuing a course or courses leading to a graduate degree or graduate certificate (subject to the restrictions in §21.7620(d)). Equivalent evidence of completion of study may include, but is not limited to, a copy of the reservist's transcript showing that he or she has received passing grades in all courses needed to obtain a baccalaureate degree at the institution of higher learning which he or she has been attending.

(4) No reservist may receive payment of educational assistance from VA for:

(i) An audited course (see §21.4252(i));

(ii) A new enrollment in a course during a period when approval has been suspended by a State approving agency or VA;

(iii) Pursuit of a course by a nonmatriculated student except as provided in §21.4252(l);

(iv) An enrollment in a course at an educational institution for which the reservist is an official of such institution authorized to sign certificates of enrollment under 10 U.S.C. chapter 1606;

(v) A new enrollment in a course which does not meet the veteran-nonveteran ratio requirement as computed under §21.4201;

(vi) Except as provided in §21.7620(c), an enrollment in a nonaccredited independent study course; or

(vii) An enrollment in a course offered under contract for which VA approval is prohibited by §21.4252(m).

(Authority: 10 U.S.C. 16131(c), 16136(b); 38 U.S.C. 3672(a), 3676, 3680(a), 3680A(f), 3680A(g); §642, Public Law 101–189, 103 Stat. 1458)

[53 FR 34740, Sept. 8, 1988, as amended at 61 FR 20729, May 8, 1996; 61 FR 29304, June 10, 1996; 62 FR 55762, Oct. 28, 1997; 65 FR 81743, Dec. 27, 2000]

### §21.7624 Overcharges and restrictions on enrollments.

(a) *Overcharges.* VA may disapprove an educational institution for further enrollments when the educational institution charges or receives from a reservist tuition and fees that exceed the established charges which the educational institution requires from similarly circumstanced nonreservists enrolled in the same course.

(Authority: 10 U.S.C. 2136; 38 U.S.C. 3690; sec. 705(a)(1), Pub. L. 98–525, 98 Stat. 2565, 2567; secs. 642 (c), (d), 645(a)(1), Pub. L. 101–189, 103 Stat. 1457–1458)

(b) *Restriction on enrollments.* The provisions of §21.4210(b) apply to any determination by VA as to whether to impose restrictions on approval of enrollments and whether to discontinue

payments to reservists already enrolled at an educational institution.

(Authority: 10 U.S.C. 2136; 38 U.S.C. 3690(b); sec. 705(a)(1), Pub. L. 98–525, 98 Stat. 2565, 2567; secs. 642 (c), (d), 645(a)(1), Pub. L. 101–189, 103 Stat. 1457–1458)

[61 FR 29304, June 10, 1996, as amended at 63 FR 35837, July 1, 1998]

PAYMENTS—EDUCATIONAL ASSISTANCE

### § 21.7630 Educational assistance.

VA will pay educational assistance pursuant to 10 U.S.C. chapter 1606 to an eligible reservist while he or she is pursuing approved courses in a program of education at the rates specified in § 21.7636 and § 21.7639.

(Authority: 10 U.S.C. 16131(b); Pub. L. 98–525)

[53 FR 34740, Sept. 8, 1988, as amended at 61 FR 20729, May 8, 1996]

### § 21.7631 Commencing dates.

VA will determine the commencing date of an award or increased award of educational assistance under this section. When more than one paragraph in this section applies, VA will award educational assistance using the latest of the applicable commencing dates.

(a) *Entrance or reentrance including change of program or educational institution.* When an eligible reservist enters or reenters into training (including a reentrance following a change of program or educational institution), the commencing date of his or her award of educational assistance will be determined as follows:

(1) If the award is the first award of educational assistance for the program of education the reservist is pursuing, the commencing date of the award of educational assistance is the latest of:

(i) The date the educational institution certifies under paragraph (b) or (c) of this section;

(ii) One year before the date of claim as determined by § 21.1029(b);

(iii) The effective date of the approval of the course, or one year before the date VA receives the approval notice whichever is later; or

(2) If the award is the second or subsequent award of educational assistance for the program of education the reservist is pursuing, the effective date of the award of educational assistance is the later of—

(i) The date the educational institution certifies under paragraph (b) or (c) of this section; or

(ii) The effective date of the approval of the course, or one year before the date VA receives the approval notice, whichever is later.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3672, 5103)

(b) *Certification by educational institution—course or subject leads to a standard college degree.* (1) When a student enrolls in a course offered by independent study, the commencing date of the award or increased award of educational assistance will be the date the student began pursuit of the course according to the regularly established practices of the educational institution.

(2) When a student enrolls in a resident course or subject, the commencing date of the award will be the date of reporting provided that—

(i) The published standards of the school require the student to register before reporting,

(ii) The published standards of the school require the student to report no more than 14 days before the first scheduled date of classes for the term, quarter or semester for which the student has registered, and

(iii) The first scheduled class for the course or subject in which the student is enrolled begins during the calendar week when, according to the school's academic calendar, classes are generally scheduled to commence for the term.

(3) When a student enrolls in a resident course or subject whose first scheduled class begins after the calendar week when, according to the school's academic calendar, classes are scheduled to commence for the term, quarter, or semester, the commencing date of the award or increased award of educational assistance allowance will be the actual date of the first class scheduled for the particular course or subject.

(4) When a student enrolls in a resident course or subject and neither the provisions of paragraph (b)(2) nor (b)(3) of this section apply to the enrollment,

the commencing date of the award or increased award of educational assistance will be the first scheduled date of classes for the term, quarter, or semester in which the student is enrolled.

(Authority: 10 U.S.C. 16136(b)).

(c) *Certification by educational institution—course does not lead to a standard college degree.* (1) When a reservist enrolls in a course which does not lead to a standard college degree and which is offered in residence, the commencing date of the award of educational assistance will be as stated in paragraph (b) of this section.

(2) When a reservist enrolls in a course which is offered by correspondence, the commencing date of the award of educational assistance shall be the later of—

(i) The date the first lesson was sent, or

(ii) The date of affirmance in accordance with 38 U.S.C. 3686.

(3) When a reservist enrolls in a program of apprenticeship or other on-job training, the commencing date of the award of educational assistance shall be the first date of employment in the training position.

(Authority: 10 U.S.C. 16136(b))

(d) *Liberalizing laws and VA issues.* When a liberalizing law or VA issue affects the commencing date of a reservist's award of educational assistance, that commencing date shall be in accordance with facts found, but not earlier than the effective date of the act or administrative issue.

(Authority: 38 U.S.C. 5112(b), 5113; Pub. L. 98–525)

(e) *Individuals in a penal institution.* If a reservist is paid a reduced rate of educational assistance under §21.7639 (d), (e), (f), (g) and (h) of this section, the rate will be increased or assistance will commence effective the earlier of the following dates:

(1) The date the tuition and fees are no longer being paid under another Federal program or a State or local program, or

(2) The date of the release from the prison or jail.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3482(g); Pub. L. 98–525)

(f) [Reserved]

(g) *Increase (''kicker'') in amount payable.* If a reservist is entitled to an increase (''kicker'') in the monthly rate of educational assistance because he or she has met the requirements of §21.7636(b), the effective date of that increase (''kicker'') will be the latest of the following dates:

(1) The commencing date of the reservist's award as determined by paragraphs (a) through (g) of this section; or

(2) The first date on which the reservist is entitled to the increase (''kicker'') as determined by the Secretary of the military department concerned; or

(3) February 10, 1996.

(Authority: 10 U.S.C. 16131)

[53 FR 34740, Sept. 8, 1988, as amended at 61 FR 11311, Mar. 20, 1996; 61 FR 29304, June 10, 1996; 62 FR 55520, Oct. 27, 1997; 64 FR 23773, May 4, 1999; 66 FR 38939, July 26, 2001]

### §21.7633 Suspension or discontinuance of payments.

VA may suspend or discontinue payments of educational assistance. In doing so, VA will apply §§21.4210 through 21.4216.

(Authority: 10 U.S.C 16136(b); 38 U.S.C. 3690)

[63 FR 35837, July 1, 1998]

### §21.7635 Discontinuance dates.

The effective date of reduction or discontinuance of educational assistance will be as stated in this section. If more than one type of reduction or discontinuance is involved, the earliest date will control.

(a) *Death of reservist.* (1) If the reservist receives an advance payment and dies before the end of the period covered by the advance payment, the discontinuance date of educational assistance shall be the last date of the period covered by the advance payment.

(2) In all other cases if the reservist dies while pursuing a program of education, the discontinuance date of educational assistance shall be the last date of attendance.

(Authority: 10 U.S.C. 16136; 38 U.S.C. 3680(e))

(b) *Course discontinued—course interrupted—course terminated—course not satisfactorily completed or withdrawn from.* (1) If the reservist, for reasons other than being called or ordered to active duty, withdraws from all courses or receives all nonpunitive grades, and in either case there are no mitigating circumstances VA will terminate or reduce educational assistance effective the first date of the term in which the withdrawal occurs or the first date of the term for which grades are assigned.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3680(a); Pub. L. 102–127) (Aug. 1, 1990)

(2) If the reservist withdraws from all courses with mitigating circumstances or withdraws from all courses such that a punitive grade is or will be assigned for those courses or the reservist withdraws from all courses because he or she is ordered to active duty, VA will terminate educational assistance for—

(i) Residence training: last date of attendance; and

(ii) Independent study: official date of change in status under the practices of the institution of higher learning.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3680(a); Pub. L. 98–525, Pub. L. 102–127) (Aug. 1, 1990)

(3) When a reservist withdraws from a correspondence course, VA will terminate educational assistance effective the date the last lesson is serviced.

(4) When a reservist withdraws from an apprenticeship or other on-job training, VA will terminate educational assistance effective the date of last training.

(Authority: 10 U.S.C. 2136(b); 38 U.S.C. 3680(a); sec. 705(a)(1), Pub. L. 98–525, 98 Stat. 2565, 2567; sec. 642 (c), (d), Pub. L. 101–189, 103 Stat. 1457–1458)

(5) When a reservist withdraws from flight training, VA will terminate educational assistance effective the date of last instruction.

(Authority: 10 U.S.C. 2136(b); 38 U.S.C. 3680(a); sec. 705(a)(1), Pub. L. 98–525, 98 Stat. 2565, 2567; sec. 642 (c), (d), Pub. L. 101–189, 103 Stat. 1457–1458)

(c) *Reduction in the rate of pursuit of the course.* If the reservist reduces the rate of training by withdrawing from part of a course, but continues training in part of the course, the provisions of this paragraph apply.

(1) If the reduction in the rate of training occurs other than on the first date of the term, VA will reduce the reservist's educational assistance effective on the date the reduction occurred when—

(i) A nonpunitive grade is assigned for the part of the course from which he or she withdraws, and

(A) The reservist withdraws because he or she is ordered to active duty, or

(B) The withdrawal occurs with mitigating circumstances; or

(ii) A punitive grade is assigned for the part of the course from which the reservist withdraws.

(2) VA will reduce educational assistance effective the first date of the enrollment in which the reduction occurs when—

(i) The reduction occurs on the first date of the term, or

(ii) The reservist—

(A) Receives a nonpunitive grade for the part of the course from which he or she withdraws, and

(B) Withdraws without mitigating circumstances, and

(C) Does not withdraw because he or she is ordered to active duty.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3680(a); Pub. L. 102–127) (Aug. 1, 1990)

(3) A reservist, who enrolls in several subjects and reduces his or her rate of pursuit by completing one or more of them while continuing training in the others, may receive an interval payment based on the subjects completed if the requirements of § 21.7640 are met. If those requirements are not met, VA will reduce the reservist's educational

assistance effective the date the subject or subjects were completed.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3680; Pub. L. 98–525, Pub. L. 100–689)

(d) *Nonpunitive grade.* (1) If the reservist receives a nonpunitive grade in a particular course, for any reason other than a withdrawal from it, VA will reduce his or her educational assistance effective the first date of enrollment for the term in which the grade applies when no mitigating circumstances are found.

(2) If the reservist receives a nonpunitive grade for a particular course for any reason other than a withdrawal from it, VA will reduce the reservist's educational assistance effective the last date of attendance when mitigating circumstances are found.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3680; Pub. L. 98–525, Pub. L. 100–689)(Nov. 18, 1988)

(e) *Discontinued by VA.* If VA discontinues payment to a reservist following the procedures stated in §21.4211(d) and (g), the date of discontinuance of payment of educational assistance will be—

(1) The date on which payments first were suspended by the Director of a VA facility as provided in §21.4210, if the discontinuance was preceded by suspension.

(2) The end of the month in which the decision to discontinue, made by VA under §21.7633 or §21.4211(d) and (g), is effective, if the Director of a VA facility did not suspend payments before the discontinuance.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3690; Pub. L. 98–525)

(f) *Disapproved by State approving agency.* If a State approving agency disapproves a course in which a reservist is enrolled, the date of discontinuance of payment of educational assistance will be—

(1) The date on which payments first were suspended by the Director of a VA facility as provided in §21.4210 if disapproval was preceded by such a suspension.

(2) The end of the month in which disapproval is effective or VA receives notice of the disapproval, whichever is later, provided that the Director of a VA facility did not suspend payments before the disapproval.

(Authority: 10 U.S.C. 16131(b), 38 U.S.C. 3672(a), 3690; Pub. L. 98–525)

(g) *Disapproval by VA.* If VA disapproves a course in which a reservist is enrolled, the effective date of discontinuance of payment of educational assistance will be—

(1) The date on which the Director of a VA facility first suspended payments, as provided in §21.4210 of this part, if such a suspension preceded the disapproval.

(2) The end of the month in which the disapproval occurred, provided that the Director of a VA facility did not suspend payments before the disapproval.

(Authority: 10 U.S.C. 16131(b), 38 U.S.C. 3671(b), 3672(a), 3690; Pub. L. 98–525)

(h) *Unsatisfactory progress.* If a reservist's progress is unsatisfactory, his or her educational assistance shall be discontinued effective the earlier of the following:

(1) The date the educational institution discontinues the reservist's enrollment, or

(2) The date on which the reservist's progress becomes unsatisfactory according to the educational institution's regularly established standards of progress.

(Authority: 10 U.S.C. 16131(b), 38 U.S.C. 3474; Pub. L. 98–525)

(i) *False or misleading statements.* If educational assistance is paid as the result of false or misleading statements, see §21.7658 of this part.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3690; Pub. L. 98–525)

(j) *Conflicting interests (not waived).* If an institution of higher learning and VA have conflicting interests as provided in §21.4005 and §21.7805 of this part, and VA does not grant the waiver, the date of discontinuance shall be 30 days after the date of the letter notifying the reservist.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3683; Pub. L. 98–525)

(k) *Incarceration in prison or penal institution for conviction of a felony.* (1)

The provisions of this paragraph apply to a reservist whose educational assistance must be discontinued or who becomes restricted to payment of educational assistance at a reduced rate under § 21.7639(d) of this part.

(2) The reduced rate or discontinuance will be effective the latest of the following dates:

(i) The first day on which all or part of the reservist's tuition and fees were paid by a Federal, State or local program,

(ii) The date the reservist is incarcerated in prison or penal institution, or

(iii) The commencing date of the award as determined by § 21.7631 of this part.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3482(g); Pub. L. 98–525)

(l) *Exhaustion of entitlement.* If a reservist exhausts his or her 36 months of entitlement, the discontinuance date shall be the date the entitlement is exhausted.

(Authority: 10 U.S.C. 16131(c); Pub. L. 98–525)

(m) *End of eligibility period.* If the reservist's eligibility period ends while the reservist is receiving educational assistance, the date of discontinuance shall be the date on which eligibility ends as determined by § 21.7550 and § 21.7551 of this part.

(Authority: 10 U.S.C. 16133; Pub. L. 98–525)

(n) *Required certifications not received after certification of enrollment.* (1) If VA does not timely receive a required certification of attendance for a reservist enrolled in a course not leading to a standard college degree, VA will terminate payments effective the last date of the last period for which a certification of the reservist's attendance was received. If VA later receives the certification, VA will make any adjustment on the basis of facts found.

(2) In the case of an advance payment, if VA does not receive verification of enrollment and certificate of delivery of the check within 60 days of the first day of the term, quarter, semester, or course for which the advance payment was made, VA will determine the actual facts and make an adjustment, if required. If the reservist failed to enroll, termination will be effective the beginning date of the enrollment period.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3680(d); Pub. L. 98–525)

(o) *Receipt of financial assistance under 10 U.S.C. 2107.* If the reservist receives financial assistance under 10 U.S.C. 2107, the effective date for discontinuance of payment of educational assistance shall be the first date for which the reservist receives such assistance.

(Authority: 10 U.S.C. 16134; Pub. L. 98–525)

(p) *Failure to participate satisfactorily in required training in Selected Reserve.* If the reservist fails to participate satisfactorily in required training in the Selected Reserve, VA will discontinue payment of educational assistance allowance effective the first date certified by the Department of Defense or the Department of Transportation as the date on which the reservist fails to participate satisfactorily as a member of the Selected Reserve.

(Authority: 10 U.S.C. 16134; Pub. L. 98–525)

(q) *Error-payee's or administrative.* (1) When an act of commission or omission by a payee or with his or her knowledge results in an erroneous award of educational assistance, the effective date of the reduction or discontinuance will be the effective date of the award, or the day before the act, whichever is later, but not before the last date on which the reservist was entitled to payment of educational assistance.

(2) When an administrative error or error in judgment by VA, the Department of Defense, or the Department of Transportation is the sole cause of an erroneous award, the award will be reduced or terminated effective the date of last payment.

(Authority: 38 U.S.C. 5112(b), 5113; Pub. L. 98–525)

(r) *Completion of baccalaureate instruction.* If a reservist who is limited in the types of courses he or she may pursue, as provided in § 21.7540 (b)(2) and (b)(3), completes a course of instruction required for the award of a baccalaureate degree or the equivalent evidence of completion of study (see § 21.7622(f)),

VA will discontinue educational assistance effective the day after the date upon which the required course of instruction was completed.

(Authority: 10 U.S.C. 2131; sec. 705(a)(1), Pub. L. 98–525, 98 Stat. 2565; secs. 642 (a), (b), (d), 645(a), (b), Pub. L. 101–189, 103 Stat. 1456–1458)

(s) *Forfeiture for fraud.* If a reservist must forfeit his or her educational assistance due to fraud, the date of discontinuance of payment of educational assistance will be the later of—

(1) The effective date of the award, or

(2) The day before the date of the fraudulent act.

(Authority: 38 U.S.C. 6103, Pub. L. 98–525)

(t) *Forfeiture for treasonable acts or subversive activities.* If a reservist must forfeit his or her educational assistance due to treasonable acts or subversive activities, the date of discontinuance of payment of educational assistance will be the later of—

(1) The effective date of the award, or

(2) The day before the date the reservist committed the treasonable act or subversive activities for which he or she was convicted.

(Authority: 38 U.S.C. 6104, 6105; Pub. L. 98–525)

(u) *Change in law or VA issue or interpretation.* If there is a change in applicable law or VA issue, or in the Department of Veterans Affairs's application of the law or VA issue, VA will use the provisions of §3.114(b) of this chapter to determine the date of discontinuance of the reservist's educational assistance.

(Authority: 38 U.S.C. 5112, 5113; Pub. L. 98–525)

(v) *Independent study course loses accreditation.* If the reservist is enrolled in a course offered in whole or in part by independent study, and the course loses its accreditation (or the educational institution offering the course loses its accreditation), the date of reduction or discontinuance will be the effective date of the withdrawal of accreditation by the accrediting agency, unless the provisions of §21.7620 (c)(3) or (c)(4) apply.

(Authority: 10 U.S.C. 16136; 38 U.S.C. 3680A(a)(4))

(w) [Reserved]

(x) *Reduction following loss of increase (''kicker'').* If a reservist is entitled to an increase (''kicker'') in the monthly rate of basic educational assistance as provided in §21.7636(b) and loses that entitlement, the effective date for the reduction in the monthly rate payable is the date, as determined by the Secretary of the military department concerned, that the reservist is no longer entitled to the increase (''kicker'').

(Authority: 10 U.S.C. 16131)

(y) *Election to receive educational assistance under 38 U.S.C. chapter 30.* VA shall terminate educational assistance effective the first date for which the reservist received educational assistance when—

(1) The service that formed a basis for establishing eligibility for educational assistance under 10 U.S.C. chapter 1606 included a period of active duty as described in §21.7020(b)(1)(iv); and

(2) The reservist subsequently made an election, as described in §21.7042(a)(7) or (b)(10), to become entitled to basic educational assistance under 38 U.S.C. chapter 30.

(Authority: Sec. 107, Pub. L. 104–275, 110 Stat. 3329–3330)

(z) *Except as otherwise provided.* If the reservist's educational assistance must be discontinued for any reason other than those stated in the other paragraphs of this section, VA will determine the date of discontinuance of payment of educational assistance on the basis of facts found.

(Authority: 38 U.S.C. 5112(a), 5113; Pub. L. 98–525)

[53 FR 34740, Sept. 8, 1988, as amended at 57 FR 57106, Dec. 3, 1992; 58 FR 51783, Oct. 5, 1993; 61 FR 29304, June 10, 1996; 62 FR 55520, Oct. 27, 1997; 63 FR 35837, July 1, 1998; 65 FR 5788, Feb. 7, 2000; 65 FR 61101, Oct. 16, 2000; 66 FR 38939, July 26, 2001]

### § 21.7636 Rates of payment.

(a) *Monthly rate of educational assistance.* (1) Except as otherwise provided in this section or in § 21.7639, the monthly rate of educational assistance payable for training that occurs after September 30, 2003, and before October 1, 2004, to a reservist pursuing a program of education is the rate stated in this table:

| Training | Monthly rate |
|---|---|
| Full | $282.00 |
| ¾ time | 212.00 |
| ½ time | 140.00 |
| ¼ time | 70.50 |

(2)(i) The monthly rate of basic educational assistance payable to a reservist for apprenticeship or other on-the-job training full time that occurs after September 30, 2003, and before October 1, 2004, is the rate stated in this table:

| Training period | Monthly rate |
|---|---|
| First six months of pursuit of training | $211.50 |
| Second six months of pursuit of training | 155.10 |
| Remaining pursuit of training | 98.70 |

(ii) Full-time training will consist of the number of hours which constitute the standard workweek of the training establishment, but not less than 30 hours unless a lesser number of hours is established as the standard workweek for the particular establishment through bona fide collective bargaining between employers and employees.

(3) The monthly rate of basic educational assistance payable to a reservist for pursuit of a cooperative course that occurs after September 30, 2003, and before October 1, 2004, is the rate stated in paragraph (a)(1) of this section for full-time training during that period of time.

(Authority: 10 U.S.C. 16131(b), (c); sec. 8203(b), Pub. L. 105–178, 112 Stat. 493–494)

(b) *Increase (''kicker'') in educational assistance rates.* (1) The Secretary of the military department concerned may increase the amount of educational assistance stated in paragraph (a) of this section that is payable to a reservist who has a skill or specialty in which there is a critical shortage of personnel or for which it is difficult to recruit, or, in the case of critical units, retain personnel.

(2) The Secretary of the military department concerned—

(i) Will set the amount of the increase (''kicker'') for full-time training, but the increase (''kicker'') may not exceed $350 per month; and

(ii) May set the amount of the increase (''kicker'') payable, for a reservist pursuing a program of education less than full time or pursuing an apprenticeship or other on-job training, at an amount less than the amount described in paragraph (b)(2)(i) of this section.

(Authority: 10 U.S.C. 16131(i)(1))

(c) *Limitations on payments.* VA may withhold final payment until VA receives proof of the reservist's enrollment and adjusts the reservist's account.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3680(g))

[61 FR 29305, June 10, 1996, as amended at 62 FR 27964, May 22, 1997; 62 FR 55520, Oct. 27, 1997; 62 FR 66278, Dec. 18, 1997; 64 FR 26297, May 14, 1999; 65 FR 59127, Oct. 4, 2000; 65 FR 60499, Oct. 11, 2000; 66 FR 38937, July 26, 2001; 67 FR 6655, Feb. 13, 2002; 68 FR 42978, July 21, 2003; 69 FR 62205, Oct. 25, 2004]

### § 21.7639 Conditions which result in reduced rates or no payment.

The payment of educational assistance at the monthly rates established in § 21.7636 shall be subject to reduction, whenever the circumstances described in this section arise.

(a) *Withdrawals and nonpunitive grades.* (1) Withdrawal from a course or receipt of a nonpunitive grade affects payments to a reservist. VA will not pay benefits to a reservist for pursuit of a course from which the reservist withdraws or receives a nonpunitive grade which is not used in computing requirements for graduation unless the provisions of this paragraph are met.

(i) The reservist withdraws because he or she is ordered to active duty; or

(ii) Both of the following exist.

(A) There are mitigating circumstances, and

(B) The reservist submits a description of the circumstances in writing to VA either within one year from the date VA notifies the reservist that he

or she must submit the mitigating circumstances, or at a later date if the reservist is able to show good cause why the one-year time limit should be extended to the date on which he or she submitted the description of the mitigating circumstances.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3471, 3680(a), 5101, 5113; Pub. L. 102–127) (Aug. 1, 1990))

(2) If VA considers that mitigating circumstances exist because the reservist withdrew during a drop-add period or because the withdrawal constitutes the first withdrawal of no more than six credits after May 31, 1989, the reservist is not subject to the reporting requirement found in paragraph (b)(1)(ii)(B) of this section.

(Authority: 10 U.S.C. 16130(b), 38 U.S.C. 3680(a)) (June. 1, 1989)

(b) *No education assistance for some incarcerated reservists.* VA will pay no educational assistance to reservists who are incarcerated and who are training less than one-half time. In addition, VA will pay no educational assistance to a reservist who—

(1) Is incarcerated in Federal, State or local penal institution for conviction of a felony, and

(2) Is enrolled in a course—

(i) For which there are no tuition and fees, or

(ii) For which tuition and fees are being paid by a Federal program (other than one administered by VA) or by a State or local program, and

(3) Is incurring no charge for the books, supplies and equipment necessary for the course.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3482(g); Pub. L. 98–525)

(c) *Reduced educational assistance for some incarcerated reservists.* (1) VA will pay reduced educational assistance to a reservist who—

(i) Is incarcerated in a Federal, State or local penal institution for conviction of a felony, and

(ii) Is enrolled in a course—

(A) For which the reservist pays some (but not all) of the charges for tuition and fees, or

(B) For which a Federal program (other than one administered by VA) or a State or local program pays all the charges for tuition and fees, but for which the reservist must pay for books, supplies and equipment.

(2) The monthly rate of educational assistance payable to such a reservist is the lesser of the following:

(i) The monthly rate of the portion of tuition and fees that are not paid by a Federal program (other than one administered by VA) or a State or local program plus the monthly rate of any charges to the reservist for the cost of necessary supplies, books and equipment, or

(ii) The monthly rate as stated in §21.7636(a) and any increase payable under §21.7636(b).

(3) In determining the monthly rate stated in paragraph (c)(2)(i) of this paragraph, VA will—

(i) Add the portion of tuition and fees that are not paid by a Federal program (other than one administered by VA) for the reservist's enrollment period to the total cost to the reservist for the cost of necessary supplies, books and equipment, and

(ii) Divide the figure obtained in paragraph (c)(3)(i) of this paragraph by the number of months and fractions of a month in the reservist's enrollment period.

(Authority: 10 U.S.C. 16131(i)(1), 16136(b); 38 U.S.C. 3482(g))

(d)(1) A reservist pursuing only independent study and whose enrollment begins after June 30, 1993, shall be paid educational assistance on the basis of his or her training time.

(2) No payments may be made to a reservist who is limited in the types of courses he or she may pursue, as provided in §21.7540(b)(2) and (b)(3), and who is pursuing independent study unless he or she is concurrently pursuing one or more courses offered through resident training at an institution of higher learning.

(Authority: 10 U.S.C. 2131; 10 U.S.C. 2136(b); 38 U.S.C. 3532, 3532 note, 3680; sec. 705(a)(1), Pub. L. 98–525, 98 Stat. 2565, 2567; secs. 642, 645 (a), (b), Pub. L. 101–189, 103 Stat. 1457–1458)

(e) *Payment for correspondence courses.* A reservist who is pursuing a correspondence course or the correspondence portion of a correspondence-residence course shall be paid 55 percent of the established charge which the educational institution requires nonreservists to pay for the lessons—

(1) Which the reservist has completed;

(2) Which the educational institution has serviced; and

(3) For which payment is due.

(Authority: 10 U.S.C. 2131(f); sec. 642 (b), (d), Pub. L. 101–189, 103 Stat. 1456–1458)

(f) *Failure to work sufficient hours of apprenticeship and other on-job training.* (1) For any calendar month in which a reservist pursuing an apprenticeship or other on-job training program fails to complete 120 hours of training, VA will reduce proportionally—

(i) The rates specified in § 21.7636(a)(2); and

(ii) Any increase set by the Secretary of the military department concerned as described in § 21.7636(b).

(2) In making the computations required by paragraph (f)(1) of this section, VA will round the number of hours worked to the nearest multiple of eight.

(3) For the purpose of this paragraph, hours worked include only—

(i) The training hours the reservist worked; and

(ii) All hours of the reservist's related training which occurred during the standard workweek and for which the reservist received wages. (See § 21.7636(a)(2)(ii) as to the requirements for full-time training.)

(Authority: 10 U.S.C. 2131(d)(2), 16131(i)(1); sec. 642 (b), (d), Pub. L. 101–189, 103 Stat. 1456–1458)

(g) *Flight training course.* A reservist who is pursuing a flight training course shall be paid 60 percent of the established charge for tuition and fees (other than tuition and fees charged for or attributable to solo flying hours) which the flight school requires similarly circumstanced nonreservists enrolled in the same course to pay.

(Authority: 10 U.S.C. 16131(g))

(h) *Membership in the Senior Reserve Officers' Training Corps.* A reservist may not receive educational assistance for any period for which he or she receives financial assistance under 10 U.S.C. 2107 as a member of the Senior Reserve Officers' Training Corps.

(Authority: 10 U.S.C. 16134)

(i) *Course not offered by an institution of higher learning or not leading to an identifiable educational, professional, or vocational objective.* A reservist who is limited in the types of courses he or she may pursue, as described in § 21.7540(b)(2) and (b)(3), may not receive educational assistance for instruction in a program of education unless it is offered at an institution of higher learning. The instruction must lead to an identifiable educational, professional, or vocational objective, but does not have to lead to a standard college degree.

(Authority: 10 U.S.C. 2131(b), 2136(b); sec. 705(a)(1), Pub. L. 98–525, 98 Stat. 2565, 2567; secs. 642 (b)(1), (c), (d), 645(a), (b), Pub. L. 101–189, 103 Stat. 1456–1458)

[53 FR 34740, Sept. 8, 1988, as amended at 57 FR 57107, Dec. 3, 1992; 58 FR 51783, Oct. 5, 1993; 58 FR 65930, Dec. 17, 1993; 61 FR 29305, June 10, 1996; 61 FR 29482, June 11, 1996; 62 FR 55521, Oct. 27, 1997; 62 FR 55762, Oct. 28, 1997]

### § 21.7640 Release of payments.

(a) *Payments are dependent upon certifications, reports, and verifications of pursuit.* When certifications, reports, or verifications of pursuit are mentioned in this paragraph, the certifications, reports, and verifications of pursuit are to be made in the form prescribed by the Secretary of Veterans Affairs.

(1) VA will pay educational assistance to a reservist who is pursuing a standard college degree only after the educational institution has certified his or her enrollment.

(2) VA will pay educational assistance to a reservist who is pursuing a course not leading to a standard college degree (other than a correspondence course, a course of flight training, or an apprenticeship or other on-job training) only after:

(i) The educational institution has certified his or her enrollment in the

form prescribed by the Secretary of Veterans Affairs; and

(ii) VA has received a report by the reservist, which report is endorsed by the educational institution, of—

(A) Each day of absence that occurred before December 18, 1989; or

(B) A verification of pursuit from the reservist of training that occurred on or after December 18, 1989.

(3) VA will pay educational assistance to a reservist pursuing a program of apprenticeship or other on-job training only after:

(i) The training establishment has certified his or her enrollment in the training program in the form prescribed by the Secretary of Veterans Affairs; and

(ii) VA has received certification by the reservist and the training establishment of the reservist's hours worked.

(4) VA will pay educational assistance to a reservist who is pursuing a correspondence course only after:

(i) The educational institution has certified his or her enrollment in the form prescribed by the Secretary of Veterans Affairs; and

(ii) VA has received a certification by the reservist, which certification is endorsed by the educational institution, as to the number of lessons completed and serviced by the educational institution.

(5) VA will pay educational assistance to a reservist who is pursuing a flight course only after:

(i) The educational institution certifies the reservist's enrollment in the form prescribed by the Secretary of Veterans Affairs; and

(ii) VA has received a report by the reservist of the flight training the reservist has completed, which report is endorsed by the educational institution.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3680)

(b) *Payment for intervals between terms.* (1) In administering 10 U.S.C. chapter 1606, VA will apply the provisions of §21.4138(f) in the same manner as they are applied in the administration of 38 U.S.C. chapter 34 when determining whether a reservist is entitled to payment for an interval between terms. References to §21.4205 and §21.4138(f) shall be deemed to refer to §21.7636.

(2) The Director of the VA facility of jurisdiction may authorize payment to be made for breaks, including intervals between terms within a certified period of enrollment, during which the educational institution is closed under an established policy based upon an order of the President or due to an emergency situation.

(i) If the Director has authorized payment due to an emergency school closing resulting from a strike by the faculty or staff of the educational institution, and the closing lasts more than 30 days, the Director, Education Service, will decide if payments may be continued. The decision will be based on a full assessment of the strike situation. Further payments will not be authorized if in his or her judgment the school closing will not be temporary.

(ii) An educational institution which disagrees with a decision made under this subparagraph by a Director of a VA facility, has 1 year from the date of the letter notifying the educational institution of the decision to request that the decision be reviewed. The request must be submitted in writing to the Director of the VA facility where the decision was made. The Director, Education Service, shall review the evidence of record and any other pertinent evidence the educational institution may wish to submit. The Director, Education Service has the authority either to affirm or reverse a decision of the Director of a VA facility.

(3) A reservist, who is pursuing a course leading to a standard college degree, may transfer between consecutive school terms from one approved institution of higher learning to another for the purpose of enrolling in, and pursuing, a similar course at the second institution of higher learning. If the interval between terms does not exceed 30 days, VA shall, for the purpose of paying educational assistance, consider the reservist to be enrolled in the first institution of higher learning during the interval.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3680)

(c) *Payee.* (1) VA will make payment to the reservist or to a duly appointed

fudiciary. VA will make direct payment to the reservist even if he or she is a minor.

(2) The assignment of educational assistance is prohibited. In administering this provision, VA will apply the provisions of §§ 21.4146 (a), (b), (c) and (e) of this part to 10 U.S.C. chapter 1606 in a manner not inconsistent with the way in which they are applied in the administration of 38 U.S.C. chapters 34 and 36.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3680, 5301(a))

(d) *Advance payments.* VA will apply the provisions of § 21.4138(a) in making advance payments to reservists.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3680)

(e) *Frequency of payment.* Except as provided in § 21.4138(a), VA shall pay educational assistance in the month following the month for which training occurs. VA may withhold payment to a reservist who is enrolled in a course not leading to a standard college degree for any month until the reservist's attendance has been reported for that month. VA may withhold final payment in all cases until it both receives certification that the reservist pursued his or her course, and makes any necessary adjustments.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3680(g))

(f) *Apportionments prohibited.* VA will not apportion educational assistance.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3680)

(Approved by the Office of Management and Budget under control number 2900–0073)

[53 FR 34740, Sept. 8, 1988, as amended at 61 FR 20729, May 8, 1996; 61 FR 29306, June 10, 1996; 61 FR 29482, June 11, 1996; 64 FR 52652, Sept. 30, 1999]

### § 21.7642 Nonduplication of educational assistance.

(a) *Payments of educational assistance shall not be duplicated.* A reservist is barred from receiving educational assistance concurrently under 10 U.S.C. Chapter 1606 and any of the following provisions of law—

(1) 38 U.S.C. ch. 30;

(2) 38 U.S.C. ch. 31;

(3) 38 U.S.C. ch. 32;

(4) 38 U.S.C. ch. 34;

(5) 38 U.S.C. ch. 35;

(6) 10 U.S.C. ch. 107;

(7) Section 903 of the Department of Defense Authorization Act, 1981;

(8) The Hostage Relief Act of 1980; or

(9) The Omnibus Diplomatic Security Act of 1986.

(Authority: 10 U.S.C. 2136(b); 38 U.S.C. 3695; sec. 705(a)(1), Pub. L. 98–525, 98 Stat. 2565, 2567; secs. 642(c), (d), Pub. L. 101–189, 103 Stat. 1457–1458)

(b) *Election of benefits.* When paragraph (a) of this section applies, the reservist must elect in writing which benefit he or she wishes to receive. The reservist may make a new election at any time, but may not elect more than once in any calendar month.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3695; Pub. L. 98–525)

(c) *Senior Reserve Officers' Training Corps scholarship program.* Educational assistance may not be provided to a reservist receiving financial assistance under 10 U.S.C. 2107 as a member of the Senior Reserve Officers' Training Corps scholarship program.

(Authority: 10 U.S.C. 16134; Pub. L. 98–525)

(d) *Nonduplication—Federal program.* Payment of educational assistance is prohibited to an otherwise eligible reservist—

(1) For a unit course or courses which are being paid for entirely or partly by the Armed Forces during any period he or she is on active duty;

(2) For a unit course or courses which are being paid for entirely or partly by the Department of Health and Human Services during any period that he or she is on active duty with the Public Health Service; or

(3) For a unit course or courses which are being paid for entirely or partly by the United States under the Government Employees' Training Act.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3681; Pub. L. 98–525)

(e) *Service Members Occupational Conversion and Training Act of 1992.* A reservist may not receive educational assistance under the Montgomery GI Bill—Selected Reserve program during

the period for which benefits are payable under the Service Members Occupational Conversion and Training Act of 1992.

(Authority: Sec. 4492(a), Pub. L. 102–484, 106 Stat. 2765–2766)

[53 FR 34740, Sept. 8, 1988, as amended at 56 FR 9628, Mar. 7, 1991; 61 FR 20729, May 8, 1996; 61 FR 29307, June 10, 1996]

### §21.7644 Overpayments.

(a) *Prevention of overpayments.* In administering benefits payable under 10 U.S.C. chapter 1606, VA will apply the provisions of §§21.4008 and 21.4009 of this part in the same manner as they are applied in the administration of 38 U.S.C. chapters 34 and 36. See §21.7633.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3690(b); Pub. L. 98–525)

(b) *Penalties are not overpayments.* The Secretary concerned may require a refund from an individual who fails to participate satisfactorily in required training as a member of the Selected Reserve. This refund is subject to waiver by the Secretary. However, this refund—

(1) Is not an overpayment for VA purposes, and

(2) Is not subject to waiver by VA under §1.957 of this chapter.

(Authority: 10 U.S.C. 16135; Pub. L. 98–525)

(c) *Liability for overpayments.* (1) The amount of the overpayment of educational assistance paid to a reservist constitutes a liability of that reservist unless—

(i) The overpayment is waived as provided in §1.957 of this chapter, or

(ii) The overpayment results from an administrative error or an error in judgment. See §21.7635(o) of this part.

(2) The amount of the overpayment of educational assistance paid to a reservist constitutes as liability of the educational institution if VA determines that the overpayment was made as the result of—

(i) Willful or negligent false certification by the educational institution, or

(ii) Willful or negligent failure to certify excessive absences from a course, or discontinuance or interruption of a course by the reservist.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3685; Pub. L. 98–525)

(d) *Waiver of recovery of overpayments.* (1) Except as stated in paragraph (b) of this section in determining whether an overpayment should be waived or recovered from a reservist, VA will apply the provisions of §1.957 of this chapter.

(2) In determining whether an overpayment should be recovered from an educational institution, VA will apply the provisions of §21.4009(a)(2), (3), (4), and (5), (b), (c), (d), (e), (f), (g), (h), (i), and (j) of this part to overpayments of educational assistance under 10 U.S.C. chapter 1606 in the same manner as they are applied to overpayments of educational assistance allowance under 38 U.S.C. chapters 34 and 36.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3685, 5302; Pub. L. 98–525)

CROSS-REFERENCE: Entitlement charges. See §21.7576(c) of this part offering training to veterans and servicemembers under 38 U.S.C. ch. 34.

[53 FR 34740, Sept. 8, 1988, as amended at 61 FR 20729, May 8, 1996]

## PURSUIT OF COURSE AND REQUIRED REPORTS

### §21.7650 Pursuit.

The reservist is entitled to educational assistance only for actual pursuant of a program of educational. Verification is accomplished by various certifications.

(Authority: 10 U.S.C. 16131(a); Pub. L. 98–525)

### §21.7652 Certification of enrollment and verification of pursuit.

As stated in §21.7640 of this part, the educational institution must certify the reservist's enrollment before he or she may receive educational assistance. Nothing in this section or in any section in Part 21 shall be construed as requiring any institution of higher learning to maintain daily attendance records for any course leading to a standard college degree.

(a) *Content of certification of entrance or reentrance.* The certification of entrance or reentrance must clearly specify:

(1) The course;

(2) The starting and ending dates of the enrollment period;

(3) The credit hours or clock hours being pursued by the reservist;

(4) The amount of tuition, fees and the cost of books, supplies and equipment charged to a reservist who is incarcerated in a Federal, State or local prison or jail for conviction of a felony; and

(5) Such other information as the Secretary may find is necessary to determine the reservist's monthly rate of educational assistance.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3482(g), 3680; Pub. L. 98–525)

(b) *Length of the enrollment period covered by the enrollment certification.* (1) Educational institutions organized on a term, quarter or semester basis generally shall report enrollment for the term, quarter, semester, ordinary school year or ordinary school year plus summer term. If the certification covers two or more terms, the educational institution will report the dates for the break between terms if a term ends and the following term does not begin in the same or the next calendar month, or if the reservist elects not to be paid for the intervals between terms. The educational institution must submit a separate enrollment certification for each term, quarter or semester when the certification is for a reservist who is incarcerated in a Federal, State or local prison or jail for conviction of a felony.

(2) Educational institutions organized on a year-round basis will report enrollment for the length of the course. The certification will include a report of the dates during which the educational institution closes for any interval designated in its approval data as breaks between school years.

(3) When a reservist enrolls in independent study leading to a standard college degree concurrently with resident training, the educational institution's certification will include—

(i) The enrollment date, and

(ii) The ending date for the period being certified. If the educational institution has not prescribed maximum time for completion of the independent study portion of the enrollment, the certification must include an ending date for the independent study based on the educational institution's estimate for completion.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3684; Pub. L. 98–525)

(c) *Verification of pursuit.* (1) A reservist who is pursuing a course leading to a standard college degree must have his or her continued enrollment in and pursuit of the course verified for the entire enrollment period. Verification of continued enrollment will be made at least once a year and in the last month of enrollment if the enrollment period ends more than 3 months after the last verification. In the case of a reservist who completed, interrupted or terminated his or her course, any communication from the reservist or other authorized person notifying the VA of the reservist's completion of a course as scheduled or an earlier termination date, will be accepted to terminate payments accordingly.

(2) The verification of pursuit will also include a report on the following items when applicable:

(i) Continued enrollment in and pursuit of the course,

(ii) Conduct and progress (See § 21.7653(c)),

(iii) Date of interruption or termination of training (See § 21.7656(a)),

(iv) Changes in number of credit hours or clock hours of attendance (See § 21.7656(a)), and

(v) Any other changes or modifications in the course as certified at enrollment.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3680(g); Pub. L. 98–525)

[52 FR 34740, Sept. 8, 1988, as amended at 61 FR 29482, June 11, 1996]

### § 21.7653 Progress, conduct, and attendance.

(a) *Satisfactory pursuit of program.* In order to receive educational assistance for pursuit of a program of education, a reservist must maintain satisfactory progress. Progress is unsatisfactory if

the reservist does not satisfactorily progress according to the regulatory prescribed standards of the educational institution he or she is attending.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3474; Pub. L. 98–525)

(b) *Satisfactory conduct.* In order to receive educational assistance for pursuit of a program of education, a reservist must maintain satisfactory conduct according to the regularly prescribed standards and practices of the educational institution in which he or she is enrolled. If the reservist will no longer be retained as a student or will not be readmitted as a student by the educational institution in which he or she is enrolled, the VA will discontinue educational assistance, unless further development establishes that the educational institution's action is retaliatory.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3474; Pub. L. 98–525)

(c) *Satisfactory attendance.* In order to receive educational assistance for pursuit of a program of education, a reservist must maintain satisfactory course attendance. VA will discontinue educational assistance if the reservist does not maintain satisfactory course attendance. Attendance is unsatisfactory if the reservist does not attend according to the regularly prescribed standards of the educational institution in which he or she is enrolled.

(Authority: 10 U.S.C. 2136(b); 38 U.S.C. 3474; sec. 705(a)(1), Pub. L. 98–525, 98 Stat. 2565, 2567; sec. 642 (c), (d), Pub. L. 101–189, 103 Stat. 1457–1458)

(d) *Reports.* At times the unsatisfactory progress, conduct, or course attendance of a reservist is caused by or results in his or her interruption or termination of training. If this occurs, the interruption or termination shall be reported in accordance with §21.7656(a). If the reservist continues in training despite making unsatisfactory progress, the fact of his or her unsatisfactory progress must be reported to VA within the time allowed by paragraphs (d)(1), (d)(2), and (d)(3) of this section.

(1) A reservist's progress may become unsatisfactory as a result of the grades he or she receives. The educational institution shall report such unsatisfactory progress to VA in time for VA to receive it before the earlier of the following dates is reached:

(i) Thirty days from the date on which the school official who is responsible for determining whether a student is making progress first receives the final grade report which establishes that the reservist is not progressing satisfactorily; or

(ii) Sixty days from the last day of the enrollment period during which the reservist earned the grades that caused him or her to meet the unsatisfactory progress standards.

(2) If the unsatisfactory progress of the reservist is caused solely by any factors other than the grades which he or she receives, the educational institution shall report the unsatisfactory progress in time for VA to receive it within 30 days of the date on which the progress of the reservist becomes unsatisfactory.

(3) The educational institution shall report the unsatisfactory conduct or attendance of the reservist to VA in time for VA to receive it within 30 days of the date on which the conduct or attendance of the reservist becomes unsatisfactory.

(e) *Reentrance after discontinuance.* In order for a reservist to receive educational assistance following discontinuance for unsatisfactory progress, conduct, or attendance, the provisions of this paragraph must be met.

(1) The reservist's subsequent reentrance into a program of education may be for the same program, for a revised program, or for an entirely different program, depending on the cause of the discontinuance and removal of that cause.

(2) A reservist may reenter following discontinuance because of unsatisfactory attendance, conduct, or progress when either of the following sets of conditions exists:

(i) The reservist resumes enrollment at the same educational institution in the same program of education and the educational institution has both approved the reservist's reenrollment and certified it to VA; or

(ii) In all other cases, VA determines that—

(A) The cause of the unsatisfactory attendance, conduct, or progress in the previous program has been removed and is not likely to recur; and

(B) The program which the reservist now proposes to pursue is suitable to his or her aptitudes, interests, and abilities.

(Authority: 10 U.S.C. 2136(b); 38 U.S.C. 3474; sec. 705(a)(1), Pub. L. 98–525, 98 Stat. 2565, 2567; sec. 642 (c), (d), Pub. L. 101–189, 103 Stat. 1457–1458)

(Approved by the Office of Management and Budget under control number 2900–0552)

[53 FR 34740, Sept. 8, 1988, as amended at 61 FR 29307, June 10, 1996]

### § 21.7654 Pursuit and absences.

Except as provided in this section, a reservist must submit a verification to VA each month of his or her enrollment during the period for which the reservist is to be paid. This verification shall be in a form prescribed by the Secretary.

(a) *Exceptions to the monthly verification requirement.* A reservist does not have to submit a monthly verification as described in the introductory text of this section when the reservist—

(1) Is enrolled in a correspondence course; or

(2) Has received an advance payment for the training completed during a month.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3680(a), (g))

(b) *Items to be reported on all monthly verifications.* (1) The monthly verification for all reservists will include a report on the following items when applicable:

(i) Continued enrollment in and actual pursuit of the course;

(ii) The date of interruption or termination of training;

(iii) Except as provided in § 21.7656(a), changes in the number of credit hours or in the number of clock hours of attendance;

(iv) Nonpunitive grades; and

(v) Any other changes or modifications in the course as certified at enrollment.

(2) The verification of enrollment must:

(i) Contain the information required for release of payment;

(ii) If required or permitted by the Secretary to be submitted on paper, be signed by the reservist on or after the final date of the reporting period, or if permitted by the Secretary to be submitted by telephone or electronically in a manner designated by the Secretary, be submitted in the form and manner prescribed by the Secretary on or after the final date of the reporting period; and

(iii) If submitted on paper, clearly show the date on which it was signed.

(c) *Additional requirements for apprenticeships and other on-job training programs.* (1) When a reservist is pursuing an apprenticeship or other on-job training, he or she must monthly certify training by reporting the number of hours worked.

(2) The information provided by the reservist must be verified by the training establishment.

(Authority: 10 U.S.C. 2136(b); 38 U.S.C. 3680(a); sec. 705(a)(1), Pub. L. 98–525, 98 Stat. 2565, 2567; sec. 642(c), (d), Pub. L. 101–189, 103 Stat. 1457–1458)

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3680(g))

(Approved by the Office of Management and Budget under control number 2900–0597)

[61 FR 29308, June 10, 1996, as amended at 65 FR 61101, Oct. 16, 2001]

### §21.7656 Other required reports.

(a) *Reports from reservists.* (1) A reservist enrolled full time in a program of education for a standard term, quarter, or semester must report without delay to VA:

(i) A change in his or her credit hours or clock hours of attendance if that change would result in less than full-time enrollment;

(ii) Any change in his or her pursuit that would result in less than full-time enrollment; and

(iii) Any interruption or termination of his or her attendance.

(2) A reservist not described in paragraph (a)(1) of this section must report without delay to VA:

(i) Any change in his or her credit hours or clock hours of attendance;

(ii) Any change in his or her pursuit; and

(iii) Any interruption or termination of his or her attendance.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3684)

(b) *Interruptions, terminations or changes in hours of credit or attendance.* When a reservist interrupts or terminates his or her training for any reason, including unsatisfactory conduct or progress, or when he or she changes the number of hours of credit or attendance, the educational institution must report this fact to VA.

(1) Except as provided in paragraph (b)(2) of this section, an educational institution must report without delay to VA each time a reservist:

(i) Interrupts or terminates his or her training for any reason; or

(ii) Changes his or her credit hours or clock hours of attendance.

(2) An educational institution does not need to report a change in a reservist's hours of credit or attendance when:

(i) The reservist is enrolled full time in a program of education for a standard term, quarter, or semester before the change; and

(ii) The reservist continues to be enrolled full time after the change.

(3) If the change in status or change in number of credit hours or clock hours of attendance occurs on a day other than one indicated by paragraph (b)(4) or (b)(5) of this section, the educational institution will initiate a report of the change in time for VA to receive it within 30 days of the date on which the change occurs.

(4) If the educational institution has certified the reservist's enrollment for more than one term, quarter or semester and the reservist interrupts his or her training at the end of a term, quarter or semester within the certified enrollment period, the educational institution shall report the change in status to VA in time for VA to receive the report within 30 days of the last officially scheduled registration date for the next term, quarter or semester.

(5) If the change in status or change in the number of hours of credit or attendance occurs during the 30 days of a drop-add period, the educational institution must report the change in status or change in the number of hours of credit or attendance to VA in time for VA to receive the report within 30 days from the last date of the drop-add period or 60 days from the first day of the enrollment period, whichever occurs first.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3684.)

(c) *Nonpunitive grades.* An educational institution may assign a nonpunitive grade for a course or subject in which the reservist is enrolled even though the reservist does not withdraw from the course or subject. When this occurs, the educational institution must report the assignment of the nonpunitive grade in time for VA to receive it before the earlier of the following dates is reached:

(1) 30 days from the date on which the educational institution assigns the grade, or

(2) 60 days from the last day of the enrollment period for which the nonpunitive grade is assigned.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3684; Pub. L. 98–525)

(Approved by the Office of Management and Budget under control numbers 2900–0612 and 2900–0597)

[53 FR 34740, Sept. 8, 1988, as amended at 65 FR 61101, Oct. 16, 2001]

## §21.7658 False, late, or missing reports.

(a) *Reservist.* Payments may not be based on false or misleading statements, claims or reports. VA will apply the provisions of §§21.4006 and 21.4007 of this part to a reservist or any other person who submits false or misleading claims, statements or reports in connection with benefits payable under 10 U.S.C. chapter 1606 in the same manner as they are applied to people who make similar false or misleading claims for benefits payable under 38 U.S.C. chapter 34 or 36.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3680, 3690, 6103; Pub. L. 98–525)

(b) *Educational institution or training establishment.* (1) VA may hold an educational institution liable for overpayments which result from a willful or negligent:

(i) Failure of the educational institution to report, excessive absences from a course or discontinuance or interruption of a course by a reservist; or

(ii) False certification by the educational institution. See § 21.7644(c).

(2) If an educational institution or training establishment willfully and knowingly submits a false report or certification, VA may disapprove that institution's or establishment's courses for further enrollments and may discontinue educational assistance to reservists already enrolled. In doing so, VA will apply §§ 21.4210 through 21.4216.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3690)

[53 FR 34740, Sept. 8, 1988, as amended at 61 FR 20729, May 8, 1996; 63 FR 35837, July 1, 1998]

### § 21.7659 Reporting fee.

In determining the amount of the reporting fee payable to educational institutions for furnishing required reports, VA will apply the provisions of § 21.4206.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3684)

[62 FR 55762, Oct. 28, 1997]

COURSE ASSESSMENT

### § 21.7670 Measurement of courses leading to a standard, undergraduate college degree.

Except as provided in § 21.7672, VA will measure a reservist's courses as stated in this section.

(a) *Fourteen semester hours are full time.* Unless 12 or 13 semester hours are full time as provided in paragraphs (b) and (c) of this section, or unless paragraphs (d) or (e) of this section apply to measurement of the reservist's enrollment VA will measure a reservist's enrollment as follows:

(1) 14 or more semester hours or the equivalent are full-time training,

(2) 10 through 13 semester hours or the equivalent are three-quarter-time training;

(3) 7 through 9 semester hours or the equivalent are half-time training; and

(4) 1 through 6 semester hours or the equivalent are less than half-time training.

(Authority: 10 U.S.C. 16131(b), 38 U.S.C. 3688(a); Pub. L. 98–525, Pub. L. 100–689)(Nov. 18, 1988)

(b) *Thirteen semester hours are full time.* (1) VA will consider that 13 semester hours or the equivalent are full-time training when the educational institution certifies that all undergraduate students enrolled for 13 semester hours or the equivalent are

(i) Charged full-time tuition, or

(ii) Considered full-time for other administrative purposes.

(2) When 13 semester hours or the equivalent are full-time training—

(i) 10 through 12 semester hours or the equivalent are three-quarter-time training;

(ii) 7 through 9 semester hours or the equivalent are half-time training; and

(iii) 1 through 6 semester hours or the equivalent are less than half-time training.

(Authority: 10 U.S.C. 16131(b), 38 U.S.C. 3688(a); Pub. L. 98–525, Pub. L. 100–689)(Nov. 18, 1988)

(c) *Twelve semester hours are full time.* (1) VA will consider that 12 semester hours or the equivalent are full-time training when the educational institution certifies that all undergraduate students enrolled for 12 semester hours or the equivalent are—

(i) Charged full-time tuition, or

(ii) Considered full time for other administrative purposes.

(2) When 12 semester hours or the equivalent are full-time training—

(i) 9 through 11 semester hours or the equivalent are three-quarter-time training;

(ii) 6 through 8 semester hours or the equivalent are half-time training; and

(iii) 1 through 5 semester hours or the equivalent are less than half-time training.

(Authority: 10 U.S.C. 16131(b), 38 U.S.C. 3688(a); Pub. L. 98–525, Pub. L. 100–689)

(d) *Other requirements.* Notwithstanding any other provision of this

section, in administering benefits payable under 10 U.S.C. chapter 1606, VA shall apply the provisions of §21.4272.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3688(b))

[53 FR 34740, Sept. 8, 1988, as amended at 56 FR 9629, Mar. 7, 1991; 57 FR 57107, Dec. 3, 1992; 61 FR 29308, June 10, 1996; 62 FR 55762, Oct. 28, 1997]

### §21.7672 Measurement of courses not leading to a standard college degree.

(a) *Overview.* (1) Courses not leading to a standard college degree may be measured on either a clock-hour basis, or a credit-hour basis or a combination of both. Factors which the Department of Veterans Affairs must include in determining the proper basis for measurement include whether the courses are accredited; whether the course could be credited toward a standard college degree; and whether the course is offered on a standard quarter or semester-hour basis.

(2) In determining which is the correct basis for measuring a reservist's enrollment, VA will first examine whether credit-hour measurement is appropriate, as provided in paragraph (b) of this section.

(3) If it is not appropriate to measure a reservist's enrollment on a credit-hour basis, VA will measure the enrollment on a clock-hour basis as described in paragraph (c) of this section.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3688(b))

(b) *Credit-hour measurement—standard method.* (1) When all the conditions of paragraph (b)(1) of this section are met, the Department of Veterans Affairs will—

(i) Measure the reservist's enrollment in the same manner as collegiate undergraduate courses are measured in §21.7670 (a), (b), and (c).

(ii) Apply the provisions of §21.4272(g) if one or more of the reservist's courses are offered during a nonstandard term.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3688)

(2) For new enrollments beginning on or after July 1, 1993, when a course is offered by an institution of higher learning in residence on a standard quarter- or semester-hour basis, VA will measure a reservist's enrollment in a course not leading to a standard college degree on the same credit-hour basis as courses leading to a standard undergraduate degree, as provided in §21.7670.

(3) For new enrollments beginning on or after July 1, 1993, when a course is offered in residence on a standard quarter- or semester-hour basis by an educational institution which is not an institution of higher learning, VA also will measure on a credit-hour basis as provided in §21.7670 a reservist's enrollment in a course not leading to a standard college degree, provided that the educational institution requires at least the same number of clock-hours of attendance as required in paragraph (c) of this section. If the educational institution does not require at least the same number of clock-hours of attendance as required in paragraph (c) of this section, VA will not apply the provisions of §21.7670, but will measure the course according to paragraph (c) of this section.

(4) VA will apply the provisions of §21.4272(g) to new enrollments beginning on or after July 1, 1993, if one or more of the reservist's courses are offered during a nonstandard term.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3688(a)(7))

(c) *Clock-hour measurement.* The provisions of this paragraph apply to all enrollments in courses not leading to a standard college degree. If VA concludes that the courses in which a reservist is enrolled do not qualify for credit-hour measurement, VA shall measure those courses as follows. (Supervised study shall be excluded from measurement of all courses to which this paragraph applies).

(1) If shop practice is an integral part of the course—

(i) Full-time training shall be 22 clock hours attendance with not more than 2½ hours rest period allowance;

(ii) Three-quarter-time training shall be 16 through 21 clock hours attendance with not more than 2 hours rest period allowance;

(iii) Half-time training shall be 11 through 15 clock hours attendance with

not more than 1¼ hours rest period allowance; and

(iv) One-quarter-time training shall be 1 through 10 clock hours attendance. For attendance of 6 through 10 clock hours, there shall be not more than one quarter hour rest period allowance. For attendance of 1 through 5 clock hours, there shall be no rest period allowance.

(2) If theory and class instruction predominates—

(i) Full-time training is 18 clock hours net instruction;

(ii) Three-quarter-time training is 13 through 17 clock hours net instruction;

(iii) Half-time training is 9 through 12 clock hours net instruction; and

(iv) Less than half-time training is 1 through 8 clock hours net instruction. In measuring net instruction for this paragraph there will be included customary intervals not to exceed 10 minutes between classes: however, supervised study must be excluded.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3688)

[56 FR 9629, Mar. 7, 1991, as amended at 57 FR 46985, Oct. 14, 1992; 61 FR 29308, June 10, 1996; 61 FR 29482, June 11, 1996]

### § 21.7673 Measurement of concurrent enrollments.

(a) *Conversion of units of measurement required.* Where a reservist enrolls concurrently in courses offered by two schools and the standards for measurement of the courses pursued concurrently in the two schools are different, the Department of Veterans Affairs will measure the reservist's enrollment by converting the units of measurement for courses in the second school to their equivalent in units of measurement required for the courses in the program of education which the reservist is pursuing at the primary institution. This conversion will be accomplished as follows:

(1) If VA measures the course at the primary institution on a credit-hour basis (including a course which does not lead to a standard college degree, which is being measured on a credit-hour basis as provided in § 21.7672(b)), and VA measures the courses at the second school on a clock-hour basis, the clock hours will be converted to credit hours.

(2) If VA measures the courses pursued at the primary institution on a clock-hour basis, and VA measures the courses pursued at the second school on a credit-hour basis, including courses which qualify for credit-hour measurement on the basis of § 21.7672(b), VA will convert the credit hours to clock hours to determine the reservist's training time.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3688)

(b) *Conversion of clock hours to credit hours.* If the provisions of paragraph (a) of this section require the Department of Veteran Affairs to convert clock hours, it will do so by—

(1) Dividing the number of credit hours which the Department of Veterans Affairs considers to be full-time at the educational institution whose courses are measured on a credit-hour basis by the number of clock hours which are full-time at the educational institution whose courses are measured on a clock-hour basis; and

(2) Multiplying each clock hour of attendance by the decimal determined in paragraph (b)(1) of this section. The Department of Veterans Affairs will drop all fractional hours.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3688)

(c) *Conversion of credit hours to clock hours.* If the provisions of paragraph (a) of this section require the Department of Veterans Affairs to convert credit hours to clock hours, it will do so by—

(1) Dividing the number of clock hours which the Department of Veterans Affairs considers to be full-time at the educational institution whose courses are measured on a clock-hour basis by the number of credit hours which are full-time at the educational institution whose courses are measured on a credit-hour basis; and

(2) Multiplying each credit hour by the number determined in paragraph (b)(1) of this section. The Department of Veterans Affairs will drop all fractional hours.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3688)

(d) *Standards for measurement the same.* If VA measures the courses pursued at both institutions on either a clock-hour basis or a credit-hour basis,

VA will measure the reservist's enrollment by adding together the units of measurement for the courses in the second school and the units of measurement for courses in the primary institution. The standard for full time will be the full-time standard for the courses at the primary institution.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3688)

[56 FR 9632, Mar. 7, 1991, as amended at 61 FR 29310, June 10, 1996]

### § 21.7674 Measurement of practical training courses.

(a) *Nursing courses.* (1) Courses for the objective of registered nurse or registered professional nurse will be measured on the basis of credit hours or clock hours of attendance, whichever is appropriate. The clock hours of attendance may include academic class time, clinical training, and supervised study periods.

(2) Courses offered by institutions of higher learning which lead to the objective of practical nurse, practical trained nurse, or licensed practical nurse will be measured on credit hours or clock hours of attendance per week whichever is appropriate.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3688; Pub. L. 98–525)

(b) *Medical and dental assistants courses for VA.* Programs approved in accordance with the provisions of § 21.7720(b)(9) will be measured on a clock-hour basis as provided in § 21.7672. However, the program will be regarded as full-time institutional training, provided the combined total of the classroom and other formal instruction portion of the program and the on-the-job portion of the program requires 30 or more clock hours of attendance per week.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3688; Pub. L. 98–525)

(c) *Other practical training courses.* These courses will be measured in semester hours of credit or clock hours of attendance per week, whichever is appropriate.

(Authority: 10 U.S.C. 16136(b) 38 U.S.C. 3688; Pub. L. 98–525

[53 FR 34740, Sept. 8, 1988, as amended at 61 FR 29310, June 10, 1996]

## STATE APPROVING AGENCIES

### § 21.7700 State approving agencies.

VA and State approving agencies have the same general responsibilities for approving courses for training under 38 U.S.C. chapter 1606 (or 10 U.S.C. chapter 106 as in effect before December 1, 1994) as they do for approving courses for training under 38 U.S.C. chapter 30 or 32. Accordingly, in administering 10 U.S.C. chapter 1606 (or 10 U.S.C. chapter 106 as in effect before December 1, 1994), VA will apply the provisions of the following sections:

(a) § 21.4150—Designation,

(b) § 21.4151—Cooperation,

(c) § 21.4152—Control by agencies of the United States,

(d) § 21.4153—Reimbursement of expenses,

(e) Section 21.4154—Report of activities,

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3670 through 3676)

[53 FR 34740, Sept. 8, 1988, as amended at 55 FR 48844, Nov. 23, 1990; 61 FR 29310, June 10, 1996]

## APPROVAL OF COURSES

### § 21.7720 Course approval.

(a) *Courses must be approved.* (1) A course of education offered by an educational institution must be approved by—

(i) The State approving agency for the State in which the educational institution is located; or

(ii) The State approving agency which has appropriate approval authority; or

(iii) VA, where appropriate.

(2) In determining when approval authority rests with the State approving agency or VA, the provisions of § 21.4250 (b)(3), (c)(2)(i), (c)(2)(ii), (c)(2)(iii), and (c)(2)(iv) apply.

(3) A course approved under 38 U.S.C. chapter 36 is approved for purposes of 10 U.S.C. chapter 1606 (or 10 U.S.C.

chapter 106 as in effect before December 1, 1994).

(Authority: 10 U.S.C. 2131(c), 2136(b); 16131(c)(1), 16136(b); 38 U.S.C. 3672; sec. 705(a)(1), Pub. L. 98–525, 98 Stat. 2565, 2567; sec. 642, Pub. L. 101–189, 103 Stat. 1456–1458)

(b) *Course approval criteria.* In administering benefits payable under 10 U.S.C. chapter 1606 (or 10 U.S.C. chapter 106 as in effect before December 1, 1994), VA and, where appropriate, the State approving agencies, shall apply the following sections:

(1) § 21.4250 (except paragraph (c)(1))—Approval of courses;

(2) § 21.4251—Period of operation of course;

(3) § 21.4253 (except those portions of paragraphs (b) and (f) that permit approval of a course leading to a high school diploma)—Accredited courses;

(4) § 21.4254—Nonaccredited courses;

(5) § 21.4255—Refund policy; nonaccredited courses;

(6) § 21.4258—Notice of approval;

(7) § 21.4259—Suspension or disapproval;

(8) § 21.4260—Courses in foreign countries;

(9) § 21.4261—Apprentice courses;

(10) § 21.4262—Other training on-the-job courses;

(11) § 21.4265—Practical training approved as institutional training or on-job training;

(12) § 21.4266—Courses offered at subsidiary branches or extensions; and

(13) § 21.4267—Approval of independent study.

(Authority: 10 U.S.C. 16131(c)(1), 16136(b); 38 U.S.C. 3670 through 3676)

[61 FR 29310, June 10, 1996, as amended at 62 FR 55762, Oct. 28, 1997]

### § 21.7722 Courses and enrollments which may not be approved.

(a) The Secretary of Veterans Affairs may not approve an enrollment by a reservist in, and a State approving agency may not approve for training under 10 U.S.C. chapter 1606 (or 10 U.S.C. chapter 106 as in effect before December 1, 1994):

(1) A bartending or personality development course;

(2) A course offered by radio;

(3) Except for enrollments in a nurse's aide course approved pursuant to § 21.4253(a)(5), an institutional course for the objective of nurse's aide or a nonaccredited nursing course which does not meet the licensing requirements in the State where the course is offered; or

(4) Effective October 29, 1992, a nonaccredited course or unit subject offered entirely or partly by independent study. However, see §§ 21.7620(c) and 21.7622(f) concerning payment of educational assistance to reservists enrolled in such a course.

(Authority: 10 U.S.C. 16131(c)(1), 16136(b); 38 U.S.C. 3452)

(b) A State approving agency (or VA when acting as a State approving agency) may approve the following courses for training under 10 U.S.C. chapter 1606 (or 10 U.S.C. chapter 106 as in effect before December 1, 1994), but VA may not approve an enrollment in any of these courses by a reservist who is limited in the types of courses he or she may pursue, as provided in § 21.7540 (b)(2) and (b)(3):

(1) A correspondence course;

(2) A cooperative course;

(3) An apprenticeship or other on-job training program;

(4) A nursing course offered by an autonomous school of nursing;

(5) A medical or dental specialty course not offered by an institution of higher learning;

(6) A refresher, remedial, or deficiency course; or

(7) A course or combination of courses consisting solely of independent study.

(Authority: 10 U.S.C. 2131(c), 2136(b), 16131(c)(1), 16136(b); 38 U.S.C. 3670 through 3676; sec. 705(a)(1), Pub. L. 98–525, 98 Stat. 2565, 2567; sec. 642, Pub. L. 101–189, 103 Stat. 1456–1458)

[61 FR 29310, June 10, 1996]

## ADMINISTRATIVE

### § 21.7801 Delegation of authority.

(a) *General delegation of authority.* Except as otherwise provided, authority is delegated to the Under Secretary for Benefits of VA, and to supervisory or

adjudication personnel within the jurisdiction of the Education Service of VA designated by the Under Secretary for Benefits to make findings and decisions under 10 U.S.C. chapter 1606 and the applicable regulations, precedents and instructions concerning the program authorized by that chapter to the extent that the program is administered by VA.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 512(a); Pub. L. 98–525)

(b) *Other delegations of authority.* In administering benefits payable under 10 U.S.C. chapter 1606, VA shall apply §21.4001(b), (c)(1), (2), and (3) (in part), and (f) in the same manner as those paragraphs are applied in the administration of 38 U.S.C. chapter 34.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 512(a); 3696; Pub. L. 98–525)

[53 FR 34740, Sept. 8, 1988, as amended at 61 FR 20729, May 8, 1996; 61 FR 29483, June 11, 1996]

### §21.7802 Finality of decisions.

(a) *Agency decisions generally are binding.* The decision of the VA facility of original jurisdiction on which an action is based—

(1) Will be final,

(2) Will be binding upon all facilities of VA as to conclusions based on evidence on file at that time, and

(3) Will not be subject to revision on the same factual grounds except by duly constituted appellate authorities or except as provided in §21.7803. (See §§ 19.192 and 19.193 of this chapter).

(Authority: 38 U.S.C. 511)

(b) *Decisions of an Activity within the VA.* Current determinations of pertinent elements of eligibility for a program of education made by a VA adjudicative activity by application of the same criteria and based on the same facts are binding one upon the other in the absence of clear and unmistakable error.

(Authority: 38 U.S.C. 511)

(c) *Determinations of satisfactory participation.* A determination made by a competent military or naval authority or by the Coast Guard as to whether or not an individual is participating satisfactorily in required training as a member of the Selected Reserve is binding upon VA.

(Authority: 10 U.S.C. 16134; Pub. L. 98–525)

[53 FR 34740, Sept. 8, 1988, as amended at 61 FR 29483, June 11, 1996]

### §21.7803 Revision of decisions.

The revision of a decision on which an action was predicated is subject to the following sections:

(a) Clear and unmistakable error, §3.105(a) of this chapter; and

(b) Difference of opinion, §3.105(b) of this chapter.

(Authority: 38 U.S.C. 511)

### §21.7805 Conflicting interests.

In administering benefits payable under 10 U.S.C. chapter 1606, VA will apply the provisions of §21.4005 in the same manner as they are applied in the administration of 38 U.S.C. chapters 34 and 36.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3683; Pub. L. 98–525)

[53 FR 34740, Sept. 8, 1988, as amended at 61 FR 20729, May 8, 1996; 61 FR 29483, June 11, 1996]

### §21.7807 Examination of records.

In administering benefits payable under 10 U.S.C. chapter 1606, VA will apply the provisions of §21.4209 in the same manner as they are applied in the administration of 38 U.S.C. chapters 34 and 36.

(Authority: 10 U.S.C. 16136(b), 38 U.S.C. 3690; Pub. L. 98–525)

[53 FR 34740, Sept. 8, 1988, as amended at 61 FR 20729, May 8, 1996]

## Subpart M—Vocational Training and Rehabilitation for Certain Children of Vietnam Veterans—Spina Bifida and Covered Birth Defects

AUTHORITY: 38 U.S.C. 101, 501, 512, 1151 note, 1802, 1804–1805, 1811, 1811 note, 1812, 1814, 1816, 1821–1824, 5112, unless otherwise noted.

SOURCE: 67 FR 72565, Dec. 6, 2002, unless otherwise noted.

GENERAL

### § 21.8010 Definitions and abbreviations.

(a) *Program-specific definitions and abbreviations.* For the purposes of this subpart:

*Covered birth defect* means the same as defined at § 3.815(c)(3) of this title.

*Eligible child* means, as appropriate, either an *individual* as defined at § 3.814(c)(2) of this title who suffers from spina bifida, or an *individual* as defined at § 3.815(c)(2) of this title who has a covered birth defect other than a birth defect described in § 3.815(a)(2).

*Employment assistance* means employment counseling, placement and post-placement services, and personal and work adjustment training.

*Institution of higher education* has the same meaning that § 21.4200 provides for the term *institution of higher learning.*

*Program of employment services* means the services an eligible child may receive if the child's entire program consists only of employment assistance.

*Program participant* means an eligible child who, following an evaluation in which VA finds the child's achievement of a vocational goal is reasonably feasible, elects to participate in a vocational training program under this subpart.

*Spina bifida* means the same as defined at § 3.814(c)(3) of this title.

*Vietnam veteran* means, in the case of a child suffering from spina bifida, the same as defined at § 3.814(c)(1) or § 3.815(c)(1) of this title and, in the case of a child with a covered birth defect, the same as defined at § 3.815(c)(1) of this title.

*Vocational training program* means the vocationally oriented training services, and assistance, including placement and post-placement services, and personal and work-adjustment training that VA finds necessary to enable an eligible child to prepare for and participate in vocational training or employment. A vocational training program may include a program of education offered by an institution of higher education only if the program is predominantly vocational in content.

*VR&E* refers to the Vocational Rehabilitation and Employment activity (usually a division) in a Veterans Benefits Administration regional office, the staff members of that activity in the regional office or in outbased locations, and the services that activity provides.

(Authority: 38 U.S.C. 101, 1802, 1804, 1811–1812, 1814, 1821)

(b) *Other terms and abbreviations.* The following terms and abbreviations have the same meaning or explanation that § 21.35 provides:

(1) CP (Counseling psychologist);
(2) Program of education;
(3) Rehabilitation facility;
(4) School, educational institution, or institution;
(5) Training establishment;
(6) Vocational goal;
(7) VRC (Vocational rehabilitation counselor); and
(8) Workshop.

(Authority: 38 U.S.C. 1804, 1811, 1814, 1821)

### § 21.8012 Vocational training program for certain children of Vietnam veterans—spina bifida and covered birth defects.

VA will provide an evaluation to an eligible child to determine the child's potential for achieving a vocational goal. If this evaluation establishes that it is feasible for the child to achieve a vocational goal, VA will provide the child with the vocational training, employment assistance, and other related rehabilitation services authorized by this subpart that VA finds the child needs to achieve a vocational goal, including employment.

(Authority: 38 U.S.C. 1804, 1812, 1814)

### § 21.8014 Application.

(a) *Filing an application.* To participate in a vocational training program, the child of a Vietnam veteran (or the child's parent or guardian, an authorized representative, or a Member of Congress acting on behalf of the child) must file an application. An application is a request for an evaluation of the feasibility of the child's achievement of a vocational goal and, if a CP or VRC determines that achievement of a vocational goal is feasible, for participation in a vocational training program. The application may be in any form, but it must:

(1) Be in writing over the signature of the applicant or the person applying on the child's behalf;

(2) Provide the child's full name, address, and VA claim number, if any, and the parent Vietnam veteran's full name and Social Security number or VA claim number, if any; and

(3) Clearly identify the benefit sought.

(Authority: 38 U.S.C. 1804(a), 1822, 5101)

(b) *Time for filing.* For a child claiming eligibility based on having spina bifida, an application under this subpart may be filed at any time after September 30, 1997. For a child claiming eligibility based on a covered birth defect, an application under this subpart may be filed at any time after November 30, 2001. (The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0579)

(Authority: 38 U.S.C. 1804, 1811, 1811 note, 1812, 1814, 1821)

### §21.8016 Nonduplication of benefits.

(a) *Election of benefits—chapter 35.* An eligible child may not receive benefits concurrently under 38 U.S.C. chapter 35 and under this subpart. If the child is eligible for both benefits, he or she must elect in writing which benefit to receive.

(Authority: 38 U.S.C. 1804(e)(1), 1814, 1824)

(b) *Reelections of benefits—chapter 35.* An eligible child receiving benefits under this subpart or under 38 U.S.C. chapter 35 may change his or her election at any time. A reelection between benefits under this subpart and under 38 U.S.C. chapter 35 must be prospective, however, and may not result in an eligible child receiving benefits under both programs for the same period of training.

(Authority: 38 U.S.C. 1804(e)(1), 1814, 1824)

(c) *Length of benefits under multiple programs—chapter 35.* The aggregate period for which an eligible child may receive assistance under this subpart and under 38 U.S.C. chapter 35 together may not exceed 48 months of full-time training or the part-time equivalent.

(Authority: 38 U.S.C. 1804(e)(2), 1814)

(d) *Nonduplication of benefits under 38 U.S.C. 1804 and 1814.* An eligible child may only be provided one program of vocational training under this subpart.

(Authority: 38 U.S.C. 1804, 1814, 1824)

BASIC ENTITLEMENT REQUIREMENTS

### §21.8020 Entitlement to vocational training and employment assistance.

(a) *Basic entitlement requirements.* Under this subpart, for an eligible child to receive vocational training, employment assistance, and related rehabilitation services and assistance to achieve a vocational goal (to include employment), the following requirements must be met:

(1) A CP or VRC must determine that achievement of a vocational goal by the child is reasonably feasible; and

(2) The child and VR&E staff members must work together to develop and then agree to an individualized written plan of vocational rehabilitation identifying the vocational goal and the means to achieve this goal.

(Authority: 38 U.S.C. 1804(b), 1814)

(b) *Services and assistance.* An eligible child may receive the services and assistance described in §21.8050(a). The following sections in subpart A of this part apply to the provision of these services and assistance in a manner comparable to their application for a veteran under the 38 U.S.C. chapter 31 program:

(1) Section 21.250(a) and (b)(2);

(2) Section 21.252;

(3) Section 21.254;

(4) Section 21.256 (not including paragraph (e)(2));

(5) Section 21.257; and

(6) Section 21.258.

(Authority: 38 U.S.C. 1804, 1814)

(c) *Requirements to receive employment services and assistance.* VA will provide employment services and assistance under paragraph (b) of this section only if the eligible child:

(1) Has achieved a vocational objective;

(2) Has voluntarily ceased vocational training under this subpart, but the

case manager finds the child has attained sufficient skills to be employable; or

(3) VA determines during evaluation that the child already has the skills necessary for suitable employment and does not need additional training, but to secure suitable employment the child does need the employment assistance that paragraph (b) of this section describes.

(Authority: 38 U.S.C. 1804, 1814)

(d) *Additional employment services and assistance.* If an eligible child has received employment assistance and obtains a suitable job, but VA later finds the child needs additional employment services and assistance, VA may provide the child with these services and assistance if, and to the extent, the child has remaining program entitlement.

(Authority: 38 U.S.C. 1804, 1814)

(e) *Program entitlement usage*—(1) *Basic entitlement period.* An eligible child will be entitled to receive 24 months of full-time training, services, and assistance (including employment assistance) or the part-time equivalent, as part of a vocational training program.

(2) *Extension of basic entitlement period.* VA may extend the basic 24-month entitlement period, not to exceed another 24 months of full-time program participation, or the part-time equivalent, if VA determines that:

(i) The extension is necessary for the child to achieve a vocational goal identified before the end of the basic 24-month entitlement period; and

(ii) The child can achieve the vocational goal within the extended period.

(3) *Principles for charging entitlement.* VA will charge entitlement usage for training, services, or assistance (but not the initial evaluation, as described in § 21.8032) furnished to an eligible child under this subpart on the same basis as VA would charge for similar training, services, or assistance furnished a veteran in a vocational rehabilitation program under 38 U.S.C. chapter 31. VA may charge entitlement at a half-time, three-quarter-time, or full-time rate based upon the child's training time using the rate-of-pursuit criteria in § 21.8310. The provisions concerning reduced work tolerance under § 21.312, and those relating to less-than-half-time training under § 21.314, do not apply under this subpart.

(Authority: 38 U.S.C. 1804, 1814)

### § 21.8022 Entry and reentry.

(a) *Date of program entry.* VA may not enter a child into a vocational training program or provide an evaluation or any training, services, or assistance under this subpart before the date VA first receives an application for a vocational training program filed in accordance with § 21.8014.

(Authority: 38 U.S.C. 1151 note, 1804, 1811, 1811 note, 1812, 1814)

(b) *Reentry.* If an eligible child interrupts or ends pursuit of a vocational training program and VA subsequently allows the child to reenter the program, the date of reentrance will accord with the facts, but may not precede the date VA receives an application for the reentrance.

(Authority: 38 U.S.C. 1804, 1814, 1822)

EVALUATION

### § 21.8030 Requirement for evaluation of child.

(a) *Children to be evaluated.* The VR&E Division will evaluate each child who:

(1) Applies for a vocational training program; and

(2) Has been determined to be an eligible child as defined in § 21.8010.

(Authority: 38 U.S.C. 1804(a), 1814)

(b) *Purpose of evaluation.* The evaluation has two purposes:

(1) To ascertain whether achievement of a vocational goal by the child is reasonably feasible; and

(2) If a vocational goal is reasonably feasible, to develop an individualized plan of integrated training, services, and assistance that the child needs to prepare for and participate in vocational training or employment.

(Authority: 38 U.S.C. 1804, 1814)

### § 21.8032 Evaluations.

(a) *Scope and nature of evaluation.* The scope and nature of the evaluation

under this program will be comparable to an evaluation of the reasonable feasibility of achieving a vocational goal for a veteran under 38 U.S.C. chapter 31 and §§21.50(b)(5) and 21.53(b) and (d).

(Authority: 38 U.S.C. 1804(a), 1814)

(b) *Specific services to determine the reasonable feasibility of achieving a vocational goal.* As a part of the evaluation of reasonable feasibility of achieving a vocational goal, VA may provide the following specific services, as appropriate:

(1) Assessment of feasibility by a CP or VRC;

(2) Review of feasibility assessment and of need for special services by the Vocational Rehabilitation Panel;

(3) Provision of medical, testing, and other diagnostic services to ascertain the child's capacity for training and employment; and

(4) Evaluation of employability by professional staff of an educational or rehabilitation facility, for a period not to exceed 30 days.

(Authority: 38 U.S.C. 1804(a), 1814)

(c) *Responsibility for evaluation.* A CP or VRC will make all determinations as to the reasonable feasibility of achieving a vocational goal.

(Authority: 38 U.S.C. 1804(a), (b), 1814)

SERVICES AND ASSISTANCE TO PROGRAM PARTICIPANTS

**§21.8050 Scope of training, services, and assistance.**

(a) *Allowable training, services, and assistance.* VA may provide to vocational training program participants:

(1) Vocationally oriented training, services, and assistance, to include:

(i) Training in an institution of higher education if the program is predominantly vocational; and

(ii) Tuition, fees, books, equipment, supplies, and handling charges.

(2) Employment assistance including:

(i) Vocational, psychological, employment, and personal adjustment counseling;

(ii) Services to place the individual in suitable employment and post-placement services necessary to ensure satisfactory adjustment in employment; and

(iii) Personal adjustment and work adjustment training.

(3) Vocationally oriented independent living services only to the extent that the services are indispensable to the achievement of the vocational goal and do not constitute a significant portion of the services to be provided.

(4) Other vocationally oriented services and assistance of the kind VA provides veterans under the 38 U.S.C. chapter 31 program, except as paragraph (c) of this section provides, that VA determines the program participant needs to prepare for and take part in vocational training or in employment.

(Authority: 38 U.S.C. 1804(c), 1814)

(b) *Vocational training program.* VA will provide either directly or by contract, agreement, or arrangement with another entity, and at no cost to the beneficiary, the vocationally oriented training, other services, and assistance that VA approves for the individual child's program under this subpart. Authorization and payment for approved services will be made in a comparable manner to that VA provides for veterans under the 38 U.S.C. chapter 31 program.

(Authority: 38 U.S.C. 1804(c), 1814)

(c) *Prohibited services and assistance.* VA may not provide to a vocational training program participant any:

(1) Loan;

(2) Subsistence allowance;

(3) Automobile adaptive equipment;

(4) Training at an institution of higher education in a program of education that is not predominantly vocational in content;

(5) Employment adjustment allowance;

(6) Room and board (other than for a period of 30 days or less in a special rehabilitation facility either for purposes of an extended evaluation or to improve and enhance vocational potential);

(7) Independent living services, except those that are incidental to the pursuit of the vocational training program.

(Authority: 38 U.S.C. 1804(c), 1814)

DURATION OF VOCATIONAL TRAINING

**§ 21.8070 Basic duration of a vocational training program.**

(a) *Basic duration of a vocational training program.* The duration of a vocational training program, as paragraphs (e)(1) and (e)(2) of § 21.8020 provide, may not exceed 24 months of full-time training, services, and assistance or the part-time equivalent, except as § 21.8072 allows.

(Authority: 38 U.S.C. 1804(d), 1814)

(b) *Responsibility for estimating the duration of a vocational training program.* While preparing the individualized written plan of vocational rehabilitation, the CP or VRC will estimate the time the child needs to complete a vocational training program.

(Authority: 38 U.S.C. 1804(c), 1814)

(c) *Duration and scope of training must meet general requirements for entry into the selected occupation.* The child will receive training, services, and assistance, as § 21.8120 describes, for a period that VA determines the child needs to reach the level employers generally recognize as necessary for entry into employment in a suitable occupational objective.

(Authority: 38 U.S.C. 1804(c), 1814)

(d) *Approval of training beyond the entry level.* To qualify for employment in a particular occupation, the child may need training that exceeds the amount a person generally needs for employment in that occupation. VA will provide the necessary additional training under one or more of the following conditions:

(1) Training requirements for employment in the child's vocational goal in the area where the child lives or will seek employment exceed those job seekers generally need for that type of employment;

(2) The child is preparing for a type of employment in which he or she will be at a definite disadvantage in competing with nondisabled persons and the additional training will offset the competitive disadvantage;

(3) The choice of a feasible occupation is limited, and additional training will enhance the child's employability in one of the feasible occupations; or

(4) The number of employment opportunities within a feasible occupation is restricted.

(Authority: 38 U.S.C. 1804(c), 1814)

(e) *Estimating the duration of the training period.* In estimating the length of the training period the eligible child needs, the CP or VRC must determine that:

(1) The proposed vocational training would not normally require a person without a disability more than 24 months of full-time pursuit, or the part-time equivalent, for successful completion; and

(2) The program of training and other services the child needs, based upon VA's evaluation, will not exceed 24 months or the part-time equivalent. In calculating the proposed program's length, the CP or VRC will follow the procedures in § 21.8074(a).

(Authority: 38 U.S.C. 1804(d), 1814)

(f) *Required selection of an appropriate vocational goal.* If the total period the child would require for completion of an initial vocational training program in paragraph (e) of this section is more than 24 months, or the part-time equivalent, the CP or VRC must work with the child to select another suitable initial vocational goal.

(Authority: 38 U.S.C. 1804(d)(2), 1814)

**§ 21.8072 Authorizing training, services, and assistance beyond the initial individualized written plan of vocational rehabilitation.**

(a) *Extension of the duration of a vocational training program.* VA may authorize an extension of a vocational training program when necessary to provide additional training, services, and assistance to enable the child to achieve the vocational or employment goal identified before the end of the child's basic entitlement period, as stated in the individualized written plan of vocational rehabilitation under § 21.8080. A change from one occupational objective to another in the same field or occupational family meets the criterion for prior identification in the individualized written plan of vocational rehabilitation.

(Authority: 38 U.S.C. 1804(d)(2), (e)(2), 1814)

(b) *Extensions for prior participants in the program.* (1) Except as paragraph (b)(2) of this section provides, VA may authorize additional training, limited to the use of remaining program entitlement including any allowable extension, for an eligible child who previously participated in vocational training under this subpart. The additional training must:

(i) Be designed to enable the child to complete the prior vocational goal or a different vocational goal; and

(ii) Meet the same provisions as apply to training for new participants.

(2) An eligible child who has previously achieved a vocational goal in a vocational training program under this subpart may not receive additional training under paragraph (b)(1) of this section unless a CP or VRC sets aside the child's achievement of that vocational goal under §21.8284.

(Authority: 38 U.S.C. 1804(b) through (e), 1814)

(c) *Responsibility for authorizing a program extension.* A CP or VRC may approve extensions of the vocational training program the child is pursuing up to the maximum program limit of 48 months if the CP or VRC determines that the child needs the additional time to successfully complete training and obtain employment, and the following conditions are met:

(1) The child has completed more than half of the planned training; and

(2) The child is making satisfactory progress.

(Authority: 38 U.S.C. 1804(d)(2), 1814)

### §21.8074 Computing the period for vocational training program participation.

(a) *Computing the participation period.* To compute the number of months and days of an eligible child's participation in a vocational training program:

(1) Count the number of actual months and days of the child's:

(i) Pursuit of vocational education or training;

(ii) Receipt of extended evaluation-type services and training, or services and training to enable the child to prepare for vocational training or employment, if a veteran in a 38 U.S.C. chapter 31 program would have received a subsistence allowance while receiving the same type of services and training; and

(iii) Receipt of employment and post-employment services (any period of employment or post-employment services is considered full-time program pursuit).

(2) Do not count:

(i) The initial evaluation period;

(ii) Any period before the child enters a vocational training program under this subpart;

(iii) Days of authorized leave; and

(iv) Other periods during which the child does not pursue training, such as periods between terms.

(3) Convert part-time training periods to full-time equivalents.

(4) Total the months and days under paragraphs (a)(1) and (a)(3) of this section. This sum is the period of the child's participation in the program.

(Authority: 38 U.S.C. 1804(d), 1814)

(b) *Consistency with principles for charging entitlement.* Computation of the program participation period under this section will be consistent with the principles for charging entitlement under §21.8020.

(Authority: 38 U.S.C. 1804(d), 1814)

## INDIVIDUALIZED WRITTEN PLAN OF VOCATIONAL REHABILITATION

### §21.8080 Requirement for an individualized written plan of vocational rehabilitation.

(a) *General.* A CP or VRC will work in consultation with each child for whom a vocational goal is feasible to develop an individualized written plan of vocational rehabilitation services and assistance to meet the child's vocational training needs. The CP or VRC will develop this individualized written plan of vocational rehabilitation in a manner comparable to the rules governing the development of an individualized written rehabilitation plan (IWRP) for a veteran for 38 U.S.C. chapter 31 purposes, as §§21.80, 21.84, 21.88, 21.90, 21.92, 21.94 (a) through (d), and 21.96 provide.

(Authority: 38 U.S.C. 1804(b), 1814)

(b) *Selecting the type of training to include in the individualized written plan of vocational rehabilitation.* If training is

necessary, the CP or VRC will explore a range of possibilities, to include paid and unpaid on-job training, institutional training, and a combination of on-job and institutional training to accomplish the goals of the program. Generally, an eligible child's program should include on-job training, or a combination of on-job and institutional training, when this training:

(1) Is available;

(2) Is as suitable as using only institutional training for accomplishing the goals of the program; and

(3) Will meet the child's vocational training program needs.

(Authority: 38 U.S.C. 1804(b), (c), 1814)

### § 21.8082 Inability of child to complete individualized written plan of vocational rehabilitation or achieve vocational goal.

(a) *Inability to timely complete an individualized written plan of vocational rehabilitation or achieve identified goal.* After a vocational training program has begun, the VR&E case manager may determine that the eligible child cannot complete the vocational training program described in the child's individualized written plan of vocational rehabilitation within the time limits of the individualized written plan of vocational rehabilitation or cannot achieve the child's identified vocational goal. Subject to paragraph (b) of this section, VR&E may assist the child in revising or selecting a new individualized written plan of vocational rehabilitation or goal.

(b) *Allowable changes in the individualized written plan of vocational rehabilitation or goal.* Any change in the eligible child's individualized written plan of vocational rehabilitation or vocational goal is subject to the child's continuing eligibility under the vocational training program and the provisions governing duration of a vocational training program in §§ 21.8020(e) and 21.8070 through 21.8074.

(Authority: 38 U.S.C. 1804(d), 1804(e), 1814)

(c) *Change in the individualized written plan of vocational rehabilitation or vocational goal.* (1) The individualized written plan of vocational rehabilitation or vocational goal may be changed under the same conditions as provided for a veteran under § 21.94 (a) through (d), and subject to § 21.8070 (d) through (f), if:

(i) The CP or VRC determines that achievement of a vocational goal is still reasonably feasible and that the new individualized written plan of vocational rehabilitation or goal is necessary to enable the eligible child to prepare for and participate in vocational training or employment; and

(ii) Reentrance is authorized under § 21.8284 in a case when the child has completed a vocational training program under this subpart.

(2) A CP or VRC may approve a change of vocational goal from one field or occupational family to another field or occupational family if the child can achieve the new goal:

(i) Before the end of the basic 24-month entitlement period that § 21.8020(e)(1) describes; or

(ii) Before the end of any allowable extension under §§ 21.8020(e)(2) and 21.8072 if the new vocational goal in another field or occupational family was identified during the basic 24-month entitlement period.

(3) A change from one occupational objective to another in the same field or occupational family does not change the planned vocational goal.

(4) The child must have sufficient remaining entitlement to pursue the new individualized written plan of vocational rehabilitation or goal, as § 21.8020 provides.

(Authority: 38 U.S.C. 1804(d), 1814)

(d) *Assistance if child terminates planned program before completion.* If the eligible child elects to terminate the planned vocational training program, he or she will receive the assistance that § 21.80(d) provides in identifying other resources through which to secure the desired training or employment.

(Authority: 38 U.S.C. 1804(c), 1814)

## COUNSELING

### § 21.8100 Counseling.

An eligible child requesting or receiving services and assistance under this subpart will receive professional counseling by VR&E and other qualified VA staff members, and by contract

counseling providers, as necessary, in a manner comparable to VA's provision of these services to veterans under the 38 U.S.C. chapter 31 program, as §§21.100 and 21.380 provide.

(Authority: 38 U.S.C. 1803(c)(8), 1804(c), 1814)

VOCATIONAL TRAINING, SERVICES, AND ASSISTANCE

**§21.8120 Vocational training, services, and assistance.**

(a) *Purposes.* An eligible child may receive training, services, and assistance to enable the child to prepare for and participate in vocational training or employment.

(Authority: 38 U.S.C. 1804(b), (c), 1814)

(b) *Training permitted.* VA and the child will select vocationally oriented courses of study and training, completion of which usually results in a diploma, certificate, degree, qualification for licensure, or direct placement in employment. The educational and training services to be provided include:

(1) Remedial, deficiency, and refresher training; and

(2) Training that leads to an identifiable vocational goal. Under this program, VA may authorize all forms of programs that §§21.122 through 21.132 describe. This includes education and training programs in institutions of higher education. VA may authorize the education and training at an undergraduate or graduate degree level, only if the degree program is predominantly vocational in nature. For an eligible child to participate in a graduate degree program, the graduate degree must be a requirement for entry into the child's vocational goal. For example, a master's degree is required to engage in social work. The program of training is predominantly vocational in content if the majority of the instruction provides the technical skills and knowledge employers generally regard as specific to, and required for, entry into the child's vocational goal.

(c) *Cost of education and training services.* The CP or VRC will consider the cost of training in selecting a facility when:

(1) There is more than one facility in the area in which the child resides that:

(i) Meets the requirements for approval under §§21.290 through 21.298 (except as provided by §21.8286(b)),

(ii) Can provide the training, services and other supportive assistance the child's individualized written plan of vocational rehabilitation specifies, and

(iii) Is within reasonable commuting distance; or

(2) The child wishes to train at a suitable facility in another area, even though a suitable facility in the area where the child lives can provide the training. In considering the costs of providing training in this case, VA will use the provisions of §21.120 (except 21.120(a)(3)), §21.370 (however, the words ''under §21.282'' in §21.370(b)(2)(iii)(B) do not apply), and §21.372 in a manner comparable to that for veterans under the 38 U.S.C. chapter 31 program.

(Authority: 38 U.S.C. 1804(b), (c), 1814)

(d) *Accessible courses not locally available.* If suitable vocational training courses are not available in the area in which the child lives, or if they are available but not accessible to the child, VA may make other arrangements. These arrangements may include, but are not limited to:

(1) Transportation of the child, but not the child's family, personal effects, or household belongings, to another area where necessary services are available; or

(2) Use of an individual instructor to provide necessary training in a manner comparable to that for veterans under the 38 U.S.C. chapter 31 program, as §21.146 describes.

(Authority: 38 U.S.C. 1804(b), (c), 1814)

EVALUATION AND IMPROVEMENT OF VOCATIONAL POTENTIAL

**§21.8140 Evaluation and improvement of vocational potential.**

(a) *General.* A CP or VRC may use the services that paragraph (d) of this section describes to:

(1) Evaluate vocational training and employment potential;

(2) Provide a basis for planning:

(i) A program of services and assistance to improve the eligible child's

preparation for vocational training and employment; or

(ii) A vocational training program;

(3) Reevaluate the vocational training feasibility of an eligible child participating in a vocational training program; and

(4) Remediate deficiencies in the child's basic capabilities, skills, or knowledge to give the child the ability to participate in vocational training or employment.

(Authority: 38 U.S.C. 1804(b), 1814)

(b) *Periods when evaluation and improvement services may be provided.* A CP or VRC may authorize the services described in paragraph (d) of this section, except those in paragraph (d)(4) of this section, for delivery during:

(1) An initial or extended evaluation; or

(2) Pursuit of a vocational training program.

(Authority: 38 U.S.C. 1804(c), 1814)

(c) *Duration of services.* The duration of services needed to improve vocational training and employment potential, furnished on a full-time basis either as a preliminary part or all of a vocational training program, may not exceed 9 months. If VA furnishes these services on a less than full-time basis, the duration will be for the period necessary, but may not exceed the equivalent of 9 months of full-time training.

(Authority: 38 U.S.C. 1804(c), 1814)

(d) *Scope of services.* Evaluation and improvement services include:

(1) Diagnostic services;

(2) Personal and work adjustment training;

(3) Referral for medical care and treatment pursuant to §§ 17.900 through 17.905 of this title for the spina bifida, covered birth defects, or related conditions;

(4) Vocationally oriented independent living services indispensable to pursuing a vocational training program;

(5) Language training, speech and voice correction, training in ambulation, and one-hand typewriting;

(6) Orientation, adjustment, mobility and related services; and

(7) Other appropriate services to assist the child in functioning in the proposed training or work environment.

(Authority: 38 U.S.C. 1804(c), 1814)

(e) *Applicability of chapter 31 rules on special rehabilitation services.* The provisions of § 21.140 do not apply to this subpart. Subject to the provisions of this subpart, the following provisions apply to the vocational training program under this subpart in a manner comparable to that for veterans under the 38 U.S.C. chapter 31 program: § 21.142(a) and (b); § 21.144; § 21.146; § 21.148(a) and (c); § 21.150 other than paragraph (b); § 21.152 other than paragraph (b); § 21.154 other than paragraph (b); and § 21.156.

(Authority: 38 U.S.C. 1804(c), 1814)

SUPPLIES

### § 21.8210 Supplies.

(a) *Purpose of furnishing supplies.* VA will provide the child with the supplies that the child needs to pursue training, to obtain and maintain employment, and otherwise to achieve the goal of his or her vocational training program.

(Authority: 38 U.S.C. 1804(c), 1814)

(b) *Types of supplies.* VA may provide books, tools, and other supplies and equipment that VA determines are necessary for the child's vocational training program and are required by similarly circumstanced veterans pursuing such training under 38 U.S.C. chapter 31.

(Authority: 38 U.S.C. 1804(c), 1814)

(c) *Periods during which VA may furnish supplies.* VA may provide supplies to an eligible child receiving:

(1) An initial or extended evaluation;

(2) Vocational training, services, and assistance to reach the point of employability; or

(3) Employment services.

(Authority: 38 U.S.C. 1804(c), 1814)

(d) *Other rules.* The provisions of §§ 21.212 through 21.224 apply to children pursuing a vocational training program under this subpart in a comparable manner as VA provides supplies to veterans under 38 U.S.C. chapter 31, except the following portions:

(1) Section 21.216(a)(3) pertaining to special modifications, including automobile adaptive equipment;

(2) Section 21.220(a)(1) pertaining to advancements from the revolving fund loan;

(3) Section 21.222(b)(1)(x) pertaining to discontinuance from an independent living services program.

(Authority: 38 U.S.C. 1804(c), 1814)

PROGRAM COSTS

### §21.8260 Training, services, and assistance costs.

The provisions of §21.262 pertaining to reimbursement for training and other program costs apply, in a comparable manner as provided under the 38 U.S.C. chapter 31 program for veterans, to payments to facilities, vendors, and other providers for training, supplies, and other services they deliver under this subpart.

(Authority: 38 U.S.C. 1804(c), 1814)

VOCATIONAL TRAINING PROGRAM ENTRANCE, TERMINATION, AND RESOURCES

### §21.8280 Effective date of induction into a vocational training program.

Subject to the limitations in §21.8022, the date an eligible child is inducted into a vocational training program will be the date the child first begins to receive training, services, or assistance under an individualized written plan of vocational rehabilitation.

(Authority: 38 U.S.C. 1804(c), (d), 1814)

### §21.8282 Termination of a vocational training program.

A case manager may terminate a vocational training program under this subpart for cause, including lack of cooperation, failure to pursue the individualized written plan of vocational rehabilitation, fraud, administrative error, or finding that the child no longer has a covered birth defect. An eligible child for whom a vocational goal is reasonably feasible remains eligible for the program subject to the rules of this subpart unless the child's eligibility for or entitlement to a vocational training program under this subpart resulted from fraud or administrative error or unless VA finds the child no longer has a covered birth defect. The effective date of termination will be the earliest of the following applicable dates:

(a) *Fraud.* If an eligible child establishes eligibility for or entitlement to benefits under this subpart through fraud, VA will terminate the award of vocational training and rehabilitation as of the date VA first began to pay benefits.

(b) *Administrative error.* If an eligible child who is not entitled to benefits under this subpart receives those benefits through VA administrative error, VA will terminate the award of benefits as of the first day of the calendar month beginning at least 60 days after notifying the child of the proposed termination. This 60-day period may not result in the entrance of the child into a new quarter, semester, or other term of training unless VA has already obligated payment for the training.

(c) *Change in status as an eligible child with a covered birth defect.* If VA finds that a child no longer has a covered birth defect, VA will terminate the award of benefits effective the last day of the month in which such determination becomes final.

(d) *Lack of cooperation or failure to pursue individualized written plan of vocational rehabilitation.* If reasonable VR&E efforts to motivate an eligible child do not resolve a lack of cooperation or failure to pursue an individualized written plan of vocational rehabilitation, VA will terminate the award of benefits as of the first day of the calendar month beginning at least 60 days after notifying the child of the proposed termination. This 60-day period may not result in the entrance of the child into a new quarter, semester, or other term of training. VA will deobligate payment for training in the new quarter, semester, or other term of training.

(Authority: 38 U.S.C. 1804, 1814)

### §21.8284 Additional vocational training.

VA may provide an additional period of training or services under a vocational training program to an eligible child who has completed training for a vocational goal and/or been suitably

employed under this subpart, if the child is otherwise eligible and has remaining program entitlement as provided in § 21.8072(b), only under one of the following conditions:

(a) Current facts, including any relevant medical findings, establish that the child's disability has worsened to the extent that he or she can no longer perform the duties of the occupation which was the child's vocational goal under this subpart;

(b) The occupation that was the child's vocational goal under this subpart is now unsuitable;

(c) The vocational training program services and assistance the child originally received are now inadequate to make the child employable in the occupation which he or she sought to achieve;

(d) Experience has demonstrated that VA should not reasonably have expected employment in the objective or field for which the child received vocational training program services and assistance; or

(e) Technological change that occurred after the child achieved a vocational goal under this subpart now prevents the child from:

(1) Performing the duties of the occupation for which VA provided training, services, or assistance, or in a related occupation; or

(2) Securing employment in the occupation for which VA provided training, services, or assistance, or in a related occupation.

(Authority: 38 U.S.C. 1804(c), 1814)

### § 21.8286 Training resources.

(a) *Applicable 38 U.S.C. chapter 31 resource provisions.* The provisions of § 21.146 and §§ 21.290 through 21.298 apply to children pursuing a vocational training program under this subpart in a comparable manner as for veterans under the 38 U.S.C. chapter 31 program, except as paragraph (b) of this section specifies.

(Authority: 38 U.S.C. 1804(c), 1814)

(b) *Limitations.* The provisions of § 21.294(b)(1)(i) and (b)(1)(ii) pertaining to independent living services do not apply to this subpart. The provisions of § 21.294(b)(1)(iii) pertaining to authorization of independent living services as a part of an individualized written plan of vocational rehabilitation apply to children under this subpart in a comparable manner as for veterans under the 38 U.S.C. chapter 31 program only to the extent § 21.8050 allows.

(Authority: 38 U.S.C. 1804(c), 1814)

RATE OF PURSUIT

### § 21.8310 Rate of pursuit.

(a) *General requirements.* VA will approve an eligible child's pursuit of a vocational training program at a rate consistent with his or her ability to successfully pursue training, considering:

(1) Effects of his or her disability;

(2) Family responsibilities;

(3) Travel;

(4) Reasonable adjustment to training; and

(5) Other circumstances affecting the child's ability to pursue training.

(Authority: 38 U.S.C. 1804(c), 1814)

(b) *Continuous pursuit.* An eligible child should pursue a program of vocational training with as little interruption as necessary, considering the factors in paragraph (a) of this section.

(Authority: 38 U.S.C. 1804(c), 1814)

(c) *Responsibility for determining the rate of pursuit.* VR&E staff members will consult with the child when determining the rate and continuity of pursuit of a vocational training program. These staff members will also confer with the medical consultant and the Vocational Rehabilitation Panel described in §§ 21.60 and 21.62, as necessary. This rate and continuity of pursuit determination will occur during development of the individualized written plan of vocational rehabilitation, but may change later, as necessary to enable the child to complete training.

(Authority: 38 U.S.C. 1804(c), 1814)

(d) *Measurement of training time used.* VA will measure the rate of pursuit in a comparable manner to rate of pursuit measurement under § 21.310 for veterans under the 38 U.S.C. chapter 31 program.

(Authority: 38 U.S.C. 1804(c), 1814)

AUTHORIZATION OF SERVICES

**§21.8320 Authorization of services.**

The provisions of §21.326, pertaining to the commencement and termination dates of a period of employment services, apply to children under this subpart in a manner comparable to that provided for veterans under the 38 U.S.C. chapter 31 program. References in that section to an individualized employment assistance plan or IEAP are considered as referring to the child's individualized written plan of vocational rehabilitation under this subpart.

(Authority: 38 U.S.C. 1804(c), 1814)

LEAVES OF ABSENCE

**§21.8340 Leaves of absence.**

(a) *Purpose of leave of absence.* The purpose of the leave system is to enable the child to maintain his or her status as an active program participant.

(Authority: 38 U.S.C. 1804(c), 1814)

(b) *Basis for leave of absence.* The VR&E case manager may grant the child leaves of absence for periods during which the child fails to pursue a vocational training program. For prolonged periods of absence, the VR&E case manager may approve leaves of absence only if the case manager determines the child is unable to pursue a vocational training program through no fault of the child.

(Authority: 38 U.S.C. 1804(c), 1814)

(c) *Effect on entitlement.* During a leave of absence, VA suspends the running of the basic 24-month period of entitlement, plus any extensions thereto, until the child resumes the program.

(Authority: 38 U.S.C. 1804(c), 1814)

SATISFACTORY CONDUCT AND COOPERATION

**§21.8360 Satisfactory conduct and cooperation.**

The provisions for satisfactory conduct and cooperation in §§21.362 and 21.364, except as otherwise provided in this section, apply to children under this subpart in a manner comparable to the way they apply to veterans under the 38 U.S.C. chapter 31 program. If an eligible child fails to meet these requirements for satisfactory conduct or cooperation, the VR&E case manager will terminate the child's vocational training program. VA will not grant an eligible child reentrance to a vocational training program unless the reasons for unsatisfactory conduct or cooperation have been removed.

(Authority: 38 U.S.C. 1804(c), 1814)

TRANSPORTATION SERVICES

**§21.8370 Authorization of transportation services.**

(a) *General.* VA authorizes transportation services necessary for an eligible child to pursue a vocational training program. The sections in subpart A of this part that are referred to in this paragraph apply to children under this subpart in a manner comparable to the way they apply to veterans under the 38 U.S.C. chapter 31 program. Transportation services include:

(1) Transportation for evaluation or counseling under §21.376;

(2) Intraregional travel under §21.370 (except that assurance that the child meets all basic requirements for induction into training will be determined without regard to the provisions of §21.282) and interregional travel under §21.372;

(3) Special transportation allowance under §21.154; and

(4) Commuting to and from training and while seeking employment, subject to paragraphs (c) and (d) of this section.

(Authority: 38 U.S.C. 1804(c), 1814)

(b) *Reimbursement.* For transportation services that VA authorizes, VA will normally pay in arrears and in the same manner as tuition, fees, and other services under this program.

(Authority: 38 U.S.C. 1804(c), 1814)

(c) *Payment for commuting expenses for training and seeking employment.* VA may pay for transportation during the period of vocational training and the first 3 months the child receives employment services. VA may reimburse the child's costs, not to exceed $200 per month, of commuting to and from training and seeking employment if he

or she requests this assistance and VA determines, after careful examination of the child's situation and subject to the limitations in paragraph (d) of this section, that the child would be unable to pursue training or employment without this assistance. VA may:

(1) Reimburse the facility at which the child is training if the facility provided transportation or related services; or

(2) Reimburse the child for his or her actual commuting expense if the child paid for the transportation.

(Authority: 38 U.S.C. 1804(c), 1814)

(d) *Limitations.* Payment of commuting expenses under paragraph (a)(4) of this section may not be made for any period when the child:

(1) Is gainfully employed;

(2) Is eligible for, and entitled to, payment of commuting costs through other VA and non-VA programs; or

(3) Can commute to school with family, friends, or fellow students.

(Authority: 38 U.S.C. 1804(c), 1814)

(e) *Documentation.* VA must receive supportive documentation with each request for reimbursement. The individualized written plan of vocational rehabilitation will specify whether VA will pay monthly or at a longer interval.

(Authority: 38 U.S.C. 1804(c), 1814)

(f) *Nonduplication.* If a child is eligible for reimbursement of transportation services both under this section and under § 21.154, the child will receive only the benefit under § 21.154.

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0580)

(Authority: 38 U.S.C. 1804(c), 1814)

ADDITIONAL APPLICABLE REGULATIONS

### § 21.8380 Additional applicable regulations.

The following regulations are applicable to children in this program in a manner comparable to that provided for veterans under the 38 U.S.C. chapter 31 program: §§ 21.380, 21.412, 21.414 (except (c), (d), and (e)), 21.420, and 21.430.

(Authority: 38 U.S.C. 1804, 1814, 5112)

DELEGATION OF AUTHORITY

### § 21.8410 Delegation of authority.

The Secretary delegates authority for making findings and decisions under 38 U.S.C. 1804 and 1814 and the applicable regulations, precedents, and instructions for the program under this subpart to the Under Secretary for Benefits and to VR&E supervisory or non-supervisory staff members.

(Authority: 38 U.S.C. 512(a), 1804, 1814)

# PART 23—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

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AUTHORITY: 20 U.S.C. 1681, 1682, 1683, 1685, 1686, 1687, 1688.

SOURCE: 65 FR 52865, 52889, Aug. 30, 2000, unless otherwise noted.

## Subpart A—Introduction

### § 23.100 Purpose and effective date.

The purpose of these Title IX regulations is to effectuate Title IX of the Education Amendments of 1972, as amended (except sections 904 and 906 of those Amendments) (20 U.S.C. 1681, 1682, 1683, 1685, 1686, 1687, 1688), which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in these Title IX regulations. The effective date of these Title IX regulations shall be September 29, 2000.

### § 23.105 Definitions.

As used in these Title IX regulations, the term:

*Administratively separate unit* means a school, department, or college of an educational institution (other than a local educational agency) admission to which is independent of admission to any other component of such institution.

*Admission* means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.

*Applicant* means one who submits an application, request, or plan required to be approved by an official of the Federal agency that awards Federal financial assistance, or by a recipient, as a condition to becoming a recipient.

*Designated agency official* means Deputy Assistant Secretary for Resolution Management.

*Educational institution* means a local educational agency (LEA) as defined by 20 U.S.C. 8801(18), a preschool, a private elementary or secondary school, or an applicant or recipient that is an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, or an institution of vocational education, as defined in this section.

*Federal financial assistance* means any of the following, when authorized or extended under a law administered by the Federal agency that awards such assistance:

(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages, or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement that has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

*Institution of graduate higher education* means an institution that:

(1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences;

(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in such field is awarded by an institution of undergraduate higher education or professional education); or

(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

*Institution of professional education* means an institution (except any institution of undergraduate higher education) that offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the Secretary of Education.

*Institution of undergraduate higher education* means:

(1) An institution offering at least two but less than four years of college-level study beyond the high school level, leading to a diploma or an associate degree, or wholly or principally creditable toward a baccalaureate degree; or

(2) An institution offering academic study leading to a baccalaureate degree; or

(3) An agency or body that certifies credentials or offers degrees, but that may or may not offer academic study.

*Institution of vocational education* means a school or institution (except an institution of professional or graduate or undergraduate higher education) that has as its primary purpose preparation of students to pursue a technical, skilled, or semiskilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers full-time study.

*Recipient* means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and that operates an education program or activity that receives such assistance, including any subunit, successor, assignee, or transferee thereof.

*Student* means a person who has gained admission.

*Title IX* means Title IX of the Education Amendments of 1972, Public Law 92–318, 86 Stat. 235, 373 (codified as amended at 20 U.S.C. 1681–1688) (except sections 904 and 906 thereof), as amended by section 3 of Public Law 93–568, 88 Stat. 1855, by section 412 of the Education Amendments of 1976, Public Law 94–482, 90 Stat. 2234, and by Section 3 of Public Law 100–259, 102 Stat. 28, 28–29 (20 U.S.C. 1681, 1682, 1683, 1685, 1686, 1687, 1688).

*Title IX regulations* means the provisions set forth at §§ 23.100 through 23.605.

*Transition plan* means a plan subject to the approval of the Secretary of Education pursuant to section 901(a)(2) of the Education Amendments of 1972, 20 U.S.C. 1681(a)(2), under which an educational institution operates in making the transition from being an educational institution that admits only students of one sex to being one that

admits students of both sexes without discrimination.

[65 FR 52865, 52889, 52890, Aug. 30, 2000]

### § 23.110 Remedial and affirmative action and self-evaluation.

(a) *Remedial action.* If the designated agency official finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the designated agency official deems necessary to overcome the effects of such discrimination.

(b) *Affirmative action.* In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action consistent with law to overcome the effects of conditions that resulted in limited participation therein by persons of a particular sex. Nothing in these Title IX regulations shall be interpreted to alter any affirmative action obligations that a recipient may have under Executive Order 11246, 3 CFR, 1964–1965 Comp., p. 339; as amended by Executive Order 11375, 3 CFR, 1966–1970 Comp., p. 684; as amended by Executive Order 11478, 3 CFR, 1966–1970 Comp., p. 803; as amended by Executive Order 12086, 3 CFR, 1978 Comp., p. 230; as amended by Executive Order 12107, 3 CFR, 1978 Comp., p. 264.

(c) *Self-evaluation.* Each recipient education institution shall, within one year of September 29, 2000:

(1) Evaluate, in terms of the requirements of these Title IX regulations, its current policies and practices and the effects thereof concerning admission of students, treatment of students, and employment of both academic and nonacademic personnel working in connection with the recipient's education program or activity;

(2) Modify any of these policies and practices that do not or may not meet the requirements of these Title IX regulations; and

(3) Take appropriate remedial steps to eliminate the effects of any discrimination that resulted or may have resulted from adherence to these policies and practices.

(d) *Availability of self-evaluation and related materials.* Recipients shall maintain on file for at least three years following completion of the evaluation required under paragraph (c) of this section, and shall provide to the designated agency official upon request, a description of any modifications made pursuant to paragraph (c)(2) of this section and of any remedial steps taken pursuant to paragraph (c)(3) of this section.

### § 23.115 Assurance required.

(a) *General.* Either at the application stage or the award stage, Federal agencies must ensure that applications for Federal financial assistance or awards of Federal financial assistance contain, be accompanied by, or be covered by a specifically identified assurance from the applicant or recipient, satisfactory to the designated agency official, that each education program or activity operated by the applicant or recipient and to which these Title IX regulations apply will be operated in compliance with these Title IX regulations. An assurance of compliance with these Title IX regulations shall not be satisfactory to the designated agency official if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with § 23.110(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior to or subsequent to the submission to the designated agency official of such assurance.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended to provide real property or structures thereon, such assurance shall obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used to provide an education program or activity.

(2) In the case of Federal financial assistance extended to provide personal property, such assurance shall obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases such assurance shall obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Form.* (1) The assurances required by paragraph (a) of this section, which may be included as part of a document that addresses other assurances or obligations, shall include that the applicant or recipient will comply with all applicable Federal statutes relating to nondiscrimination. These include but are not limited to: Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681–1683, 1685–1688).

(2) The designated agency official will specify the extent to which such assurances will be required of the applicant's or recipient's subgrantees, contractors, subcontractors, transferees, or successors in interest.

### § 23.120 Transfers of property.

If a recipient sells or otherwise transfers property financed in whole or in part with Federal financial assistance to a transferee that operates any education program or activity, and the Federal share of the fair market value of the property is not upon such sale or transfer properly accounted for to the Federal Government, both the transferor and the transferee shall be deemed to be recipients, subject to the provisions of §§ 23.205 through 23.235(a).

### § 23.125 Effect of other requirements.

(a) *Effect of other Federal provisions.* The obligations imposed by these Title IX regulations are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by Executive Order 11246, 3 CFR, 1964–1965 Comp., p. 339; as amended by Executive Order 11375, 3 CFR, 1966–1970 Comp., p. 684; as amended by Executive Order 11478, 3 CFR, 1966–1970 Comp., p. 803; as amended by Executive Order 12087, 3 CFR, 1978 Comp., p. 230; as amended by Executive Order 12107, 3 CFR, 1978 Comp., p. 264; sections 704 and 855 of the Public Health Service Act (42 U.S.C. 295m, 298b-2); Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*); the Equal Pay Act of 1963 (29 U.S.C. 206); and any other Act of Congress or Federal regulation.

(b) *Effect of State or local law or other requirements.* The obligation to comply with these Title IX regulations is not obviated or alleviated by any State or local law or other requirement that would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession.

(c) *Effect of rules or regulations of private organizations.* The obligation to comply with these Title IX regulations is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association that would render any applicant or student ineligible to participate or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and that receives Federal financial assistance.

### § 23.130 Effect of employment opportunities.

The obligation to comply with these Title IX regulations is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for members of one sex than for members of the other sex.

### § 23.135 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under these Title IX regulations, including any investigation of any complaint communicated to such recipient alleging its noncompliance with these Title IX regulations or alleging any actions that would be prohibited by these Title IX regulations. The recipient shall notify all its students and employees of the name, office address, and telephone number of the employee or employees appointed pursuant to this paragraph.

(b) *Complaint procedure of recipient.* A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by these Title IX regulations.

### § 23.140 Dissemination of policy.

(a) *Notification of policy.* (1) Each recipient shall implement specific and

continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in the educational programs or activities that it operates, and that it is required by Title IX and these Title IX regulations not to discriminate in such a manner. Such notification shall contain such information, and be made in such manner, as the designated agency official finds necessary to apprise such persons of the protections against discrimination assured them by Title IX and these Title IX regulations, but shall state at least that the requirement not to discriminate in education programs or activities extends to employment therein, and to admission thereto unless §§ 23.300 through 23.310 do not apply to the recipient, and that inquiries concerning the application of Title IX and these Title IX regulations to such recipient may be referred to the employee designated pursuant to § 23.135, or to the designated agency official.

(2) Each recipient shall make the initial notification required by paragraph (a)(1) of this section within 90 days of September 29, 2000 or of the date these Title IX regulations first apply to such recipient, whichever comes later, which notification shall include publication in:

(i) Newspapers and magazines operated by such recipient or by student, alumnae, or alumni groups for or in connection with such recipient; and

(ii) Memoranda or other written communications distributed to every student and employee of such recipient.

(b) *Publications.* (1) Each recipient shall prominently include a statement of the policy described in paragraph (a) of this section in each announcement, bulletin, catalog, or application form that it makes available to any person of a type, described in paragraph (a) of this section, or which is otherwise used in connection with the recruitment of students or employees.

(2) A recipient shall not use or distribute a publication of the type described in paragraph (b)(1) of this section that suggests, by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by these Title IX regulations.

(c) *Distribution.* Each recipient shall distribute without discrimination on the basis of sex each publication described in paragraph (b)(1) of this section, and shall apprise each of its admission and employment recruitment representatives of the policy of nondiscrimination described in paragraph (a) of this section, and shall require such representatives to adhere to such policy.

## Subpart B—Coverage

### § 23.200 Application.

Except as provided in §§ 23.205 through 23.235(a), these Title IX regulations apply to every recipient and to each education program or activity operated by such recipient that receives Federal financial assistance.

### § 23.205 Educational institutions and other entities controlled by religious organizations.

(a) *Exemption.* These Title IX regulations do not apply to any operation of an educational institution or other entity that is controlled by a religious organization to the extent that application of these Title IX regulations would not be consistent with the religious tenets of such organization.

(b) *Exemption claims.* An educational institution or other entity that wishes to claim the exemption set forth in paragraph (a) of this section shall do so by submitting in writing to the designated agency official a statement by the highest-ranking official of the institution, identifying the provisions of these Title IX regulations that conflict with a specific tenet of the religious organization.

### § 23.210 Military and merchant marine educational institutions.

These Title IX regulations do not apply to an educational institution whose primary purpose is the training

of individuals for a military service of the United States or for the merchant marine.

### § 23.215 Membership practices of certain organizations.

(a) *Social fraternities and sororities.* These Title IX regulations do not apply to the membership practices of social fraternities and sororities that are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, 26 U.S.C. 501(a), the active membership of which consists primarily of students in attendance at institutions of higher education.

(b) *YMCA, YWCA, Girl Scouts, Boy Scouts, and Camp Fire Girls.* These Title IX regulations do not apply to the membership practices of the Young Men's Christian Association (YMCA), the Young Women's Christian Association (YWCA), the Girl Scouts, the Boy Scouts, and Camp Fire Girls.

(c) *Voluntary youth service organizations.* These Title IX regulations do not apply to the membership practices of a voluntary youth service organization that is exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, 26 U.S.C. 501(a), and the membership of which has been traditionally limited to members of one sex and principally to persons of less than nineteen years of age.

### § 23.220 Admissions.

(a) Admissions to educational institutions prior to June 24, 1973, are not covered by these Title IX regulations.

(b) *Administratively separate units.* For the purposes only of this section, §§ 23.225 and 23.230, and §§ 23.300 through 23.310, each administratively separate unit shall be deemed to be an educational institution.

(c) *Application of §§ 23.300 through .310.* Except as provided in paragraphs (d) and (e) of this section, §§ 23.300 through 23.310 apply to each recipient. A recipient to which §§ 23.300 through 23.310 apply shall not discriminate on the basis of sex in admission or recruitment in violation of §§ 23.300 through 23.310.

(d) *Educational institutions.* Except as provided in paragraph (e) of this section as to recipients that are educational institutions, §§ 23.300 through 23.310 apply only to institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.

(e) *Public institutions of undergraduate higher education.* §§ 23.300 through 23.310 do not apply to any public institution of undergraduate higher education that traditionally and continually from its establishment has had a policy of admitting students of only one sex.

### § 23.225 Educational institutions eligible to submit transition plans.

(a) *Application.* This section applies to each educational institution to which §§ 23.300 through 23.310 apply that:

(1) Admitted students of only one sex as regular students as of June 23, 1972; or

(2) Admitted students of only one sex as regular students as of June 23, 1965, but thereafter admitted, as regular students, students of the sex not admitted prior to June 23, 1965.

(b) *Provision for transition plans.* An educational institution to which this section applies shall not discriminate on the basis of sex in admission or recruitment in violation of §§ 23.300 through 23.310.

### § 23.230 Transition plans.

(a) *Submission of plans.* An institution to which § 23.225 applies and that is composed of more than one administratively separate unit may submit either a single transition plan applicable to all such units, or a separate transition plan applicable to each such unit.

(b) *Content of plans.* In order to be approved by the Secretary of Education, a transition plan shall:

(1) State the name, address, and Federal Interagency Committee on Education Code of the educational institution submitting such plan, the administratively separate units to which the plan is applicable, and the name, address, and telephone number of the person to whom questions concerning the plan may be addressed. The person who submits the plan shall be the chief administrator or president of the institution, or another individual legally authorized to bind the institution to all actions set forth in the plan.

(2) State whether the educational institution or administratively separate unit admits students of both sexes as regular students and, if so, when it began to do so.

(3) Identify and describe with respect to the educational institution or administratively separate unit any obstacles to admitting students without discrimination on the basis of sex.

(4) Describe in detail the steps necessary to eliminate as soon as practicable each obstacle so identified and indicate the schedule for taking these steps and the individual directly responsible for their implementation.

(5) Include estimates of the number of students, by sex, expected to apply for, be admitted to, and enter each class during the period covered by the plan.

(c) *Nondiscrimination*. No policy or practice of a recipient to which § 23.225 applies shall result in treatment of applicants to or students of such recipient in violation of §§ 23.300 through 23.310 unless such treatment is necessitated by an obstacle identified in paragraph (b)(3) of this section and a schedule for eliminating that obstacle has been provided as required by paragraph (b)(4) of this section.

(d) *Effects of past exclusion*. To overcome the effects of past exclusion of students on the basis of sex, each educational institution to which § 23.225 applies shall include in its transition plan, and shall implement, specific steps designed to encourage individuals of the previously excluded sex to apply for admission to such institution. Such steps shall include instituting recruitment programs that emphasize the institution's commitment to enrolling students of the sex previously excluded.

### § 23.235 Statutory amendments.

(a) This section, which applies to all provisions of these Title IX regulations, addresses statutory amendments to Title IX.

(b) These Title IX regulations shall not apply to or preclude:

(1) Any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference;

(2) Any program or activity of a secondary school or educational institution specifically for:

(i) The promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) The selection of students to attend any such conference;

(3) Father-son or mother-daughter activities at an educational institution or in an education program or activity, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided to students of the other sex;

(4) Any scholarship or other financial assistance awarded by an institution of higher education to an individual because such individual has received such award in a single-sex pageant based upon a combination of factors related to the individual's personal appearance, poise, and talent. The pageant, however, must comply with other nondiscrimination provisions of Federal law.

(c) *Program or activity* or *program* means:

(1) All of the operations of any entity described in paragraphs (c)(1)(i) through (iv) of this section, any part of which is extended Federal financial assistance:

(i)(A) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(ii)(A) A college, university, or other postsecondary institution, or a public system of higher education; or

(B) A local educational agency (as defined in section 8801 of title 20), system of vocational education, or other school system;

(iii)(A) An entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(*1*) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(*2*) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(iv) Any other entity that is established by two or more of the entities described in paragraphs (c)(1)(i), (ii), or (iii) of this section.

(2)(i) *Program or activity* does not include any operation of an entity that is controlled by a religious organization if the application of 20 U.S.C. 1681 to such operation would not be consistent with the religious tenets of such organization.

(ii) For example, all of the operations of a college, university, or other postsecondary institution, including but not limited to traditional educational operations, faculty and student housing, campus shuttle bus service, campus restaurants, the bookstore, and other commercial activities are part of a ''program or activity'' subject to these Title IX regulations if the college, university, or other institution receives Federal financial assistance.

(d)(1) Nothing in these Title IX regulations shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion. Medical procedures, benefits, services, and the use of facilities, necessary to save the life of a pregnant woman or to address complications related to an abortion are not subject to this section.

(2) Nothing in this section shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion. Accordingly, subject to paragraph (d)(1) of this section, no person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, employment, or other educational program or activity operated by a recipient that receives Federal financial assistance because such individual has sought or received, or is seeking, a legal abortion, or any benefit or service related to a legal abortion.

## Subpart C—Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

### § 23.300 Admission.

(a) *General.* No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which §§ 23.300 through §§ 23.310 apply, except as provided in §§ 23.225 and §§ 23.230.

(b) *Specific prohibitions.* (1) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which §§ 23.300 through 23.310 apply shall not:

(i) Give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;

(ii) Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or

(iii) Otherwise treat one individual differently from another on the basis of sex.

(2) A recipient shall not administer or operate any test or other criterion for admission that has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria that do not have such a disproportionately adverse effect are shown to be unavailable.

(c) *Prohibitions relating to marital or parental status.* In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which §§ 23.300 through 23.310 apply:

(1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant that treats persons differently on the basis of sex;

(2) Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish or follow any rule or practice that so discriminates or excludes;

(3) Subject to § 23.235(d), shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and

(4) Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is ''Miss'' or ''Mrs.'' A recipient may make pre-admission inquiry as to the sex of an applicant for admission, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by these Title IX regulations.

### § 23.305 Preference in admission.

A recipient to which §§ 23.300 through 23.310 apply shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity that admits as students only or predominantly members of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of §§ 23.300 through 23.310.

### § 23.310 Recruitment.

(a) *Nondiscriminatory recruitment.* A recipient to which §§ 23.300 through 23.310 apply shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to § 23.110(a), and may choose to undertake such efforts as affirmative action pursuant to § 23.110(b).

(b) *Recruitment at certain institutions.* A recipient to which §§ 23.300 through 23.310 apply shall not recruit primarily or exclusively at educational institutions, schools, or entities that admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of §§ 23.300 through 23.310.

## Subpart D—Discrimination on the Basis of Sex in Education Programs or Activities Prohibited

### § 23.400 Education programs or activities.

(a) *General.* Except as provided elsewhere in these Title IX regulations, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient that receives Federal financial assistance. Sections 23.400 through 23.455 do not apply to actions of a recipient in connection with admission of its students to an education program or activity of a recipient to which §§ 23.300 through 23.310 do not apply, or an entity, not a recipient, to which §§ 23.300 through 23.310 would not apply if the entity were a recipient.

(b) *Specific prohibitions.* Except as provided in §§ 23.400 through 23.455, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

(5) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;

(6) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person that discriminates on the basis of sex in providing any aid, benefit, or service to students or employees;

(7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

(c) *Assistance administered by a recipient educational institution to study at a foreign institution.* A recipient educational institution may administer or assist in the administration of scholarships, fellowships, or other awards established by foreign or domestic wills, trusts, or similar legal instruments, or by acts of foreign governments and restricted to members of one sex, that are designed to provide opportunities to study abroad, and that are awarded to students who are already matriculating at or who are graduates of the recipient institution; *Provided,* that a recipient educational institution that administers or assists in the administration of such scholarships, fellowships, or other awards that are restricted to members of one sex provides, or otherwise makes available, reasonable opportunities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

(d) *Aids, benefits or services not provided by recipient.* (1) This paragraph (d) applies to any recipient that requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or that facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments.

(2) Such recipient:

(i) Shall develop and implement a procedure designed to assure itself that the operator or sponsor of such other education program or activity takes no action affecting any applicant, student, or employee of such recipient that these Title IX regulations would prohibit such recipient from taking; and

(ii) Shall not facilitate, require, permit, or consider such participation if such action occurs.

### § 23.405 Housing.

(a) *Generally.* A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) *Housing provided by recipient.* (1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(i) Proportionate in quantity to the number of students of that sex applying for such housing; and

(ii) Comparable in quality and cost to the student.

(c) *Other housing.* (1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than that provided by such recipient.

(2)(i) A recipient which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take such reasonable action as may be necessary to assure itself that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole:

(A) Proportionate in quantity; and

(B) Comparable in quality and cost to the student.

(ii) A recipient may render such assistance to any agency, organization, or person that provides all or part of such housing to students of only one sex.

### § 23.410 Comparable facilities.

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

### § 23.415 Access to course offerings.

(a) A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including

health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

(b)(1) With respect to classes and activities in physical education at the elementary school level, the recipient shall comply fully with this section as expeditiously as possible but in no event later than one year from September 29, 2000. With respect to physical education classes and activities at the secondary and post-secondary levels, the recipient shall comply fully with this section as expeditiously as possible but in no event later than three years from September 29, 2000.

(2) This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(3) This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.

(4) Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards that do not have such effect.

(5) Portions of classes in elementary and secondary schools, or portions of education programs or activities, that deal exclusively with human sexuality may be conducted in separate sessions for boys and girls.

(6) Recipients may make requirements based on vocal range or quality that may result in a chorus or choruses of one or predominantly one sex.

### § 23.420 Access to schools operated by LEAs.

A recipient that is a local educational agency shall not, on the basis of sex, exclude any person from admission to:

(a) Any institution of vocational education operated by such recipient; or

(b) Any other school or educational unit operated by such recipient, unless such recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools.

### § 23.425 Counseling and use of appraisal and counseling materials.

(a) *Counseling.* A recipient shall not discriminate against any person on the basis of sex in the counseling or guidance of students or applicants for admission.

(b) *Use of appraisal and counseling materials.* A recipient that uses testing or other materials for appraising or counseling students shall not use different materials for students on the basis of their sex or use materials that permit or require different treatment of students on such basis unless such different materials cover the same occupations and interest areas and the use of such different materials is shown to be essential to eliminate sex bias. Recipients shall develop and use internal procedures for ensuring that such materials do not discriminate on the basis of sex. Where the use of a counseling test or other instrument results in a substantially disproportionate number of members of one sex in any particular course of study or classification, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination in the instrument or its application.

(c) *Disproportion in classes.* Where a recipient finds that a particular class contains a substantially disproportionate number of individuals of one sex, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination on the basis of sex in counseling or appraisal materials or by counselors.

### § 23.430 Financial assistance.

(a) *General.* Except as provided in paragraphs (b) and (c) of this section, in providing financial assistance to any of its students, a recipient shall not:

(1) On the basis of sex, provide different amounts or types of such assistance, limit eligibility for such assistance that is of any particular type or

source, apply different criteria, or otherwise discriminate;

(2) Through solicitation, listing, approval, provision of facilities, or other services, assist any foundation, trust, agency, organization, or person that provides assistance to any of such recipient's students in a manner that discriminates on the basis of sex; or

(3) Apply any rule or assist in application of any rule concerning eligibility for such assistance that treats persons of one sex differently from persons of the other sex with regard to marital or parental status.

(b) *Financial aid established by certain legal instruments.* (1) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government that require that awards be made to members of a particular sex specified therein; *Provided,* that the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.

(2) To ensure nondiscriminatory awards of assistance as required in paragraph (b)(1) of this section, recipients shall develop and use procedures under which:

(i) Students are selected for award of financial assistance on the basis of nondiscriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex;

(ii) An appropriate sex-restricted scholarship, fellowship, or other form of financial assistance is allocated to each student selected under paragraph (b)(2)(i) of this section; and

(iii) No student is denied the award for which he or she was selected under paragraph (b)(2)(i) of this section because of the absence of a scholarship, fellowship, or other form of financial assistance designated for a member of that student's sex.

(c) *Athletic scholarships.* (1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) A recipient may provide separate athletic scholarships or grants-in-aid for members of each sex as part of separate athletic teams for members of each sex to the extent consistent with this paragraph (c) and § 23.450.

### § 23.435 Employment assistance to students.

(a) *Assistance by recipient in making available outside employment.* A recipient that assists any agency, organization, or person in making employment available to any of its students:

(1) Shall assure itself that such employment is made available without discrimination on the basis of sex; and

(2) Shall not render such services to any agency, organization, or person that discriminates on the basis of sex in its employment practices.

(b) *Employment of students by recipients.* A recipient that employs any of its students shall not do so in a manner that violates §§ 23.500 through 23.550.

### § 23.440 Health and insurance benefits and services.

Subject to § 23.235(d), in providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner that would violate §§ 23.500 through 23.550 if it were provided to employees of the recipient. This section shall not prohibit a recipient from providing any benefit or service that may be used by a different proportion of students of one sex than of the other, including family planning services. However, any recipient that provides full coverage health service shall provide gynecological care.

### § 23.445 Marital or parental status.

(a) *Status generally.* A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status that treats students differently on the basis of sex.

(b) *Pregnancy and related conditions.* (1) A recipient shall not discriminate against any student, or exclude any student from its education program or

activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

(2) A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation as long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

(3) A recipient that operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section, shall ensure that the separate portion is comparable to that offered to non-pregnant students.

(4) Subject to § 23.235(d), a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan, or policy that such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

(5) In the case of a recipient that does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom as a justification for a leave of absence for as long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status that she held when the leave began.

**§ 23.450 Athletics.**

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person, or otherwise be discriminated against in any interscholastic, intercollegiate, club, or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport. For the purposes of these Title IX regulations, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.

(c) *Equal opportunity.* (1) A recipient that operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available, the designated agency official will consider, among other factors:

(i) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(ii) The provision of equipment and supplies;

(iii) Scheduling of games and practice time;

(iv) Travel and per diem allowance;

(v) Opportunity to receive coaching and academic tutoring;

(vi) Assignment and compensation of coaches and tutors;

(vii) Provision of locker rooms, practice, and competitive facilities;

(viii) Provision of medical and training facilities and services;

(ix) Provision of housing and dining facilities and services;

(x) Publicity.

(2) For purposes of paragraph (c)(1) of this section, unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the designated agency official may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period.* A recipient that operates or sponsors interscholastic, intercollegiate, club, or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from September 29, 2000. A recipient that operates or sponsors interscholastic, intercollegiate, club, or intramural athletics at the secondary or postsecondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from September 29, 2000.

### § 23.455 Textbooks and curricular material.

Nothing in these Title IX regulations shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.

## Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs or Activities Prohibited

### § 23.500 Employment.

(a) *General.* (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient that receives Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way that could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by §§ 23.500 through 23.550, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

(4) A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity that admits as students only or predominantly members of one sex, if the giving of such preferences has the effect of discriminating on the basis of sex in violation of these Title IX regulations.

(b) *Application.* The provisions of §§ 23.500 through 23.550 apply to:

(1) Recruitment, advertising, and the process of application for employment;

(2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation, and changes in compensation;

(4) Job assignments, classifications, and structure, including position descriptions, lines of progression, and seniority lists;

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;

(9) Employer-sponsored activities, including social or recreational programs; and

(10) Any other term, condition, or privilege of employment.

**§ 23.505 Employment criteria.**

A recipient shall not administer or operate any test or other criterion for any employment opportunity that has a disproportionately adverse effect on persons on the basis of sex unless:

(a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and

(b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.

**§23.510 Recruitment.**

(a) *Nondiscriminatory recruitment and hiring.* A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have so discriminated in the past, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

(b) *Recruitment patterns.* A recipient shall not recruit primarily or exclusively at entities that furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of §§23.500 through 23.550.

**§23.515 Compensation.**

A recipient shall not make or enforce any policy or practice that, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and that are performed under similar working conditions.

**§23.520 Job classification and structure.**

A recipient shall not:

(a) Classify a job as being for males or for females;

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements that classify persons on the basis of sex, unless sex is a bona fide occupational qualification for the positions in question as set forth in §23.550.

**§23.525 Fringe benefits.**

(a) *''Fringe benefits'' defined.* For purposes of these Title IX regulations, *fringe benefits* means: Any medical, hospital, accident, life insurance, or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provision of §23.515.

(b) *Prohibitions.* A recipient shall not:

(1) Discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee's sex;

(2) Administer, operate, offer, or participate in a fringe benefit plan that does not provide for equal periodic benefits for members of each sex and for equal contributions to the plan by such recipient for members of each sex; or

(3) Administer, operate, offer, or participate in a pension or retirement plan that establishes different optional or compulsory retirement ages based on sex or that otherwise discriminates in benefits on the basis of sex.

**§23.530 Marital or parental status.**

(a) *General.* A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment that treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) *Pregnancy.* A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) *Pregnancy as a temporary disability.* Subject to §23235(d), a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, recovery therefrom, and any temporary disability resulting therefrom as any other temporary disability for all job-related purposes, including commencement, duration, and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) *Pregnancy leave.* In the case of a recipient that does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status that she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

### §23.535 Effect of state or local law or other requirements.

(a) *Prohibitory requirements.* The obligation to comply with §§23.500 through 23.550 is not obviated or alleviated by the existence of any State or local law or other requirement that imposes prohibitions or limits upon employment of members of one sex that are not imposed upon members of the other sex.

(b) *Benefits.* A recipient that provides any compensation, service, or benefit to members of one sex pursuant to a State or local law or other requirement shall provide the same compensation, service, or benefit to members of the other sex.

### §23.540 Advertising.

A recipient shall not in any advertising related to employment indicate preference, limitation, specification, or discrimination based on sex unless sex is a bona fide occupational qualification for the particular job in question.

### §23.545 Pre-employment inquiries.

(a) *Marital status.* A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is ''Miss'' or ''Mrs.''

(b) *Sex.* A recipient may make pre-employment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by these Title IX regulations.

### §23.550 Sex as a bona fide occupational qualification.

A recipient may take action otherwise prohibited by §§23.500 through 23.550 provided it is shown that sex is a bona fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section that is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex.

## Subpart F—Procedures

### §23.600 Notice of covered programs.

Within 60 days of September 29, 2000, each Federal agency that awards Federal financial assistance shall publish in the FEDERAL REGISTER a notice of

the programs covered by these Title IX regulations. Each such Federal agency shall periodically republish the notice of covered programs to reflect changes in covered programs. Copies of this notice also shall be made available upon request to the Federal agency's office that enforces Title IX.

### § 23.605 Enforcement procedures.

The investigative, compliance, and enforcement procedural provisions of Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) (''Title VI'') are hereby adopted and applied to these Title IX regulations. These procedures may be found at 38 CFR 18.6 through 18.11.

[65 FR 52890, Aug. 30, 2000]

## PART 25—UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION FOR FEDERAL AND FEDERALLY ASSISTED PROGRAMS

AUTHORITY: Sec. 213, Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub. L. 91–646, 84 Stat. 1894 (42 U.S.C. 4601) as amended by the Surface Transportation and Uniform Relocation Assistance Act of 1987, Title IV of Pub. L. 100–17, 101 Stat. 246–256 (42 U.S.C. 4601 note).

### § 25.1 Uniform relocation

Regulations and procedures for complying with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Pub. L. 91–646, 84 Stat. 1894, 42 U.S.C. 4601), as amended by the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Title IV of Pub. L. 100–17, 101 Stat. 246–255, 42 U.S.C. 4601 note) are set forth in 49 CFR part 24.

[52 FR 48022, Dec. 17, 1987]

## PART 26—ENVIRONMENTAL EFFECTS OF THE DEPARTMENT OF VETERANS AFFAIRS (VA) ACTIONS

Sec.

26.1 Issuance and purpose.
26.2 Applicability and scope.
26.3 Definitions.
26.4 Policy.
26.5 Responsibilities.
26.6 Environmental documents.
26.7 VA environmental decision making and documents.
26.8 Assistance to applicants.
26.9 Information on and public participation in VA environmental process.

AUTHORITY: 42 U.S.C. 4321–4370a; E.O. 11514, March 5, 1970, as amended by E.O. 11991, May 24, 1977.

SOURCE: 51 FR 37182, Oct. 20, 1986, unless otherwise noted.

### § 26.1 Issuance and purpose.

The purpose of this part is to implement the National Environmental Policy Act (NEPA) of 1969 as amended (42 U.S.C. 4321–4370a), in accordance with regulations promulgated by the Council of Environmental Quality (CEQ Regulations, 40 CFR parts 1500–1508), and Executive Order 11514, March 5, 1970, as amended by Executive Order 11991, May 24, 1977. This part shall provide guidance to officials of the Department of Veterans Affairs (VA) on the application of the NEPA process to Department activities.

(Authority: 42 U.S.C. 4321–4370a)

[51 FR 37182, Oct. 20, 1986, as amended at 54 FR 34987, Aug. 23, 1989]

### § 26.2 Applicability and scope.

This part applies to VA, its administrations and staff offices.

(Authority: 42 U.S.C. 4321–4370a)

[51 FR 37182, Oct. 20, 1986, as amended at 54 FR 34987, Aug. 23, 1989]

### § 26.3 Definitions.

(a) *United States* means all States, territories, and possessions of the United States and all waters and air space subject to the territorial jurisdiction of the United States. The territories and possessions of the United States include the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands.

(b) *VA elements,* for the purposes of this part, means the Veterans Health Services and Research Administration (VHS&RA), the Veterans Benefits Administration (VBA), the National Cemetery Administration (NCS), and the Office of Facilities.

(c) Other terms used in this part are defined in CEQ Regulations, 40 CFR part 1508.

(Authority: 42 U.S.C. 4321–4370a)

[51 FR 37182, Oct. 20, 1986, as amended at 54 FR 34987, Aug. 23, 1989]

### § 26.4 Policy.

(a) VA must act with care in carrying out its mission of providing services for veterans to ensure it does so consistently with national environmental policies. Specifically, VA shall ensure that all practical means and measures are used to protect, restore, and enhance the quality of the human environment; to avoid or minimize adverse environmental consequences, consistently with other national policy considerations; and to attain the following objectives:

(1) Achieve the fullest possible use of the environment, without degradation, or undesirable and unintended consequences;

(2) Preserve historical, cultural, and natural aspects of our national heritage, while maintaining, where possible, an environment that supports diversity and variety and individual choice;

(3) Achieve a balance between the use and development of resources, within the sustained capacity of the ecological system involved; and,

(4) Enhance the quality of renewable resources while working toward the maximum attainable recycling of nonrenewable resources.

(b) VA elements shall:

(1) Interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the NEPA and CEQ Regulations;

(2) Prepare concise and clear environmental documents which shall be supported by documented environmental analyses;

(3) Integrate the requirements of NEPA with Department planning and decision-making procedures;

(4) Encourage and facilitate involvement by affected agencies, organizations, interest groups and the public in decisions which affect the quality of the human environment; and,

(5) Consider alternatives to the proposed actions which are encompassed by the range of alternatives discussed in relevant environmental documents, and described in the environmental impact statement.

(Authority: 42 U.S.C. 4321–4370a)

[51 FR 37182, Oct. 20, 1986, as amended at 54 FR 34987, Aug. 23, 1989]

### § 26.5 Responsibiities.

(a) The Director of the Office of Environmental Affairs shall:

(1) Be responsible to coordinate and provide guidance to VA elements on all environmental matters;

(2) Assist in the preparation of environmental documents by VA elements; and, where more than one VA element, or Federal, State, or local agency is involved, assign the lead VA element or propose the lead Federal, State or local agency to prepare the environmental documents;

(3) Recommend appropriate actions to the Secretary of Veterans Affairs on those environmental matters for which the Secretary of Veterans Affairs has final approval authority;

(4) Assist in resolution of disputes concerning environmental matters within VA, and among VA and other Federal, State and local agencies;

(5) Coordinate preparation of VA comments on draft and final environmental impact statements of other agencies;

(6) Serve as the VA's principal liaison to the CEQ, the Environmental Protection Agency, the Office of Management and Budget, and other Federal, State, and local agencies on VA environmental actions; and

(7) Prepare appropriate supplemental guidance on implementation of these regulations.

(b) VA General Counsel shall provide legal advice and assistance in meeting the requirement of NEPA, the CEQ Regulations and these regulations.

(c) The heads of each VA element shall:

(1) Adopt procedures to ensure that decisions are made in accordance with NEPA, the CEQ Regulations and these regulations; and

(2) Be responsible to prepare environmental documents relating to programs and proposed actions by their

elements, when required by these regulations.

(Authority: 42 U.S.C. 4321–4370a)

### §26.6 Environmental documents.

(a) *Environmental Impact Statements.* The head of each VA element shall include a detailed written statement ''in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environmental.'' NEPA 102(2), 42 U.S.C. 4332(2) *see* CEQ Regulations, 40 CFR part 1502. An environmental impact statement shall be prepared in accordance with the following procedures:

(1) *Typical Classes of Action Which Normally Do Require Environmental Impact Statements:* (i) Proposed legislation (CEQ Regulation, 40 CFR 1508.17);

(ii) Acquisition of land in excess of 10 acres for development of a VA medical center facility;

(iii) Acquisition of land in excess of 50 acres for development of a VA national cemetery; and

(iv) Promulgation of policies which substantially alter agency programs and which have a significant effect on the quality of the human environmental.

(2) *Specific Criteria for Typical Classes of Action Which Normally Do Require Environmental Impact Statements:* (i) Probable significant degradation of historic or cultural resources, park lands, prime farmlands, designated wetlands or ecologically critical areas;

(ii) An increase in average daily vehicle traffic volume of at least 20 percent on access roads to the site or the major roadway network;

(iii) Probable conflict with Federal, State, or local environmental protection laws or requirements;

(iv) Probable threat or hazard to the public, or the involvement of highly uncertain risks to the environment;

(v) Similarity to previous actions that required an environmental impact statement; and

(vi) Probable conflict with, or significant effect on, local or regional zoning or comprehensive land use plans.

(b) *Categorical Exclusions.* A categorical exclusion is a ''category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal Agency in implementation of these regulations . . . and for which, therefore, neither an environmental assessment (see subparagraph (c), *infra*) or an environmental impact statement is required.'' CEQ Regulations, 40 CFR 1508.4.

(1) Typical classes of action which normally do not require either an Environmental Impact Statement or an Environmental Assessment:

(i) Repair, replacement, and new installation of primary or secondary electrical distribution systems;

(ii) Repair, replacement, and new installation of components such as windows, doors, roofs; and site elements such as sidewalks, patios, fences, retaining walls, curbs, water distribution lines, and sewer lines which involve work totally within VA property boundaries;

(iii) Routine VA grounds and facility maintenance activities;

(iv) Procurement activities for goods and services for routing facility operations maintenance and support;

(v) Interior construction or renovation;

(vi) New construction of 75,000 gross square feet or less;

(vii) Development of 20 acres of land or less within an existing cemetery, or development on acquired land of five acres or less;

(viii) Actions which involve support or ancillary appurtenances for normal operation;

(ix) Leases, licenses, permits, and easements;

(x) Reduction in force resulting from workload adjustments, reduced personnel or funding levels, skill imbalances or other similar causes;

(xi) VA policies, actions and studies which do not significantly affect the quality of the human environment;

(xii) Preparation of regulations, directives, manuals or other guidance that implement, but do not substantially change, the regulations, directives, manuals, or other guidance of higher organizational levels or another Federal agency; and

(xiii) Actions, activities, or programs that do not require expenditure of Federal funds.

(2) Specific criteria for typical classes of action which normally do not require either an Environmental Impact Statement or an Environmental Assessment:

(i) Minimal or no effect on the environment;

(ii) No significant change to existing environmental conditions;

(iii) No significant cumulative environmental impact; and

(iv) Similarity to Actions previously assessed with a finding of no significant impact.

(3) Extraordinary circumstances that must be considered by a VA element before categorically excluding a particular Department action:

(i) Greater scope or size than normally experienced for a particular categorical exclusion;

(ii) Actions in highly populated or congested areas;

(iii) Potential for degradation, although slight, or existing poor environmental conditions;

(iv) Use of unproven technology;

(v) Potential presence of an endangered species, archeological remains, or other protected resources; or

(vi) Potential presence of hazardous or toxic substances.

(c) *Environmental assessments.* If the proposed action is not covered by paragraph (a) or (b) of this section, the responsible official (head of the VA element) will prepare an environmental assessment (CEQ Regulations, 40 CFR 1508.9). Based on the environmental assessment, the official shall determine whether it is necessary to prepare an environmental impact statement, or to prepare a finding of no significant impact (CEQ Regulations, 40 CFR 1508.13).

(1) Typical classes of action which normally do require Environmental Assessments, but not necessarily Environmental Impact Statements:

(i) Acquisition of land of 10 acres or less for development of a VA medical facility;

(ii) Acquisition of land from 5 to 50 acres for development of a VA national cemetery; and,

(iii) New construction in excess of 75,000 gross square feet;

(2) Specific criteria for typical classes of action which normally do require an Environmental Assessment:

(i) Potential minor degradation of environmental quality;

(ii) Potential cumulative impact on environmental quality;

(iii) Presence of hazardous or toxic substances;

(iv) Potential violation of pollution abatement laws;

(v) Potential impact on protected wildlife or vegetation;

(vi) Potential effects on designated prime farmlands, wetlands, floodplains, or ecologically critical areas;

(vii) Alteration of stormwater runoff and retention;

(viii) Potential dislocation of persons or residences;

(ix) Potential increase of average daily vehicle traffic volume on access roads to the site by 10 percent or more but less than 20 percent, or which alters established traffic patterns in terms of location and direction;

(x) Potential threat or hazard to the public, or highly uncertain risks to the environment;

(xi) Potential conflicts with Federal, State, or local environmental protection laws or requirements;

(xii) Potential conflict with, or significant impact on, official local or regional zoning or comprehensive land use plans; and,

(xiii) Overloading of public utilities with insufficient capacity to provide reliable service and for average and peak periods.

(Authority: 42 U.S.C. 4321–4370a)

[51 FR 37182, Oct. 20, 1986, as amended at 54 FR 34987, Aug. 23, 1989]

## § 26.7 VA environmental decision making and documents.

(a) Relevant environmental documents shall accompany other decision documents as they proceed through the decision-making process.

(b) The major decision points for VA actions, by which time the necessary environmental documents must be completed, are as follows:

(1) *Leases.* Prior to execution of lease agreement.

(2) *Grants.* Prior to notification of grant award.

(3) *Policy.* Prior to final approval of a policy which substantially alters agency programs and which affects the human environment.

(4) *Legislative proposals.* Included in any recommendation or report to Congress on a legislative proposal which would affect the environment. The document must be available in time for Congressional hearings and deliberations.

(5) *Major, minor, minor miscellaneous delegated projects, and non-recurring maintenance projects.* Prior to contract award for working drawings or prior to in-house initiation of working drawings. If the Secretary of Veterans Affairs or designee makes a finding of compelling need, working drawings may commence prior to completion of the environmental compliance process. However, this will not preclude completion of environmental compliance prior to construction.

(6) *Land acquisition for development.* Prior to the Secretary's acceptance of custody and accountability (for Federal lands), or acceptance of offer to donate or contract for purchase (for private lands).

(c) Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, VA must act in accordance with CEQ Regulations, 40 CFR 1506.11.

(Authority: 42 U.S.C. 4321–4370a)

[51 FR 37182, Oct. 20, 1986, as amended at 54 FR 34987, Aug. 23, 1989]

### §26.8 Assistance to applicants.

(a) The CEQ Regulations (40 CFR 1501.2(d)) provide for advising of private applicants or other non-Federal groups when VA involvement in a particular action is reasonably foreseeable. Such foreseeable actions involve application to a VA element by private persons, States, and local agencies and pertain primarily to permits, leases, requests for financial assistance, grants, and related actions involving the use of VA real property.

(b) VA involvement may be reasonably foreseeable when the following actions are initiated by non-Federal groups:

(1) Easements and rights-of-way on VA land;

(2) Petroleum, grazing, and timber leases;

(3) Permits, license, and other use agreements or grants of real property for use by non-VA groups; and,

(4) Application for grants-in-aid for acquisition, construction, expansion or improvement of state veterans' health care facilities or cemeteries.

(c) Public notices or other means used to inform or solicit applicants for permits, leases, or related actions will describe the environmental documents, studies or information foreseeably required for later action by VA elements and will advise of the assistance available to applicants by VA element.

(d) When VA owned land is leased or otherwise provided to non-VA groups, VA element affected will initiate the NEPA process pursuant to these regulations.

(e) When VA grant funds are requested by a State agency, VA element affected will initiate the NEPA process and ensure compliance with VA environmental program. The environmental documents prepared by the grant applicant shall assure full compliance with State and local regulations as well as NEPA before the proposed action is approved.

(Authority: 42 U.S.C. 4321–4370a)

### §26.9 Information on and public participation in VA environmental process.

(a) During the preparation of environmental documents, the responsible VA element shall include the participation of environmental agencies, applicants, State and local governments and the public to the extent practicable and in conformance with CEQ Regulations. Information or status reports on environmental documents shall be provided to interested persons upon request.

(b) Notice of availability or filing requirements vary, depending on the type of environmental documents requested. Specific requirements and procedures are defined for each VA element.

(c) For those actions relating specifically to the Secretary of Veterans Affairs, the Office of Environmental Affairs, or a VA element, information is available by writing to the Director, Office of Environmental Affairs, Department of Veterans Affairs, 810

Vermont Avenue NW., Washington, DC 20420.

(Authority: 42 U.S.C. 4321–4370a)

# PART 36—LOAN GUARANTY

GUARANTY OF LOANS TO VETERANS TO PURCHASE MANUFACTURED HOMES AND LOTS, INCLUDING SITE PREPARATION

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AUTHORITY: 38 U.S.C. 501, 3701–3704, 3707, 3710–3714, 3719, 3720, 3729, 3762, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 36 appear at 61 FR 7217, Feb. 27, 1996.

## GUARANTY OF LOANS TO VETERANS TO PURCHASE MANUFACTURED HOMES AND LOTS, INCLUDING SITE PREPARATION

AUTHORITY: Sections 36.4201 through 36.4287 issued under 38 U.S.C. 501, 3701–3704, 3707, 3710–3714, 3719, 3720, 3729.

SOURCE: Sections 36.4201 through 36.4287 appear at 36 FR 1253, Jan. 27, 1971, unless otherwise noted.

NOTE: Those requirements, conditions, or limitations which are expressly set forth in 38 U.S.C. 3712 and are not restated herein must be taken into consideration in conjunction with the § 36.4200 series.

### § 36.4201 Applicability of the § 36.4200 series.

The § 36.4200 series shall be applicable to each loan entitled to guaranty under 38 U.S.C. 3712 on or after the date of publication thereof in the FEDERAL REGISTER.

### § 36.4202 Definitions.

Wherever used in 38 U.S.C. 3712 or the § 36.4200 series, unless the context otherwise requires, the terms defined in this section shall have the meaning herein stated.

*Automatic lender.* A lender that may process a loan or assumption without submitting the credit package to the Department of Veterans Affairs for underwriting review. Pursuant to 38 U.S.C. 3702(d) there are two categories of lenders who may process loans automatically: (1) Entities such as banks, savings and loan associations, and mortgage and loan companies that are subject to examinations by an agency of the United States or any State and (2) lenders approved by the Department of Veterans Affairs pursuant to standards established by the Department of Veterans Affairs.

(Authority: 38 U.S.C. 3702(d))

*Credit package.* Any information, report of verifications used by a lender, holder or authorized servicing agent to determine the creditworthiness of an applicant for a Department of Veterans Affairs guaranteed loan or the assumer of such a loan.

(Authority: 38 U.S.C. 3710 and 3714)

*Date of first uncured default.* The due date of the earliest payment not fully satisfied by the proper application or available credits or deposits.

*Default.* Failure of a borrower to comply with the terms of a loan agreement.

*Guaranty.* The obligation of the United States, assumed by virtue of 38 U.S.C. 3712, to repay a specified percentage of a loan upon default of the primary debtor, which guaranty payment shall be made after liquidation of the security for the loan and an accounting with the Secretary.

*Holder.* The lender or any subsequent assignee or transferee of the guaranteed obligation or the authorized servicing agent of the lender or of the assignee or transferee if the obligation has been assigned or transferred.

*Indebtedness.* The unpaid principal and interest plus any other amounts allowable under the terms of a loan including those authorized by statute and consistent with the § 36.4200 series, which have been paid and debited to the loan account. Unpaid late charges may not be included in the indebtedness.

*Lender.* The payee or assignee or transferee of an obligation at the time it is guaranteed. This term also includes any sole proprietorship, partnership, or corporation and the owners, officers, and employees of a sole proprietorship, partnership, or corporation

engaged in the origination, procurement, transfer, servicing, or funding of a loan which is guaranteed by VA.

(Authority: 38 U.S.C. 3704(d), 3712(g))

*Lien.* Any interest in, or power over, real or personal property, reserved by the vendor, or created by the parties or by operation of law, chiefly or solely for the purpose of assuring the payment of the purchase price, or a debt, and irrespective of the identity of the party in whom title to the property is vested, including but not limited to mortgages, deeds with a defeasance therein or collaterally, deeds of trust, security deeds, security instruments, mechanics' liens, lease-purchase contracts, conditional sales contracts, consignments.

*Loan.* Unpaid principal balance plus unpaid earned interest due under the terms of the obligation.

*Lot.* A parcel of land acceptable to the Secretary as a manufactured home site.

*Manufactured home.* A movable dwelling unit designed and constructed for year-round occupancy on land by a single family, which dwelling unit contains permanent eating, cooking, sleeping, and sanitary facilities. A double-wide manufactured home is a movable dwelling designed for occupancy by one family consisting of (1) two or more units intended to be joined together horizontally when located on a site, but capable of independent movement or (2) a unit having a section or sections which unfold along the entire length of the unit.

*Manufacturer's invoice.* A document, issued by a manufacturer and provided with a manufactured home to a retail dealer, acceptable in form and content to the Secretary which indicates the wholesale (base) price at the factory of the manufactured home model or series including any furnishings, equipment and accessories installed by the manufacturer, net of all rebates to the dealer. The following certification or a reasonable facsimile thereof, signed by an authorized representative of the manufacturer, must appear on the invoice:

''The undersigned certifies that the manufacturer's invoice price shown on this invoice reflects the dealer's cost at point of manufacture, exclusive of any and all freight or transportation charges, net of any and all discounts, bonuses, refunds, rebates (including volume rebates), prizes or anything of value which will inure to the benefit of the dealer at the time of purchase or at any future date.''

*Necessary site preparation.* Those improvements essential to render a manufactured home site acceptable to the Secretary including, but not limited to, the installation of utility connections, sanitary facilities and paving, and the construction of a suitable pad.

*New manufactured home.* A manufactured home which, at the time of purchase by the veteran-borrower, has not been previously occupied and was manufactured less than 1 year prior to the date of application to the Department of Veterans Affairs for loan guaranty.

(Authority: Sec. 406, Pub. L. 97–306)

*Reasonable value* means that figure which represents the amount a reputable and qualified appraiser, unaffected by personal interest, bias, or prejudice, would recommend to a prospective purchaser as a proper price or cost in the light of prevailing conditions.

*Repossession—repossessed* means recovery or acquisition of such physical control of property (pursuant to the provisions of the security instrument or as otherwise provided by law) as to make further legal or other action unnecessary in order to obtain actual possession of the property or to dispose of the same by sale or otherwise.

*Resale* means sale of the property by the holder to a third party for the purpose of liquidating the security for the loan after having acquired the property by repossession, public or private sale, or by any other means.

*Secretary.* The Secretary of Veterans Affairs, or any employee of the Department of Veterans Affairs authorized to act in the Secretary's stead.

*Servicing agent.* An agent designated by the loan holder as the entity to collect installments on the loan and/or perform other functions as necessary to protect the interests of the holder.

(Authority: 38 U.S.C. 3714)

*Used manufactured home.* A manufactured home which has been previously occupied or which was manufactured more than 1 year prior to date of loan application.

*Wholesale (base) price list.* The price list(s) as periodically amended, published and distributed by a home manufacturer to all retail dealers in a given marketing area, quoting the actual wholesale (base) price at the factory for specific models or series of manufactured homes, itemized options, itemized furniture, and specialty items offered for sale to such dealers during a specified period of time. All such wholesale (base) prices shall exclude any costs of trade association fees or charges, discounts, refunds, rebates, prizes, loan discount points or other financing charges, or anything else of more than a nominal value of $10 which will inure to the benefit of a dealer and/or home purchaser at any date, as required to be disclosed in the manufacturer's invoice. Each price list and amendment shall be retained by the manufacturer for a minimum period of six years from the date of publication to be available to VA and other Federal agencies upon request.

[36 FR 1253, Jan. 27, 1971, as amended at 40 FR 13212, Mar. 25, 1975; 43 FR 37197, Aug. 22, 1978; 44 FR 22723, Apr. 17, 1979; 48 FR 40227, Sept. 6, 1983; 50 FR 13193, Apr. 3, 1985; 54 FR 34988, Aug. 23, 1989; 55 FR 37471, Sept. 12, 1990; 58 FR 29114, May 19, 1993; 58 FR 37858, July 14, 1993]

GENERAL PROVISIONS

## § 36.4203 Eligibility of the veteran for the manufactured home loan benefit under 38 U.S.C. 3712.

(a) To be eligible for the manufactured home loan benefit a veteran must have loan guaranty entitlement for manufactured home purposes available for use. Notwithstanding the provisions of § 36.4205(e), the Secretary may exclude the amount of guaranty entitlement used for any guaranteed manufactured home loan provided:

(1) The property which served as security for the loan has been disposed of by the veteran, or has been destroyed by fire or other natural hazard; and

(2)(i) The loan has been repaid in full or the Secretary has been released from liability as to the loan, or if the Secretary has suffered a loss on said loan, such loss has been paid in full; or

(ii) A veteran-transferee has agreed to assume the outstanding balance on the loan and consented to the use of his or her entitlement to the extent the entitlement of the veteran-transferor had been used originally, and the veteran-transferee otherwise meets the requirements of 38 U.S.C. chapter 37.

(3) In a case in which the veteran still owns a property purchased with a VA-guaranteed loan, the Secretary may, one time only, restore entitlement if:

(i) The loan has been repaid in full, or, if the Secretary has suffered a loss on the loan, the loss has been paid in full; or

(ii) The Secretary has been released from liability as to the loan and, if the Secretary has suffered a loss on the loan, the loss has been paid in full.

(4) The Secretary may, in any case involving circumstances deemed appropriate, waive either or both of the requirements set forth in paragraphs (a)(1) and (a)(2)(i) of this section.

(Authority: 38 U.S.C. 3702, 3712)

The Secretary may, in any case involving circumstances deemed appropriate, waive either or both of the requirements set forth in paragraph (a)(1) or (2) of this section.

(b) A veteran may use his or her remaining home loan guaranty entitlement for any purpose authorized by 38 U.S.C. 3710, 3711, or 3712 except that a veteran who has purchased a manufactured home unit may not purchase a second manufactured home unit until the unit which secured the first loan has been disposed of by the veteran or has been destroyed by fire or other natural hazard.

(c) The available entitlement of a veteran will be determined by the Secretary as of the date of receipt of an application for guaranty of a manufactured home loan or loan report. Such date of receipt shall be the date the application or loan report is date stamped into the Department of Veterans Affairs. Eligibility derived from the most recent period of service (1) shall cancel any unused entitlement derived from any earlier period of service, and (2) shall be reduced by the

amount by which entitlement from service during any earlier period has been used to obtain a direct, guaranteed, or insured loan:

(i) On property which the veteran owns at the time of application; or

(ii) As to which the Secretary has incurred actual liability or loss, unless in the event of loss or the incurrence and payment of such liability by the Secretary the resulting indebtedness of the veteran to the United States has been paid in full.

*Provided*, That if the Secretary issues or has issued a certificate of commitment covering the loan described in the application for guaranty or in the loan report, the amount and percentage of guaranty contemplated by the certificate of commitment shall not be subject to reduction if the loan has been or is closed on a date which is not later than the expiration date of the certificate of commitment, notwithstanding that the Secretary in the meantime and prior to the issuance of the evidence of guaranty shall have incurred actual liability or loss on a direct, guaranteed, or insured loan previously obtained by the borrower. For the purposes of this paragraph, the Secretary will be deemed to have incurred actual loss on a guaranteed or insured loan if the Secretary has paid a guaranty or insurance claim thereon and the veteran's resultant indebtedness to the Government has not been paid in full, and to have incurred actual liability on a guaranteed or insured loan if the Secretary is in receipt of a claim on the guaranty or insurance or is in receipt of a notice of default. In the case of a direct loan, the Secretary will be deemed to have incurred an actual loss if the loan is in default.

(Authority: 38 U.S.C. 3712(b)(1) and (2) and (c)(4))

[44 FR 22723, Apr. 17, 1979, as amended at 48 FR 40227, Sept. 6, 1983; 49 FR 28243, July 11, 1984; 60 FR 38257, July 26, 1995]

### § 36.4204 Loan purposes, maximum loan amounts and terms.

(a) A manufactured home loan may be guaranteed if the loan is for one of the following purposes;

(1) To purchase a lot on which to place a manufactured home already owned by the veteran;

(2) To purchase a single-wide manufactured home;

(3) To purchase a single-wide manufactured home and a lot on which to place such home;

(4) To purchase a double-wide manufactured home;

(5) To purchase a double-wide manufactured home and lot on which to place such home;

(6) To refinance an existing loan, including a previously refinanced purchase money loan, that was made for the purchase of and is secured by a manufactured home and to purchase a lot on which the manufactured home is or will be placed; or

(7) To refinance in accordance with § 36.4223 an existing manufactured home loan guaranteed, insured or made under paragraphs (a)(1) through (6) of this section provided the amount of the loan to refinance does not exceed an amount equal to 95 percent of the reasonable value of the manufactured home securing the loan, as determined by the Secretary.

(Authority: 38 U.S.C. 3712(a)(1))

(b) In the case of a loan to purchase a new manufactured home unit only, the loan amount shall not exceed the lesser of an amount equal to 95 percent of the purchase price of the property securing the loan or the amount computed in paragraph (c), of this section, provided the total loan amount does not exceed 145 percent of the manufacturer's invoice.

(c) For all manufactured home loans, the maximum loan amount is as follows:

(1) In the case of a loan to purchase a new manufactured home unit only, the loan amount is to be computed as the sum of:

(i) One hundred twenty-five (125) percent of the figure produced by this computation:

Subtract from the manufacturer's invoice cost the manufacturer's invoice cost of any components (furnishings, accessories, equipment) removed from the unit by the dealer. To the remainder add the dealer's cost for any components added by such dealer. The sum

so obtained shall be the figure to be multiplied by the specified percentage; and

(ii) One hundred (100) percent of the actual amount of fees and charges permitted in § 36.4232.

(2) A loan to purchase a lot upon which a manufactured home owned by the veteran will be placed is limited to the reasonable value of a developed lot or the reasonable value plus such amount determined by the Secretary to be appropriate to cover the cost of necessary site preparation for an undeveloped lot.

(3) The maximum loan amount for a used manufactured home may not exceed the reasonable value as established by the Secretary, plus:

(i) Actual fees or charges for required recordation of documents;

(ii) The amount of any documentary stamp taxes levied on the transactions;

(iii) The amount of State and local taxes levied on the transactions; and

(iv) The premium for customary physical damage insurance and vendor's single interest coverage on the manufactured home for an initial policy term not to exceed one year.

(4) In the case of an interest rate reduction refinancing loan (38 U.S.C. 3712(a)(1)(F)) the maximum loan may not exceed the sum of:

(i) The balance of the VA loan being refinanced;

(ii) Closing costs as authorized by § 36.4232 or § 36.4254, as appropriate; and

(iii) Allowable discounts, provided that:

(A) The loan application is submitted to the Secretary for prior approval;

(B) The amount of discount is disclosed to the Secretary and the veteran prior to the issuance of the certificate of commitment by the Secretary. This certificate of commitment shall specify the discount to be paid by the veteran, and this discount may not be increased once the commitment has been issued without the approval of the Secretary;

(C) The discount has been determined by the Secretary to be reasonable in amount; and

(5) For a loan to refinance a purchase money lien on a manufactured home and to purchase a lot (38 U.S.C. 3712(a)(1)(G)) on which the manufactured home is or will be placed:

(i) The loan must be secured by the same manufactured home which must be owned and occupied by the veteran as the veteran's home; and

(ii) The amount of the loan may not exceed an amount equal to the sum of:

(A) The purchase price of the lot, not to exceed the reasonable value thereof, as authorized by § 36.4252;

(B) The amount determined by the Secretary to be appropriate to cover the cost of necessary preparation of the lot;

(C) The balance of the loan being refinanced; and

(D) Closing costs, as authorized by § 36.4232 or § 36.4254, as appropriate, and a reasonable discount with respect to that portion of the loan used to refinance the existing purchase money lien.

(iii) Allowable discounts may be charged to the veteran on the portion of the loan used to refinance the existing purchase money lien provided:

(A) The loan application is submitted to the Secretary for prior approval;

(B) The amount of discount to be paid on the unit portion of the loan is disclosed to the Secretary and the veteran prior to the issuance of the certificate of commitment by the Secretary. The certificate of commitment shall specify the discount to be paid by the veteran on the unit portion of the loan, and this discount may not be increased once the commitment has been issued without the approval of the Secretary; and

(C) The discount on the unit portion of the loan has been determined by the Secretary to be reasonable in amount.

(6) All powers of the Secretary under paragraphs (c) (4) and (5) of this section, except the authority to revise the discount after the commitment is issued, are hereby delegated to those officials designated by § 36.4221(b). The power of the Secretary to approve an increase in the discount on the unit portion of the loan after the commitment is issued is delegated to those officials designated by § 36.4220(a).

(d) The loan amount in an individual case shall not exceed the following:

(1) In the case of a loan to purchase a new manufactured home unit only, the loan amount shall not exceed the sum of the following:

(i) 120 percent of the figure produced by the following computation:

Subtract from the manufacturer's invoice cost the manufactuer's invoice cost of any components (furnishings, accessories, equipment) removed from the unit by the dealer. To the remainder add the dealer's cost for any components added by such dealer. The sum so obtained shall be the figure to be multiplied by the specified percentage.

(ii) 100 percent of the actual amount of fees and charge permitted in § 36.4232.

(2) In the case of a loan to purchase a new manufactured home unit plus the cost of necessary site preparation where the veteran owns the lot, the loan amount shall be limited to the amount determined in paragraph (d)(1) of this section plus such costs of necessary site preparation as are approved by the Secretary.

(3) In the case of a loan to purchase a new manufactured home unit plus the purchase of an undeveloped lot on which to place such home plus the cost of necessary site preparation, the loan amount shall be limited to the amount determined in paragraph (d)(1) of this section plus the reasonable value of the undeveloped lot as determined by the Secretary plus such costs of necessary site preparation as are approved by the Secretary.

(4) In the case of a loan to purchase a new manufactured home unit plus the cost of a suitably developed lot on which to place such home, the loan amount shall be limited to the amount determined in paragraph (d)(1) of this section plus the reasonable value of the developed lot as determined by the Secretary.

(5) In the case of a loan to purchase a lot upon which will be placed a manufactured home owned by the veteran the loan is limited to the reasonable value of a developed lot or the reasonable value plus such amount as is determined by the Secretary to be appropriate to cover the cost of necessary site preparation for an undeveloped lot.

(6) In the case of a used manufactured home the maximum loan may not exceed the reasonable value as established by the Secretary, plus;

(i) Actual fees or charges for required recordation of documents;

(ii) The amount of any documentary stamp taxes levied on the transaction;

(iii) The amount of State and local taxes levied on the transaction; and

(iv) The premium for customary physical damage insurance and vendor's single interest coverage on the manufactured home for an initial policy term of not to exceed 5 years.

(7) In the case of an interest rate reduction refinancing loan (38 U.S.C. 3712(a)(1)(F)) the maximum loan may not exceed:

(i) The balance of the Department of Veterans Affairs loan being refinanced;

(ii) Closing costs as authorized by § 36.4232 or § 36.4254, as appropriate; and

(iii) Allowable discounts provided:

(A) The loan application is submitted to the Secretary for prior approval;

(B) The amount of discount is disclosed to the Secretary and the veteran prior to the issuance of the certificate of commitment by the Secretary. Said certificate of commitment shall specify the discount to be paid by the veteran, and this discount may not be increased once the commitment has been issued without the approval of the Secretary;

(C) The discount has been determined by the Secretary to be reasonable in amount; and

(D) All powers of the Secretary under this paragraph (d)(7) of this section, except the authority to revise the discount after the commitment is issued, are hereby delegated to those officials designated by § 36.4221(b). The power of the Secretary to approve an increase in the discount after the commitment is issued is delegated to those officials designated by § 36.4220(a).

(Authority: 38 U.S.C. 3712 (a)(4) and (g))

(8) In the case of a loan to refinance a purchase money lien on a manufactured home and to buy a lot (38 U.S.C. 3712(a)(1)(G)) on which the manufactured home is or will be placed:

(i) The loan must be secured by the same manufactured home which must be owned and occupied by the veteran as the veteran's home; and

(ii) The amount of the loan may not exceed an amount equal to the sum of:

(A) The purchase price, not to exceed the reasonable value of the lot, as authorized by § 36.4252,

(B) The amount determined by the Secretary to be appropriate to cover the cost of necessary preparation of the lot,

(C) The balance of the loan being refinanced, and

(D) Closing costs, as authorized by § 36.4232 or § 36.4254, as appropriate, and a reasonable discount with respect to that portion of the loan used to refinance the existing purchase money lien.

(iii) Allowable discounts may be charged to the veteran on the portion of the loan used to refinance the existing purchase money lien provided:

(A) The loan application is submitted to the Secretary for prior approval;

(B) The amount of discount to be paid on the unit portion of the loan is disclosed to the Secretary and the veteran prior to the issuance of the certificate of commitment by the Secretary. The certificate of commitment shall specify the discount to be paid by the veteran on the unit portion of the loan, and this discount may not be increased once the commitment has been issued without the approval of the Secretary;

(C) The discount on the unit portion of the loan has been determined by the Secretary to be reasonable in amount; and

(D) All powers of the Secretary under paragraph (d)(8) of this section, except the authority to revise the discount after the commitment is issued, are hereby delegated to those officials designated by § 36.4221(b). The power of the Secretary to approve an increase in the discount on the unit portion of the loan after the commitment is issued is delegated to those officials designated by § 36.4220(a).

(Authority: 38 U.S.C. 3712 (a)(1)(G), (a)(5) and (g))

EDITORIAL NOTE: At 58 FR 37858, July 14, 1993, the following paragraph (d) was redesignated from paragraph (b), effective August 13, 1993. However, paragraph (d) already exists, and the redesignation resulted in two paragraph (d)s.

(d) A loan for any of the purposes described in paragraphs (a)(1) through (6) of this section may include an amount determined by the Secretary to be appropriate to cover the cost of necessary preparation of a lot already owned or to be acquired by the veteran, including the costs of installing utility connections and sanitary facilities, of paving, and of constructing a suitable pad for the manufactured home.

(e) The maximum permissible loan terms shall not exceed;

(1) 20 years and 32 days in the case of a loan to purchase a single-wide manufactured home or a single-wide manufactured home and lot;

(2) 15 years and 32 days in the case of a loan to purchase a lot on which to place a manufactured home already owned by the veteran;

(3) 23 years and 32 days in the case of a loan to purchase a double-wide manufactured home, or 25 years and 32 days in the case of a loan to purchase a double-wide manufactured home and lot; or

(4) In the case of a used manufactured home the maximum term set forth in paragraph (c)(1) or (3) of this section or the remaining physical life expectancy of the unit as established by the Secretary, whichever is less.

(Authority: 38 U.S.C. 3712(a)(1) and (2), (d)(1), (e)(4)(B))

(f) An itemized list of all items included in the manufactured home loan as enumerated in § 36.4232 shall be provided to both the purchaser and the Secretary. At the time of loan origination an independent fee inspection shall be conducted to assure that all items included in the loan amount are accounted for and in place. A similar inspection will be conducted in the event of repossession immediately prior to repossession. The costs of the fee inspections may be included in the loan amount or the claim amount and charged to the borrower pursuant to the provisions of § 36.4232 (a) and (b).

(The information collection requirements contained in § 36.4204(f) were approved by the Office of Management and Budget under OMB control number 2900–0516)

(g) The cost of the transaction which cannot be paid from the proceeds of the loan must be paid by the veteran in cash from the veteran's own resources. Except for interest rate reduction refinancing loans pursuant to paragraph (a)(7) of this section or loans to refinance a manufactured home and to buy

a lot pursuant to paragraph (a)(8) of this section, closing costs and prepaid items incident to the real estate portion of any manufactured home loan must be paid in cash and may not be included in the loan amount.

(Authority: 38 U.S.C. 3712 (a)(4), (a)(5), (g))

[48 FR 40227, Sept. 6, 1983, as amended at 54 FR 34988, Aug. 23, 1989; 58 FR 37858, July 14, 1993]

### § 36.4205 Computation of guaranty.

(a) The amount of guaranty in respect to a loan guaranteed under 38 U.S.C. 3712 shall be forty (40) percent of the original principal amount of the loan or $20,000, whichever is less. With respect to a loan guaranteed under 38 U.S.C. 3712(a)(1)(F), the dollar amount of guaranty may not exceed the original dollar amount of guaranty on the loan being refinanced. With respect to a loan guaranteed under 38 U.S.C. 3712(a)(1)(G), the dollar amount of guaranty previously used to obtain a manufactured unit loan may be transferred pursuant to § 36.4224(b) for use in refinancing the unit when simultaneously acquiring a lot.

(b) Subject to the provisions of paragraph (c) of § 36.4203, the following formulas will determine the amount of guaranty entitlement which remains available to an eligible veteran after prior use of entitlement:

(1) If a veteran previously secured a nonrealty (business) loan, the amount of nonrealty entitlement used is doubled and subtracted from $36,000. The sum remaining is the amount of available entitlement for use not to exceed $20,000 for manufactured home purposes.

(2) If a veteran previously secured a realty (home) loan, the amount of realty (home) loan entitlement used is subtracted from $36,000. The sum remaining is the amount of available entitlement for use not to exceed $20,000 for manufactured home purposes.

(3) If a veteran previously secured a manufactured home loan, the amount of entitlement used for manufactured home purposes is subtracted from $36,000. The sum remaining is the amount of available entitlement for use for home loan purposes only. To determine the amount of additional entitlement available for manufactured home purposes, the amount of entitlement previously used for manufactured home purposes is subtracted from $20,000. Except for manufactured home loans to be obtained pursuant to 38 U.S.C. 3712(a)(1)(F) or (G), the sum remaining is the amount of available entitlement for use for manufactured home purposes.

(c) For the purpose of computing the remaining guaranty benefit to which a veteran is entitled, manufactured home and manufactured home lot loans guaranteed prior to October 1, 1978, shall be taken into consideration as if made subsequent thereto, and the veteran's entitlement will be reduced by the amount of the Secretary's guaranty issued in the particular loan transaction.

(d) A guaranty is reduced or increased pro rata with any deduction or increase in the amount of the guaranteed indebtedness, but in no event will the amount payable on a guaranty exceed the amount of the original guaranty or the percentage of the indebtedness corresponding to that of the original guaranty.

(e) The amount of any guaranty for a manufactured home or manufactured home lot loan shall be charged against the original or remainder of the borrower's guaranty benefit available for manufactured home purposes. Complete or partial liquidation, by payment or otherwise, of the veteran's guaranteed indebtedness does not increase the remainder of the guaranty benefit, if any, otherwise available to the veteran. When the maximum guaranty available legally to a veteran for manufactured home purposes shall have been granted, no further guaranty for manufactured home purposes shall be available to the veteran.

(f)(1) The amount of guaranty entitlement, available and unused, of an eligible unremarried surviving spouse (whose eligibility does not result from his or her own service) is determinable in the same manner as in the case of any veteran, and any entitlement which the decedent (who was his or her spouse) used shall be disregarded. A certificate as to the eligibility of such surviving spouse, issued by the Secretary, shall be a condition precedent

to the guaranty or insurance of any loan made to a surviving spouse in such capacity.

(Authority: 38 U.S.C. 3701(a)(2), 3712(c)(4))

(2) For the purpose of obtaining an interest rate reduction refinancing loan purusant to 38 U.S.C. 3712(a)(1)(F), an unmarried surviving spouse who was a co-obligor under an existing Department of Veterans Affairs guaranteed loan shall be considered to be eligible for the 38 U.S.C. 3712(a)(1)(F) benefit.

(Authority: 38 U.S.C. 3712(a)(4)(C))

(g) Any evidence of guaranty issued by the Secretary in respect to such loan shall be conclusive evidence of the eligibility of the loan for guaranty and of the amount of such guaranty, *Provided, however,* That the Secretary may establish against the original lender, defenses based on fraud or material misrepresentation and that the Secretary may by regulations in force at the date of such issuance establish partial defenses to the amount payable on the guaranty.

[44 FR 22724, Apr. 17, 1979, as amended at 46 FR 43669, Aug. 31, 1981; 48 FR 40228, Sept. 6, 1983; 58 FR 37859, July 14, 1993]

### § 36.4206 Underwriting standards, occupancy, and non-discrimination requirements.

(a) Except for refinancing loans pursuant to 38 U.S.C. 3712(a)(1)(F), no loan shall be guaranteed unless the terms of repayment bear a proper relationship to the veteran's present and anticipated income and expenses, and the veteran is a satisfactory credit risk, as determined by use of the standards in § 36.4337 of this part.

(Authority: 38 U.S.C. 3712)

(b) Use of the standards in § 36.4337 of this part for underwriting manufactured home loans will be waived only in extraordinary circumstances.

(Authority: 38 U.S.C. 3712)

(c) The lender responsibilities contained in § 36.4337 of this part and the certification required and penalties to be assessed under § 36.4337A of this part against lenders making false certifications also apply to lenders originating VA guaranteed manufactured home loans under the authority of 38 U.S.C. 3712.

(Authority: 38 U.S.C. 3712)

(d) No loan shall be guaranteed pursuant to 38 U.S.C. 3712(a)(1) unless:

(1) The veteran certifies, in such form as the Secretary shall prescribe, that he or she will personally occupy the property as his or her home or, if the veteran is on active duty status as a member of the Armed Forces and is for that reason unable to occupy the property, the veteran's spouse must certify that he or she will personally occupy the property as his or her home. For the purposes of this section, the words *personally occupy the property as his or her home* mean that the veteran as of the date of his or her certification actually lives in the property personally as his or her residence or actually intends upon completion of the loan and acquisition of the manufactured home to move into the home personally within a reasonable time and to utilize the home as his or her residence.

(2) The veteran certifies, in such form as the Secretary shall prescribe that:

(i) Neither the veteran, nor anyone authorized to act for the veteran, will refuse to sell or rent, after the making of a bona fide offer, or refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny the dwelling or property covered by this loan to any person because of race, color, religion, sex, handicap, familial status, or national origin;

(ii) The veteran recognizes that any restrictive covenant on the property relating to race, color, religion, sex, handicap, familial status, or national origin is illegal and void and any such covenant is specifically disclaimed; and

(iii) The veteran understands that civil action for preventive relief may be brought by the Attorney General of the United States in any appropriate U.S. district court against any person responsible for a violation of the applicable law.

[46 FR 43670, Aug. 31, 1981, as amended at 56 FR 9855, Mar. 8, 1991; 58 FR 37859, July 14, 1993]

### § 36.4207 Manufactured home standards.

To qualify for purchase with a guaranteed loan a manufactured home must:

(a) Meet the following dimensional requirements.

(1) A single-wide unit must be a minimum of ten (10) feet wide and have a minimum floor area of four hundred (400) square feet.

(2) A double-wide unit, when assembled, must be a minimum of twenty (20) feet wide and have a minimum floor area of seven hundred (700) square feet.

(b) Be so constructed as to be towed on its own chassis and undercarriage and/or independent undercarriage;

(c) Contain living facilities for year around occupancy by one family, including permanent provisions for heat, sleeping, cooking, and sanitation; and

(d) Comply with the specifications in effect at the time the loan is made that are prescribed by the Secretary.

(Authority: 38 U.S.C. 3712(h)(1))

[36 FR 1253, Jan. 27, 1971, as amended at 40 FR 13213, Mar. 25, 1975; 44 FR 22725, Apr. 17, 1979; 56 FR 9855, Mar. 8, 1991]

### § 36.4208 Manufactured home location standards.

(a) Any rental site on which a manufactured home to be purchased with a guaranteed loan will be placed must qualify as an acceptable rental site as follows:

(1) Be located within a manufactured home park or subdivision which is acceptable to the Department of Veterans Affairs; or

(2) Be a site which is not within a manufactured home park or subdivision provided that (i) the site is determined by the Department of Veterans Affairs to be an acceptable rental site, or (ii) in the absence of a determination by the Department of Veterans Affairs in respect to such site the manufactured home purchaser and the dealer certify to the Secretary as follows:

(A) Placement of the manufactured home on the site or lot is not a violation of zoning laws or other local requirements applicable to manufactured homes;

(B) The site or lot is served by water and sanitary facilities which are approved by the local public authority and which are acceptable to the Department of Veterans Affairs;

(C) The site or lot is served by an all-weather street or road;

(D) The site or lot is not known to be subject to conditions that may be hazardous to the health or safety of the manufactured home occupants or that may endanger the manufactured home; and

(E) The site is free from, and the location of the manufactured home thereon will not substantially contribute to, adverse scenic or environmental conditions.

(b) No manufactured home purchased with a guaranteed loan may be placed on a lot owned by an eligible veteran or on a lot to be purchased or improved with the proceeds of a guaranteed manufactured home loan unless the lot owned or to be so purchased or improved is determined by the Department of Veterans Affairs to be an acceptable manufactured home site.

(c) A manufactured home park or subdivision which is not approved by the Federal Housing Administration will be acceptable to the Department of Veterans Affairs for the purpose of 38 U.S.C. 3712 if the Secretary determines that the park or subdivision, whether existing or proposed, (1) is designed to encourage the maintenance and development of manufactured home sites which will be free from, and not substantially contribute to, adverse scenic and environmental conditions, and (2) complies otherwise with the applicable standards for planning, construction, and general acceptability prescribed by the Secretary.

[36 FR 1253, Jan. 27, 1971, as amended at 55 FR 37472, Sept. 12, 1990; 56 FR 9855, Mar. 8, 1991]

### § 36.4209 Reporting requirements.

(a) Each loan proposed for guaranty under 38 U.S.C. 3712 shall, unless otherwise provided in the § 36.4200 series, be submitted to the Secretary for approval prior to closing. The Secretary upon determining any such proposed loan to be eligible for guaranty will issue a certificate of commitment.

(b) Except as provided in paragraph (c) of this section, a certificate of commitment shall entitle the holder to the

issuance of the evidence of guaranty upon the ultimate actual payment of the full proceeds of the loan for the purposes described in the original report and upon the submission within 60 days thereafter of a supplemental report showing such fact and:

(1) That the loan conforms to the terms of the certificate of commitment;

(2) The identity of all property purchased therewith, including the itemized list required by § 36.4204(f);

(3) That all property purchased with the proceeds of the loan has been encumbered as required by the § 36.4200 series;

(4) In respect to any property purchased with the loan proceeds as to which the Secretary issued a certificate of reasonable value which was conditioned upon completion of any construction, repairs, alterations or improvements not inspected and approved subsequent to completion by a compliance inspector designated by the Secretary that such construction, repairs, alterations or improvements have been completed according to the plans and specifications upon which such reasonable value was based; and

(5) That the loan conforms otherwise to the applicable provisions of 38 U.S.C. chapter 37 and § 36.4200 series.

(c) A deviation of more than five (5) percent between the estimates upon which the certificate of commitment was issued and the report of final payment of the proceeds of the loan, or a change in the identity of the property acquired by the veteran with the loan proceeds will invalidate the certificate of commitment, unless such deviation or change is approved by the Secretary.

(d) Upon the failure of the lender to report in accordance with paragraph (b) of this section, the certificate of commitment shall have no further effect; *Provided, nevertheless,* That if the loan otherwise meets the requirements of this section, said certificate of commitment may be given effect by the Secretary, notwithstanding the report is received after the date otherwise required.

(e) Subject to compliance with the regulations concerning guaranty of manufactured home loans to veterans, the Certificate of Guaranty will be issuable within the available entitlement of the veteran on the basis of the loan reported, except for refinancing loans for interest rate reductions. No certificate of commitment shall be issued, and no loan shall be guaranteed, unless the lender, the veteran, and the loan are shown to be eligible; nor shall guaranty be issued on any manufactured home loan unless the Secretary determines that there has been compliance by the veteran with the certification requirements of 38 U.S.C. 3712(e)(5).

(Authority: 38 U.S.C. 3712(a)(4), (c)(2), (e)(5))

(f) Any amount of the loan that is disbursed for an ineligible purpose shall be excluded in computing the amount of guaranty.

(g) Approval by the Secretary pursuant to 38 U.S.C. 3712(c)(1) is required before a lender may close manufactured home loans or manufactured home lot loans on the automatic basis. Evidence of guaranty will be issuable if the loan closed on the automatic basis is reported to the Secretary within 60 days of full disbursement, and upon certification of the lender that no default exists thereunder which has continued for more than 30 days and that the loan complies with paragraphs (b)(2), (3), (4), and (5), (e), and (f) of this section. Upon the failure of the lender to report in accordance with this paragraph the loan will not be eligible for guaranty unless the lender submits with the report a certification that the loan is not in default and an explanation as to why the loan was not timely reported.

(Authority: 38 U.S.C. 3712 (c)(1) and (g))

(h) With respect to any loan for which a commitment was made on or after March 1, 1988, the Secretary must be notified whenever the holder receives knowledge of disposition of a manufactured home and/or lot securing a Department of Veterans Affairs guaranteed loan.

(1) If the seller applies for prior approval of the assumption of the loan, then:

(i) A holder (or its authorized servicing agent) who is an automatic lender must examine the creditworthiness

of the purchaser and determine compliance with the provisions of 38 U.S.C. 3714. The creditworthiness review must be performed by the party that has automatic authority. If both the holder and its servicing agent are automatic lenders, then they must decide between themselves which one will make the determination of creditworthiness, whether the loan is current and whether there is a contractual obligation to assume the loan, as required by 38 U.S.C. 3714. If the actual loan holder does not have automatic authority and its servicing agent is an automatic lender, then the servicing agent must make the determinations required by 38 U.S.C. 3714 on behalf of the holder. The actual holder will remain ultimately responsible for any failure of its servicing agent to comply with the applicable law and Department of Veterans Affairs regulations.

(A) If the assumption is approved and the transfer of the security is completed, then the notice required by this paragraph shall consist of the credit package (unless previously provided in accordance with paragraph (h)(1)(i)(B) of this section) and a copy of the executed deed, bill of sale, transfer of equity agreement, and/or assumption agreement as required by the VA office of jurisdiction. The notice shall be submitted to the Department of Veterans Affairs with the Department of Veterans Affairs receipt for the funding fee provided for in §§36.4232(e)(3) or 36.4254(d)(3) of this part.

(B) If the application for assumption is disapproved, the holder shall notify the seller and the purchaser that the decision may be appealed to the Department of Veterans Affairs office of jurisdiction within 30 days. The holder shall make available to that Department of Veterans Affairs office all items used by the holder in making the holder's decision in case the decision is appealed to the Department of Veterans Affairs. If the application remains disapproved after 60 days (to allow time for appeal to and review by the Department of Veterans Affairs) then the holder must refund $50 of any fee previously collected under the provisions of §36.4275(a)(3)(iii) of this part. If the application is subsequently approved and the sale is completed, then the holder (or its authorized servicing agent) shall provide the notice described in paragraph (h)(1)(i)(A) of this section.

(C) In performing the requirements of paragraphs (h)(1)(i)(A) or (h)(1)(i)(B) of this section the holder must complete its examination of the creditworthiness of the prospective purchaser and advise the seller of its decision no later than 45 days after the date of receipt by the holder of a complete application package for the approval of the assumption. The 45-day period may be extended by an interval not to exceed the time caused by delays in processing of the application which are documented as beyond the control of the holder, such as employers or depositories not responding to requests for verifications, which were timely forwarded, or followups on those requests.

(ii) If neither the holder nor its authorized servicing agent is an automatic lender, the notice to the Department of Veterans Affairs shall include:

(A) Advice regarding whether the loan is current or in default;

(B) A copy of the purchase contract; and

(C) A complete credit package developed by the holder which the Secretary may use for determining the creditworthiness of the purchaser.

(D) The notice and documents required by this section must be submitted to the Department of Veterans Affairs office of jurisdiction no later than 35 days after the date of receipt by the holder of a complete application package for the approval of the assumption, subject to the same extensions as provided in paragraph (h)(1)(i) of this section. If the assumption is not automatically approved by the holder or its authorized agent pursuant to the automatic authority provisions, $50 of any fee collected in accordance with §36.4275(a)(3)(iii) of this part must be refunded. If the Department of Veterans Affairs does not approve the assumption, the holder will be notified and an additional $50 of any fee collected under §36.4275(a)(3)(iii) of this part must be refunded following expiration of the 30-day appeal period set out in paragraph (h)(1)(i)(B) of this section. If such an appeal is made to the Department of Veterans Affairs, then the

review will be conducted at the Department of Veterans Affairs office of jurisdiction by an individual who was not involved in the original disapproval decision. If the application for assumption is approved and the transfer of the security is completed, then the holder (or its authorized servicing agent) shall provide the notice required in paragraph (h)(1)(i)(A) of this section.

(2) If the seller fails to notify the holder before disposing of property securing the loan, the holder shall notify the Secretary within 60 days after learning of the transfer. Such notice shall advise whether or not the holder intends to exercise its option to immediately accelerate the loan or whether an opportunity will be extended to the transferor and transferee to apply for retroactive approval of the assumption under the terms of this paragraph

(Authority: 38 U.S.C. 3714)

(Approved by the Office of Management and Budget under control number 2900–0516)

[36 FR 1253, Jan. 27, 1971, as amended at 44 FR 22725, Apr. 17, 1979; 46 FR 43670, Aug. 31, 1981; 55 FR 37472, Sept. 12, 1990; 58 FR 37859, July 14, 1993]

### § 36.4210 Joint loans.

(a) Except as provided in paragraph (b) of this section, the prior approval of the Secretary is required in respect to any manufactured home loan to be made to two or more borrowers who become jointly and severally liable, or jointly liable therefor, and who will acquire an undivided interest in the property to be purchased or who will otherwise share in the proceeds of the loan, or in respect to any loan to be made to an eligible veteran whose interest in the property owned, or to be acquired with the loan proceeds, is an undivided interest only. The amount of the guaranty shall be computed in such cases only on that portion of the loan allocable to the eligible veteran which, taking into consideration all relevant factors, represents the proper contribution of the veteran to the transaction. Such loans shall be secured to the extent required by 38 U.S.C. chapter 37 and the regulations concerning guaranty of manufactured home loans to veterans.

(b) Notwithstanding the provisions of paragraph (a) of this section, the joinder of the spouse of a veteran-borrower in the ownership of property shall not require prior approval or preclude the issuance of a guaranty based upon the entire amount of the loan. If both spouses be eligible veterans, either or both, within permissible maxima, may utilize available guaranty entitlement.

(c) For the purpose of determining the rights and the liabilities of the Secretary with respect to a loan subject to paragraph (a) of this section, credits legally applicable to the entire loan shall be applied as follows:

(1) Prepayments made expressly for credit to that portion of the indebtedness allocable to the veteran shall be applied to such portion of the indebtedness. All other payments shall be applied ratably to those portions of the loan allocable respectively to the veteran and to the other debtors.

(2) Proceeds of the sale or other liquidation of the security shall be applied ratably to the respective portions of the loan, such portion of the proceeds as represents the interest of the veteran being applied to that portion of the loan allocable to such veteran.

(Authority: 38 U.S.C. 3703(c)(1))

[44 FR 22725, Apr. 17, 1979, as amended at 55 FR 37473, Sept. 12, 1990]

### § 36.4211 Amortization—prepayment.

(a) To be eligible for guaranty under 38 U.S.C. 3712 a loan shall be amortized fully within the term of the loan in accordance with any generally recognized plan of amortization requiring approximately equal monthly payments. The loan shall not be payable on demand or at sight or presentation, or at a time not specified or computable from the language in the evidence of indebtedness, or on a renewal basis at the option of the holder. The first payment may be deferred not longer than 2 months from the date the loan is closed.

(b) No guaranteed loan security instrument shall contain any provision giving the holder a right to declare the loan due or otherwise to declare a default if the holder ''shall feel insecure'' or upon the occurrence of any similar

condition at the holder's option, without regard to any act or omission by the debtor.

(c) The debtor shall have the right, without penalty or fee, to prepay all or not less than one installment of the indebtedness at any time. Credit for any partial prepayment made on other than an installment due date may be postponed to the next installment due date. The holder and the debtor may agree at any time that any prepayment not previously applied in satisfaction of matured installments shall be reapplied for the purpose of curing or preventing any subsequent default. Any prepayment in full of the indebtedness (unpaid principal balance plus earned interest) shall be credited on the date received. In determining the amount required to prepay the indebtedness in full the holder of the loan shall exclude all unearned interest or discount.

(d) Subject to paragraph (a) of this section any amounts which under the terms of a loan do not become due and payable on or before the last maturity date permissible for loans of its class under the limitations contained in §36.4204 shall automatically fall due on such date.

### §36.4212 Interest rates and late charges.

(a) In guaranteeing or insuring loans under 38 U.S.C. chapter 37, the Secretary may elect to require that such loans either bear interest at a rate that is agreed upon by the veteran and the lender, or bear interest at a rate not in excess of a rate established by the Secretary. The Secretary may, from time to time, change that election by publishing a notice in the FEDERAL REGISTER. Provided, however, that the interest rate of a loan for the purpose of an interest rate reduction under 38 U.S.C. 3712(a)(1)(F) must be less than the interest rate of the VA loan being refinanced. This paragraph (a) does not apply in the case of an adjustable rate mortgage being refinanced with a fixed rate loan.

(Authority: 38 U.S.C. 3703, 3712)

(b) For loans bearing an interest rate agreed upon by the veteran and the lender, the veteran may pay reasonable discount points in connection with the loan. The discount points may not be included in the loan amount, except for interest rate reduction refinancing loans under 38 U.S.C. 3712(a)(1)(F).

(Authority: 38 U.S.C. 3703, 3712)

(c) The rate of interest in instruments securing the indebtedness for all loans may be expressed in terms of add-on or discount.

(Authority: 38 U.S.C. 3710, 3712)

(d) Interest in excess of the rate reported by the lender when requesting evidence of guaranty or insurance shall not be payable on any advance, or in the event of any delinquency or default; *Provided*, that a late charge not in excess of an amount equal to 4 percent of any installment paid more than 15 days after due date shall not be considered a violation of this limitation.

(Authority: 38 U.S.C. 3712)

(e) Adjustable rate mortgage loans which comply with the requirements of this paragraph are eligible for guaranty.

(1) *Interest rate index.* Changes in the interest rate charged on an adjustable rate mortgage must correspond to changes in the weekly average yield on one year (52 week) Treasury bills adjusted to a constant maturity. Yields on one year Treasury bills at ''constant maturity'' are interpolated by the United States Treasury from the daily yield curve. This curve, which relates the yield on the security to its time to maturity, is based on the closing market bid yields on actively traded one year Treasury bills in the over-the-counter market. The weekly average one year constant maturity Treasury bill yields are published by the Federal Reserve Board of the Federal Reserve System. The Federal Reserve Statistical Release Report H.15 (519) is released each Monday. These one year constant maturity Treasury bill yields are also published monthly in the Federal Reserve Bulletin, published by the Federal Reserve Board of the Federal Reserve System, as well as quarterly in the Treasury Bulletin, published by the Department of the Treasury.

(2) *Frequency of interest rate changes.* Interest rate adjustments must occur

on an annual basis, except that the first adjustment may occur not sooner than 12 months nor later than 18 months from the date of the borrower's first mortgage payment. The adjusted rate will become effective the first day of the month following the adjustment date; the first monthly payment at the new rate will be due on the first day of the following month. To set the new interest rate, the lender will determine the change between the initial (i.e., base) index figure and the current index figure. The initial index figure shall be the most recent figure available before the date of mortgage loan origination. The current index figure shall be the most recent index figure available 30 days before the date of each interest rate adjustment.

(3) *Method of rate changes.* Interest rate changes may only be implemented through adjustments to the borrower's monthly payments.

(4) *Initial rate and magnitude of changes.* The initial contract interest rate of an adjustable rate mortgage shall be agreed upon by the lender and the veteran. The rate must be reflective of adjustable rate lending. Annual adjustments in the interest rate shall be set at a certain spread or margin over the interest rate index prescribed in paragraph (e)(1) of this section. Except for the initial rate, this margin shall remain constant over the life of the loan. Annual adjustments to the contract interest rate shall correspond to annual changes in the interest rate index, subject to the following conditions and limitations:

(i) No single adjustment to the interest rate may result in a change in either direction of more than one percentage point from the interest rate in effect for the period immediately preceding that adjustment. Index changes in excess of one percentage point may not be carried over for inclusion in an adjustment in a subsequent year. Adjustments in the effective rate of interest over the entire term of the mortgage may not result in a change in either direction of more than five percentage points from the initial contract interest rate.

(ii) At each adjustment date, changes in the index interest rate, whether increases or decreases, must be translated into the adjusted mortgage interest rate, rounded to the nearest one-eighth of one percent, up or down. For example, if the margin is 2 percent and the new index figure is 6.06 percent, the adjusted mortgage interest rate will be 8 percent. If the margin is 2 percent and the new index figure is 6.07 percent, the adjusted mortgage interest rate will be 8⅛ percent.

(5) *Pre-loan disclosure.* The lender shall explain fully and in writing to the borrower, no later than on the date upon which the lender provides the prospective borrower with a loan application, the nature of the obligation taken. The borrower shall certify in writing that he or she fully understands the obligation and a copy of the signed certification shall be placed in the loan folder and included in the loan submission to VA. Such lender disclosure must include the following items:

(i) The fact that the mortgage interest rate may change, and an explanation of how changes correspond to changes in the interest rate index;

(ii) Identification of the interest rate index, its source of publication and availability;

(iii) The frequency (i.e., annually) with which interest rate levels and monthly payments will be adjusted, and the length of the interval that will precede the initial adjustment; and

(iv) A hypothetical monthly payment schedule that displays the maximum potential increases in monthly payments to the borrower over the first five years of the mortgage, subject to the provisions of the mortgage instrument.

(6) *Annual disclosure.* At least 25 days before any adjustment to a borrower's monthly payment may occur, the lender must provide a notice to the borrower which sets forth the date of the notice, the effective date of the change, the old interest rate, the new interest rate, the new monthly payment amount, the current index and the date it was published, and a description of how the payment adjustment was calculated. A copy of the annual disclosure shall be made a part of the lender's permanent record on the loan.

(Authority: 38 U.S.C. 3707, 3712)

[60 FR 38257, July 26, 1995]

### § 36.4213 Capacity of parties.

Nothing in the § 36.4200 series shall be construed to relieve any lender of responsibility for any loss caused by lack of legal capacity of any person to contract, sell, convey or encumber, or by the existence of other legal disability or defects invalidating or rendering unenforceable in whole or in part either the loan obligation or the security therefor.

### § 36.4214 Geographical limits.

The site for any manufactured home purchased with a guaranteed loan must be located within the United States of America, which for the purposes of 38 U.S.C. 3712 comprises the several States, the Territories and possessions of the United States, the District of Columbia, the Commonwealth of Puerto Rico and the Commonwealth of the Northern Mariana Islands.

[46 FR 43670, Aug. 31, 1981, as amended at 48 FR 1717, Jan. 14, 1983]

### § 36.4215 Maintenance of records.

(a) The holder shall maintain a record of the amounts of payments received on the obligation and disbursements chargable thereto and the dates thereof. This record shall be maintained until the Secretary ceases to be liable as guarantor of the loan. For the purpose of any accounting with the Secretary or computation of claim against the Secretary, any holder who fails to maintain such record shall be presumed to have received on the dates due all sums which by the terms of the contract are payable prior to date of claim, and the burden of going forward with evidence and of ultimate proof of the contrary shall be on such holder.

(b) The lender shall retain copies of all loan origination records on VA guaranteed loan for at least one year from the date of loan closing. Loan origination records include the loan application, including any preliminary application, verifications of employment and deposit, all credit reports, including preliminary credit reports, copies of each sales contract and addendums, letters of explanation for adverse credit items, discrepancies and the like, direct references from creditors, correspondence with employers, appraisal reports, reports on other inspections of the property, and all closing papers and documents.

(Authority: 38 U.S.C. 501, 3703(c)(1), 3712(g))

(c) The Secretary has the right to inspect, examine, or audit, at a reasonable time and place, the records or accounts of a lender or holder pertaining to loans guaranteed by the Secretary.

(Recordkeeping requirements contained in § 36.4215 were approved by the Office of Management and Budget under OMB control number 2900–0515)

[36 FR 1253, Jan. 27, 1971, as amended at 40 FR 13214, Mar. 25, 1975; 55 FR 34913, Aug. 27, 1990]

### § 36.4217 Delivery of notice.

Any notice required by the § 36.4200 series to be given the Secretary must be in writing or such other communications medium as may be approved by an official designated in § 36.4221(b) and delivered, by mail or otherwise, to the VA office at which the guaranty was issued, or to any changed address of which the holder has been given notice. Such notice must plainly identify the case by setting forth the name of the original veteran-obligor and the file number assigned to the case by the Secretary, if available, or otherwise the name and serial number of the veteran. If mailed, the notice shall be by certified mail when so provided by the § 36.4200 series. This section does not apply to legal process. (See § 36.4282.)

[58 FR 29114, May 19, 1993]

### § 36.4218 Payment in full; termination of guaranty.

Upon full satisfaction of a guaranteed loan by payment or otherwise the instrument evidencing the guaranty shall be returned to the Department of Veterans Affairs office issuing the same with the holder's cancellation or endorsement of release thereon.

### § 36.4219 Incorporation by reference.

Department of Veterans Affairs regulations issued under 38 U.S.C. 3712, and in effect on the date of any loan which is submitted and accepted or approved for a guaranty thereunder, shall govern the rights, duties, and liabilities of the parties to such loan and any provisions

of the loan instruments inconsistent with such regulations are hereby amended and supplemented to conform thereto.

### § 36.4220 Substantive and procedural requirements; waiver.

(a) Notwithstanding any requirement, condition, or limitation stated in or imposed by the regulations concerning the guaranty of manufactured home loans to veterans, the Under Secretary for Benefits, or the Director, Loan Guaranty Service, within the limitations and conditions prescribed by the Secretary, is hereby authorized, if the Under Secretary for Benefits or Director, Loan Guaranty Service finds the interests of the Government are not adversely affected, to relieve undue prejudice to a debtor, holder, or other person, which might otherwise result, provided no such action may be taken which would impair the vested rights of any person affected thereby. If such requirement, condition, or limitation is of an administrative or procedural (not substantive) nature, any employee designated in § 36.4221 is hereby authorized to grant similar relief if the designated employee finds the failure or error of the lender was due to misunderstanding or mistake and that the interests of the Government are not adversely affected. Provisions of the regulations considered to be of an administrative or procedural (nonsubstantive) nature are limited to the following:

(1) The requirement in § 36.4209(b) that a lender originating a loan under a certificate of commitment report the loan for issuance of guaranty evidence within 60 days following actual payment of the full proceeds of the loan. In such cases it is not necessary that a finding be made that the loan is not in default.

(2) The requirements in § 36.4209(h) of this part concerning the giving of notice in assumption cases under 38 U.S.C. 3714.

(Authority: 38 U.S.C. 3714)

(3) The requirement in § 36.4279 that a holder promptly forward an advice of the terms of any agreement effecting a reamortization or extension of a loan.

(4) The requirement in § 36.4280 concerning the giving of notice of default.

(5) The requirement in § 36.4280 that a holder give 30 days advance notice of its intention to foreclose or repossess the security.

(6) The requirement in § 36.4282 that a holder give notice of repossession of personal property within 10 days after such repossession has occurred.

(7) The requirement in § 36.4210(a) that a lender obtain the prior approval of the Secretary before closing a joint loan if the lender or class of lenders is approved by the Secretary to close loans on the automatic basis pursuant to 38 U.S.C. 3712(c)(1).

(Authority: 38 U.S.C. 3712(c)(1))

(b) No waiver, consent, or approval required or authorized by the regulations concerning guaranty of loans to veterans shall be valid unless in writing signed by the Secretary or the employee designated in § 36.4221.

[36 FR 1253, Jan. 27, 1971, as amended at 46 FR 43670, Aug. 31, 1981; 49 FR 13352, Apr. 4, 1984; 55 FR 37473, Sept. 12, 1990; 61 FR 28058, June 4, 1996]

### § 36.4221 Delegation of authority.

(a) Except as hereinafter provided, each employee of the Department of Veterans Affairs heretofore or hereafter appointed to, or lawfully filling, any position designated in paragraph (b) of this section is hereby delegated authority, within the limitations and conditions prescribed by law, to exercise the powers and functions of the Secretary with respect to the guaranty of manufactured home loans and the rights and liabilities arising therefrom, including but not limited to the adjudication and allowance, disallowance, and compromise of claims; the collection or compromise of amounts due, in money or other property; the extension, rearrangement, or acquisition of loans; the management and disposition of secured and unsecured notes and other property; and those functions expressly or impliedly embraced within paragraphs (2) to (6), inclusive, of 38 U.S.C. 3720(a). Incidental to the exercise and performance of the powers and functions hereby delegated, each such employee is authorized to execute and

deliver (with or without acknowledgment) for, and on behalf of, the Secretary, evidence of guaranty and such certificates, forms, conveyances, and other instruments as may be appropriate in connection with the acquisition, ownership, management, sale, transfer, assignment, encumbrance, rental, or other disposition of real or personal property, or of any right, title, or interest therein, including, but not limited to, contracts of sale, installment contracts, deeds, leases, bills of sale, assignments, and releases; and to approve disbursements to be made for any purpose authorized by 38 U.S.C. chapter 37.

(b) Designated positions:

Under Secretary for Benefits.
Director, Loan Guaranty Service.
Director, Regional Office.
Director, Medical and Regional Office Center.
Director, VA Regional Office and Insurance Center.
Loan Guaranty Officer.
Assistant Loan Guaranty Officer.

The authority hereby delegated to employees of the positions designated in this paragraph may, with the approval of the Under Secretary for Benefits, be redelegated.

(c) Nothing in this section shall be construed (1) to authorize any such employee to exercise the authority vested in the Secretary under 38 U.S.C. 501 or 3715(b) or to sue, or enter appearance for and on behalf of the Secretary, or confess judgment against the Secretary in any court without prior authorization; or (2) to include the authority to exercise those powers delegated to the Under Secretary for Benefits, or the Director, Loan Guaranty Service, under § 36.4220: *Provided,* That anything in the regulations concerning guaranty of loans to veterans to the contrary notwithstanding, any evidence of guaranty issued on or after January 27, 1971 by any of the employees designated in paragraph (b) of this section or by any employee designated an authorized agent or a loan guaranty agent shall be deemed to have been issued by the Secretary, subject to the defenses reserved in 38 U.S.C. 3721.

(d) Each Regional Office, regional office and insurance center, and Medical and Regional Office Center shall maintain and keep current a cumulative list of all employees of that Office or Center who, since May 1, 1980, have occupied the positions of Director, Loan Guaranty Officer and Assistant Loan Guaranty Officer. This list will include each employee's name, title, date the employee assumed the position, and the termination date, if applicable, of the employee's tenure in such position. The list shall be available for public inspection and copying at the Regional Office, or Center, during normal business hours.

(Authority: 38 U.S.C. 501, 3720(a)(5))

[36 FR 1253, Jan. 27, 1971, as amended at 40 FR 13214, Mar. 25, 1975; 44 FR 16014, Mar. 16, 1979; 45 FR 21243, Apr. 1, 1980; 46 FR 43671, Aug. 31, 1981; 49 FR 13352, Apr. 4, 1984; 61 FR 28058, June 4, 1996]

### § 36.4222 Hazard insurance.

(a) The holder shall require insurance policies to be procured and maintained in an amount sufficient to protect the security against risks or hazards to which it may be subjected to the extent customary in the locality. The costs of such required insurance coverage may be paid for by the veteran. Only the costs for one year may be included in the loan amount.

(1) Flood insurance will be required on any manufactured home, building or personal property securing a loan at any time during the term of the loan that such security is located in an area identified by the Federal Emergency Management Agency as having special flood hazards and in which flood insurance has been made available under the National Flood Insurance Act, as amended. The amount of flood insurance must be at least equal to the lesser of the outstanding principal balance of the loan or the maximum limit of coverage available for the particular type of property under the National Flood Insurance Act, as amended. The Secretary cannot guarantee a loan for the acquisition or construction of property located in an area identified by the Federal Emergency Management Agency as having special flood hazards unless the community in which such

area is situated is then participating in the National Flood Insurance Program.

(Authority: 42 U.S.C. 4012a, 4106(a))

(2) Broad Lender's Protection Insurance or its equivalent is required to protect against loss for any items missing from the manufactured home at time of repossession and to cover repossession expenses including, but not limited to, breakdown and transport charges, permit and export fees, and an amount, limited by the Secretary, of unpaid park rent.

(b) All monies under such policies covering payment of insured losses shall be applied to restoration of the security or to the loan balance.

[58 FR 37859, July 14, 1993, as amended at 62 FR 5531, Feb. 6, 1997]

### § 36.4223 Interest rate reduction refinancing loan.

(a) A veteran may refinance [38 U.S.C. 3712(a)(1)(F)] an existing Department of Veterans Affairs guaranteed loan to reduce the interest rate payable on the Department of Veterans Affairs loan provided the following requirements are met:

(1) The loan application must be submitted to the Secretary for prior approval unless the veteran is not charged a discount, in which case the loan application may be processed on the automatic basis;

(2) The loan must be secured by the same real property and/or personal property as the loan being refinanced and the veteran must own the manufactured home and/or manufactured home lot securing the loan; and

(i) Presently occupy or have previously occupied the manufactured home, a manufactured home on the lot securing the loan, or the manufactured home and the lot securing the loan as his or her home and must certify in such form as the Secretary shall prescribe that the veteran presently or has previously so occupied the manufactured home or a manufactured home on the lot; or

(ii) When a veteran is on Active Duty status as a member of the Armed Forces and is unable to occupy the manufactured home or a manufactured home on the lot securing the loan as a home because of such status, the veteran's spouse must occupy or must have previously occupied the manufactured home or a manufactured home on the lot as the spouse's home and must certify such occupancy in such form as the Secretary shall prescribe.

(3) The amount of the refinancing loan may not exceed an amount equal to the sum of the balance of the loan being refinanced and such closing costs as authorized in § 36.4232 or § 36.4254, as appropriate, and a discount not to exceed 2 percent of the loan amount;

(Authority: 38 U.S.C. 3703, 3712)

(4) The dollar amount of the guaranty of the 38 U.S.C. 3712(a)(1)(F) loan may not exceed the greater of the original guaranty amount of the loan being refinanced, or 25 percent of the loan; and

(Authority: 38 U.S.C. 3703, 3712)

(5) The term of the refinancing loan 38 U.S.C. 3712(a)(1)(F) may not exceed the original term of the loan being refinanced.

(b) Notwithstanding any other regulatory provision, the interest rate reduction refinancing loan may be guaranteed without regard to the amount of guaranty entitlement for manufactured home purposes available for use by the veteran, and the amount of the veteran's remaining guaranty entitlement for manufactured home purposes shall not be charged for an interest rate reduction refinancing loan. The interest rate reduction refinancing loan will be guaranteed with the entitlement used by the veteran to obtain the loan being refinanced. The veteran's loan guaranty entitlement used originally for a purpose as enumerated in 38 U.S.C. 3712(a)(1)(A) through (E) or (G) and subsequently transferred for use on an interest rate reduction refinancing loan (38 U.S.C. 3712(a)(1)(F)) shall be eligible for restoration when the interest rate reduction refinancing loan or subsequent interest rate reduction refinancing loan on the same property meets the requirements of § 36.4203(a).

(c) Title to the security which is refinanced for the purpose of an interest rate reduction must be in conformity

with § 36.4234, and/or § 36.4253, as appropriate.

(Authority: 38 U.S.C. 3712(a)(1)(F) and (4))

[46 FR 43671, Aug. 31, 1981, as amended at 48 FR 40229, Sept. 6, 1983; 58 FR 37860, July 14, 1993; 60 FR 38258, July 26, 1995; 61 FR 7415, Feb. 28, 1996]

### § 36.4224 Refinancing existing manufactured home loan including purchase of lot.

(a) A veteran may refinance (38 U.S.C. 3712(a)(1)(G)) an existing purchase money lien on a manufactured home owned and occupied by the veteran as his or her home in conjunction with a loan to acquire a suitable lot on which that manufactured home is or will be located provided the following requirements are met.

(1) The loan application must be submitted to the Secretary for prior approval;

(2) The loan must be secured by the same manufactured home which is being refinanced and the real property on which the manufactured home is or will be located.

(3) The amount of the loan may not exceed an amount equal to the sum of the balance of the loan being refinanced; the purchase price, not to exceed the reasonable value of the lot, as authorized in § 36.4252; the costs of necessary site preparation of the lot as determined by the Secretary; a reasonable discount as authorized in § 36.4204(d)(8) with respect to that portion of the loan used to refinance the existing purchase money lien on the manufactured home, and closing costs as authorized in § 36.4232 or § 36.4254, as appropriate.

(b) If the loan being refinanced was guaranteed by the Department of Veterans Affairs, the portion of the loan made for the purpose of refinancing an existing purchase money manufactured home loan may be guaranteed without regard to the outstanding guaranty entitlement available for use by the veteran, and the veteran's guaranty entitlement shall not be charged as a result of any guaranty provided for the refinancing portion of the loan. For the purposes enumerated in 38 U.S.C. 3702(b) the refinancing portion of the loan shall be considered to have been obtained with the guaranty entitlement used to obtain the VA-guaranteed loan being refinanced. Guaranty for the refinancing loan shall be computed by first applying to the loan a combined total of the guaranty entitlement used to obtain the VA-guaranteed loan being refinanced and second any additional guaranty entitlement available to the veteran for manufactured home purposes, up to a maximum of $20,000 or forty (40) percent of the original principal amount of the loan, whichever is less.

(Authority: 38 U.S.C. 3712(a)(1)(G) and (5))

[48 FR 40229, Sept. 6, 1983, as amended at 58 FR 37860, July 14, 1993]

### § 36.4225 Authority to close manufactured home loans on the automatic basis.

(a) Supervised lenders of the classes described in 38 U.S.C. 3702(d) (1) and (2) are authorized by statute to process VA guaranteed manufactured home loans on the automatic basis. This category of lenders includes any Federal land bank, national bank, State bank, private bank, building and loan association, insurance company, credit union or mortgage and loan company that is subject to examination and supervision by an agency of the United States or of any State or by any State.

(b) Nonsupervised lenders of the class described in 38 U.S.C. 3702(d)(3) must apply to the Secretary for authority to process manufactured home loans on the automatic basis. The following minimum requirements must be met:

(1) *Minimum assets.* A minimum of $50,000 of working capital must be maintained. Working capital is defined as the excess of current assets over current liabilities. Current assets are defined as cash or other assets that could readily be converted into cash within 1 year on the normal accounting or business cycle. Current liabilities are defined as obligations that would be paid within a year on a normal accounting or business cycle. The lender's latest financial statements (profit and loss statements and balance sheets), audited and certified by a CPA (certified public accountant), must accompany the application. If the date of the financial statement precedes that of the application by more than 6

months, the lender-applicant must also attach a copy of its latest internal quarterly report. In addition, the lender-applicant must agree that if the application is approved, the applicant will provide within 120 days following the end of each of its fiscal years an audited financial statement to the Director, Loan Guaranty Service for review.

(2) *Experience.* The firm must have been actively engaged in originating manufactured home loans for at least the last 2 years. Alternately, each principal officer of the firm who is actively involved in managing origination functions must have a minimum of 2 recent years' total experience in the field of VA manufactured home mortgages in managerial functions in either the present company of employment or in companies other than that of his or her present employment. In either case, every principal officer (president and vice presidents) must submit a resume of his or her experience in the mortgage lending field. Should the secretary and/or treasurer participate in the management of origination functions, they too must submit a resume and meet the minimum experience requirement if the company does not meet the experience requirement. Should the lender or any of its directors or officers ever have been debarred or suspended by any Federal agency or department or any of its directors or officers have been a director or officer of any other lender or corporation that was so suspended, or if the lender-applicant ever had a servicing contract with an investor terminated for cause, a statement of the facts must also be submitted. Lender-applicants will submit individual requests for each branch office they wish to have approved. The parent organization must agree to accept full responsibility for the actions of branch offices.

(3) *Underwriter.* If it is proposed that all loans to be made by the lender will be submitted to its home office for approval or rejection, the lender must have at least one full-time designated underwriter in its home office. If the loans will be approved or rejected by branch managers, the lender must have at least one full-time designated underwriter in each branch. In either event, the designated underwriters must be identified and a resume on each submitted to VA. The underwriters should have at least three years of experience in consumer installment finance. If changes in underwriting personnel occur, the lender must notify VA.

(4) *Lines of credit.* The identity of the source(s) of warehouse lines of credit must be revealed to VA and the applicant must agree that VA may contact the named source(s) for the purpose of verifying the information.

(5) *Secondary market.* If the lender-applicant customarily sells the manufactured home loans it originates, it must provide a listing of all permanent investors to whom the loans are sold, including the investor's address, telephone number and names of persons to contact.

(6) *Liaison.* The lender-applicant must designate one employee to act as liaison on its behalf with the VA. If possible, the lender-applicant should select employees other than VA approved underwriters to act as liaison. Officers from branch or regional offices should also be appointed to act as liaison with local VA offices. The lender must notify VA of any changes in liaison personnel.

(7) *Courtesy closing.* The lender-applicant must certify to VA that it will not close loans on an automatic basis as a courtesy or accommodation for other mortgage lenders whether or not such lenders are themselves approved to close on an automatic basis. The lender must agree that the processing of forms other than the initial credit application will not be delegated to the dealer or developer.

(8) *Subsidiaries/affiliates.* A lender approved for automatic processing may not close manufactured home loans on the automatic basis involving any dealership or manufacturer in which it has a financial interest or which it owns, is owned by, or with which it is affiliated. This restriction may be eliminated for lenders that can provide documentation which demonstrates to VA's satisfaction that (i) the lender and the manufacturer and/or dealer are separate entities that operate independently for each other, and (ii) the percentage of all VA manufactured home loans originated by the lender during at least a

one-year period on which payments are past due 90 days or more is no higher than the national average for the same period for all mortgage loans.

(9) *Lender agents.* A lender using an agent to perform a portion of the work involved in originating and closing a VA guaranteed loan on an automatic basis must take full responsibility by certification or corporate resolution for all acts, errors and omissions of the agent and its employees. Any such acts, errors or omissions will be treated as those of the lender and appropriate sanctions may be imposed against the lender and its agent.

(10) *Minimum use of automatic authority.* If approved, lenders must use their automatic authority to the maximum extent possible. Any lender with automatic authority who submits a loan on the prior approval basis will be required to submit an explanation from the designated underwriter as to why the loan was not closed automatically. Such a statement will not be needed for loans that must be processed on the prior approval basis, e.g., joint loans.

(11) *Probation.* Lender-applicants meeting the requirements of this section will be approved to close loans on an automatic basis for a 1-year probationary period. Poor underwriting and/or consistently careless processing by the lender during the probationary period will be a basis for withdrawal of automatic authority.

(12) *Quality control system.* In order to be approved as a nonsupervised lender for automatic processing authority, the lender must implement a written quality control system which ensures compliance with VA requirements. The lender must agree to furnish findings under its system to VA on demand. The elements of the quality control system must include the following:

(i) *Underwriting policies.* Each office of the lender shall maintain copies of VA credit standards and all available VA underwriting guidelines.

(ii) *Corrective measures.* The system should ensure the effective corrective measures are taken promptly when deficiencies in loan originations are identified by either the lender or VA. Any cases involving major discrepancies which are discovered under the system must be reported to VA.

(iii) *System integrity.* The quality control system should be independent of the loan production function.

(iv) *Scope.* The review of understanding decisions and certifications must include compliance with VA underwriting requirements, sufficiency of documentation and soundness of underwriting judgments.

(c) A lender approved to close loans on the automatic basis who subsequently fails to meet the requirements of this section must report the circumstances surrounding the deficiency and the remedial action to be taken to cure it to VA.

(Authority: 38 U.S.C. 501, 1803(c)(1), and 1812(g))

(d) To participate in VA's automatic program nonsupervised lenders of the class described in paragraph 3702(d)(3) of title 38 U.S. Code shall pay fees as follows:

(1) $500 for new applications;

(2) $200 for reinstatement of lapsed or terminated automatic authority;

(3) $100 for each underwriter approval;

(4) $100 for each agent approval;

(5) $100 for each regional underwriting office approval;

(6) A minimum fee of $100 for any other VA administrative action pertaining to a lender's participation in ALP;

(7) $200 annually for certification of home offices;

(8) $100 annually for certification of regional offices; and

(9) $100 annually for each agent renewal.

(e) Supervised lenders of the classes described in paragraphs (d)(1) and (d)(2) of 38 U.S. Code 3702 participating in VA's Loan Guaranty Program shall pay fees as follows:

(1) $100 fee for each agent approval; and

(2) $100 annually for each agent renewal.

(Authority: 38 U.S.C. 3712(g))

(f) Lenders participating in VA's Lender Appraisal Processing Program

shall pay a fee of $100 for approval of each staff appraisal reviewer.

[56 FR 40559, Aug. 15, 1991, as amended at 57 FR 828, Jan. 9, 1992; 57 FR 40616, Sept. 4, 1992]

### § 36.4226 Withdrawal of authority to close manufactured home loans on the automatic basis.

(a)(1) As provided in 38 U.S.C. 3702(e), the authority of any lender to close manufactured home loans on the automatic basis may be withdrawn by the Secretary at any time upon 30 days notice. The automatic processing authority of both supervised and nonsupervised lenders may be withdrawn for engaging in practices which are imprudent from a lending standpoint or which are prejudicial to the interests of veterans or the Government but are of a lesser degree than would warrant complete debarment or suspension of the lender from participation in the program.

(2) Automatic processing authority may be withdrawn for failure to meet basic qualifying criteria. For non-supervised lenders, this includes lack of a designated underwriter, failure to maintain $50,000 working capital and/or failure to file required financial statements. For supervised lenders this includes loss of status as an entity subject to examination and supervision by a Federal or State supervisory agency as required by 38 U.S.C. 3702(d). During the 1 year probationary period for newly approved automatic lenders, automatic authority may be withdrawn based upon poor underwriting or consistently careless processing by the lender, as determined by VA.

(3) Automatic processing authority may also be withdrawn based on any of the causes for debarment set forth at § 44.305 of this title.

(b) Authority to close manufactured home loans on the automatic basis may also be temporarily withdrawn for a period of time under the following schedule.

(1) Withdrawal for 60 days:

(i) Automatic loan submissions show deficiencies in credit underwriting, such as use of unstable sources of income to qualify the borrower, ignoring significant adverse credit items affecting the applicant's creditworthiness, etc., after such deficiencies have been repeatedly called to the lender's attention;

(ii) Employment or deposit verifications are handcarried by applicants or otherwise improperly permitted to pass through the hands of a third party;

(iii) Automatic loan submissions are consistently incomplete after such deficiencies have been repeatedly called to the lender's attention by VA; or

(iv) There are continued instances of disregard of VA requirements after they have been called to the lender's attention.

(2) Withdrawal for 180 days:

(i) Loans are closed automatically which conflict with VA credit standards and which would not have been made by a lender acting prudently;

(ii) The lender fails to disclose to VA significant obligations or other information so material to the veteran's ability to repay the loan that undue risk to the Government results;

(iii) Employment or deposit verifications are allowed to be handcarried by applicant or otherwise mishandled, resulting in the submission of significant misinformation to VA;

(iv) Substantiated complaints are received that the lender misrepresented VA requirements to veterans to the detriment of their interests (e.g., veteran was dissuaded from seeking a lower interest rate based on lender's incorrect advice that such options were precluded by VA requirements);

(v) Closing documentation shows instances of improper charges to the veteran after the impropriety of such charges has been called to the lender's attention by Va, or refusal to refund such charges after notification by VA; or

(vi) There are other instances of lender actions which are prejudicial to the interests of veterans, such as deliberate delays in scheduling loan closings.

(3) Withdrawal for a period from one year to three years:

(i) The lender fails to properly disburse loans (e.g., loan disbursement checks returned due to insufficient funds); or

(ii) There is involvement by the lender in the improper use of a veteran's

entitlement (e.g., knowingly permitting the veteran to violate occupancy requirements, lender involvement in sale of veteran's entitlement).

(4) A continuation of actions that have led to previous withdrawal of automatic authority justifies withdrawal of automatic authority for the next longer period of time.

(5) Withdrawal of automatic processing authority does not prevent a lender from processing VA guaranteed manufactured home loans on the prior approval basis.

(6) Action by VA to remove a lender's automatic authority does not prevent VA from also taking debarment or suspension action based on the same conduct by the lender.

(7) VA field facilities are authorized to withdraw automatic privileges for 60 days, based on any of the violations set forth in paragraphs (b)(1) through (b)(3) of this section, for nonsupervised lenders without operations in other stations' jurisdictions. All determinations regarding withdrawal of automatic authority for longer periods of time or multi-jurisdictional lenders must be made in Central Office.

(c) VA will provide 30 days notice of withdrawal of automatic authority in order to enable the lender to either close or obtain prior approval for a loan on which processing has begun. There is no right to a formal hearing to contest the withdrawal of automatic processing privileges. However, if within 15 days after receiving notice the lender requests an opportunity to contest the withdrawal, the lender may submit in person, in writing, or through a representative, information and argument in opposition to the withdrawal.

(d) If the lender's submission in opposition raises a dispute over facts material to the withdrawal of automatic authority, the lender will be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witnesses VA presents. The Under Secretary for Benefits will appoint a hearing officer or panel to conduct the hearing.

(e) A transcribed record of the proceedings shall be made available at cost to the lender, upon request, unless the requirement for a transcript is waived by mutual agreement.

(f) In actions based upon a conviction or civil judgment, or in which there is no genuine dispute over material facts, the Under Secretary for Benefits shall make a decision on the basis of all the information in the administrative record, including any submissions made by the lender.

(g) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact will be prepared by the hearing officer or panel. The Under Secretary for Benefits shall base the decision on the facts as found, together with any information and argument submitted by the lender and any other information in the administrative record.

(Authority: 38 U.S.C. 501, 1803(c)(1), and 1812(g)).

[56 FR 40560, Aug. 15, 1991, as amended at 61 FR 28058, June 4, 1996]

### § 36.4227 Advertising and Solicitation Requirements.

Any advertisement or solicitation in any form (e.g., written, electronic, oral) from a private lender concerning manufactured housing loans to be guaranteed or insured by the Secretary:

(a) Must not include information falsely stating or implying that it was issued by or at the direction of VA or any other department or agency of the United States, and

(b) Must not include information falsely stating or implying that the lender has an exclusive right to make loans guaranteed or insured by VA.

(Authority: 38 U.S.C. 3703, 3704)

[67 FR 9402, Mar. 1, 2002]

FINANCING MANUFACTURED HOME UNITS

### § 36.4231 Warranty requirements.

(a) When a new manufactured home purchased with financing guaranteed under 38 U.S.C. 3712 is delivered to the veteran-borrower he or she will be supplied a written warranty by the manufacturer in the form and content prescribed by the Secretary. Such warranty shall be in addition to, and not

in derogation of, all other rights and privileges which such purchaser or owner may have under any other law or instrument, and the warranty instrument will so provide. No evidence of guaranty shall be issued by the Secretary unless a copy of such warranty duly receipted by the purchaser is submitted with the loan papers.

(b) Any manufactured housing unit properly displaying a certification of conformity to all applicable Federal manufactured home construction and safety standards pursuant to 42 U.S.C. 5415 shall be acceptable as security for a VA guaranteed loan.

(Authority: 38 U.S.C. 3712)

(c) When a used manufactured home is purchased from a manufactured home dealer with financing guaranteed under 38 U.S.C. 3712 the veteran-borrower must be supplied with a written warranty by the manufactured home dealer in the form and content prescribed by the Secretary. Such warranty shall be in addition to, and not in derogation of, all other rights and privileges which such purchaser or owner may have under any other law or instrument, and the warranty instrument will so provide. No evidence of guaranty shall be issued by the Secretary unless a copy of such warranty duly receipted by the purchaser is submitted with the loan papers.

[48 FR 40229, Sept. 6, 1983, as amended at 60 FR 38259, July 26, 1995]

### § 36.4232 Allowable fees and charges; manufactured home unit.

(a) Incident to the origination of a guaranteed loan for the purchase or refinancing of a manufactured home unit only, no charge shall be made against, or paid by, the veteran-borrower without the express prior approval of the Secretary except as provided in paragraph (e) of this section and as follows:

(1) Actual fees or charges for required recordation of documents;

(2) The costs of independent fee inspections for itemized items included in the manufactured home loan, as required by § 36.4204(f);

(3) The amount of any documentary stamp taxes levied on the transaction;

(4) The amount of State and local taxes levied on the transaction;

(5) The premium for customary physical damage insurance and vendor's single interest coverage on the manufactured home for an initial policy term of not to exceed one (1) year;

(6) The premium for insurance against loss for items missing at time of repossession and for repossession expenses, unless State law prohibits charging borrowers for this coverage, in which case the lender is required to pay for the coverage without reimbursement from the veteran;

(7) For the purposes of obtaining a refinancing loan for interest rate reduction or a refinancing loan to simultaneously refinance a unit and acquire a lot, the cost of a credit report and an appraisal; and

(Authority: 38 U.S.C. 3712 (a)(1)(b), (a)(4)(A) and (g)).

(8) The actual amount charged for flood zone determinations, including a charge for a life-of-the-loan flood zone determination service purchased at the time of loan origination, if made by a third party who guarantees the accuracy of the determination. A fee may not be charged for a flood zone determination made by a Department of Veterans Affairs appraiser or for the lender's own determination.

(Authority: 38 U.S.C. 3712; 42 U.S.C. 4001 note, 4012a)

(b) Any charge against the borrower properly made under paragraph (a) of this section may be included in the loan and paid out of the proceeds of the loan provided the total loan amount does not exceed 145 percent of the manufacturer's invoice.

(Authority: 38 U.S.C. 3712(g))

(c)(1) Costs of a credit report (except for 38 U.S.C. 3712(a)(1)(F) or (G) refinancing loans) such additional insurance as the veteran may desire, and any other expenses normally charged to a manufactured home purchaser under local customs may be paid by the borrower other than from the loan proceeds.

(2) For the purchase of a used manufactured home unit, the fee of a Department of Veterans Affairs appraiser

and of compliance inspectors designated by the Department of Veterans Affairs, except appraisal fees incurred for the predetermination of reasonable value requested by others than veteran or lender, may be paid by the borrower from other than the loan proceeds.

(Authority: 38 U.S.C. 3712 (e)(4) and (g))

(d) Subject to the limitations set forth in this section, the following may be included in the loan made for the purchase of a new (not used) manufactured home unit and paid out of the proceeds of the loan:

(1) The actual cost of transportation or freight;

(2) Setup charges for installing the manufactured home on site not to exceed $400 for a single-wide manufactured home or $800 for a double-wide manufactured home.

(Authority: 38 U.S.C. 3712(g))

If the actual costs exceed the limitations in this section, the veteran must certify that any excess cost has been paid in cash from the veteran's own resources without borrowing.

(e)(1) Subject to the limitations set out in paragraph (e)(5) of this section, a fee must be paid to the Secretary. A fee of 1 percent of the total amount must be paid in a manner prescribed by the Secretary before a manufactured home unit loan will be eligible for guaranty. Provided, however, that the fee shall be 0.50 percent of the total loan amount for interest rate reduction refinancing loans guaranteed under 38 U.S.C. 3712(a)(1)(F). All or part of the fee may be paid in cash at loan closing or all or part of the fee may be included in the loan without regard to the reasonable value of the property or the computed maximum loan amount, as appropriate. In computing the fee, the lender shall disregard any amount included in the loan to enable the borrower to pay such fee.

(Authority: 38 U.S.C. 3729(a))

(2) Subject to the limitations set out in paragraph (e)(5) of this section, a fee of one-half of one percent of the loan balance must be paid to the Secretary in a manner prescribed by the Secretary by a person assuming a loan to which section 3714 of chapter 37 of 38 U.S.C. applies. The instrument securing such a loan shall contain a provisions describing the right of the holder to collect this fee as trustee for the Department of Veterans Affairs. The loan holder shall list the amount of this fee in every assumption statement provided and include a notice that the fee must be paid to the holder immediately following loan settlement. The fee must be transmitted to the Secretary within 15 days of receipt by the holder of notice of the transfer.

(Authority: 38 U.S.C. 3714, 3729)

(3) The lender is required to pay to the Secretary the fee described in paragraph (e)(1) of this section within 15 days after loan closing. Any lender closing a loan, subject to the limitations set out in paragraph (e)(5) of this section, who fails to submit timely payment of this fee will be subject to a late charge equal to 4 percent of the total fee due. If payment of the 1 percent fee is more than 30 days after loan closing, interest will be assessed at a rate set in conformity with the Department of Treasury's Fiscal Requirements Manual. This interest charge is in addition to the 4 percent late charge, but the late charge is not included in the amount on which interest is computed. This interest charge is to be calculated on a daily basis beginning on the date of closing, although the interest will be assessed only on funding fee payments received more than 30 days after closing.

(Authority: 38 U.S.C. 501)

(4) The lender is required to pay to the Secretary electronically through the Automated Clearing House (ACH) system the fees described in paragraphs (e)(1) and (e)(2) of this section and any late fees and interest due on them. This shall be paid to a collection agent by operator-assisted telephone, terminal entry, or central processing unit-to-central processing unit (CPU-to-CPU) transmission. The collection agent will be identified by the Secretary. The lender shall provide the collection agent with the following: authorization for payment of the funding fee (including late fees and interest) along with the following information:

VA lender ID number; four-digit personal identification number; dollar amount of debit; VA loan number; OJ (office of jurisdiction) code; closing date; loan amount; information about whether the payment includes a shortage, late charge, or interest; veteran name; loan type; sale amount; downpayment; whether the veteran is a reservist; and whether this is a subsequent use of entitlement. For all transactions received prior to 8:15 p.m. on a workday, VA will be credited with the amount paid to the collection agent at the opening of business the next banking day.

(Authority: 38 U.S.C. 3729(a))

(5) The fee described in paragraphs (e)(1) and (e)(2) of this section shall not be collected from a veteran who is receiving compensation (or who but for the receipt of retirement pay would be entitled to receive compensation) or from a surviving spouse described in section 3701(b)(2) of title 38, United States Code.

(Authority: 38 U.S.C. 3729(b))

(The information collection requirements in this section have been approved by the Office of Management and Budget under control numbers 2900–0474 and 2900–0516)

[36 FR 1253, Jan. 27, 1971, as amended at 40 FR 1514, Jan. 8, 1975; 44 FR 16014, Mar. 16, 1979; 46 FR 43671, Aug. 31, 1981; 47 FR 46700, Oct. 20, 1982; 49 FR 40230, Sept. 6, 1983; 50 FR 5754, Feb. 12, 1985; 53 FR 27047, July 18, 1988; 55 FR 37473, Sept. 12, 1990; 58 FR 37860, July 14, 1993; 60 FR 38259, July 26, 1996; 62 FR 63278, Nov. 28, 1997]

### § 36.4234 Title and lien requirements.

(a) The interest in the manufactured home acquired by the veteran at the time of purchase shall be either:

(1) Legal title evidenced by such document as is customarily issued to the purchaser of a manufactured home in the jurisdiction in which the manufactured home is initially sited, or

(2) A full possessory interest convertible into a legal title conforming to paragraph (a)(1) of this section upon payment in full of the guaranteed loan.

(b) The loan must be secured by a properly recorded financing statement and security agreement or other security instrument that creates a first lien on or equivalent security interest in the manufactured home and all of the furnishings, equipment, and accessories paid for in whole or in part out of the loan proceeds.

(c) It is the responsibility of the lender that the veteran initially obtains an interest in the manufactured home meeting the requirements of paragraph (a) of this section and to obtain and retain a security interest meeting the requirements of paragraph (b) of this section.

[36 FR 1253, Jan. 27, 1971, as amended at 46 FR 43671, Aug. 31, 1981; 58 FR 37860, July 14, 1993]

COMBINATION AND MANUFACTURED HOME LOT LOANS

### § 36.4251 Loans to finance the purchase of manufactured homes and the cost of necessary site preparation.

(a) A loan to finance the purchase of a manufactured home may include funds (or be augmented by a separate loan) to pay all or a part of the cost of the necessary site preparation of a lot on which to place the manufactured home and the loan shall be eligible for guaranty: Provided, that:

(1) The veteran has, or incident to the transaction will acquire, a title to the lot that conforms to § 36.4253(a).

(2) The loan is secured as required by § 36.4253(d).

(3) The lot is determined by the Secretary to be an acceptable manufactured homesite pursuant to § 36.4208,

(4) The cost of the necessary site preparation is determined by the Secretary to be reasonable.

(5) The amount of the loan to pay for necessary site preparation does not exceed the cost thereof and also does not exceed the reasonable value of the developed lot as determined by the Secretary, and

(6) The loan conforms otherwise to the requirements of the § 36.4200 series.

(b) Notwithstanding that the veteran-borrower's obligation for such site preparation be evidenced and secured separately from the obligation for purchase of the manufactured home, the obligations together shall constitute one loan for the purposes of the § 36.4200

series, including computation of the Secretary's guaranty liability.

(c) The cost of site preparation which will not be paid from the proceeds of the loan must be paid by the veteran in cash from the veteran's own resources.

[36 FR 3368, Feb. 23, 1971, as amended at 40 FR 13215, Mar. 25, 1975; 48 FR 40230, Sept. 6, 1983]

### § 36.4252 Loans for purchase or refinancing of a manufactured home.

(a) A loan to purchase a manufactured home may include funds (or be augmented by a separate loan) to finance all or part of the cost of acquisition by the veteran of a lot on which to place the manufactured home and the loan shall be eligible for guaranty: *Provided,* That:

(1) The veteran will acquire title to such lot that conforms to the requirements of § 36.4253(a),

(2) The loan is secured as required by § 36.4253(d),

(3) The lot is determined by the Secretary to be an acceptable manufactured homesite pursuant to § 36.4208,

(4) The portion of the loan allocated to acquisition of the lot does not exceed the reasonable value of the lot as determined by the Secretary, and

(5) The loan conforms otherwise to the requirements of the § 36.4200 series.

(b) Notwithstanding that the veteran-borrower's obligation for acquisition of the lot be evidenced and secured separately from the obligation for purchase of the manufactured home, the obligations together (including, where appropriate, that for site preparation) shall constitute one loan for the purposes of the § 36.4200 series, including computation of the Secretary's guaranty liability.

(c) The cost of lot acquisition which will not be paid from the proceeds of the loan must be paid by the veteran in cash from the veteran's own resources.

(d) For the purpose of this section acquisition of a manufactured home lot includes:

(1) The refinancing of the balance owed by the veteran as purchaser under an existing real estate installment contract, and

(2) The refinancing of existing mortgage loans or other liens which are secured of record on a manufactured home lot owned by the veteran.

(e) A loan to acquire a lot on which to site a manufactured home may include funds to refinance an existing loan made for the purchase of and secured by a manufactured home on which lot the manufactured home is located or will be placed, provided that:

(1) The veteran will acquire or retain title to such manufactured home and lot that conforms to the requirements of §§ 36.4234 and 36.4253,

(2) The loan is secured as required by § 36.4253(g),

(3) The lot is determined by the Secretary to be an acceptable manufactured homesite pursuant to § 36.4208,

(4) The portion of the loan allocated to the acquisition and preparation of the lot does not exceed the reasonable value of the developed lot as determined by the Secretary,

(5) The cost of necessary site preparation is determined by the Secretary to be reasonable.

(6) The portion of the loan allocated to the refinancing of the manufactured home does not exceed an amount equal to the sum of the balance of the loan being refinanced; a reasonable discount as authorized in § 36.4204(d)(8) with respect to that portion of the loan used to refinance the existing purchase money lien on the manufactured loan, and closing costs as authorized in § 36.4232 or § 36.4254, as appropriate,

(7) The loan conforms otherwise to the requirements of the § 36.4200 series,

(8) The veteran-borrower's obligation for acquisition of the lot and for refinancing the existing loan on the manufactured home (including site preparation, where appropriate), shall constitute one loan for the purposes of the § 36.4200 series, including computation of the Secretary's guaranty liability.

(Authority: 38 U.S.C. 3712(a)(1)(G) or (5))

[36 FR 3368, Feb. 23, 1971, as amended at 40 FR 13215, Mar. 25, 1975; 44 FR 22725, Apr. 17, 1979; 48 FR 40230, Sept. 6, 1983]

### § 36.4253 Title and lien requirements.

(a) The interest in the realty constituting a manufactured home lot acquired by the veteran wholly or in part with the proceeds of a guaranteed loan, or in the realty constituting a manufactured home lot improved wholly or

in part with the proceeds of a guaranteed loan, shall not be less than:

(1) A fee simple estate therein, legal or equitable; or

(2) A leasehold estate running or renewable at the option of the lessee for a period of not less than 14 years from the maturity of the loan, or to any earlier date at which the fee simple title will vest in the lessee, which is assignable or transferable, if the same be subjected to the lien; however, a leasehold estate which is not freely assignable and transferable will be considered an acceptable estate if it is determined by the Under Secretary for Benefits, or the Director, Loan Guaranty Service, (i) that such type of leasehold is customary in the area where the property is located, (ii) that a veteran or veterans will be prejudiced if the requirement for free assignability is adhered to and, (iii) that the assignability and other provisions applicable to the leasehold estate are sufficient to protect the interests of the veteran and the Government and are otherwise acceptable; or

(3) A life estate, provided that the remainder and reversionary interests are subjected to the lien; or

(4) A beneficial interest in a revocable Family Living Trust that ensures that the veteran, or veteran and spouse, have an equitable life estate, provided the lien attaches to any remainder interest and the trust arrangement is valid under State law.

The title to such estate shall be such as is acceptable to informed buyers, title companies, and attorneys, generally, in the community in which the property is situated, except as modified by paragraph (b) of this section.

(b) Any such property or estate will not fail to comply with the requirements of paragraph (a) of this section by reason of the following:

(1) Encroachments;

(2) Easements;

(3) Servitudes;

(4) Reservations for water, timber, or subsurface rights;

(5) Right in any grantor or cotenant in the chain of title, or a successor of either, to purchase for cash, which right by the terms thereof is exercisable only if:

(i) An owner elects to sell,

(ii) The option price is not less than the price at which the then owner is willing to sell to another, and

(iii) Exercised within 30 days after notice is mailed by certified mail to the address of optionee last known to the then owner of the then owner's election to sell, stating the price and the identity of the proposed vendee;

(6) State and local housing agency deed restrictions provided that the veteran obtained the property under a State or local political subdivision program designed to assist low- or moderate-income purchasers, and as a condition the purchaser must agree to one or more of the following restrictions:

(i) If the property is resold within a time period as established by local law or ordinance, after the purchaser acquires title, the purchaser must first offer the property to the government housing agency, or a low- or moderate-income purchaser designated by such agency, provided the option to purchase is exercised within 90 days after notice by the purchaser to the agency of intention to sell;

(ii) If the property is resold within a time period as established by local law or ordinance, after the purchaser acquires title, a governmental agency may specify a maximum price for the property upon resale; or

(iii) Such other restriction approved by the Secretary designed to insure either that a property acquired under such program again be made available to low- or moderate-income purchasers, or to prevent a private purchaser from obtaining a windfall profit on the resale of such property, while assuring that the purchaser has a reasonable opportunity to dispose of the property without undue difficulty at a reasonable price.

The sale price of a property under any of the restrictions of paragraph (b)(6) of this section shall not be less than the lowest of the following: The price designated by the owner as the asking price; the appraised value of the property; or the original purchase price of the property, increased by a factor reflecting all or a reasonable portion of the increased costs of housing or the percentage increase in median income in the area between the date of original

purchase and resale, plus the reasonable value or actual costs of any capital improvements made by the owner, plus a reasonable real estate commission less the cost of necessary repairs required to place the property in saleable condition; or other reasonable formula approved by the Secretary. The veteran must be fully informed and consent in writing to the deed restrictions. A copy of the veteran's consent statement must be forwarded with the application for manufactured home loan guaranty or the report of a manufactured home loan processed on the automatic basis;

(Authority: 38 U.S.C. 3712(g)).

(7) A recorded restriction on title designed to provide housing for older persons, provided that the restriction is acceptable under the provisions of the Fair Housing Act, title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Amendments Act of 1988, 42 U.S.C. 3601 *et seq.* The veteran must be fully informed and consent in writing to the restrictions. A copy of the veteran's consent statement must be forwarded with the application for manufactured home loan guaranty or the report of a manufactured home loan processed on the automatic basis;

(Authority: 38 U.S.C. 501, 3703(c)(1), 3712(g))

(8) Building and use restrictions whether or not enforceable by a reverter clause if there has been no breach of the conditions affording a right to an exercise of the reverter;

(9) Violation of a restriction based on race, color, religion, sex, handicap, familial status, or national origin, whether or not such restriction provides for reversion or forfeiture of title or a lien for liquidated damages in the event of a breach;

(10) Any other covenant, condition, restriction, or limitation approved by the Secretary in the particular case. Such approval shall be a condition precedent to the guaranty of the loan;

(c) The following limitations on the quantum or quality of the estate or property shall be deemed for the purposes of paragraph (b) of this section to have been taken into account in the appraisal of the manufactured home lot and determined by the Secretary as not materially affecting the reasonable value of such property:

(1) *Building or use restrictions.* Provided, (i) no violation exists, (ii) the proposed use by a veteran does not presage a violation of a condition affording a right of reverter, and (iii) any right of future modification contained in the building or use restrictions is not exercisable, by its own terms, until at least 10 years following the date of the loan.

(2) *Violations of equal opportunity restrictions.* Violations of a restriction based on race, color, religion, sex, handicap, familial status, or national origin, whether or not such restriction provides for reversion or forfeiture of title or a lien for liquidated damages in the event of a breach.

(3) *Violations of building or use restrictions of record.* Violations of building or use restrictions of record which have existed for more than 1 year, are not the subject of pending or threatened litigation, and which do not provide for a reversion or termination of title or condemnation by municipal authorities or a lien for liquidated damages which may be superior to the lien securing the guaranteed loan.

(4) *Easements.* (i) Easements for public utilities along one or more of the property lines and easements for drainage or irrigation ditches, provided the exercise of the rights thereof do not interfere with the use of the manufactured home or improvements located on the subject property.

(ii) Mutual easements for joint driveways located partly on the subject property and partly on adjoining property, provided the agreement is recorded in the public records.

(iii) Easements for underground conduits which are in place and which do not extend under any buildings in the subject property.

(5) *Encroachments.* (i) On the subject property by improvements on the adjoining property where such encroachments do not exceed 1 foot within the subjects boundaries, provided such encroachments do not touch any buildings or interfere with the use or enjoyment of any building or improvement on the subject property.

(ii) By hedges or removable fences belonging to subject or adjoining property.

(iii) Not exceeding 1 foot on adjoining property by driveways belonging to subject property, provided there exists a clearance of at least 8 feet between the buildings on the subject propert and the property line affected by the encroachment.

(6) *Variations of lot lines.* Variations between the length of the subject property lines as shown on the plot plan or other exhibits submitted to the Department of Veterans Affairs and as shown by the record or possession lines, provided such variations do not interfere with the current use of any of the improvements on the subject property including the manufactured home and do not involve a deficiency of more than 2 percent with respect to the length of the front line or more than 5 percent with respect to the length of any other line.

(d) In a combination loan (loan to finance the purchase of a manufactured home and to finance the purchase of a lot and/or necessary site preparation) the total indebtedness of the veteran arising from such combination loan transaction must be secured by a first lien or the equivalent thereof on the estate of the veteran in the manufactured home lot, which real estate security interest shall be in addition to the manufactured home security interest required by § 36.4234.

(e) Tax liens special assessment liens, and ground rents shall be disregarded with respect to any requirement that loans shall be secured by a lien of specified dignity. With the prior approval of the Secretary, Under Secretary for Benefits, or Director, Loan Guaranty Service, liens retained by nongovernmental entities to secure assessments or charges for municipal type services and facilities clearly within the public purpose doctrine may be disregarded. In determining whether a loan for the purchase or improvement of a manufactured home lot is secured by a first lien the Secretary may also disregard a superior lien created by a duly recorded covenant running with the realty in favor of a private entity to secure an obligation to such entity for the homeowner's share of the costs of the management, operation, or maintenance of property, services or programs within and for the benefit of the development or community in which the veteran's realty is located, if the Secretary determines that the interests of the veteran-borrower and of the Government will not be prejudiced by the operation of such covenant. In respect to any such superior lien created after June 6, 1969, the Secretary's determination must have been made prior to the recordation of the covenant.

(f) In the case of a combination loan or a loan to purchase a lot upon which a manufactured home owned by the veteran will be placed it shall be the responsibility of the lender that the veteran initially obtains or has an estate in the land constituting the manufactured home lot meeting the requirements of paragraph (a) of this section and to obtain and retain a security interest thereon meeting the requirements of paragraph (d) of this section.

(g) In the case of a combination loan to purchase a manufactured home lot and to refinance an existing purchase money loan on a manufactured home unit which is or will be located on the lot to be purchased, it shall be the responsibility of the lender to assure that the veteran obtains or retains an estate in the manufactured home and in the land meeting the requirements of paragraph (a) of this section and § 36.4234. The lender must also obtain and retain a first lien or the equivalent thereof on the estate of the veteran in both the manufactured home and in the lot on which the manufactured home is located.

(Authority: 38 U.S.C. 501, 3703(c), and 3712 (a)(1)(G), (e)(3) and (g))

[36 FR 3368, Feb. 23, 1971, as amended at 45 FR 55720, Aug. 21, 1980; 47 FR 49393, Nov. 1, 1982; 48 FR 40231, Sept. 9, 1983; 49 FR 22081, May 25, 1984; 55 FR 25976, June 26, 1990; 58 FR 37860, July 14, 1993; 61 FR 28058, June 4, 1996]

### § 36.4254 Fees and charges.

(a) Except as provided in § 36.4232 fees and charges incident to origination of a combination loan or a loan to purchase a lot upon which a manufactured home owned by the veteran will be placed which may be paid by the veteran shall

be limited, with respect to the real estate portion of the loan, to reasonable and customary amounts for any of the following:

(1) Fees of the Department of Veterans Affairs appraiser and of compliance inspectors designated by the Department of Veterans Affairs, except appraisal fees incurred for the predetermination of reasonable value requested by others than veteran or lender,

(2) Recording fees and recording taxes or other charges incident to recordation,

(3) Credit report,

(4) That portion of taxes, assessments, and other similar items for the current year chargeable to the borrower and an initial deposit (lump-sum payment) for any tax and insurance account,

(5) Survey, if required by lender or veteran,

(6) Title examination and title insurance, if any,

(7) The actual amount charged for flood zone determinations, including a charge for a life-of-the-loan flood zone determination service purchased at the time of loan origination, if made by a third party who guarantees the accuracy of the determination. A fee may not be charged for a flood zone determination made by a Department of Veterans Affairs appraiser or for the lender's own determination, and

(8) Such other items as may be authorized in advance by the Under Secretary for Benefits as appropriate for inclusion under this paragraph as proper local variances.

(Authority: 38 U.S.C. 3712; 42 U.S.C. 4001 note, 4012a)

(b) A lender may charge and the veteran may pay a flat charge not exceeding one (1) percent of the amount of the loan less the portion thereof allocated to the manufactured home: *Provided*, That such flat charge shall be in lieu of all other charges relating to costs of origination not expressly specified and allowed in this schedule.

(c) Except for a refinancing loan pursuant to 38 U.S.C. 3712(a)(1)(F) or (G) fees and charges specified in this section may not be included in the loan.

(d)(1) Notwithstanding the provisions of paragraph (c) of this section and subject to the limitations set out in paragraphs (d)(4) and (d)(5) of this section, a fee must be paid to the Secretary. A fee of 1 percent of the total loan amount must be paid to the Secretary before a combination manufactured home and lot loan (or a loan to purchase a lot upon which a manufactured home owned by the veteran will be placed) will be eligible for guaranty. Provided, however, that the fee shall be 0.50 percent of the total loan amount for interest rate reduction refinancing loans guaranteed under 38 U.S.C. 3712(a)(1)(F). All or part of such fee may be paid in cash at loan closing or all or part of the fee may be included in the loan without regard to the reasonable value of the property or the computed maximum loan amount, as appropriate. In computing the fee, the lender will disregard any amount included in the loan to enable the borrower to pay such fee.

(Authority: 38 U.S.C. 3729(a))

(2) Subject to the limitations set out in paragraphs (d)(3) and (d)(4) of this section, a fee of one-half of one percent of the loan balance must be paid to the Secretary in a manner prescribed by the Secretary by a person assuming a loan to which section 3714 of chapter 37 of 38 U.S.C. applies. The instrument securing such a loan shall contain a provision describing the right of the holder to collect this fee as trustee for the Department of Veterans Affairs. The loan holder shall list the amount of this fee in every assumption statement provided and include a notice that the fee must be paid to the holder immediately following loan settlement. The fee must be transmitted to the Secretary within 15 days of receipt by the holder of notice of the transfer.

(Authority: 38 U.S.C. 3714, 3729)

(3) The lender is rquired to pay to the Secretary the fee described in paragraph (d)(1) of this section within 15 days after loan closing. Any lender closing a loan, subject to the limitations set out in paragraphs (d)(4) and (d)(5) of this section, who fails to submit timely payment of this fee will be

subject to a late charge equal to 4 percent of the total fee due. If payment of the 1 percent fee is made more than 30 days after loan closing, interest will be assessed at a rate set in conformity with the Department of Treasury's Fiscal Requirements Manual. This interest charge is in addition to the 4 percent late charge, but the late charge is not included in the amout on which interest is computed. This interest charge is to be calculated on a daily basis beginning on the date of closing, although the interest will be assessed only on funding fee payments received more than 30 days after closing.

(Authority: 38 U.S.C. 501)

(4) The lender is required to pay to the Secretary electronically through the Automated Clearing House (ACH) system the fees described in paragraphs (d)(1) and (d)(2) of this section and any late fees and interest due on them. This shall be paid to a collection agent by operator-assisted telephone, terminal entry, or CPU-to-CPU transmission. The collection agent will be identified by the Secretary. The lender shall provide the collection agent with the following: authorization for payment of the funding fee (including late fees and interest) along with the following information: VA lender ID number; four-digit personal identification number; dollar amount of debit; VA loan number; OJ (office of jurisdiction) code; closing date; loan amount; information about whether the payment includes a shortage, late charge, or interest; veteran name; loan type; sale amount; downpayment; whether the veteran is a reservist; and whether this is a subsequent use of entitlement. For all transactions received prior to 8:15 p.m. on a workday, VA will be credited with the amount paid to the collection agent at the opening of business the next banking day.

(Authority: 38 U.S.C. 3729(a))

(5) The fee described in paragraphs (d)(1) and (d)(2) of this section shall not be collected from a veteran who is receiving compensation or who but for the receipt of retirement pay would be entitled to receive compensation) or from a surviving spouse described in section 3701(b)(2) of title 38 U.S.C.

(Authority: 38 U.S.C. 3729(b))

(6) Collection of the loan fee in this paragraph does not apply to loans closed prior to August 17, 1984, between October 1, and October 15, 1987, inclusive, between November 16 and December 20, 1987, inclusive, nor to loans closed after September 30, 1989.

(Authority: 38 U.S.C. 3729(c))

(The information collection requirements in this section have been approved by the Office of Management and Budget under control number 2900–0474)

[36 FR 3369, Feb. 23, 1971, as amended at 46 FR 43671, Aug. 31, 1981; 47 FR 46700, Oct. 20, 1982; 48 FR 40231, Sept. 6, 1983; 50 FR 5754, Feb. 12, 1985; 53 FR 27048, July 18, 1988; 55 FR 37473, Sept. 12, 1990; 60 FR 38259, July 26, 1995; 61 FR 28058, June 4, 1996; 62 FR 63278, Nov. 28, 1997]

### § 36.4255 Loans for the acquisition of a lot.

(a) A loan to finance all or part of the cost of acquisition by the veteran of a lot on which to place a manufactured home owned by the veteran shall be eligible for guaranty, *Provided*, That:

(1) The veteran will acquire title to such lot that conforms to the requirements of § 36.4253(a),

(2) The loan is secured as required by § 36.4253(d),

(3) The lot is determined by the Secretary to be an acceptable manufactured homesite pursuant to § 36.4208,

(4) The portion of the loan allocated to acquisition of the lot does not exceed the reasonable value of the lot as determined by the Secretary,

(5) The loan conforms otherwise to the requirements of the § 36.4200 series.

(b) The cost of lot acquisition which will not be paid from the proceeds of the loan must be paid by the veteran in cash from his or her own resources.

(c) For the purpose of this section, acquisition of a manufactured home lot includes:

(1) The refinancing of the balance owed by the veteran as purchaser under an existing real estate installment contract, and

(2) The refinancing of existing mortgage loans or other liens which are secured of record on a manufactured home lot owned by the veteran.

(Authority: 38 U.S.C. 501, and 3712(g))

[40 FR 13215, Mar. 25, 1975, as amended at 48 FR 40231, Sept. 6, 1983]

SERVICING, LIQUIDATION OF SECURITY AND CLAIM

### § 36.4275 Events constituting default and acceptability of partial payments.

(a) Except as provided in paragraphs (a)(1), (a)(2) and (a)(3) of this section, the conveyance of or other transfer of title to property by operation of law or otherwise, after the creation of a lien thereon to secure a loan which is guaranteed in whole or in part by the Secretary, shall not constitute an event of default, or acceleration of maturity, elective or otherwise, and shall not of itself terminate or otherwise affect the guaranty.

(1) The Secretary may issue guaranty on loans in which a State, Territorial, or local governmental agency provides assistance to a veteran for the acquisition of a mobile home or lot. Such loans will not be considered ineligible for guaranty if the State, Territorial, or local authority, by virtue of its laws or regulations or by virtue of Federal law, requires the acceleration of maturity of the loan upon the sale or conveyance of the security property to a person ineligible for assistance from such authority.

(2) At the time of application for a loan assisted by a State, Territorial, or local governmental agency, the veteran-applicant must be fully informed and consent in writing to the housing authority restrictions. A copy of the veteran's consent statement must be forwarded with the loan application or the report of a loan processed on the automatic basis.

(3) Any housing loan which is financed under 38 U.S.C. chapter 37 and to which section 3714 of that chapter applies, shall include a provision in the security instrument that the holder may declare the loan immediately due and payable upon transfer of the property securing such loan to any transferee unless the acceptability of the assumption of the loan is established pursuant to section 3714.

(i) A holder may not exercise its option to accelerate a loan upon:

(A) The creation of a lien or other encumbrance subordinate to the lender's security instrument which does not relate to a transfer of rights of occupancy in the property;

(B) The creation of a purchase money security interest for household appliances;

(C) A transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety;

(D) The granting of a leasehold interest of three years or less not containing an option to purchase;

(E) A transfer to a relative resulting from the death of a borrower;

(F) A transfer where the spouse or children of the borrower become joint owners of the property with the borrower;

(G) A transfer resulting from a decree of a dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement by which the spouse of the borrower becomes the sole owner of the property. In such a case the borrower shall have the option of applying directly to the Department of Veterans Affairs regional office of jurisdiction for a release of liability in accordance with § 36.4285 of this part; or

(H) A transfer into an inter vivos trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property.

(ii) Any instrument evidencing the loan (i.e., the retail installment contract, promissory note and/or mortgage or deed of trust) shall bear in a conspicuous position in capital letters on the first page of the document in type at least 2½ times larger in height than the regular type on such page the following warning: ''THIS LOAN IS NOT ASSUMABLE WITHOUT THE APPROVAL OF THE DEPARTMENT OF VETERANS AFFAIRS OR ITS AUTHORIZED AGENT.'' Due to the difficulty in obtaining some commercial type sizes which are exactly 2½ times larger in height than other sizes, minor deviations will be permitted based on

commercially available type sizes nearest to 2½ times the size of the print on the document. A similar warning in regular size type must appear on every assumption statement provided on a loan to which this paragraph applies.

(iii) On any loan to which 38 U.S.C. 3714 applies, the holder may charge a reasonable fee, not to exceed the lesser of (A) $300 and the actual cost of any credit report required, or (B) any maximum prescribed by applicable state law, for processing an application for assumption and changing its records. A provision authorizing the collection by the holder of this fee shall be contained in the instrument securing the loan.

(Authority: 38 U.S.C. 3704 and 3714)

(b) The inclusion in the guaranteed obligation of a provision contrary to the provisions of this section or § 36.4211 shall not impair the right of the holder to payment of the guaranty provided that:

(1) Default was declared or maturity was accelerated under some other provision of the note, mortgage, or other loan instrument, or

(2) Activation or enforcement of such provision is warranted under § 36.4280, or

(3) The prior approval of the Secretary was obtained.

(c) If the title to real property or a leasehold interest therein which secures a manufactured home loan guaranteed after December 22, 1970, is restricted against sale or occupancy on the ground of race, color, religion, or national origin, by restrictions created and filed of record by the borrower subsequent to that date, such action, at the election of the holder, shall constitute an event of default entitling the holder to declare the unpaid balance of the loan immediately due and payable.

(d) The holder of any guaranteed obligation shall have the right, notwithstanding the absence of express provision therefor in the instruments evidencing the indebtedness, to accelerate the maturity of such obligation at any time after the continuance of any default for the period specified in § 36.4280.

(e) If sufficient funds are tendered to bring a delinquency current at any time prior to repossession or foreclosure of the manufactured home the holder shall be obligated to accept the funds in payment of the delinquency, unless the prior approval of the Secretary is obtained to do otherwise.

(f) A partial payment is a remittance on a loan in default (as defined in § 36.4202(c)) of any amount less than the full amount due under the terms of the loan and security instruments at the time the remittance is tendered.

(1) Except as provided in paragraph (f)(2) of this section, or upon the express waiver of the Secretary, the holder shall accept any partial payment and either apply it to the obligor's account or identify it with the obligor's account and hold it in a special account pending disposition. When partial payments held for disposition aggregate a full monthly installment, including escrow, they shall be applied to the obligor's account.

(2) A partial payment may be returned to the obligor within 10 calendar days from date of receipt of such payment, with a letter of explanation only if one or more of the following conditions exist:

(i) The property is wholly or partially tenant-occupied and rental payments are not being remitted to the holder for application to the loan account;

(ii) The payment is less than one full monthly installment, including escrows and late charge, if applicable, unless the lesser payment amount has been agreed to under a written repayment plan;

(iii) The payment is less than 50 percent of the total amount then due, unless the lesser payment amount has been agreed to under a written repayment plan;

(iv) The payment is less than the amount agreed to in a written repayment plan;

(v) The amount tendered is in the form of a personal check and the holder has previously notified the obligor in writing that only cash or certified remittances are acceptable;

(vi) A delinquency of any amount has continued for at least 6 months since the account first became delinquent and no written repayment plan has been arranged;

(vii) Foreclosure and/or repossession has been commenced by the taking of the first action required for foreclosure/repossession under local law;

(viii) The holder's lien position would be jeopardized by acceptance of the partial payment.

(3) A failure by the holder to comply with the provisions of this paragraph may result in a partial or total loss of guaranty or insurance pursuant to § 36.4286(b), but such failure shall not constitute a defense to any legal action to terminate the loan.

(Authority: 38 U.S.C. 501, 3703(c), 3712(g))

(Approved by the Office of Management and Budget under control number 2900–0516)

[45 FR 31064, May 12, 1980, as amended at 46 FR 51386, Oct. 20, 1981; 55 FR 37474, Sept. 12, 1990]

### § 36.4276 Advances and other charges.

(a) A holder may advance any reasonable amount necessary and proper for the maintenance or repair of the security, or for the payment of accrued taxes, special assessments or other charges which constitute prior liens, or premiums on fire or other hazard insurance against loss of or damage to such property and any such advance so made may be added to the guaranteed indebtedness. A holder may also advance the one-half of one percent funding fee due on a transfer under 38 U.S.C. 3714 when this is not paid at the time of transfer. All security instruments for loans to which 38 U.S.C. 3714 applies must include a clause authorizing an advance for this purpose if it is not paid at the time of transfer.

(Authority: 38 U.S.C. 3714)

(b) In addition to advances allowable under paragraph (a) of this section, the holder may charge against the proceeds of the sale of the security; against gross amounts collected; or, in the computation of a claim under the guaranty, if lawfully authorized by the loan agreement and subject to § 36.4284, any of the following items actually paid:

(1) Any expense which is reasonably necessary for preservation of the security,

(2) Court costs in a foreclosure or other proper judicial proceeding involving the security,

(3) Other expenses reasonably necessary for collecting the debt, or repossession or liquidation of the security, including a reasonable sales commission to the dealer or sales broker for resale of the security,

(4) Reasonable trustee's fees or commissions paid incident to the sale of real property,

(5) Reasonable amount for legal services actually performed not to exceed 10 percent of the unpaid indebtedness as of the date of the first uncured default, or $850 whichever is less. In no event may the combined total of the amounts claimed for trustee's fees and legal services (paragraphs (b)(4) and (5) of this section) exceed $850.

(6) The cost of a credit report(s) on the debtor(s), which is (are) to be forwarded to the Secretary in connection with the claim,

(7) Reasonable and customary costs of property inspections,

(8) Any other expense or fee that is approved in advance by the Secretary.

(Authority: 38 U.S.C. 3720(g))

(c) In claims filed under § 36.4283(f)(4) of this part, the following costs and expenditures actually incurred and paid may be included in the computation of the indebtedness:

(1) Property preservation or repair costs incurred prior to the date of the liquidation appraisal, to the extent that they contributed to the minimum selling price of the property as determined by the Secretary, and subject to the limitation that they do not exceed the actual cost incurred by the holder, and,

(2) Costs of loan termination, including, but not limited to:

(i) The reasonable and customary expense of transporting the home to the site where it will be repaired and/or resold;

(ii) The cost of the liquidation appraisal;

(iii) A reasonable amount for legal services actually performed and trustee fees, not to exceed a total of $700;

(iv) Court costs in a foreclosure or other judicial proceeding involving the security;

(v) Any other expenses reasonably necessary for repossession of the security or other termination of the loan; and,

(vi) Any other expense or fee that is approved in advance by the Secretary.

[36 FR 1253, Jan. 27, 1971, as amended at 45 FR 38056, June 6, 1980; 53 FR 27049, July 18, 1988; 53 FR 34295, Sept. 6, 1988; 55 FR 37474, Sept. 12, 1990; 58 FR 29114, May 19, 1993; 58 FR 37860, July 14, 1993; 59 FR 48565, Sept. 22, 1994]

### § 36.4277 Release of security.

(a) Except upon full payment of the indebtedness the holder shall not release a lien or other right in or to property held as security for a guaranteed loan, or grant a fee or other interest in such property, without the prior approval of the Secretary, unless in the opinion of the holder such release does not involve a decrease in the value of the security in excess of $500: *Provided*, That the aggregate of the reduction in the original value of the security resultant from such releases without the Secretary's prior approval does not exceed $500.

(b) Except upon full payment of the indebtedness or upon the prior approval of the Secretary, the holder shall not release a lien under paragraph (a) of this section unless the consideration received for the release is commensurate with the fair market value of the property released and the entire consideration is applied to the indebtedness, or if encumbrance on other property is accepted in lieu of that released it shall be the holder's duty to acquire such lien on property of substantially equal value which is reasonably capable of serving the purpose for which the property released was utilized.

(c) Failure of the holder to comply with the provisions of this section shall not in itself affect the validity of the title of a purchaser to the property released.

(d) The holder shall notify the Secretary of any such release or substitution of security within 30 days after completion of such transaction.

(e) The release of the personal liability of any obligor on a guaranteed obligation resultant from the act or omission of any holder without the prior approval of the Secretary shall release the obligation of the Secretary as guarantor, except when such act or omission consists of

(1) Failure to establish the debt as a valid claim against the assets of the estate of any deceased obligor, provided no lien for the guaranteed debt is thereby impaired or destroyed; or

(2) An election and appropriate prosecution of legally available effective remedies with respect to the repossession or the liquidation of the security in any case, irrespective of the identity or the survival of the original or of any subsequent debtor, if holder shall have given such notice as required by § 36.4280 and if, after receiving such notice, the Secretary shall have failed to notify the holder within 15 days to proceed in such manner as to effectively preserve the personal liability of the parties liable, or such of them as the Secretary indicates is such notice to the holder; or

(3) The release of an obligor, or obligors, from liability on an obligation secured by a lien on property, which release is an incident of and contemporaneous with the sale of such property to an eligible veteran who assumed such obligation, which assumed obligation is guaranteed on his or her account pursuant to 38 U.S.C. 3712; or

(4) The release of an obligor or obligors as provided in § 36.4279.

(5) The release of an obligor, or obligors, incident to the sale of property which the holder is authorized to approve under the provisions of 38 U.S.C. 3714.

(Authority: 38 U.S.C. 3714)

[36 FR 1253, Jan. 27, 1971, as amended at 53 FR 34295, Sept. 6, 1988; 55 FR 37474, Sept. 12, 1990]

### § 36.4278 Servicing procedures for holders.

(a) *Establishment of loan servicing program.* The holder of a loan guaranteed or insured by the Secretary shall develop and maintain a loan servicing program which follows accepted industry standards for servicing of similar type conventional loans. The loan servicing program established pursuant to

this section may employ different servicing approaches to fit individual borrower circumstances and avoid establishing a fixed routine. However, it must incorporate each of the provisions specified in paragraphs (b) through (l) of this section.

(b) *Procedures for providing information.* (1) Loan holders shall establish procedures to provide loan information to borrowers, arrange for individual loan consultations upon request and maintain controls to assure prompt responses to inquiries. One or more of the following means of making information readily available to borrowers is required:

(i) An office staffed with trained servicing personnel with access to loan account information located within 200 miles of the property.

(ii) Toll-free telephone service or acceptance of collect telephone calls at an office capable of providing needed information.

(2) All borrowers must be informed of the system available for obtaining answers to loan inquiries, the office from which the needed information may be obtained, and reminded of the system at least annually.

(c) *Statement for income tax purposes.* Within 60 days after the end of each calendar year, the holder shall furnish to the borrower a statement of the interest paid and, if applicable, a statement of the taxes disbursed from the escrow account during the preceding year. At the borrower's request, the holder shall furnish a statement of the escrow account sufficient to enable the borrower to reconcile the account.

(d) *Change of servicing.* Whenever servicing of a loan guaranteed or insured by the Secretary is transferred from one holder to another, notice of such transfer by both the transferor and transferee, the form and content of such notice, the timing of such notice, the treatment of payments during the period of such transfer, and damages and costs for failure to comply with these requirements shall be governed by the pertinent provisions of the Real Estate Settlement Procedures Act as administered by the Department of Housing and Urban Development.

(e) *Escrow accounts.* A holder of a loan guaranteed or insured by the Secretary may collect periodic deposits from the borrower for taxes and/or insurance on the security and maintain a tax and insurance escrow account provided such a requirement is authorized under the terms of the security instruments. In maintaining such accounts, the holder shall comply with the pertinent provisions of the Real Estate Settlement Procedures Act.

(f) *System for servicing delinquent loans.* In addition to the requirements of the Real Estate Settlement Procedures Act concerning the duties of the loan servicer to respond to borrower inquiries, to protect the borrower's credit rating during a payment dispute period, and to pay damages and costs for noncompliance, holders shall establish a system for servicing delinquent loans which ensures that prompt action is taken to collect amounts due from borrowers and minimize the number of loans in a default status. The holder's servicing system must include the following:

(1) An accounting system which promptly alerts servicing personnel when a loan becomes delinquent;

(2) A collection staff which is trained in techniques of loan servicing and counseling delinquent borrowers to advise borrowers how to cure delinquencies, protect their equity and credit rating and, if the default is insoluble, pursue alternatives to foreclosure;

(3) Procedural guidelines for individual analysis of each delinquency;

(4) Instructions and appropriate controls for sending delinquent notices, assessing late charges, handling partial payments, maintaining servicing histories and evaluating repayment proposals;

(5) Management review procedures for evaluating efforts made to collect the delinquency and the response from the borrower before a decision is made to initiate action to liquidate a loan;

(6) Procedures for reporting delinquencies of 90 days or more and loan terminations to major consumer credit bureaus as specified by the Secretary and for informing borrowers that such action will be taken; and,

(7) Controls to ensure that all notices required to be given to the Secretary

on delinquent loans are provided timely and in such form as the Secretary shall require.

(g) *Collection actions.* (1) Holders should employ collection techniques which provide flexibility to adapt to the individual needs and circumstances of each borrower. A variety of collection techniques may be used based on the holder's determination of the most effective means of contact with borrowers during various stages of delinquency. However, at a minimum, the holder's collection procedures must include the following actions:

(i) A written delinquency notice to the borrower(s) requesting immediate payment if a loan installment has not been received within 17 days after the due date. This notice must be mailed no later than the 20th day of the delinquency and state the amount of the payment and of any late charges that are due.

(ii) An effort, concurrent with the written delinquency notice, to establish contact with the borrower(s) by telephone. When talking with the borrower(s), the holder should attempt to determine why payment was not made and emphasize the importance of remitting loan installments as they come due.

(iii) A letter to the borrower(s) if payment has not been received within 30 days after it is due and telephone contact could not be made. This letter should emphasize the seriousness of the delinquency and the importance of taking prompt action to resolve the default. It should also notify the borrower(s) that the loan is in default, state the total amount due and advise the borrower(s) how to contact the holder to make arrangements for curing the default.

(iv) In the event the holder has not established contact with the borrower(s) and has not determined the financial circumstances of the borrower(s) or established a reason for the default or obtained agreement to a repayment plan from the borrower(s), then a face-to-face interview with the borrower(s) or a reasonable effort to arrange such a meeting is required.

(2) The holder must provide a valid explanation of any failure to perform these collection actions when reporting loan defaults to the Secretary. A pattern of such failure may be a basis for sanctions under 38 CFR 36.4216.

(h) *Conducting interviews with delinquent borrowers.* When personal contact with the borrower(s) is established, the holder shall solicit sufficient information to properly evaluate the prospects for curing the default and whether the granting of forbearance or other relief assistance would be appropriate. At a minimum, the holder must make a reasonable effort to establish the following facts:

(1) The reason for the default and whether the reason is a temporary or permanent condition;

(2) The present income and employment of the borrower(s);

(3) The current monthly expenses of the borrower(s) including household and debt obligations;

(4) The current mailing address and telephone number of the borrower(s); and,

(5) A realistic and mutually satisfactory arrangement for curing the default.

(i) *Property inspection.* (1) The holder shall make an inspection of the property securing the loan whenever it becomes aware that the physical condition of the security may be in jeopardy. Unless a repayment agreement is in effect, a property inspection shall also be made:

(i) Before the 60th day of delinquency or before initiating action to liquidate a loan, whichever is earlier; and

(ii) At least once each month after liquidation proceedings have been started unless servicing information shows the property remains owner-occupied.

(2) Whenever a holder obtains information which indicates that a property securing a loan is abandoned, it shall make appropriate arrangements to protect the property from vandalism and the elements. Thereafter, the holder shall schedule inspections at least monthly to prevent unnecessary deterioration due to vandalism, or neglect. With respect to any loan more than 30 days delinquent, a property abandonment must be reported to the Secretary and appropriate action initiated under 36.4280(e) within 15 days after the

holder confirms the property is abandoned.

(j) *Collection records.* The holder shall maintain individual file records of collection action on delinquent loans and make such records available to the Secretary for inspection on request. Such collection records shall show:

(1) The dates and content of letters and notices which were mailed to the borrower(s);

(2) Dated summaries of each personal servicing contact and the result of same;

(3) The indicated reason(s) for default; and

(4) The date and result of each property inspection.

(k) *Reporting to the Secretary.* A summary of collection efforts, the information obtained through such efforts and the holder's evaluation of the reason for the default and prospects for resolution of the default must be included in any notice provided to the Secretary pursuant to § 36.4280.

(l) *Quality control procedures.* No later than 180 days after the effective date of this regulation, each loan holder shall establish internal controls to periodically assess the quality of the servicing performed on loans guaranteed by the Secretary and assure that all requirements of this section are being met. Those procedures must provide for a review of the holder's servicing activities at least annually and include an evaluation of delinquency and foreclosure rates on loans in its portfolio which are guaranteed by the Secretary. As part of its evaluation of delinquency and foreclosure rates, the holder shall:

(1) Collect and maintain appropriate data on delinquency and foreclosure rates to enable the holder to evaluate the effectiveness of its collection efforts;

(2) Determine how its VA delinquency and foreclosure rates compare with rates in various reports published by the industry, investors and others; and

(3) Analyze significant variances between its foreclosure and delinquency rates and those found in available reports and publications and take appropriate corrective action.

(m) Holders shall provide available statistical data on delinquency and foreclosure rates and their analysis of such data to the Secretary upon request.

(Approved by the Office of Management and Budget under Control Number 2900–0530)

[58 FR 29114, May 19, 1993]

### § 36.4279 Extensions and reamortizations.

(a) Provided the debtor(s) is (are) a reasonable credit risk(s), as determined by the holder based upon review of the debtor's (s') creditworthiness, including a review of a current credit report(s) on the debtor(s), the terms of repayment of any loan may, by written agreement between the holder and debtor(s), be extended in the event of default, to avoid imminent default, or in any other case where the prior approval of the Secretary is obtained. Except with the prior approval of the Secretary, no such extension shall set a rate of amortization less than that sufficient to fully amortize at least 80 percent of the loan balance so extended within the maximum maturity prescribed for loans of its class.

(b) In the event of a partial prepayment pursuant to § 36.4211, the balance of the indebtedness may, by written agreement between the holder and the debtor(s), be reamortized, provided the reamortization schedule will result in full repayment of the loan within the original maturity, and provided the debtor(s) is (are) a reasonable credit risk(s), as determined by the holder based upon review of the debtor's (s') creditworthiness, including a review of a current credit report(s) on the debtor(s).

(c) Unless the prior approval of the Secretary has been obtained, any extension or reamortization agreed to by a holder which relieves any obligor from liability will release the liability of the Secretary under the guaranty on the entire loan. However, if such release of liability of an obligor results through operation of law by reason of an extension or other act of forbearance, the liability of the Secretary as guarantor will not be affected thereby, *Provided,* The required lien is maintained and the title holder is and will remain liable for the payment of the indebtedness: *And further provided,*

That if such extension or act of forbearance will result in the release of the veteran, all delinquent installments, plus any foreclosure expenses which may have been incurred, shall have been fully paid.

(d) The holder shall promptly forward to the Secretary an advice of the terms of any agreement effecting a reamortization or extension of a guaranteed loan, together with cop(y)(ies) of the credit report(s) obtained on the debtor(s).

(Authority: 38 U.S.C. 3712)

[36 FR 1253, Jan. 27, 1971, as amended at 53 FR 34295, Sept. 6, 1988]

### § 36.4280 Reporting of defaults.

The holder of any guaranteed loan shall give notice to the Secretary within 15 days after any debtor:

(a) Is in default by reason of nonpayment of two full installments; or

(b) Is in default by failing to comply with any other covenant or obligation of such guaranteed loan which failure persists for a continuing period of 60 days after demand for compliance therewith has been made, except that if the default is due to nonpayment of real estate taxes, the notice shall not be required until the failure to pay when due has persisted for a continuing period of 120 days.

(c) In the event any failure of the months or for more than 1 month on an extended loan, the holder may then or thereafter give the notice in the manner described in paragraph (e) of this section.

(d) The notice prescribed in paragraph (e) of this section may be submitted prior to the time prescribed in paragraph (c) of this section in any case where any material prejudice to the rights of the holder or to the Secretary or hazard to the security warrants more prompt action.

(e) Except upon the express waiver of the Secretary, a holder shall not begin proceedings in court or give notice of sale under power of sale, repossess the security, or accelerate the loan, or otherwise take steps to terminate the debtor's rights in the security until the expiration of 30 days after delivery by certified mail to the Secretary of a notice of intention to take such action; provided, that immediate action as required under 38 CFR 36.4278(i) may be taken if the property to be affected thereby has been abandoned by the debtor, or has been or may be otherwise subjected to extraordinary waste or hazard.

(f) The notice required under subparagraph (e) of this paragraph shall also be provided to the original veteran-borrower and any other liable obligors by certified mail within 30 days after such notice is provided to the Secretary in all cases in which the current owner of the property is not the original veteran-borrower. A failure by the holder to make a good faith effort to comply with the provisions of this subparagraph may result in a partial or total loss of guaranty pursuant to VA Regulation 36.4286(b), but such failure shall not constitute a defense to any legal action to terminate the loan. A good faith effort will include:

(1) A search of the holder's automated and physical loan record systems to identify the name and current or last address of the original veteran and any other liable obligors;

(2) A search of the holder's automated and physical loan record systems to identify sufficient information (e.g., Social Security Number) to perform a routine trace inquiry through a major consumer credit bureau;

(3) Conducting the trace inquiry using an in-house credit reporting terminal;

(4) Obtaining the results of the inquiry;

(5) Mailing the required notices and concurrently providing the Secretary with the names and addresses of all obligors identified and sent notice; and

(6) Documentation of the holder's records.

[36 FR 1253, Jan. 27, 1971, as amended at 58 FR 29116, May 19, 1993]

### § 36.4281 Refunding of loans in default.

Upon receiving a notice of default the Secretary may at any time prior to the termination of the borrower's interest in the property require the holder upon penalty of otherwise losing the guaranty to transfer and assign the loan and the security therefor to the Secretary or to another designated by him or her upon receipt of payment of the

balance of the indebtedness remaining unpaid to the date of such assignment. Such assignment may be made without recourse but the transferor shall not thereby be relieved from the provisions of § 36.4286.

[36 FR 1253, Jan. 27, 1971, as amended at 55 FR 37474, Sept. 12, 1990]

### § 36.4282 Legal proceedings (notice of repossession).

(a) When the holder institutes suit or otherwise becomes a party in any legal or equitable proceeding brought on or in connection with the guaranteed indebtedness, or involving title to, or other lien on, the security, such holder, within the time that would be required if the Secretary were a party to the proceeding, shall deliver to the Secretary, by mail or otherwise, by making such delivery to the loan guaranty officer at the office which granted the guaranty, or other office to which the holder has been notified the file is transferred, a copy of every procedural paper filed on behalf of holder, and shall also so deliver, as promptly as possible, a copy of each similar pleading served on holder or filed in the cause by any other party thereto. Notice of, or motion for, continuance and orders thereon are excepted from the foregoing.

(b) A copy of a notice of sale under power by a holder or one acting at his or her behest (e.g., trustee or public official) shall be similarly delivered to the Secretary at or before the date of first publication, posting, or other notice, but in any event, except in emergency or when waived by the Secretary, not less than 10 days prior to date of sale. Copy of any other notice of sale served on the holder or of which he or she has knowledge shall be similarly delivered to the Secretary, including any such notice of sale under tax or other superior lien or any judicial sale.

(c) The procedure prescribed in paragraphs (a) and (b) of this section shall not be applicable in any proceeding to which the Secretary is a party, after the Secretary's appearance shall have been entered therein by a duly authorized attorney.

(d) In any legal or equitable proceeding (including probate and bankruptcy proceedings) to which the Secretary is a party, original process and any other process prior to appearance, proper to be served on the Secretary, shall be delivered to the loan guaranty officer of the office of the Department of Veterans Affairs having jurisdiction of the area in which the court is situated. Within the time required by applicable law, or rule of court, the Secretary will cause appropriate special or general appearance to be entered in the cause by the Secretary's authorized attorney.

(e) After appearance of the Secretary by attorney, all process and notice otherwise proper to serve on the Secretary before or after judgment, if served on the Secretary's attorney of record shall have the same effect as if the Secretary were personally served within the jurisdiction of the court.

(f) If following a default the holder does not begin appropriate action within 30 days after requested in writing by the Secretary to do so, or does not prosecute such action with reasonable diligence, the Secretary shall have the option to intervene in, or begin and prosecute to completion any action or proceeding, in the Secretary's name or in the name of the holder, which the Secretary deems necessary or appropriate, and may fix a date beyond which no further charges may be included in the computation of the guaranty claim. The Secretary shall pay, in advance if necessary, any court costs or other expenses incurred by the Secretary, or properly taxed against the Secretary, in any such action to which the Secretary is a party, but may charge the same, and also a reasonable amount for legal services, against the guaranteed indebtedness, or the proceeds of the sale of the security to the same extent as the holder (see § 36.4276), or otherwise collect from the holder any such expenses incurred by the Secretary because of the neglect or failure of the holder to take or complete proper action. The rights and remedies herein reserved are without prejudice to any other rights, remedies, or defenses, in law or in equity, available to the Secretary.

(g) The holder, no later than 10 days after it has repossessed a property,

must advise the Secretary of such repossession. The holder shall proceed thereafter, within a reasonable time after repossession, to terminate the debtors' rights in the property. If it is a legal requirement or if the Secretary requires that the debtors' rights be terminated by public sale, the holder shall follow the procedures set forth in paragraph (b) of this section. Otherwise, the holder shall proceed in the manner set forth in § 36.4283(f).

[36 FR 1253, Jan. 27, 1971, as amended at 47 FR 12965, Mar. 26, 1982; 53 FR 34296, Sept. 6, 1988]

### § 36.4283 Foreclosure or repossession.

(a) Upon receipt by the Secretary of notice of a judicial or statutory sale, or other public sale under power of sale contained in the loan instruments, to liquidate any security for a guaranteed loan, the Secretary may specify in advance of such sale the minimum amount which shall be credited to the indebtedness of the borrower on account of the value of the security to be sold, subject to the provisions of paragraphs (a)(1), (2), (3), and (4) of this section:

(1) If a minimum amount has been specified in relation to a sale of the property and the holder is the successful bidder at the sale for an amount not in excess of such specified amount the holder shall dispose of the property in the manner set forth in paragraph (f) and the amount realized from the resale of the property shall govern in the final accounting for determining the rights and liabilities of the holder and the Secretary.

(2) If a minimum amount has been specified by the Secretary and:

(i) A third party is the successful bidder at the sale for an amount equal to or in excess of that specified, the holder shall credit to the indebtedness the net proceeds of the sale.

(ii) A third party is the successful bidder at the sale for an amount less than that specified, the holder shall credit to the indebtedness the amount specified less expenses allowable under § 36.4276.

(iii) The holder is the successful bidder at the sale for an amount in excess of the specified amount the indebtedness shall be credited with the net proceeds of the sale or an amount established in accordance with paragraph (f) of this section, whichever is the greater, unless the bid in excess of the specified amount was made pursuant to paragraph (d) of this section.

(3) If a minimum amount has not been specified by the Secretary under paragraph (a)(1) or (2) of this section, and the Secretary advised the holder that it did not intend to specify an amount, and the property is purchased at the sale by a third party, the holder shall credit against the indebtedness the net proceeds of the sale except as provided in paragraph (d) of this section. However, if the property is purchased at the sale by the holder, the indebtedness will be credited with the net proceeds of the sale or an amount established in accordance with paragraph (f) of this section, whichever is greater.

(4) The holder shall notify the Secretary of the results of the sale within 10 days after the sale is completed.

(b) In the event that any real property which is security for a guaranteed loan is to be acquired by a holder in a manner other than as provided in paragraph (a) or (c) of this section (e.g., by strict foreclosure or by the termination without a public sale of the purchaser's interest in a land sale contract), the holder shall notify the Secretary of the acquisition within 15 days thereafter and account to the Secretary for the proceeds of the liquidation of the security in accordance with paragraph (f) of this section.

(c) When a debtor proposes to convey or transfer any property to a holder to avoid foreclosure or other judicial, contractual, or statutory disposition of the obligation or of the security, the consent of the Secretary to the terms of such proposal shall be obtained in advance of such conveyance or transfer. If the Secretary consents thereto, the holder may acquire the property and account to the Secretary for the proceeds of the liquidation of the security in accordance with paragraph (f) of this section.

(d) If a minimum bid is required under applicable State law, or decree of foreclosure or order of sale, or other lawful order or decree, the holder may bid an amount not exceeding such

amount legally required. If an amount has been specified by the Secretary and the holder is the successful bidder for an amount not exceeding the amount legally required, such specified amount shall govern for the purpose of this section.

(e) If the Secretary has specified an amount as provided in this section, and the holder learns of any material damage to the property occurring prior to the foreclosure sale or to the acceptance of a deed in lieu of foreclosure or prior to any other event to which such specified amount is applicable, the holder shall promptly advise the Secretary of such damage. Also, if the holder acquires or repossesses the property and the holder learns of any material damage to it, the holder shall promptly advise the Secretary of such damage.

(f) When the security for a guaranteed loan is acquired by the holder through foreclosure or otherwise, the holder shall resell the property within a reasonable time and may thereafter submit its claim under the guaranty. The Secretary, upon receipt of a notice of acquisition, shall determine the current reasonable value of the property and advise the holder of the minimum selling price that will be acceptable in any accounting with the Secretary upon liquidation of the security.

(1) If the holder resells the property for an amount at least equal to the minimum selling price, it shall credit the indebtedness with the proceeds of the sale.

(2) If the holder is unable to resell the property for an amount at least equal to the minimum selling price after exposure to the market for a reasonable period of time, the holder may submit to the Secretary a written advice setting forth the price, terms, conditions and expenses of any offer received. The Secretary shall thereupon:

(i) Assent to the resale of the property upon the terms of such offer, in which event the holder will credit the indebtedness with the proceeds of the sale, or

(ii) Review the minimum selling price previously established and, if appropriate, provide the holder with a reduced minimum selling price at which the property shall be further exposed to the market.

(3) If the holder resells the property and finances the sale under the terms of a new security agreement and note, the Secretary may, pursuant to paragraph (f)(3)(iv) of this section, agree to indemnify the holder against loss on the new loan.

(i) The Secretary's maximum liability under the indemnity agreement shall be the percentage of the loan originally guaranteed applied to the indebtedness as of the date of claim computation as set forth in §36.4284(a), or the amount originally guaranteed, or the amount of the Secretary's liability under a preexisting indemnity agreement, whichever is less.

(ii) In the event the proceeds of sale are less than the total indebtedness, the Secretary may pay a partial claim for the difference between the indebtedness and the proceeds of sale and thereafter agree to indemnify the holder for the amount of the maximum liability as of the date of claim computation, less the amount of claim paid.

(iii) Subject to the limitation that the total amount payable under an indemnity agreement shall in no event exceed the Secretary's maximum liability, the remaining liability will be continued as a percentage of the new loan amount increasing or decreasing pro rata with any increase or decrease in the balance of the loan obligation.

(iv) The Secretary shall execute an indemnity agreement evidencing the amount and terms of the indemnity liability, provided:

(A) The Secretary has determined that resale of the security under an indemnity agreement is in the best interest of the Government, and the holder has obtained the prior approval of the Secretary;

(B) The terms of repayment of the proposed loan bear a proper relationship to the borrower's present and anticipated income and expenses, and the borrower is a satisfactory credit risk;

(C) The borrower executes an agreement establishing liability to the Secretary for the amount of any claim paid under the indemnity agreement;

(D) The term of the proposed loan does not exceed the maximum term allowable under § 36.4204(c)(4);

(E) The interest rate charged the borrower does not exceed the maximum rate allowable under § 36.4212 as of the date of closing pursuant to the indemnity agreement;

(F) The holder agrees to comply with VA manufactured home regulations as if the original loan had not been terminated.

(Authority: 38 U.S.C. 3712(g))

(4) If the holder has not resold the property, it may elect to submit its claim under Loan Guaranty within 60 days of the date of the Secretary's written advice of the minimum selling price.

(i) For purposes of computation of a claim submitted pursuant to this paragraph, and subject to the limitation that the maximum amount of claim payable shall in no event exceed the amount originally guaranteed, the amount payable on a claim for the guaranty shall be the percentage of the loan originally guaranteed applied to the indebtedness computed as of the date the holder acquired the security. Further:

(A) The minimum selling price determined by the Secretary and provided to the holder shall be credited to the indebtedness as proceeds of sale; or

(B) If no minimum selling price is provided then the current reasonable value of the property as determined by the Secretary and provided to the holder shall be credited to the indebtedness as proceeds of sale; and

The amount payable on the claim shall in no event exceed the remaining balance of the indebtedness.

(ii) Allowable post-acquisition expenditures or costs paid by the holder which may be included in the accounting with the Secretary are limited to those specified in § 36.4276(c).

(g) If at the end of 6 months from the date of acquisition the holder has been unable to resell the property and no claim has been filed pursuant to paragraph (f)(4) of this section, a claim may be submitted under the guaranty and the Secretary will pay to the holder upon submission of such claim:

(1) The difference between the appraised value of the property as determined by the Secretary and the indebtedness including those costs allowable under § 36.4276 and the costs of repossessing the manufactured home not to exceed $100, plus any accrued and unpaid interest to the applicable cutoff date as set forth in § 36.4284(a) at the maximum rate allowable. For loans guaranteed prior to May 8, 1984, the Secretary will also pay accrued interest at a rate of 6 percent from such cutoff date to the date of claim but not to exceed 60 days. For loans guaranteed on or after May 8, 1984, the Secretary will pay accrued interest at a rate 4.75 percent below the contract interest rate from such cutoff date to the date of claim but not to exceed 90 days.

(Authority: 38 U.S.C. 3712(g))

(2) The amount of the guaranty payable on the total outstanding indebtedness as of the applicable cutoff date set forth in § 36.4284(a), whichever is less.

(h) If the property securing the guaranteed loan is acquired by a holder pursuant to paragraph (a), (b) or (c) of this section, or § 36.4282(g), the following provisions shall apply:

(1) The holder's notice to the Secretary after acquisition shall state the amount of the successful bid at public sale, or in the event of a repossession or a voluntary conveyance, the date of acquisition.

(2) The holder's notice after acquisition shall also provide complete occupancy data. Except with the prior approval of the Secretary the holder shall not rent the property to a new tenant nor extend the terms of an existing tenancy on other than a month-to-month basis.

(3) Except with the prior approval of the Secretary, any taxes or special assessments which constitute prior liens due and payable after acquisition of the property by the holder shall be paid by the holder sufficiently in advance of the payment due dates to avoid penalties and to take advantage of any discounts. The holder also may include in its accounting with the Secretary any expenditures for repairs made that were reasonably necessary to properly maintain or refurbish the security

property, not to exceed $400. Expenditures in excess of $400 shall not be made without the prior approval of the Secretary.

(4) As between the holder and the Secretary, the holder shall be responsible for any loss due to damage to or destruction of the property, ordinary wear and tear excepted, from the date of repossession or acquisition by the holder to the date the property has been liquidated.

(5) The holder shall include as credits in its accounting with the Secretary all rentals and other income collected from the property and insurance proceeds or refunds subsequent to the date of acquisition by the holder.

(i) Definitions: (1) The terms *date of sale* or *date of acquisition* as used in this section are defined as the date of the event (e.g., date of repossession, date of sale confirmation when required under local practice, date of acceptance of deed in case of voluntary conveyance, etc.) which fixes the rights of the parties in the property.

(2) The term *property* or *real property* as used in this section shall include:

(i) A leasehold estate therein which at the time of closing the loan was of not less duration than that prescribed by § 36.4253, and

(ii) The rights derived by the holder through a foreclosure sale of real estate whether or not such rights constitute an estate in real property under local law.

(j) A claim for the guaranty must include a cop(y)(ies) of a current credit report(s) on the debtor(s).

(Authority: 38 U.S.C. 3712)

(k) The provisions of this section shall not be in derogation of any rights which the Secretary may have under § 36.4286. The Under Secretary for Benefits, or the Director, Loan Guaranty Service, may authorize any deviation from the provisions of this section, within the limitations prescribed in 38 U.S.C. chapter 37, which may be necessary or desirable to accomplish the objectives of this section if such deviation is made necessary by reason of any laws or practice in any State, Territory, or the District of Columbia: *Provided*, That no such deviation shall impair the rights of any holder not consenting thereto with respect to loans made or approved prior to the date the holder is notified of such action.

(Information collection requirements contained in paragraph (j) were approved by the Office of Management and Budget under control number 2900–0480)

[36 FR 1253, Jan. 27, 1971, as amended at 47 FR 12965, Mar. 26, 1982; 49 FR 22081, May 25, 1984; 53 FR 34296, Sept. 6, 1988; 58 FR 37860, July 14, 1993; 61 FR 28058, June 4, 1996]

### § 36.4284 Computation of guaranty claims.

(a) Subject to the limitation that the maximum amount payable shall in no event exceed the amount originally guaranteed, the amount payable on a claim for the guaranty shall be the percentage of the loan originally guaranteed applied to the indebtedness computed as of the date of claim but not later than (1) the date of judgment or of decree of foreclosure; or (2) in nonjudicial foreclosures, the date of publication of the first notice of sale; or (3) in cases in which the security is repossessed without a judgment, decree, or foreclosure, the date the holder repossesses the security; or (4) if no security is available, the date of claim but not more than 6 months after the first uncured default. Deposits or other credits or setoffs including any escrowed or earmarked funds legally applicable to the indebtedness on the date of the claim computation shall be applied in reduction of the indebtedness upon which the claim is based.

(b) Credits accruing from the proceeds of a sale or other disposition of the security shall be reported to the Secretary incident to such submission, and the amount payable on the claim shall in no event exceed the remaining balance of the indebtedness.

(c) Any allowable expenditures or costs, paid by the holder, and any accrued and unpaid interest to the applicable cutoff date as set forth in paragraph (a) of this section at the maximum rate allowable, may be deducted from the proceeds of the sale of the property, or may be included in the accounting to the Secretary on such loan. For loans guaranteed prior to May 8, 1984, the holder may also either deduct from sales proceeds, or include

in the accounting, accrued interest at a rate of 6 percent from such cutoff date to the date of resale or other liquidation but not to exceed 60 days. For loans guaranteed on or after May 8, 1984, the holder may also either deduct from sales proceeds, or include in the accounting, accrued interest at a rate 4.75 percent below the contract interest rate from such cutoff date to the date of resale or other liquidation but not to exceed 90 days.

(Authority: 38 U.S.C. 3712(g))

(d) In computing the indebtedness for the purpose of filing a claim for payment of a guaranty, or in the event of a transfer of the loan under § 36.4281, or other accounting to the Secretary, the holder shall not be entitled to treat repayments theretofore made, as liquidated damages, or rentals, or otherwise than as payments on the indebtedness, notwithstanding any provision in the note, or mortgage, or otherwise, to the contrary.

(e) Appropriate computation of the guaranty, proceeds of liquidation, and allowable costs for claims filed under § 36.4283(f)(4) are specified in § 36.4276(c).

[36 FR 1253, Jan. 27, 1971, as amended at 49 FR 22082, May 25, 1984; 58 FR 37861, July 14, 1993]

### § 36.4285 Subrogation and indemnity.

(a) The Secretary shall be subrogated to the contract and the lien or other rights of the holder to the extent of any sum paid on a guaranty, which right shall be junior to the holder's rights as against the debtor or the encumbered property until the holder shall have received the full amount payable under the contract with the debtor except that where the holder has entered into a recourse and/or repurchase or indemnity agreement with a dealer or servicer or other entity and the Department of Veterans Affairs pays a claim under guaranty to the holder the Department of Veterans Affairs will not be subrogated to any rights the holder may have under the recourse and/or repurchase or indemnity agreement. No partial or complete release by a creditor shall impair the rights of the Secretary with respect to the debtor's obligation.

(b) The holder, upon request, shall execute, acknowledge, and deliver an appropriate instrument tendered the holder for that purpose, evidencing any payment received from the Secretary and the Secretary's resulting right of subrogation.

(c) The Secretary may cause the instrument required by paragraph (b) of this section to be filed for record in the Office of the Recorder of Deeds, or other appropriate office of the proper county, town, or State, in accordance with the applicable State law.

(d) Any amounts paid by the Secretary on account of the liabilities of any veteran guaranteed under the provisions of 38 U.S.C. 3712 shall constitute a debt owing to the United States by such veteran.

(e) Whenever any veteran disposes of residential property securing a guaranteed loan obtained under 38 U.S.C. 3712, and for which the commitment to make the loan was made prior to March 1, 1988, the Secretary, upon application made by such veteran, shall issue to the veteran a release relieving him or her of all further liability to the Secretary on account of such loan (including liability for any loss resulting from any default of the transferee or any subsequent purchaser of such property) if the Secretary has determined, after such investigation as the Secretary may deem appropriate, that there has been compliance with the conditions prescribed in 38 U.S.C. 3713(a). The assumption of full liability for repayment of the loan by the transferee of the property must be evidenced by an agreement in writing in such form as the Secretary may require. Release of the veteran from liability to the Secretary will not impair or otherwise affect the Secretary's guaranty on the loan, or the liability of the veteran to the holder. Any release of liability granted to a veteran by the Secretary shall inure to the spouse of such veteran. The release of the veteran from liability to the Secretary will constitute the Secretary's prior approval to a release of the veteran from liability on the loan by the holder thereof.

This release will not result in the veteran being entitled to further loan benefits unless the requirements of §36.4203 are met.

(Authority: 38 U.S.C. 3713, 3714)

(f) If, on or after July 1, 1972, any veteran disposes of residential property securing a guaranteed loan obtained by him or her under 38 U.S.C. 3712, without securing a release from liability with respect to such loan under 38 U.S.C. 3713(a) and a default subsequently occurs which results in liability of the veteran to the Secretary on account of the loan, the Secretary may relieve the veteran of such liability if the Secretary determines that:

(1) A transferee either immediate or remote is legally liable to the Secretary for the debt of the original veteran-borrower established after the termination of the loan, and

(2) The original loan was current at the time such transferee acquired the property, and

(3) The transferee who is liable to the Secretary is found to have been a satisfactory credit risk at the time he or she acquired the property.

(Authority: 38 U.S.C. 3713(b))

(g) If a veteran or any other person disposes of residential property securing a guaranteed or insured loan for which a commitment was made on or after March 1, 1988, and the veteran or other person notifies the loan holder in writing before disposing of the property, the veteran or other person shall be relieved of all further liability to the Secretary with respect to the loan (including liability for any loss resulting from any default of the purchaser or any subsequent owner of the property) and the application for assumption shall be approved if the holder determines that:

(1) The proposed purchaser is creditworthy;

(2) The proposed purchaser is contractually obligated to assume the loan and the liability to indemnify the Department of Veterans Affairs for the amount of any claim paid under the guaranty as a result of a default on the loan, or has already done so; and,

(3) The payments on the loan are current.

Should these requirements be satisfied, the holder may also release the selling veteran or other person from liability on the loan. This does not apply if the approval for the assumption is granted upon special appeal to avoid immediate foreclosure.

(Authority: 38 U.S.C. 3713, 3714)

[36 FR 1253, Jan. 27, 1971, as amended at 36 FR 13032, July 13, 1971; 44 FR 16015, Mar. 16, 1979; 55 FR 37474, Sept. 12, 1990]

### §36.4286 Partial or total loss of guaranty.

(a) There shall be no guaranty liability on the part of the Secretary in respect to any loan as to which a signature to the note, the mortgage or other security instrument is a forgery. Except as to a holder who acquired the loan instrument before maturity, for value, and without notice, and who has not directly or by agent participated in the fraud, or in the misrepresentation hereinafter specified, any willful and material misrepresentation or fraud by the lender, or by a holder, or the agent of either, in procuring the guaranty shall relieve the Secretary of liability, or shall constitute a defense against liability on account of the guaranty of the loan in respect to which the willful misrepresentation, or the fraud, is practiced: *Provided,* That if a misrepresentation, although material, is not made willfully, or with fraudulent intent, it shall have only the consequences prescribed in paragraphs (b) and (c) of this section.

(b) In taking security required by 38 U.S.C. 3712 and the §36.4200 series, a holder shall obtain the required lien on real property the title to which is such as to be acceptable to prudent lending institutions, informed buyers, title companies, and attorneys, generally in the community in which the property is situated: *Provided,* That a title will not be unacceptable by reason of any of the limitations on the quantum or quality of the property or title stated in §36.4253. If such holder fails in this respect or fails to comply with any of the requirements of 38 U.S.C. 3712 and the §36.4200 series with respect to:

(1) Obtaining and retaining a lien of the dignity prescribed on all property

upon which a lien is required by 38 U.S.C. 3712 or the § 36.4200 series,

(2) Inclusion of power to substitute trustees,

(3) The procurement and maintenance of insurance coverage,

(4) Advice to Secretary as to default,

(5) Notice of intention to begin action,

(6) Notice to the Secretary in any suit or action, or notice of sale,

(7) The release, conveyance, substitution, or exchange of security,

(8) Lack of legal capacity of a party to the transaction incident to which the guaranty is granted,

(9) Failure of the lender to see that any escrowed or earmarked account is expended in accordance with the agreement,

(10) The taking into consideration of limitations upon the quantum or quality of the estate or property,

(11) Any other requirement of 38 U.S.C. 3712 or the § 36.4200 series which does not by the terms of said section or regulations result in relieving the Secretary of all liability with respect to the loan,

no claim on the guaranty shall be paid on account of the loan with respect to which such failure occurred, or in respect to which an unwillful misrepresentation occurred, until the amount by which the ultimate liability of the Secretary would thereby be increased has been ascertained. The burden of proof shall be upon the holder to establish that no increase of ultimate liability is attributable to such failure or misrepresentation. The amount of increased liability of the Secretary shall be offset by deduction from the amount of the guaranty otherwise payable, or if consequent upon loss of security shall be offset by crediting to the indebtedness the amount of the impairment as proceeds of the sale of security in the final accounting to the Secretary. To the extent the loss resultant from the failure of misrepresentation prejudices the Secretary's right of subrogation acceptance by the holder of the guaranty payment shall subordinate the holder's right to those of the Secretary.

(c) If after the payment of a guaranty, or after a loan is transferred pursuant to § 36.4281, the fraud, misrepresentation, or failure to comply with the regulations concerning guaranty of loans to veterans as provided in this section is discovered and the Secretary determines that an increased loss to the Government resulted therefrom, the transferee or person to whom such payment was made shall be liable to the Secretary for the amount of the loss caused by such misrepresentation or failure.

### § 36.4287 Substitution of trustees.

In jurisdictions in which valid, any deed of trust or mortgage securing a guaranteed loan, if it names trustees or confers a power of sale otherwise, shall contain a provision empowering any holder of the indebtedness to appoint substitute trustees or other person with such power to sell, who shall succeed to all the rights, powers, and duties of the trustees, or other person, originally designated.

## GUARANTY OR INSURANCE OF LOANS TO VETERANS

AUTHORITY: Sections 36.4300 through 36.4375 issued under 38 U.S.C. 101, 501, 3701–3704, 3710, 3712–3714, 3720, 3729, 3732, unless otherwise noted.

NOTE: Those requirements, conditions, or limitations which are expressly set forth in 38 U.S.C. chapter 37 are not restated in these regulations and must be taken into consideration in conjunction with §§ 36.4300 to 36.4393 of this part, inclusive.

[53 FR 1350, Jan. 19, 1988]

### § 36.4300 Applicability of §§ 36.4300 to 36.4393, inclusive.

(a) Sections 36.4300 to 36.4393 of this part, inclusive, shall be applicable to each loan entitled to an automatic guaranty, or otherwise guaranteed or insured, on or after the date of publication in the FEDERAL REGISTER, and shall be applicable to such loans previously guaranteed or insured to the extent that no legal rights vested under the regulations are impaired.

(b) Title 38 U.S.C., chapter 37, is a continuation and restatement of the provisions of Title III of the Servicemen's Readjustment Act of 1944, and may be considered an amendment to such Title III. References to the sections or chapters of title 38 U.S.C., shall, where applicable, be deemed to

refer to the prior corresponding provisions of the law.

(Authority: 38 U.S.C. 501, 3703(c), 3712(g))

[53 FR 1350, Jan. 19, 1988]

### § 36.4301 Definitions.

Whenever used in 38 U.S.C. chapter 37 or §§ 36.4300 to 36.4375 of this part, inclusive, and §§ 36.4390 through 36.4393 of this part, unless the context otherwise requires, the terms defined in this section shall have the following meaning:

*A period of more than 180 days.* For the purposes of sections 3707 and 3702(a)(2)(C) of title 38 U.S.C., the term *a period of more than 180 days* shall mean 181 or more calendar days of continuous active duty.

*Acquisition and improvement loan.* A loan to purchase an existing property which includes additional funds for the purpose of installing energy conservation improvements or making other alterations, improvements, or repairs.

(Authority: 38 U.S.C. 3703(c)(1), 3710(a) (1), (4), and (7))

*Alterations.* Any structural changes or additions to existing improved realty.

*Automatic lender.* A lender that may process a loan or assumption ¼without submitting the credit package to the Department of Veterans Affairs for underwriting review. Pursuant to 38 U.S.C. 3702(d) there are two categories of lenders who may process loans automatically: (1) Entities such as banks, savings and loan associations, and mortgage and loan companies that are subject to examination by an agency of the United States or any State and (2) lenders approved by the Department of Veterans Affairs pursuant to standards established by the Department of Veterans Affairs.

(Authority: 38 U.S.C. 3702(d))

*Condominium.* Unless otherwise provided by State law, a condominium is a form of ownership where the buyer receives title to a three dimensional air space containing the individual living unit together with an undivided interest or share in the ownership of common elements.

*Cost* means the entire consideration paid or payable for or on account of the application of materials and labor to tangible property.

*Credit package.* Any information, reports or verifications used by a lender, holder or authorized servicing agent to determine the creditworthiness of an applicant for a Department of Veterans Affairs guaranteed loan or the assumer of such a loan.

(Authority: 38 U.S.C. 3710 and 3714)

*Date of first uncured default* means the due date of the earliest payment not fully satisfied by the proper application of available credits or deposits.

*Default* means failure of a borrower to comply with the terms of a loan agreement.

*Designated* appraiser means a person requested by the Secretary to render an estimate of the reasonable value of a property, or of a specified type of property, within a stated area for the purpose of justifying the extension of credit to an eligible veteran for any of the purposes stated in 38 U.S.C. Chapter 37. An appraiser on a fee basis is not an agent of the Secretary.

*Discharge or release.* For purposes of basic eligibility a person will be considered discharged or released if the veteran was issued a discharge certificate under conditions other than dishonorable (38 U.S.C. 3702(c)). The term *discharge or release* includes (1) retirement from the active military, naval, or air service, and (2) the satisfactory completion of the period of active military, naval, or air service for which a person was obligated at the time of entry into such service in the case of a person who, due to enlistment or reenlistment, was not awarded a discharge or release from such period of service at the time of such completion thereof and who, at such time, would otherwise have been eligible for the award of a discharge or release under conditions other than dishonorable.

(Authority: 38 U.S.C. 101(18))

*Dwelling.* Any building designed primarily for use as a home consisting of not more than four family units plus an added unit for each veteran if more than one eligible veteran participates in the ownership, except that in the

case of a condominium housing development or project within the purview of 38 U.S.C. 3710(a)(6) and §§ 36.4356 through 36.4360(a) of this part the term is limited to a one single-family residential unit. Also, a manufactured home, permanently affixed to a lot owned by a veteran and classified as real property under the laws of the State where it is located.

(Authority: 38 U.S.C. 3710(a)(9) and (f))

*Economic readjustment* means rearrangement of an eligible veteran's indebtedness in a manner calculated to enable the veteran to meet obligations and thereby avoid imminent loss of the property which secures the delinquent obligation.

*Energy conservation improvement.* An improvement to an existing dwelling or farm residence through the installation of a solar heating system, a solar heating and cooling system, or a combined solar heating and cooling system or through application of a residential energy conservation measure as prescribed in 38 U.S.C. 3710(d) or by the Secretary.

(Authority: 38 U.S.C. 3710(a)(7))

*Full disbursement.* Payment by a lender of the entire proceeds of a loan or the purposes described in the report of the lender in respect of such loan to the Secretary either:

(1) By payment to those contracting with the borrower for such purposes, or

(2) By payment to the borrower, or

(3) By transfer to an account against which the borrower can draw at will, or

(4) By transfer to an escrow account, or

(5) By transfer to an earmarked account if

(i) The amount is not in excess of 10 percent of the loan, or

(ii) The loan is an Acquisition and Improvement loan pursuant to § 36.4301, or

(iii) The loan is one submitted by a lender of the class specified in 38 U.S.C. 3702(d) or 3703(a)(2).

(Authority: 38 U.S.C. 3703(c)(1))

*Graduated payment mortgage loan.* A loan for the purpose of acquiring a single-family dwelling unit involving a plan for repayment in which a portion of the interest due is deferred for a period of time. The interest so deferred is added to the principal balance thus resulting in a principal amount greater than at loan origination (negative amortization). The monthly payments increase on an annual basis (graduate) for a predetermined period of time until the payments reach a level which will fully amortize the loan during the remaining loan term.

(Authority: 38 U.S.C. 3703 (c) and (d))

*Guaranty* means the obligation of the United States, assumed by virtue of 38 U.S.C. Chapter 37, to repay a specified percentage of a loan upon the default of the primary debtor.

*Holder.* The lender or any subsequent assignee or transferee of the guaranteed obligation or the authorized servicing agent of the lender or of the assignee or transferee if the obligation has been assigned or transferred.

(Authority: 38 U.S.C. 3714)

*Home* means place of residence.

*Improvements.* Any alteration that improves the property for the purpose for which it is occupied.

*Indebtedness.* The unpaid principal and interest plus any other amounts allowable under the terms of a loan including those authorized by statute and consistent with §§ 36.4300 to 36.4393 of this part, inclusive, which have been paid and debited to the loan account as of the applicable date established pursuant to paragraph (f) of § 36.4319 or § 36.4321 of this part.

(Authority: 38 U.S.C. 3732)

*Insurance* means the obligation assumed by the United States to indemnify a lender to the extent specified in §§ 36.4300 to 36.4393, inclusive, for any loss incurred upon any loan insured under 38 U.S.C. 3703(a)(2).

*Insurance account* means the record of the amount available to a lender or purchaser for losses incurred on loans insured under 38 U.S.C. 3703(a).

*Lender.* The payee or assignee or transferee of an obligation at the time it is guaranteed or insured. This term also includes any sole proprietorship, partnership, or corporation and the

owners, officers and employees of a sole proprietorship, partnership, or corporation engaged in the origination, procurement, transfer, servicing, or funding of a loan which is guaranteed or insured by VA.

(Authority: 38 U.S.C. 3704(d), 3712(g))

*Lien* means any interest in, or power over, real or personal property, reserved by the vendor, or created by the parties or by operation of law, chiefly or solely for the purpose of assuring the payment of the purchase price, or a debt, and irrespective of the identity of the party in whom title to the property is vested, including but not limited to mortgages, deeds with a defeasance therein or collaterally, deeds of trust, security deeds, mechanics' liens, lease-purchase contracts, conditional sales contracts, consignments.

*Liquidation sale.* Any judicial, contractural or statutory disposition of real property, under the terms of the loan instruments and applicable law, to liquidate a defaulted loan that is secured by such property. This includes a voluntary conveyance made to avoid such disposition of the obligation or of the security.

(Authority: 38 U.S.C. 3732)

*Lot.* A parcel of land acceptable to the Secretary as a manufactured home site.

(Authority: 38 U.S.C. 3710(a)(9))

*Manufactured home.* A moveable dwelling unit designed and constructed for year-round occupancy by a single family, on land, containing permanent eating, cooking, sleeping and sanitary facilities. A double-wide manufactured home is a moveable dwelling designed for occupancy by one family and consisting of: (1) Two or more units intended to be joined together horizontally when located on a site, but capable of independent movement or (2) a unit having a section or sections which unfold along the entire length of the unit. For the purposes of this section of VA regulations, manufactured home/lot loans guaranteed under the purview of §§ 36.4300 to 36.4393, inclusive, must be for units permanently affixed to a lot and considered to be real property under the laws of the State where it is located. If the loan is for the purchase of a manufactured home and lot it must be considered as one loan.

(Authority: 38 U.S.C. 3710(a)(9))

*Net loss.* (insured loans) means the indebtedness, plus any other charges authorized under § 36.4313, remaining unsatisfied after the liquidation of all available security and recourse to all intangible rights of the holder against those obligated on the debt.

*Net value.* The fair market value of real property, minus an amount representing the costs that the Secretary estimates would be incurred by VA in acquiring and disposing of the property. The number to be subtracted from the fair market value will be calculated by multiplying the fair market value by the current cost factor. The cost factor used will be the most recent percentage of the fair market value that VA calculated and published in the Notices section of the FEDERAL REGISTER (it is intended that this percentage will be calculated annually). In computing this cost factor, VA will determine the average operating expenses and losses (or gains) on resale incurred for properties acquired under § 36.4320 which were sold during the preceding fiscal year and the average administrative cost to VA associated with the property management activity. The final net value derived from this calculation will be stated as a whole dollar amount (any fractional amount will be rounded up to the next whole dollar). The cost items included in the calculation will be:

(1) *Property operating expenses.* All disbursements made for payment of taxes, assessments, liens, property maintenance and related repairs, management broker's fees and commissions, and any other charges to the property account excluding property improvements and selling expenses.

(2) *Selling expenses.* All disbursements for sales commissions plus any other costs incurred and paid in connection with the sale of the property.

(3) *Administrative costs.* (i) An estimate of the total cost for VA of personnel (salary and benefits) and overhead (which may include things such as travel, transportation, communication,

utilities, printing, supplies, equipment, insurance claims and other services) associated with the acquisition, management and disposition of property acquired under § 36.4320 of this part. The average administrative costs will be determined by:

(A) Dividing the total cost for VA personnel and overhead salary and benefits costs by the average number of properties on hand and adjusting this figure based on the average holding time for properties sold during the preceding fiscal year; then

(B) Dividing the figure calculated in paragraph (3)(i)(A) of this definition by the VBA ratio of personal services costs to total obligations.

(ii) The three cost averages will be added to the average loss (or gain) on property sold during the preceding fiscal year (based on the average property purchase price) and the sum will be divided by the average fair market value at the time of acquisition for properties which were sold during the preceding fiscal year to derive the percentage to be used in estimating net value.

(Authority: 38 U.S.C. 3732)

*Purchase price.* The entire legal consideration paid or payable upon or on account of the sale of property, exclusive of acquisition costs, or for the cost of materials and labor to be applied to the property.

*Real-estate loan.* Any obligation incurred for the purchase of real property or a leasehold estate as limited in §§ 36.4300 to 36.4393, inclusive, or for the construction of fixtures or appurtenances thereon or for alterations, improvements, or repairs thereon required by §§ 36.4300 to 36.4393, inclusive, to be secured by a lien on such property or is so secured. Loans for the purpose specified in 38 U.S.C. 3710(a)(5) (refinancing of mortgage loans or other liens on a dwelling or farm residence), loans for the purpose specified in 38 U.S.C. 3710(a)(8) (refinancing of a VA guaranteed, insured or direct loan to lower the interest rate), loans for the purposes specified in 38 U.S.C. 3710(a)(9) (purchase of manufactured homes/lots or the refinancing of such loans in order to reduce the interest rate or purchase a lot, in States in which manufactured homes, when permanently affixed to a lot, are considered real property, and loans to purchase one-family residential units in condominium housing developments or projects within the purview of 38 U.S.C. 3710(a)(6) and §§ 36.4356 through 36.4360a shall also be considered real estate loans.

*Reasonable value* means that figure which represents the amount a reputable and qualified appraiser, unaffected by personal interest, bias, or prejudice, would recommend to a prospective purchaser as a proper price or cost in the light of prevailing conditions.

*Registered mail.* The term *registered mail* wherever used in the regulations concerning guaranty or insurance of loans to veterans shall include certified mail.

*Repairs.* Any alteration of existing improved realty or equipment which is necessary or advisable for protective, safety or restorative purposes.

*Repossession - repossessed* means recovery or acquisition of such physical control of property (pursuant to the provisions of the security instrument or as otherwise provided by law) as to make further legal or other action unnecessary in order to obtain actual possession of the property or to dispose of the same by sale or otherwise.

*Residential property.* (1) Any one-family residential unit in a condominium housing development within the purview of 38 U.S.C. 3710(a)(6) and §§ 36.4356 through 36.4360a, (2) any manufactured home permanently affixed to a lot owned or being purchased by a veteran and considered to be real property under the laws of the State where it is located, and (3) any improved real property (other than a condominium housing development or a manufactured home and/or lot) or leasehold estate therein as limited by §§ 36.4300 to 36.4393, inclusive, the primary use of which is for occupancy as a home, consisting of not more than four family units, plus an added unit for each eligible veteran if more than one participates in the ownership thereof, or (4) any land to be purchased out of the proceeds of a loan for the construction

of a dwelling, and on which such dwelling is to be erected.

(Authority: 38 U.S.C. 3710(f)(2) and (3))

*Secretary*. The Secretary of Veterans Affairs, or any employee of the Department of Veterans Affairs authorized to act in the Secretary's stead.

*Servicing agent*. An agent designated by the loan holder as the entity to collect installments on the loan and/or perform other functions as necessary to protect the interests of the holder.

(Authority: 38 U.S.C. 3714)

*Specified amount*. A sum, equal to the lesser of the net value of real property or the total indebtedness secured thereby, which the Secretary designates as the minimum amount to be credited to the indebtedness incident to a liquidation sale.

(Authority: 38 U.S.C. 3732)

*Unguaranteed portion of the indebtedness*. The indebtedness computed as of the applicable date of under paragraph (f) of § 36.4319 or § 36.4321 of this part minus the amount of the guaranty payable as of such date.

(Authority: 38 U.S.C. 3732)

(Authority: 38 U.S.C. 501, 3703(c)(1))

[24 FR 2651, Apr. 7, 1959]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 36.4301, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

GENERAL PROVISIONS

### § 36.4302 Computation of guaranties or insurance credits.

(a) With respect to a loan to a veteran guaranteed under 38 U.S.C. 3710 the guaranty shall not exceed the lesser of the dollar amount of entitlement available to the veteran or

(1) 50 percent of the original principal loan amount where the loan amount is not more than $45,000; or

(2) $22,500 where the original principal loan exceeds $45,000, but is not more than $56,250; or

(3) Except as provided in subparagraph (4), the lesser of $36,000 or 40 percent of the original principal loan amount where the loan amount exceeds $56,250; or

(4) The lesser of $60,000 or 25 percent of the original principal loan amount where the loan amount exceeds $144,000 and the loan is for the purchase or construction of a home or the purchase of a condominium unit.

(Authority: 38 U.S.C. 3703(a))

(b) With respect to an interest rate reduction refinancing loan guaranteed under 38 U.S.C. 3710(a)(8), (a)(9)(B)(i), or (a)(11), the dollar amount of guaranty may not exceed the greater of the original guaranty amount of the loan being refinanced, or 25 percent of the refinancing loan amount.

(Authority: 38 U.S.C. 3703, 3710)

(c) With respect to a loan for an energy efficient mortgage guaranteed under 38 U.S.C. 3710(d), the amount of the guaranty shall be in the same proportion as would have been provided if the energy efficient improvements were not added to the loan amount, and there shall be no additional charge to the veteran's entitlement as a result of the increased guaranty amount.

(Authority: 38 U.S.C. 3703, 3710)

(d) An amount equal to 15 percent of the original principal amount of each insured loan shall be credited to the insurance account of the lender and shall be charged against the guaranty entitlement of the borrower: *Provided*, That no loan may be insured unless the borrower has sufficient entitlement remaining to permit such credit.

(e) Subject to the provisions of § 36.4303(g), the following formulas shall govern the computation of the amount of the guaranty or insurance entitlement which remains available to an eligible veteran after prior use of entitlement:

(1) If a veteran previously secured a nonrealty (business) loan, the amount of nonrealty entitlement used is doubled and subtracted from $36,000. The sum remaining is the amount of available entitlement for use, except that:

(i) Entitlement may be increased by up to $24,000 if the loan amount exceeds $144,000 and the loan is for purchase or

construction of a home or purchase of a condominium; and

(ii) Entitlement for manufactured home loans that are to be guaranteed under 38 U.S.C. 3712 may not exceed $20,000.

(2) If a veteran previously secured a realty (home) loan, the amount of realty (home) loan entitlement used is subtracted from $36,000. The sum remaining is the amount of available entitlement for use, except that:

(i) Entitlement may be increased by up to $24,000 if the loan amount exceeds $144,000 and the loan is for purchase or construction of a home or purchase of a condominium: and

(ii) Entitlement for manufactured home loans that are to be guaranteed under 38 U.S.C. 3712 may not exceed $20,000.

(3) If a veteran previously secured a manufactured home loan under 38 U.S.C. 3712, the amount of entitlement used for that loan is subtracted from $36,000. The sum remaining is the amount of available entitlement for home loans and the sum remaining may be increased by up to $24,000 if the loan amount exceeds $144,000 and the loan is for purchase or construction of a home or purchase of a condominium. To determine the amount of entitlement available for manufactured home loans processed under 38 U.S.C. 3712, the amount of entitlement previously used for that purpose is subtracted from $20,000. The sum remaining is the amount of available entitlement for use for manufactured home loan purposes under 38 U.S.C. 3712.

(Authority: 38 U.S.C. 3703)

(f) For the purpose of computing the remaining guaranty or insurance benefit to which a veteran is entitled, loans guaranteed prior to the effective date of §§ 36.4300 to 36.4393, inclusive, shall be taken into consideration as if made subsequent thereto.

(g) A loan eligible for insurance may be either guaranteed or insured at the option of the borrower and the lender: *Provided*, That if the Secretary is not advised of the exercise of such option at the time the loan is reported pursuant to § 36.4303 such loan will not be eligible for insurance.

(h) A guaranty is reduced or increased pro rata with any deduction or increase in the amount of the guaranteed indebtedness, but in no event will the amount payable on a guaranty or the percentage of the indebtedness corresponding to that of the original guaranty whichever is less. However, on a graduated payment mortgage loan, the percentage of guaranty applicable to the original loan amount pursuant to paragraph (a) of this section shall apply to the loan indebtedness to the extent scheduled deferred interest is added to principal during the graduation period without regard to the original maximum dollar amount of guaranty.

(Authority: 38 U.S.C. 3703(b) and (d))

(i) The amount of any guaranty or the amount credited to a lender's insurance account in relation to any insured loan shall be charged against the original or remainder of the guaranty benefit of the borrower. Complete or partial liquidation, by payment or otherwise, of the veteran's guaranteed or insured indebtedness does not increase the remainder of the guaranty benefit, if any, otherwise available to the veteran. When the maximum amount of guaranty or insurance legally available to a veteran shall have been granted, no further guaranty or insurance is available to the veteran.

(j) Notwithstanding the provisions of paragraph (g) of this section, the Secretary may exclude the amount of guaranty or insurance entitlement used for any guaranteed or insured loan provided:

(1) The property which served as security for the loan has been disposed of by the veteran, or has been destroyed by fire or other natural hazard; and

(2)(i) The loan has been repaid in full or the Secretary has been released from liability as to the loan, or if the Secretary has suffered a loss on said loan, such loss has been paid in full; or

(ii) A veteran-transferee has agreed to assume the outstanding balance on the loan and consented to the use of his or her entitlement to the extent the entitlement of the veteran-transferor had been used originally; or

(3) The loan has been repaid in full, and the loan for which the veteran

seeks to use entitlement is secured by the same property which secured the fully repaid loan; or

(4) In a case in which the veteran still owns the property purchased with a VA-guaranteed loan, the Secretary may, one time only, restore entitlement used on that loan if:

(i) the loan has been repaid in full or, if the Secretary has suffered a loss on the loan, the loss has been paid in full; or

(ii) the Secretary has been released from liability as to the loan, and, if the Secretary has suffered a loss on the loan, the loss has been paid in full.

(k) The Secretary may, in any case involving circumstances deemed appropriate, waive either or both of the requirements set forth in paragraphs (j)(1) and (j)(2)(i) of this section.

(Authority: 38 U.S.C. 3702(b), 3710)

(l)(1) The amount of guaranty entitlement, available and unused, of an eligible unmarried surviving spouse (whose eligibility does not result from his or her own service) is determinable in the same manner as in the case of any veteran, and any entitlement which the decedent (who was his or her spouse) used shall be disregarded. A certificate as to the eligibility of such surviving spouse, issued by the Secretary, shall be a condition precedent to the guaranty or insurance of any loan made to a surviving spouse in such capacity.

(Authority: 38 U.S.C. 3701(a))

(2) An unmarried surviving spouse who was a co-obligor under an existing VA guaranteed, insured or direct loan shall be considered to be a veteran eligible for an interest rate reduction refinancing loan pursuant to 38 U.S.C. 3710(a)(8) or (9)(B)(i).

(Authority: 38 U.S.C. 3710(e)(3))

(Authority: 38 U.S.C. 501, 3703(c)(1))

[13 FR 7274, Nov. 27, 1948, as amended at 35 FR 17179, Nov. 7, 1970; 40 FR 34589, Aug. 18, 1975; 46 FR 43672, Aug. 31, 1981; 47 FR 15139, Apr. 8, 1982; 49 FR 28243, July 11, 1984; 50 FR 3334, Jan. 24, 1985; 55 FR 40655, Oct. 4, 1990; 60 FR 38259, July 26, 1995; 68 FR 6627, Feb. 10, 2003]

## § 36.4303 Reporting requirements.

(a) With respect to loans automatically guaranteed under 38 U.S.C. 3703(a)(1), evidence of the guaranty will be issuable to a lender of a class described under 38 U.S.C. 3702(d) if the loan is reported to the Secretary within 60 days following full disbursement and upon the certification of the lender that:

(1) No default exists thereunder that has continued for more than 30 days;

(2) Except for acquisition and improvement loans as defined in § 36.4301, any construction, repairs, alterations, or improvements effected subsequent to the appraisal of reasonable value, and paid for out of the proceeds of the loan, which have not been inspected and approved upon completion by a compliance inspector designated by the Secretary, have been completed properly in full accordance with the plans and specifications upon which the original appraisal was based; and any deviations or changes of identity in said property have been approved as required in § 36.4304 concerning guaranty or insurance of loans to veterans;

(3) The loan conforms otherwise with the applicable provisions of 38 U.S.C. Chapter 37 and of the regulations concerning guaranty or insurance of loans to veterans.

(Authority: 38 U.S.C. 3703(c)(1))

(b) Loans made pursuant to 38 U.S.C. 3703(a), although not entitled to automatic insurance thereunder, may, when made by a lender of a class described in 38 U.S.C. 3702(d)(1), be reported for issuance of an insurance credit.

(Authority: 38 U.S.C. 3702(d), 3703(a)(2))

(c) Each loan proposed to be made to an eligible veteran by a lender not within a class described in 38 U.S.C. 3702(d) shall be submitted to the Secretary for approval prior to closing. Lenders described in 38 U.S.C. 3702(d) shall have the optional right to submit any loan for such prior approval. The Secretary, upon determining any loan so submitted to be eligible for a guaranty, or for insurance, will issue a certificate of commitment with respect thereto.

(d) A certificate of commitment shall entitle the holder to the issuance of the evidence of guaranty or insurance upon the ultimate actual payment of the full proceeds of the loan for the purposes described in the original report and upon the submission within 60 days thereafter of a supplemental report showing that fact and:

(1) The identity of any property purchased therewith,

(2) That all property purchased or acquired with the proceeds of the loan has been encumbered as required by the regulations concerning guaranty or insurance of loans to veterans,

(3) Except for acquisition and improvement loans as defined in § 36.4301(c), any construction, repairs, alterations, or improvements paid for out of the proceeds of the loan, which have not been inspected and approved subsequent to completion by a compliance inspector designated by the Secretary, have been completed properly in full accordance with the plans and specifications upon which the original appraisal was based; and that any deviations or changes of identity in said property have been approved as required by § 36.4304, and

(4) That the loan conforms otherwise with the applicable provisions of 38 U.S.C. Chapter 37 and the regulations concerning guaranty or insurance of loans to veterans.

(Authority: 38 U.S.C. 3703(c)(1))

(e) Upon the failure of the lender to report in accordance with the provisions of paragraph (d) of this section, the certificate of commitment shall have no further effect, or the amount of guaranty or insurance shall be reduced pro rata, as may be appropriate under the facts of the case: Provided, nevertheless, that if the loan otherwise meets the requirements of this section, said certificate of commitment may be given effect by the Secretary, notwithstanding the report is received after the date otherwise required.

(f) For loans not reported within 60 days, evidence of guaranty will be issued only if the loan report is accompanied by a statement signed by a corporate officer of the lending institution which explains why the loan was reported late. The statement must identify the case or cases in issue and must set forth the specific reason or reasons why the loan was not submitted on time. Upon receipt of such a statement evidence of guaranty will be issued. A pattern of late reporting and the reasons therefore will be considered by VA in taking action under § 36.4349.

(g) Evidence of a guaranty will be issued by the Secretary by appropriate endorsement on the note or other instrument evidencing the obligation, or by a separate certificate at the option of the lender. Notice of credit to an insurance account will be given to the lender. Unused certificates of eligibility issued prior to March 1, 1946, are void. No certificate of commitment shall be issued and no loan shall be guaranteed or insured unless the lender, the veteran, and the loan are shown to be eligible. Evidence of guaranty or insurance will not be issued on any loan for the purchase or construction of residential property unless the veteran, or the veteran's spouse in the case of a veteran who cannot occupy the property because of active duty status with the Armed Forces, certifies in such form as the Secretary shall prescribe that the veteran, or spouse of the active duty veteran, intends to occupy the property as his or her home. Guaranty or insurance evidence will not be issued on any loan for the alteration, improvement, or repair of any residential property or on a refinancing loan unless the veteran, or spouse of an active duty servicemember, certifies that he or she presently occupies the property as his or her home. An exception to this is if the home improvement or refinancing loan is for extensive changes to the property that will prevent the veteran or the spouse of the active duty veteran from occupying the property while the work is being completed. In such a case the veteran or spouse of the active duty veteran must certify that he or she intends to occupy or reoccupy the property as his or her home upon completion of the substantial improvements or repairs. All of the mentioned certifications must take place at the time of loan application and closing except in the case of loans automatically guaranteed, in which case veterans or, in the case of an active duty veteran, the veterans' spouse

shall make the required certification only at the time the loan is closed.

(Authority: 38 U.S.C. 3704(c))

(h) Subject to compliance with the regulations concerning guaranty or insurance of loans to veterans, the certificate of guaranty or the evidence of insurance credit will be issuable within the available entitlement of the veteran on the basis of the loan stated in the final loan report or certification of loan disbursement, except for refinancing loans for interest rate reductions. The available entitlement of a veteran will be determined by the Secretary as of the date of receipt of an application for guaranty or insurance of a loan or of a loan report. Such date of receipt shall be the date the application or loan report is date-stamped into VA. Eligibility derived from the most recent period of service:

(1) Shall cancel any unused entitlement derived from any earlier period of service, and

(2) Shall be reduced by the amount by which entitlement from service during any earlier period has been used to obtain a direct, guaranteed, or insured loan.

(i) On property which the veteran owns at the time of application, or

(ii) As to which the Secretary has incurred actual liability or loss, unless in the event of loss or the incurrence and payment of such liability by the Secretary, the resulting indebtedness of the veteran to the United States has been paid in full. *Provided,* That if the Secretary issues or has issued a certificate of commitment covering the loan described in the application for guaranty or insurance or in the loan report, the amount and percentage of guaranty or the amount of the insurance credit contemplated by the certificate of commitment shall not be subject to reduction if the loan has been or is closed on a date that is not later than the expiration date of the certificate of commitment, notwithstanding that the Secretary in the meantime and prior to the issuance of the evidence of guaranty or insurance shall have incurred actual liability or loss on a direct, guaranteed, or insured loan previously obtained by the borrower. For the purposes of this paragraph, the Secretary will be deemed to have incurred actual loss on a guaranteed or insured loan if the Secretary has paid a guaranty or insurance claim thereon and the veteran's resultant indebtedness to the Government has not been paid in full, and to have incurred actual liability on a guaranteed or insured loan if the Secretary is in receipt of a claim on the guaranty or insurance or is in receipt of a notice of default. In the case of a direct loan, the Secretary will be deemed to have incurred an actual loss if the loan is in default. A loan, the proceeds of which are to be disbursed progressively or at intervals, will be deemed to have been closed for the purposes of this paragraph if the loan has been completed in all respects excepting the actual ''payout'' of the entire loan proceeds.

(Authority: 38 U.S.C. 3702(a), 3710(c))

(i) Any amounts that are disbursed for an ineligible purpose shall be excluded in computing the amount of guaranty or insurance credit.

(j) Notwithstanding the lender has erroneously, but without intent to misrepresent, made certification with respect to paragraph (a)(1) of this section, the guaranty or insurance will become effective upon the curing of such default and its continuing current for a period of not less than 60 days thereafter. For the purpose of this paragraph a loan will be deemed current so long as the installment is received within 30 days after its due date.

(k) No guaranty or insurance commitment or evidence of guaranty or insurance will be issuable in respect to any loan to finance a contract that:

(1) Is for the purchase, construction, repair, alteration, or improvement of a dwelling or farm residence;

(2) Is dated on or after June 4, 1969;

(3) Provides for a purchase price or cost to the veteran in excess of the reasonable value established by the Secretary; and

(4) Was signed by the veteran prior to the veteran's receipt of notice of such reasonable value; unless such contract includes, or is amended to include, a provision substantially as follows:

It is expressly agreed that, notwithstanding any other provisions of this contract, the purchaser shall not incur any penalty by forfeiture of earnest money or otherwise or be obligated to complete the purchase of the property described herein, if the contract purchase price or cost exceeds the reasonable value of the property established by the Department of Veterans Affairs. The purchaser shall, however, have the privilege and option of proceeding with the consummation of this contract without regard to the amount of the reasonable value established by the Department of Veterans Affairs.

(Authority: 38 U.S.C. 501, 3703(c)(1))

(l) With respect to any loan for which a commitment was made on or after March 1, 1988, the Secretary must be notified whenever the holder receives knowledge of disposition of the residential property securing a VA-guaranteed loan.

(1) If the seller applies for prior approval of the assumption of the loan, then:

(i) A holder (or its authorized servicing agent) who is an automatic lender must examine the creditworthiness of the purchaser and determine compliance with the provisions of 38 U.S.C. 3714. The creditworthiness review must be performed by the party that has automatic authority. If both the holder and its servicing agent are automatic lenders, then they must decide between themselves which one will make the determination of creditworthiness, whether the loan is current and whether there is a contractual obligation to assume the loan, as required by 38 U.S.C. 3714. If the actual loan holder does not have automatic authority and its servicing agent is an automatic lender, then the servicing agent must make the determinations required by 38 U.S.C. 3714 on behalf of the holder. The actual holder will remain ultimately responsible for any failure of its servicing agent to comply with the applicable law and VA regulations.

(A) If the assumption is approved and the transfer of the security is completed, then the notice required by this paragraph shall consist of the credit package (unless previously provided in accordance with paragraph (k)(1)(i)(B) of this section) and a copy of the executed deed and/or assumption agreement as required by VA office of jurisdiction. The notice shall be submitted to the Department with VA receipt for the funding fee provided for in § 36.4312(e)(3) of this part.

(B) If the application for assumption is disapproved, the holder shall notify the seller and the purchaser that the decision may be appealed to the VA office of jurisdiction within 30 days. The holder shall make available to that VA office all items used by the holder in making the holder's decision in case the decision is appealed to VA. If the application remains disapproved after 60 days (to allow time for appeal to and review by VA), then the holder must refund $50 of any fee previously collected under the provisions of § 36.4312(d)(8) of this part. If the application is subsequently approved and the sale is completed, then the holder (or its authorized servicing agent) shall provide the notice described in paragraph (k)(1)(i)(A) of this section.

(C) In performing the requirements of paragraphs (k)(1)(i)(A) or (k)(1)(i)(B) of this section, the holder must complete its examination of the creditworthiness of the prospective purchaser and advise the seller no later than 45 days after the date of receipt by the holder of a complete application package for the approval of the assumption. The 45-day period may be extended by an interval not to exceed the time caused by delays in processing of the application that are documented as beyond the control of the holder, such as employers or depositories not responding to requests for verifications, which were timely forwarded, or follow-ups on those requests.

(ii) If neither the holder nor its authorized servicing agent is an automatic lender, the notice to VA shall include:

(A) Advice regarding whether the loan is current or in default;

(B) A copy of the purchase contract; and

(C) A complete credit package developed by the holder which the Secretary may use for determining the creditworthiness of the purchaser.

(D) The notice and documents required by this section must be submitted to the VA office of jurisdiction no later than 35 days after the date of

receipt by the holder of a complete application package for the approval of the assumption, subject to the same extensions as provided in paragraph (k)(l)(i) of this section. If the assumption is not automatically approved by the holder or its authorized agent, pursuant to the automatic authority provisions, $50 of any fee collected in accordance with § 36.4312(d)(8) of this part must be refunded. If the Department of Veterans Affairs does not approve the assumption, the holder will be notified and an additional $50 of any fee collected under § 36.4312(d)(8) of this section must be refunded following the expiration of the 30-day appeal period set out in paragraph (k)(l)(i)(B) of this section. If such an appeal is made to the Department of Veterans Affairs, then the review will be conducted at the Department of Veterans Affairs office of jurisdiction by an individual who was not involved in the original disapproval decision. If the application for assumption is approved and the transfer of security is completed, then the holder (or its authorized servicing agent) shall provide the notice required in paragraph (k)(l)(i)(A) of this section.

(2) If the seller fails to notify the holder before disposing of property securing the loan, the holder shall notify the Secretary within 60 days after learning of the transfer. Such notice shall advise whether or not the holder intends to exercise its option to immediately accelerate the loan and whether or not an opportunity will be extended to the transferor and transferee to apply for retroactive approval of the assumption under the terms of this paragraph.

(Authority: 38 U.S.C. 3714)

(The Information collection requirements in this section have been approved by the Office of Management and Budget under control number 2900–0516)

[63 FR 12002, Mar. 12, 1998]

### § 36.4304 Deviations; changes of identity.

A deviation of more than 5 percent between the estimates upon which a certificate of commitment has been issued and the report of final payment of the proceeds of the loan, or a change in the identity of the property upon which the original appraisal was based, will invalidate the certificate of commitment unless such deviation or change be approved by the Secretary. Any deviation in excess of 5 percent or change in the identity of the property upon which the original appraisal was based must be supported by a new or supplemental appraisal of reasonable value: *Provided,* That substitution of materials of equal or better quality and value approved by the veteran and the designated appraiser shall not be deemed a ''change in the identity of the property'' within the purview of this section. A deviation not in excess of 5 percent will not require the prior approval of the Secretary.

[17 FR 9668, Oct. 25, 1952]

### § 36.4305 Partial disbursement.

In cases where intervening circumstances make it impracticable to complete the actual paying out of the loan originally proposed, or justify the lender in declining to make further disbursements on a construction loan, evidence of guaranty or of insurance of the loan or the proper pro rata part thereof will be issuable if the loan is otherwise eligible for automatic guaranty or a certificate of commitment was issued thereon: *Provided,*

(a) A report of the loan is submitted to the Secretary within a reasonable time subsequent to the last disbursement, but in no event more than 90 days thereafter, unless report of the facts and circumstances is made and an extension of time obtained from the Secretary.

(b) There has been no default on the loan, except that the existence of a default shall not preclude issuance of a guaranty certificate or insurance advice if a certificate of commitment was issued with respect to the loan.

(c) The Secretary determines that a person of reasonable prudence similarly situated would not make further disbursements in the situation presented.

(d) There has been full compliance with the provisions of 38 U.S.C. Chapter 37 and of the applicable regulations up to the time of the last disbursement.

(e) In the case of a construction loan when the construction is not fully completed, the amount and percentage of the guaranty and the amount of the loan for the purposes of insurance or accounting to the Secretary shall be based upon such portion of the amount disbursed out of the proceeds of the loan which, when added to any other payments made by or on behalf of the veteran to the builder or the contractor, does not exceed 80 percent of the value of that portion of the construction performed (basing value on the contract price) plus the sum, if any, disbursed by the lender out of the proceeds of the loan for the land on which the construction is situated: *And provided further,* That the lender shall certify as follows:

(1) Any amount advanced for land is protected by title or lien as provided in the regulations concerning guaranty or insurance of loans to veterans; and

(2) No enforceable liens, for any work done or material furnished for that part of the construction completed and for which payment has been made out of the proceeds of the loan, exist or can come into existence.

[13 FR 7275, Nov. 27, 1948, as amended at 15 FR 4397, July 12, 1950; 24 FR 2653, Apr. 7, 1959]

### § 36.4306 Refinancing of mortgage or other lien indebtedness.

(a) Any loan for the purpose of refinancing (38 U.S.C. 3710(a)(5)) an existing mortgage loan or other indebtedness secured by a lien of record on a dwelling or farm residence owned and occupied or to be reoccupied if the refinancing loan is for the completion of major alterations, repairs or improvements to the property, by an eligible veteran as the veteran's home, or in the case of an eligible veteran unable to occupy the property because of active duty status in the Armed Forces, occupied or to be reoccupied by the veteran's spouse as the spouse's home, shall be eligible for guaranty in an amount as computed under § 36.4302(a) provided that —

(1) The amount of the loan may not exceed an amount equal to 90 percent of the reasonable value of the dwelling or farm residence which will secure the loan, as determined by the Secretary.

(Authority: 38 U.S.C. 3710(e)(1) and 3710(h))

(2) The dollar amount of discount, if any, to be paid by the veteran is reasonable in amount as determined by the Secretary in accordance with § 36.4312(d)(7)(i),

(3) The loan is otherwise eligible for guaranty.

(b) [Reserved]

(c) Nothing shall preclude guaranty of a loan to an eligible veteran having home loan guaranty entitlement to refinance under the provisions of 38 U.S.C. 3710(a)(5) a VA guaranteed or insured (or direct) mortgage loan made to him or her which is outstanding on the dwelling or farm residence owned and occupied or to be reoccupied after the completion of major alterations, repairs, or improvements to the property, by the veteran as a home, or in the case of an eligible veteran unable to occupy the property because of active duty status in the Armed Forces, occupied or to be reoccupied by the veteran's spouse as the spouse's home.

(Authority: 38 U.S.C. 3710(e)(1))

(d) A refinancing loan may include contractual prepayment penalties, if any, due the holder of the mortgage or other lien indebtedness to be refinanced.

(e) [Reserved]

(f) Nothing in this section shall preclude the refinancing of the balance due for the purchase of land on which new construction is to be financed through the proceeds of the loan, or the refinancing of the balance due on an existing land sale contract relating to a veteran's dwelling or farm residence.

(g) A veteran may refinance (38 U.S.C. 3710(a)(9)(B)(ii)) an existing loan that was for the purchase of, and is secured by, a manufactured home in order to purchase the lot on which the manufactured home is or will be permanently affixed, provided the following requirements are met:

(1) The refinancing of a manufactured home and the purchase of a lot must be considered as one loan;

(2) The manufactured home upon being permanently affixed to the lot

will be considered real property under the laws of the State where it is located;

(3) The loan must be secured by the same manufactured home which is being refinanced and the real property on which the manufactured home is or will be located;

(4) The amount of the loan may not exceed an amount equal to the sum of the balance of the loan being refinanced; the purchase price, not to exceed the reasonable value of the lot; the costs of the necessary site preparation of the lot as determined by the Secretary; a reasonable discount as authorized in §36.4312(d)(6) with respect to that portion of the loan used to refinance the existing purchase money lien on the manufactured home, and closing costs as authorized in §36.4312.

(5) If the loan being refinanced was guaranteed by VA, the portion of the loan made for the purpose of refinancing an existing purchase money manufactured home loan may be, guaranteed without regard to the outstanding guaranty entitlement available for use by the veteran, and the verteran's guaranty entitlement shall not be charged as a result of any guaranty provided for the refinancing portion of the loan. For the purposes enumerated in 38 U.S.C. 3702(b) the refinancing portion of the loan shall be considered to have been obtained with the guaranty entitlement used to obtain VA-guaranteed loan being refinanced. The total guaranty for the new loan shall be the sum of the guaranty entitlement used to obtain VA-guaranteed loan being refinanced and any additional guaranty entitlement available to the veteran. However, the total guaranty may not exceed the guaranty amount as calculated under §36.4302(a) of this part.

(Authority: 38 U.S.C. 3703(a))

[35 FR 18872, Dec. 11, 1970, as amended at 46 FR 43672, Aug. 31, 1981; 48 FR 27403, June 15, 1983; 49 FR 42571, Oct. 23, 1984; 50 FR 3334, Jan. 24, 1985; 55 FR 40656, Oct. 4, 1990]

### §36.4306a Interest rate reduction refinancing loan.

(a) Pursuant to 38 U.S.C. 3710(a)(8), (a)(9)(B)(i), and (a)(11), a veteran may refinance an existing VA guaranteed, insured, or direct loan to reduce the interest rate payable on the existing loan provided the following requirements are met:

(1) The loan must be secured by the same dwelling or farm residence as the loan being refinanced; and

(2) The veteran must own the dwelling or farm residence securing the loan and

(i) Must occupy the dwelling or residence as his or her home; or

(ii) Must have previously occupied the dwelling or residence as his or her home and must certify, in such form as the Secretary shall require, that he or she has previously occupied the dwelling or residence; or

(iii) In any case in which the veteran is on, or was on, active duty status as a member of the Armed Forces and is unable, or was unable, to occupy the residence or dwelling as a home because of such active duty status, the spouse of the veteran must occupy, or must have previously occupied, such dwelling or residence as the spouse's home and must certify to that occupancy in such form as the Secretary shall require.

(Authority: 38 U. S.C. 3710(e)(1))

(3) The monthly principal and interest payment on the new loan must be lower than the payment on the loan being refinanced, except when the term of the new loan is shorter than the term of the loan being refinanced; or the new loan is a fixed-rate loan that refinances a VA-guaranteed adjustable rate mortgage; or the increase in the monthly payments on the loan results from the inclusion of energy efficient improvements, as provided by §36.4336(a)(4); or the Secretary approves the loan in advance after determining that the new loan is necessary to prevent imminent foreclosure and the veteran qualifies for the new loan under the credit standards contained in §36.4337.

(4) The amount of the refinancing loan may not exceed:

(i) An amount equal to the balance of the loan being refinanced, which must

not be delinquent, except in cases described in paragraph (a)(5) of this section, and such closing costs as authorized by § 36.4312(d) and a discount not to exceed 2 percent of the loan amount; or

(ii) In the case of a loan to refinance an existing VA-guaranteed or direct loan and to improve the dwelling securing such loan through energy efficient improvements, the amount referred to with respect to the loan under paragraph (a)(4)(i) of this section, plus the amount authorized by § 36.4336(a)(4).

(Authority: 38 U.S.C. 3703, 3710)

(5) If the loan being refinanced is delinquent (delinquent means that a scheduled monthly payment of principal and interest is more than 30 days past due), the new loan will be guaranteed only if the Secretary approves it in advance after determining that the borrower, through the lender, has provided reasons for the loan deficiency, has provided information to establish that the cause of the delinquency has been corrected, and qualifies for the loan under the credit standards contained in § 36.4337. In such cases, the term ''balance of the loan being refinanced'' shall include any past due installments, plus allowable late charges.

(6) The dollar amount of guaranty on the 38 U.S.C. 3710(a)(8) or (a)(9)(B)(i) loan may not exceed the greater of the original guaranty amount of the loan being refinanced or 25 percent of the loan; and

(7) The term of the refinancing loan (38 U.S.C. 3710(a)(8)) may not exceed the original term of the loan being refinanced plus ten years, or the maximum loan term allowed under 38 U.S.C. 3703(d)(1), whichever is less. For manufactured home loans that were previously guaranteed under 38 U.S.C. 3712, the loan term, if being refinanced under 38 U.S.C. 3710(a)(9)(B)(i), may exceed the original term of the loan but may not exceed the maximum loan term allowed under 38 U.S.C. 3703(d)(1).

(Authority: 38 U.S.C. 3703(c)(1), 3710(e)(1))

(b) Notwithstanding any other regulatory provision, the interest rate reduction refinancing loan may be guaranteed without regard to the amount of guaranty entitlement available for use by the veteran, and the amount of the veteran's remaining guaranty entitlement, if any, shall not be charged for an interest rate reduction refinancing loan. The interest rate reduction refinancing loan will be guaranteed with the lesser of the entitlement used by the veteran to obtain the loan being refinanced or the amount of the guaranty as calculated under § 36.4302(a) of this part. The veteran's loan guaranty entitlement originally used for a purpose as enumerated in 38 U.S.C. 3710(a) (1) through (7) and (9)(A) (i) and (ii) and subsequently transferred to an interest rate reduction refinancing loan (38 U.S.C. 3710(a) (8) or (9)(B)(i)) shall be eligible for restoration when the interest rate reduction refinancing loan or subsequent interest rate reduction refinancing loans on the same property meets the requirements of § 36.4302(h).

(Authority: 38 U.S.C. 3703(a))

(c) Title to the estate which is refinanced for the purpose of an interest rate reduction must be in conformity with § 36.4350.

(Authority: 38 U.S.C. 3710(a) (8), (9)(B) (i) and (e))

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0601)

[46 FR 43672, Aug. 31, 1981, as amended at 48 FR 27403, June 15, 1983; 50 FR 3335, Jan. 24, 1985; 55 FR 40656, Oct. 4, 1990; 60 FR 38260, July 26, 1995; 61 FR 7415, Feb. 28, 1996; 62 FR 63454, Dec. 1, 1997; 64 FR 19910, Apr. 23, 1999; 64 FR 28363, May 26, 1999]

### § 36.4307 Joint loans.

(a) Except as provided in paragraph (b) of this section, the prior approval of the Secretary is required in respect to any loan to be made to two or more borrowers who become jointly and severally liable, or jointly liable therefor, and who will acquire an undivided interest in the property to be purchased or who will otherwise share in the proceeds of the loan, or in respect to any loan to be made to an eligible veteran whose interest in the property owned, or to be acquired with the loan proceeds, is an undivided interest only, unless such interest is at least a 50 percent interest in a partnership. The

amount of the guaranty or insurance credit shall be computed in such cases only on that portion of the loan allocable to the eligible veteran which, taking into consideration all relevant factors, represents the proper contribution of the veteran to the transaction. Such loans shall be secured to the extent required by 38 U.S.C. Chapter 37 and the regulations concerning guaranty or insurance of loans to veterans.

(b) Notwithstanding the provisions of paragraph (a) of this section, the joinder of the spouse of a veteran-borrower in the ownership of residential property shall not require prior approval or preclude the issuance of a guaranty or insurance credit based upon the entire amount of the loan. If both spouses be eligible veterans, either or both may, within permissible maxima, utilize available guaranty or insurance entitlement.

(c) For the purpose of determining the rights and the liabilities of the Secretary with respect to a loan subject to paragraph (a) of this section, credits legally applicable to the entire loan shall be applied as follows:

(1) Prepayments made expressly for credit to that portion of the indebtedness allocable to the veteran (including the gratuity paid pursuant to former provisions of law), shall be applied to such portion of the indebtedness. All other payments shall be applied ratably to those portions of the loan allocable respectively to the veteran and to the other debtors.

(2) Proceeds of the sale or other liquidation of the security shall be applied ratably to the respective portions of the loan, such portion of the proceeds as represents the interest of the veteran being applied to that portion of the loan allocable to such veteran.

[13 FR 7739, Dec. 15, 1948, as amended at 24 FR 2653, Apr. 7, 1959; 40 FR 34590, Aug. 18, 1975]

### § 36.4308 Transfer of title by borrower or maturity by demand or acceleration.

(a) Except as provided by paragraphs (b) or (c) of this section the conveyance of or other transfer of title to property by operation of law or otherwise, after the creation of a lien thereon to secure a loan which is guaranteed or insured in whole or in part by the Secretary, shall not constitute an event of default, or acceleration of maturity, elective or otherwise, and shall not of itself terminate or otherwise affect the guaranty or insurance.

(b)(1) The Secretary may issue guaranty on loans in which a State, Territorial, or local governmental agency provides assistance to a veteran for the acquisition of a dwelling. Such loans will not be considered ineligible for guaranty if the State, Territorial, or local authority, by virtue of its laws or regulations or by virtue of Federal law, requires the acceleration of maturity of the loan upon the sale or conveyance of the security property to a person ineligible for assistance from such authority.

(2) At the time of application for a loan assisted by a State, Territorial, or local governmental agency, the veteran-applicant must be fully informed and consent in writing to the housing authority restrictions. A copy of the veteran's consent statement must be forwarded with the loan application or the report of a loan processed on the automatic basis.

(Authority: 38 U.S.C. 3703(c))

(c) Any housing loan which is financed under 38 U.S.C. chapter 37, and to which section 3714 of that chapter applies, shall include a provision in the security instrument that the holder may declare the loan immediately due and payable upon transfer of the property securing such loan to any transferee unless the acceptability of the assumption of the loan is established pursuant to section 3714.

(1) A holder may not exercise its option to accelerate a loan upon:

(i) The creation of a lien or other encumbrance subordinate to the lender's security instrument which does not relate to the transfer of rights of occupancy in the property;

(ii) The creation of a purchase money security interest for household appliances;

(iii) A transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety;

(iv) The granting of a leasehold interest of three years or less not containing an option to purchase;

(v) A transfer to a relative resulting from the death of a borrower;

(vi) A transfer where the spouse or children of the borrower become joint owners of the property with the borrower;

(vii) A transfer resulting from a decree of a dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement by which the spouse of the borrower becomes the sole owner of the property. In such a case the borrower shall have the option of applying directly to the Department of Veterans Affairs regional office of jurisdiction for a release of liability in accordance with § 36.4323 of this part; or

(viii) A transfer into an inter vivos trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property.

(2) With respect to each such loan at least one of the instruments used in the transaction shall contain the following statement: ''This loan is not assumable without the approval of the Department of Veterans Affairs or its authorized agent.'' This statement must be:

(i) Printed in a font size which is the larger of:

(A) Two times the largest font size contained in the body of the instrument; or

(B) 18 points; and

(ii) Contained in at least one of the following:

(A) The note;

(B) The mortgage or deed of trust; or

(C) A rider to either the note, the mortgage, or the deed of trust.

(Authority: 38 U.S.C.3714(d))

(d) The term of payment of any guaranteed or insured obligation shall bear a proper relation to the borrower's present and anticipated income and expenses, (except loans pursuant to 38 U.S.C. 3710(a)(8) or (9)(B)(i)). In addition the terms of payment of any guaranteed or insured obligation shall provide for discharge of the obligation at a definite date or dates or intervals, in amount specified on or computable from the face of the instrument. A loan which is payable on demand, or at sight, or on presentation, or at a time not specified or computable from the language in the note, mortgage, or other loan instrument, or which contemplates periodic renewals at the option of the holder to satisfy the repayment requirements of this section, is not eligible for guaranty or insurance, except as provided in paragraph (f) of this section.

(e) No guaranteed or insured obligation shall contain a provision to the effect that the holder shall have the right to declare the indebtedness due, or to pursue one or more legal or equitable remedies, if holder ''shall feel insecure,'' or upon the occurrence of one or more such conditions optional to the holder, without regard to an act or omission by the debtor, which condition by the terms of the note, mortgage, or other loan instrument would at the option of the holder afford a basis for declaring a default.

(f) Notwithstanding the inclusion in the guaranteed or insured obligation of a provision contrary to the provisions of this section, the right of the holder to payment of the guaranty or insurance shall not be thereby impaired: *Provided,*

(1) Default was declared or maturity was accelerated under some other provision of the note, mortgage, or other loan instrument, or

(2) Activation or enforcement of such provision is warranted under § 36.4317 (a), or

(3) The prior approval of the Secretary was obtained.

(Authority: 38 U.S.C. 3703(c))

(g) The holder of any guaranteed or insured obligation shall have the right, notwithstanding the absence of express provision therefor in the instruments evidencing the indebtedness, to accelerate the maturity or such obligation at any time after the continuance of any default for the period specified in § 36.4316.

(h) If sufficient funds are tendered to bring a delinquency current at any time prior to a judicial or statutory sale or other public sale under power of sale provisions contained in the loan instruments to liquidate any security for a guaranteed loan, the holder shall be obligated to accept the funds in payment of the delinquency unless:

(1) The prior approval of the Secretary is obtained to do otherwise, or

(2) Reinstatement of the loan would adversely affect the dignity of the lien or be otherwise precluded by law.

A delinquency will include all installment payments (principal, interest, taxes, insurance, advances, etc.) due and unpaid and any accumulated late charges plus any reasonable expenses incurred and paid by the holder if termination proceedings have begun (e.g., advertising costs, foreclosure costs, attorney or trustee fees, recording fees, etc.).

(Authority: 38 U.S.C. 501, 3703(c), 3712(g))

(Approved by the Office of Management and Budget under OMB control number 2900–0516)

[13 FR 7739, Dec. 15, 1948, as amended at 15 FR 4397, July 12, 1950; 43 FR 53728, Nov. 17, 1978; 46 FR 43673, Aug. 31, 1981; 46 FR 51386, Oct. 20, 1981; 50 FR 3335, Jan. 24, 1985; 55 FR 37476, Sept. 12, 1990; 55 FR 39404, Sept. 27, 1990; 68 FR 6627, Feb. 10, 2003]

### § 36.4309 Amortization.

(a) All loans, the maturity date of which is beyond 5 years from date of loan or date of assumption by the veteran, shall be amortized. Except as provided in paragraph (e) of this section, the schedule of payments thereon shall be in accordance with any generally recognized plan of amortization requiring approximately equal periodic payments and shall require a principal reduction not less often than annually during the life of the loan. The final installment on any loan shall not be in excess of two times the average of the preceding installments, except that on a construction loan such installment may be for an amount not in excess of 5 per centum of the original principal amount of the loan. The limitations imposed herein on the amount of the final installment shall not apply in the case of any loan extended pursuant to § 36.4314(a).

(b) Any plan of repayment on loans required to be amortized which does not provide for approximately equal periodic payments shall not be eligible unless the plan conforms with the provisions of paragraph (e) of this section, or is otherwise approved by the Secretary.

(c) Every guaranteed or insured loan shall be repayable within the estimated economic life of the property securing the loan.

(d) Subject to paragraph (a) of this section, any amounts which under the terms of a loan do not become due and payable on or before the last maturity date permissible for loans of its class under the limitations contained in 38 U.S.C. Chapter 37 shall automatically fall due on such date. (See § 36.4334.)

(e) A graduated payment mortgage loan, providing for deferrals of interest during the first 5 years of the loan and addition of the deferred amounts to principal shall be eligible, *Provided:*

(1) The loan is for the purpose of acquiring a single-family dwelling unit, including a condominium unit or simultaneously acquiring and improving a previously occupied, existing single-family dwelling unit.

(2)(i) For proposed construction or existing homes not previously occupied (new homes), the maximum loan amount cannot exceed 97.5 percent of the lesser of the reasonable value of the property as of the time the loan is made or the purchase price.

(ii) For previously occupied, existing homes the maximum loan amount must be computed to assure that the principal amount of the loan, including all interest scheduled to be deferred and added to the loan principal, will not exceed the purchase price or reasonable value of the property, whichever is less, as of the time the loan is made;

(3) The increases in the monthly periodic payment amount occur annually on each of the first five annual anniversary dates of the first loan installment due date, at a rate of 7.5 percent over the preceding year's monthly payment amount;

(4) Beginning with the payment due on the fifth annual anniversary date of the first loan installment due date, all remaining monthly periodic payments are approximately equal in amount and amortize the loan fully in accordance with the requirements of this section, and

(5) The plan is otherwise acceptable to the Secretary.

(Authority: 38 U.S.C. 3703(d))

[13 FR 7275, Nov. 27, 1948, as amended at 24 FR 2653, Apr. 7, 1959; 47 FR 15139, Apr. 8, 1982]

### § 36.4310 Prepayment.

The debtor shall have the right to prepay at any time, without premium or fee, the entire indebtedness or any part thereof not less than the amount of one installment, or $100, whichever is less. Any prepayment in full of the indebtedness shall be credited on the date received, and no interest may be charged thereafter. Any partial prepayment made on other than an installment due date need not be credited until the next following installment due date or 30 days after such prepayment, whichever is earlier. The holder and the debtor may agree at any time that any prepayment not previously applied in satisfaction of matured installments shall be reapplied for the purpose of curing or preventing any subsequent default.

[38 FR 25678, Sept. 14, 1973]

### § 36.4311 Interest rates.

(a) In guaranteeing or insuring loans under 38 U.S.C. chapter 37, the Secretary may elect to require that such loans either bear interest at a rate that is agreed upon by the veteran and the lender, or bear interest at a rate not in excess of a rate established by the Secretary. The Secretary may, from time to time, change that election by publishing a notice in the FEDERAL REGISTER. However, the interest rate of a loan for the purpose of an interest rate reduction under 38 U.S.C. 3710(a)(8), (a)(9)(B)(i), or (a)(11) must be less than the interest rate of the VA loan being refinanced. This paragraph does not apply in the case of an adjustable rate mortgage being refinanced under 38 U.S.C. 3710(a)(8), (a)(9)(B)(i), or (a)(11) with a fixed rate loan.

(Authority: 38 U.S.C. 3703, 3710)

(b) For loans bearing an interest rate agreed upon by the veteran and the lender, the veteran may pay reasonable discount points in connection with the loan. The discount points may not be included in the loan amount, except for interest rate reduction refinancing loans under 38 U.S.C. 3710(a)(8), (a)(9)(B)(i), and (a)(11). For loans bearing an interest rate agreed upon by the veteran and the lender, the provisions of § 36.4312(d)(6) and (d)(7) do not apply.

(Authority: 38 U.S.C. 3703, 3710)

(c) Interest in excess of the rate reported by the lender when requesting evidence of guaranty or insurance shall not be payable on any advance, or in the event of any delinquency or default: *Provided,* that a late charge not in excess of an amount equal to 4 percent on any installment paid more than 15 days after due date shall not be considered a violation of this limitation.

(Authority: 38 U.S.C. 3710)

(d) Effective October 1, 2003, adjustable rate mortgage loans which comply with the requirements of this paragraph (d) are eligible for guaranty.

(1) *Interest rate index.* Changes in the interest rate charged on an adjustable rate mortgage must correspond to changes in the weekly average yield on one year (52 weeks) Treasury bills adjusted to a constant maturity. Yields on one year Treasury bills at ''constant maturity'' are interpolated by the United States Treasury from the daily yield curve. This curve, which relates the yield on the security to its time to maturity, is based on the closing market bid yields on actively traded one year Treasury bills in the over-the-counter market. The weekly average one year constant maturity Treasury bill yields are published by the Federal Reserve Board of the Federal Reserve System. The Federal Reserve Statistical Release Report H. 15 (519) is released each Monday. These one year constant maturity Treasury bill yields are also published monthly in the Federal Reserve Bulletin, published by the Federal Reserve Board of the Federal Reserve System, as well as quarterly in the Treasury Bulletin, published by the Department of the Treasury.

(2) *Frequency of interest rate changes.* Interest rate adjustments must occur on an annual basis, except that the first adjustment may occur no sooner than 36 months from the date of the borrower's first mortgage payment.

The adjusted rate will become effective the first day of the month following the adjustment date; the first monthly payment at the new rate will be due on the first day of the following month. To set the new interest rate, the lender will determine the change between the initial (i.e., base) index figure and the current index figure. The initial index figure shall be the most recent figure available before the date of mortgage loan origination. The current index figure shall be the most recent index figure available 30 days before the date of each interest rate adjustment.

(3) *Method of rate changes.* Interest rate changes may only be implemented through adjustments to the borrower's monthly payments.

(4) *Initial rate and magnitude of changes.* The initial contract interest rate of an adjustable rate mortgage shall be agreed upon by the lender and the veteran. Annual adjustments in the interest rate shall correspond to annual changes in the interest rate index, subject to the following conditions and limitations:

(i) No single adjustment to the interest rate may result in a change in either direction of more than one percentage point from the interest rate in effect for the period immediately preceding that adjustment. Index changes in excess of one percentage point may not be carried over for inclusion in an adjustment in a subsequent year. Adjustments in the effective rate of interest over the entire term of the mortgage may not result in a change in either direction of more than five percentage points from the initial contract interest rate.

(ii) At each adjustment date, changes in the index interest rate, whether increases or decreases, must be translated into the adjusted mortgage interest rate, rounded to the nearest one-eighth of one percent, up or down. For example, if the margin is 2 percent and the new index figure is 6.06 percent, the adjusted mortgage interest rate will be 8 percent. If the margin is 2 percent and the new index figure is 6.07 percent, the adjusted mortgage interest rate will be 8⅛ percent.

(5) *Pre-loan disclosure.* The lender shall explain fully and in writing to the borrower, at the time of loan application, the nature of the obligation taken. The borrower shall certify in writing that he or she fully understands the obligation and a copy of the signed certification shall be placed in the loan folder and furnished to VA upon request.

(i) The fact that the mortgage interest rate may change, and an explanation of how changes correspond to changes in the interest rate index;

(ii) Identification of the interest rate index, its source of publication and availability;

(iii) The frequency (i.e., annually) with which interest rate levels and monthly payments will be adjusted, and the length of the interval that will precede the initial adjustment; and

(iv) A hypothetical monthly payment schedule that displays the maximum potential increases in monthly payments to the borrower over the first five years of the mortgage, subject to the provisions of the mortgage instrument.

(6) *Annual disclosure.* At least 25 days before any adjustment to a borrower's monthly payment may occur, the lender must provide a notice to the borrower which sets forth the date of the notice, the effective date of the change, the old interest rate, the new interest rate, the new monthly payment amount, the current index and the date it was published, and a description of how the payment adjustment was calculated. A copy of the annual disclosure shall be made a part of the lender's permanent record on the loan.

(Authority: 38 U.S.C. 3707A)

[60 FR 38260, July 26, 1995, as amended at 70 FR 22597, May 2, 2005]

### § 36.4312 Charges and fees.

(a) No charge shall be made against, or paid by, the borrower incident to the making of a guaranteed or insured loan other than those expressly permitted under paragraph (d) or (e) of this section, and no loan shall be guaranteed or insured unless the lender certifies to the Secretary that it has not imposed and will not impose any charges or fees against the borrower in excess of those permissible under paragraph (d) or (e) of this section. Any charge which is proper to make against the borrower

under the provisions of this paragraph may be paid out of the proceeds of the loan: *Provided,* That if the purpose of the loan is to finance the purchase or construction of residential property the costs of closing the loan including the pro rata portion of the ground rents, hazard insurance premiums, current year's taxes, and other prepaid items normally involved in financing such transaction may not be included in the loan.

(b) Except as provided in the regulations concerning the guaranty or insurance of loans to veterans, no brokerage or service charge or their equivalent may be charged against the debtor or the proceeds of the loan either initially, periodically, or otherwise.

(c) Brokerage or other charges shall not be made against the veteran for obtaining any guaranty or insurance under 38 U.S.C. chapter 37, nor shall any premiums for insurance on the life of the borrower be paid out of the proceeds of a loan.

(d) The following schedule of permissible fees and charges shall be applicable to all Department of Veterans Affairs guaranteed or insured loans.

(1) The veteran may pay reasonable and customary amounts for any of the following items:

(i) Fees of Department of Veterans Affairs appraiser and of compliance inspectors designated by the Department of Veterans Affairs except appraisal fees incurred for the predetermination of reasonable value requested by others than veteran or lender.

(ii) Recording fees and recording taxes or other charges incident to recordation.

(iii) Credit report.

(iv) That portion of taxes, assessments, and other similar items for the current year chargeable to the borrower and an initial deposit (lump-sum payment) for the tax and insurance account.

(v) Hazard insurance required by § 36.4326.

(vi) Survey, if required by lender or veteran; except that any charge for a survey in connection with a loan under §§ 36.4356 through 36.4360a (Condominium Loans) must have the prior approval of the Secretary.

(vii) Title examination and title insurance, if any.

(viii) The actual amount charged for flood zone determinations, including a charge for a life-of-the-loan flood zone determination service purchased at the time of loan origination, if made by a third party who guarantees the accuracy of the determination. A fee may not be charged for a flood zone determination made by a Department of Veterans Affairs appraiser or for the lender's own determination.

(ix) Such other items as may be authorized in advance by the Under Secretary for Benefits as appropriate for inclusion under this paragraph as proper local variances.

(2) A lender may charge and the veteran may pay a flat charge not exceeding 1 percent of the amount of the loan, provided that such flat charge shall be in lieu of all other charges relating to costs of origination not expressly specified and allowed in this schedule.

(3) In cases where a lender makes advances to a veteran during the progress of construction, alteration, improvement, or repair, either under a commitment of the Department of Veterans Affairs to issue a guaranty certificate or insurance credit upon completion, or where the lender would be entitled to guaranty or insurance on such advances when reported under automatic procedure, the lender may make a charge against the veteran of not exceeding 2 percent of the amount of the loan for its services in supervising the making of advances and the progress of construction notwithstanding that the ''holdback'' or final advance is not actually paid out until after the construction, alteration, improvement, or repair is fully completed: *Provided,* That the major portion (51 percent or more) of the loan proceeds is paid out during the actual progress of the construction, alteration, improvement, or repair. Such charge may be in addition to the 1 percent charge allowed under paragraph (d)(2) of this section.

(4) In consideration, alteration, improvement or repair loans, including supplemental loans made pursuant to § 36.4355, where no charge is permissible under the provisions of paragraph (d)(3) of this section the lender may charge and the veteran may pay a flat sum not

exceeding 1 percent of the amount of the loan. Such charge may be in addition to the 1 percent allowed under paragraph (d)(2) of this section.

(5) The fees and charges permitted under this paragraph are maximums and are not intended to preclude a lender from making alternative charges against the veteran which are not specifically authorized in the schedule provided the imposition of such alternative charges would not result in an aggregate charge or payment in excess of the prescribed maximum.

(6) Allowable discounts. The veteran borrower subject to the limitations set forth in paragraphs (d) (6) and (7) of this section may pay a discount required by a lender when the proceeds of the loan will be used for any of the following purposes:

(i) To refinance existing indebtedness pursuant to 38 U.S.C. 3710(a)(5), (8), (9)(B)(i) or (ii);

(ii) To repair, alter or improve a dwelling owned by the veteran pursuant to 38 U.S.C. 3710(a) (4) or (7) if such loan is to be secured by a first lien;

(iii) To construct a dwelling or farm residence on land already owned or to be acquired by the veteran, provided that the veteran did not or will not acquire the land directly or indirectly from a builder or developer who will be constructing such dwelling or farm residence;

(iv) To purchase a dwelling from a class of sellers which the Secretary determines are legally precluded under all circumstances from paying such a discount if the best interest of the veteran would be so served.

(7) Computation of discounts—(i) Computation of discount—loans secured by a first lien. Unless otherwise approved by the Secretary, the discount, if any, to be paid by the borrower may not exceed the difference between the bid price, rounded to the lower whole number, and par value for GNMA ( Government National Mortgage Association) 90-day forward bid closing price for pass through securities ½ percent less than the face note rate of the loan. Unless the lender and borrower negotiate a firm written commitment for a maximum amount of discount to be paid, the bid price to be used in the computation must be the GNMA 90-day forward bid closing quote for any day 1 to 4 business days prior to loan closing. ''Loan closing'' is defined for this purpose as the date on which the borrower's 3-day right of rescission commences pursuant to the Truth in Lending Act. If the lender and borrower choose to negotiate a firm discount commitment for a maximum amount of discount to be paid, the bid price to be used in establishing the maximum discount must be the closing quote for the business day prior to the date of the commitment. Lenders negotiating firm commitments must close that loan at a discount no higher than the firm commitment regardless of changes in the maximum allowable Department of Veterans Affairs interest rate. If a lender's commitment expires prior to loan closing, the lender and borrower may negotiate a new firm commitment based on the procedure outlined in this paragraph (d)(7)(i) or may use the procedure for determining the discount based on the GNMA 90-day forward bid closing quote for any day 1 to 4 business days prior to loan closing.

(ii) Computation of discount—unsecured loans or loans secured by less than a first lien. The borrower, subject to the limitations set forth in paragraphs (d) (6) and (7) of this section, may pay a discount required by the lender when the proceeds of the loan will be used to repair, alter, or improve a dwelling owned by the veteran pursuant to 38 U.S.C. 3710(a)(4) or (7) if such loan is unsecured or secured by less than a first lien. No such discount may be charged unless:

(A) The loan is submitted to the Secretary for prior approval;

(B) The dollar amount of the discount is disclosed to the Secretary and the veteran prior to the issuance by the Secretary of the certificate of commitment. Said certificate of commitment shall specify the discount to be paid by the veteran, and this discount may not be increased once the commitment is issued without the approval of the Secretary;

(C) The discount has been determined by the Secretary to be reasonable in amount.

(iii) A veteran may pay the discount on an acquisition and improvement loan (as defined in § 36.4301 provided:

(A) The veteran pays no discount on the acquisition portion of the loan except in accordance with paragraph (d)(6)(iv) of this section; and

(B) The discount paid on the improvements portion of the loan does not exceed the percentage of discount paid on the acquisition portion of the loan.

Acquisition and improvement loans may be closed either on the automatic or prior approval basis.

(iv) Unless the Under Secretary for Benefits otherwise directs, all powers of the Secretary under paragraphs (d)(6) and (7) of this section are hereby delegated to the officials designated by § 36.4342(b).

(Authority: 38 U.S.C. 3703, 3710; 42 U.S.C. 4001 note, 4012a)

(8) On any loan to which section 3714 of 38 U.S.C. chapter 37 applies, the holder may charge a reasonable fee, not to exceed the lesser of (i) $300 and the actual cost of any credit report required, or (ii) any maximum prescribed by applicable State law, for processing an application for assumption and changing its records.

(Authority: 38 U.S.C. 3714)

(e) Subject to the limitations set out in paragraph (e)(4) of this section, a fee must be paid to the Secretary.

(1) The fee on loans to veterans shall be as follows:

(i) On all interest rate reduction refinancing loans guaranteed under 38 U.S.C. 3710(a)(8), (a)(9)(B)(i), and (a)(11), the fee shall be 0.50 percent of the total loan amount.

(ii) On all refinancing loans other than those described in paragraph (e)(1)(i) of this section, the funding fee shall be 2.75 percent of the loan amount for loans to veterans whose entitlement is based on service in the Selected Reserve under the provisions of 38 U.S.C. 3701(b)(5), and 2 percent of the loan amount for loans to all other veterans; provided, however, that if the veteran is using entitlement for a second or subsequent time, the fee shall be 3 percent of the loan amount.

(iii) Except for loans to veterans whose entitlement is based on service in the Selected Reserve under the provisions of 38 U.S.C. 3701(b)(5), the funding fee shall be 2 percent of the total loan amount for all loans for the purchase or construction of a home on which the veteran does not make a down payment, unless the veteran is using entitlement for a second or subsequent time, in which case the fee shall be 3 percent. On purchase or construction loans on which the veteran makes a down payment of 5 percent or more, but less than 10 percent, the amount of the funding fee shall be 1.50 percent of the total loan amount. On purchase or construction loans on which the veteran makes a down payment of 10 percent or more, the amount of the funding fee shall be 1.25 percent of the total loan amount.

(iv) On loans to veterans whose entitlement is based on service in the Selected Reserve under the provisions of 38 U.S.C. 3701(b)(5), the funding fee shall be 2.75 percent of the total loan amount on loans for the purchase or construction of a home on which the veteran does not make a down payment, unless the veteran is using entitlement for a second or subsequent time, in which case the fee shall be 3 percent. On purchase or construction loans on which veterans whose entitlement is based on service in the Selected Reserve make a down payment of 5 percent or more, but less than 10 percent, the amount of the funding fee shall be 2.25 percent of the total loan amount. On purchase or construction loans on which such veterans make a down payment of 10 percent or more, the amount of the funding fee shall be 2 percent of the total loan amount.

(v) All or part of the fee may be paid in cash at loan closing or all or part of the fee may be included in the loan without regard to the reasonable value of the property or the computed maximum loan amount, as appropriate. In computing the fee, the lender will disregard any amount included in the loan to enable the borrower to pay such fee.

(Authority: 38 U.S.C. 3729)

(2) Subject to the limitations set out in this section, a fee of one-half of one percent of the loan balance must be paid to the Secretary in a manner prescribed by the Secretary by a person assuming a loan to which section 3714

of title 38 U.S. Code applies. The instrument securing such a loan shall contain a provision describing the right of the holder to collect this fee as trustee for the Department of Veterans Affairs. The loan holder shall list the amount of this fee in every assumption statement provided and include a notice that the fee must be paid to the holder immediately following loan settlement. The fee must be transmitted to the Secretary within 15 days of the receipt by the holder of the notice of transfer.

(Authority: 38 U.S.C. 3714, 3729(d))

(3) The lender is required to pay to the Secretary the fee described in paragraph (e)(1) of this section within 15 days after loan closing. Any lender closing a loan, subject to the limitations set out in paragraph (e)(4) of this section who fails to submit timely payment of this fee will be subject to a late charge equal to 4 percent of the total fee due. If payment of the fee described in paragraph (e)(1) of this section is made more than 30 days after loan closing, interest will be assessed at a rate set in conformity with the Department of Treasury's Fiscal Requirements Manual. This interest charge is in addition to the 4 percent late charge, but the late charge is not included in the amount on which interest is computed. This interest charge is to be calculated on a daily basis beginning on the date of closing, although the interest will be assessed only on funding fee payments received more than 30 days after closing.

(4) The lender is required to pay to the Secretary electronically through the Automated Clearing House (ACH) system the fees described in paragraphs (e)(1) and (e)(2) of this section and any late fees and interest due on them. This shall be paid to a collection agent by operator-assisted telephone, terminal entry, or CPU-to-CPU transmission. The collection agent will be identified by the Secretary. The lender shall provide the collection agent with the following: authorization for payment of the funding fee (including late fees and interest) along with the following information: VA lender ID number; four-digit personal identification number; dollar amount of debit; VA loan number; OJ (office of jurisdiction) code; closing date; loan amount; information about whether the payment includes a shortage, late charge, or interest; veteran name; loan type; sale amount; downpayment; whether the veteran is a reservist; and whether this is a subsequent use of entitlement. For all transactions received prior to 8:15 p.m. on a workday, VA will be credited with the amount paid to the collection agent at the opening of business the next banking day.

(Authority: 38 U.S.C. 3729(a))

(5) The fees described in paragraph (e)(1) and (e)(2) of this section shall not be collected from a veteran who is receiving compensation (or who but for the receipt of retirement pay would be entitled to receive compensation) or from a surviving spouse described in section 3701(b) of title 38, United States Code.

(Authority: 38 U.S.C. 3729(b))

(The information collection requirements in this section have been approved by the Office of Management and Budget under control numbers 2900–0474 and 2900–0516)

[13 FR 7275, Nov. 27, 1948]

EDITORIAL NOTE: For Federal Register citations affecting § 36.4312, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

### § 36.4313 Advances and other charges.

(a) A holder may advance any amount reasonably necessary and proper for the maintenance or repair of the security, or for the payment of accrued taxes, special assessments, ground or water rents, or premiums on fire or other casualty insurance against loss of or damage to such property and any such advance so made may be added to the guaranteed or insured indebtedness. A holder may also advance the one-half of one percent funding fee due on a transfer under 38 U.S.C. 3714 when this is not paid at the time of transfer. All security instruments for loans to which 38 U.S.C. 3714 applies must include a clause authorizing the collection of an assumption funding fee and

an advance for this fee if it is not paid at the time of transfer.

(Authority: 38 U.S.C. 3714)

(b) In addition to advances allowable under paragraph (a) of this section, the holder may charge against the proceeds of the sale of the security; against gross amounts collected; in any accounting to the Secretary after payment of a claim under the guaranty, in the computation of a claim under the guaranty, if lawfully authorized by the loan agreement and subject to § 36.4321(a), or, in the computation of an insurance loss, any of the following items actually paid:

(1) Any expense which is reasonably necessary for preservation of the security,

(2) Court costs in a foreclosure or other proper judicial proceeding involving the security,

(3) Other expenses reasonably necessary for collecting the debt, or repossession or liquidation of the security,

(4) Reasonable trustee's fees or commissions not in excess of those allowed by statute and in no event in excess of 5 percent of the unpaid indebtedness,

(5) Reasonable amount for legal services actually performed not to exceed 10 percent of the unpaid indebtedness as of the date of the first uncured default, or $850 whichever is less. In no event may the combined total of the amounts claimed for trustee's fees and legal services (paragraphs (b)(4) and (5) of this section) exceed $850.

(6) The cost of a credit report(s) on the debtor(s), which is (are) to be forwarded to the Secretary in connection with the claim,

(7) Reasonable and customary costs of property inspections,

(8) Any other expense or fee that is approved in advance by the Secretary.

(Authority: 38 U.S.C. 3720(a)(3))

(c) Any advances or charges enumerated in paragraph (a) or (b) of this section may be included as specified in the holder's accounting to the Secretary, but they are not chargeable to the debtor unless he or she otherwise be liable therefor.

(d) Advances of the type enumerated in paragraph (a) of this section and any other advances determined to be necessary and proper in order to preserve or protect the security may be authorized by employees designated in § 36.4342(b) in the case of any property constituting the security for a loan acquired by the Secretary or constituting the security for the unpaid balance of the purchase price owing to the Secretary on account of the sale of such property. Such advances shall be secured to the extent legal and practicable by a lien on the property.

(e) Notwithstanding the provisions of paragraph (a) or (b) of this section, holders of condominium loans guaranteed or insured under 38 U.S.C. 3710(a)(6) shall not pay those assessments or charges allocable to the condominium unit which are provided for in the instruments establishing the condominium form of ownership in the absence of the prior approval of the Secretary.

[13 FR 7739, Dec. 15, 1948, as amended at 17 FR 9668, Oct. 25, 1952; 36 FR 320, Jan. 9, 1971; 40 FR 34591, Aug. 18, 1975; 45 FR 38056, June 6, 1980; 53 FR 27049, July 18, 1988; 53 FR 34296, Sept. 6, 1988; 55 FR 37477, Sept. 12, 1990; 58 FR 29116, May 19, 1993; 59 FR 48566, Sept. 22, 1994]

### § 36.4314 Extensions and reamortizations.

(a) Provided the debtor(s) is (are) a reasonable credit risk(s), as determined by the holder based upon review of the debtor's (s') creditworthiness, including a review of a current credit report(s) on the debtor(s), the terms of repayment of any loan may by written agreement between the holder and the debtor(s), be extended in the event of default, to avoid imminent default, or in any other case where the prior approval of the Secretary is obtained. Except with the prior approval of the Secretary, no such extension shall set a rate of amortization less than that sufficient to fully amortize at least 80 percent of the loan balance so extended within the maximum maturity prescribed for loans of its class.

(b) In the event of a partial prepayment pursuant to § 36.4310, the balance of the indebtedness may, by written agreement between the holder and the debtor(s), be reamortized, provided the reamortization schedule will result in full repayment of the loan within the original maturity, and provided the

debtor(s) is (are) reasonable credit risk(s), as determined by the holder based upon review of the debtor's (s') creditworthiness, including a review of a current credit report(s) on the debtor(s).

(c) In the event an additional loan is proposed to be made pursuant to §36.4351 for the repair, alteration, or improvement of real property on which there is an existing loan guaranteed or insured under 38 U.S.C. chapter 37, the terms of repayment of the prior loan may, by written agreement between the holder and the debtor, be recast to combine the schedule of repayments on the two loans, provided the entire indebtedness is repayable within the permissible maximum maturity of the original loan.

(d) Unless the prior approval of the Secretary has been obtained, any extension or reamortization agreed to by a holder which relieves any obligor from liability will release the liability of the Secretary under the guaranty or insurance on the entire loan. However, if such release of liability of an obligor results through operation of law by reason of an extension or other act of forbearance, the liability of the Secretary as guarantor or insurer will not be affected thereby, provided the required lien is maintained and the title holder is and will remain liable for the payment of the indebtedness: *And further provided,* That if such extension or act of forbearance will result in the release of the veteran, all delinquent installments, plus any foreclosure expenses which may have been incurred, shall have been fully paid.

(e) The holder shall promptly forward to the Secretary an advice of the terms of any agreement effecting a reamortization or extension of a guaranteed or insured loan, together with a cop(y)(ies) of the credit report(s) obtained on the debtor(s).

(Authority: 38 U.S.C. 3703(c)(1))

[13 FR 7276, Nov. 27, 1948, as amended at 19 FR 4002, July 1, 1954; 24 FR 2653, Apr. 7, 1959; 53 FR 34296, Sept. 6, 1988]

### §36.4315 Notice of default and acceptability of partial payments.

(a) *Reporting of defaults.* The holder of any guaranteed or insured loan shall give notice to the Secretary within 45 days after any debtor:

(1) Is in default by reason of nonpayment of any installment for a period of 60 days from the date of first uncured default (see §36.4301(f)); or

(2) Is in default by failing to comply with any other covenant or obligation of such guaranteed or insured loan which failure persists for a continuing period of 90 days after demand for compliance therewith has been made, except that if the default is due to nonpayment of real estate taxes, the notice shall not be required until the failure to pay when due has persisted for a continuing period of 180 days.

(b) *Partial payments.* A partial payment is a remittance on a loan in default (as defined in §36.4301(g)) of any amount less than the full amount due under the terms of the loan and security instruments at the time the remittance is tendered.

(1) Except as provided in paragraph (b)(2) of this section, or upon the express waiver of the Secretary, the mortgage holder shall accept any partial payment and either apply it to the mortgagor's account or identify it with the mortgagor's account and hold it in a special account pending disposition. When partial payments held for disposition aggregate a full monthly installment, including escrow, they shall be applied to the mortgagor's account.

(2) A partial payment may be returned to the mortgagor, within 10 calendar days from date of receipt of such payment, with a letter of explanation only if one or more of the following conditions exist:

(i) The property is wholly or partially tenant-occcupied and rental payments are not being remitted to the holder for application to the loan account;

(ii) The payment is less than one full monthly installment, including escrows and late charge, if applicable, unless the lesser payment amount has been agreed to under a written repayment plan;

(iii) The payment is less than 50 percent of the total amount then due, unless the lesser payment amount has been agreed to under a written repayment plan;

(iv) The payment is less than the amount agreed to in a written repayment plan;

(v) The amount tendered is in the form of a personal check and the holder has previously notified the mortgagor in writing that only cash or certified remittances are acceptable;

(vi) A delinquency of any amount has continued for at least 6 months since the account first became delinquent and no written repayment plan has been arranged;

(vii) Foreclosure has been commenced by the taking of the first action required for foreclosure under local law;

(viii) The holder's lien position would be jeopardized by acceptance of the partial payment.

(3) A failure by the holder to comply with the provisions of this paragraph may result in a partial or total loss of guaranty or insurance pursuant to § 36.4325(b), but such failure shall not constitute a defense to any legal action to terminate the loan.

(Authority: 38 U.S.C. 3703(c)(1))

[45 FR 31065, May 12, 1980]

### § 36.4316 Continued default.

(a) In the event any failure of the debtor to discharge the debtor's obligations under the loan continues for a period of 3 months, or for more than 1 month on an extended loan or on a term loan, the holder may at the holder's option then or thereafter give the notice prescribed in § 36.4317.

(b) The notice prescribed in § 36.4317 may be submitted prior to the time prescribed in paragraph (a) of this section in any case where any material prejudice to the rights of the holder or to the Secretary or hazard to the security warrants more prompt action.

(Authority: 38 U.S.C. 3732)

(The information collection requirements contained in paragraph (c) were approved by the Office of Management and Budget under control number 2900–0480)

[13 FR 7276, Nov. 27, 1948, as amended at 45 FR 31065, May 12, 1980; 53 FR 34296, Sept. 6, 1988; 61 FR 28058, June 4, 1996]

### § 36.4317 Notice of intention to foreclose.

(See also § 36.4319.) Except upon the express waiver of the Secretary, a holder shall not begin proceedings in court or give notice of sale under power of sale, or otherwise take steps to terminate the debtor's rights in the security until the expiration of 30 days after delivery by registered mail to the Secretary of a notice of intention to take such action: Provided, That

(a) Immediate action as required under 38 CFR 36.4346 (i), may be taken if the property to be affected thereby has been abandoned by the debtor or has been or may be otherwise subjected to extraordinary waste or hazard, or if there exist conditions justifying the appointment of a receiver for the property (without reference to any contractual provisions for such appointment);

(b) Any right of a holder to repossess personal property may be exercised without prior notice to the Secretary; but notice of any such action taken shall be given by certified mail to the Secretary within ten days thereafter; and

(c) The notice required under this paragraph shall also be provided to the original veteran-borrower and any other liable obligors by certified mail within 30 days after such notice is provided to the Secretary in all cases in which the current owner of the property is not the original veteran-borrower. A failure by the holder to make a good faith effort to comply with the provisions of this subparagraph may result in a partial or total loss of guaranty or insurance pursuant to VA Regulation 36.4325(b), but such failure shall not constitute a defense to any legal action to terminate the loan. A good faith effort will include, but is not limited to:

(1) A search of the holder's automated and physical loan record systems to identify the name and current or last known address of the original veteran and any other liable obligors;

(2) A search of the holder's automated and physical loan record systems to identify sufficient information (e.g., Social Security Number) to perform a routine trace inquiry through a major consumer credit bureau;

(3) Conducting the trace inquiry using an in-house credit reporting terminal;

(4) Obtaining the results of the inquiry;

(5) Mailing the required notices and concurrently providing the Secretary with the names and addresses of all obligors identified and sent notice; and,

(6) Documentation of the holder's records.

(Approved by the Office of Management and Budget under Control Number 2900–0530)

[58 FR 29116, May 19, 1993]

### §36.4318 Refunding of loans in default.

(a) Upon receiving a notice of default or a notice under §36.4317, the Secretary may within 30 days thereafter require the holder upon penalty of otherwise losing the guaranty or insurance to transfer and assign the loan and the security therefore to the Secretary or to another designated by the Secretary upon receipt of payment in full of the balance of the indebtedness remaining unpaid to the date of such assignment. Such assignment may be made without recourse but the transferor shall not thereby be relieved from the provisions of §36.4325.

(b) If the obligation is assigned or transferred to a third party pursuant to paragraph (a) of this section the Secretary may continue in effect the guaranty or insurance issued with respect to the previous loan in such manner as to cover the assignee or transferee.

[13 FR 7276, Nov. 27, 1948, as amended at 45 FR 31065, May 12, 1980; 61 FR 28058, June 4, 1996]

### §36.4319 Legal proceedings.

(a) When the holder institutes suit or otherwise becomes a party in any legal or equitable proceeding brought on or in connection with the guaranteed or insured indebtedness, or involving title to, or other lien on, the security, such holder, within the time that would be required if the Secretary were a party to the proceeding, shall deliver to the Secretary, by mail or otherwise, by making such delivery to the loan guaranty officer at the office which granted the guaranty or the insurance, or other office to which the holder has been notified the file is transferred, a copy of every procedural paper filed on behalf of holder, and shall also so deliver, as promptly as possible, a copy of each similar pleading served on holder or filed in the cause by any other party thereto. Notice of, or motion for, continuance and orders thereon are excepted from the foregoing.

(b) A copy of a notice of sale shall be similarly delivered by the holder, or the holder's agent or trustee, to the Secretary at the VA Regional Office of jurisdiction at least 30 days prior to the scheduled liquidation sale, or within 5 days after the date of first publication of the notice, whichever is later. A copy of any other notice of sale or acquisition of the property served on the holder or advice of any sale of which the holder has knowledge shall be similarly delivered to the Secretary, including any such notice of a tax sale or other superior lien or judicial sale. Such notice shall be accompanied by a statement of the account indebtedness and a copy of the liquidation appraisal request, if not previously delivered.

(Authority: 38 U.S.C. 3732)

(c) The procedure prescribed in paragraphs (a) and (b) of this section shall not be applicable in any proceeding to which the Secretary is a party, after the Secretary's appearance shall have been entered therein by a duly authorized attorney.

(d) In any legal or equitable proceeding (including probate and bankruptcy proceedings) to which the Secretary is a party, original process and any other process prior to appearance, proper to be served on the Secretary, shall be delivered to the loan guaranty officer of the regional office of the VA having jurisdiction of the area in which the court is situated. Within the time required by applicable law, or rule of court, the Secretary will cause appropriate special or general appearance to be entered in the case by an authorized attorney.

(Authority: 38 U.S.C. 3732)

(e) After appearance of the Secretary by attorney all process and notice otherwise proper to serve on the Secretary before or after judgment, if served on the attorney of record, shall have the

same effect as if the Secretary were personally served within the jurisdiction of the court.

(Authority: 38 U.S.C. 3732)

(f) If following a default, the holder does not bring appropriate action within 30 days after requested in writing by the Secretary to do so, or does not prosecute such action with reasonable diligence, the Secretary may at the Secretary's option fix a date beyond which no further charges may be included in the computation of the indebtedness for the purposes of accounting between the holder and the Secretary. The Secretary may also intervene in, or begin and prosecute to completion any action or proceeding, in the Secretary's name or in the name of the holder, which the Secretary deems necessary or appropriate. The Secretary shall pay, in advance if necessary, any court costs or other expenses incurred by the Secretary or properly taxed against the Secretary in any such action to which the Secretary is a party, but may charge the same, and also a reasonable amount for legal services, against the guaranteed or insured indebtedness, or the proceeds of the sale of the security to the same extent as the holder (see § 36.4313 of this part), or otherwise collect from the holder any such expenses incurred by the Secretary because of the neglect or failure of the holder to take or complete proper action. The rights and remedies herein reserved are without prejudice to any other rights, remedies, or defenses, in law or in equity, available to the Secretary.

(Authority: 38 U.S.C. 3732)

[13 FR 7276, Nov. 27, 1948, as amended at 45 FR 31065, May 12, 1980; 53 FR 1351, Jan. 19, 1988; 53 FR 4978, Feb. 19, 1988; 53 FR 42950, Oct. 25, 1988, 54 FR 612, Jan. 9, 1989; 54 FR 27163, June 28, 1989]

### § 36.4320 Sale of security.

(a) Upon receipt by the Secretary of notice of a liquidation sale of any security for a guaranteed or insured loan, the Secretary shall determine the net value of the security and shall notify the holder of the net value and of the regulatory provision which will govern the disposition of the security.

(1) If the net value of the real property securing a guaranteed or insured loan exceeds the unguaranteed portion of the indebtedness, the Secretary shall specify in advance of the liquidation sale the minimum amount which shall be credited to the indebtedness of the borrower on account of the value of the security to be sold, subject to the following:

(i) The specified amount in such cases shall be the lesser of the net value of the property or the total indebtedness.

(ii) If a minimum amount for credit to the indebtedness has been specified in relation to a liquidation sale of real property, and:

(A) The holder acquires the property, or the rights to the property, at the sale for an amount not in excess of such specified amount, the holder shall credit to the indebtedness the amount specified. The holder then may retain the property or, not later than 15 days after the date of sale, advise the Secretary of the holder's election to convey or transfer the property, or the rights to the property, to the Secretary;

(B) The holder acquires the property, or the rights to the property, at the liquidation sale for an amount in excess of the specified amount, the indebtedness shall be credited with the proceeds of the sale. The holder may elect to convey the property to the Secretary under the terms of paragraph (a)(1)(ii)(A) of this section, unless a bid in excess of the specified amount was made pursuant to paragraph (a)(3) of this section.

(Authority: 38 U.S.C. 3732(c))

(C) A third party acquires the property, or the rights to the property, at the liquidation sale for an amount equal to or in excess of that specified, the holder shall credit to the indebtedness the net proceeds of the sale;

(D) A third party acquires the property, or the rights to the property, at the liquidation sale for an amount less than that specified, the holder shall credit to the indebtedness the amount specified.

(iii) If a minimum amount has been specified by the Secretary, the Secretary's liability under loan guaranty

shall be the total indebtedness less the amount credited to the indebtedness under paragraph (a)(1)(ii) of this section, not to exceed the Secretary's maximum liability as computed under § 35.4321 of this part.

(2) If the net value of the real property securing a guaranteed or insured loan does not exceed the unguaranteed portion of the indebtedness:

(i) The Secretary shall notify the holder that no minimum amount will be specified for credit to the indebtedness on account of the value of the security to be sold;

(ii) The Secretary may not accept conveyance or transfer of the property;

(iii) The holder shall credit against the indebtedness the net proceeds of the sale, and the Secretary's liability under loan guaranty shall be limited to the total indebtedness less the amount credited to the indebtedness not to exceed the Secretary's maximum liability as computed under § 36.4321 of this part; and

(iv) The liability of the Secretary shall not be subject to adjustment by reason of any subsequent disposition of the property by the holder.

(3) If a minimum bid is required under applicable State law, or decree of foreclosure or order of sale, or other lawful order or decree, and:

(i) Such minimum bid exceeds an amount which has been specified by the Secretary under paragraph (a)(1) of this section; and

(ii) The holder acquires the property at the liquidation sale for an amount not exceeding the amount legally required; the holder may elect to convey the property to the Secretary pursuant to paragraph (a)(1)(ii)(A) of this section. The amount bid at the sale or the total indebtedness, whichever is less, shall govern instead of the specified amount and for the purpose of determining the Secretary's liability under loan guaranty.

(Authority: 38 U.S.C. 3732)

(b) The holder should not carry out a liquidation sale until the Secretary has furnished the notice required under paragraph (a) of this section. In the event the holder carries out a liquidation sale prior to receiving such notice, the holder shall credit against the indebtedness the greater of:

(1) The net proceeds of the sale; or

(2) The amount of the indebtedness or the net value of the property, whichever is less.

The provisions of paragraph (a)(1)(ii)(A) of this section, which extends to the holder the option of conveying or transferring the property to the Secretary, shall not be applicable, and the Secretary's liability under the loan guaranty shall be the total indebtedness less the amount credited to the indebtedness under paragraph (b) (1) or (2) of this section, not to exceed the Secretary's maximum liability as computed under § 36.4321 of this part.

(Authority: 38 U.S.C. 3732)

(c) When a debtor proposes to convey or transfer any real property to a holder to avoid foreclosure or other judicial, contractural, or statutory disposition of the obligation or of the security, the consent of the Secretary to the terms of such proposal shall be obtained in advance of such conveyance or transfer. In consenting to the terms of the debtor's proposal the Secretary shall furnish the notice required under paragraph (a) of this section.

(Authority: 38 U.S.C. 3732)

(d) Upon receipt by the Secretary of notice of a judicial or statutory sale, or other public sale under power of sale contained in the loan instruments, to liquidate any personal property which is security for a guaranteed or insured loan, the Secretary may specify in advance of such sale the minimum amount which shall be credited to the indebtedness of the borrower on account of the value of the security to be sold.

(1) If a minimum amount has been specified by the Secretary, and

(i) The holder is the successful bidder at the sale for an amount not in excess of such minimum amount, the holder shall sell the property pursuant to paragraph (d)(3) of this section and the amount realized from the resale of the property shall govern, instead of the specified minimum amount, in the final accounting for determining the

rights and liabilities of the holder and the Secretary,

(ii) A third party is the successful bidder at the sale for an amount equal to or in excess of that specified, the holder shall credit to the indebtedness the net proceeds of the sale,

(iii) A third party is the successful bidder at the sale for an amount less than that specified, the holder shall credit to the indebtedness the amount specified,

(iv) The holder is the successful bidder at the sale for an amount in excess of the specified amount, the indebtedness shall be credited with the proceeds of the sale or the amount realized from the resale of the property pursuant to paragraph (d)(3) of this section, whichever is the greater, unless the bid in excess of the specified amount was made pursuant to paragraph (d)(4) of this section.

(2) If a minimum amount has not been specified by the Secretary under paragraph (d)(1) of this section, the holder shall credit against the indebtedness the net proceeds of the sale except as provided in paragraph (d)(4) of this section.

(3) If personal property has been repossessed or otherwise acquired by a holder and no public sale is proposed or required to be held to entitle the holder to effect a further disposition of such property, or if the holder is the successful bidder at the sale of personal property as provided in paragraph (d)(1) of this section, the holder shall sell the property within a reasonable time. The holder shall submit to the Secretary a written advice setting forth the price, terms, conditions and the expenses of the proposed sale at least 10 days in advance, and the Secretary shall either assent to such sale in which event the holder shall credit against the indebtedness the net proceeds of the sale or, upon agreement to indemnify the holder to the extent of any increased or resultant loss, the Secretary may specify the minimum net price for which the security may be sold. If such amount has been specified, the holder shall sell the personal property within a reasonable time in the open market for the best price obtainable: *Provided, that* the prior approval of the Secretary shall be obtained if the property is to be sold for a net amount less than the specified amount, or if the property is to be sold on terms other than all cash. The ultimate net amount realized by the holder from such sale shall be reported by the holder to the Secretary in an accounting which will determine their respective rights and liabilities.

(4) If a minimum bid is required under applicable State law, or decree of foreclosure or order of sale, or other lawful order or decree, the holder may bid an amount not exceeding such amount legally required. If an amount has been specified by the Secretary and the holder is the successful bidder for an amount not exceeding the amount legally required, such specified amount shall govern for the purposes of this paragraph and for the purpose of computing the ultimate loss under the guaranty or insurance. In the event no amount is specified and the holder is the successful bidder for an amount not exceeding the amount legally required, the amount paid or payable by the Secretary under the guaranty shall not be subject to any adjustment by reason of such bid.

(Authority: 38 U.S.C. 3732)

(e) If the Secretary has specified an amount as provided in this section, and the holder learns of any material damage to the property occurring prior to the foreclosure sale or to the acceptance of a deed in lieu of foreclosure or prior to any other event to which such specified amount is applicable, the holder shall promptly advise the Secretary of such damage.

(f) The holder in accounting to the Secretary in connection with the disposition of any property in accordance with paragraph (a), (b), or (d) of this section, may include as a part of the indebtedness all actual expenses or costs of the proceedings, paid by the holder, within the limits defined in § 36.4313 of this part. In connection with the conveyance or transfer of property to the Secretary the holder may include in accounting to the Secretary the following expense items if actually paid by the holder, in addition to the consideration payable for the property under paragraph (g) of this section:

(Authority: 38 U.S.C. 3732)

(1) State and documentary stamp taxes as may be required.

(2) The customary cost of obtaining evidence of title in favor of the Secretary as specified in paragraph (h)(5) of this section but not including title evidence obtained incident to the making of the loan or any expenses incurred to clear title defects.

(3) Amount expended for taxes, special assessments, including such payments which are specified in paragraph (h)(4) of this section.

(4) Recording fees.

(5) Any other expenditures in connection with the property which are approved by the Secretary.

(g) In the event a holder elects to convey or transfer the property to the Secretary pursuant to paragraph (a), (b), or (c) of this section, the consideration to be paid by the Secretary in return for the property shall be the specified amount: *Provided,* That if a claim under the guaranty was previously paid, the consideration payable for the property shall be an amount equal to the indebtedness (less the amount previously paid on the guaranty) or the specified amount, whichever is less. If no claim under the guaranty was previously paid, the holder may, pursuant to § 36.4321(b) submit a claim within the maximum guaranty liability for the difference between the specified amount and an amount equal to the indebtedness. In the case of an insured loan, the holder may submit a claim for the difference between an amount equal to the indebtedness and the specified amount pursuant to § 36.4374.

(h) The conveyance or transfer of any property to the Secretary pursuant to paragraphs (a), (b), or (c) of this section shall be subject to the following provisions:

(1) If the holder's notice to the Secretary electing to convey or transfer the property precedes the acquisition of the property by the holder and the holder then acquires the property, the holder shall promptly after such acquisition advise the Secretary of the acquisition. Such advice, or the notice of election if given subsequent to acquisition, shall state the amount of the successful bid (if the property was acquired by the holder at public sale) and shall state the insurance coverage then in force, specifying for each policy, the name of the insurance company, the hazard covered, the amount, and the expiration date.

(2) The holder may cancel any insurance in force when the holder acquires the property, provided the holder has obtained the prior approval of the Secretary. Coincident with the notice of election to convey or transfer the property to the Secretary or with the acquisition of the property by the holder, following such notice, whichever is later, the holder shall obtain endorsements on all such insurance policies naming the Secretary as an assured, as his/her interest may appear. Such insurance policies shall be forwarded to the Secretary at the time of the conveyance or transfer of the property to the Secretary or as soon after that time as feasible.

(3) Occupancy of the property by anyone properly in possession by virtue of and during a period of redemption, or by anyone else unless under a claim of title which makes the title sought to be conveyed by the holder of less dignity or quality than that required by this section, shall not preclude the holder from conveying or transferring the property to the Secretary. Except with the prior approval of the Secretary, the holder shall not rent the property to a new tenant, nor extend the term of an existing tenancy on other than a month-to-month basis.

(4) Any taxes, special assessments or ground rents due and payable within 30 days after date of conveyance or transfer to the Secretary shall be paid by the holder if bills therefor are obtainable before such conveyance or transfer.

(5) Each conveyance or transfer of real property to the Secretary pursuant to this section shall be acceptable if the holder thereby convenants or warrants against the acts of the holder and those claiming under the holder (e.g., by special warranty deed) and if it vests in the Secretary or will entitle the Secretary to such title as is or would be acceptable to prudent lending institutions, informed buyers, title companies, and attorneys, generally, in the community in which the property is situated. Any title so acceptable will not be unacceptable to the Secretary

by reason of any of the limitations on the quantum or quality of the property or title stated in § 36.4350(b) of this part:

*Provided, That* (i) at the time of conveyance or transfer to the Secretary there has been no breach of any conditions affording a right to the exercise of any reverter, except that title will not be unacceptable to the Secretary by reason of a violation of a restriction based on race, color, creed, or national origin, whether or not such restriction provides for reversion or forfeiture of title or a lien for liquidated damages in the event of a breach.

(ii) With respect to any such limitations which came into existence subsequent to the making of the loan, full compliance was had with the requirements of § 36.4324 of this part. The acceptability of a conveyance or transfer pursuant to the requirements of this paragraph will be established by delivery to the Secretary of any of the following evidence of title issued by an institution or person satisfactory to the Secretary, in form satisfactory to him/her showing that title to the property of the quality specified in this paragraph is or will be vested in the Secretary:

(*A*) A title policy insuring the Secretary in an amount approximately equal to the consideration for the property, or a commitment for such title policy; or

(*B*) A certificate of record title; or

(*C*) An abstract of title accompanied by a legal opinion as to the quality of such title of record; or

(*D*) A Torrens or similar title certificate; or

(*E*) Such other evidence of title as the Secretary may approve.

In lieu of such title evidence, the Secretary will accept a conveyance or transfer with general warranty with respect to the title from a holder described in 38 U.S.C. 3702(d) or from a holder of financial responsibility satisfactory to the Secretary. In any case where the holder does not deliver evidence of title of the character specified in this paragraph, the holder to aid the Secretary in determination of acceptability of title shall without expense to the Secretary furnish such evidence of title, including survey, if any, as may have been obtained by the holder incident to the making of the loan or attendant to the foreclosure.

(6) Except with respect to matters covered by any covenants or warranties of the holder, the acceptance by the Secretary of a conveyance or transfer by the holder shall conclude the responsibility of the holder to the Secretary under the regulations of this subpart with respect to the title and in the event of the subsequent discovery of title defects, the Secretary shall have no recourse against the holder with respect to such title other than by reason of such covenants and warranties.

(7) As between the holder and the Secretary, the responsibility for any loss due to damage to or destruction of the property or due to personal injury sustained in respect to such property shall be governed by the provisions of this paragraph and paragraph (h)(10) of this section. Ordinary wear and tear excepted, the holder shall bear such risk of loss from the date of acquisition by the holder to the date such risk of loss is assumed by the Secretary. Such risk of loss is assumed by the Secretary from the date of receipt of the holder's election to convey or transfer the property to the Secretary or, in the event of receipt of notice of such election prior to acquisition, from the date of the Secretary's receipt of notice of acquisition by the holder:

*Provided, That* if custody over the property has not been delivered by the holder to the Secretary on the date when the Secretary otherwise would have assumed the risk of loss, the Secretary's assumption of the risk of loss will be deferred until such custody over the property is delivered, or until the property has been conveyed or transferred to the Secretary. The amount of any loss chargeable to the holder may be deducted from the amount payable by the Secretary at the time the property is transferred. In any case where pursuant to the VA regulations rejection of the title is legally proper, the Secretary may surrender custody of the property as of the date specified in the Secretary's notice to the holder. The Secretary's assumption of such risk shall terminate upon such surrender.

(8) The holder shall not be liable to the Secretary for any portion of the paid or unpaid taxes, special assessments, ground rents, insurance premiums, or other similar items.

(9) The Secretary shall be entitled to all rentals and other income collected from the property and to any insurance proceeds or refunds subsequent to the date of acquisition by the holder.

(10) In respect to a property which was the security for a condominium loan guaranteed or insured 38 U.S.C. 3710(a)(6) the responsibility for any loss due to damage to or destruction of the property or due to personal injury sustained in respect to such property shall in no event pass to the Secretary until the Secretary expressly assumes such responsibility or until conveyance of the property to the Secretary, whichever first occurs. The holder shall have the right to convey such property to the Secretary only if the property (including elements of the development or project owned in common with other unit owners) is undamaged by fire, earthquake, windstorm, flooding or boiler explosion. The absence of a right in the holder to convey such property which is so damaged shall not preclude a conveyance, if the Secretary agrees in a given case to such a conveyance upon completion of repairs within a specified period of time and such repairs are so completed and the conveyance is otherwise in order.

(i)(1) The terms ''date of sale'' or ''date of acquisition'' as used in this section are defined as the date of the event (e.g., sale, confirmation of sale when required under local practice, delivery of deed in case of voluntary conveyance, etc.) which fixes the rights of the parties in the property.

(2) The term ''property'' or ''real property'' as used in this section shall include

(i) A leasehold estate which at the time of closing the loan was not less duration than prescribed by § 36.4350(a)(2) of this part, and

(ii) The rights derived by the holder through a foreclosure sale of real estate whether or not such rights constitute an estate in real property under local law.

(j) Except as provided in paragraph (h)(6) of this section, the provisions of this section shall not be in derogation of any rights which the Secretary may have under § 36.4325 of this part. The Under Secretary for Benefits, or the Director, Loan Guaranty Service, may authorize any deviation from the provisions of this section, within the limitations prescribed in 38 U.S.C. Chapter 37, which may be necessary or desirable to accomplish the objectives of this section if such deviation is made necessary by reason of any laws or practice in any State or Territory or the District of Columbia: *Provided, that* no such deviation shall impair the rights of any holder not consenting to the deviation with respect to loans made or approved prior to the date the holder is notified of such action.

(Authority: 38 U.S.C. 3732, Pub. L. 100–527)

[13 FR 7739, Dec. 15, 1948, as amended at 20 FR 9180, Dec. 10, 1955; 24 FR 2654, Apr. 7, 1959; 28 FR 11505, Oct. 29, 1963; 33 FR 6975, May 9, 1968; 33 FR 18026, Dec. 4, 1968; 34 FR 11095, July 1, 1969; 36 FR 320, Jan. 9, 1971; 40 FR 34591, Aug. 18, 1975; 53 FR 1352, Jan. 19, 1988; 54 FR 27163, June 28, 1989; 60 FR 38262, July 26, 1995; 61 FR 28058, June 4, 1996]

### § 36.4321 Computation of guaranty claims; subsequent accounting.

(a) Subject to the limitation that the total amounts payable shall in no event exceed the amount originally guaranteed, the amount payable on a claim for the guaranty shall be the percentage of the loan originally guaranteed applied to the indebtedness computed as of the earliest of the following dates:

(1) The date of the liquidation sale; or,

(2) The cutoff date established under paragraph (f) of § 36.4319 of this part; or,

(3) The cutoff date established under paragraph (b) of this section.

Deposits or other credits or setoffs legally applicable to the indebtedness on the date of computation shall be applied in reduction of the indebtedness on which the claim is based. Any escrowed or earmarked funds not subject to superior claims of third persons must likewise be so applied.

(b) In any case in which there is a delay in the liquidation sale caused by:

(1) The holder of the loan extending forbearance in excess of 30 days at the request of the Secretary, the cutoff

date for computation of the indebtedness shall be 30 days after the date the Secretary determines the liquidation sale would have taken place if there had been no such delay, provided: the net value of the real property securing the loan does not exceed the unguaranteed portion of the indebtedness as of the actual liquidation sale date *and* such net value will exceed the unguaranteed portion of the indebtedness as ofthe cutoff date;

(2) The Secretary, including the Secretary's failure to provide the holder with advice as to the net value of the security within two working days prior to a scheduled liquidation sale but excluding forbearance exercised at the request of the Secretary, with respect to a holder which has complied with the provisions of § 36.4319(b) of this part, the cutoff date for computation of the indebtedness shall be the date the liquidation sale would have taken place if there had been no such delay;

(3) A voluntary case commenced under Title 11, United States Code (relating to bankruptcy), the cutoff date for computation of the indebtedness shall be 30 days after the date the Secretary determines the liquidation sale would have taken place if there had been no such delay, provided: the net value of the real property securing the loan does not exceed the unguaranteed portion of the indebtedness as of the actual liquidation sale date *and* such net value will exceed the unguaranteed portion of the indebtedness as of the cutoff date.

(c) Adjustment of cutoff dates:

(1) Any cutoff date established under § 36.4319(f) of this part or paragraph (b) of this section will be adjusted by a period of months corresponding to the number of installment payments, if any, received by the holder and credited to the indebtedness after the cutoff date is established.

(2) When a cutoff date is established under paragraph (b)(2) of this section, the actual liquidation sale date will be used for purposes of computing the indebtedness in any subsequent accounting between the holder and the Secretary; if an earlier cutoff date is in effect at the time delay in a liquidation sale is caused by the Secretary, such date will not be modified by application of the provisions of paragraph (b)(2) of this section, but will be extended by an interval corresponding to the delay in the liquidation sale caused by the Secretary for purposes of computing the indebtedness in any subsequent accounting between the holder and the Secretary.

(3) Any cutoff date established under § 36.4319 of this part or paragraph (b) of this section will be considered to be the liquidation sale date. Such date will be modified in accordance with paragraph (b) of this section if the provisions of that paragraph are applicable after such date has been established.

(Authority: 38 U.S.C. 501)

(d) Credits accruing from the proceeds of a sale or other disposition of the security subsequent to the date of computation, and prior to the submission of this claim, shall be reported to the Secretary incident to such submission, and the amount payable on the claim shall in no event exceed the remaining balance of the indebtedness.

(Authority: 38 U.S.C. 501)

(e) The claimant shall be deemed to have received as trustee for the benefit of the United States any amounts received on account of the indebtedness after the date of the claim, from the proceeds of a sale of the security or otherwise, to the extent such credits exceed the balance of the indebtedness unsatisfied by the payment of the guaranty. The claimant shall immediately pay such amounts to the Secretary to the extent of the debtor's liability to the Secretary as guarantor.

(Authority: 38 U.S.C. 501)

[54 FR 27163, June 28, 1989]

### § 36.4322 Computation of indebtedness.

In computing the indebtedness for the purpose of filing a claim for payment of a guaranty or for payment of an insured loss, or in the event of a transfer of the loan under § 36.4318 (a), or other accounting to the Secretary, the holder shall not be entitled to treat

repayments theretofore made as liquidated damages, or rentals, or otherwise than as payments on the indebtedness, notwithstanding any provision in the note, or mortgage, or otherwise, to the contrary.

[13 FR 7278, Nov. 27, 1948]

### § 36.4323 Subrogation and indemnity.

(a) The Secretary shall be subrogated to the contract and the lien or other rights of the holder to the extent of any sum paid on a guaranty or on account of an insured loss, which right shall be junior to the holder's rights as against the debtor or the encumbered property until the holder shall have received the full amount payable under the contract with the debtor. No partial or complete release by a creditor shall impair the rights of the Secretary with respect to the debtor's obligation.

(b) The holder, upon request, shall execute, acknowledge and deliver an appropriate instrument tendered for that purpose, evidencing any payment received from the Secretary and the Secretary's resulting right of subrogation.

(c) The Secretary shall cause the instrument required by paragraph (b) of this section to be filed for record in the office of the recorder of deeds, or other appropriate office of the proper county, town or State, in accordance with the applicable State law. The filing or failure to file such instrument for record shall have the legal results prescribed by the applicable law of the State where the real or personal property is situated, with respect to filing or failure to so file mortgages and other lien instruments and assignments thereof.

The references herein to ''filing for record'' include ''registration'' or any similar transaction, by whatever name designated when title to the encumbered property has been ''registered'' pursuant to a Torrens or other similar title registration system provided by law.

(d) As a condition to paying a claim for an insured loss the Secretary may require that the loan, including any security or judgment held therefor, be assigned to the extent of such payment, and if any claim has been filed in bankruptcy, insolvency, probate, or similar proceedings such claim may likewise be required to be so assigned.

(e) Any amounts paid by the Secretary on account of the liabilities of any veteran guaranteed or insured under the provisions of 38 U.S.C. chapter 37 shall constitute a debt owing to the United States by such veteran.

(Authority: 38 U.S.C. 3732)

(1) Prior to a liquidation sale, an official authorized to act for the Secretary under provisions of § 36.4342 of this part may approve a complete release of the Secretary's right to collect a debt owing to the United States under this paragraph and/or under paragraph (a) of this section provided such official determines:

(i) The loan default was caused by circumstances beyond the control of the obligor;

(ii) There are no indications of fraud, misrepresentation or bad faith on the part of the obligor in obtaining the loan or in connection with the loan default;

(iii) The obligor cooperated with VA in exploring all realistic alternatives to termination of the loan through foreclosure; and, either

(iv) Review of the obligor's current financial situation and prospective earning potential and obligations indicates there are no realistic prospects that the obligor could repay all or part of the anticipated debt within six years of the liquidation sale while providing the necessities of life for himself or herself and his or her family; or,

(v) In consideration for a release of the Secretary's collection rights the obligor completes, or VA is enabled to authorize, an action which reduces the Government's claim liability sufficiently to offset the amount of the anticipated indebtedness which would otherwise be established pursuant to this paragraph and likely be collectable by VA after foreclosure in view of the obligor's financial situation; such actions would include termination of the loan by means of a deed in lieu of foreclosure, private sale of the property for less than the indebtedness with a reduced claim paid by VA for the balance due the loan holder or enabling VA to authorize the holder to elect a more expeditious foreclosure

procedure when such an election would result in the legal release of the obligor's liability; or

(vi) The obligor being released is not the current titleholder to the property and there are no indications of fraud, misrepresentation, or bad faith on the obligor's part in obtaining the loan or disposing of the property or in connection with the loan default.

(2) Prior to a liquidation sale, an official authorized to act for the Secretary under provisions of section 4342 of this part may approve a partial release of the Secretary's right to collect a debt owing to the United States under this paragraph and/or under paragraph (a) of this section provided such official determines:

(i) The loan default was caused by circumstances beyond the control of the obligor:

(ii) There are no indications of fraud, misrepresentation or bad faith on the part of the obligor in obtaining the loan or in connection with the loan default;

(iii) The obligor cooperated with VA in exploring all realistic alternatives to termination of the loan through foreclosure;

(iv) Review of the obligor's current financial situation and prospective earning potential and obligations indicates there are no realistic prospects that the obligor could repay all of the anticipated debt within six years of the liquidation sale while providing the necessities of life for himself or herself and his or her family; and,

(v) The obligor executes a written agreement acknowledging his or her liability to VA under this paragraph and executes a promissory note which provides for regular amortized monthly payments of an amount determined by VA in accordance with paragraph (e)(3) of this section including interest on the total amount payable at the rate in effect for Loan Guaranty liability accounts at the time of execution, or, the obligor agrees to other terms of repayment acceptable to VA including payment of a lump sum in settlement of his or her obligation under this paragraph;

(3) For purposes of this paragraph a review of an obligor's financial situation will take into consideration:

(i) The obligor's current and anticipated family income based on employment skills and experience;

(ii) The obligor's current short-term and long-term financial obligations, including the obligation to repay the Government which must be afforded consideration at least equal to his or her consumer debt obligations;

(iii) A current credit report on the obligor;

(iv) The obligor's assets and net worth; and,

(v) The required balance available for family support used in underwriting VA guaranteed loans in the area.

The amount of indebtedness established will be such that the obligor's financial situation permits repayment of the debt to the Government in regular monthly installments of principal plus interest over a five year period commencing within one year after the date the promissory note is executed, except in those cases in which a lump sum settlement appears to be in the best interest of the Government or in which it appears the obligor may reasonably expect significant changes in his or her financial situation which would permit higher payments to be made during later periods of the life of the note.

(4) Determinations made under paragraphs (e)(1) and (e)(2) of this section are intended for the benefit of the Government in reducing the amount of claim payable by VA and/or avoiding the establishment of uncollectible debts owing to the United States. Such determinations are discretionary on the part of VA and shall not constitute a defense to any legal action to terminate the loan nor vest any appellate right in an obligor which would require further review of the case.

(Authority: 38 U.S.C. 501, 3703(c)(1))

(f) Whenever any veteran disposes of residential property securing a guaranteed or insured loan obtained by him or her under 38 U.S.C. chapter 37, and for which the commitment to make the loan was made prior to March 1, 1988, the Secretary, upon application made by such veteran, shall issue to the veteran a release relieving him or her of all further liability to the Secretary on

account of such loan (including liability for any loss resulting from any default of the transferee or any subsequent purchaser of such property) if the Secretary has determined, after such investigation as may be deemed appropriate, that there has been compliance with the conditions prescribed in 38 U.S.C. 3713. The assumption of full liability for repayment of the loan by the transferee of the property must be evidenced by an agreement in writing in such form as the Secretary may require. Release of the veteran from liability to the Secretary will not impair or otherwise affect the Secretary's guaranty or insurance liability on the loan, or the liability of the veteran to the holder. Any release of liability granted to a veteran by the Secretary shall inure to the spouse of such veteran. The release of the veteran from liability to the Secretary will constitute the Secretary's prior approval to a release of the veteran from liability on the loan by the holder thereof.

(Authority: 38 U.S.C. 3713)

(g) If, on or after July 1, 1972, any veteran disposes of residential property securing a guaranteed or insured loan obtained under 38 U.S.C. Chapter 37, without receiving a release from liability with respect to such loan under 38 U.S.C. 3713 and a default subsequently occurs which results in liability of the veteran to the Secretary on account of the loan, the Secretary may relieve the veteran of such liability if he determines that:

(1) A transferee either immediate or remote is legally liable to the Secretary for the debt of the original veteran-borrower established after the termination of the loan, and

(2) The original loan was current at the time such transferee acquired the property, and

(3) The transferee who is liable to the Secretary is found to have been a satisfactory credit risk at the time he or she acquired the property.

(h) If a veteran or any other person disposes of residential property securing a guaranteed or insured loan for which a commitment was made on or after March 1, 1988, and the veteran or other person notifies the loan holder in writing before disposing of the property, the veteran or other person shall be relieved of all further liability to the Secretary with respect to the loan (including liability for any loss resulting from any default of the purchaser or any subsequent owner of the property) and the application for assumption shall be approved if the holder determines that:

(1) The proposed purchaser is creditworthy;

(2) The proposed purchaser is contractually obligated to assume the loan and the liability to indemnify the Department of Veterans Affairs for the amount of any claim paid under the guaranty as a result of a default on the loan, or has already done so; and,

(3) The payments on the loan are current.

Should these requirements be satisfied, the holder may also release the veteran or other person from liability on the loan. This does not apply if the approval for the assumption is granted upon special appeal to avoid immediate foreclosure.

(Authority: 38 U.S.C. 3714)

[13 FR 7278, Nov. 27, 1948, as amended at 24 FR 2654, Apr. 7, 1959; 33 FR 5362, Apr. 4, 1968; 37 FR 24034, Nov. 11, 1972; 54 FR 30211, July 19, 1989; 54 FR 34988, Aug. 23, 1989; 55 FR 27467, July 3, 1990; 55 FR 31387, Aug. 2, 1990; 55 FR 33904, Aug. 20, 1990; 55 FR 37477, Sept. 12, 1990; 67 FR 62647, Oct. 8, 2002]

### § 36.4324 Release of security.

(a) Except upon full payment of the indebtedness the holder shall not release a lien or other right in or to real property held as security for a guaranteed or insured loan, or grant a fee or other interest in such property, without the prior approval of the Secretary, unless in the opinion of the holder such release does not involve a decrease in the value of the security in excess of $2,500: *Provided,* That the aggregate of the reduction in the original value of the security resultant from such releases without the Secretary's prior approval does not exceed $2,500.

(b) Holder may release from the lien personal property including crops without the prior approval of the Secretary.

(c) Except upon full payment of the indebtedness or upon the prior approval of the Secretary, the holder

shall not release a lien under paragraph (a) or (b) of this section unless the consideration received for the release is commensurate with the fair market value of the property released and the entire consideration is applied to the indebtedness, or if encumbrance on other property is accepted in lieu of that released it shall be the holder's duty to acquire such lien on property of substantially equal value which is reasonably capable of serving the purpose for which the property released was utilized.

(d) Failure of the holder to comply with the provisions of this section shall not in itself affect the validity of the title of a purchaser to the property released.

(e) The holder shall notify the Secretary of any such release or substitution of security within 30 days after completion of such transaction.

(f) The release of the personal liability of any obligor on a guaranteed or insured obligation resultant from the act or omission of any holder without the prior approval of the Secretary shall release the obligation of the Secretary as guarantor or insurer, except when such act or omission consists of (1) failure to establish the debt as a valid claim against the assets of the estate of any deceased obligor, provided no lien for the guaranteed or insured debt is thereby impaired or destroyed; or (2) an election and appropriate prosecution of legally available effective remedies with respect to the repossession or the liquidation of the security in any case, irrespective of the identity or the survival of the original or of any subsequent debtor, if holder shall have given such notice as required by § 36.4317 of this part and if, after receiving such notice, the Secretary shall have failed to notify the holder within 15 days to proceed in such manner as to effectively preserve the personal liability of the parties liable, or such of them as the Secretary indicates in such notice to the holder; or (3) the release of an obligor, or obligors, from liability on an obligation secured by a lien on property, which release is an incident of and contemporaneous with the sale of such property to an eligible veteran who assumed such obligation, which assumed obligation is guaranteed on the assuming veteran's account pursuant to 38 U.S.C. chapter 37; or (4) the release of an obligor or obligors as provided in § 36.4314(d) of this part; or, the release of an obligor, or obligors, incident to the sale of property securing the loan which the holder is authorized to approve under the provisions of 38 U.S.C. 3714.

(Authority: 38 U.S.C. 3714)

[13 FR 7278, Nov. 27, 1948, as amended at 24 FR 6315, Aug. 6, 1959; 35 FR 7728, May 20, 1970; 46 FR 43673, Aug. 31, 1981; 52 FR 26342, July 14, 1987; 55 FR 37477, Sept. 12, 1990]

### § 36.4325 Partial or total loss of guaranty or insurance.

(a) Subject to the incontestable provisions of 38 U.S.C. 3721 as to loans guaranteed or insured on or subsequent to July 1, 1948, there shall be no liability on account of a guaranty or insurance, or any certificate or other evidence thereof, with respect to a transaction in which a signature to the note, the mortgage, or any other loan papers, or the application for guaranty or insurance is a forgery; or in which the certificate of discharge or the certificate of eligibility is counterfeited, or falsified, or is not issued by the Government.

(1) Except as to a holder who acquired the loan instrument before maturity, for value, and without notice, and who has not directly or by agent participated in the fraud, or in the misrepresentation hereinafter specified, any wilful and material misrepresentation or fraud by the lender, or by a holder, or the agent of either, in procuring the guaranty or the insurance credit, shall relieve the Secretary of liability, or, as to loans guaranteed or insured on, or subsequent to July 1, 1948, shall constitute a defense against liability on account of the guaranty or insurance of the loan in respect to which the wilful misrepresentation, or the fraud, is practiced: *Provided,* That if a misrepresentation, although material, is not made wilfully, or with fraudulent intent, it shall have only the consequences prescribed in paragraphs (b) and (c) of this section.

(2) [Reserved]

(b) In taking security required by 38 U.S.C. chapter 37 and the regulations concerning guaranty or insurance of

loans to veterans, a holder shall obtain the required lien on property the title to which is such as to be acceptable to prudent lending institutions, informed buyers, title companies, and attorneys, generally, in the community in which the property is situated: *Provided,* That a title will not be unacceptable by reason of any of the limitations on the quantum or quality of the property or title stated in § 36.4350(b) and if such holder fails in this respect or fails to comply with 38 U.S.C. chapter 37 and the regulations concerning guaranty or insurance of loans to veterans with respect to:

(1) Obtaining and retaining a lien of the dignity prescribed on all property upon which a lien is required by 38 U.S.C. chapter 37 or the regulations concerning guaranty or insurance of loans to veterans,

(2) Inclusion of power to substitute trustees (§ 36.4327),

(3) The procurement and maintenance of insurance coverage (§ 36.4326),

(4) Advice to Secretary as to default (§ 36.4315),

(5) Notice of intention to begin action (§ 36.4317),

(6) Notice to the Secretary in any suit or action, or notice of sale (§ 36.4319),

(7) The release, conveyance, substitution, or exchange of security (§ 36.4324),

(8) Lack of legal capacity of a party to the transaction incident to which the guaranty or the insurance is granted (§ 36.4328),

(9) Failure of the lender to see that any escrowed or earmarked account is expended in accordance with the agreement,

(10) The taking into consideration of limitations upon the quantum or quality of the estate or property (§ 36.4350(b)),

(11) Any other requirement of 38 U.S.C. chapter 37 or the regulations concerning guaranty or insurance of loans to veterans which does not by the terms of said chapter or the regulations concerning guaranty or insurance of loans to veterans result in relieving the Secretary of all liability with respect to the loan,

no claim on the guaranty or insurance shall be paid on account of the loan with respect to which such failure occurred, or in respect to which an unwillful misrepresentation occurred, until the amount by which the ultimate liability of the Secretary would thereby be increased has been ascertained. The burden of proof shall be upon the holder to establish that no increase of ultimate liability is attributable to such failure or misrepresentation. The amount of increased liability of the Secretary shall be offset by deduction from the amount of the guaranty or insurance otherwise payable, or if consequent upon loss of security shall be offset by crediting to the indebtedness the amount of the impairment as proceeds of the sale of security in the final accounting to the Secretary. To the extent the loss resultant from the failure or misrepresentation prejudices the Secretary's right of subrogation acceptance by the holder of the guaranty or insurance payment shall subordinate the holder's right to those of the Secretary.

(c) If after the payment of a guaranty or an insurance loss, or after a loan is transferred pursuant to § 36.4318 (a), the fraud, misrepresentation or failure to comply with the regulations in this subpart as provided in this section is discovered and the Secretary determines that an increased loss to the government resulted therefrom the transferor or person to whom such payment was made shall be liable to the Secretary for the amount of the loss caused by such misrepresentation or failure.

[13 FR 7741, Dec. 15, 1948, as amended at 24 FR 2654, Apr. 7, 1959]

### § 36.4326 Hazard insurance.

The holder shall require insurance policies to be procured and maintained in an amount sufficient to protect the security against the risks or hazards to which it may be subjected to the extent customary in the locality. All moneys received under such policies covering payment of insured losses shall be applied to restoration of the security or to the loan balance. Flood insurance will be required on any building or personal property securing a loan at any time during the term of the loan that such security is located in an area identified by the Federal

Emergency Management Agency as having special flood hazards and in which flood insurance has been made available under the National Flood Insurance Act, as amended. The amount of flood insurance must be at least equal to the lesser of the outstanding principal balance of the loan or the maximum limit of coverage available for the particular type of property under the National Flood Insurance Act, as amended. The Secretary cannot guarantee a loan for the acquisition or construction of property located in an area identified by the Federal Emergency Management Agency as having special flood hazards unless the community in which such area is situated is then participating in the National Flood Insurance Program.

(Authority: 42 U.S.C. 4012a, 4106(a))

[62 FR 5531, Feb. 6, 1997]

### § 36.4327 Substitution of trustees.

In jurisdictions in which valid, any deed of trust or mortgage securing a guaranteed or insured loan, if it names trustees, or confers a power of sale otherwise, shall contain a provision empowering any holder of the indebtedness to appoint substitute trustees, or other person with such power to sell, who shall succeed to all the rights, powers and duties of the trustees, or other person, originally designated.

[13 FR 7279, Nov. 27, 1948]

### § 36.4328 Capacity of parties to contract.

Nothing in §§ 36.4300 to 36.4375, inclusive, shall be construed to relieve any lender of responsibility otherwise existing, for any loss caused by the lack of legal capacity of any person to contract, convey, or encumber, or caused by the existence of other legal disability or defects invalidating, or rendering unenforceable in whole or in part, either the loan obligation or the security therefor.

[13 FR 7279, Nov. 27, 1948]

### § 36.4329 Geographical limits.

Any real property purchased, constructed, altered, improved, or repaired with the proceeds of a guaranteed or insured loan shall be situated within the United States which for purposes of 38 U.S.C. Chapter 37 is here defined as the several States, Territories and possessions, and the District of Columbia, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands.

[46 FR 43673, Aug. 31, 1981]

### § 36.4330 Maintenance of records.

(a) The holder shall maintain a record of the amounts of payments received on the obligation and disbursements chargeable thereto and the dates thereof. This record shall be maintained until the Secretary ceases to be liable as guarantor or insurer of the loan. For the purpose of any accounting with the Secretary or computation of a claim, any holder who fails to maintain such record shall be presumed to have received on the dates due all sums which by the terms of the contract are payable prior to date of claim for default, and the burden of going forward with evidence and of ultimate proof of the contrary shall be on such holder.

(b) The lender shall retain copies of all loan origination records on a VA-guaranteed loan for at least two years from the date of loan closing. Loan origination records include the loan application, including any preliminary application, verifications of employment and deposit, all credit reports, including preliminary credit reports, copies of each sales contract and addendums, letters of explanation for adverse credit items, discrepancies and the like, direct references from creditors, correspondence with employers, appraisal and compliance inspection reports, reports on termite and other inspections of the property, builder change orders, and all closing papers and documents.

(Authority: 38 U.S.C. 501, 3703(c)(1))

(c) The Secretary has the right to inspect, examine, or audit, at a reasonable time and place, the records or accounts of a lender or holder pertaining

to loans guaranteed or insured by the Secretary.

(The information collection requirements in this section have been approved by the Office of Management and Budget under control number 2900–0515)

[63 FR 12004, Mar. 12, 1998]

### § 36.4332 Delivery of notice.

Any notice required by §§ 36.4300 to 36.4375 to be given the Secretary must be in writing or such other communications medium as may be approved by an official designated in § 36.4342 and delivered, by mail or otherwise, to the VA office at which the guaranty or insurance was issued, or to any changed address of which the holder has been given notice. Such notice must plainly identify the case by setting forth the name of the original veteran-obligor and the file number assigned to the case by the Secretary, if available, or otherwise the name and serial number of the veteran. If mailed, the notice shall be by certified mail when so provided by §§ 36.4300 to 36.4375. This paragraph does not apply to legal process.

[58 FR 29117, May 19, 1993]

### § 36.4333 Satisfaction of indebtedness.

Upon full satisfaction of a guaranteed loan by payment or otherwise it shall be the duty of the holder to cancel the endorsement, if any, of the Secretary; and forthwith inform the Secretary of such cancellation. In the event the Secretary's liability thereon is evidenced by an instrument separate from the instrument evidencing the debtor's obligation, the instrument evidencing the obligation of the Secretary shall be returned to the Department of Veterans Affairs office issuing same, or to the central office, with the holder's cancellation or endorsement of release thereon.

[13 FR 7279, Nov. 27, 1948]

### § 36.4334 Incorporation by reference.

Regulations issued under 38 U.S.C. Chapter 37 and in effect on the date of any loan which is submitted and accepted or approved for a guaranty or for insurance thereunder, shall govern the rights, duties, and liabilities of the parties to such loan and any provisions of the loan instruments inconsistent with such regulations are hereby amended and supplemented to conform thereto.

[24 FR 2655, Apr. 7, 1959]

### § 36.4335 Supplementary administrative action.

Notwithstanding any requirement, condition, or limitation stated in or imposed by the regulations concerning the guaranty or insurance of loans to veterans, the Under Secretary for Benefits, or the Director, Loan Guaranty Service, within the limitations and conditions prescribed by the Secretary, is hereby authorized, if he or she finds the interests of the Government are not adversely affected, to relieve undue prejudice to a debtor, holder, or other person, which might otherwise result, provided no such action may be taken which would impair the vested rights of any person affected thereby. If such requirement, condition, or limitation is of an administrative or procedural (not substantive) nature, any employee designated in § 36.4342 is hereby authorized to grant similar relief if he or she finds the failure or error of the lender was due to misunderstanding or mistake and that the interests of the Government are not adversely affected. Provisions of the regulations considered to be of an administrative or procedural (nonsubstantive) nature are limited to the following:

(a) The requirement in § 36.4314(e) that a holder promptly forward an advice of the terms of any agreement effecting a reamortization or extension of a loan.

(b) The 45-day requirement in § 36.4315(a) concerning the giving of notice of default.

(c) The requirement in § 36.4317 that a holder give 30 days advance notice of its intention to foreclose.

(d) The requirement in § 36.4317(b) that a holder give notice of repossession of personal property within 10 days after such repossession has occurred.

(e) The requirement in § 36.4307(a) that a lender obtain in prior approval of the Secretary before closing a joint loan if the lender or class of lenders is eligible or has been approved by the

Secretary to close loans on the automatic basis pursuant to 38 U.S.C. 3702(d).

(f) The requirements in § 36.4303(k) of this part concerning the giving of notice in assumption cases under 38 U.S.C. 3714.

(Authority: 38 U.S.C. 3714 and 3720)

[20 FR 4855, July 8, 1955, as amended at 20 FR 9180, Dec. 10, 1955; 23 FR 2217, Apr. 4, 1958; 27 FR 224, Jan. 9, 1962; 40 FR 34592, Aug. 18, 1975; 45 FR 53809, Aug. 13, 1980; 49 FR 13352, Apr. 4, 1984; 55 FR 37477, Sept. 12, 1990; 61 FR 28058, June 4, 1996; 63 FR 12004, Mar. 12, 1998]

### § 36.4336 Eligibility of loans; reasonable value requirements.

(a) Evidence of guaranty or insurance shall be issued in respect to a loan for any of the purposes specified in 38 U.S.C. 3710(a) only if:

(1) The proceeds of such loan have been used to pay for the property purchased, constructed, repaired, refinanced, altered, or improved and;

(2)(i) Except as to refinancing loans pursuant to 38 U.S.C. 3710(a)(8), (a)(9)(B)(i), (a)(11), or (b)(7) and energy efficient mortgages pursuant to 38 U.S.C. 3710(d), the loan (including any scheduled deferred interest added to principal) does not exceed the reasonable value of the property or projected reasonable value of a new home which is security for a graduated payment mortgage loan, as appropriate, as determined by the Secretary, and

(ii) For the purpose of determining the reasonable value of a graduated payment mortgage loan to purchase a new home, the reasonable value of the property as of the time the loan is made shall be calculated to increase at a rate not in excess of 2.5 percent per year, but in no event may the projected value of the property exceed 115 percent of the initially established reasonable value, and

(Authority: 38 U.S.C. 3703(d)(2))

(3) The veteran has certified, in such form as the Secretary may prescribe, that the veteran has paid in cash from his or her own resources on account of such purchase, construction, alteration, repair, or improvement a sum equal to the difference, if any, between the purchase price or cost of the property and its reasonable value.

(4) A loan guaranteed under 38 U.S.C. 3710(d) which includes the cost of energy efficient improvements may exceed the reasonable value of the property. The cost of the energy efficient improvements that may be financed may not exceed $3,000; provided, however, that up to $6,000 in energy efficient improvements may be financed if the increase in the monthly payment for principal and interest does not exceed the likely reduction in monthly utility costs resulting from the energy efficient improvements.

(Authority: 38 U.S.C. 3710)

(b) Notwithstanding that the aggregate of the loan amount in the case of loans for the purposes specified in paragraph (a) of this section, and the amount remaining unpaid on taxes, special assessments, prior mortgage indebtedness, or other obligations of any character secured by enforceable superior liens or a right to such lien existing as of the date the loan is closed exceeds the reasonable value of such property as of said date and that evidence of guaranty or insurance credit is issued in respect thereof, as between the holder and Secretary (for the purpose of computing the claim on the guaranty or insurance and for the purposes of § 36.4320, and all accountings), the indebtedness which is the subject of the guaranty or insurance shall be deemed to have been reduced as of the date of the loan by a sum equal to such excess, less any amounts secured by liens released or paid on the obligations secured by such superior liens or rights by a holder or others without expense to or obligation on the debtor resulting from such payment, or release of lien or right; and all payments made on the loan shall be applied to the indebtedness as so reduced. Nothing in

this paragraph affects any right or liability resulting from fraud or willful misrepresentation.

(Authority: 38 U.S.C. 501, 3703(c)(1); 38 U.S.C. 501, 3710, 3712)

[33 FR 6975, May 9, 1968, as amended at 35 FR 17180, Nov. 7, 1970; 40 FR 34592, Aug. 18, 1975; 46 FR 43673, Aug. 31, 1981; 47 FR 15139, Apr. 8, 1982; 50 FR 3335, Jan. 24, 1985; 60 FR 38262, July 26, 1995]

UNDERWRITING STANDARDS, PROCESSING PROCEDURES, AND LENDER RESPONSIBILITY AND CERTIFICATION

### § 36.4337 Underwriting standards, processing procedures, lender responsibility, and lender certification.

(a) *Use of standards.* The standards contained in paragraphs (c) through (j) of this section will be used to determine whether the veteran's present and anticipated income and expenses, and credit history are satisfactory. These standards do not apply to loans guaranteed pursuant to 38 U.S.C. 3710(a)(8) except for cases where the Secretary is required to approve the loan in advance under § 36.4306a.

(Authority: 38 U.S.C. 3703, 3710)

(b) *Waiver of standards.* Use of the standards in paragraphs (c) through (j) of this section for underwriting home loans will be waived only in extraordinary circumstances when the Secretary determines, considering the totality of circumstances, that the veteran is a satisfactory credit risk.

(c) *Methods.* The two primary underwriting tools that will be used in determining the adequacy of the veteran's present and anticipated income are debt-to-income ratio and residual income analysis. They are described in paragraphs (d) through (f) of this section. Ordinarily, to qualify for a loan, the veteran must meet both standards. Failure to meet one standard, however, will not automatically disqualify a veteran. The following shall apply to cases where a veteran does not meet both standards:

(1) If the debt-to-income ratio is 41 percent or less, and the veteran does not meet the residual income standard, the loan may be approved with justification, by the underwriter's supervisor, as set out in paragraph (c)(4) of this section.

(2) If the debt-to-income ratio is greater than 41 percent (unless it is larger due solely to the existence of tax-free income which should be noted in the loan file), the loan may be approved with justification, by the underwriter's supervisor, as set out in paragraph (c)(4) of this section.

(3) If the ratio is greater than 41 percent and the residual income exceeds the guidelines by at least 20 percent, the second level review and statement of justification are not required.

(4) In any case described by paragraphs (c)(1) and (c)(2) of this section, the lender must fully justify the decision to approve the loan or submit the loan to the Secretary for prior approval in writing. The lender's statement must not be perfunctory, but should address the specific compensating factors, as set forth in paragraph (c)(5) of this section, justifying the approval of the loan. The statement must be signed by the underwriter's supervisor. It must be stressed that the statute requires not only consideration of a veteran's present and anticipated income and expenses, but also that the veteran be a satisfactory credit risk. Therefore, meeting both the debt-to-income ratio and residual income standards does not mean that the loan is automatically approved. It is the lender's responsibility to base the loan approval or disapproval on all the factors present for any individual veteran. The veteran's credit must be evaluated based on the criteria set forth in paragraph (g) of this section as well as a variety of compensating factors that should be evaluated.

(5) The following are examples of acceptable compensating factors to be considered in the course of underwriting a loan:

(i) Excellent long-term credit;

(ii) Conservative use of consumer credit;

(iii) Minimal consumer debt;

(iv) Long-term employment;

(v) Significant liquid assets;

(vi) Downpayment or the existence of equity in refinancing loans;

(vii) Little or no increase in shelter expense;

(viii) Military benefits;

(ix) Satisfactory homeownership experience;

(x) High residual income;

(xi) Low debt-to-income ratio;

(xii) Tax credits of a continuing nature, such as tax credits for child care; and

(xiii) Tax benefits of home ownership.

(6) The list in paragraph (c)(5) of this section is not exhaustive and the items are not in any priority order. Valid compensating factors should represent unusual strengths rather than mere satisfaction of basic program requirements. Compensating factors must be relevant to the marginality or weakness.

(d) *Debt-to-income ratio.* A debt-to-income ratio that compares the veteran's anticipated monthly housing expense and total monthly obligations to his or her stable monthly income will be computed to assist in the assessment of the potential risk of the loan. The ratio will be determined by taking the sum of the monthly Principal, Interest, Taxes and Insurance (PITI) of the loan being applied for, homeowners and other assessments such as special assessments, condominium fees, homeowners association fees, etc., and any long-term obligations divided by the total of gross salary or earnings and other compensation or income. The ratio should be rounded to the nearest two digits; e.g., 35.6 percent would be rounded to 36 percent. The standard is 41 percent or less. If the ratio is greater than 41 percent, the steps cited in paragraphs (c)(1) through (c)(6) of this section apply.

(e) *Residual income guidelines.* The guidelines provided in this paragraph for residual income will be used to determine whether the veteran's monthly residual income will be adequate to meet living expenses after estimated monthly shelter expenses have been paid and other monthly obligations have been met. All members of the household must be included in determining if the residual income is sufficient. They must be counted even if the veteran's spouse is not joining in title or on the note, or if there are any other individuals depending on the veteran for support, such as children from a spouse's prior marriage who are not the veteran's legal dependents. It is appropriate, however, to reduce the number of members of a household to be counted for residual income purposes if there is sufficient verified income not otherwise included in the loan analysis, such as child support being regularly received as discussed in paragraph (e)(4) of this section. In the case of a spouse not to be obligated on the note, verification that he/she has stable and reliable employment as discussed in paragraph (f)(3) of this section would allow not counting the spouse in determining the sufficiency of the residual income. The guidelines for residual income are based on data supplied in the Consumer Expenditure Survey (CES) published by the Department of Labor's Bureau of Labor Statistics. Regional minimum incomes have been developed for loan amounts up to $79,999 and for loan amounts of $80,000 and above. It is recognized that the purchase price of the property may affect family expenditure levels in individual cases. This factor may be given consideration in the final determination in individual loan analyses. For example, a family purchasing in a higher-priced neighborhood may feel a need to incur higher-than-average expenses to support a lifestyle comparable to that in their environment, whereas a substantially lower-priced home purchase may not compel such expenditures. It should also be clearly understood from this information that no single factor is a final determinant in any applicant's qualification for a VA-guaranteed loan. Once the residual income has been established, other important factors must be examined. One such consideration is the amount being paid currently for rental or housing expenses. If the proposed shelter expense is materially in excess of what is currently being paid, the case may require closer scrutiny. In such cases, consideration should be given to the ability of the borrower and spouse to accumulate liquid assets, such as cash and bonds, and to the amount of debts incurred while paying a lesser amount for shelter. For example, if an application indicates little or no capital reserves and excessive obligations, it may not be reasonable to conclude that a substantial increase in shelter expenses can be

absorbed. Another factor of prime importance is the applicant's manner of meeting obligations. A poor credit history alone is a basis for disapproving a loan, as is an obviously inadequate income. When one or the other is marginal, however, the remaining aspect must be closely examined to assure that the loan applied for will not exceed the applicant's ability or capacity to repay. Therefore, it is important to remember that the figures provided below for residual income are to be used as a guide and should be used in conjunction with the steps outlined in paragraphs (c) through (j) of this section. The residual income guidelines are as follows:

(1) Table of residual incomes by region (for loan amounts of $79,999 and below):

TABLE OF RESIDUAL INCOMES BY REGION

[For loan amounts of $79,999 and below]

| Family size * | Northeast | Midwest | South | West |
|---|---|---|---|---|
| 1 | 390 | 382 | 382 | 425 |
| 2 | 654 | 641 | 641 | 713 |
| 3 | 788 | 772 | 772 | 859 |
| 4 | 888 | 868 | 868 | 967 |
| 5 | 921 | 902 | 902 | 1,004 |

* For families with more than five members, add $75 for each additional member up to a family of seven. "Family" includes all members of the household.

(2) Table of residual incomes by region (for loan amounts of $80,000 and above):

TABLE OF RESIDUAL INCOMES BY REGION

[For loan amounts of $80,000 and above]

| Family size * | Northeast | Midwest | South | West |
|---|---|---|---|---|
| 1 | 450 | 441 | 441 | 491 |
| 2 | 755 | 738 | 738 | 823 |
| 3 | 909 | 889 | 889 | 990 |
| 4 | 1,025 | 1,003 | 1,003 | 1,117 |
| 5 | 1,062 | 1,039 | 1,039 | 1,158 |

* For families with more than five members, add $80 for each additional member up to a family of seven. "Family" includes all members of the household.

(3) *Geographic regions for residual income guidelines:* Northeast—Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island and Vermont; Midwest—Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota and Wisconsin; South—Alabama, Arkansas, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, Puerto Rico, South Carolina, Tennessee, Texas, Virginia, West Virginia; West—Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming.

(4) *Military adjustments.* For loan applications involving an active-duty servicemember or military retiree, the residual income figures will be reduced by a minimum of 5 percent if there is a clear indication that the borrower or spouse will continue to receive the benefits resulting from the use of facilities on a nearby military base. (This reduction applies to tables in paragraph (e) of this section.)

(f) *Stability and reliability of income.* Only stable and reliable income of the veteran and spouse can be considered in determining ability to meet mortgage payments. Income can be considered stable and reliable if it can be concluded that it will continue during the foreseeable future.

(1) *Verification.* Income of the borrower and spouse which is derived from employment and which is considered in determining the family's ability to meet the mortgage payments, payments on debts and other obligations, and other expenses must be verified. If the spouse is employed and will be contractually obligated on the loan, the combined income of both the veteran and spouse is considered when the income of the veteran alone is not sufficient to qualify for the amount of the loan sought. In other than community property states, if the spouse will not be contractually obligated on the loan, Regulation B (12 CFR part 202), promulgated by the Federal Reserve Board pursuant to the Equal Credit Opportunity Act, prohibits any request for, or consideration of, information concerning the spouse (including income, employment, assets, or liabilities), except that if the applicant is relying on alimony, child support, or maintenance payments from a spouse or former spouse as a basis for repayment of the loan, information concerning such spouse or former spouse may be requested and considered (see paragraph (f)(4) of this section). In community

property states, information concerning a spouse may be requested and considered in the same manner as that for the applicant. The standards applied to income of the veteran are also applicable to that of the spouse. There can be no discounting of income on account of sex, marital status, or any other basis prohibited by the Equal Credit Opportunity Act. Income claimed by an applicant that is not or cannot be verified cannot be considered when analyzing the loan. If the veteran or spouse has been employed by a present employer for less than 2 years, a 2-year history covering prior employment, schooling, or other training must be secured. Any periods of unemployment must be explained. Employment verifications and pay stubs must be no more than 120 days (180 days for new construction) old to be considered valid. For loans closed automatically, this requirement will be considered satisfied if the date of the employment verification is within 120 days (180 days for new construction) of the date the note is signed. For prior approval loans, this requirement will be considered satisfied if the verification of employment is dated within 120 days of the date the application is received by VA.

(2) *Active-duty, Reserve, or National Guard applicants.* (i) In the case of an active-duty applicant, a military Leave & Earnings Statement is required and will be used instead of an employment verification. The statement must be no more than 120 days old (180 days for new construction) and must be the original or a lender-certified copy of the original. For loans closed automatically, this requirement is satisfied if the date of the Leave & Earnings Statement is within 120 days (180 days for new construction) of the date the note is signed. For prior approval loans, this requirement will be considered satisfied if the verification of employment is dated within 120 days of the date the application is received by VA.

(ii) For servicemembers within 12 months of release from active duty, or members of the Reserves or National Guard within 12 months of release, one of the following is also required:

(A) Documentation that the servicemember has in fact already reenlisted or extended his/her period of active duty or Reserve or National Guard service to a date beyond the 12-month period following the projected closing of the loan.

(B) Verification of a valid offer of local civilian employment following release from active duty. All data pertinent to sound underwriting procedures (date employment will begin, earnings, etc.) must be included.

(C) A statement from the servicemember that he/she intends to reenlist or extend his/her period of active duty or Reserve or National Guard service to a date beyond the 12 month period following the projected loan closing date, and a statement from the servicemember's commanding officer confirming that the servicemember is eligible to reenlist or extend his/her active duty or Reserve or National Guard service as indicated and that the commanding officer has no reason to believe that such reenlistment or extension will not be granted.

(D) Other unusually strong positive underwriting factors, such as a downpayment of at least 10 percent, significant cash reserves, or clear evidence of strong ties to the community coupled with a nonmilitary spouse's income so high that only minimal income from the active duty servicemember or member of the Reserves or National Guard is needed to qualify.

(iii) Each active-duty member who applies for a loan must be counseled through the use of VA Form 26–0592, Counseling Checklist for Military Homebuyers. Lenders must submit a signed and dated VA Form 26–0592 with each prior approval loan application or automatic loan report involving a borrower on active duty.

(3) *Income reliability.* Income received by the borrower and spouse is to be used only if it can be concluded that the income will continue during the foreseeable future and, thus, should be properly considered in determining ability to meet the mortgage payments. If an employer puts N/A or otherwise declines to complete a verification of employment statement regarding the probability of continued

employment, no further action is required of the lender. Reliability will be determined based on the duration of the borrower's current employment together with his or her overall documented employment history. There can be no discounting of income solely because it is derived from an annuity, pension or other retirement benefit, or from part-time employment. However, unless income from overtime work and part-time or second jobs can be accorded a reasonable likelihood that it is continuous and will continue in the foreseeable future, such income should not be used. Generally, the reliability of such income cannot be demonstrated unless the income has continued for 2 years. The hours of duty and other work conditions of the applicant's primary job, and the period of time in which the applicant was employed under such arrangement, must be such as to permit a clear conclusion as to a good probability that overtime or part-time or secondary employment can and will continue. Income from overtime work and part-time jobs not eligible for inclusion as primary income may, if properly verified for at least 12 months, be used to offset the payments due on debts and obligations of an intermediate term, i.e., 6 to 24 months. Such income must be described in the loan file. The amount of any pension or compensation and other income, such as dividends from stocks, interest from bonds, savings accounts, or other deposits, rents, royalties, etc., will be used as primary income if it is reasonable to conclude that such income will continue in the foreseeable future. Otherwise, it may be used only to offset intermediate-term debts, as described in this paragraph. Also, the likely duration of certain military allowances cannot be determined and, therefore, will be used only to offset intermediate-term debts, as described in this paragraph. Such allowances are: Pro-pay, flight or hazard pay, and overseas or combat pay, all of which are subject to periodic review and/or testing of the recipient to ascertain whether eligibility for such pay will continue. Only if it can be shown that such pay has continued for a prolonged period and can be expected to continue because of the nature of the recipient's assigned duties, will such income be considered as primary income. For instance, flight pay verified for a pilot can be regarded as probably continuous and, thus, should be added to the base pay. Income derived from service in the Reserves or National Guard may be used if the applicant has served in such capacity for a period of time sufficient to evidence good probability that such income will continue beyond 12 months. The total period of active and reserve service may be helpful in this regard. Otherwise, such income may be used to offset intermediate-term debts. There are a number of additional income sources whose contingent nature precludes their being considered as available for repayment of a long-term mortgage obligation. Temporary income items such as VA educational allowances and unemployment compensation do not represent stable and reliable income and will not be taken into consideration in determining the ability of the veteran to meet the income requirement of the governing law. As required by the Equal Opportunity Act Amendments of 1976, Public Law 94–239, income from public assistance programs is used to qualify for a loan if it can be determined that the income will probably continue for 3 years or more.

(4) *Tax-exempt income.* Special consideration can be given to verified nontaxable income once it has been established that such income is likely to continue (and remain untaxed) into the foreseeable future. Such income includes certain military allowances, child support payments, workers' compensation benefits, disability retirement payments and certain types of public assistance payments. In such cases, current income tax tables may be used to determine an amount which can be prudently employed to adjust the borrower's actual income. This adjusted or ''grossed up'' income may be used to calculate the monthly debt-to-income ratio, provided the analysis is documented. Only the borrower's actual income may be used to calculate the residual income. Care should be exercised to ensure that the income is in fact tax-exempt.

(5) *Alimony, child support, maintenance, workers' compensation, foster care*

*payments.* (i) If an applicant chooses to reveal income from alimony, child support or maintenance payments (after first having been informed that any such disclosure is voluntary pursuant to the Federal Reserve Board's Regulation B), such payments are considered as income to the extent that the payments are likely to be consistently made. Factors to be considered in determining the likelihood of consistent payments include, but are not limited to: Whether the payments are received pursuant to a written agreement or court decree; the length of time the payments have been received; the regularity of receipt; the availability of procedures to compel payment; and the creditworthiness of the payor, including the credit history of the payor when available under the Fair Credit Reporting Act or other applicable laws. However, the Fair Credit Reporting Act (15 U.S.C. 1681(b)) limits the permissible purposes for which credit reports may be ordered, in the absence of written instructions of the consumer to whom the report relates, to business transactions involving the subject of the credit report or extensions of credit to the subject of the credit report.

(ii) If the applicant chooses to reveal income related to workers' compensation, it will be considered as income to the extent it can be determined such income will continue.

(iii) Income received specifically for the care of any foster child(ren) may be counted as income if documented. Generally, however, such foster care income is to be used only to balance the expenses of caring for the foster child(ren) against any increased residual income requirements.

(6) *Military quarters allowance.* With respect to off-base housing (quarters) allowances for service personnel on active duty, it is the policy of the Department of Defense to utilize available on-base housing when possible. In order for a quarters allowance to be considered as continuing income, it is necessary that the applicant furnish written authorization from his or her commanding officer for off-base housing. This authorization should verify that quarters will not be made available and that the individual should make permanent arrangements for nonmilitary housing. A Department of Defense form, DD Form 1747, Status of Housing Availability, is used by the Family Housing Office to advise personnel regarding family housing. The applicant's quarters allowance cannot be considered unless item b (Permanent) or d is completed on DD Form 1747, dated October 1990. Of course, if the applicant's income less quarters allowance is sufficient, there is no need for assurance that the applicant has permission to occupy nonmilitary housing provided that a determination can be made that the occupancy requirements of the law will be met. Also, authorization to obtain off-base housing will not be required when certain duty assignments would clearly qualify service personnel with families for quarters allowance. For instance, off-base housing authorizations need not be obtained for service personnel stationed overseas who are not accompanied by their families, recruiters on detached duty, or military personnel stationed in areas where no on-base housing exists. In any case in which no off-base housing authorization is obtained, an explanation of the circumstances justifying its omission must be included with the loan application except when it has been established by the VA facility of jurisdiction that the waiting lists for on-base housing are so long that it is improbable that individuals desiring to purchase off-base housing would be precluded from doing so in the foreseeable future. If stations make such a determination, a release shall be issued to inform lenders.

(7) *Automobile (or similar) allowance.* Generally, automobile allowances are paid to cover specific expenses related to an applicant's employment, and it is appropriate to use such income to offset a corresponding car payment. However, in some instances, such an allowance may exceed the car payment. With proper documentation, income from a car allowance which exceeds the car payment can be counted as effective income. Likewise, any other similar type of allowance which exceeds the specific expense involved may be added to gross income to the extent it is documented to exceed the actual expense.

(8) *Commissions.* When all or a major portion of the veteran's income is derived from commissions, it will be necessary to establish the stability of such income if it is to be considered in the loan analysis for the repayment of the mortgage debt and/or short-term obligations. In order to assess the value of such income, lenders should obtain written verification of the actual amount of commissions paid to date, the basis for the payment of such commissions and when commissions are paid; i.e., monthly, quarterly, semi-annually, or annually. Lenders should also obtain signed and dated individual income tax returns, plus applicable schedules, for the previous 2 years, or for whatever additional period is deemed necessary to properly demonstrate a satisfactory earnings record. The length of the veteran's employment in the type of occupation for which commissions are paid is also an important factor in the assessment of the stability of the income. If the veteran has been employed for a relatively short time, the income should not normally be considered stable unless the product or service was the same or closely related to the product or service sold in an immediate prior position. Generally, income from commissions is considered stable when the applicant has been receiving such income for at least 2 years. Less than 2 years of income from commissions cannot usually be considered stable. When an applicant has received income from commissions for less than 1 year, it will rarely be possible to demonstrate that the income is stable for qualifying purposes; such cases would require in-depth development.

(9) *Self-employment.* Generally, income from self-employment is considered stable when the applicant has been in business for at least 2 years. Less than 2 years of income from self-employment cannot usually be considered stable unless the applicant has had previous related employment and/or extensive specialized training. When an applicant has been self-employed less than 1 year, it will rarely be possible to demonstrate that the income is stable for qualifying purposes; such cases would require in-depth development. The following documentation is required for all self-employed borrowers:

(i) A profit-and-loss statement for the prior fiscal year (12-month accounting cycle), plus the period year to date since the end of the last fiscal year (or for whatever shorter period records may be available), and balance sheet based on the financial records. The financial statement must be sufficient for a loan underwriter to determine the necessary information for loan approval and an independent audit (on the veteran and/or the business) by a Certified Public Accountant will be required if necessary for such determination; and

(ii) Copies of signed individual income tax returns, plus all applicable schedules for the previous 2 years, or for whatever additional period is deemed necessary to properly demonstrate a satisfactory earnings record, must be obtained. If the business is a corporation or partnership, copies of signed Federal business income tax returns for the previous two years plus all applicable schedules for the corporation or partnership must be obtained; and

(iii) If the business is a corporation or partnership, a list of all stockholders or partners showing the interest each holds in the business will be required. Some cases may justify a written credit report on the business as well as the applicant. When the business is of an unusual type and it is difficult to determine the probability of its continued operation, explanation as to the function and purpose of the business may be needed from the applicant and/or any other qualified party with the acknowledged expertise to express a valid opinion.

(10) *Recently discharged veterans.* Loan applications received from recently discharged veterans who have little or no employment experience other than their military occupation and from veterans seeking VA-guaranteed loans who have retired after 20 years of active military duty require special attention. The retirement income of the latter veterans in many cases may not be sufficient to meet the statutory income requirements for the loan amount sought. Many have obtained full-time employment and have been

employed in their new jobs for a very short time.

(i) It is essential in determining whether veterans in these categories qualify from the income standpoint for the amount of the loan sought, that the facts in respect to their present employment and retirement income be fully developed, and that each case be considered on its individual merits.

(ii) In most cases the veteran's current income or current income plus his or her retirement income is sufficient. The problem lies in determining whether it can be properly concluded that such income level will continue for the foreseeable future. If the veteran's employment status is that of a trainee or an apprentice, this will, of course, be a factor. In cases of the self-employed, the question to be resolved is whether there are reasonable prospects that the business enterprise will be successful and produce the required income. Unless a favorable conclusion can be made, the income from such source should not be considered in the loan analysis.

(iii) If a recently discharged veteran has no prior employment history and the veteran's verification of employment shows he or she has not been on the job a sufficient time in which to become established, consideration should be given to the duties the veteran performed in the military service. When it can be determined that the duties a veteran performed in the service are similar or are in direct relation to the duties of the applicant's present position, such duties may be construed as adding weight to his or her present employment experience and the income from the veteran's present employment thus may be considered available for qualifying the loan, notwithstanding the fact that the applicant has been on the present job only a short time. This same principle may be applied to veterans recently retired from the service. In addition, when the veteran's income from retirement, in relation to the total of the estimated shelter expense, long-term debts and amount available for family support, is such that only minimal income from employment is necessary to qualify from the income standpoint, it would be proper to resolve the doubt in favor of the veteran. It would be erroneous, however, to give consideration to a veteran's income from employment for a short duration in a job requiring skills for which the applicant has had no training or experience.

(iv) To illustrate the provisions of paragraph (f)(10), it would be proper to use short-term employment income in qualifying a veteran who had experience as an airplane mechanic in the military service and the individual's employment after discharge or retirement from the service is in the same or allied fields; e.g., auto mechanic or machinist. This presumes, however, that the verification of employment included a statement that the veteran was performing the duties of the job satisfactorily, the possibility of continued employment was favorable and that the loan application is eligible in all other respects. An example of non-qualifying experience is that of a veteran who was an Air Force pilot and has been employed in insurance sales on commission for a short time. Most cases, of course, fall somewhere between those extremes. It is for this reason that the facts of each case must be fully developed prior to closing the loan automatically or submitting the case to VA for prior approval.

(11) *Employment of short duration.* The provisions of paragraph (f)(7) of this section are similarly applicable to applicants whose employment is of short duration. Such cases will entail careful consideration of the employer's confirmation of employment, probability of permanency, past employment record, the applicant's qualifications for the position, and previous training, including that received in the military service. In the event that such considerations do not enable a determination that the income from the veteran's current position has a reasonable likelihood of continuance, such income should not be considered in the analysis. Applications received from persons employed in the building trades, or in other occupations affected by climatic conditions, should be supported by documentation evidencing the applicant's total earnings to date and covering a period of not less than 1 year as well as signed and dated copies

of complete income tax returns, including all schedules for the past 2 years or for whatever additional period is deemed necessary to properly demonstrate a satisfactory earnings record. If the applicant works out of a union, evidence of the previous year's earnings should be obtained together with a verification of employment from the current employer.

(12) *Rental income*—(i) *Multi-unit subject property*. When the loan pertains to a structure with more than a one-family dwelling unit, the prospective rental income will not be considered unless the veteran can demonstrate a reasonable likelihood of success as a landlord, and sufficient cash reserves are verified to enable the veteran to carry the mortgage loan payments (principal, interest, taxes, and insurance) without assistance from the rental income for a period of at least 6 months. The determination of the veteran's likelihood of success as a landlord will be based on documentation of any prior experience in managing rental units or other collection activities. The amount of rental income to be used in the loan analysis will be based on 75 percent of the amount indicated on the lease or rental agreement, unless a greater percentage can be documented.

(ii) *Rental of existing home.* Proposed rental of a veteran's existing property may be used to offset the mortgage payment on that property, provided there is no indication that the property will be difficult to rent. If available, a copy of the rental agreement should be obtained. It is the responsibility of the loan underwriter to be aware of the condition of the local rental market. For instance, in areas where the rental market is very strong the absence of a lease should not automatically prohibit the offset of the mortgage by the proposed rental income.

(iii) *Other rental property*. If income from rental property will be used to qualify for the new loan, the documentation required of a self-employed applicant should be obtained together with evidence of cash reserves equaling 3 months PITI on the rental property. As for any self-employed earnings (see paragraph (f)(7) of this section), depreciation claimed may be added back in as income. In the case of a veteran who has no experience as a landlord, it is unlikely that the income from a rental property may be used to qualify for the new loan.

(13) *Taxes and other deductions.* Deductions to be applied for Federal income taxes and Social Security may be obtained from the Employer's Tax Guide (Circular E) issued by the Internal Revenue Service (IRS). (For veterans receiving a mortgage credit certificate (MCC), see paragraph (f)(14) of this section.) Any State or local taxes should be estimated or obtained from charts similar to those provided by IRS which may be available in those states with withholding taxes. A determination of the amount paid or withheld for retirement purposes should be made and used when calculating deductions from gross income. In determining whether a veteran-applicant meets the income criteria for a loan, some consideration may be given to the potential tax benefits the veteran will realize if the loan is approved. This can be done by using the instructions and worksheet portion of IRS Form W–4, Employee's Withholding Allowance Certificate, to compute the total number of permissible withholding allowances. That number can then be used when referring to IRS Circular E and any appropriate similar State withholding charts to arrive at the amount of Federal and State income tax to be deducted from gross income.

(14) *Mortgage credit certificates.* (i) The Internal Revenue Code (26 U.S.C.) as amended by the Tax Reform Act of 1984, allows states and other political subdivisions to trade in all or part of their authority to issue mortgage revenue bonds for authority to issue MCCs. Veterans who are recipients of MCCs may realize a significant reduction in their income tax liability by receiving a Federal tax credit for a percentage of their mortgage interest payment on debt incurred on or after January 1, 1985.

(ii) Lenders must provide a copy of the MCC to VA with the home loan application. The MCC will specify the rate of credit allowed and the amount of certified indebtedness; i.e., the indebtedness incurred by the veteran to acquire a principal residence or as a

qualified home improvement or rehabilitation loan.

(iii) For credit underwriting purposes, the amount of tax credit allowed to a veteran under an MCC will be treated as a reduction in the monthly Federal income tax. For example, a veteran having a $600 monthly interest payment and an MCC providing a 30-percent tax credit would receive a $180 (30 percent×$600) tax credit each month. However, because the annual tax credit, which amounts to $2,160 (12×$180), exceeds $2,000 and is based on a 30-percent credit rate, the maximum tax credit the veteran can receive is limited to $2,000 per year (Pub. L. 98–369) or $167 per month ($2,000/12). As a consequence of the tax credit, the interest on which a deduction can be taken will be reduced by the amount of the tax credit to $433 ($600 − $167). This reduction should also be reflected when calculating Federal income tax.

(iv) For underwriting purposes, the amount of the tax credit is limited to the amount of the veteran's maximum tax liability. If, in the example in paragraph (f)(14)(iii) of this section, the veteran's tax liability for the year were only $1,500, the monthly tax credit would be limited to $125 ($1,500/12).

(g) *Credit.* The conclusion reached as to whether or not the veteran and spouse are satisfactory credit risks must also be based on a careful analysis of the available credit data. Regulation B (12 CFR part 202), promulgated by the Federal Reserve Board pursuant to the Equal Credit Opportunity Act, requires that lenders, in evaluating creditworthiness, shall consider, on the applicant's request, the credit history, when available, of any account reported in the name of the applicant's spouse or former spouse which the applicant can demonstrate accurately reflects the applicant's creditworthiness. In other than community property states, if the spouse will not be contractually obligated on the loan, Regulation B prohibits any request for or consideration of information about the spouse concerning income, employment, assets or liabilities. In community property states, information concerning a spouse may be requested and considered in the same manner as that for the applicant.

(1) *Adverse data.* If the analysis develops any derogatory credit information and, despite such facts, it is determined that the veteran and spouse are satisfactory credit risks, the basis for the decision must be explained. If a veteran and spouse have debts outstanding which have not been paid timely, or which they have refused to pay, the fact that the outstanding debts are paid after the acceptability of the credit is questioned or in anticipation of applying for new credit does not, of course, alter the fact that the record for paying debts has been unsatisfactory. With respect to unpaid debts, lenders may take into consideration a veteran's claim of bona fide or legal defenses. Such defenses are not applicable when the debt has been reduced to judgment. Where a collection account has been established, if it is determined that the borrower is a satisfactory credit risk, it is not mandatory that such an account be paid off in order for a loan to be approved. Court-ordered judgments, however, must be paid off before a new loan is approved.

(2) *Bankruptcy.* When the credit information shows that the borrower or spouse has been discharged in bankruptcy under the ''straight'' liquidation and discharge provisions of the bankruptcy law, this would not in itself disqualify the loan. However, in such cases it is necessary to develop complete information as to the facts and circumstances concerning the bankruptcy. Generally speaking, when the borrower or spouse, as the case may be, has been regularly employed (not self-employed) and has been discharged in bankruptcy within the last one to two years, it probably would not be possible to determine that the borrower or spouse is a satisfactory credit risk unless both of the following requirements are satisfied:

(i) The borrower or spouse has obtained credit subsequent to the bankruptcy and has met the credit payments in a satisfactory manner over a continued period; and

(ii) The bankruptcy was caused by circumstances beyond the control of the borrower or spouse, e.g., unemployment, prolonged strikes, medical bills not covered by insurance. Divorce is not generally viewed as beyond the

control of the borrower and/or spouse. The circumstances alleged must be verified. If a borrower or spouse is self-employed, has been adjudicated bankrupt, and subsequently obtains a permanent position, a finding as to satisfactory credit risk may be made provided there is no derogatory credit information prior to self-employment, there is no derogatory credit information subsequent to the bankruptcy, and the failure of the business was not due to misconduct. If a borrower or spouse has been discharged in bankruptcy within the past 12 months, it will not generally be possible to determine that the borrower or spouse is a satisfactory credit risk.

(3) *Petition under chapter 13 of Bankruptcy Code.* A petition under chapter 13 of the Bankruptcy Code (11 U.S.C.) filed by the borrower or spouse is indicative of an effort to pay their creditors. Some plans may provide for full payment of debts while others arrange for payment of scaled-down debts. Regular payments are made to a court-appointed trustee over a 2- to 3-year period (or up to 5 years in some cases). When the borrowers have made all payments in a satisfactory manner, they may be considered as having reestablished satisfactory credit. When they apply for a home loan before completion of the payout period, favorable consideration may nevertheless be given if at least 12 months' worth of payments have been made satisfactorily and the Trustee or Bankruptcy Judge approves of the new credit.

(4) *Foreclosures.* (i) When the credit information shows that the veteran or spouse has had a foreclosure on a prior mortgage; e.g., a VA-guaranteed or HUD-insured mortgage, this will not in itself disqualify the borrower from obtaining the loan. Lenders and field station personnel should refer to the preceding guidelines on bankruptcies for cases involving foreclosures. As with a borrower who has been adjudicated bankrupt, it is necessary to develop complete information as to the facts and circumstances of the foreclosure.

(ii) When VA pays a claim on a VA-guaranteed loan as a result of a foreclosure, the original veteran may be required to repay any loss to the Government. In some instances VA may waive the veteran's debt, in part or totally, based on the facts and circumstances of the case. However, guaranty entitlement cannot be restored unless the Government's loss has been repaid in full, regardless of whether or not the debt has been waived, compromised, or discharged in bankruptcy. Therefore, a veteran who is seeking a new VA loan after having experienced a foreclosure on a prior VA loan will in most cases have only remaining entitlement to apply to the new loan. The lender should assure that the veteran has sufficient entitlement for its secondary marketing purposes.

(5) *Federal debts.* An applicant for a Federally-assisted loan will not be considered a satisfactory credit risk for such loan if the applicant is presently delinquent or in default on any debt to the Federal Government, e.g., a Small Business Administration loan, a U.S. Guaranteed Student loan, a debt to the Public Health Service, or where there is a judgment lien against the applicant's property for a debt owed to the Government. The applicant may not be approved for the loan until the delinquent account has been brought current or satisfactory arrangements have been made between the borrower and the Federal agency owed, or the judgment is paid or otherwise satisfied. Of course, the applicant must also be able to otherwise qualify for the loan from an income and remaining credit standpoint. Refinancing under VA's interest rate reduction refinancing provisions, however, is allowed even if the borrower is delinquent on the VA guaranteed mortgage being refinanced. Prior approval processing is required in such cases.

(6) *Absence of credit history.* The fact that recently discharged veterans may have had no opportunity to develop a credit history will not preclude a determination of satisfactory credit. Similarly, other loan applicants may not have established credit histories as a result of a preference for purchasing consumer items with cash rather than credit. There are also cases in which individuals may be genuinely wary of acquiring new obligations following bankruptcy, consumer credit counseling (debt proration), or other disruptive credit occurrence. The absence of

the credit history in these cases will not generally be viewed as an adverse factor in credit underwriting. However, before a favorable decision is made for cases involving bankruptcies or other derogatory credit factors, efforts should be made to develop evidence of timely payment of non-installment debts such as rent and utilities. It is anticipated that this special consideration in the absence of a credit history following bankruptcy would be the rare case and generally confined to bankruptcies that occurred over 3 years ago.

(7) *Consumer credit counseling plan.* If a veteran, or veteran and spouse, have prior adverse credit and are participating in a Consumer Credit Counseling plan, they may be determined to be a satisfactory credit risk if they demonstrate 12 months' satisfactory payments and the counseling agency approves the new credit. If a veteran, or veteran and spouse, have good prior credit and are participating in a Consumer Credit Counseling plan, such participation is to be considered a neutral factor, or even a positive factor, in determining creditworthiness.

(8) *Re-establishment of satisfactory credit.* In circumstances not involving bankruptcy, satisfactory credit is generally considered to be reestablished after the veteran, or veteran and spouse, have made satisfactory payments for 12 months after the date of the last derogatory credit item.

(9) *Long-term v. short-term debts.* All known debts and obligations including any alimony and/or child support payments of the borrower and spouse must be documented. Significant liabilities, to be deducted from the total income in determining ability to meet the mortgage payments are accounts that, generally, are of a relatively long term, i.e., 10 months or over. Other accounts for terms of less than 10 months must, of course, be considered in determining ability to meet family expenses. Certainly, any severe impact on the family's resources for any period of time must be considered in the loan analysis. For example, monthly payments of $300 on an auto loan with a remaining balance of $1,500 would be included in those obligations to be deducted from the total income regardless of the fact that the account can be expected to pay out in 5 months. It is clear that the applicant will, in this case, continue to carry the burden of those $300 payments for the first, most critical months of the home loan.

(10) *Requirements for verification.* If the credit investigation reveals debts or obligations of a material nature which were not divulged by the applicant, lenders must be certain to obtain clarification as to the status of such debts from the borrower. A proper analysis is obviously not possible unless there is total correlation between the obligations claimed by the borrower and those revealed by a credit report or deposit verification. Conversely, significant debts and obligations reported by the borrower must be dated. If the credit report fails to provide necessary information on such accounts, lenders will be expected to obtain their own verifications of those debts directly from the creditors. Credit reports and verifications must be no more than 120 days old (180 days for new construction) to be considered valid. For loans closed automatically, this requirement will be considered satisfied if the date of the credit report or verification is within 120 days (180 days for new construction) of the date the note is signed. For prior approval loans, this requirement will be considered satisfied if the date of the credit report or verification is within 120 days of the date of the application is received by VA. Of major significance are the applicant's rental history and outstanding or recently retired mortgages, if any, particularly prior VA loans. Lenders should be sure ratings on such accounts are obtained; a written explanation is required when ratings are not available. A determination is necessary as to whether alimony and/or child support payments are required. Verification of the amount of such obligations should be obtained, although documentation concerning an applicant's divorce should not be obtained automatically unless it is necessary to verify the amount of any alimony or child support liability indicated by the applicant. If in the routine course of processing the loan application, however, direct evidence is received (e.g., from the credit report) that an obligation to pay alimony or child support

exists (as opposed to mere evidence that the veteran was previously divorced), the discrepancy between the loan application and credit report can and should be fully resolved in the same manner as any other such discrepancy would be handled. When a pay stub or leave-and-earnings statement indicates an allotment, the lender must investigate the nature of the allotment(s) to determine whether the allotment is related to a debt. Debts assigned to an ex-spouse by a divorce decree will not generally be charged against a veteran-borrower.

(11) *Job-related expenses.* Known job-related expenses should be documented. This will include costs for any dependent care, significant commuting costs, etc. When a family's circumstances are such that dependent care arrangements would probably be necessary, it is important to determine the cost of such services in order to arrive at an accurate total of deductions.

(12) *Credit reports.* Credit reports obtained by lenders on VA-guaranteed loan applications must be either a three-file Merged Credit Report (MCR) or a Residential Mortgage Credit Report (RMCR). If used, the RMCR must meet the standards formulated jointly by the Department of Veterans Affairs, Federal National Mortgage Association, Federal Home Loan Mortgage Corporation, Federal Housing Administration, Farmers Home Administration, credit repositories, repository affiliated consumer reporting agencies and independent consumer reporting agencies. All credit reports obtained by the lender must be submitted to VA.

(h) *Borrower's personal and financial status.* The number and ages of dependents have an important bearing on whether income after deduction of fixed charges is sufficient to support the family. Type and duration of employment of both the borrower and spouse are important as an indication of stability of their employment. The amount of liquid assets owned by the borrower or spouse, or both, is an important factor in determining that they have sufficient funds to close the loan, as well as being significant in analyzing the overall qualifications for the loan. (It is imperative that adequate cash assets from the veteran's own resources are verified to allow the payment (see § 36.4336(a)(3)) of any difference between the sales price of the property and the loan amount, in addition to that necessary to cover closing costs, if the sales price exceeds the reasonable value established by VA.) Verifications must be no more than 120 days old (180 days for new construction) to be considered valid. For loans closed on the automatic basis, this requirement will be considered satisfied if the date of the deposit verification is within 120 days (180 days for new construction) of the date of the veteran's application to the lender. For prior approval loans, this requirement will be considered satisfied if the verification of employment is dated within 120 days of the date the application is received by VA. Current monthly rental or other housing expense is an important consideration when compared to that to be undertaken in connection with the contemplated housing purchase.

(i) *Estimated monthly shelter expenses.* It is important that monthly expenses such as taxes, insurance, assessments and maintenance and utilities be estimated accurately based on property location and type of house; e.g., old or new, large or small, rather than using or applying a ''rule of thumb'' to all properties alike. Maintenance and utility amounts for various types of property should be realistically estimated. Local utility companies should be consulted for current rates. The age and type of construction of a house may well affect these expenses. In the case of condominiums or houses in a planned unit development (PUD), the monthly amount of the maintenance assessment payable to a homeowners association should be added. If the amount currently assessed is less than the maximum provided in the covenants or master deed, and it appears likely that the amount will be insufficient for operation of the condominium or PUD, the amount used will be the maximum the veteran could be charged. If it is expected that real estate taxes will be raised, or if any special assessments are expected, the increased or additional amounts should be used. In special flood hazard areas, include the premium for any required flood insurance.

(j) *Lender responsibility.* (1) Lenders are fully responsible for developing all credit information; i.e., for obtaining verifications of employment and deposit, credit reports, and for the accuracy of the information contained in the loan application.

(2) Verifications of employment and deposits, and requests for credit reports and/or credit information must be initiated and received by the lender.

(3) In cases where the real estate broker/agent or any other party requests any of this information, the report(s) must be returned directly to the lender. This fact must be disclosed by appropriately completing the required certification on the loan application or report and the parties must be identified as agents of the lender.

(4) Where the lender relies on other parties to secure any of the credit or employment information or otherwise accepts such information obtained by any other party, such parties shall be construed for purposes of the submission of the loan documents to VA to be authorized agents of the lender, regardless of the actual relationship between such parties and the lender, even if disclosure is not provided to VA under paragraph (j)(3) of this section. Any negligent or willful misrepresentation by such parties shall be imputed to the lender as if the lender had processed those documents and the lender shall remain responsible for the quality and accuracy of the information provided to VA.

(5) All credit reports secured by the lender or other parties as identified in paragraphs (j)(3) and (j)(4) of this section shall be provided to VA. If updated credit reports reflect materially different information than that in other reports, such discrepancies must be explained by the lender and the ultimate decision as to the effects of the discrepancy upon the loan application fully addressed by the underwriter.

(k) *Lender certification.* Lenders originating loans are responsible for determining and certifying to VA on the appropriate application or closing form that the loan meets all statutory and regulatory requirements. Lenders will affirmatively certify that loans were made in full compliance with the law and loan guaranty regulations as prescribed in this section.

(1) *Definitions.* The definitions contained in part 42 of this title and the following definitions are applicable in this section.

(i) *Another appropriate amount.* In determining the appropriate amount of a lender's civil penalty in cases where the Secretary has not sustained a loss or where two times the amount of the Secretary's loss on the loan involved does not exceed $10,000, the Secretary shall consider:

(A) The materiality and importance of the false certification to the determination to issue the guaranty or to approve the assumption;

(B) The frequency and past pattern of such false certifications by the lender; and

(C) Any exculpatory or mitigating circumstances.

(ii) *Complaint* includes the assessment of liability served pursuant to this section.

(iii) *Defendant* means a lender named in the complaint.

(iv) *Lender* includes the holder approving loan assumptions pursuant to 38 U.S.C. 3714.

(2) *Procedures for certification.* (i) As a condition to VA issuance of a loan guaranty on all loans closed on or after October 27, 1994, and as a prerequisite to an effective loan assumption on all loans assumed pursuant to 38 U.S.C. 3714 on or after November 17, 1997, the following certification shall accompany each loan closing or assumption package:

The undersigned lender certifies that the (loan) (assumption) application, all verifications of employment, deposit, and other income and credit verification documents have been processed in compliance with 38 CFR part 36; that all credit reports obtained or generated in connection with the processing of this borrower's (loan) (assumption) application have been provided to VA; that, to the best of the undersigned lender's knowledge and belief the (loan) (assumption) meets the underwriting standards recited in chapter 37 of title 38 United States Code and 38 CFR part 36; and that all information provided in support of this (loan) (assumption) is true, complete and accurate to the best of the undersigned lender's knowledge and belief.

(ii) The certification shall be executed by an officer of the lender authorized to execute documents and act on behalf of the lender.

(3) Any lender who knowingly and willfully makes a false certification required pursuant to § 36.4337(k)(2) shall be liable to the United States Government for a civil penalty equal to two times the amount of the Secretary's loss on the loan involved or to another appropriate amount, not to exceed $10,000, whichever is greater.

(l) *Assessment of liability*. (1) Upon an assessment confirmed by the Under Secretary for Benefits, in consultation with the Investigating Official, that a certification, as required in this section, is false, a report of findings of the Under Secretary for Benefits shall be submitted to the Reviewing Official setting forth:

(i) The evidence that supports the allegations of a false certification and of liability;

(ii) A description of the claims or statements upon which the allegations of liability are based;

(iii) The amount of the VA demand to be made; and

(iv) Any exculpatory or mitigating circumstances that may relate to the certification.

(2) The Reviewing Official shall review all of the information provided and will either inform the Under Secretary for Benefits and the Investigating Official that there is not adequate evidence, that the lender is liable, or serve a complaint on the lender stating:

(i) The allegations of a false certification and of liability;

(ii) The amount being assessed by the Secretary and the basis for the amount assessed;

(iii) Instructions on how to satisfy the assessment and how to file an answer to request a hearing, including a specific statement of the lender's right to request a hearing by filing an answer and to be represented by counsel; and

(iv) That failure to file an answer within 30 days of the complaint will result in the imposition of the assessment without right to appeal the assessment to the Secretary.

(m) *Hearing procedures.* A lender hearing on an assessment established pursuant to this section shall be governed by the procedures recited at 38 CFR 42.8 through 42.47.

(n) *Additional remedies.* Any assessment under this section may be in addition to other remedies available to VA, such as debarment and suspension pursuant to 38 U.S.C. 3704 and part 44 of this title or loss of automatic processing authority pursuant to 38 U.S.C. 3702, or other actions by the Government under any other law including but not limited to title 18 U.S.C. and 31 U.S.C. 3732.

(Authority: 38 U.S.C. 3703, 3710)

(Approved by the Office of Management and Budget under control number 2900–0521)

[59 FR 49200, Sept. 27, 1994, as amended at 61 FR 56449, Nov. 1, 1996; 62 FR 53965, Oct. 17, 1997; 62 FR 63454, Dec. 1, 1997; 64 FR 19910, Apr. 23, 1999]

### § 36.4338 Death or insolvency of holder.

(a) Immediately upon the death of the holder and without the necessity of request or other action by the debtor or the Secretary, all sums then standing as a credit balance in a trust, or deposit, or other account to cover taxes, insurance accruals, or other items in connection with the loan secured by the encumbered property, whether stated to be such or otherwise designated, and which have not been credited on the note shall, nevertheless, be treated as a setoff and shall be deemed to have been credited thereon as of the date of the last debit to such account, so that the unpaid balance of the note as of that date will be reduced by the amount of such credit balance:

*Provided,* That any unpaid taxes, insurance premiums, ground rents, or advances may be paid by the holder of the indebtedness, at the holder's option, and the amount which otherwise would have been deemed to have been credited on the note reduced accordingly. This paragraph shall be applicable whether the estate of the deceased holder is solvent or insolvent.

(b) The provisions of paragraph (a) of this section shall also be applicable in the event of:

(1) Insolvency of holder;

(2) Initiation of any bankruptcy or reorganization, or liquidation proceedings as to the holder, whether voluntary or involuntary;

(3) Appointment of a general or ancillary receiver for the holder's property; or in any case

(4) Upon the written request of the debtor if all secured and due insurance premiums, taxes, and ground rents have been paid, and appropriate provisions made for future accruals.

(c) Upon the occurrence of any of the events enumerated in paragraph (a) or (b) of this section, interest on the note and on the credit balance of the deposits mentioned in paragraph (a) shall be set off against each other at the rate payable on the principal of the note, as of the date of last debit to the deposit account. Any excess credit of interest shall be treated as a set-off against the unpaid advances, if any, and the unpaid balance of the note.

(d) The provisions of paragraphs (a), (b) and (c) of this section shall apply also to corporations. The dissolution thereof by expiration of charter, by forfeiture, or otherwise shall be treated as is the death of an individual as provided in paragraph (a) of this section.

[13 FR 7279, Nov. 27, 1948, as amended at 40 FR 34593, Aug. 18, 1975]

### § 36.4339 Qualification for designated fee appraisers.

To qualify for approval as a designated fee appraiser, an applicant must show to the satisfaction of the Secretary that his or her character, experience, and the type of work in which he or she has had experience for at least 5 years qualifies the applicant to competently appraise and value within a prescribed area the type of property to which the approval relates.

[40 FR 34593, Aug. 18, 1975]

### § 36.4340 Restriction on designated fee appraisers.

(a) A designated fee appraiser shall not make an appraisal, excepting of alterations, improvements, or repairs to real property entailing a cost of not more than $3,500, if such appraiser is an officer, director, trustee, employer, or employee of the lender, contractor, or vendor.

(b) An appraisal made by a designated fee appraiser shall be subject to review and adjustment by the Secretary. The amount determined to be proper upon any such review or adjustment shall constitute the ''reasonable value'' for the purpose of determining the eligibility of the related loan.

[15 FR 4398, July 12, 1950, as amended at 24 FR 2655, Apr. 7, 1959; 43 FR 51016, Nov. 2, 1978]

### § 36.4342 Delegation of authority.

(a) Except as hereinafter provided, each employee of the Department of Veterans Affairs heretofore or hereafter appointed to, or lawfully filling, any position designated in paragraph (b) of this section is hereby delegated authority, within the limitations and conditions prescribed by law, to exercise the powers and functions of the Secretary with respect to the guaranty or insurance of loans and the rights and liabilities arising therefrom, including but not limited to the adjudication and allowance, disallowance, and compromise of claims; the collection or compromise of amounts due, in money or other property; the extension, rearrangement, or acquisition of loans; the management and disposition of secured and unsecured notes and other property; and those functions expressly or impliedly embraced within paragraphs (2) to (6), inclusive, of 38 U.S.C. 3720(a). Incidental to the exercise and performance of the powers and functions hereby delegated, each such employee is authorized to execute and deliver (with or without acknowledgment) for, and on behalf of, the Secretary, evidence of guaranty or of insurance credits and such certificates, forms, conveyances, and other instruments as may be appropriate in connection with the acquisition, ownership, management, sale, transfer, assignment, encumbrance, rental, or other disposition of real or personal property, or, of any right, title, or interest therein, including, but not limited to, contracts of sale, installment contracts, deeds, leases, bills of sale, assignments, and releases; and to approve disbursements to be made for any purpose authorized by 38 U.S.C. chapter 37.

(b) Designated positions:

Under Secretary for Benefits
Director, Loan Guaranty Service
Director, Medical and Regional Office Center
Director, VA Regional Office and Insurance Center
Director, Regional Office
Loan Guaranty Officer
Assistant Loan Guaranty Officer

The authority hereby delegated to employees of the positions designated in this paragraph may, with the approval of the Under Secretary for Benefits, be redelegated.

(c) Nothing in this section shall be construed (1) to authorize any such employee to exercise the authority vested in the Secretary under 38 U.S.C. 501 or 3703(a)(2) or to sue, or enter appearance for and on behalf of the Secretary, or confess judgment against the Secretary in any court without the Secretary's prior authorization; or (2) to include the authority to exercise those powers delegated to the Under Secretary for Benefits, or the Director, Loan Guaranty Service, under §§ 36.4320(j), 36.4335 or 36.4343:

*Provided*, That, anything in the regulations concerning guaranty or insurance of loans to veterans to the contrary notwithstanding, any evidence of guaranty or insurance issued on or after July 1, 1948, by any of the employees designated in paragraph (b) of this section or by any employee designated an authorized agent or a loan guaranty agent shall be deemed to have been issued by the Secretary, subject to the defenses reserved in 38 U.S.C. 3721.

(d) Each Regional Office, regional office and insurance center , and Medical and Regional Office Center shall maintain and keep current a cumulative list of all employees of that Office or Center who, since May 1, 1980, have occupied the positions of Director, Loan Guaranty Officer, and Assistant Loan Guaranty Officer. This list will include each employee's name, title, date the employee assumed the position, and the termination date, if applicable, of the employee's tenure in such position. The list shall be available for public inspection and copying at the Regional Office, or Center, during normal business hours.

(e)(1) Authority is hereby delegated to the officers, designated in paragraph (e)(2) of this section, of the entity performing loan servicing functions under a contract with the Secretary to execute on behalf of the Secretary all documents necessary for the servicing and termination of a loan made or acquired by the Secretary pursuant to 38 U.S.C. chapter 37 (other than under subchapter vi of that chapter). Documents executed under this paragraph include but are not limited to: loan modification agreements, notices of default and other documents necessary for loan foreclosure or termination, notices of appointment or substitution of trustees under mortgages or deeds of trust, releases or satisfactions of mortgages or deeds of trust, acceptance of deeds-in-lieu of foreclosure, loan assumption agreements, loan assignments, deeds tendered upon satisfaction or conversion of an installment land sales contract, and documents related to filing, pursuing and settling claims with insurance companies relating to hazard coverage on properties securing loans being serviced.

(2) The designated officers are: Vice President, Assistant Vice President, and Assistant Secretary.

(3) The Director, Loan Guaranty Service, Washington, DC, shall maintain a log listing all persons authorized to execute documents pursuant to paragraph (e) of this section and the dates such persons held such authority, together with certified copies of resolutions of the board of directors of the entity authorizing such individuals to perform the functions specified in paragraph (e)(1) of this section. These records shall be available for public inspection and copying at the Office of the Director of VA Loan Guaranty Service, Washington, DC 20420.

(f)(1) Authority is hereby delegated to the officers, designated in paragraph (f)(2) of this section, of the entity performing property management and sales functions under a contract with the Secretary to execute on behalf of the Secretary all documents necessary for the management and sales of residential real property acquired by the Secretary pursuant to 38 U.S.C. chapter 37. Documents executed under this paragraph include but are not limited to: sales contracts, deeds, documents relating to removing adverse occupants, and any documents relating to

sales closings. The authorization to execute deeds is limited to deeds other than general warranty deeds.

(2) The designated officers are: Senior Vice President, Vice President, Assistant Vice President, Assistant Secretary, Director, and Senior Manager.

(3) The Director, Loan Guaranty Service, Washington, DC, shall maintain a log listing all persons authorized to execute documents pursuant to paragraph (f) of this section and the dates such persons held such authority, together with certified copies of resolutions of the board of directors of the entity authorizing such individuals to perform the functions specified in paragraph (f)(1) of this section. These records shall be available for public inspection and copying at the Office of the Director of VA Loan Guaranty Service, Washington, DC 20420.

(Authority: 38 U.S.C. 501, 3720(a)(5))

[23 FR 2217, Apr. 4, 1958, and 24 FR 2655, Apr. 7, 1959, as amended at 40 FR 34593, Aug. 18, 1975; 43 FR 60460, Dec. 28, 1978; 45 FR 21243, Apr. 1, 1980; 46 FR 43673, Aug. 31, 1981; 54 FR 34988, Aug. 23, 1989; 61 FR 28058, June 4, 1996; 66 FR 32231, June 14, 2001; 69 FR 10619, Mar. 8, 2004]

### § 36.4343 Cooperative loans.

(a) Any loan, which is (1) related to an enterprise in which more than 10 individuals will participate; or (2) to be made for the purchase or construction of residential units in any housing development, cooperative or otherwise, the title to which development or to the individual units therein is not to be held directly by the veteran-participants, or which contemplates the ownership or maintenance of more than three units or of their major appurtenances in common, to be eligible for guaranty or insurance shall require prior approval of the Under Secretary for Benefits, or the Director, Loan Guaranty Service, who may issue such approval upon such conditions and limitations deemed appropriate, not inconsistent with the provisions of 38 U.S.C. chapter 37 and the regulations concerning guaranty or insurance of loans to veterans.

(b) The issuance of such approval with respect to a residential development under paragraph (a)(2) of this section also shall be subject to such conditions and stipulation as in the judgment of the approving officer are possible and proper to (1) afford reasonable and feasible protection to the rights of the Government as guarantor or insurer, and as subrogee, and to each veteran-participant against loss of his or her respective equity consequent upon the failure of other participants to discharge their obligations; (2) provide for a reasonable and workable plan for the operation and management of the project; (3) limit the personal liability of each veteran-participant to those sums allocable on a proper ratable basis to the purchase, cost, and maintenance of his or her individual unit or participating interest; (4) limit commercial features to those reasonably calculated to promote the economic soundness of the project and the living convenience of the participants, retaining the essential character of a residential project.

(c) No such project, development, or enterprise may be approved which involves an initial grouping of more than 500 veterans, or a cost of more than five million dollars, unless it is conclusively shown to the satisfaction of the approving officer that a greater number of veterans or dollar amount will assure substantial advantages to the veteran-participants which could not be achieved in a smaller project.

(d) When approved as in this section provided, and upon performance of the conditions indicated in the prior approval, proper guaranty certificate or certificates may be issued in connection with the loan or loans to be guaranteed on behalf of eligible veterans participating in the project, development or enterprise not to exceed in total amount the sum of the guaranties applied for by the individual participants and for which guaranty each participant is then eligible.

(e) In lieu of guaranty as authorized in paragraph (d) of this section, insurance shall be available on application by the lender and all veterans concerned. In such case the insurance credit shall be limited to 15 percent of the obligation of the veteran applicant (subject to available eligibility) and the total insurance credit in respect to the veterans' loans involved in the project shall not exceed 15 percent of

the aggregate of the principal sums of the individual indebtedness incurred by the veterans participating in the project for the purpose of acquiring their respective interests therein.

[13 FR 7280, Nov. 27, 1948, as amended at 20 FR 9180, Dec. 10, 1955; 24 FR 2656, Apr. 7, 1959; 40 FR 34593, Aug. 18, 1975; 46 FR 43673, Aug. 31, 1981; 61 FR 28058, June 4, 1996]

### § 36.4344 Lender Appraisal Processing Program.

(a) *Delegation of authority to lenders to review appraisals and determine reasonable value.* (1) To be eligible for delegation of authority to review VA appraisals and determine the reasonable value of properties to be purchased with VA guaranteed loans, a lender must (i) have automatic processing authority under 38 U.S.C. 3702(d), and (ii) employ one or more staff appraisal reviewers acceptable to the Secretary.

(2) To qualify as a lender's staff appraisal reviewer an applicant must be a full-time member of the lender's permanent staff and may not be employed by, or perform services for, any other mortgagee. The individual must not engage in any private pursuits in which there will be, or appear to be, any conflict of interest between those pursuits and his/her duties, responsibilities, and performance as a Lender Appraisal Processing Program (LAPP) staff appraisal reviewer. Three years of experience is necessary to qualify as a lender's staff appraisal reviewer. That experience must demonstrate a knowledge of, and the ability to apply industry-accepted principles, methods, practices and techniques of appraising, and the ability to competently determine the value of property within a prescribed geographical area. The individual must demonstrate the ability to review the work of others and to recognize deviations from accepted appraisal principles, practices, and techniques, errors in computations, and unjustifiable and unsupportable conclusions.

(3) Lenders that meet the requirements of 38 U.S.C. 3702(d), and have a staff appraisal reviewer determined acceptable by VA, will be authorized to review appraisals and make reasonable value determinations on properties that will be security for VA guaranteed loans. The lender's authorization will be subject to a one-year probationary period. Additionally, lenders must satisfy initial and subsequent VA office case review requirements prior to being allowed to determine reasonable value without VA involvement. The initial office case review requirement must be satisfied in the VA regional office in whose jurisdiction the lender's staff appraisal reviewer is located before the LAPP authority may be utilized by that lender in any other VA office's jurisdiction. To satisfy the initial office case review requirement, the first five cases of each lender staff appraisal reviewer involving properties in the regional office location where the staff appraisal reviewer is located will be processed by him or her up to the point where he or she has made a reasonable value determination and fully drafted, but not issued, the lender's notification of reasonable value letter to the veteran. At that point, and prior to loan closing, each of the five cases will be submitted to the local VA office. After a staff review of each case, VA will issue a Certificate of Reasonable Value, which the lender may use in closing the loan automatically if it meets all other requirements of the VA. If these five cases are found to be acceptable by VA, the lender's staff appraisal reviewer will be allowed to fully process subsequent appraisals for properties located in that VA office's jurisdiction without prior submission to VA and issuance by VA of a Certificate of Reasonable Value. Lenders must also satisfy a subsequent VA office case review requirement in each additional VA office location in which they desire to extend and utilize this authority. Under this requirement, the lender must have first satisfied the initial office case review requirement and then must submit to the additional VA office(s) the first case each staff appraisal reviewer processes in the jurisdiction of that office. As provided under the initial office case review requirement, VA office personnel will issue a Certificate of Reasonable value for this case and subsequently determine the acceptability of the lender's staff appraisal reviewer's processing. If VA finds this first case to be acceptable, the lender's staff appraisal reviewer will be allowed to fully process

subsequent cases in that additional VA office's jurisdiction without prior submission to VA. The initial and subsequent office case review requirements may be expanded by VA if acceptable performance has not been demonstrated. After satisfaction of the initial and subsequent office case review requirements, routine reviews of LAPP cases will be made by VA staff based upon quality control procedures established by the Under Secretary for Benefits. Such review will be made on a random sampling or performance related basis. During the probationary period a high percentage of reviews will be made by VA staff.

(4) The following certification by the lender's nominated staff appraisal reviewer must be provided with the lender's application for delegation of LAPP authority:

I hereby acknowledge and represent that by signing the Uniform Residential Appraisal Report (URAR), FHLMC (Federal Home Loan Mortgage Corporation) Form 70/FNMA (Federal Notice Mortgage Association) Form 1004, I am certifying, in all cases, that I have personally reviewed the appraisal report. In doing so I have considered and utilized recognized professional appraisal techniques, have found the appraisal report to have been prepared in compliance with applicable VA requirements, and concur with the recommendations of the fee appraiser, who was assigned by VA to the case. Furthermore, in those cases where clarifications or corrections have been requested from the VA fee appraiser there has been no pressure or influence exerted on that appraiser to remove or change information that might be considered detrimental to the subject property, or VA's interests, or to reach a predetermined value for that property. *Signature of Staff Appraisal Reviewer.*

(5) Other certifications required from the lender will be specified with particularity in the separate instructions issued by the Secretary, as noted in § 36.4344(b).

(b) *Instructions for LAPP Procedures.* The Secretary will publish separate instructions for processing appraisals under the Lenders Appraisal Processing Program. Compliance with these regulations and the separate instructions issued by the Secretary is deemed by VA to be the minimum exercise of due diligence in processing LAPP cases. Due diligence is considered by VA to represent that care, as is to be properly expected from, and ordinarily exercised by, reasonable and prudent lenders who would be dependent on the property as security to protect its investment.

(c) *VA minimum property requirements.* Lenders are responsible for determining that the property meets VA minimum property requirements. The separate instructions issued by the Secretary will set forth the lender's ability to adjust, remove, or alter the fee appraiser's or fee compliance inspector's recommendations concerning VA minimum property requirements. Condominiums, planned-unit developments and leasehold estates must have been determined acceptable by VA. A condominium or planned-unit development which is acceptable to the Department of Housing and Urban Development or the Department of Agriculture may also be acceptable to VA.

(d) *Adjustment of value recommendations.* The amount of authority to upwardly adjust the fee appraiser's estimated market value during the lender staff appraisal reviewer's initial review of the appraisal report or to subsequently process an appeal of the lender's established reasonable value will be specified in the separate instructions issued by VA as noted in § 36.4344(b). The amount specified must not in any way be considered an administrative adjustment figure which may be applied indiscriminately and without valid basis or justification with the sole purpose of reaching an amount necessary to complete the sale or mortgage transaction.

(1) *Adjustment during initial review.* Any adjustment during the staff appraisal reviewer's initial review of the appraisal report must be fully and clearly justified in writing on the appraisal report form or, if necessary, on an addendum. The basis for the adjustment must be adequate and reasonable by professional appraisal standards. If real estate market or other valid data was utilized in arriving at the decision to make the adjustment, such data must be attached to the appraisal report. All adjustments, comments, corrections, justifications, etc., to the appraisal report must be made in a contrasting color, be clearly legible, and

signed and dated by the staff appraisal reviewer.

(2) *Processing appeals.* The authority provided under 38 U.S.C. 3731(d) which permits a lender to obtain a VA fee panel appraiser's report which VA is obligated to consider in an appeal of the established reasonable value shall not apply to cases processed under the authority provided by this section. All appeals of VA fee appraisers' estimated market values or lenders' reasonable value determinations above the amount specified in the separate instructions issued by VA must be submitted, along with the lender's recommendations, if any, to VA for processing and final determination. Unless otherwise authorized in the separate instructions lenders must also submit appeals, regardless of the amount, to VA in all cases where the staff appraisal reviewer has made an adjustment during their initial review of the appraisal report to the fee appraiser's market value estimate. The fee appraiser's estimated market value or lender's reasonable value determination may be increased only when such increase is clearly warranted and fully supported by real estate market or other valid data considered adequate and reasonable by professional appraisal standards and the lender's staff appraisal reviewer clearly and fully justifies the reasoning and basis for the increase in writing on the appraisal report form or an addendum. The staff appraisal reviewer must date and sign the written justification and must cite within it the data used in arriving at the decision to make the increase. All such data shall be attached to the appraisal report form and any addendum.

(e) *Notification.* It will be the responsibility of the lender to notify the veteran borrower in writing of the determination of reasonable value and related conditions specific to the property and to provide the veteran with a copy of the appraisal report. Any delay in processing the notification of value must be documented. Any delay of more than five work days between the date of the lender's receipt of the fee appraiser's report and date of the notification of value to the veteran, without reasonable and documented extenuating circumstances, will not be acceptable. A copy of the lender notification letter to the veteran and the appraisal report must be forwarded to the VA office of jurisdiction at the same time the veteran is notified. In addition, the original appraisal report, related appraisal documentation, and a copy of the reasonable value determination notification to the veteran must be submitted to the VA with the request for loan guaranty.

(f) *Indemnification.* When the Secretary has incurred a loss as a result of a payment of claim under guaranty and in which the Secretary determines an increase made by the lender under § 36.4344(d) or (f) was unwarranted, or arbitrary and capricious, the lender shall indemnify the Secretary to the extent the Secretary determines such loss was caused, or increased, by the increase in value.

(g) *Affiliations.* A lender affiliated with a real estate firm builder, land developer or escrow agent as a subsidiary division, investment or any other entity in which it has a financial interest or which it owns may not use this authority for any cases involving the affiliate unless the lender demonstrates to the Secretary's satisfaction that the lender and its affiliate(s) are essentially separate entities that operate independently of each other, free of all cross-influences (e.g., a formal corporate agreement exists which specifically sets forth this fact).

(h) *Quality Control Plans.* The lender must have an effective self-policing or quality control system to ensure the adequacy and quality of their LAPP staff appraisal reviewer's processing and, that its activities do not deviate from high standards of integrity. The quality control system must include frequent, periodic audits that specifically address the appraisal review activity. These audits may be performed by an independent party, or by the lender's independent internal audit division which reports directly to the firm's chief executive officer. The lender must agree to furnish findings and information under this system to VA on demand. While the quality control personnel need not be appraisers, they should have basic familiarity with appraisal theory and techniques and the

ability to prescribe appropriate corrective action(s) in the appraisal review process when discrepancies or problems are identified. The basic elements of the system will be described in separate instructions issued by the Secretary. Copies of the lender's quality control plan or self-policing system evidencing appraisal related matters must be provided to the VA office of jurisdiction with the lender's application for LAPP authority.

(i) *Fees.* The Secretary may require mortgagees to pay an application fee and/or annual fees, including additional fees for each branch office authorized to process cases under the authority delegated under this section, in such amounts and at such times as the Secretary may require.

(j) *Withdrawal of lender authority.* The authority for a lender to determine reasonable value may be withdrawn by the Loan Guaranty Officer when proper cause exists. A lender's authority to make reasonable value determinations shall be withdrawn when the lender no longer meets the basic requirements for delegating the authority, or when it can be shown that the lender's reasonable value determinations have not been made in accordance with VA regulations, requirements, guidelines, instructions or applicable laws, or when there is adequate evidence to support reasonable belief by VA that a particular unacceptable act, practice, or performance by the lender or the lender's staff has occurred. Such acts, practices or performance include, but are not limited to: Demonstrated technical incompetence (i.e., conduct which demonstrates an insufficient knowledge of industry accepted appraisal principles, techniques and practices; or the lack of technical competence to review appraisal reports and make value determinations in accordance with those requirements); substantive or repetitive errors (i.e., any error(s) of a nature that would materially or significantly affect the determination of reasonable value or condition of the property; or a number or series of errors that, considered individually, may not significantly impact the determination of reasonable value or property condition, but which when considered in the aggregate would establish that appraisal reviews or LAPP case processing are being performed in a careless or negligent manner), or continued instances of disregard for VA requirements after they have been called to the lender's attention.

(1) Withdrawal of authority by the Loan Guaranty Officer may be either for an indefinite or a specified period of time. For any withdrawal longer than 90 days a reapplication for lender authority to process appraisals under these regulations will be required. Written notice will be provided at least 30 days in advance of withdrawal unless the Government's interests are exposed to immediate risk from the lender's activities in which case the withdrawal will be effected immediately. The notice will clearly and specifically set forth the basis and grounds for the action. There is no right to a formal hearing to contest the withdrawal of LAPP processing privileges. However, if within 15 days after receiving notice the lender requests an opportunity to contest the withdrawal, the lender may submit, in person, in writing, or through a representative, information and argument to the Loan Guaranty Officer in opposition to the withdrawal. The Loan Guaranty Officer will make a recommendation to the Regional Office Director who shall make the determination as to whether the action should be sustained, modified or rescinded. The lender will be informed in writing of the decision.

(2) The lender has the right to appeal the Regional Office Director's decision to the Under Secretary for Benefits. In the event of such an appeal, the Under Secretary for Benefits will review all relevant material concerning the matter and make a determination that shall constitute final agency action. If the lender's submission of opposition raises a genuine dispute over facts material to the withdrawal of LAPP authority, the lender will be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses and confront any witness the Veterans Benefits Administration presents. The Under Secretary for Benefits will appoint a hearing officer or panel to conduct the

hearing. When such additional proceedings are necessary, the Under Secretary for Benefits shall base the determination on the facts as found, together with any information and argument submitted by the lender.

(3) In actions based upon a conviction or civil judgment, or in which there is no genuine dispute over material facts, the Under Secretary for Benefits shall make a decision on the basis of all the information in the administrative record, including any submission made by the lender.

(4) Withdrawal of the LAPP authority will require that VA make subsequent determinations of reasonable value for the lender. Consequently, VA staff will review each appraisal report and issue a Certificate of Reasonable Value which can then be used by the lender to close loans on either the prior VA approval or automatic basis.

(5) Withdrawal by VA of the lender's LAPP authority does not prevent VA from also withdrawing automatic processing authority or taking debarment or suspension action based upon the same conduct by the lender.

(Authority: 38 U.S.C. 3731)

(Approved by the Office of Management and Budget under control number 2900–0513)

[55 FR 21019, May 22, 1990]

### § 36.4345 Waivers, consents, and approvals; when effective.

No waiver, consent, or approval required or authorized by the regulations concerning guaranty or insurance of loans to veterans shall be valid unless in writing signed by the Secretary or the subordinate officer to whom authority has been delegated by the Secretary.

[13 FR 7281, Nov. 27, 1948]

### § 36.4346 Servicing procedures for holders.

(a) *Establishment of loan servicing program.* The holder of a loan guaranteed or insured by the Secretary shall develop and maintain a loan servicing program which follows accepted industry standards for servicing of similar type conventional loans. The loan servicing program established pursuant to this section may employ different servicing approaches to fit individual borrower circumstances and avoid establishing a fixed routine. However, it must incorporate each of the provisions specified in paragraphs (b) through (l) of this section.

(b) *Procedures for providing information.* (1) Loan holders shall establish procedures to provide loan information to borrowers, arrange for individual loan consultations upon request and maintain controls to assure prompt responses to inquiries. One or more of the following means of making information readily available to borrowers is required.

(i) An office staffed with trained servicing personnel with access to loan account information located within 200 miles of the property.

(ii) Toll-free telephone service or acceptance of collect telephone calls at an office capable of providing needed information.

(2) All borrowers must be informed of the system available for obtaining answers to loan inquiries, the office from which the needed information may be obtained, and reminded of the system at least annually.

(c) *Statement for income tax purposes.* Within 60 days after the end of each calendar year, the holder shall furnish to the borrower a statement of the interest paid and, if applicable, a statement of the taxes disbursed from the escrow account during the preceding year. At the borrower's request, the holder shall furnish a statement of the escrow account sufficient to enable the borrower to reconcile the account.

(d) *Change of servicing.* Whenever servicing of a loan guaranteed or insured by the Secretary is transferred from one holder to another, notice of such transfer by both the transferor and transferee, the form and content of such notice, the timing of such notice, the treatment of payments during the period of such transfer, and damages and costs for failure to comply with these requirements shall be governed by the pertinent provisions of the Real Estate Settlement Procedures Act as administered by the Department of Housing and Urban Development.

(e) *Escrow accounts.* A holder of a loan guaranteed or insured by the Secretary may collect periodic deposits from the borrower for taxes and/or insurance on

the security and maintain a tax and insurance escrow account provided such a requirement is authorized under the terms of the security instruments. In maintaining such accounts, the holder shall comply with the pertinent provisions of the Real Estate Settlement Procedures Act.

(f) *System for servicing delinquent loans.* In addition to the requirements of the Real Estate Settlement Procedures Act, concerning the duties of the loan servicer to respond to borrower inquiries, to protect the borrower's credit rating during a payment dispute period, and to pay damages and costs for noncompliance, holders shall establish a system for servicing delinquent loans which ensures that prompt action is taken to collect amounts due from borrowers and minimize the number of loans in a default status. The holder's servicing system must include the following:

(1) An accounting system which promptly alerts servicing personnel when a loan becomes delinquent;

(2) A collection staff which is trained in techniques of loan servicing and counseling delinquent borrowers to advise borrowers how to cure delinquencies, protect their equity and credit rating and, if the default is insoluble, pursue alternatives to foreclosure;

(3) Procedural guidelines for individual analysis of each delinquency;

(4) Instructions and appropriate controls for sending delinquent notices, assessing late charges, handling partial payments, maintaining servicing histories and evaluating repayment proposals;

(5) Management review procedures for evaluating efforts made to collect the delinquency and the response from the borrower before a decision is made to initiate action to liquidate a loan;

(6) Procedures for reporting delinquencies of 90 days or more and loan terminations to major consumer credit bureaus as specified by the Secretary and for informing borrowers that such action will be taken; and

(7) Controls to ensure that all notices required to be given to the Secretary on delinquent loans are provided timely and in such form as the Secretary shall require.

(g) *Collection actions.* (1) Holders shall employ collection techniques which provide flexibility to adapt to the individual needs and circumstances of each borrower. A variety of collection techniques may be used based on the holder's determination of the most effective means of contact with borrowers during various stages of delinquency. However, at a minimum the holder's collection procedures must include the following actions:

(i) A written delinquency notice to the borrower(s) requesting immediate payment if a loan installment has not been received within 17 days after the due date. This notice must be mailed no later than the 20th day of the delinquency and state the amount of the payment and of any late charges that are due.

(ii) An effort, concurrent with the written delinquency notice to establish contact with the borrower(s) by telephone. When talking with the borrower(s), the holder should attempt to determine why payment was not made and emphasize the importance of remitting loan installments as they come due.

(iii) A letter to the borrower(s) if payment has not been received within 30 days after it is due and telephone contact could not be made. This letter should emphasize the seriousness of the delinquency and the importance of taking prompt action to resolve the default. It should also notify the borrower(s) that the loan is in default, state the total amount due and advise the borrower(s) how to contact the holder to make arrangements for curing the default.

(iv) In the event the holder has not established contact with the borrower(s) and has not determined the financial circumstances of the borrower(s) or established a reason for the default or obtained agreement to a repayment plan from the borrower(s), then a face-to-face interview with the borrower(s) or a reasonable effort to arrange such a meeting is required.

(2) The holder must provide a valid explanation of any failure to perform these collection actions when reporting loan defaults to the Secretary. A pattern of such failure may be a basis for

sanctions under 38 CFR 44.205 and 44.305.

(h) *Conducting interviews with delinquent borrowers.* When personal contact with the borrower(s) is established, the holder shall solicit sufficient information to properly evaluate the prospects for curing the default and whether the granting of forbearance or other relief assistance would be appropriate. At a minimum, the holder must make a reasonable effort to establish the following:

(1) The reason for the default and whether the reason is a temporary or permanent condition;

(2) The present income and employment of the borrower(s);

(3) The current monthly expenses of the borrower(s) including household and debt obligations;

(4) The current mailing address and telephone number of the borrower(s); and

(5) A realistic and mutually satisfactory arrangement for curing the default.

(i) *Property inspections.* (1) The holder shall make an inspection of the property securing the loan whenever it becomes aware that the physical condition of the security may be in jeopardy. Unless a repayment agreement is in effect, a property inspection shall also be made at the following times:

(i) Before the 60th day of delinquency or before initiating action to liquidate a loan, whichever is earlier; and,

(ii) At least once each month after liquidation proceedings have been started unless servicing information shows the property remains owner-occupied.

(2) Whenever a holder obtains information which indicates that the property securing the loan is abandoned, it shall make appropriate arrangements to protect the property from vandalism and the elements. Thereafter, the holder shall schedule inspections at least monthly to prevent unnecessary deterioration due to vandalism, or neglect. With respect to any loan more than 30 days delinquent, a property abandonment must be reported to the Secretary and appropriate action initiated under § 36.4317(a) within 15 days after the holder confirms the property is abandoned.

(j) *Collection records.* The holder shall maintain individual file records of collection action on delinquent loans and make such records available to the Secretary for inspection on request. Such collection records shall show:

(1) The dates and content of letters and notices which were mailed to the borrower(s);

(2) Dated summaries of each personal servicing contact and the result of same;

(3) The indicated reason(s) for default; and,

(4) The date and result of each property inspection.

(k) *Reporting to the Secretary.* A summary of collection efforts, the information obtained through such efforts and the holder's evaluation of the reason for the default and prospects for resolution of the default must be included in any notice provided to the Secretary pursuant to §§ 36.4315 and 36.4317.

(l) *Quality control procedures.* No later than 180 days after the effective date of this regulation, each loan holder shall establish internal controls to periodically assess the quality of the servicing performed on loans guaranteed by the Secretary and assure that all requirements of this section are being met. Those procedures must provide for a review of the holder's servicing activities at least annually and include an evaluation of delinquency and foreclosure rates on loans in its portfolio which are guaranteed by the Secretary. As part of its evaluation of delinquency and foreclosure rates, the holder shall:

(1) Collect and maintain appropriate data on delinquency and foreclosure rates to enable the holder to evaluate effectiveness of its collection efforts;

(2) Determine how its VA delinquency and foreclosure rates compare with rates in reports published by the industry, investors and others; and,

(3) Analyze significant variances between its foreclosure and delinquency rates and those found in available reports and publications and take appropriate corrective action.

(m) Holders shall provide available statistical data on delinquency and foreclosure rates and their analysis of

such data to the Secretary upon request.

(Approved by the Office of Management and Budget under Control Number 2900–0530)

[58 FR 29117, May 19, 1993, as amended at 61 FR 28058, June 4, 1996]

### § 36.4347 Minimum property and construction requirements.

No loan for the purchase or construction of residential property shall be eligible for guaranty or insurance unless such property complies or conforms with those standards of planning, construction, and general acceptability that may be applicable thereto and prescribed by the Secretary pursuant to 38 U.S.C. 3704(a).

[24 FR 2656, Apr. 7, 1959]

### § 36.4348 Authority to close loans on the automatic basis.

(a) Supervised lenders of the classes described in 38 U.S.C. 3702(d) (1) and (2) are authorized by statute to process VA guaranteed home loans on the automatic basis. This category of lenders includes any Federal land bank, national bank, State bank, private bank, building and loan association, insurance company, credit union or mortgage and loan company that is subject to examination and supervision by an agency of the United States or of any State or by any State.

(b) Non-supervised lenders of the class described in 38 U.S.C. 3702(d)(3) must apply to the Secretary for authority to process loans on the automatic basis. Each of the minimum requirements listed below must be met by applicant lenders.

(1) *Experience.* The firm must meet one of the following experience requirements:

(i) The firm must have been actively engaged in originating VA loans for at least two years, have a VA Lender ID number and have originated and closed a minimum of ten VA loans within the past two years, excluding interest rate reduction refinance loans (IRRRLs), that have been properly documented and submitted in compliance with VA requirements and procedures; or

(ii) The firm must have a VA ID number and, if active for less than two years, have originated and closed at least 25 VA loans, excluding IRRRLs, that have been properly documented and submitted in compliance with VA requirements and procedures; or

(iii) Each principal officer of the firm, who is actively involved in managing origination functions, must have a minimum of two recent years' management experience in the origination of VA loans. This experience may be with the current or prior employer. For the purposes of this requirement, principal officer is defined as president or vice president; or

(iv) If the firm has been operating as an agent for a non-supervised automatic lender (sponsoring lender), the firm must submit documentation confirming that it has a VA Lender ID number and has originated a minimum of ten VA loans, excluding IRRRLs, over the past two years. If active for less than two years, the agent must have originated at least 25 VA loans. The required documentation is a copy of the VA letter approving the firm as an agent for the sponsoring lender; a copy of the corporate resolution, describing the functions the agent was to perform, submitted to VA by the sponsoring lender; and a letter from a senior officer of the sponsoring lender indicating the number of VA loans submitted by the agent each year and that the loans have been properly documented and submitted in compliance with VA requirements and procedures.

(2) *Underwriter.* A senior officer of the firm must nominate a full-time qualified employee(s) to act in the firm's behalf as underwriter(s) to personally review and make underwriting decisions on VA loans to be closed on the automatic basis.

(i) Nominees for underwriter must have a minimum of three years experience in processing, pre-underwriting or underwriting mortgage loans. At least one recent year of this experience must have included making underwriting decisions on VA loans. (Recent is defined as within the past three years.) A VA nomination and current resume, outlining the underwriter's specific experience with VA loans, must be submitted for each underwriter nominee.

(ii) Alternatively, if an underwriter does not have the experience outlined above, the underwriter must submit

documentation verifying that he or she is a current Accredited Residential Underwriter (ARU) as designated by the Mortgage Bankers Association (MBA).

(iii) If an underwriter is not located in the lender's corporate office, then a senior officer must certify that the underwriter reports to and is supervised by an individual who is not a branch manager or other person with production responsibilities.

(iv) All VA-approved underwriters must attend a 1-day (eight-hour) training course on underwriter responsibilities, VA underwriting requirements, and VA administrative requirements, including the usage of VA forms, within 90 days of approval (if VA is unable to make such training available within 90 days, the underwriter must attend the first available training). Immediately upon approval of a VA underwriter, the office of jurisdiction will contact the underwriter to schedule this training at a VA regional office (VARO) of the underwriter's choice. This training is required for all newly approved VA underwriters, including those who qualified for approval based on an ARU designation, as well as VA-approved underwriters who have not underwritten VA-guaranteed loans in the past 24 months. Furthermore, and at the discretion of any VARO in whose jurisdiction the lender is originating VA loans, VA-approved underwriters who consistently approve loans that do not meet VA credit standards may be required to retake this training.

(3) *Underwriter certification.* The lender must certify that all underwriting decisions as to whether to accept or reject a VA loan will be made by a VA-approved underwriter. In addition each VA-approved underwriter will be required to certify on each VA loan that he or she approves that the loan has been personally reviewed and approved by the underwriter.

(4) *Financial requirements.* Each application must include the most recent annual financial statement audited and certified by a certified public accountant (CPA). If the date of the annual financial statement precedes that of the application by more than six months, the lender must also attach a copy of its latest internal financial statement. Lenders are required to meet either the working capital or the minimum net worth financial requirement as defined below.

(i) *Working capital.* A minimum of $50,000 in working capital must be demonstrated.

(A) Working capital is a measure of a firm's liquidity, or the ability to pay its short-term debts. Working capital is defined as the excess of current assets over current liabilities. Current assets are defined as cash or other liquid assets convertible into cash within a 1-year period. Current liabilities are defined as debts that must be paid within the same 1-year time frame.

(B) The VA determination of whether a lender has the required minimum working capital is based on the balance sheet of the lender's annual audited financial statement. Therefore, either the balance sheet must be classified to distinguish between current and fixed assets and between current and long-term liabilities or the information must be provided in a footnote to the statement.

(ii) *Net worth.* Lenders must show evidence of a minimum of $250,000 in adjusted net worth. Net worth is a measure of a firm's solvency, or its ability to exist in the long run, quantified by the payment of long-term debts. Net worth as defined by generally accepted accounting principles (GAAP) is total assets minus total liabilities. Adjusted net worth for VA purposes is the same as the adjusted net worth required by the Department of Housing and Urban Development (HUD), net worth less certain unacceptable assets including:

(A) Any assets of the lender pledged to secure obligations of another person or entity.

(B) Any asset due from either officers or stockholders of the lender or related entities, in which the lender's officers or stockholders have a personal interest, unrelated to their position as an officer or stockholder.

(C) Any investment in related entities in which the lender's officers or stockholders have a personal interest unrelated to their position as an officer or stockholder.

(D) That portion of an investment in joint ventures, subsidiaries, affiliates and/or other related entities which is carried at a value greater than equity,

as adjusted. ''Equity as adjusted'' means the book value of the related entity reduced by the amount of unacceptable assets carried by the related entity.

(E) All intangibles, such as goodwill, covenants not to compete, franchisee fees, organization costs, etc., except unamortized servicing costs carried at a value established by an arm's-length transaction and presented in accordance with generally accepted accounting principles.

(F) That portion of an asset not readily marketable and for which appraised values are very subjective, carried at a value in excess of a substantially discounted appraised value. Assets such as antiques, art work and gemstones are subject to this provision and should be carried at the lower of cost or market.

(G) Any asset that is principally used for the personal enjoyment of an officer or stockholder and not for normal business purposes. Adjusted net worth must be calculated by a CPA using an audited and certified balance sheet from the lender's latest financial statements. ''Personal interest'' as used in this section indicates a relationship between the lender and a person or entity in which that specified person (e.g., spouse, parent, grandparent, child, brother, sister, aunt, uncle or in-law) has a financial interest in or is employed in a management position by the lender.

(5) *Lines of credit.* The lender applicant must have one or more lines of credit aggregating at least $1 million. The identity of the source(s) of warehouse lines of credit must be submitted to VA and the applicant must agree that VA may contact the named source(s) for the purpose of verifying the information. A line of credit must be unrestricted, that is, funds are available upon demand to close loans and are not dependent on prior investor approval. A letter from the company(ies) verifying the unrestricted line(s) of credit must be submitted with the application for automatic authority.

(6) *Permanent investors.* If the lender customarily sells loans it originates, it must have a minimum of two permanent investors. The names, addresses and telephone numbers of the permanent investors must be submitted with the application.

(7) *Liaison.* The lender applicant must designate an employee and an alternate to be the primary liaison with VA. The liaison officers should be thoroughly familiar with the lender's entire operation and be able to respond to any query from VA concerning a particular VA loan or the firm's automatic authority.

(8) *Other considerations.* All applications will also be reviewed in light of the following considerations:

(i) There must be no factors that indicate that the firm would not exercise the care and diligence required of a lender originating and closing VA loans on the automatic basis; and

(ii) In the event the firm, any member of the board of directors, or any principal officer has ever been debarred or suspended by any Federal agency or department, or any of its directors or officers has been a director or officer of any other lender or corporation that was so debarred or suspended, or if the lender applicant ever had a servicing contract with an investor terminated for cause, a statement of the facts must be submitted with the application for automatic authority.

(9) *Quality control system.* In order to be approved as a non-supervised lender for automatic-processing authority, the lender must implement a written quality control system which ensures compliance with VA requirements. The lender must agree to furnish findings under its systems to VA on demand. The elements of the quality control system must include the following:

(i) *Underwriting policies.* Each office of the lender shall maintain copies of VA credit standards and all available VA underwriting guidelines.

(ii) *Corrective measures.* The system should ensure that effective corrective measures are taken promptly when deficiencies in loan origination's are identified by either the lender or VA. Any cases involving major discrepancies which are discovered under the system must be reported to VA.

(iii) *System integrity.* The quality control system should be independent of the mortgage loan production function.

(iv) *Scope.* The review of underwriting decisions and certifications must include compliance with VA underwriting requirements, sufficiency of documentation and soundness of underwriting judgments.

(v) *Appraisal quality.* For lenders approved for the Lender Appraisal Processing Program (LAPP), the quality control system must specifically contain provisions concerning the adequacy and quality of real property appraisals. While the lender's quality control personnel need not be appraisers, they should have basic familiarity with appraisal theory and techniques so that they can select appropriate cases for review if discretionary sampling is used, and prescribe appropriate corrective action(s) in the appraisal review process when discrepancies or problems are identified. Copies of the lender's quality control plan or self-policing system evidencing appraisal related matters must be provided to the VA office of jurisdiction.

(10) *Courtesy closing.* The lender-applicant must certify to VA that it will not close loans on an automatic basis as a courtesy or accommodation for other mortgage lenders, whether or not such lenders are themselves approved to close on an automatic basis without the express approval of VA. However, a lender with automatic authority may close loans for which information and supporting credit data have been developed on its behalf by a duly authorized agent.

(11) *Probation.* Lenders meeting these requirements will be approved to close VA loans on an automatic basis for a 1-year period. At the end of this period, the lender's quality of underwriting, the completeness of loan submissions, compliance with VA requirements and procedures, and the delinquency and foreclosure rates will be reviewed.

(12) *Extensions of automatic authority.* When a lender wants its automatic authority extended to another State, the request must be submitted, with the fee designated in paragraph (e)(5) of this section, to the VA regional office having jurisdiction in the State where the lender's corporate office is located.

(i) When a lender wants its automatic authority to include loans involving a real estate brokerage and/or a residential builder or developer in which it has a financial interest, owns, is owned by, or with which it is affiliated, the following documentation must be submitted:

(A) A corporate resolution from the lender and each affiliate indicating that they are separate entities operating independently of each other. The lender's corporate resolution must indicate that it will not give more favorable underwriting consideration to its affiliate's loans, and the affiliate's corporate resolution must indicate that it will not seek to influence the lender to give their loans more favorable underwriting consideration.

(B) Letters from permanent investors indicating the percentage of all VA loans based on the affiliate's production originated by the lender over a 1-year period that are past due 90 days or more. This delinquency ratio must be no higher than the national average for the same period for all mortgage loans.

(ii) When a lender wants its automatic authority extended to additional States, the lender must indicate how it plans to originate VA loans in those States. Unless a lender proposes a telemarketing plan, VA requires that a lender have a presence in the State, that is, a branch office, an agent relationship, or that it is a reasonable distance from one of its offices in an adjacent State, i.e., 50 miles. If the request is based on an agency relationship, the documentation outlined in paragraph (b)(13) must be submitted with the request for extension.

(13) *Use of agents.* A lender using an agent to perform a portion of the work involved in originating and closing a VA-guaranteed loan on an automatic basis must take full responsibility by certification for all acts, errors and omissions of the agent or other entity and its employees for the work performed. Any such acts, errors or omissions will be treated as those of the lender and appropriate sanctions may be imposed against the lender and its agent. Lenders requesting an agent must submit the following documentation to the VA regional office having jurisdiction for the lender's corporate office:

(i) A corporate resolution certifying that the lender takes full responsibility for all acts, errors and omissions of the agent that it is requesting. The corporate resolution must also identify the agent's name and address, and the geographic area in which the agent will be originating and/or closing VA loans; whether the agent is authorized to issue interest rate lock-in agreements on behalf of the lender; and outline the functions the agent is to perform. Alternatively, the lender may submit a blanket corporate resolution which sets forth the functions of any and all agents and identifies individual agents by name, address, and geographic area in separate letters which refer to the blanket resolution.

(ii) When the VA regional office having jurisdiction for the lender's corporate office acknowledges receipt of the lender's request in writing, the agent is thereby authorized to originate VA loans on the lender's behalf.

(Authority: 38 U.S.C. 501(a), 3702(d))

(c) A lender approved to close loans on the automatic basis who subsequently fails to meet the requirements of this section must report to VA the circumstances surrounding the deficiency and the remedial action to be taken to cure it. Failure to advise VA in a timely manner could result in a lender's loss of its approval to close VA loans on the automatic basis.

(Authority: 38 U.S.C. 501(a), 3702(d))

(d) *Annual recertification.* Non-supervised lenders of the class described in 38 U.S.C. 3702(d)(3) must be recertified annually for authority to process loans on the automatic basis. The following minimum annual recertification requirements must be met by each lender approved for automatic authority:

(1) *Financial requirements.* A lender must submit, within 120 days following the end of its fiscal year, an audited and certified financial statement with a classified balance sheet or a separate footnote for adjusted net worth to VA Central Office (264) for review. The same minimum financial requirements described in § 36.4348(b)(5) must be maintained and verified annually in order to be recertified for automatic authority.

(2) *Processing annual lender data.* The VA regional office having jurisdiction for the lender's corporate office will mail an annual notice to the lender requesting current information on the lender's personnel and operation. The lender is required to complete the form and return it with the appropriate annual renewal fees to the VA regional office.

(Authority: 38 U.S.C. 501(a), 3702(d))

(e) *Lender fees.* To participate as a VA automatic lender, non-supervised lenders of the class described in 38 U.S.C. 3702(d)(3) shall pay fees as follows:

(1) $500 for new applications;

(2) $200 for reinstatement of lapsed or terminated automatic authority;

(3) $100 for each underwriter approval;

(4) $100 for each agent approval;

(5) A minimum fee of $100 for any other VA administrative action pertaining to a lender's status as an automatic lender;

(6) $200 annually for certification of home offices; and

(7) $100 annually for each agent renewal.

(f) Supervised lenders of the classes described in paragraphs (d)(1) and (d)(2) of 38 U.S. Code 3702 participating in VA's Loan Guaranty Program shall pay fees as follows:

(1) $100 fee for each agent approval; and

(2) $100 annually for each agent renewal.

(Authority: 38 U.S.C. 501(a) and 3703(c)(1))

(g) Lenders participating in VA's Lender Appraisal Processing Program shall pay a fee of $100 for approval of each staff appraisal reviewer.

[56 FR 40561, Aug. 15, 1991, as amended at 57 FR 829, Jan. 9, 1992; 57 FR 40616, Sept. 4, 1992; 63 FR 12004, Mar. 12, 1998]

## § 36.4349 Withdrawal of authority to close loans on the automatic basis.

(a)(1) As provided in 38 U.S.C. 3702(e), the authority of any lender to close loans on the automatic basis may be withdrawn by the Secretary at any time upon 30 days notice. The automatic processing authority of both supervised and nonsupervised lenders

may be withdrawn for engaging in practices which are imprudent from a lending standpoint or which are prejudicial to the interests of veterans or the Government but are of a lesser degree than would warrant complete suspension or debarment of the lender from participation in the program.

(2) Automatic-processing authority may be withdrawn at any time for failure to meet basic qualifying and/or annual recertification criteria.

(i) *Non-supervised lenders.* (A) Automatic authority may be withdrawn for lack of a VA-approved underwriter, failure to maintain $50,000 in working capital or $250,000 in adjusted net worth, or failure to file required financial information.

(B) During the 1-year probationary period for newly approved lenders, automatic authority may be temporarily or permanently withdrawn for any of the reasons set forth in this section regardless of whether deficiencies previously have been brought to the attention of the probationary lender.

(ii) *Supervised lenders.* Automatic authority will be withdrawn for loss of status as an entity subject to examination and supervision by a Federal or State supervisory agency as required by 38 U.S.C. 3702(d).

(Authority: 38 U.S.C. 501(a), 3702(d))

(3) Automatic processing authority may also be withdrawn for any of the causes for debarment set forth at § 44.305 of this title.

(b) Authority to close loans on the automatic basis may also be temporarily withdrawn for a period of time under the following schedule.

(1) Withdrawal for 60 days:

(i) Automatic loan submissions show deficiencies in credit underwriting, such as use of unstable sources of income to qualify the borrower, ignoring significant adverse credit items affecting the applicant's creditworthiness, etc., after such deficiencies have been repeatedly called to the lender's attention;

(ii) Employment or deposit verifications are handcarried by applicants or otherwise improperly permitted to pass through the hands of a third party;

(iii) Automatic loan submissions are consistently incomplete after such deficiencies have been repeatedly called to the lender's attention by VA; or

(iv) There are continued instances of disregard of VA requirements after they have been called to the lender's attention.

(2) Withdrawal for 180 days:

(i) Loans are closed automatically which conflict with VA credit standards and which would not have been made by a lender acting prudently;

(ii) The lender fails to disclose to VA significant obligations or other information so material to the veteran's ability to repay the loan that undue risk to the Government results;

(iii) Employment or deposit verifications are allowed to be handcarried by applicant or otherwise mishandled, resulting in the submission of significant misinformation to VA;

(iv) Substantiated complaints are received that the lender misrepresented VA requirements to veterans to the detriment of their interests (e.g., veteran was dissuaded from seeking a lower interest rate based on lender's incorrect advice that such options were precluded by VA requirements);

(v) Closing documentation shows instances of improper charges to the veteran after the impropriety of such charges has been called to the lender's attention by VA, or refusal to refund such charges after notification by VA; or

(vi) There are other instances of lender actions which are prejudicial to the interests of veterans such as deliberate delays in scheduling loan closings.

(3) Withdrawal for a period of from one year to three years:

(i) The lender fails to properly disburse loans (e.g., loan disbursement checks returned due to insufficient funds);

(ii) There is involvement by the lender in the improper use of a veteran's entitlement (e.g., knowingly permitting the veteran to violate occupancy requirements, lender involvement in sale of veteran's entitlement, etc.).

(4) A continuation of actions that have led to previous withdrawal of

automatic authority justifies withdrawal of automatic authority for the next longer period of time.

(5) Withdrawal of automatic processing authority does not prevent a lender from processing VA guaranteed loans on the prior approval basis.

(6) Action by VA to remove a lender's automatic authority does not prevent VA from also taking debarment or suspension action based on the same conduct by the lender.

(7) VA field facilities are authorized to withdraw automatic privileges for 60 days, based on any of the violations set forth in paragraphs (b)(1) through (b)(3) of this section, for nonsupervised lenders without operations in other stations' jurisdictions. All determinations regarding withdrawal of automatic authority for longer periods of time or multi-jurisdictional lenders must be made in Central Office.

(c) VA will provide 30 days notice of a withdrawal of automatic authority in order to enable the lender to either close or obtain prior approval for a loan on which processing has begun. There is no right to a formal hearing to contest the withdrawal of automatic processing privileges. However, if within 15 days after receiving notice the lender requests an opportunity to contest the withdrawal, the lender may submit in person, in writing, or through a representative, information and argument in opposition to the withdrawal.

(d) If the lender's submission in opposition raises a dispute over facts material to the withdrawal of automatic authority, the lender will be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witnesses VA presents. The Under Secretary for Benefits will appoint a hearing officer or panel to conduct the hearing.

(e) A transcribed record of the proceedings shall be made available at cost to the lender, upon request, unless the requirement for a transcript is waived by mutual agreement.

(f) In actions based upon a conviction or civil judgment, or in which there is no genuine dispute over material facts, the Under Secretary for Benefits shall make a decision on the basis of all the information in the administrative record, including any submission made by the lender.

(g) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact will be prepared by the hearing officer or panel. The Under Secretary for Benefits shall base the decision on the facts as found, together with any information and argument submitted by the lender and any other information in the administrative record.

(Authority: 38 U.S.C. 501, 1803(c)(1))

(The information collection requirements in this section have been approved by the Office of Management and Budget under control numbers 2900–0574)

[56 FR 40562, Aug. 15, 1991, as amended at 61 FR 28059, June 4, 1996; 63 FR 12007, Mar. 12, 1998]

### § 36.4350 Estate of veteran in real property.

(a) The estate in the realty acquired by the veteran, wholly or partly with the proceeds of a guaranteed or insured loan, or owned by him and on which construction, or repairs, or alterations or improvements are to be made, shall be not less than:

(1) A fee simple estate therein, legal or equitable; or

(2) A leasehold estate running or renewable at the option of the lessee for a period of not less than 14 years from the maturity of the loan, or to any earlier date at which the fee simple title will vest in the lessee, which is assignable or transferable, if the same be subjected to the lien; however, a leasehold estate which is not freely assignable and transferable will be considered an acceptable estate if it is determined by the Under Secretary for Benefits, or the Director, Loan Guaranty Service, (i) that such type of leasehold is customary in the area where the property is located, (ii) that a veteran or veterans will be prejudiced if the requirement for free assignability is adhered to and, (iii) that the assignability and other provisions applicable to the leasehold estate are sufficient to protect the interests of the veteran and the Government and are otherwise acceptable; or

(3) A life estate, provided that the remainder and reversionary interests are subjected to the lien; or

(4) A beneficial interest in a revocable Family Living Trust that ensures that the veteran, or veteran and spouse, have an equitable life estate, provided the lien attaches to any remainder interest and the trust arrangement is valid under State law.

The title to such estate shall be such as is acceptable to informed buyers, title companies, and attorneys, generally, in the community in which the property is situated, except as modified by paragraph (b) of this section.

(b) Any such property or estate will not fail to comply with the requirements of paragraph (a) of this section by reason of the following:

(1) Encroachments;

(2) Easements;

(3) Servitudes;

(4) Reservations for water, timber, or subsurface rights;

(5) Sale and lease restrictions:

(i) Except as to condominiums, the right in any grantor or cotenant in the chain of title, or a successor of either, to purchase for cash, which right was established by an instrument recorded prior to December 1, 1976, and by the terms thereof is exercisable only if:

(A) An owner elects to sell,

(B) The option price is not less than the price at which the then owner is willing to sell to another, and

(C) Exercised within 30 days after notice is mailed by registered mail to the address of optionee last known to the then owner of the then owner's election to sell, stating the price and the identity of the proposed vendee;

(ii) A condominium estate established by the filing for record of the Master Deed, or other enabling document before December 1, 1976 will not fail to comply with the requirements of paragraph (a) of this section by reason of:

(A) Prohibition against leasing a unit for a period of less than 6 months.

(B) The existence of a right of first option to purchase or right to provide a substitute buyer reserved to the condominium association provided such option or right is exercisable only if:

(*1*) An owner elects to sell,

(*2*) The option price is not less than the price at which the then owner is willing to sell to another,

(*3*) The terms and conditions under which the option price is to be paid are identical to or are not less favor- able to the owner than the terms and conditions under which the owner was willing to sell to the owner's prospective buyer, and

(*4*) Notice of the association's decision to exercise the option must be mailed to the owner by registered or certified mail within 30 days after notice is mailed by registered or certified mail to the address of the association last known to the owner of the owner's election to sell, stating the price, terms of sale, and the identity of the proposed vendee;

(iii) Any property subject to a restriction on the owner's right to convey to any party of the owner's choice, which restriction is established by a document recorded on or after December 1, 1976, will not qualify as security for a guaranteed or insured loan. A prohibition or restriction on leasing an individual unit in a condominium will not cause the condominium estate to fail to qualify as security for such loan, provided the restriction is in accordance with § 36.4358(c);

(iv) Notwithstanding the provisions of paragraphs (b)(5) (i), (ii), and (iii) of this section, a property shall not be considered ineligible pursuant to paragraph (a) of this section if:

(A) The veteran obtained the property under a State or local political subdivision program designed to assist low- or moderate-income purchasers, and as a condition the purchaser must agree to one or more of the following restrictions:

(*1*) If the property is resold within a time period as established by local law or ordinance, after the purchaser acquires title, the purchaser must first offer the property to the government housing agency, or a low- or moderate-income purchaser designated by such agency, provided the option to purchase is exercised within 90 days after notice by the purchaser to the agency of intention to sell;

(*2*) If the property is resold within a time period as established by local law

or ordinance after the purchaser acquires title, a governmental agency may specify a maximum price which the veteran may receive for the property upon resale; or

(*3*) Such other restriction approved by the Secretary designed to insure either that a property acquired under such program again be made available to low- or moderate-income purchasers, or to prevent a private purchaser from obtaining a windfall profit on the resale of such property, while assuring that the purchaser has a reasonable opportunity to dispose of the property without undue difficulty at a reasonable price.

The sale price of a property under any of the restrictions of paragraph (b)(5)(iv)(A) of this section shall not be less than the lowest of the following: The price designated by the owner as the asking price; the appraised value of the property; or the original purchase price of the property, increased by a factor reflecting all or a reasonable portion of the increased costs of housing or the percentage increase in median income in the area between the date of original purchase and resale, plus the reasonable value or actual costs of any capital improvements made by the owner plus a reasonable real estate commission less the cost of necessary repairs required to place the property in saleable condition; or other reasonable formula approved by the Secretary. The veteran must be fully informed and consent in writing to the housing restrictions. A copy of the veteran's consent statement must be forwarded with the application for home loan guaranty or the report of a home loan processed on the automatic basis; or

(Authority: 38 U.S.C. 3703(c))

(B) A recorded restriction on title designed to provide housing for older persons, provided that the restriction is acceptable under the provisions of the Fair Housing Act, title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Amendments Act of 1988, 42 U.S.C. 3601 *et seq.* The veteran must be fully informed and consent in writing to the restrictions. A copy of the veteran's consent statement must be forwarded with the application for home loan guaranty or the report of a home loan processed on the automatic basis;

(Authority: 38 U.S.C. 501, 3703(c)(1))

(6) Building and use restrictions whether or not enforceable by a reverter clause if there has been no breach of the conditions affording a right to an exercise of the reverter;

(7) Any other covenant, condition, restriction, or limitation approved by the Secretary in the particular case. Such approval shall be a condition precedent to the guaranty or insurance of the loan;

*Provided,* That the limitations on the quantum or quality of the estate or property that are indicated in this paragraph, insofar as they may materially affect the value of the property for the purpose for which it is used, are taken into account in the appraisal of reasonable value required by 38 U.S.C. chapter 37.

(c) The following limitations on the quantum or quality of the estate or property shall be deemed for the purposes of paragraph (b) of this section to have been taken into account in the appraisal of residential property and determined by the Secretary as not materially affecting the reasonable value of such property:

(1) *Building or use restrictions.* Provided, (i) no violation exists, (ii) the proposed use by a veteran does not presage a violation of a condition affording a right of reverter, and (iii) any right of future modification contained in the building or use restrictions is not exercisable, by its own terms, until at least 10 years following the date of the loan.

(2) *Violations of racial and creed restrictions.* Violations of a restriction based on race, color, creed, or national origin, whether or not such restriction provides for reversion or forfeiture of title or a lien for liquidated damages in the event of a breach.

(3) *Violations of building or use restrictions of record.* Violations of building or use restrictions of record which have existed for more than 1 year, are not the subject of pending or threatened litigation, and which do not provide for a reversion or termination of title, or

condemnation by municipal authorities, or, a lien for liquidated damages which may be superior to the lien of the guaranteed or insured mortgage.

(4) *Easements.* (i) Easements for public utilities along one or more of the property lines and easements for drainage or irrigation ditches, provided the exercise of the rights thereof do not interfere with the use of any of the buildings or improvements located on the subject property.

(ii) Mutual easements for joint driveways located partly on the subject property and partly on adjoining property, provided the agreement is recorded in the public records.

(iii) Easements for underground conduits which are in place and which do not extend under any buildings in the subject property.

(5) *Encroachments.* (i) On the subject property by improvements on the adjoining property where such encroachments do not exceed 1 foot within the subject boundaries, provided such encroachments do not touch any buildings or interfere with the use or enjoyment of any building or improvement on the subject property.

(ii) By hedges or removable fences belonging to subject or adjoining property.

(iii) Not exceeding 1 foot on adjoining property by driveways belonging to subject property, provided there exists a clearance of at least 8 feet between the buildings on the subject property and the property line affected by the encroachment.

(6) *Variations of lot lines.* Variations between the length of the subject property lines as shown on the plot plan or other exhibits submitted to Department of Veterans Affairs and as shown by the record or possession lines, provided such variations do not interfere with the current use of any of the improvements on the subject property and do not involve a deficiency of more than 2 percent with respect to the length of the front line or more than 5 percent with respect to the length of any other line.

(Authority: 38 U.S.C. 501, 3703(c), 3712(g))

[15 FR 4550, July 18, 1950, as amended at 24 FR 2656, Apr. 7, 1959; 33 FR 18026, Dec. 4, 1968; 34 FR 11095, July 1, 1969; 41 FR 44039, Oct. 6, 1976; 44 FR 47338, Aug. 13, 1979; 45 FR 55720, Aug. 21, 1980; 47 FR 49394, Nov. 1, 1982; 55 FR 25976, June 26, 1990; 61 FR 28059, June 4, 1996]

### § 36.4351 Loans, first, second, or unsecured.

Loans for the purchase of real property or a leasehold estate as limited in the regulations concerning guaranty or insurance of loans to veterans, or for the alteration, improvement, or repair thereof, and for more than $1,500 and more than 40 percent of the reasonable value of such property or estate prior thereto shall be secured by a first lien on the property or estate. Loans for such alteration, improvement, or repairs for more than $1,500 but 40 percent or less of the prior reasonable value of the property shall be secured by a lien reasonable and customary in the community for the type of alteration, improvement, or repair financed. Those for $1,500 or less need not be secured, and in lieu of the title examination the lender may accept a statement from the borrower that he or she has an interest in the property not less than that prescribed in § 36.4350(a).

[43 FR 51016, Nov. 2, 1978]

### § 36.4352 Tax, special assessment and other liens.

Tax liens, special assessment liens, and ground rents shall be disregarded with respect to any requirement that loans shall be secured by a lien of specified dignity. With the prior approval of the Secretary, Under Secretary for Benefits, or Director, Loan Guaranty Service, liens retained by nongovernmental entities to secure assessments or charges for municipal type services and facilities clearly within the public purpose doctrine may be disregarded. In determining whether a loan for the purchase or construction of a home is secured by a first lien the Secretary may also disregard a superior lien created by a duly recorded covenant running with the realty in favor of a private entity to secure an obligation to

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

[40 FR 34594, Aug. 18, 1975, as amended at 61 FR 28059, June 4, 1996]

### § 36.4353 Combination residential and business property.

If otherwise eligible, a loan for the purchase or construction of a combination of residential property and business property which the veteran proposes to occupy in part as a home will be eligible under 38 U.S.C. 3710, if the property is primarily for residential purposes and no more than one business unit is included in the property.

[40 FR 34594, Aug. 18, 1975]

### § 36.4354 [Reserved]

### § 36.4355 Supplemental loans.

(a) Any loan for the alteration, repair, improvement, extension, replacement, or expansion of a home, with respect to which a guaranteed or insured obligation of the borrower is currently outstanding, may be reported for guaranty or insurance coverage, if such loan is made by the holder of the currently outstanding obligation, notwithstanding the fact no guaranty entitlement remains available to the borrower;

*Provided*, That if no entitlement remains available the maximum amount payable on the revised guaranty shall not exceed the amount payable on the original guaranty on the date of closing the supplemental loan, and the percentage of guaranty shall be based upon the proportion the said maximum amount bears to the aggregate indebtedness, or, in the case of an insured loan, no additional credit to the holder's insurance account may be made: *Provided further*, That the prior approval of the Secretary shall be required if

(1) The loan will be made by a lender who is not the holder of the currently guaranteed or insured obligation; or

(2) The loan will be made by a lender not of a class specified in 38 U.S.C. 3702(d); or

(3) An obligor liable on the currently outstanding obligation will be released from personal liability.

In any case in which the unpaid balance of the prior loan currently outstanding is combined or consolidated with the amount of the supplemental loan, the entire aggregate indebtedness shall be repayable in full within the maximum maturity currently prescribed by statute for the original loan. No supplemental loan for the repair, alteration, or improvement of residential property will be eligible for guaranty or insurance unless such repair, alteration, or improvement substantially protects or improves the basic livability or utility of the property involved.

(b) Such loans shall be secured as required in § 36.4351: *Provided*, That a lien of lesser dignity than therein specified will suffice if the lien obtained is immediately junior to the lien of the original guaranteed or insured obligation: *Provided further*, The liens of successive supplemental loans may be of lesser dignity so long as they are immediately junior to the lien of the last previous guaranteed or insured obligation having a lien of required dignity.

(c) Upon providing or extending guaranty or insurance coverage in respect to any such supplemental loan, the rights of the Secretary to the proceeds of the sale of security shall be subordinate to the right of the holder to satisfy therefrom the indebtedness outstanding on the original and supplemental loans.

[13 FR 7742, Dec. 15, 1948, as amended at 19 FR 4003, July 1, 1954; 21 FR 5015, July 6, 1956; 24 FR 2656, Apr. 7, 1959; 40 FR 34594, Aug. 18, 1975]

### § 36.4356 Condominium loans—general.

(a) *Authority—applicability of other loan guaranty regulations, 38 CFR Part*

*36.* A loan to an eligible veteran to purchase a one-family residential unit in a condominium housing development or project shall be eligible for guaranty or insurance to the same extent and on the same terms as other loans under 38 U.S.C. 3710 provided the loan conforms to the provisions of chapter 37, title 38 U.S.C., except for sections 1811 (direct loans), and 1827 (structural defects). The loan must also conform to the otherwise applicable provisions of the regulations concerning the guaranty or insurance of loans to veterans. Sections 36.4353, 36.4355, and 36.4364 shall not be applicable.

(b) *Definitions.* On and after July 1, 1979, the following definitions shall be applicable to each condominium loan entitled to be guaranteed or insured, and shall be applicable to such loans previously guaranteed or insured to the extent that no legal rights vested thereunder are impaired. Whenever used in 38 U.S.C. chapter 37 or the § 36.4300 series, unless the context otherwise requires, the terms defined in this paragraph shall have the meaning stated.

(1) *Affiliate of declarant.* Affiliate of declarant means any person or entity which controls, is controlled by, or is under common control with, a declarant.

(i) A person or entity shall be considered to control a declarant if that person or entity is a general partner, officer, director, or employee of the declarant who:

(*a*) Directly or indirectly or acting in concert with one or more persons, or through one or more subsidiaries, owns, controls, or holds with power to vote, or holds proxies representing, more than 20 percent of the voting shares of the declarant;

(*b*) Controls in any manner the election of a majority of the directors of the declarant; or

(*c*) Has contributed more than 20 percent of the capital of the declarant.

(ii) A person or entity shall be considered to be controlled by a declarant if the declarant is a general partner, officer, director, or employee of that person or entity who:

(*a*) Directly or indirectly or acting in concert with one or more persons or through one or more subsidiaries, owns, controls, or holds with power to vote, or holds proxies representing, more than 20 percent of the voting shares of that person or entity;

(*b*) Controls in any manner the election of a majority of the directors of that person or entity; or

(*c*) Has contributed more than 20 percent of the capital of that person or entity.

(2) *Condominium.* Unless otherwise provided by State law, a condominium is a form of ownership in which the buyer receives title to a three dimensional air space containing the individual living unit together with an undivided interest or share in the ownership of common elements (restatement of § 36.4301, Condominium).

(3) *Conversion condominium.* Condominium projects not originally built and sold as condominiums but subsequently converted to the condominium form of ownership.

(4) *Declarant.* Any person who has executed a declaration or an amendment to a declaration to add additional real estate to the project or any successors or assigns of the declarant who offers to sell or sells units in the condominium project and who assumes declarant rights in the project including the right to: Add, convert or withdraw real estate from the condominium project; maintain sales offices, management offices and rental units; exercise easements through the common elements for the purpose of making improvements within the condominium; or exercise control of the owner's association. Declarant is further defined as any sponsor of a project or affiliate of the declarant who is acting on behalf of or exercising the rights of the declarant.

(5) *Existing—declarant in control or marketing units.* A condominium in which all onsite or offsite improvements were completed or the conversion was completed prior to appraisal by the Department of Veterans Affairs, but the declarant is in control of the owners' association and/or is currently marketing units for initial transfer to individual unit owners.

(6) *Existing—resale.* A condominium in which all onsite or offsite improvements were completed, or the conversion was completed prior to appraisal

by the Department of Veterans Affairs, and the declarant is no longer in control of the owners' association and /or marketing units for initial transfer to individual unit owners.

(7) *Expandable condominium.* A project which may be increased in size by the declarant. An expandable condominium is constructed in phases (or stages). After each phase is completed and constituted, the common estates are merged. Each unit owner, thereby, gains an individual interest in all of the facilities of the common estate.

(8) *Foreclosure.* Foreclosure shall mean the termination of a lien by either judicial or nonjudicial procedures in accordance with local law or the voluntary transfer of property by a deed-in-lieu of foreclosure or similar procedures.

(9) *High rise condominium.* A condominium project which is a multi-story elevator building.

(10) *Horizontal condominium.* A condominium project in which generally no part of a living unit extends over or under another living unit.

(11) *Low rise condominium.* A condominium project in which all or a part of a living unit extends over or under another living unit, e.g., garden apartment or walk-up project.

(12) *Proposed condominium.* A condominium project that is to be constructed or is under construction. In the case of a condominium conversion, the declarant proposes to convert a building or buildings to the condominium form of ownership, or the declarant is in the process of converting the building or buildings to the condominium form of ownership.

(13) *Series condominium.* A number of adjoining but separately constituted condominiums. An association of owners is established for each project, and each association is responsible for maintenance and upkeep of the common elements in its own project. Cross-easements between the separate condominiums may be created to permit members of the separate condominiums to use the common areas of the other condominiums.

(c) *Project approval.* Prior to Department of Veterans Affairs guaranty of an individual unit loan in a condominium, the legal documentation establishing the condominium project or development must be approved by the Secretary.

(Authority: 38 U.S.C. 501, 3703(c)(1), 3710(a)(6))

[44 FR 47338, Aug. 13, 1979, as amended at 50 FR 5978, Feb. 13, 1985]

### § 36.4357 Acceptable ownership arrangements and documentation.

(a) *Types of condominium ownership.* The following types of basic ownership arrangements are generally acceptable provided they are established in compliance with the applicable condominium law of the jurisdiction(s) in which the condominium is located:

(1) Ownership of units by individual owners coupled with an undivided interest in all common elements.

(2) Ownership of units by individual owners coupled with an undivided interest in general common elements and specified limited common elements.

(3) Individual ownership of units coupled with an undivided interest in the general common elements and/or limited common elements, with title to additional property for common use vested in an association of unit owners, with mandatory membership by unit owners or owners' associations. Any such arrangement must not be precluded by applicable State law.

(Authority: 38 U.S.C. 501, 3710(a)(6))

(b) *Estate of unit owner.* The legal estate of each unit owner must comply with the provisions of § 36.4350. The declaration or equivalent document shall allocate an undivided interest in the common elements to each unit. Such interest may be allocated equally to each unit, may be proportionate to that unit's relative size or value, or may be allocated according to any other specified criteria provided that the method chosen is equitable and reasonable for that condominium.

(Authority: 38 U.S.C. 501(1), 1803(c)(1), (d)(3), 1810(a)(6))

(c) *Condominium documentation*—(1) *Compliance with applicable law.* The declaration, bylaws and other enabling documentation shall conform to the laws governing the establishment and maintenance of condominium regimes within the jurisdiction in which the

condominium is located, and to all other laws which apply to the condominium.

(2) *Recordation.* The declaration and all amendments or modifications thereof shall be placed of record in the manner prescribed by the appropriate jurisdiction. If recording of plats, plans, or bylaws or equivalent documents and all amendments or modifications thereof is the prevailing practice or is required by law within the jurisdiction where the project is located, then such documents shall be placed of record. If the bylaws are not recorded, then covenants, restrictions and other matters requiring record notice should be contained in the declaration or equivalent document.

(3) *Availability.* The owner's association shall be required to make available to unit owners, lenders and the holders, insurers and guarantors of the first mortgage on any unit, current copies of the declaration, bylaws and other rules governing the condominium, and other books, records and financial statements of the owners' association. The owners' association also shall be required to make available to prospective purchasers current copies of the declaration, bylaws, other rules governing the condominium, and the most recent annual audited financial statement, if such is prepared. ''Available'' as used in this paragraph (c)(3) shall at least mean available for inspection, upon request, during normal business hours or under other reasonable circumstances.

(4) *Amendments to documents after Department of Veterans Affairs project approval.* While the declarant is in control of the owners' association, amendments to the declaration, bylaws or other enabling documentation must be approved by the Secretary. The declarant should have proposed amendments reviewed prior to recordation. This provision does not apply to amendments which annex additional phases to the condominium regime in accordance with a general plan of development (§§ 36.4360(a)(3) and 36.4360a(b)(6)).

(Authority: 38 U.S.C. 501, 3703(c)(1), 3710(a)(6))

(d) *Real property descriptions in the declaration*—(1) *Clarity—conformity with the law of the jurisdiction.* The description of the units, common elements, any recreational facilities and other related amenities, and any limited common elements shall be clear and in conformity with the law of the jurisdiction where the project is located. Responsibility for maintenance and repair of all portions of the condominium shall be set forth clearly.

(2) *Developmental plan—proposed condominiums.* The declaration or other legally enforceable and binding document must state in a reasonable manner the overall development plan of the condominium, including building types, architectural style and the size of the units for those phases of the condominium which are required to be built. Under the applicable provisions of the declaration or such other legally enforceable and binding document, the development of the required portion of the condominium must be consistent with the overall plan, except that the declarant may reserve the right to change the overall plan or decide not to construct planned units or improvements to the common elements if the declaration sets forth the conditions required to be satisfied prior to the exercise of that right the time within which the right may be exercised, and any other limitations and criteria that would be necessary or appropriate under the particular circumstances. Such conditions, time restraints and other limitations must be reasonable in light of the overall plan for the condominium. In an expandable project, additional phases which are not required to be built may be described in the development plan in very general terms, or the declaration may provide that the declarant makes no assurances concerning the construction, building types, architectural style and size of the units, etc. of these phases. However, the minimum number of units to be built should be that which would be adequate to reasonably support the common elements. (See § 36.4360(a)(6).)

(Approved by the Office of Management and Budget under control number 2900–0448)

(Authority: 38 U.S.C. 501, 3703(c)(1), 3710(a)(6))

[44 FR 47339, Aug. 13, 1979, as amended at 50 FR 5979, Feb. 13, 1985; 50 FR 26359, June 26, 1985]

**§ 36.4358 Rights and restrictions.**

(a) *Declarant's rights and restrictions*—(1) *Disclosure and reasonableness of reserved rights.* Any right reserved by the declarant must be reasonable and set forth in the declaration.

(2) *Examples of reserved rights of declarant, sponsor, or affiliate of declarant which are usually unacceptable.* Binding the owners' association either directly or indirectly to any of the following agreements is not acceptable unless the owner's association shall have a right of termination thereof which is exercisable without penalty at any time after transfer of control, upon not more than 90 days' notice to the other party thereto:

(i) Any management contract, employment contract or lease of recreational or parking areas or facilities;

(ii) Any contract or lease, including franchises and licenses, to which a declarant is a party.

The requirements of paragraphs (a)(2)(i) and (ii) of this section do not apply to acceptable ground leases.

(3) *Examples of reserved rights which are usually acceptable.* The following rights in the common elements may usually be reserved by the declarant for a reasonable period of time, subject to a concomitant obligation to restore:

(i) Easement over and upon the common elements and upon lands appurtenant to the condominium for the purpose of completing improvements for which provision is made in the declaration, but only if access thereto is otherwise not reasonably available.

(ii) Easement over and upon the common elements for the purpose of making repairs required pursuant to the declaration or contracts of sale made with unit purchasers.

(iii) Right to maintain facilities in the common areas which are identified in the declaration and which are reasonably necessary to market the units. These may include sales and management offices, model units, parking areas, and advertising signs.

(Authority: 38 U.S.C. 501, 3703(c)(1), 3710(a)(6))

(b) *Owners' association's rights and restrictions*—(1) *Right of entry upon units and limited common elements.* The owners' association shall be granted a right of entry upon unit premises and any limited common elements to effect emergency repairs, and a reasonable right of entry thereupon to effect other repairs, improvements, replacement or maintenance as necessary.

(2) *Power to grant rights and restrictions in common elements.* The owners' association should be granted other rights, such as the right to grant utility easements under, through or over the common elements, which are reasonably necessary to the ongoing development and operation of the project.

(3) *Responsibility for damage to common elements and units.* A provision may be made in the declaration or bylaws for allocation of responsibility for damages resulting from the exercise of any of the above rights.

(4) *Assessments*—(i) *Levy and collection.* The declaration or its equivalent shall describe the authority of the owners' association to levy and enforce the collection of general and special assessments for common expenses and shall describe adequate remedies for failure to pay such common expenses. The common expenses assessed against any unit, with interest, late charges, costs and a reasonable attorney's fee shall be a lien upon such unit in accordance with applicable law. Each such assessment, together with interest, late charges, costs, and attorney's fee, shall also be the personal obligation of the person who was the owner of such unit at the time the assessment fell due. The personal obligation for delinquent assessments shall not pass to successors in title or interest unless assumed by them, or required by applicable law. Common expenses as used in this subdivision shall mean expenditures made or liabilities incurred by or on behalf of the owners' association, together with any assessments for the creation and maintenance of reserves.

(ii) *Reserves and working capital.* There shall be in new or proposed condominium projects (including conversions) a provision for an adequate reserve fund for the periodic maintenance, repair and replacement of the common elements, which fund shall be maintained out of regular assessments for common expenses. Additionally, a working capital fund must be established for the initial months of the

project operations equal to at least a 2 months' estimated common area charge for each unit.

(iii) *Priority of lien.* Any assessment lien must be subordinate to any Department of Veterans Affairs guaranteed mortgage except as provided in § 36.4352. A lien for common expense charges and assessments shall not be affected by any sale or transfer of a unit except that a sale or transfer pursuant to a foreclosure of a first mortgage shall extinguish a subordinate lien for common expense charges and assessments which became payable prior to such sale or transfer. Any such sale or transfer pursuant to a foreclosure shall not relieve the purchaser or transferee of a unit from liability for, nor the unit so sold or transferred from the lien of, any common expense charges thereafter becoming due.

(Authority: 38 U.S.C. 501, 3703(c)(1), (d)(3), 3710(a)(6))

(c) *Unit owners' rights and restrictions*—(1) *Obligation to pay expenses.* The declaration or equivalent document shall establish a duty on each unit owner, including the declarant, to pay a proportionate share of common expenses upon being assessed therefor by the owners' association. Such share may be allocated equally to each unit, may be proportionate to that unit's common element interest, relative size or value, or may be allocated according to any other specified criteria provided that the method chosen is equitable and reasonable for that condominium.

(2) *Voting rights.* The declaration or equivalent document shall allocate a portion of the votes in the association to each unit. Such portion may be allocated equally to each unit, may be proportionate to that unit's common expense liability, common element interest, relative size or value, or may be allocated according to any other specified criteria provided that the method is equitable and reasonable for that condominium. The declaration may provide different criteria for allocations of votes to the units on particular specified matters and may also provide different percentages of required unit owner approvals for such particular specified matters.

(3) *Ingress and egress of unit owners.* There may not be any restriction upon any unit owner's right of ingress and egress to his or her unit.

(4) *Encroachments—units and common elements*—(i) *Easements for encroachments.* In the event any portion of the common elements encroaches upon any unit or any unit encroaches upon the common elements or another unit as a result of the construction, reconstruction, repair, shifting, settlement, or movement of any portion of the improvements, a valid easement for the encroachment and for the maintenance of the same shall exist so long as the encroachment exists. The declaration may provide, however, reasonable limits on the extent of any easement created by the overlap of units, common elements, and limited common elements resulting from such encroachments; or

(ii) *Monuments as boundaries.* If permitted by the governing law within the jurisdiction where the project is located, the existing physical boundaries of a unit or a common element or the physical boundaries of a unit or a common element reconstructed in substantial accordance with the original plats and plans thereof become its boundaries rather than the metes and bounds expressed in the deed, plat or plan, regardless of settling or lateral movement of the building, or minor variance between boundaries shown on the plats, plans or in the deed and those of the building. The declaration should provide reasonable limits on the extent of any such revised boundary(ies) created by the overlap of units, common elements, and limited common elements resulting from such encroachments.

(5) *Right of first refusal.* The right of a unit owner to sell, transfer, or otherwise convey his or her unit in a condominium shall not be subject to any right of first refusal or similar restriction if the declaration or similar document is recorded on or after December 1, 1976. If the declaration was recorded prior to December 1, 1976, the right of first refusal must comply with § 36.4350(b)(5)(ii); *Provided, however,* restrictions on the basis of age or restrictions established by a State, Territorial, or local government agency as

part of a program for providing assistance to low- and moderate-income purchasers shall be governed by § 36.4350(b)(5)(iv).

(Authority: 38 U.S.C. 3703(c))

(6) *Leasing restrictions.* Except as provided in this paragraph, there shall be no prohibition or restriction on a condominium unit owner's right to lease his or her unit. The following restrictions are acceptable:

(i) A requirement that leases have a minimum initial term of up to 1 year, or

(ii) Age restrictions or restrictions imposed by State or local housing authorities which are allowable under § 36.4308(e) or § 36.4350(b)(5)(iv).

(d) *Rights of action.* The owners' association and any aggrieved unit owner should be granted a right of action against unit owners for failure to comply with the provisions of the declaration, bylaws, or equivalent documents, or with decisions of the owners' association which are made pursuant to authority granted the owners' association in such documents. Unit owners should have similar rights of action against the owners' association.

(Authority: 38 U.S.C. 501, 3703(c)(1), 3710(a)(6))

[44 FR 47339, Aug. 13, 1979, as amended at 47 FR 49394, Nov. 1, 1982; 50 FR 5979, Feb. 13, 1985]

### § 36.4359 Miscellaneous legal requirements.

(a) *Declarant transfer of control of owners' association*—(1) *Standards for transfer of control.* The declarant shall relinquish all special rights, expressed or implied, through which the declarant may directly or indirectly control, direct, modify, or veto any action of the owners' association, its executive board, or a majority of unit owners, and control of the owners' association shall pass to the owners of units within the project, not later than the earlier of the following:

(i) 120 days after the date by which 75 percent of the units have been conveyed to unit purchasers, or

(ii) The last date of a specified period of time following the first conveyance to a unit purchaser; such period of time is to be reasonable for the particular project. The maximum acceptable period usually will be from 3 to 5 years for single-phased condominium regimes and 5 to 7 years for expandable condominiums.

(iii) On a case basis, modifications or variations of the requirements of paragraphs (a)(1)(i) and (ii) of this section will be acceptable, particularly in circumstances involving very large condominium developments.

(2) *Declarant's unit votes after transfer of control.* The requirements of paragraph (a)(1) of this section shall not affect the declarant's rights, as a unit owner, to exercise the votes allocated to units which declarant owns.

(3) *Unit owners' participation in management.* Declarants should provide for and foster early participation of unit owners in the management of the project.

(b) *Taxes.* Unless otherwise provided by State law, real estate taxes must be assessed and be lienable only against the individual units, together with their undivided interests in the common elements, and not against the multifamily structure. The owners' association usually owns no real estate, so it has no obligation concerning ad valorem taxes. Unless taxes are assessed only against the individual units, a tax lien could amount to more than the value of any particular unit in the structure.

(c) [Reserved]

(d) *Policies for bylaws.* The bylaws of the condominium should be sufficiently detailed for the successful governance of the condominium by unit owners. Among other things, such documents should contain adequate provisions for the election and removal of directors and officers.

(e) *Insurance and related requirements*—(1) *Insurance.* The holder shall require hazard and flood insurance policies to be procured and maintained in accordance with § 36.4326. Because of the nature of condominiums, additional types of insurance coverages—such as tort liability insurance for injuries sustained on the premises, personal liability insurance for directors and officers managing association affairs, boiler insurance, etc.—should be considered in appropriate circumstances.

(2) *Fidelity bond coverage.* The securing of appropriate fidelity bond coverage is recommended but not required, for any person or entity handling funds of the owners' association, including, but not limited to, employees of the professional managers. Such fidelity bonds should name the association as an obligee, and be written in an amount equal to at least the estimated maximum of funds, including reserve funds, in the custody of the owners' association or the management agent at any given time during the term of the fidelity bond. However, the bond should not be less than a sum equal to 3 months' aggregate assessments on all units plus reserve funds.

(Authority: 38 U.S.C. 501, 3703(c)(1), 3710(a)(6))

[44 FR 47340, Aug. 13, 1979, as amended at 50 FR 5979, Feb. 13, 1985]

### § 36.4360 Documentation and related requirements—flexible condominiums and condominiums with off-site facilities.

(a) *Expandable condominiums.* The following policies apply to condominium regimes which may be increased in size by the declarant:

(1) The declarant's right to expand the regime must be fully described in the declaration. The declaration must contain provisions adequate to ensure that future improvements to the condominium will be consistent with initial improvements in terms of quality of construction. The declarant must build each phase in accordance with an approved general plan for the total development (§ 36.4357(d)(2)) supported by detailed plats and plans of each phase prior to the construction of the particular phase.

(2) The reservation of a right to expand the condominium regime, the method of expansion and the result of an expansion must not affect the statutory validity of the condominium regime or the validity of title to the units.

(3) The declaration or equivalent document must contain a convenant that the condominium regime may not be amended or merged with a successor condominium regime without prior written approval of the Secretary. The declarant may have the proposed legal documentation to accomplish the merger reviewed prior to recordation. However, the Secretary's final approval of the merger will not be granted until the successor condominium has been legally established and construction completed. The declarant may add phases to an expandable condominium regime without the prior approval of the Secretary if the phasing implements a previously approved general plan for the total development. A copy of the amendment to the declaration or other annexation document which adds each phase must be submitted to the Secretary in accordance with § 36.4360a(b)(6).

(4) Liens arising in connection with the declarant's ownership of, and construction of improvements upon, the property to be added must not adversely affect the rights of existing unit owners, or the priority of first mortgages on units in the existing condominium property. All taxes, assessments, mechanic's liens, and other charges affecting such property, covering any period prior to the addition of the property, must be paid or otherwise satisfactorily provided for by the declarant.

(5) The declarant must purchase (at declarant's own expense) a general liability insurance policy in an amount not less than $1 million for each occurrence, to cover any liability which owners of previously sold units are exposed to as a result of further condominium project development.

(6) Each expandable project shall have a specified maximum number of units which will give each unit owner a minimum percentage of interest in the common elements. Each project shall also have a specified minimum number of units which will give each unit owner a maximum percentage of interest in the common elements. The minimum number of units to be built should be that which would be adequate to reasonably support the common elements. The maximum number of units to be built should be that which would not overload the capacity of the common facilities. The maximum possible percentage(s) and the minimum possible percentage(s) of undivided interest in the common elements for each type of unit must be

stated in the declaration or equivalent document.

(7) The declaration or equivalent document shall set forth clearly the basis for reallocation of unit owner's ownership interests, common expense liabilities and voting rights in the event the number of units in the condominium is increased. Such reallocation shall be according to the applicable criteria set forth in §§ 36.4357(b) and 36.4358(c)(1) and (2).

(8) The declarant's right to expand the condominium must be for a reasonable period of time with a specific ending date. The maximum acceptable period will usually be from 5 to 7 years after the date of recording the declaration. On a case basic, longer periods of expansion rights will be acceptable, particularly in circumstances involving sizable condominium developments.

(b) *Series projects.* (1) Each phase in the series approach is to be considered as a separate project. A separate set of legal documents must be filed for each phase or project that relates to the condominium within its own boundary. The declaration for each phase must describe the particular project as a part of the whole development area, but subject only the one phase to the condominium regime. A separate unit ratio must be established that would relate each unit to all units of the particular condominium for purposes of ownership in the common areas, voting rights and assessment liability. A separate association may be created to govern the affairs of each condominium. Each phase is subject to a separate presale requirement.

(2) In the case of proposed projects, or projects under construction, the declaration should state the number of total units that the developer intends to build on other sections of the development area.

(c) *Other flexible condominiums.* Condominiums containing withdrawable real estate (contractable condominiums) and condominiums containing convertible real estate (portions of the condominium within which additional units or limited common elements, or both, may be created) will be considered acceptable provided the flexible condominium complies with the § 36.4300 series.

(Authority: 38 U.S.C. 501, 3703(c)(1), 3710(a)(6))

(Approved by the Office of Management and Budget under control number 2900–0448)

[44 FR 47341, Aug. 13, 1979, as amended at 50 FR 5980, Feb. 13, 1985; 50 FR 26359, June 26, 1985]

### § 36.4360a Appraisal requirements.

(a) *Existing resale condominiums.* Upon acceptance by the local office of the organizational documents, the project and unit(s) proposed as security for guaranteed financing shall be appraised to ensure that they meet MPR's (Minimum Property Requirements) and are safe, sanitary, and structurally sound. The Department of Veterans Affairs MPR's for existing construction apply to all existing resale condominiums including conversions, except that water, heating, ventilating, air conditioning and sewer service may be supplied from a central source.

(Authority: 38 U.S.C. 501, 3703(c)(1), 3710(a)(6), (b)(5))

(b) *Proposed condominiums or existing condominiums with declarant in control or marketing units*—(1) *Low rise and high rise condominiums.* Low rise and high rise condominiums shall comply with local building codes. Only the alterations, improvements, or repairs to low rise and high rise buildings proposed to be converted to the condominium form of ownership must comply with current local building codes, unless local authorities require total code compliance on the entire structure when a building is being converted to the condominium form of ownership. In those areas where local standards are nonexistent, inferior to, or in conflict with Department of Veterans Affairs objectives, a certification will be required from a registered professional architect and/or registered engineer certifying that the plans and specifications conform to one of the national building codes which is typical of similar construction methods and standards for condominiums used in the area. Those portions of the condominium conversion which are not being altered, improved or repaired

must be appraised in accordance with paragraph (a) of this section.

(2) *Horizontal condominiums.* Department of Veterans Affairs policies and procedures applicable to single-family residential construction shall also apply to horizontal condominiums. Proposed or existing (declarant in control or marketing units) horizontal condominium conversions shall comply with current local building codes for alterations and improvements or repairs made to convert the building to the condominium form of ownership unless local authorities require total code compliance on the entire structure when a building is being converted to the condominium form of ownership. In those areas where local standards are nonexistent, inferior to, or in conflict with Department of Veterans Affairs objectives, a certification will be required from a professional architect and/or registered engineer certifying that the plans and specifications conform to one of the national building codes which is typical of similar construction methods and standards for condominiums used in the area. Those portions of the condominium conversion which are not being altered, improved or repaired must be appraised in accordance with paragraph (a) of this section.

(Authority: 38 U.S.C. 501, 3703(c)(1))

(3) *Unit completion.* All units in the individual project or phase must be substantially completed except for customer preference items, such as interior finishes, appliances or equipment.

(4) *Common element completion.* All amenities of the condominium (to include offsite community facilities), that are to be considered in the unit value, must be bound legally to the condominium regime. All such amenities as well as the common elements of the project, must be substantially completed and available for use by the unit owners. In large multi-phase projects, the declarant should construct common elements in a manner consistent with the addition of units to support the entire development. The Secretary, in appropriate cases, may approve the placement of adequate funds by the declarant in an escrow or otherwise earmarked account or accept a letter of credit or surety bond to assure completion of amenities and allow closing of VA-guaranteed (or insured) loans. Such funds must be adequate to assure completion of the amenities free and clear of all liens.

(Authority: 38 U.S.C. 501, 3703(c)(1), 3710(a)(6))

(5) *Information brochure/public offering statement.* When units are being sold by the declarant (not applicable to resales), an information brochure/public offering statement must be given to veteran buyers prior to the time a downpayment is received and an agreement is signed, unless State law authorized receipt of the downpayment and delivery of the information brochure followed by a period in which purchasers may cancel the purchase agreement without penalty for a specified number of days. Information brochures must be written in simple terms to inform buyers that the association does not provide owner's contents and personal liability policies which are the owner's responsibility. In the event the development is expandable, series, etc., there must be full disclosure of the impact of the total development plan. In expandable, series or other projects with more than one phase, the information brochure must disclose fully later development rights, and the general plans of the declarant for additional phases. If the declarant makes no assurance concerning phases which are not required to be built, the declarant should state that no assurances are given concerning construction, unit sizes, building types, architectural styles, etc. In condominium conversions, the information brochure must list the major structural and mechanical components and the estimated remaining useful life of the components. A brief explanation must be furnished in the brochure explaining that certain major structural or mechanical components may require replacement within a specified time period. If the declarant has elected to place funds into a condominium reserve fund for replacement of a major component under the provisions of §36.4360a(b)(7), the amount of the contribution into the reserve fund must be specified in the information brochure.

(6) *Evidence of proper phasing.* In an expandable or flexible condominium, evidence of the addition of each phase in accordance with a previously approved general plan of development must be submitted to the Secretary prior to the guaranty of the first loan in the added area.

(7) *Additional condominum conversion requirements.* (i) The declarant of a condominium project, which is (A) proposed, (B) under construction, or (C) an existing project with a declarant in control or marketing units not previously occupied, must furnish structural and mechanical common element component statements on the present condition of all accessible structural and mechanical components material to the use and enjoyment of the condominium. These statements must be completed by a registered professional engineer and/or architect prior to the guaranty of the first unit loan in the project. Each statement must also give an estimate of the expected useful life of the roof, elevators, heating and cooling, plumbing and electrical systems assuming normal maintenance. A minimum of 10 years estimated remaining useful life is required on all structural and mechanical components. In the alternative, the declarant may contribute an amount of funds to the condominium reserve fund equal to a minimum of 1/10 (one-tenth) of the estimated costs of replacement of a major structural or mechanical component (as determined by an independent registered professional architect or engineer) for each year of estimated remaining useful life less than 10 years, e.g. 7 years remaining useful life equals a 3/10 required declarant contribution to the reserve fund of the component's estimated replacement cost. The noted statements and remaining useful life requirement are not applicable to existing resale conversion projects when the declarant is no longer marketing units and/or in control of the association. Expandable or series condominium conversions require engineering and architectural statements on each stage or phase.

(ii) In declarant controlled projects, a statement(s) by the local authority(ies) of the adequacy of offsite utilities servicing the site (e.g., sanitary or water) is required. If a local authority(ies) declines to issue such a statement(s), a statement(s) may be obtained from a registered professional engineer. If local authority(ies) declines to issue such a statement(s), a statement(s) may be obtained from a registered professional engineer.

(c) *Presale requirements*—(1) *Proposed construction or existing declarant in control.* Bona fide agreements of sale must have been executed by purchasers other than the declarant (who are obligated contractually to complete the purchase) of 70 percent of the total number of units in the project. Lenders shall certify as to satisfaction of the presale requirement prior to VA guaranty of the first unit loan. When a declarant can demonstrate that a lower percentage would be justified, the Secretary, on an individual case basis, may approve a presale requirement of less than 70 percent. Reduction of the 70 percent presale requirement will be considered when:

(i) Strong initial sales demonstrate a ready market, or

(ii) The declarant will provide cash assests or acceptable bonds for payment of full common area assessments to the owners' association until such assessments are assumed by unit purchasers, or

(iii) Subsequent phases of an overall development are being undertaken in a proven market area, or

(iv) Previous experience in similar projects in the same market area indicates strong market acceptance, or

(v) The development is in a market area that has repeatedly indicated acceptance of such projects.

(2) *Multiphase—proposed or existing declarant in control.* The requirements of paragraph (c)(1) of this section shall apply to each individual phase of a multiphase development, taking into consideration that each individual phase must be capable of self-support in the event that the developer does not complete all planned phases.

(d) *Warranty.* Except in condominium conversion projects, each CRV (Certificate of Reasonable Value) issued by the Secretary relating to a proposed or existing not previously occupied dwelling unit in a condominium project shall be subject to the express condition that

the builder, seller, or the real party in interest in the transaction shall deliver to the veteran purchasing the dwelling unit with the aid of a guaranteed or insured loan a warranty against defects for the unit and common elements. The unit shall be warranted for 1 year from the date of settlement or the date of occupancy (whichever first occurs). The common elements shall be warranted for 2 years from the date each of the common elements is completed and available for use by the unit owners, or 2 years from the date the first unit is conveyed to a unit owner other than the declarant, whichever is later, in the particular phase of the condominium containing the common element. For these purposes, defects shall be those items reasonably requiring the repair, renovation, restoration, or replacement of any of the components constituting the unit or common elements. Items of maintenance relating to the unit or common elements are not covered by the warranty. No certificate of guaranty or insurance credit shall be issued unless a copy of such warranty, duly receipted by the purchaser, is submitted with the loan papers.

(e) *Ownership and operation of offsite facilities*—(1) *Title requirements.* Evidence must be presented that the offsite facility owned by an owners' association with mandatory membership by condominium unit owners or condominium unit owners' associations has been completed and conveyed free of encumbrances by the declarant for the benefit of the unit owners with title insured by an owner's title policy or other acceptable title evidence. Offsite facilities conveyed to a nonprofit corporation are the preferred method of offsite facilities ownership; however, the Secretary will consider other forms of ownership on an individual case basis.

(2) *Mandatory membership.* The declaration of the condominium (each condominium in a series development) and the legal documentation of the corporation or association which owns the offsite facility must provide the following:

(i) The owner of a condominium unit is automatically a member of the offsite facility corporation or association and that upon the sale of the unit, membership is transferred automatically to the new owner/purchaser. It is also acceptable if each condominium owners' association (in lieu of each individual unit owner) is automatically a member of the offsite facility corporation or association coupled with use rights for each of the unit owners or residents. If membership in an offsite owners' association is voluntary, no credit in the CRV valuation may be given for such offsite amenities.

(ii) Each member of the offsite facility corporation or association must be entitled to a representative vote at meetings of the offsite facility corporation or association. If the individual condominium owners' association is a member of the offsite facility corporation or association, each condominium owners' association must be entitled to a representative vote at meetings of the offsite facility corporation or association.

(iii) Each member must agree by acceptance of the unit deed to pay a share of the expenses of the offsite facility corporation or association as assessed by the corporation or association for upkeep, insurance, reserve fund for replacements, maintenance and operation of the offsite facility. The share of said expenses shall be determined equitably. Failure to pay such assessment must result in a lien against the individual unit in the same manner as unpaid assessments by the association of owners of the condominium. If each condominium owners' association is a member of the offsite facility in lieu of individual unit owners, failure of the condominium owners' association to pay its equitable assessment to the offsite facility must result in an enforceable lien.

(3) *Declarant payment of offsite facility in a series project.* Until the declarant has completed all of the intended condominium phases in a total condominium development or established each condominium regime by filing a separate declaration in a series development, the balance of the total sum of the expenses of the offsite facility not covered by the assessment against the unit owners should be assessed against and be payable by the declarant commencing on the first day of the first

month after the first unit is conveyed to a homeowner in the first phase. If this balance is not paid, it must become a lien against those parcels of land in the development area which are owned by the declarant. The collection of such debt and enforcement of such lien may be by foreclosure or such other remedies afforded the corporation or association under local law.

(f) *Professional management.* Many condominiums are small enough and their common areas so minimal that professional management is not necessary. VA does not have a requirement for professional management of condominiums. The powers given to the owners' association by the declaration and bylaws are fundamentally for ''use control'' and maintenance of the undivided interest all of the owners have in the common areas. These powers normally include management which may, if desired, be delegated to a professional manager. However, if the board of directors wants professional management, the management agreement must be terminable for cause upon 30 days' notice, and run for a reasonable period of from 1 to 3 years and be renewable for consent of the association and the management. (Management contracts negotiated by the declarant should not exceed 2 years.)

(g) *Commercial areas.* With respect to existing and proposed condominiums, commercial areas within condominium developments are acceptable, but such interests will be considered in value.

(Authority: 38 U.S.C. 501, 3703(c)(1), 3710(a)(6))

(Approved by the Office of Management and Budget under control number 2900–0448)

[44 FR 47342, Aug. 13, 1979, as amended at 50 FR 5980, Feb. 13, 1985; 50 FR 26359, June 26, 1985; 55 FR 34913, Aug. 27, 1990]

### § 36.4362 Requirement of construction warranty.

Each certificate of reasonable value issued by the Secretary relating to a proposed or newly constructed dwelling unit, except those covering one-family residential units in condominium housing developments or projects within the purview of §§ 36.4356 through 36.4360a, shall be subject to the express condition that the builder, seller, or the real party in interest in the transaction shall deliver to the veteran constructing or purchasing such dwelling with the aid of a guaranteed or insured loan a warranty, in the form prescribed by the Secretary, that the property has been completed in substantial conformity with the plans and specifications upon which the Secretary based the valuation of the property, including any modifications thereof, or changes or variations therein, approved in writing by the Secretary, and no certificate of guaranty or insurance credit shall be issued unless a copy of such warranty duly receipted by the purchaser is submitted with the loan papers.

[40 FR 34595, Aug. 18, 1975, as amended at 44 FR 47343, Aug. 13, 1979]

### § 36.4363 Nondiscrimination and equal opportunity in housing certification requirements.

(a) Any request for a master certificate of reasonable value on proposed or existing construction, and any request for appraisal of individual existing housing not previously occupied, which is received on or after November 21, 1962, will not be assigned for appraisal prior to receipt of a certification from the builder, sponsor or other seller, in the form prescribed by the Secretary, that neither it nor anyone authorized to act for it will decline to sell any property included in such request to a prospective purchaser because of his or her race, color, religion, sex or national origin.

(b) On requests for appraisal of individual proposed construction received on or after November 21, 1962, the prescribed nondiscrimination certification will be required if the builder is to sell the veteran the lot on which the dwelling is to be constructed, but will not be required if:

(1) The veteran owns the lot; or

(2) The lot is being acquired by the veteran from a seller other than the builder and there is no identity of interest between the builder and the seller of the lot.

(c) Each builder, sponsor or other seller requesting approval of site and subdivision planning shall be required to furnish a certification, in the form prescribed by the Secretary, that neither it nor anyone authorized to act for

it will decline to sell any property included in such request to a prospective purchaser because of his or her race, color, religion, sex or national origin. Site and subdivision analysis will not be commenced by the Department of Veterans Affairs prior to receipt of such certification.

(d) No commitment shall be issued and no loan shall be guaranteed or insured under 38 U.S.C. Chapter 37 unless the veteran certifies, in such form as the Secretary shall prescribe, that

(1) Neither he/she, nor anyone authorized to act for him/her, will refuse to sell or rent, after the making of a bona fide offer, or refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny the dwelling or property covered by this loan to any person because of race, color, religion, sex, or national origin;

(2) He/she recognizes that any restrictive covenant on the property relating to race, color, religion, sex or national origin is illegal and void and any such covenant is specifically disclaimed; and

(3) He/she understands that civil action for preventive relief may be brought by the Attorney General of the United States in any appropriate U.S. District Court against any person responsible for a violation of the applicable law.

[28 FR 7673, July 27, 1963, as amended at 36 FR 13032, July 13, 1971; 40 FR 34595, Aug. 18, 1975]

### § 36.4364 Correction of structural defects.

(a) The purpose of this section is to specify the types of assistance that the Secretary may render pursuant to 38 U.S.C. 1827 to an eligible borrower who has been unable to secure satisfactory correction of structural defects in a dwelling encumbered by a mortgage securing a guaranteed, insured or direct loan, and the terms and conditions under which such assistance will be rendered.

(b) A written application for assistance in the correction of structural defects shall be filed by a borrower under a guaranteed, insured or direct loan with the Director of the Department of Veterans Affairs office having loan jurisdiction over the area in which the dwelling is located. The application must be filed not later than 4 years after the date on which the first direct, guaranteed or insured mortgage loan on the dwelling was made, guaranteed or insured by the Secretary. A borrower under a direct, guaranteed or insured mortgage loan on the same dwelling which was made, guaranteed or insured subsequent to the first such loan shall be entitled to file an application if it is filed within 4 years of the date on which such first loan was made, guaranteed or insured by the Secretary.

(c) An applicant for assistance under this section must establish that:

(1) The applicant is the owner of a one- to four-family dwelling which was inspected during construction by the Department of Veterans Affairs or the Federal Housing Administration.

(2) The applicant is an original veteran-borrower on an outstanding guaranteed, insured or direct loan secured by a mortgage on such dwelling which was made, guaranteed or insured on or after May 8, 1968. The Secretary may, however, recognize an applicant who is not the original veteran-borrower but who contracted to assume such borrower's personal obligation thereunder, if the Secretary determines that such recognition would be in the best interests of the Government in the particular case.

(3) There exists in such dwelling a structural defect, not the result of fire, earthquake, flood, windstorm, or waste, which seriously affects the livability of the dwelling.

(4) The applicant has made reasonable efforts to obtain correction of such structural defect by the builder, seller, or other person or firm responsible for the construction of the dwelling.

(d) In those instances in which the Secretary determines that assistance under this section is appropriate and necessary the Secretary may take any of the following actions:

(1) Pay such amount as is reasonably necessary to correct the defect, or

(2) Pay the claim of the borrower for reimbursement of the borrower's expenses for correcting or obtaining correction of the defect, or

(3) Acquire title to the property upon terms acceptable to the borrower and

the holder of the guaranteed or insured loan.

(e) To the extent of any expenditure made by the Secretary pursuant to paragraph (d) of this section the Secretary shall be subrogated to any legal rights the borrower or applicant described in paragraph (c)(2) of this section may have against the builder, seller, or other persons arising out of the structural defect or defects.

(f) The borrower shall not be entitled, as a matter of right, to receive the assistance in the correction of structural defects provided in this section. Any determination made by the Secretary in connection with a borrower's application for assistance shall be final and conclusive and shall not be subject to judicial or other review. Authority to act for the Secretary under this section is delegated to the Under Secretary for Benefits.

(g) For the purpose of this section, the term ''structural defects seriously affecting livability'' shall in no event be deemed to include (1) defects of any nature in a dwelling in respect to which the applicant for assistance under this section was the builder or general contractor, or (2) structural features, improvements, amenities, or equipment which were not taken into account in the Secretary's determination of reasonable value.

[33 FR 16088, Nov. 1, 1968, as amended at 36 FR 321, Jan. 9, 1971; 40 FR 34595, Aug. 18, 1975; 61 FR 28059, June 4, 1996]

### § 36.4365 Advertising and Solicitation Requirements.

Any advertisement or solicitation in any form (e.g., written, electronic, oral) from a private lender concerning housing loans to be guaranteed or insured by the Secretary:

(a) Must not include information falsely stating or implying that it was issued by or at the direction of VA or any other department or agency of the United States, and

(b) Must not include information falsely stating or implying that the lender has an exclusive right to make loans guaranteed or insured by VA.

(Authority: 38 U.S.C. 3703, 3704)

[67 FR 9402, Mar. 1, 2002]

LOANS UNDER 38 U.S.C. 3703

SOURCE: Sections 36.4370 through 36.4375 appear at 13 FR 7281, Nov. 27, 1948, unless otherwise noted.

### § 36.4370 Insured loan and insurance account.

(a) Loans otherwise eligible may be insured when purchased by a lender eligible under 38 U.S.C. 3703(a) if the purchaser (lender) submits with the loan report evidence of an agreement, general or special, made prior to the closing of the loan, to purchase such loan subject to its being insured.

(b) A current account shall be maintained in the name of each insured lender or purchaser. The account shall be credited with the appropriate amounts available for the payment of losses on insured loans made or purchased. The account shall be debited with appropriate amounts on account of transfers, purchases under § 36.4318, or payment of losses. The Secretary may on 6 months' notice close any lender's insurance account. Such account after expiration of the 6-month period shall be available only as to loans embraced therein.

(c) Amounts received or recovered by the Secretary or the holder with respect to a loan after payment of an insured claim thereon will not restore any amount to the holder's insurance account.

[13 FR 7281, Nov. 27, 1948, as amended at 24 FR 2657, Apr. 7, 1959]

### § 36.4372 Transfer of insured loans.

(a) In cases involving the transfer from one insured financial institution to another insured institution of loans which are transferred without recourse, guaranty, or repurchase agreement, if no payment on any loan included in the transfer is past due more than one calendar month at the time of transfer there shall be transferred from the insurance account of the transferor to the insurance account of the transferee an amount equal to the original percentage credited to the insurance account in respect to each loan being transferred applied to the unpaid balance of such loans, or to the purchase price, whichever is the lesser.

(b) Transfers between insurance accounts in a manner or under conditions not provided in paragraph (a) of this section must have the prior approval of the Secretary.

(c) Where loans are transferred with recourse or under a guaranty or repurchase agreement no insurance credit will be transferred or insurance account affected and no reports will be required.

(d) In all cases of transfer of loans from one insured financial institution to another insured institution, except as provided in paragraph (c) of this section, a report on a prescribed form executed by the parties and showing their agreement with regard to the transfer of insurance credits shall be made to the Secretary.

### § 36.4373 Debits and credits to insurance account under § 36.4318.

In the event that an insured loan is transferred under the provisions of § 36.4318, there shall be charged to the insurance account of the transferor a sum equal to the amount paid transferor on account of the indebtedness less the current market value of the property transferred as security therefor as determined by an appraiser designated by the Secretary, or the amount chargeable to such insurance account in the event of a transfer under § 36.4372, whichever sum is the greater. The credit to the insurance account of the transferee will be computed in accordance with § 36.4372(a).

### § 36.4374 Payment of insurance.

(a) Upon the continuance of a default for the period specified in § 36.4316, the holder may proceed to establish the net loss, after giving the notice prescribed in § 36.4317 if security is available. The net loss shall be reported to the Secretary with proper claim, whereupon the holder shall be entitled to payment of the claim within the amount then available for such payment under the payee's related insurance account. Subject to the provisions of the paragraph (b) of this section and to § 36.4370(b) a supplemental claim for any balance of an insurance loss may be filed at any time within 5 years after the date of the original claim.

(b) The basis of the claim for an insured loss shall consist in the unrealized principal or the amount paid for the obligation, if less, plus unrealized interest to the date of claim or the date of sale whichever is earlier, and those expenses, if any, allowable under § 36.4313, but subject to proper credits because of payments, set-off, proceeds of security or otherwise, provided that if there is no liquidation of security the claim shall not include an accrual of interest for a period in excess of 6 months from the date of the first uncured default.

[13 FR 7742, Dec. 15, 1948]

### § 36.4375 Reports of insured institutions.

An insured financial institution shall make such reports respecting its insurance accounts as the Secretary may from time to time require, not more frequently than semiannually.

## FEDERALLY ASSISTED CONSTRUCTION CONTRACTS—NONDISCRIMINATION IN EMPLOYMENT—EXECUTIVE ORDERS 11246 AND 11375

AUTHORITY: Sections 36.4390 to 36.4393 issued under 72 Stat. 1114 (38 U.S.C. 501).

### § 36.4390 Purpose.

Sections 36.4390 through 36.4393 are promulgated to achieve the aims of the applicable provisions of Executive Orders 11246 and 11375 and the regulations of the Secretary of Labor with respect to federally assisted construction contracts.

[40 FR 34595, Aug. 18, 1975]

### § 36.4391 Applicability.

(a) For the purposes of the home loan guaranty and insurance and direct loan programs of the Department of Veterans Affairs, the term ''applicant for Federal assistance'' or ''applicant'' in Part III of Executive Order 11246, shall mean the builder, sponsor or developer of land to be improved by such builder, sponsor or developer for the purpose of constructing housing thereon for sale to eligible veterans with financing which is to be guaranteed or insured or made under the provisions of 38 U.S.C. chapter 37, or the builder, sponsor or

developer of housing to be constructed for sale to eligible veterans with financing which is to be guaranteed or insured or made under the provisions of 38 U.S.C. chapter 37.

(b) The provisions of Executive Orders 11246 and 11375 and the rules and regulations of the Secretary of Labor are applicable to:

(1) Each Master Certificate of Reasonable Value or extension or modification thereof relating to proposed construction issued on or after July 22, 1963;

(2) Each individual Certificate of Reasonable Value or extension or modification thereof relating to proposed construction issued on or after July 22, 1963, except as provided in paragraph (c)(2) of this section;

(3) Each Special Conditions Letter or modification thereof issued on or after July 22, 1963, in respect to site approval of land to be improved by a builder, sponsor or developer for the construction of housing thereon;

(4) Each direct loan fund reservation commitment or extension thereof issued to builders on or after July 22, 1963;

(c) The provisions of Executive Orders 11246 and 11375 and the rules and regulations of the Secretary of Labor are not applicable to:

(1) Grants under chapter 21, title 38, U.S.C.;

(2) Individual Certificates of Reasonable Value issued on or after July 22, 1963, if:

(i) The certificate relates to existing properties, either previously occupied or unoccupied; or

(ii) The certificate relates to proposed construction and

(*a*) A veteran was named in the request for appraisal, or

(*b*) A veteran contracted for the construction or purchase of the home prior to issuance of the certificate, or

(*c*) The property was listed in the Schedule of Reasonable Values on an outstanding Master Certificate of Reasonable Value issued prior to July 22, 1963;

(3) Any contract or subcontract for construction work not exceeding $10,000;

(4) Any other contract or subcontract which is exempted or excepted by the regulations of the Secretary of Labor.

[29 FR 2862, Feb. 29, 1964, as amended at 31 FR 8745, June 24, 1966; 40 FR 34595, Aug. 18, 1975]

### § 36.4392 Certification requirements.

In any case in which §§ 36.4390 through 36.4393 are applicable, as set forth in § 36.4391, no action will be taken by the Department of Veterans Affairs on any request for appraisal relating to proposed construction, site approval of land to be improved by a builder, sponsor or developer for the construction of housing thereon, or for a direct loan fund reservation commitment unless the builder, sponsor or developer has furnished the Department of Veterans Affairs a signed certification in form as follows:

To induce the Department of Veterans Affairs to act on any request submitted by or on behalf of the undersigned for site approval of land to be improved for the construction of housing thereon to be financed with loans guaranteed, insured or made by the Department of Veterans Affairs, or for establishment by the Department of Veterans Affairs of reasonable value relating to proposed construction or for direct loan fund reservation commitments, the undersigned hereby agrees that it will incorporate or cause to be incorporated into any contract for construction work or modification thereof, as defined in the rules and regulations of the Secretary of Labor relating to the land or housing included in its request to the Department of Veterans Affairs the following equal opportunity clause:

During the performance of this contract the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin.

(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representative of the contractor's commitments under section 202 of Executive Order 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations and relevant orders of the Secretary of Labor.

(5) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by the rules, regulations and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records and accounts by the administering agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations and orders.

(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations or orders, this contract may be canceled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts or federally assisted construction contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation or order of the Secretary of Labor, or as otherwise provided by law.

(7) The contractor will include the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the administering agency may direct as a means of enforcing such provisions, including sanctions for noncompliance: *Provided, however,* That in the event a contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

Except in special cases and in subcontracts for the performance of construction work at the site of construction, the clause is not required to be inserted in subcontracts below the second tier. Subcontracts may incorporate by reference the equal opportunity clause.

The undersigned further agrees that it will be bound by the above equal opportunity clause in any federally assisted construction work which it performs itself other than through the permanent work force directly employed by an agency of Government.

The undersigned agrees that it will cooperate actively with the administering agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with the equal opportunity clause and the rules, regulations and relevant orders of the Secretary of Labor, that it will furnish the administering agency and the Secretary of Labor such information as they may require for the supervision of such compliance, and that it will otherwise assist the administering agency in the discharge of the agency's primary responsibility for securing compliance. The undersigned further agrees that it will refrain from entering into any contract or contract modification subject to Executive Order 11246 with a contractor debarred from, or who has not demonstrated eligibility for, Government contracts and federally assisted construction contracts pursuant to Part II, Subpart D of Executive Order 11246 and will carry out such sanctions and penalties for violation of the equal opportunity clause as may be imposed upon the contractors and subcontractors by the administering agency or the Secretary of Labor pursuant to Part II, Subpart D of Executive Order 11246.

In addition, the undersigned agrees that if it fails or refuses to comply with these undertakings such failure or refusal shall be a proper basis for cancellation by the Department of Veterans Affairs of any outstanding master certificates of reasonable value or individual certificates of reasonable value relating to proposed construction, except in respect to cases in which an eligible veteran has contracted to purchase a property included on such certificates, and for the rejection of future requests submitted by the undersigned or on his or her behalf for site approval, appraisal services, and direct loan fund reservation commitments until satisfactory assurance of future compliance has been received from the undersigned, and for referral of the case to the Department of Justice for appropriate legal proceedings.

[31 FR 8745, June 24, 1966, as amended at 40 FR 34596, Aug. 18, 1975]

### § 36.4393 Complaint and hearing procedure.

(a) Upon receipt of a written complaint signed by the complainant to the effect that any person, firm or entity has violated the undertakings referred to in § 36.4392, such person, firm or other entity shall be invited to discuss the matter in an informal hearing with the Director of the Department of Veterans Affairs regional office or center.

(b) If the existence of a violation is denied by the person, firm or other entity against which a complaint has been made, the Director or designee shall conduct such inquiries and hearings as may be deemed appropriate for the purpose of ascertaining the facts.

(c) If it is found that the person, firm or other entity against which a complaint has been made has not violated the undertakings referred to in § 36.4392, the parties shall be so notified.

(d) If it is found that there has been a violation of the undertakings referred to in § 36.4392, the person, firm or other entity in violation shall be requested to attend a conference for the purpose of discussing the matter. Failure or refusal to attend such a conference shall be proper basis for the application of sanctions.

(e) The conference arranged for discussing a violation shall be conducted in an informal manner and shall have as its primary objective the elimination of the violation. If the violation is eliminated and satisfactory assurances are received that the person, firm or other entity in violation will comply with the undertakings pursuant to § 36.4392 in the future, the parties concerned shall be so notified.

(f) Failure or refusal to comply and give satisfactory assurances of future compliance with the equal employment opportunity requirements shall be proper basis for applying sanctions. The sanctions shall be applied in accordance with the provisions of Executive Order 11246 as amended and the regulations of the Secretary of Labor.

(g) Upon written application, a complainant or a person, firm or other entity against which a complaint has been filed may apply to the Under Secretary for Benefits for a review of the action taken by a Director. Upon receiving such application, the Under Secretary for Benefits may designate a representative or representatives to conduct an informal hearing and to make a report of findings. The Under Secretary for Benefits may, after a review of such report, modify or reverse an action taken by a Director.

(h) Reinstatement of restricted persons, firms or other entities shall be within the discretion of the Under Secretary for Benefits and under such terms as the Under Secretary for Benefits may prescribe.

[29 FR 2862, Feb. 29, 1964, as amended at 40 FR 34596, Aug. 18, 1975; 61 FR 28059, June 4, 1996]

## ASSISTANCE TO CERTAIN DISABLED VETERANS IN ACQUIRING SPECIALLY ADAPTED HOUSING

AUTHORITY: Sections 36.4400 to 36.4411 issued under 72 Stat. 1114, 1168, as amended (38 U.S.C. 501, 2101).

NOTE: Those requirements, conditions, or limitations expressly set forth in 38 U.S.C. Chapter 21 and not restated herein must be taken into consideration in conjunction with the regulations in §§ 36.4401 to 36.4410.

[24 FR 2657, Apr. 7, 1959]

### § 36.4400 Applicability.

References in the regulations pertaining to assistance to certain disabled veterans in acquiring specially adapted housing to 38 U.S.C. chapters 21 and 37, shall where applicable, be deemed to refer also to the prior corresponding provision of the law.

[24 FR 2657, Apr. 7, 1959]

### § 36.4401 Definitions.

Wherever used in 38 U.S.C. Chapter 21 or §§ 36.4401 through 36.4410, unless the context otherwise requires, the terms defined in this section shall have the meaning herein stated; namely:

(a) *Secretary:* The Secretary of Veterans Affairs or any employee of the Department of Veterans Affairs authorized to act in the Secretary's stead.

(b) *Chapter 21:* chapter 21 of title 38, U.S.C.

(c) *Movable facilities:* Such exercising equipment and other aids as may be allowed or required by the Chief Medical Director or designee.

(d) *Necessary land:* Any plot of land the cost and area of which are not disproportionate to the type of improvements thereon and which is in keeping with the locality.

(e) *Special fixtures and necessary adaptations.* Construction features which are specially designed to overcome the physical limitations of the individual beneficiary and which are allowed or required by the Chief Medical Director or designee as necessary by nature of the qualifying disability.

(f) *Housing unit:* A family dwelling or unit approved by the Veterans Health Services and Research Administration as medically feasible for occupancy as a home by the individual beneficiary, including the land, improvements, and all appurtenances, together with such movable facilities or special features as are authorized under the definitions of those terms in §§ 36.4401 through 36.4410.

(g) *Remodeling:* Any alterations, repairs, or improvements necessary or desirable to the housing unit, as defined in §§ 36.4401 through 36.4410.

(h) *Veteran's family.* Persons related by blood, marriage, or adoption.

(Authority: 38 U.S.C. 2101(b))

[24 FR 2657, Apr. 7, 1959, as amended at 46 FR 43673, Aug. 31, 1981]

### § 36.4402 Eligibility.

(a) *Eligibility, housing grants.* No beneficiary shall be eligible for assistance under section 2101(a) of Chapter 21 for the purpose of reimbursing the veteran for the cost of an existing structure acquired by the veteran prior to applying for assistance or for constructing or remodeling a dwelling or for otherwise acquiring a suitable housing unit, unless it is determined pursuant to §§ 36.4401 through 36.4410 that:

(1) It is medically feasible for such beneficiary to reside in the existing or proposed housing unit and in the locality where such is or will be situated;

(2) The nature and condition of the proposed housing unit are such as to be suitable to the veteran's needs for dwelling purposes;

(3) Such unit bears a proper relation to the veteran's present and anticipated income and expenses;

(4) The veteran has or will acquire an interest in the housing unit which is:

(i) A fee simple estate, or

(ii) A leasehold estate, the unexpired term of which, including renewals at the option of the lessee, is not less than 50 years, or

(iii) An interest in a residential unit in a cooperative or a condominium type development which in the judgment of the Under Secretary for Benefits or the Director, Loan Guaranty Service, provides a right of occupancy for a period of not less than 50 years, or

(iv) A beneficial interest in a revocable Family Living Trust that ensures that the veteran, or veteran and spouse, have an equitable life estate, provided the trust arrangement is valid under State law;

*Provided,* The title to such estate or interest is or shall be such as is acceptable to prudent lending institutions, informed buyers, title companies, and attorneys, generally, in the community;

(5) The veteran has certified, in such form as the Secretary shall prescribe, that

(i) Neither the veteran, nor anyone authorized to act for the veteran, will refuse to sell or rent, after the making of a bona fide offer, or refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny the dwelling or property acquired by this benefit to any person because of race, color, religion, sex, or national origin;

(ii) The veteran recognizes that any restrictive covenant on the property relating to race, color, religion, sex, or national origin is illegal and void and any such covenant is specifically disclaimed;

(iii) The veteran understands that civil action for preventive relief may be brought by the Attorney General of the United States in any appropriate U.S. District Court against any person responsible for a violation of the applicable law; and

(6) The housing unit, if it is located or becomes located in an area identified by the Federal Emergency Management Agency as having special

flood hazards and in which flood insurance has been made available under the National Flood Insurance Act, as amended, is or will be covered by flood insurance. The amount of flood insurance must be at least equal to the lesser of the full insurable value of the property or the maximum limit of coverage available for the particular type of property under the National Flood Insurance Act, as amended. The Secretary cannot approve any financial assistance for the acquisition or construction of property located in an area identified by the Federal Emergency Management Agency as having special flood hazards unless the community in which such area is situated is then participating in the National Flood Insurance Program.

(Authority: 42 U.S.C. 4012a, 4106(a))

(b) *Eligibility, adaptations grants.* No beneficiary shall be eligible for assistance under section 2101(b) of chapter 21, for the cost of reasonably necessary adaptations to an existing structure or for the inclusion of such adaptations in proposed construction or for the purchase of a structure already including such adaptations unless it is determined pursuant to §§36.4401 through 36.4410 of this part that:

(1) The veteran has not been declared eligible for assistance under section 2101(a) of chapter 21;

(2) The veteran has not been provided the particular type of adaptation, improvement, or structural alteration under section 1712(a) of title 38 U.S.C.;

(3) The veteran is or will be residing in and reasonably intends to continue residing in a residence owned by such veteran or by a member of such veteran's family;

(4) The adaptations are reasonably necessary because of the veteran's disability; and

(5) If the veteran is the owner or part-owner of the housing unit, the veteran must comply with paragraphs (a)(5) and (6) of this section.

(Authority: 38 U.S.C. 2101(b), 2104)

[46 FR 43673, Aug. 31, 1981, as amended at 56 FR 9862, Mar. 8, 1991; 61 FR 28059, June 4, 1996; 62 FR 5531, Feb. 6, 1997]

### § 36.4403 Joint ownership of housing unit.

The construction or remodeling of a housing unit, or reimbursement to a veteran who has acquired a suitable unit at the veteran's own expense pursuant to section 2101(a) of chapter 21, shall be permissible notwithstanding that title to the home is or will be vested in an eligible veteran and spouse. If an undivided interest is or will be owned by a person other than the spouse of the veteran the cost of the unit to the veteran shall be computed to be such part of the total cost of the unit as is proportionate to the undivided interest of the veteran in the entire property, and the percentages and amounts prescribed in section 2101(a) of chapter 21 shall be calculated only upon such cost to the veteran.

[46 FR 43674, Aug. 31, 1981]

### § 36.4404 Computation of cost.

(a) *Computation of cost of housing unit.* Under section 2101(a) of chapter 21, for the purpose of computing the amount of benefits payable to a veteran-beneficiary, there may be included in the total cost to the veteran the following amount, not to exceed $50,000.

(1) The cost of the necessary land and the grading, landscaping, and improvement thereof for use for residential purposes.

(2) The cost of the improvement erected thereon and the appurtenances thereto, including such heating, cooking, laundry, and refrigeration equipment as may be suitable to equip a housing unit for residential use.

(3) The cost of remodeling a housing unit.

(4) The cost of movable facilities and special fixtures.

(5) Reasonable architects' and attorneys' fees for services rendered to the veteran which are necessary to and are in connection with the transaction.

(6) Any charges for the customary necessary connections to or extensions of public facilities and improvements.

(7) Such other reasonable costs or expenses incurred in closing a loan or financing the aquisition of the housing and land, including unpaid taxes, ground rents, or assessments, which

are normally required to be paid by a lienor or a purchaser.

(b) *Computation of cost of adaptations.* Under section 2101(b) of Chapter 21, for the purpose of computing the amount of benefits payable to a veteran-beneficiary, the assistance is limited to the lesser of:

(1) The actual cost, or in the case of a veteran acquiring a residence already adapted with special features, the fair market value of the adaptations, including installation costs, determined to be reasonably necessary, or

(2) $10,000.

(Authority: 38 U.S. C. 2102)

[46 FR 43674, Aug. 31, 1981, as amended at 50 FR 13021, Apr. 2, 1985; 56 FR 9862, Mar. 8, 1991; 61 FR 28059, June 4, 1996; 68 FR 6627, Feb. 10, 2003; 70 FR 3893, Jan. 27, 2005]

### § 36.4405 Submission of proof to the Secretary.

As a condition precedent to the grant the Secretary may require submission of such proof of costs and other matters as the Secretary may deem necessary.

[13 FR 7282, Nov. 27, 1948, as amended at 46 FR 43674, Aug. 31, 1981]

### § 36.4406 Disbursement of benefit authorized.

After approval of an application for a grant, the Secretary shall decide upon a method of disbursement which in the Secretary's opinion is appropriate and advisable in the interest of the veteran and the Government and disburse the benefit payable accordingly. Disbursements may be made to the veteran or to third parties who have contracted with the veteran, or to an escrow agent under conditions imposed by the Secretary.

[14 FR 5780, Sept. 22, 1949, as amended at 46 FR 43674, Aug. 31, 1981]

### § 36.4407 Supplementary administrative action.

Notwithstanding any requirement, condition, or limitation stated in or imposed by §§ 36.4401 through 36.4410, the Secretary, within the limitations and conditions prescribed in 38 U.S.C. chapters 3 and 21, may take such action as may be necessary or appropriate to relieve undue prejudice to a veteran or a third party contracting or dealing with such veteran which might otherwise result.

[24 FR 2657, Apr. 7, 1959]

### § 36.4408 Delegation of authority.

(a) Except as hereinafter provided, each employee of the Department of Veterans Affairs heretofore or hereafter appointed to, or lawfully filling, any position designated in paragraph (b) of this section is hereby delegated authority, within the limitations and conditions prescribed by law, to exercise the powers and functions of the Secretary with respect to assisting eligible veterans to acquire specially adapted housing.

(b) Designated positions:

Under Secretary for Benefits.
Director, Loan Guaranty Service.
Assistant Director for Construction and Valuation.
Chief, Specially Adapted Housing Unit, Loan Guaranty Service.
Director, Medical and Regional Office Center.
Director, VA Regional Office and Insurance Center.
Director, VA Regional Office.
Loan Guaranty Officer.
Assistant Loan Guaranty Officer.

(c) Nothing in this section shall be construed to authorize any employee designated in paragraph (b) of this section to determine basic eligibility or medical feasibility, except as otherwise authorized.

[13 FR 7282, Nov. 27, 1948, as amended at 19 FR 3225, June 2, 1954; 46 FR 43674, Aug. 31, 1981; 61 FR 28059, June 4, 1996]

### § 36.4409 Guaranteed or insured loans under 38 U.S.C. chapter 37.

In any case where, in addition to the benefits of chapter 21, the veteran will utilize the veteran's entitlement to the loan guaranty or insurance benefits of 38 U.S.C. chapter 37, the complete transaction must be in accord with applicable regulations promulgated thereunder excepting § 36.4306 thereof.

[24 FR 2657, Apr. 7, 1959, as amended at 46 FR 43674, Aug. 31, 1981]

### § 36.4410 Allocation of the funds of the grant.

Any amount payable as a grant under section 2101(a), chapter 21 may be required by the Secretary to be utilized as the Secretary deems advisable for payment of any of the following costs or debts which are obligations of the veteran before any part of the grant may be paid to the veteran directly:

(a) Cost of necessary land,

(b) Cost of constructing, adapting, or remodeling a housing unit.

(c) Delinquent taxes secured by a lien on the housing unit,

(d) Reduction or retirement of any indebtedness incurred in connection with the purchase, construction, or remodeling of a housing unit on which the grant is made.

[13 FR 7283, Nov. 27, 1948, as amended at 46 FR 43674, Aug. 31, 1981]

### § 36.4411 Geographical limits.

Any real property purchased, constructed, altered, improved, repaired, or specially adapted, in whole or in part, with the proceeds of any specially adapted housing grant, shall be situated in the United States, which, for purposes of 38 U.S.C. chapter 21, is defined as the several States, Territories, and possessions, including the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any other area over which the United States may, at some future date, acquire sovereignty.

(Authority: 38 U.S.C. 501, 2101 (a) and (b))

[47 FR 29231, July 6, 1982]

## DIRECT LOANS

AUTHORITY: Sections 36.4500 through 36.4600 issued under 38 U.S.C. 501.

NOTE: Those requirements, conditions, or limitations which are expressly set forth in 38 U.S.C. chapter 37 are not restated herein and must be taken into consideration in the interpretation or application of the regulations concerning direct loans to veterans.

[24 FR 2658, Apr. 7, 1959]

### § 36.4500 Applicability.

(a) The regulations concerning direct loans to veterans shall be applicable to loans made by Department of Veterans Affairs pursuant to 38 U.S.C. 3711.

(b) Sections 36.4501, 36.4512, and 36.4527, which concern direct loans to Native American veterans shall be applicable to loans made by the Secretary pursuant to 38 U.S.C. 3761 through 3764.

(Authority: 42 U.S.C. 4012a)

(c) Title 38, U.S.C. chapter 37 is a continuation and restatement of the provisions of title III of the Servicemen's Readjustment Act of 1944, and may be considered to be an amendment to such title III. References in the regulations concerning direct loans to veterans to the sections or chapters of title 38, United States Code, shall, where applicable, be deemed to refer to the prior corresponding provisions of the law.

[24 FR 2658, Apr. 7, 1959, as amended at 58 FR 59660, Nov. 10, 1993; 62 FR 5531, Feb. 6, 1997]

### § 36.4501 Definitions.

Wherever used in 38 U.S.C. 3711, 3762 or the regulations concerning direct loans to veterans, unless the context otherwise requires, the terms defined in this section shall have the meaning herein stated, namely:

*Cost* means the entire consideration paid or payable for or on account of the application of materials and labor to tangible property.

*Default* means failure of a borrower to comply with the terms of a loan agreement.

*Dwelling* means a building designed primarily for use as a home, consisting of one residential unit only and not containing any business unit.

*Energy conservation improvement.* An improvement to an existing dwelling'or farm residence through the installation of a solar heating system, a solar heating and cooling system, or a combined solar heating and cooling system, or through application of a residential energy conservation measure as prescribed in 38 U.S.C. 3710(d) or by the Secretary.

*Farm residence* means a dwelling located on a farm which is to be occupied by the veteran as the veteran's home.

*Guaranty* means the obligation of the United States, incurred pursuant to 38

U.S.C. chapter 37, to repay a specified percentage of a loan upon the default of the primary debtor.

*Home* means a place of residence.

*Improvement* means any addition or alteration which enhances the utility of the property for residential purposes.

*Indebtedness* means the unpaid principal and interest plus any other sums a borrower is obligated to pay Department of Veterans Affairs under the terms of the loan instruments or of the regulations concerning direct loans to veterans.

*Loan* means a loan made to a veteran by Department of Veterans Affairs pursuant to the provisions of 38 U.S.C. 3711 or 3762 and the regulations concerning direct loans to veterans.

*Meaningful interest* means a leasehold estate or other interest in trust land and any improvements thereon which permits the use, occupancy and enjoyment of that land and any improvements by the grantee. This interest must be capable of being conveyed (1) as security for a loan made under 38 CFR 36.4527, (2) by the grantee to a third party subject to the approval of the tribal organization and the Secretary or designee, and (3) by the Secretary or other foreclosing mortgagee, subject to the provisions of a memorandum of understanding entered into by the Secretary or designee, the tribal organization, and the Bureau of Indian Affairs.

*Native American* means:

(1) An Indian, as defined in section 4(d) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(d));

(2) A native Hawaiian, as defined in section 201(a)(7) of the Hawaiian Homes Commission Act of 1920, (Public Law 67–34, 42 Stat. 108);

(3) An Alaska Native within the meaning provided for the term 'Native' in section 3(b) of the Alaska Native Claims Settlement Act (43 U.S.C. 1602(b)); and

(4) A Pacific Islander, within the meaning of the Native American Programs Act of 1974 (42 U.S.C. 2991 *et seq.*)

*Native American veteran* means any veteran who is a Native American.

*Period of more than 180 days* means 181 or more calendar days of continuous active duty.

*Purchase price* means the entire legal consideration paid or payable upon or on account of the sale of property, exclusive of acquisition costs, or for the cost of materials and labor to be applied thereto.

*Reasonable value* means that figure which represents the amount a reputable and qualified appraiser, unaffected by personal interest, bias, or prejudice, would recommend to a prospective purchaser as proper price or cost in the light of prevailing conditions.

*Repairs* means any alteration of existing realty which is necessary or advisable for protective, safety, or restorative purposes.

*Secretary* means the Secretary of Veterans Affairs, or any employee of the Department of Veterans Affairs authorized to act in the Secretary's stead.

*Tribal organization* has the same meaning given in section 4(l) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(1)) and includes the Department of Hawaiian Homelands, in the case of native Hawaiians, and such other organizations as the Secretary may prescribe.

*Trust land* means any land that:

(1) Is held in trust by the United States for Native Americans;

(2) Is subject to restrictions on alienation imposed by the United States on Indian lands (including native Hawaiian homelands);

(3) Is owned by a Regional Corporation or a Village Corporation, as such terms are defined in section 3(g) and 3(j) of the Alaska Native Claims Settlement Act, respectively (43 U.S.C. 1602(g), (j)); or

(4) Is on any island in the Pacific Ocean if such land is, by cultural tradition, communally-owned land, as determined by the Secretary.

*Department of Veterans Affairs* means the Secretary of Veterans Affairs, or any employee of the Department of

Veterans Affairs authorized to act in the Secretary's stead.

(Authority: 38 U.S.C. 3761–3764)

[24 FR 2658, Apr. 7, 1959, as amended at 31 FR 16713, Dec. 30, 1966; 35 FR 17180, Nov. 7, 1970; 40 FR 4143, Jan. 28, 1975; 41 FR 32218, Aug. 2, 1976; 41 FR 44859, Oct. 13, 1976; 45 FR 20472, Mar. 28, 1980; 46 FR 43674, Aug. 31, 1981; 58 FR 59660, Nov. 10, 1993]

### § 36.4502 Use of guaranty entitlement.

The guaranty entitlement of the veteran obtaining a direct loan which is closed on or after February 1, 1988, shall be charged with the lessor of the loan amount or an amount which bears the same ratio to $36,000 as the amount of the loan bears to $33,000. The charge against entitlement of a veteran who obtained a direct loan which was closed prior to the aforesaid date, shall be the amount which would have been charged had the loan been closed subsequent to such date.

(Authority: 38 U.S.C. 3711(d)(2)(A))

[55 FR 40657, Oct. 4, 1990]

### § 36.4503 Amount and amortization.

(a) The original principal amount of any loan made on or after February 1, 1988, shall not exceed an amount which bears the same ratio to $33,000 as the amount of the guaranty to which the veterans is entitled under 38 U.S.C. 3710 at the time the loan is made bears to $36,000. This limitation shall not preclude the making of advances, otherwise proper, subsequent to the making of the loan pursuant to the provisions of § 36.4511. Except as to home improvement loans, loans made by VA shall near interest at the rate of 7½ percent per annum. Loans solely for the purposes of energy conservation improvements or other alterations, improvements, or repairs shall bear interest at the rate of 9 percent per annum.

(Authority: 38 U.S.C. 3711(d)(2)(A))

(b) Each loan shall be repayable on the basis of approximately equal monthly installments; except that in the case of loans made for any of the purposes described in clause (2), (3), or (4) of subsection (a) of 38 U.S.C. 3710, such loans may provide for repayment in quarterly, semiannual, or annual installments, provided that such plan of repayment corresponds to the present and anticipated income of the veteran.

(c) The first installment payment on a loan to construct, alter or improve a farm residence or other dwelling may be postponed for a period not exceeding 12 months from the date of the loan instruments. The first installment payment for a loan for the purchase of a dwelling or farm on which there is a farm residence may not be postponed more than 60 days from the date of loan closing: *Provided,* That if the loan is repayable in quarterly, semi-annual or annual installments, the first installment payment date may be postponed for not more than 12 months from the date of the loan instruments.

(d) The final installment on any loan shall not be in excess of two times the average of the preceding installments, except that on a construction loan the final installment may be for an amount not in excess of 5 percent of the original principal amount of the loan. The limitations imposed by this paragraph on the amount of the final installment shall not apply in the case of any loan extended or recast pursuant to § 36.4505 or 36.4506.

(Authority: 38 U.S.C. 501, 3703(c)(1), 3711(d)(1), 3712 (f) and (g))

[15 FR 6288, Sept. 20, 1950, as amended at 24 FR 2658, Apr. 7, 1959; 52 FR 12382, Apr. 16, 1987; 52 FR 18357, May 15, 1987; 53 FR 18983, May 26, 1988; 53 FR 44401, Nov. 3, 1988; 53 FR 51551, Dec. 22, 1988; 54 FR 24557, June 8, 1989; 54 FR 30384, July 20, 1989; 55 FR 6983, Feb. 28, 1990; 55 FR 40657, Oct. 4, 1990; 57 FR 37713, Aug. 20, 1992]

### § 36.4504 Loan closing expenses.

(a) Department of Veterans Affairs will designate a loan closer to represent the Department of Veterans Affairs at the closing and in advance thereof will agree with the loan closer upon the fee to be paid by the Department of Veterans Affairs for preparing the loan closing instruments and attending at the closing of the loan. The loan closer as such is neither an agent nor employee of the Department of Veterans Affairs.

(b) With respect to a loan made to a veteran-borrower pursuant to an application (VA Form 26-1802a, received by the Department of Veterans Affairs on

or after March 3, 1966, the borrower shall pay the Department of Veterans Affairs the following:

(1) $50, or one percent (1%) of the loan amount, whichever is greater, which charge shall be in lieu of the loan closer's fee, credit report, and cost of appraisal: *Provided,* That if the loan is to finance the cost of construction, repairs, alterations, or improvements necessitating disbursements of the loan proceeds as the construction or other work progresses, the charge to the veteran-borrower shall be two percent (2%) of the loan amount, but not less than $50 in any event.

(2)(i) A loan fee of one percent of the total loan amount. All or part of such fee may be paid in cash at loan closing or all or part of the fee may be included in the loan without regard to the reasonable value of the property. In computing the fee, the Department of Veterans Affairs will disregard any amount included in the loan to enable the borrower to pay such fee. If all or part of the fee is included in the loan, the amount of the loan as increased may not exceed $33,000.

(Authority: 38 U.S.C. 3729(a))

(ii) The fee described in paragraph (b)(2)(i) of this section shall not be collected from a veteran who is receiving compensation (or who but for the receipt of retirement pay would be entitled to receive compensation) or from a surviving spouse described in section 3701(b)(2) of title 38 U.S.C.

(Authority: 38 U.S.C. 3729(b))

(iii) Collection of the loan fee described in this paragraph (b)(2) of this section shall not apply to loans closed prior to August 17, 1984, or to loans closed after September 30, 1987.

(Authority: 38 U.S.C. 3729(d))

(3) Costs or expenses normally paid by a purchaser or lienor incident to loan closing including but not limited to the following:

(i) Fee of Department of Veterans Affairs designated compliance inspector;

(ii) Recording fees and recording taxes or other charges incident to recordation;

(iii) That portion of taxes, assessments, and other similar items for the current year chargeable to the borrower and the initial deposit (lump-sum payment) for the tax and insurance account;

(iv) Hazard insurance as required by § 36.4512,

(v) Survey, if any;

(vi) Title examination and title evidence.

Charges or costs payable by the veteran-borrower, except as to the payment of the loan fee described in paragraph (b)(2)(i) of this section, shall be paid in cash and may not be paid out of the proceeds of the loan. No service or brokerage fee shall be charged against the veteran-borrower by any third party for procuring a direct loan or in connection therewith.

(c) With respect to a loan to construct, repair, alter, or improve a farm residence or other dwelling, the Department of Veterans Affairs may require the veteran to deposit with the Department of Veterans Affairs, or in an escrow satisfactory to the Department of Veterans Affairs, 10 percent of the estimated cost thereof or such alternative sum, in cash or its equivalent, as the Department of Veterans Affairs may determine to be necessary in order to afford adequate assurance that sufficient funds will be available, from the proceeds of the loan or from other sources, to assure completion of the construction, repair, alteration, or improvement in accordance with the plans and specifications upon which the Department of Veterans Affairs based its loan commitment.

(Authority: 38 U.S.C. 501, 3724, and 3729)

[15 FR 6288, Sept. 20, 1950, as amended at 23 FR 2339, Apr. 10, 1958; 33 FR 6976, May 9, 1968; 35 FR 17180, Nov. 7, 1970; 41 FR 32218, Aug. 2, 1976; 47 FR 46700, Oct. 20, 1982; 50 FR 5755, Feb. 12, 1985]

### § 36.4505 Maturity of loan.

(a) The maturity of a loan shall not exceed 25 years and 32 days. If the Department of Veterans Affairs determines the income and expenses of a veteran-applicant under customary credit standards would prevent the veteran from making the required loan payments for a loan which matures in

25 years and 32 days, but the veteran would be able to make the loan payments over a longer period of time, the loan may be made with a maturity not in excess of 30 years and 32 days.

(b) Every loan shall be repayable within the estimated economic life of the property securing the loan.

(c) Nothing in this section shall preclude extension of the loan pursuant to the provisions of § 36.4506.

(Authority: 38 U.S.C. 3703 (c)(1), (d)(1))

[46 FR 43675, Aug. 31, 1981]

### § 36.4506 Recasting.

In the event of default or to avoid imminent default, the Department of Veterans Affairs may at any time enter into an agreement with the borrower which will permit the latter temporarily to repay the obligation on a basis appropriate to the borrower's apparent current ability to pay or may enter into an appropriate recasting or extension agreement: *Provided,* That no such agreement shall extend the ultimate repayment of a loan beyond the expiration of 30 years and 32 days from the date of the loan. *Provided further,* That nothing in this section shall be deemed to limit the forbearance or indulgence which the Secretary may extend in an individual case pursuant to the provisions of 38 U.S.C. 3720(f).

[46 FR 43675, Aug. 31, 1981]

### § 36.4507 Refinancing of mortgage or other lien indebtedness.

(a) Loans may be made for the purpose of refinancing (38 U.S.C. 3710(a)(5)) an existing mortgage loan or other indebtedness secured by a lien of record on a dwelling or farm residence owned and occupied by an eligible veteran as the veteran's home, provided that:

(1) The amount of the loan does not exceed the sum due the holder of the mortgage or other lien indebtedness on such dwelling or farm residence, and also is not more than the reasonable value of the dwelling or farm residence, and

(2) The loan is otherwise eligible.

(b) A refinancing loan for an amount which exceeds the sum due the holder of the mortgage or other lien indebtedness (the excess proceeds to be paid to the veteran) may also be made, *Provided, That:*

(1) The loan is otherwise eligible, and

(2) The issuance of a commitment to make any such loan for an amount which exceeds eighty (80) percent of the reasonable value of the veteran's dwelling or farm residence shall require, unless the Under Secretary for Benefits otherwise directs, the approval of the Director, Loan Guaranty Service.

(c) Nothing shall preclude making a loan pursuant to the provisions of 38 U.S.C. 3710(a)(5) to an eligible veteran having home loan guaranty entitlement to refinance a loan previously guaranteed insured or made by the Secretary which is outstanding on the dwelling or farm residence owned and occupied or to be reoccupied after the completion of major alterations, repairs, or improvements to the property, by the veteran as the veteran's home.

(Authority: 38 U.S.C. 3711)

(d) A refinancing loan may include contractual prepayment penalties, if any, due the holder of the mortgage or other lien indebtedness to be refinanced.

(e) Nothing in this section shall preclude the refinancing of the balance due for the purchase of land on which new construction is to be financed through the proceeds of the loan, or the refinancing of the balance due on an existing land sale contract relating to a veteran's dwelling or farm residence.

[35 FR 18872, Dec. 11, 1970, as amended at 46 FR 43675, Aug. 31, 1981; 49 FR 42571, Oct. 23, 1984; 61 FR 28059, June 4, 1996]

### § 36.4508 Transfer of property by borrower.

(a) Direct loans for which commitments are made on or after March 1, 1988, are not assumable without the prior approval of the Department of Veterans Affairs or its authorized agent. The following shall apply:

(1) The Department of Veterans Affairs shall include in the mortgage or deed of trust and the promissory note or bond on any loan for which a commitment was made on or after March 1, 1988, the following warning in a conspicuous position in capital letters on

the first page of the document in type at least 2½ times larger than the regular type on such page: ''THIS LOAN IS NOT ASSUMABLE WITHOUT THE APPROVAL OF THE DEPARTMENT OF VETERANS AFFAIRS OR ITS AUTHORIZED AGENT''. Due to the difficulty in obtaining some commercial type sizes which are exactly 2½ times larger in height than other sizes, minor deviations in size will be permitted based on commercially available type sizes nearest to 2½ times the size of the print on the document.

(2) The instrument securing a direct loan for which a commitment is made on or after March 1, 1988, shall include:

(i) A provision that the Department of Veterans Affairs or other holder may declare the loan immediately due and payable upon transfer of the property securing such loan to any transferee unless the acceptability of the assumption of the loan is established pursuant to section 3714. This option may not be exercised if the transfer is the result of:

(A) The creation of a lien or other encumbrance subordinate to the lender's security instrument which does not relate to a transfer of rights of occupancy in the property;

(B) The creation of a purchase money security interest for household appliances;

(C) A transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety;

(D) The granting of a leasehold interest of three years or less not containing an option to purchase;

(E) A transfer to a relative resulting from the death of a borrower;

(F) A transfer where the spouse or children of the borrower become a joint owner of the property with the borrower;

(G) A transfer resulting from a decree of a dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement by which the spouse of the borrower becomes the sole owner of the property. In such a case the borrower shall have the option of applying directly to the Department of Veterans Affairs regional office of jurisdiction for a release of liability under 1813(a); or

(H) A transfer into an inter vivos trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property.

(ii) A provision that a funding fee equal to one-half of one percent of the loan balance as of the date of transfer shall be payable to the Department of Veterans Affairs or its authorized agent. Furthermore, this provision shall provide that if this fee is not paid it shall constitute an additional debt to that already secured by the instrument; and,

(iii) A provision authorizing an assumption processing charge, not to exceed the lesser of $300 and the actual cost of a credit report or any maximum prescribed by applicable State law.

(Authority: 38 U.S.C. 3714)

(b) Whenever any veteran disposes of residential property securing a direct loan obtained under 38 U.S.C. chapter 37, the Department of Veterans Affairs, upon application made by such borrower, shall issue to the borrower a release relieving the borrower of all further liability to the Department of Veterans Affairs on account of such loan (including liability for any loss resulting from any default of the transferee or any subsequent purchaser of such property) if the Department of Veterans Affairs has determined, after such investigation as it deems appropriate, that there has been compliance with the conditions prescribed in 38 U.S.C. 3713(a) or 1814, as appropriate. The assumption of full liability for repayment of the loan by the transferee of the property must be evidenced by an agreement in writing in such form as the Department of Veterans Affairs may require. Any release of liability granted to a veteran by the Department of Veterans Affairs shall inure to the spouse of such veteran.

(c) If, on or after July 1, 1972, any veteran disposes of the property securing a direct loan obtained under 38 U.S.C. chapter 37, without receiving a release from liability with respect to such loan under 38 U.S.C. 3713(a) and a default subsequently occurs which results in liability of the veteran to the Secretary on account of the loan, the Secretary may relieve the veteran of

such liability if the Secretary determines that:

(1) A transferee either immediate or remote is legally liable to the Secretary for the debt of the original veteran-borrower established after the termination of the loan, and

(2) The original loan was current at the time such transferee acquired the property, and

(3) The transferee who is liable to the Secretary is found to have been a satisfactory credit risk at the time the transferee acquired the property.

(Approved by the Office of Management and Budget under control number 2900–0516)

[15 FR 6289, Sept. 29, 1950, as amended at 33 FR 5362, Apr. 4, 1968; 37 FR 24034, Nov. 11, 1972; 46 FR 43675, Aug. 31, 1981; 55 FR 37477, Sept. 12, 1990]

### § 36.4509 Joint loans.

(a) No loan will be made unless an eligible veteran is the sole principal obligor, or such veteran and spouse or eligible veteran co-applicant are the principal obligors thereon, nor unless such veteran alone, or together with a spouse or eligible veteran co-applicant, acquire the entire fee simple or other permissible estate in the realty for the acquisition of which the loan was obtained. Nothing in this section shall preclude other parties from becoming liable as comaker, endorser, guarantor, or surety.

(b) Notwithstanding that an applicant and spouse or other co-applicant are both eligible veterans and will be jointly and severally liable as borrowers, the original principal amount of the loan may not exceed the maximum permissible under § 36.4503(a). In any event the loan may not exceed $33,000.

(Authority: 38 U.S.C. 3711(d)(2)(A) and (3))

[43 FR 60460, Dec. 28, 1978]

### § 36.4510 Prepayment, acceleration, and liquidation.

(a) Any credit on the loan not previously applied in satisfaction of matured installments, other than the gratuity credit required by prior provisions of law to be credited to principal, may be reapplied by the Department of Veterans Affairs at the request of the borrower for the purpose of curing or preventing a default.

(b) The Department of Veterans Affairs shall include in the instruments evidencing or securing the indebtedness provisions relating to the following:

(1) The right of the borrower to prepay at any time without premium or fee, the entire indebtedness or any part thereof: *Provided,* That any such prepayment, other than payment in full, may not be made in any amount less than the amount of one installment, or $100, whichever is less: *And provided further,* That any prepayment made on other than an installment due date will not be credited until the next following installment due date, but not later than 30 days after such prepayment.

(2) The right of the Department of Veterans Affairs to accelerate the maturity of the entire indebtedness in the event of default.

(3) The right of the Department of Veterans Affairs to foreclose or otherwise proceed toliquidate or acquire property which is the security for the loan in the event of the borrower's delinquency in the repayment of the obligation or in the event of default in any other provisions of the loan contract.

(c) The Department of Veterans Affairs shall have the right to accelerate the entire indebtedness and to foreclose or otherwise proceed to liquidate, or acquire the security for the loan, in the event the veteran is adjudged a bankrupt, or if the property has been abandoned by the borrower or subjected to waste or hazard, or in the event conditions exist which warrant the appointment of a receiver by court.

[15 FR 6289, Sept. 20, 1950, as amended at 20 FR 6260, Aug. 26, 1955; 24 FR 2658, Apr. 7, 1959; 41 FR 44859, Oct. 13, 1976; 61 FR 28059, June 4, 1996]

### § 36.4511 Advances after loan closing.

(a) The Department of Veterans Affairs may at any time advance any sum or sums as are reasonably necessary and proper for the maintenance, repair, alteration, or improvement of the security for a loan or for the payment of taxes, assessments, ground or water rights, or casualty insurance thereon: *Provided,* That no advance shall be made for alterations or improvements

which are not necessary for the maintenance or repair of the security if such advance will increase the indebtedness to an amount in excess of $33,000.

(b) All sums disbursed incident to the making of advances under this section shall be added to the indebtedness. Department of Veterans Affairs may require any such advances to be secured ratably and on a parity with the principal indebtedness, or otherwise secured. The sum so advanced shall be evidenced by a supplemental note or otherwise as may be required by Department of Veterans Affairs.

(c) Department of Veterans Affairs may pay and charge against the indebtedness, or against the proceeds of the sale of any security therefor, any expense which is reasonably necessary for collection of the debt, protection, repossession, preservation, or liquidation of the security or of the lien thereon, including a reasonable amount for trustees' and legal fees.

(d) The Department of Veterans Affairs may treat as an advance and add to the mortgage balance the one-half of one percent funding fee due on a transfer under 38 U.S.C. 3714 when this is not paid at the time of transfer.

(Authority: 38 U.S.C. 3714)

[15 FR 6289, Sept. 20, 1950, as amended at 38 FR 33772, Dec. 7, 1973; 41 FR 44859, Oct. 13, 1976; 55 FR 37478, Sept. 12, 1990]

### § 36.4512 Taxes and insurance.

(a) In addition to the monthly installment payments of principal and interest payable under the terms of the loan agreement, the borrower will be required to make payments monthly to the Secretary in such amounts as may be determined by the Secretary from time to time to be necessary for the purpose of accumulating funds sufficient for the payment of taxes and assessments, ground rents, insurance premiums, and similar levies or charges on the security property. The borrower at loan closing shall pay in cash to the Secretary such sum as it estimates may be necessary as the initial deposit to the borrower's tax and insurance reserve account.

(Authority: 38 U.S.C. 3720)

(b) The borrower shall procure and maintain insurance of a type or types and in such amounts as may be required by the Secretary to protect the security against fire and other hazards. The Secretary cannot make a loan for the acquisition or construction of property located in an area identified by the Federal Emergency Management Agency as having special flood hazards unless the community in which such area is situated is then participating in the National Flood Insurance Program. The Secretary shall not make, increase, extend, or renew a loan secured by a building or manufactured home that is located or to be located in an area identified by the Federal Emergency Management Agency as having special flood hazards and in which flood insurance has been made available under the National Flood Insurance Act, as amended, unless the building or manufactured home and any personal property securing the loan is covered by flood insurance for the term of the loan. The amount of flood insurance must be at least equal to the lesser of the outstanding principal balance of the loan or the maximum limit of coverage available for the particular type of property under the National Flood Insurance Act, as amended. The requirements of 38 CFR 36.4700 through 36.4709 shall apply to direct loans made pursuant to 38 U.S.C. 3711 and 3761 through 3764. All hazard and flood insurance shall be carried with a company or companies satisfactory to the Secretary and the policies and renewals thereof shall be held in the possession of the Secretary and contain a mortgagee loss payable clause in favor of and in a form satisfactory to the Secretary.

(Authority: 42 U.S.C. 4012a, 4106(a))

[62 FR 5531, Feb. 6, 1997]

### § 36.4513 Foreclosure and liquidation.

In the event of a foreclosure sale or other liquidation of the security for a loan, the Department of Veterans Affairs shall credit upon the indebtedness the greater of:

(a) The net proceeds of the sale, or

(b) The current market value of the property as determined by the Department of Veterans Affairs, less the costs and expenses of liquidation.

In no event shall the credit pursuant to paragraph (b) of this section exceed the amount of the gross indebtedness, nor shall such credit be less than the amount legally required to be credited to the indebtedness under local law. If a deed in lieu of foreclosure is accepted, the consideration will be a full and complete release of liability of the obligors, or such lesser amount as may be agreed upon between the obligors and the Department of Veterans Affairs.

[23 FR 2340, Apr. 10, 1958]

### § 36.4514 Eligibility requirements.

Prior to making a loan, or a commitment therefor, the Department of Veterans Affairs shall determine that:

(a) The applicant is an eligible veteran.

(b) The applicant has full capacity under local law to enter into binding contracts.

(c) The applicant is a satisfactory credit risk and has the ability to repay the obligation proposed to be incurred and that the proposed payments on such obligation bear a proper relationship to present and anticipated income and expenses as determined by use of the credit standards in § 36.4337 of this part.

(Authority: 38 U.S.C. 501)

(d) Private capital is not available in the area at an interest rate not in excess of the rate authorized for guaranteed home loans for a loan for which the veteran is qualified under 38 U.S.C. 3710.

(e) The applicant is unable to obtain a loan for such purpose from the Secretary of Agriculture, under the Bankhead-Jones Farm Tenant Act, as amended, or under the Housing Act of 1949.

(f) In respect to a loan application received on or after September 15, 1956, there has been compliance by the applicant with the certification requirements prescribed in 38 U.S.C. 3704(c).

(g) The applicant has certified, in such form as the Secretary shall prescribe, that

(1) Neither the applicant nor anyone authorized to act for the applicant, will refuse to sell or rent, after the making of a bonafide offer, or refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny the dwelling or property covered by this loan to any person because of race, color, religion, sex, handicap, familial status, or national origin;

(2) The applicant recognizes that any restrictive convenant on the property relating to race, color, religion, sex, handicap, familial status, or national origin is illegal and void and any such covenant is specifically disclaimed; and

(3) The applicant understands that civil action for preventive relief may be brought by the Attorney General of the United States in any appropriate U.S. District Court against any person responsible for a violation of the applicable law.

[15 FR 6290, Sept. 20, 1950, as amended at 20 FR 6260, Aug. 26, 1955; 24 FR 2658, Apr. 7, 1959; 36 FR 13032, July 13, 1971; 56 FR 9862, Mar. 8, 1991]

### § 36.4515 Estate of veteran in real property.

(a) The estate in the realty acquired by the veteran, wholly or partly with the proceeds of a loan hereunder, or owned by the veteran and on which improvements on a farmhouse are to be financed by such loan, shall be not less than:

(1) A fee simple estate therein, legal or equitable; or

(2) A leasehold estate running or renewable at the option of the lessee for a period of not less than 14 years from the maturity of the loan, or to any earlier date at which the fee simple title will vest in the lessee, which is assignable or transferable, if the same be subjected to the lien; however, a leasehold estate which is not freely assignable and transferable will be considered an acceptable estate if it is determined by the Under Secretary for Benefits, or the Director, Loan Guaranty Service, (i) that such type of leasehold is customary in the area where the property is located; (ii) that a veteran or veterans will be prejudiced if the requirement for free assignability is adhered to and (iii) that the assignability and other provisions applicable to the

leasehold estate are sufficient to protect the interests of the veteran and the Government and are otherwise acceptable; or

(3) A life estate, provided that the remainder and reversionary interests are subjected to the lien. The title to such estate shall be such as is acceptable to informed buyers, title companies, and attorneys, generally, in the community in which the property is situated, except as modified by paragraph (b) of this section; or

(4) A beneficial interest in a revocable Family Living Trust that ensures that the veteran, or veteran and spouse, have an equitable life estate, provided the lien attaches to any remainder interest and the trust arrangement is valid under State law.

(b) Any such property or estate will not fail to comply with the requirements in paragraph (a) of this section by reason of the following:

(1) Encroachments;

(2) Easements;

(3) Servitudes;

(4) Reservations for water, timber, or subsurface rights;

(5) Right in any grantor or cotenant in the chain of title, or a successor of either, to purchase for cash, which right by the terms thereof is exercisable only if:

(i) An owner elects to sell,

(ii) The option price is not less than the price at which the then owner is willing to sell to another, and

(iii) Exercised within 30 days after notice is mailed by registered mail to the address of optionee last known to the then owner, of the then owner's election to sell, stating the price and the identity of the proposed vendee;

(6) Building and use restrictions whether or not enforceable by a reverter clause if there has been no breach of the conditions affording a right to an exercise of the reverter;

(7) Any other covenant, condition, restriction, or limitation approved by the Department of Veterans Affairs in the particular case.

The limitations on the quantum or quality of the estate or property that are indicated in this paragraph, insofar as they may materially affect the value of the property for the purpose for which it is used, shall be taken into account in the appraisal of reasonable value.

[15 FR 6290, Sept. 20, 1950, as amended at 24 FR 2658, Apr. 7, 1959; 28 FR 11506, Oct. 29, 1963; 33 FR 18027, Dec. 4, 1968; 34 FR 11095, July 1, 1969; 45 FR 20472, Mar. 28, 1980; 56 FR 9862, Mar. 8, 1991; 61 FR 28059, June 4, 1996]

### § 36.4516 Lien requirements.

(a) Loans for the purchase of a dwelling or for the purchase of a farm on which there is a farm residence shall be secured by a first lien on the property or estate. Loans for the construction of a farm residence or other dwelling shall also be secured by a first lien.

(b) Loans solely for the purpose of energy conservation improvements or other alterations, improvements, or repairs shall be secured in the following manner:

(1) Loans for $1,500 or less need not be secured, and in lieu of the title examination a statement may be accepted from the borrower that he or she has an interest in the property not less than that prescribed in § 36.4515(a).

(2) Loans for more than $1,500 but 40 percent or less of the prior to the improved reasonable value of the property shall be secured by a lien reasonable and customary in the community for the type of alteration, improvement, or repair financed.

(3) Loans for more than $1,500 and for more than 40 percent of the prior to the improved reasonable value of such property shall be secured by a first lien on the property or estate. However, such a home improvement loan may be secured by a lien immediately subordinate to the lien securing the previous loan extended by the Secretary, if the Department of Veterans Affairs is the holder of all liens of superior priority on the property.

(Authority: 38 U.S.C. 3711(d)(1))

(c) Tax liens, special assessment liens, and ground rent shall be disregarded with respect to any requirement that loans shall be secured by a lien of specified dignity. With the prior approval of the Secretary, Under Secretary for Benefits, or Director, Loan Guaranty Service, liens retained by nongovernmental entities to secure assessments or charges for municipal type services and facilities clearly

within the public purpose doctrine may be disregarded. In determining whether a loan for the purchase or construction of a home is secured by a first lien the Secretary may also disregard a superior lien created by a duly recorded covenant running with the realty in favor of a private entity to secure an obligation to such entity for the homeowner's share of the costs of the management, operation, or maintenance of property, services or programs within and for the benefit of the development or community in which the veteran's realty is located, if the Secretary determines that the interests of the veteran-borrower and of the Government will not be prejudiced by the operation of such covenant. In respect to any such superior lien to be created after June 6, 1969, the Secretary's determination must have been made prior to the recordation of the covenant.

[20 FR 6261, Aug. 26, 1955, as amended at 20 FR 9180, Dec. 10, 1955; 23 FR 2340, Apr. 10, 1958; 34 FR 9561, June 18, 1969; 45 FR 20472, Mar. 28, 1980; 61 FR 28059, June 4, 1996]

### § 36.4517 Incorporation by reference.

The regulations concerning direct loans to veterans in effect on the date a loan is closed shall govern the rights, duties, and liabilities of the parties to such loan during the period the Department of Veterans Affairs is the holder thereof, and any provisions of the loan instruments inconsistent with such regulations are hereby amended and supplemented to conform thereto.

[15 FR 6290, Sept. 20, 1950]

### § 36.4518 Supplementary administrative action.

Notwithstanding any requirement condition, or limitation stated in or imposed by the regulations in this part concerning direct loans to veterans, the Under Secretary for Benefits, or the Director, Loan Guaranty Service, within the limitations and conditions prescribed by the Secretary, may take such action as may be necessary or appropriate to relieve any undue prejudice to a debtor, or other person, which might otherwise result, provided such action shall not impair the vested rights of any person affected thereby. If such requirement, condition, or limitation is of an administrative or procedural nature, such action may be taken by any employee authorized to act under § 36.4520.

[23 FR 2340, Apr. 10, 1958, as amended at 61 FR 28059, June 4, 1996]

### § 36.4519 Eligible purposes and reasonable value requirements.

(a) A loan may be made only for the purpose hereinafter set forth in this paragraph, and the loan may not exceed the reasonable value of the property as established by the Department of Veterans Affairs:

(1) To purchase or construct a dwelling to be owned and occupied by the veteran as a home;

(2) To purchase a farm on which there is a farm residence to be occupied by the veteran as a home;

(3) To construct on land owned by the veteran a farm residence to be occupied by the veteran as a home;

(4) To repair, alter, or improve a farm residence or other dwelling owned and occupied or to be reoccupied after the completion of major alterations, repairs, or improvements to the property, by the veteran as his or her home;

(5) To make energy conservation improvements to a dwelling owned and occupied or to be occupied after the completion of major alterations, repairs, or improvements to the property, by the veteran as his or her home;

(6) To refinance (38 U.S.C. 3710(a)(5)) existing mortgage loans or other lines which are secured of record on a dwelling or farm residence owned and occupied or to be reoccupied after the completion of major alterations, repairs or improvements to the property, by the veteran as the veteran's home;

*Provided,* The veteran certifies, in such form as the Secretary may prescribe, that he or she has paid in cash from his or her own resources on account of such purchase, construction, alteration, repair, or improvement a sum equal to the difference, if any, between the purchase price or cost of the property and its reasonable value.

(b) In the case of a loan for the construction of a farm residence or other dwelling on land owned by the veteran, a portion of the loan proceeds may be expended to liquidate an indebtedness secured by a lien against such land, but only if the reasonable value of the land

is equal to or in excess of the amount of the indebtedness secured by such lien and if the liquidation of such indebtedness will permit the loan to be secured by a first lien. Except as provided in § 36.4507, no portion of the proceeds of a loan for repairs, alterations or improvements to a farm residence or other dwelling may be expended to liquidate a prior lien against the property.

(c) No direct loan may be made for the purpose of an interest rate reduction refinancing loan pursuant to 38 U.S.C. 3710(a)(8).

(Authority: 38 U.S.C. 3711(b))

[20 FR 6261, Aug. 26, 1955, as amended at 43 FR 60461, Dec. 28, 1978; 46 FR 43675, Aug. 31, 1981; 49 FR 42571, Oct. 23, 1984]

### § 36.4520 Delegation of authority.

(a) Except as hereinafter provided, each employee of the Department of Veterans Affairs heretofore or hereafter appointed to, or otherwise lawfully filling, any position designated in paragraph (b) of this section is hereby delegated authority, within the limitations and conditions prescribed by law, to exercise the powers and functions of the Secretary with respect to the making of loans and the rights and liabilities arising therefrom, including but not limited to the collection or compromise of amounts due, in money or other property, the extension, rearrangement, or sale of loans, the management and disposition of secured or unsecured notes and other property. In connection with direct loans made and held by the Department of Veterans Affairs, such designated employees may take any action which they are authorized to consent to or approve in respect to guaranteed or insured loans under the regulations prescribed therefor by the Secretary. Incidental to the exercise and performance of the powers and functions hereby delegated, each such employee is authorized to execute and deliver (with or without acknowledgment) for, and on behalf of, the Secretary evidence of guaranty and such certificates, forms, conveyances, and other instruments as may be appropriate in connection with the acquisition, ownership, management, sale, transfer, assignment, encumbrance, rental, or other disposition of real or personal property or of any right, title, or interest therein, including, but not limited to, contracts of sale, installment contracts, deeds, leases, bills of sale, assignments, and releases; and to approve disbursements to be made for any purpose authorized by 38 U.S.C. chapter 37.

(b) Designated positions:

Under Secretary for Benefits
Director, Loan Guaranty Service
Director, Medical and Regional Office Center
Director, VA Regional Office and Insurance Center
Director, Regional Office
Loan Guaranty Officer
Assistant Loan Guaranty Officer

The authority hereby delegated to employees of the positions designated in this paragraph may, with the approval of the Under Secretary for Benefits, be redelegated.

(c) Nothing in this section shall be construed to authorize any such employee to exercise the authority vested in the Secretary under 38 U.S.C. 501 or 3703(a)(2) or to sue or enter appearance for and on behalf of the Secretary or confess judgment against the Secretary in any court without the Secretary's prior authorization.

(d) Each Regional Office, regional office and insurance center, and Medical and Regional Office Center shall maintain and keep current a cumulative list of all employees of that Office or Center who, since May 1, 1980, have occupied the positions of Director, Loan Guaranty Officer, and Assistant Loan Guaranty Officer. This list will include each employee's name, title, date the employee assumed the position, and the termination date, if applicable, of the employee's tenure in such position. The list shall be available for public inspection and copying at the Regional Office, or Center, during normal business hours.

(Authority: 38 U.S.C. 501, 3720(a)(5))

[23 FR 2340, Apr. 10, 1958, as amended at 43 FR 60461, Dec. 28, 1978; 45 FR 21243, Mar. 1, 1980; 46 FR 43675, Aug. 31, 1981; 54 FR 34988, Aug. 23, 1989; 61 FR 28059, June 4, 1996]

### § 36.4521 Minimum property and construction requirements.

No loan for the purchase or construction of residential property shall be

made unless such property complies or conforms with those standards of planning, construction, and general acceptability applicable thereto which have been prescribed by the Secretary.

[23 FR 2340, Apr. 10, 1958]

### § 36.4522 Waivers, consents, and approvals.

No waiver, consent, or approval required or authorized by the regulations concerning direct loans to veterans shall be valid unless in writing signed by Department of Veterans Affairs.

[15 FR 6291, Sept. 20, 1950]

### § 36.4523 Geographical limits.

Any real property purchased, constructed, or improved with the proceeds of a loan under 38 U.S.C. 3711 shall be situated in the United States, which for purposes of 38 U.S.C. Chapter 37 is here defined as the several States, Territories, and possessions, and the District of Columbia, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands: *Provided*. That no loan shall be made pursuant to 38 U.S.C. 3711 unless the real property is located in one of the areas designated from time to time by the Department of Veterans Affairs as an area in which private capital is not available under 38 U.S.C. chapter 37 to eligible veterans for financing of the purchase, construction, repairs, alterations, or improvement of a farm residence or other dwelling, as the case may be.

[46 FR 43675, Aug. 31, 1981]

### § 36.4524 Sale of loans.

In the event a direct loan is purchased from the Department of Veterans Affairs at any time pursuant to the provisions of 38 U.S.C. 3711(g), the Department of Veterans Affairs may issue a guaranty in connection therewith within the maximums applicable to loans guaranteed under 38 U.S.C. 3710 and such loans shall thereafter be subject to the applicable provisions of the regulations governing the guaranty or insurance of loans to veterans, and such part of the regulations concerning direct loans to veterans as may be inconsistent therewith or variant therefrom shall no longer govern the subsequent disposition of the rights and liabilities of any interested parties.

[24 FR 2659, Apr. 7, 1959]

### § 36.4525 Requirement of a construction warranty.

Any commitment to make a direct loan and any approval of a direct loan application issued or made on or after May 2, 1955, shall, if the purpose of the loan is to finance the construction of a dwelling or farmhouse or to finance the purchase of a newly constructed dwelling, be subject to the express condition that the builder, seller, or the real party in interest in the transaction shall deliver to the veteran constructing or purchasing such dwelling with the aid of a direct loan a warranty, in the form prescribed by the Secretary, that the property has been completed in substantial conformity with the plans and specifications upon which the Secretary based the valuation of the property, including any modifications thereof, or changes or variations therein, approved in writing by the Secretary, and no direct loan shall be disbursed in full unless a copy of such warranty duly receipted by the purchaser is submitted to the Department of Veterans Affairs.

[20 FR 2463, Apr. 14, 1955, as amended at 46 FR 43676, Aug. 31, 1981]

### § 36.4526 Issuance of fund reservation commitments.

(a) Any builder or sponsor proposing to construct one or more dwellings in an area designated as eligible for direct loans may apply for a commitment for the reservation of direct loan funds to be used for the making of loans to eligible veterans for the purchase or construction of such dwellings. Such commitment may be issued on such conditions as the Department of Veterans Affairs determines to be proper in the particular case and will be valid for a period of 3 months;

*Provided*, That the Department of Veterans Affairs may, for good and sufficient reasons, extend the period of the commitment. No commitment shall be issued unless the builder or sponsor shall have paid an amount equivalent

to 2 percent of the funds being reserved, which amount shall be nonrefundable. The commitment shall be nontransferable except with the written approval of the Department of Veterans Affairs.

(b) Notwithstanding that direct loan funds may be available for reservation when issuance of a reservation commitment is requested by a builder or sponsor, the Department of Veterans Affairs may withhold issuance of such commitment in any case in which it determines that the experience or technical qualifications of the builder in respect to home construction are not acceptable, or that other factors bearing on the likelihood of the success of the proposed project are such as to justify withholding issuance of a fund reservation commitment.

[23 FR 2340, Apr. 10, 1958]

### § 36.4527 Direct housing loans to Native American veterans on trust lands.

(a) The Secretary may make a direct housing loan to a Native American veteran if:

(1) The Secretary has entered into a memorandum of understanding with respect to such loans with the tribal organization that has jurisdiction over the veteran; or

(2) The tribal organization that has jurisdiction over the veteran has entered into a memorandum of understanding with any department or agency of the United States with respect to such loans and the memorandum complies with the requirements of paragraph (b) of this section.

(Authority: 38 U.S.C. 3762(a))

(3) The memorandum is in effect when the loan is made and will remain in effect until the maturity of the subject loan.

(b)(1) Subject to paragraph (b)(2) of this section, each memorandum of understanding entered into by the Secretary with a tribal organization shall provide for the following:

(i) That each Native American veteran who is under the jurisdiction of the tribal organization and to whom the Secretary makes a direct loan under this section

(A) Holds, possesses, or acquires using the proceeds of the loan a meaningful interest in a lot and/or dwelling that is located on trust land; and

(B) Will purchase, construct, or improve a dwelling on the lot using the proceeds of the loan.

(ii) That each Native American veteran obtaining a direct loan under this section will convey to the Secretary by an appropriate instrument the interest referred to in paragraph (A) as security for the direct loan or, if the laws of the tribal organization do not allow the veteran to convey the meaningful interest to the Secretary, the memorandum of understanding may authorize the tribe to serve as Trustee for the Secretary for purposes of protecting the interest of the Secretary as lender.

(iii) That the tribal organization and each Native American veteran obtaining a direct loan under this section will permit the Secretary or his or her designee to enter upon the trust land of that organization or veteran for the purposes of carrying out such actions as the Secretary or his or her designee determines may be necessary:

(A) To evaluate the advisability of the loan; and

(B) To monitor any purchase, construction, or improvements carried out using the proceeds of the loan.

(C) To protect the improvements from vandalism and the elements,

(D) To make property inspections in conjunction with loan servicing, financial counseling, foreclosure, acquisition, management, repair, and resale of the secured interest.

(iv) That the tribal organization has established standards and procedures that authorize the grantee to legally establish the interest conveyed by a Native American veteran pursuant to subsection (B) and terminate all interest of the veteran in the land and improvements, including:

(A) Procedures for foreclosing the loan in the event of a default;

(B) Procedures for acquiring possession of the veteran's interest in the property; and

(C) Procedures for the resale of the property interest and/or the dwelling purchased, constructed, or improved using the proceeds of the loan.

(v) That the tribal organization agrees to such other terms and conditions with respect to the making of direct loans to Native American veterans under the jurisdiction of the tribal organization as the Secretary and the tribal organization may negotiate in order to ensure that direct loans made under this section are made in a responsible and prudent manner.

(2) The Secretary, or his or her designee, may only enter into a memorandum of understanding with a tribal organization under this section if the Secretary, or designee, determines that the memorandum provides for standards and procedures necessary to reasonably protect the financial interests of the United States.

(c)(1) Except as otherwise provided in this paragraph, and notwithstanding the provisions of section 36.4503 of this title, the principal amount of any loan made under this section may not exceed $80,000. The original principal amount of any loan made under this section shall not exceed an amount which bears the same ratio to $80,000 as the amount of the guaranty to which the veteran would be entitled under 38 U.S.C. 3710 at the time the loan is made bears to $36,000.

(2) The Secretary may make loans which exceed the amount specified in paragraph (c)(1) of this section in geographic areas in which the Secretary has determined that housing costs are significantly higher than average housing costs nationwide. The Secretary shall determine the maximum loan amounts in such areas. The original principal amount of any such loan shall not exceed an amount which bears the same ratio to the maximum loan amount established by the Secretary as the amount of the guaranty to which the veteran would be entitled under 38 U.S.C. 3710 at the time the loan is made bears to $36,000.

(3) Loans made under this section shall bear interest at a rate determined by the Secretary after considering yields on comparable mortgages in the secondary market, including bid and ask prices on mortgage-backed securities guaranteed by the Government National Mortgage Association (GNMA).

(4) The minimum requirements for planning, construction, improvement, and general acceptability relating to any direct loan made under this section shall be consistent with the administrative property standards established for loans made or guaranteed under title 38, U.S.C., chapter 37.

(d) Notwithstanding the provisions of § 36.4504(b), for loans made under this section, the Native American veteran-borrower shall pay the following loan closing costs to the parties indicated:

(1) A loan fee of 1.25 percent of the total loan amount (2 percent for Reservists who qualify under the provisions of 38 U.S.C. 3701(b)(5)) to the Department of Veterans Affairs. All or part of such fee may be paid in cash at loan closing or all or part of the fee may be included in the loan without regard to the reasonable value of the property or the maximum loan amount. In computing the fee, the Department of Veterans Affairs will disregard any amount included in the loan to enable the borrower to pay such fee.

(2) The fee described in paragraph (d)(1) of this section shall not be collected from a veteran who is receiving compensation (or who but for the receipt of retirement pay would be entitled to receive compensation) or from a surviving spouse described in § 3701(b)(2) of title 38 U.S.C.

(3) If the Secretary designates a third party to process the loan package on VA's behalf, a processing fee to that third party not to exceed $300 plus the actual cost of any credit report required.

(4) Costs or expenses normally paid by a purchaser or mortgagee incident to loan closing including but not limited to the following:

(i) Fees of the Department of Veterans Affairs designated appraisers and compliance inspectors;

(ii) Recording fees or other charges incident to recordation;

(iii) That portion of assessments and other similar items for the current year chargeable to the borrower; and

(iv) Hazard insurance premiums, if such insurance is available.

(5) Charges or costs payable by the Native American veteran-borrower, except for the loan fee described in paragraph (d)(1) of this section, shall be paid in cash and may not be paid out of the proceeds of the loan. No service or

brokerage fee shall be charged against the Native American veteran-borrower by any third party for procuring a direct loan.

(e)(1) The credit underwriting standards of 38 CFR 36.4337 shall apply to loans made under this section except to the extent the Secretary determines that they should be modified on account of the purpose of the program to make available housing to Native American veterans living on trust lands.

(2) The Secretary shall determine the reasonable value of the leasehold or other property interest that will serve as security for a loan made under this section in accordance with § 37.4519, of this chapter, unless the Secretary determines that such requirements are impractical to implement in a geographic area, on particular trust lands, or under circumstances specified by the Secretary.

(f) In connection with the origination of any loan under this section, the Secretary may make advances in cash to provide for repairs, alterations, and improvements and to meet incidental expenses of the loan transaction.

(g) Loans made under this section shall be amortized under a generally recognized plan which provides for equal monthly installments consisting of principal and interest, except for the final installment, which may not be in excess of two times the regular monthly installment. The limitation on the amount of the final installment shall not apply in the case of any loan extended, ballooned and/or reamortized.

(h) The Secretary may:

(1) Take any action that the Secretary determines to be necessary for the custody, management, and protection of properties and the realization or sale of investments under the VA Native American Direct Loan Program;

(2) Determine any necessary expenses and expenditures and the manner in which such expenses and expenditures shall be incurred, allowed, and paid;

(3) Employ, utilize, and compensate persons, organizations, or departments or agencies (including departments and agencies of the United States) designated by the Secretary to carry out necessary functions, including but not limited to loan processing and servicing activities, appraisals, and property inspections.

(i) Notwithstanding any requirement, condition, or limitation stated in or imposed by any provision of this regulation, the Under Secretary for Benefits, or the Director, Loan Guaranty Service, within the limitations and conditions prescribed by the Secretary, may execute memoranda of understanding, make determinations concerning the maximum direct loan amount as provided in paragraph (c) of this section, and take such supplementary administrative action as may be necessary or appropriate to relieve any undue prejudice to a debtor, or other person, which might otherwise result, provided such action shall not impair the vested rights of any person affected thereby. If such a requirement, condition, or limitation is of an administrative or procedural nature, such action may be taken by any employee authorized to act under paragraph (j) of this section.

(j)(1) Except as hereinafter provided, each employee of the Department of Veterans Affairs appointed to, or otherwise lawfully filling, any position designated in paragraph (j)(2) of this section is hereby delegated authority, within the limitations and conditions prescribed by law, to exercise the powers and functions of the Secretary with respect to the making of loans and the rights and liabilities arising therefrom, including, but not limited to the collection or compromise of amounts due, in money or other property, the extension, rearrangement, or sale of loans, and the management and disposition of secured or unsecured notes and other property. In connection with direct loans made and held by the Department of Veterans Affairs, such designated employees may take any action which they are authorized to consent to or approve in respect to guaranteed loans under § 36.4342. Incidental to the exercise and performance of the powers and functions hereby delegated, each such employee is authorized to execute and deliver (with or without acknowledgment) for, and on behalf of, the Secretary such certificates, forms, conveyances, and other instruments as may be appropriate in connection with

the acquisition, ownership, management, sale, transfer, assignment, encumbrance, rental, or other disposition of real or personal property or of any right, title, or interest therein, including, but not limited to, contracts of sale, installment contracts, deeds, leases, bills of sale, assignments, and releases; and to approve disbursements to be made for any purpose authorized by 38 U.S.C. chapter 37.

(2) Designated positions:

Under Secretary for Benefits
Deputy Under Secretary for Benefits
Director, Loan Guaranty Service
Director, Medical and Regional Office Center
Director, VA Regional Office and Insurance Center
Director, Regional Office
Loan Guaranty Officer
Assistant Loan Guaranty Officer

The authority hereby delegated to employees of the positions designated in this paragraph may, with the approval of the Under Secretary for Benefits, be redelegated.

(3) Nothing in this section shall be construed to authorize any such employee to exercise the authority vested in the Secretary under 38 U.S.C. 501(a) or 3703(a)(2) or to sue or enter appearance for and on behalf of the Secretary or confess judgment against the Secretary in any court without the Secretary's prior authorization.

(4) Each Regional Office, Regional Office and Insurance Center, and Medical and Regional Office Center shall maintain and keep current a cumulative list of all employees of that Office or Center who, since May 1, 1980, have occupied the positions of Director, Loan Guaranty Officer, and Assistant Loan Guaranty Officer. This list will include each employee's name, title, date the employee assumed the position, and the termination date, if applicable, of the employee's tenure in such position. The list shall be available for public inspection and copying at the Regional Office, or Center, during normal business hours.

(Authority: 38 U.S.C. 3761–3764)

[58 FR 59660, Nov. 10, 1993, as amended at 68 FR 6627, Feb. 10, 2003]

SALE OF LOANS, GUARANTEE OF PAYMENT

## § 36.4600 Sale of loans, guarantee of payment.

(a) Whenever loans are sold by the Department of Veterans Affairs, they will be clearly identified as loans sold with or without recourse.

(b) The payment of all loans sold with recourse shall be guaranteed in accordance with the provisions of this section.

(c) Wherever the term ''holder'' appears in this section it shall mean the purchaser of a loan sold by the Secretary and any subsequent transferee or assignee of such loan. The holder of each loan sold subject to guaranty shall be deemed to have agreed with the Secretary as follows:

(Authority: 38 U.S.C. 501, 3720):

(1) To furnish the Secretary with notice of default within 60 days after a loan has become two full installments in default.

(Authority: 38 U.S.C. 501, 3720)

(2) To maintain on the real estate a lien of the dignity assigned or transferred to the purchaser by the Secretary.

(3) To maintain insurance in an amount sufficient to protect the security against risks or hazards to which it may be subjected to the extent customary in the locality, and to apply the proceeds of loss payments to the loan balance or the restoration of the security, as the holder may in the holder's discretion deem proper. Flood insurance will be required on any building or personal property securing a loan at any time during the term of the loan that such security is located in an area identified by the Federal Emergency Management Agency as having special flood hazards and in which flood insurance has been made available under the National Flood Insurance Act, as amended. The amount of flood insurance must be at least equal to the lesser of the outstanding principal balance of the loan or the maximum limit of coverage available for the particular type of property under the National Flood Insurance Act, as amended. The notice requirements of 38 CFR 36.4709

shall apply to loans sold pursuant to this section.

(Authority: 42 U.S.C. 4012a, 4104a)

(4) To obtain a consideration equal to the fair market value of any real estate released from the first lien securing the loan, except where the loan will be paid in full, and to apply the entire consideration in reduction of the principal balance of the loan.

(5) To maintain the tax and insurance account as provided for in the loan instruments and to pay accrued taxes, special assessments, ground or water rents and premiums on fire or other insurance properly chargeable to the tax and insurance account.

(6) To submit to the Secretary notice of any suit or action or other legal or equitable proceeding to which the holder is a party (including a copy of every procedural paper filed on behalf of the holder or served on the holder), brought on or in connection with a loan sold under this section or involving title to, or other lien on, the property securing the loan, within the time that would be required if the Secretary were a party to the proceeding.

(7) To submit to the Secretary for prior approval any proposal to recast or extend the repayment terms of the loan.

(8) To take no action to accelerate the indebtedness or terminate the debtor's interest in the property without the prior approval of the Secretary.

(9) To make advances only for the maintenance and repairs reasonably necessary for the preservation of the security, or for the payment of accrued taxes, special assessments, ground or water rents, premiums on fire or other insurance against loss or damage to the property, or for other purposes approved in advance by the Secretary.

(10) To furnish the Secretary prompt notice of the cancellation of any repurchase endorsement or notice on the note or bond upon the payment in full of any loan sold pursuant to this section or of the release of the Secretary from liability to repurchase the loan.

(11) To maintain adequate accounting records and to provide the Secretary with such data relating to the loan as the Secretary may request incident to the Secretary's determination of the amount payable in connection with a request for the repurchase of the loan.

(12) To service the loans properly in accordance with established practices.

(13) To permit the Secretary to inspect, examine or audit at reasonable times and places the records of loans which are subject to repurchase under this section.

(14) To sell any loan to the Secretary for the amount specified in paragraph (e)(1) of this section upon request of the Secretary if the loan is six (6) full installments or more in default.

(15) To dispose of partial payments in accordance with the provisions of this paragraph. A partial payment is a remittance on a loan in default of any amount less than the full amount due under the terms of the loan and security instruments at the time the remittance is tendered; a default is a failure of a borrower to comply with the terms of a loan agreement.

(i) Except as provided in paragraph (c)(15)(ii) of this section, or upon the express waiver of the Secretary, the mortgage holder shall accept any partial payment and either apply it to the mortgagor's account or identify it with the mortgagor's account and hold it in a special account pending disposition. When partial payments held for disposition aggregate a full monthly installment, including escrow, they shall be applied to the mortgagor's account.

(ii) A partial payment may be returned to the mortgagor, within 10 calendar days from date of receipt of such payment, with a letter of explanation only if one or more of the following conditions exist:

(*a*) The property is wholly or partially tenant-occupied and rental payments are not being remitted to the holder for application to the loan account;

(*b*) The payment is less than one full monthly installment, including escrows and late charge, if applicable, unless the lesser payment amount has been agreed to under a written repayment plan;

(*c*) The payment is less than 50 percent of the total amount then due, unless the lesser payment amount has been agreed to under a written repayment plan;

(*d*) The payment is less than the amount agreed to in a written repayment plan;

(*e*) The amount tendered is in the form of personal check and the holder has previously notified the mortgagor in writing that only cash or certified remittances are acceptable;

(*f*) A delinquency of any amount has continued for at least 6 months since the account first became delinquent and no written repayment plan has been arranged.

(*g*) The loan has been submitted to the Department of Veterans Affairs for repurchase;

(*h*) The lien position of the security instrument would be jeopardized by acceptance of the partial payment.

(iii) A failure by the holder to comply with the provisions of this paragraph may result in a deduction from the repurchase price pursuant to paragraph (e)(1) of this section.

(Authority: 38 U.S.C. 3720)

NOTE: In any instance in which the holder desires Department of Veterans Affairs prior approval to a proposed action the holder may submit the facts to the Loan Guaranty Officer as provided in paragraph (i) of this section.

(16) To obtain and forward a current credit report(s) on the debtor(s) to the Secretary when requesting that the Secretary repurchase the loan.

(Authority: 38 U.S.C. 3703(c)(1) and 3720)

(d) The Secretary's guaranty liability under this section shall consist of and be limited solely to liability to repurchase the loan from the holder thereof whenever,

(1) The debtor is in default by reason of nonpayment of not less than two full installments and default has continued for three months or more on the date the holder submits its written request for repurchase by the Secretary; or

(2) The property securing the loan has been abandoned by the debtor; or

(3) The debtor has failed to comply with any other covenant or obligation of the loan contract and on the date of the holder's request for repurchase such failure has continued for more than 90 days after the holder's demand for compliance with the covenant or obligation, except that if the failure is due to nonpayment of real estate taxes the failure to pay when due has persisted for a continuing period of 180 days; or

(4) The Secretary determines, upon request of the holder to repurchase any loan, that such repurchase is in the best interests of the Government notwithstanding that the account is ineligible for repurchase under paragraphs (d) (1) through (3) of this section.

(e)(1) A cash payment shall be made to the holder upon the repurchase of a loan by the Secretary and shall be an amount equal to the price paid by the purchaser when the loan was sold by the Secretary, less repayments received by the holder which are properly applicable to the principal balance of the loan, plus any advances made for the purposes described in paragraph (c)(9) of this section, but no payments shall be made for accrued unpaid interest, except that with respect to loans sold by the Secretary after July 15, 1970, payment will be made for unpaid accured interest from the date of the first uncured default to the date of the claim for repurchase, but not in excess of interest for 120 days. If, however, there has been a failure of any holder to comply with the provisions of paragraph (c) of this section the Secretary shall be entitled to deduct from the repurchase price otherwise payable such amount as the Secretary determines to be necessary to restore the Secretary to the position the Secretary would have occupied upon repurchase of the loan in the absence of any such failure. Incident to the repurchase by the Secretary, the holder will pay to the Secretary an amount equal to the balance, if any, remaining in the tax and insurance account.

(2) The holder shall be deemed to have received as trustee for the benefit of the Secretary any amounts received on account of the loan indebtedness subsequent to submitting its request to repurchase and shall pay such amounts to the Department of Veterans Affairs upon the assignment and delivery of the note, bond and security instruments to the Department of Veterans Affairs.

(3) The holder may be reimbursed for the cost of a current credit report(s) on the debtor(s) which is (are) forwarded

to the Secretary along with the request for repurchase and for any other costs or expenses incurred which are approved in advance by the Secretary as being necessary to protect the Government's interest.

(f) Notwithstanding any other provision of this section, the Secretary shall be released from liability and shall not be obligated to repurchase any loan in respect to which:

(1) An obligor has been released from personal liability by any act or omission of the holder without the prior approval of the Secretary, except that a holder shall not be under any duty to establish the debt as a valid claim against the assets of the estate of any deceased or bankrupt obligor when such failure will not impair the validity or effectiveness of the lien securing the loan; or

(2) The holder has instituted foreclosure action against the property securing the loan without the prior approval of the Secretary, and such action has proceeded to the point where the judicial sale or sale under the power in the deed of trust has been held or the owner's interest in the property has been terminated by the holder by strict foreclosure, acceptance of a voluntary deed, or by other liquidation action; or

(3) Any material alteration has been made to the note, bond, security instrument, or installment sale contract after sale and delivery of the instruments by the Secretary to the purchaser.

(g)(1) Each employee of the Department of Veterans Affairs heretofore or hereafter appointed to or lawfully filling, any position designated in paragraph (g)(2) of this section is hereby delegated authority within the limitations and conditions prescribed by law to exercise the powers and functions of the Secretary with respect to the sale, assignment, transfer, and repurchase of loans, including, but not limited to the offering of such loans for sale, the acceptance of purchase offers, the assignment or transfer of notes or bonds and security instruments evidencing the loans sold, granting the prior approval of the Secretary under this section, determining the eligibility of the loans for repurchase and to calculate and pay the sum due the holder upon repurchase of the loan by the Department of Veterans Affairs.

(2) Designated positions:

Under Secretary for Benefits.
Director, Loan Guaranty Service.
Director, Regional Office.
Director, Medical and Regional Office Center.
Director, VA Center.
Loan Guaranty Officer.
Assistant Loan Guaranty Officer.

(h) No waiver, consent, or approval required or authorized by this section shall be valid unless in writing signed by an employee of the Department of Veterans Affairs authorized in this section to act for the Secretary.

(i) Whenever prior approval or consent of the Secretary is desired in respect to an action to be taken by a holder of a loan, the holder may address such request to the Loan Guaranty Officer in the Regional Office or Center having jurisdiction over the area in which the real estate security is located.

(j) Notwithstanding any requirement, condition, or limitation stated in or imposed by this section concerning the sale and repurchase of loans, the Under Secretary for Benefits, or the Director, Loan Guaranty Service, within the limitations and conditions prescribed by the Secretary may take such action as may be necessary or appropriate to relieve undue prejudice to a holder, debtor or other person, which might otherwise result, as long as such action shall not impair the vested rights of any person affected thereby. If such requirement, condition, or limitation is of an administrative or procedural nature, such action may be taken by an employee authorized to act under paragraph (g) of this section.

(k) This section will apply to all loans sold by the Department of Veterans Affairs after the effective date of this section which were originated or acquired by the Secretary of Veterans Affairs under chapter 37, title 38, U.S.C., or title III of the Servicemen's Readjustment Act of 1944, as amended, except that it shall not apply to direct

loans sold pursuant to section 3711(g) of chapter 37, title 38, U.S.C.

(Authority: 38 U.S.C. 3703(c)(1) and 3720)

(Information collection requirements contained in paragraphs (c) and (e) were approved by the Office of Management and Budget under control number 2900–0840.)

[27 FR 2686, Mar. 22, 1962, as amended at 39 FR 7785, Feb. 28, 1974; 44 FR 25839, May 3, 1979; 45 FR 31065, May 12, 1980; 51 FR 4596, Feb. 6, 1986; 52 FR 6548, Mar. 4, 1987; 53 FR 34296, Sept. 6, 1988; 61 FR 28059, June 4, 1996; 62 FR 5532, Feb. 6, 1997]

### § 36.4700 Authority, purpose, and scope.

(a) *Authority.* Sections 36.4700 through 36.4709 of this part are issued pursuant to 42 U.S.C. 4012a, 4104a, 4104b, 4106, and 4128.

(b) *Purpose.* The purpose of sections 36.4700 through 36.4709 of this part is to implement the requirements of the National Flood Insurance Act of 1968 and the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. 4001–4129).

(c) *Scope.* Sections 36.4700 through 36.4709 of this part, except for §§ 36.4705 and 36.4707, apply to loans secured by buildings or mobile homes located or to be located in areas determined by the Director of the Federal Emergency Management Agency to have special flood hazards. Sections 36.4705 and 36.4707 apply to loans secured by buildings or mobile homes, regardless of location.

(Authority: 42 U.S.C. 4012a, 4104a, 4104b, 4106, and 4128)

[62 FR 5532, Feb. 6, 1997]

### § 36.4701 Definitions.

(a) *Act* means the National Flood Insurance Act of 1968, as amended (42 U.S.C. 4001–4129).

(b) *Secretary* means the Secretary of Veterans Affairs.

(c) *Building* means a walled and roofed structure, other than a gas or liquid storage tank, that is principally above ground and affixed to a permanent site, and a walled and roofed structure while in the course of construction, alteration, or repair.

(d) *Community* means a State or a political subdivision of a State that has zoning and building code jurisdiction over a particular area having special flood hazards.

(e) *Designated loan* means a loan secured by a building or mobile home that is located or to be located in a special flood hazard area in which flood insurance is available under the Act.

(f) *Director of FEMA* means the Director of the Federal Emergency Management Agency.

(g) *Mobile home* means a structure, transportable in one or more sections, that is built on a permanent chassis and designed for use with or without a permanent foundation when attached to the required utilities. The term mobile home does not include a recreational vehicle. For purposes of this part, the term mobile home means a mobile home on a permanent foundation. The term mobile home includes a manufactured home as that term is used in the NFIP.

(h) *NFIP* means the National Flood Insurance Program authorized under the Act.

(i) *Residential improved real estate* means real estate upon which a home or other residential building is located or to be located.

(j) *Servicer* means the person responsible for:

(1) Receiving any scheduled, periodic payments from a borrower under the terms of a loan, including amounts for taxes, insurance premiums, and other charges with respect to the property securing the loan; and

(2) Making payments of principal and interest and any other payments from the amounts received from the borrower as may be required under the terms of the loan.

(k) *Special flood hazard area* means the land in the flood plain within a community having at least a one percent chance of flooding in any given year, as designated by the Director of FEMA.

(Authority: 42 U.S.C. 4012a, 4104a, 4104b, 4106 and 4128)

[62 FR 5532, Feb. 6, 1997]

### § 36.4702 Requirement to purchase flood insurance where available.

*In general.* The Secretary shall not make, increase, extend, or renew any designated loan unless the building or mobile home and any personal property

securing the loan is covered by flood insurance for the term of the loan. The amount of insurance must be at least equal to the lesser of the outstanding principal balance of the designated loan or the maximum limit of coverage available for the particular type of property under the Act. Flood insurance coverage under the Act is limited to the overall value of the property securing the designated loan minus the value of the land on which the property is located.

(Authority: 42 U.S.C. 4012a)

[62 FR 5532, Feb. 6, 1997]

### § 36.4703 Exemptions.

The flood insurance requirement prescribed by 38 CFR 36.4702 does not apply with respect to:

(a) Any State-owned property covered under a policy of self-insurance satisfactory to the Director of FEMA, who publishes and periodically revises the list of States falling within this exemption; or

(b) Property securing any loan with an original principal balance of $5,000 or less and a repayment term of one year or less.

(Authority: 42 U.S.C. 4012a(c))

[62 FR 5533, Feb. 6, 1997]

### § 36.4704 Escrow requirement.

If the Secretary requires the escrow of taxes, insurance premiums, fees, or any other charges for a loan secured by residential improved real estate or a mobile home that is made, increased, extended, or renewed on or after October 1, 1996, the Secretary shall also require the escrow of all premiums and fees for any flood insurance required under 38 CFR 36.4702. The Secretary, or a servicer acting on behalf of the Secretary, shall deposit the flood insurance premiums on behalf of the borrower in an escrow account. This escrow account will be subject to escrow requirements adopted pursuant to section 10 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2609) (RESPA), which generally limits the amount that may be maintained in escrow accounts for certain types of loans and requires escrow account statements for those accounts, only if the loan is otherwise subject to RESPA. Following receipt of a notice from the Director of FEMA or other provider of flood insurance that premiums are due, the Secretary, or a servicer acting on behalf of the Secretary, shall pay the amount owed to the insurance provider from the escrow account by the date when such premiums are due.

(Authority: 42 U.S.C. 4012a(d))

[62 FR 5533, Feb. 6, 1997]

### § 36.4705 Required use of standard flood hazard determination form.

(a) *Use of form.* The Secretary shall use the standard flood hazard determination form developed by the Director of FEMA (as set forth in appendix A of 44 CFR part 65) when determining whether the building or mobile home offered as collateral security for a loan is or will be located in a special flood hazard area in which flood insurance is available under the Act. The standard flood hazard determination form may be used in a printed, computerized, or electronic manner.

(b) *Retention of form.* The Secretary shall retain a copy of the completed standard flood hazard determination form, in either hard copy or electronic form, for the period of time the Secretary owns the loan.

(Authority: 42 U.S.C. 4104b)

[62 FR 5533, Feb. 6, 1997]

### § 36.4706 Forced placement of flood insurance.

If the Secretary, or a servicer acting on behalf of the Secretary, determines at any time during the term of a designated loan that the building or mobile home and any personal property securing the designated loan is not covered by flood insurance or is covered by flood insurance in an amount less than the amount required under 38 CFR 36.4702, then the Secretary or a servicer acting on behalf of the Secretary, shall notify the borrower that the borrower should obtain flood insurance, at the borrower's expense, in an amount at least equal to the amount required under 38 CFR 36.4702, for the remaining term of the loan. If the borrower fails to obtain flood insurance within 45

days after notification, then the Secretary or a servicer acting on behalf of the Secretary, shall purchase insurance on the borrower's behalf. The Secretary or a servicer acting on behalf of the Secretary, may charge the borrower for the cost of premiums and fees incurred in purchasing the insurance.

(Authority: 42 U.S.C. 4012a(e))

[62 FR 5533, Feb. 6, 1997]

### § 36.4707 Determination fees.

(a) *General.* Notwithstanding any Federal or State law other than the Flood Disaster Protection Act of 1973 as amended (42 U.S.C. 4001–4129), the Secretary, or a servicer acting on behalf of the Secretary, may charge a reasonable fee for determining whether the building or mobile home securing the loan is located or will be located in a special flood hazard area. A determination fee may also include, but is not limited to, a fee for life-of-loan monitoring.

(b) *Borrower fee.* The determination fee authorized by paragraph (a) of this section may be charged to the borrower if the determination:

(1) Is made in connection with a making, increasing, extending, or renewing of the loan that is initiated by the borrower;

(2) Reflects the Director of FEMA's revision or updating of floodplain areas or flood-risk zones;

(3) Reflects the Director of FEMA's publication of a notice or compendium that:

(i) Affects the area in which the building or mobile home securing the loan is located; or

(ii) By determination of the Director of FEMA, may reasonably require a determination whether the building or mobile home securing the loan is located in a special flood hazard area; or

(4) Results in the purchase of flood insurance coverage by the Secretary or a servicer acting on behalf of the Secretary, on behalf of the borrower under 38 CFR 36.4706.

(c) *Purchaser or transferee fee.* The determination fee authorized by paragraph (a) of this section may be charged to the purchaser or transferee of a loan in the case of the sale or transfer of the loan.

(Authority: 42 U.S.C. 4012a(h))

[62 FR 5533, Feb. 6, 1997]

### § 36.4708 Notice of special flood hazards and availability of Federal disaster relief assistance.

(a) *Notice requirement.* When the Secretary makes, increases, extends, or renews a loan secured by a building or a mobile home located or to be located in a special flood hazard area, the Secretary shall mail or deliver a written notice to the borrower and to the servicer in all cases whether or not flood insurance is available under the Act for the collateral securing the loan.

(b) *Contents of notice.* The written notice must include the following information:

(1) A warning, in a form approved by the Director of FEMA, that the building or the mobile home is or will be located in a special flood hazard area;

(2) A description of the flood insurance purchase requirements set forth in section 102(b) of the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. 4012a(b));

(3) A statement, where applicable, that flood insurance coverage is available under the NFIP and may also be available from private insurers; and

(4) A statement whether Federal disaster relief assistance may be available in the event of damage to the building or mobile home caused by flooding in a Federally declared disaster.

(c) *Timing of notice.* The Secretary shall provide the notice required by paragraph (a) of this section to the borrower within a reasonable time before the completion of the transaction, and to the servicer as promptly as practicable after the Secretary provides notice to the borrower and in any event no later than the time the Secretary provides other similar notices to the servicer concerning hazard insurance and taxes. Notice to the servicer may be made electronically or may take the form of a copy of the notice to the borrower.

(d) *Record of receipt.* The Secretary shall retain a record of the receipt of the notices by the borrower and the

servicer for the period of time the Secretary owns the loan.

(e) *Alternate method of notice.* Instead of providing the notice to the borrower required by paragraph (a) of this section, the Secretary may obtain satisfactory written assurance from a seller or lessor that, within a reasonable time before the completion of the sale or lease transaction, the seller or lessor has provided such notice to the purchaser or lessee. The Secretary shall retain a record of the written assurance from the seller or lessor for the period of time the Secretary owns the loan.

(f) *Use of prescribed form of notice.* The Secretary will be considered to be in compliance with the requirement for notice to the borrower of this section by providing written notice to the borrower containing the language presented in appendix A to this part within a reasonable time before the completion of the transaction. The notice presented in appendix A to this part satisfies the borrower notice requirements of the Act.

(Authority: 42 U.S.C. 4104a)

[62 FR 5533, Feb. 6, 1997]

### § 36.4709 Notice of servicer's identity.

(a) *Notice requirement.* When the Secretary makes, increases, extends, renews, sells, or transfers a loan secured by a building or mobile home located or to be located in a special flood hazard area, the Secretary shall notify the Director of FEMA (or the Director's designee) in writing of the identity of the servicer of the loan. The Director of FEMA has designated the insurance provider to receive the Secretary's notice of the servicer's identity. This notice may be provided electronically if electronic transmission is satisfactory to the Director of FEMA's designee.

(b) *Transfer of servicing rights.* The Secretary shall notify the Director of FEMA (or the Director's designee) of any change in the servicer of a loan described in paragraph (a) of this section within 60 days after the effective date of the change. This notice may be provided electronically if electronic transmission is satisfactory to the Director of FEMA's designee. Upon any change in the servicing of a loan described in paragraph (a) of this section, the duty to provide notice under this paragraph (b) shall transfer to the transferee servicer.

(Authority: 42 U.S.C. 4104a)

[62 FR 5534, Feb. 6, 1997]

## APPENDIX A TO PART 36—SAMPLE FORM OF NOTICE OF SPECIAL FLOOD HAZARDS AND AVAILABILITY OF FEDERAL DISASTER RELIEF ASSISTANCE

We are giving you this notice to inform you that:

The building or mobile home securing the loan for which you have applied is or will be located in an area with special flood hazards. The area has been identified by the Director of the Federal Emergency Management Agency (FEMA) as a special flood hazard area using FEMA's Flood Insurance Rate Map or the Flood Hazard Boundary Map for the following community: _____. This area has at least a one percent (1%) chance of a flood equal to or exceeding the base flood elevation (a 100-year flood) in any given year. During the life of a 30-year mortgage loan, the risk of a 100-year flood in a special flood hazard area is 26 percent (26%).

Federal law allows a lender and borrower jointly to request the Director of FEMA to review the determination of whether the property securing the loan is located in a special flood hazard area. If you would like to make such a request, please contact us for further information.

____ The community in which the property securing the loan is located participates in the National Flood Insurance Program (NFIP). Federal law will not allow us to make you the loan that you have applied for if you do not purchase flood insurance. The flood insurance must be maintained for the life of the loan. If you fail to purchase or renew flood insurance on the property, Federal law authorizes and requires us to purchase the flood insurance for you at your expense.

- Flood insurance coverage under the NFIP may be purchased through an insurance agent who will obtain the policy either directly through the NFIP or through an insurance company that participates in the NFIP. Flood insurance also may be available from private insurers that do not participate in the NFIP.
- At a minimum, flood insurance purchased must cover the lesser of:

(1) the outstanding principal balance of the loan; or

(2) the maximum amount of coverage allowed for the type of property under the NFIP.

Flood insurance coverage under the NFIP is limited to the overall value of the property securing the loan minus the value of the land on which the property is located.

• Federal disaster relief assistance (usually in the form of a low-interest loan) may be available for damages incurred in excess of your flood insurance if your community's participation in the NFIP is in accordance with NFIP requirements.

____ Flood insurance coverage under the NFIP is not available for the property securing the loan because the community in which the property is located does not participate in the NFIP. In addition, if the nonparticipating community has been identified for at least one year as containing a special flood hazard area, properties located in the community will not be eligible for Federal disaster relief assistance in the event of a Federally-declared flood disaster.

(Authority: 42 U.S.C. 4104a)

[62 FR 5534, Feb. 6, 1997]

# PART 38—NATIONAL CEMETERIES OF THE DEPARTMENT OF VETERANS AFFAIRS

Sec.

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AUTHORITY: 38 U.S.C. 107, 501, 512, chapter 24, 7105, and as noted in specific sections.

SOURCE: 70 FR 4769, Jan. 31, 2005, unless otherwise noted.

## § 38.600 Definitions.

(a) [Reserved]

(b) *Definitions.* For purposes of §§ 38.617 and 38.618:

*Appropriate State official* means a State attorney general or other official with statewide responsibility for law enforcement or penal functions.

*Clear and convincing evidence* means that degree of proof which produces in the mind of the fact-finder a firm belief regarding the question at issue.

*Convicted* means a finding of guilt by a judgment or verdict or based on a plea of guilty, by a Federal or State criminal court.

*Federal capital crime* means an offense under Federal law for which the death penalty or life imprisonment may be imposed.

*Interment* means the burial of casketed remains or the placement or scattering of cremated remains.

*Life imprisonment* means a sentence of a Federal or State criminal court directing confinement in a penal institution for life.

*Memorialization* means any action taken to honor the memory of a deceased individual.

*Personal representative* means a family member or other individual who has identified himself or herself to the National Cemetery Administration cemetery director as the person responsible for making decisions concerning the interment of the remains of or memorialization of a deceased individual.

*State capital crime* means, under State law, the willful, deliberate, or premeditated unlawful killing of another human being for which the death penalty or life imprisonment without parole may be imposed.

(Authority: 38 U.S.C. 2408, 2411)

## § 38.601 Advisory Committee on Cemeteries and Memorials.

Responsibilities in connection with Committee authorized by 38 U.S.C. chapter 24 are as follows:

(a) The Under Secretary for Memorial Affairs will schedule the frequency of meetings, make presentations before the Committee, participate when requested by the Committee, evaluate Committee reports and recommendations and make recommendations to the Secretary based on Committee actions.

(b) The Committee will evaluate and study cemeterial, memorial and burial benefits proposals or problems submitted by the Secretary or Under Secretary for Memorial Affairs, and make

recommendations as to course of action or solution. Reports and recommendations will be submitted to the Secretary for transmission to Congress.

### § 38.602 Names for national cemeteries and features.

(a) *Responsibility.* The Secretary is responsible for naming national cemeteries. The Under Secretary for Memorial Affairs, is responsible for naming activities and features therein, such as drives, walks, or special structures.

(b) *Basis for names.* The names of national cemetery activities may be based on physical and area characteristics, the nearest important city (town), or a historical characteristic related to the area. Newly constructed interior thoroughfares for vehicular traffic in national cemetery activities will be known as *drives.* To facilitate location of graves by visitors, drives will be named after cities, counties or States or after historically notable persons, places or events.

### § 38.603 Gifts and donations.

(a) Gifts and donations will be accepted only after it has been determined that the donor has a clear understanding that title thereto passes to, and is vested in, the United States, and that the donor relinquishes all control over the future use or disposition of the gift or donation, with the following exceptions:

(1) Carillons will be accepted with the condition that the donor will provide the maintenance and the operator or the mechanical means of operation. The time of operation and the maintenance will be coordinated with the superintendent of the national cemetery.

(2) Articles donated for a specific purpose and which are usable only for that purpose may be returned to the donor if the purpose for which the articles were donated cannot be accomplished.

(3) If the donor directs that the gift is donated for a particular use, those directions will be carried out insofar as they are proper and practicable and not in violation of Department of Veterans Affairs policy.

(4) When considered appropriate and not in conflict with the purpose of the national cemetery, the donor may be recognized by a suitable inscription on those gifts. In no case will the inscription give the impression that the gift is owned by, or that its future use is controlled by, the donor. Any tablet or plaque, containing an inscription will be of such size and design as will harmonize with the general nature and design of the gift.

(b) Officials and employees of the Department of Veterans Affairs will not solicit contributions from the public nor will they authorize the use of their names, the name of the Secretary, or the name of the Department of Veterans Affairs by an individual or organization in any campaign or drive for money or articles for the purpose of making a donation to the Department of Veterans Affairs. This restriction does not preclude discussion with the individual offering the gift relative to the appropriateness of the gift offered.

### § 38.617 Prohibition of interment or memorialization of persons who have been convicted of Federal or State capital crimes.

(a) *Prohibition.* The interment in a national cemetery under the control of the National Cemetery Administration of the remains, or the memorialization, of any of the following persons is prohibited:

(1) Any person identified to the Secretary of Veterans Affairs by the United States Attorney General, prior to approval of interment or memorialization, as an individual who has been convicted of a Federal capital crime and sentenced to death or life imprisonment as a result of such crime.

(2) Any person identified to the Secretary of Veterans Affairs by an appropriate State official, prior to approval of interment or memorialization, as an individual who has been convicted of a State capital crime and sentenced to death or life imprisonment without parole as a result of such crime.

(3) Any person found under procedures specified in § 38.618 to have committed a Federal or State capital crime but have avoided conviction of such crime by reason of unavailability for trial due to death or flight to avoid prosecution.

(b) *Notice.* The prohibition referred to in paragraph (a)(3) of this section is not contingent on receipt by the Secretary of Veterans Affairs or any other VA official of notice from any Federal or State official.

(c) Receipt of notification. The Under Secretary for Memorial Affairs is delegated authority to receive from the United States Attorney General and appropriate State officials on behalf of the Secretary of Veterans Affairs the notification of conviction of capital crimes referred to in paragraphs (a)(1) and (2) of this section.

(d) *Decision where notification previously received.* Upon receipt of a request for interment or memorialization, where the Secretary of Veterans Affairs has received the notification referred to in paragraph (a)(1) or (2) of this section with regard to the deceased, the cemetery director will make a decision on the request for interment or memorialization pursuant to 38 U.S.C. 2411.

(e) *Inquiry.* (1) Upon receipt of a request for interment or memorialization, where the Secretary of Veterans Affairs has not received the notification referred to in paragraph (a)(1) or (a)(2) of this section with regard to the deceased, but the cemetery director has reason to believe that the deceased may have been convicted of a Federal or State capital crime, the cemetery director will initiate an inquiry to either:

(i) The United States Attorney General, in the case of a Federal capital crime, requesting notification of whether the deceased has been convicted of a Federal capital crime for which the deceased was sentenced to death or life imprisonment; or

(ii) An appropriate State official, in the case of a State capital crime, requesting notification of whether the deceased has been convicted of a State capital crime for which the deceased was sentenced to death or life imprisonment without parole.

(2) The cemetery director will defer decision on whether to approve interment or memorialization until after a response is received from the Attorney General or appropriate State official.

(f) *Decision after inquiry.* Where an inquiry has been initiated under paragraph (e) of this section, the cemetery director will make a decision on the request for interment or memorialization pursuant to 38 U.S.C. 2411 upon receipt of the notification requested under that paragraph, unless the cemetery director initiates an inquiry pursuant to § 38.618(a).

(g) *Notice of decision.* Written notice of a decision under paragraph (d) or (f) of this section will be provided by the cemetery director to the personal representative of the deceased, along with written notice of appellate rights in accordance with § 19.25 of this title. This notice of appellate rights will include notice of the opportunity to file a notice of disagreement with the decision of the cemetery director. Action following receipt of a notice of disagreement with a denial of eligibility for interment or memorialization under this section will be in accordance with §§ 19.26 through 19.38 of this title.

(Authority: 38 U.S.C. 512, 2411, 7105)

### § 38.618 Findings concerning commission of a capital crime where a person has not been convicted due to death or flight to avoid prosecution.

(a) *Inquiry.* With respect to a request for interment or memorialization, if a cemetery director has reason to believe that a deceased individual who is otherwise eligible for interment or memorialization may have committed a Federal or State capital crime, but avoided conviction of such crime by reason of unavailability for trial due to death or flight to avoid prosecution, the cemetery director, with the assistance of the VA regional counsel, as necessary, will initiate an inquiry seeking information from Federal, State, or local law enforcement officials, or other sources of potentially relevant information. After completion of this inquiry and any further measures required under paragraphs (c), (d), (e), and (f) of this section, the cemetery director will make a decision on the request for interment or memorialization in accordance with paragraph (b), (e), or (g) of this section.

(b) *Decision approving request without a proceeding or termination of a claim by personal representative without a proceeding.* (1) If, after conducting the inquiry described in paragraph (a) of this

section, the cemetery director determines that there is no clear and convincing evidence that the deceased committed a Federal or State capital crime of which he or she was not convicted due to death or flight to avoid prosecution, and the deceased remains otherwise eligible, the cemetery director will make a decision approving the interment or memorialization.

(2) If the personal representative elects for burial at a location other than a VA national cemetery, or makes alternate arrangements for burial at a location other than a VA national cemetery, the request for interment or memorialization will be considered withdrawn and action on the request will be terminated.

(c) *Initiation of a proceeding.* (1) If, after conducting the inquiry described in paragraph (a) of this section, the cemetery director determines that there appears to be clear and convincing evidence that the deceased has committed a Federal or State capital crime of which he or she was not convicted by reason of unavailability for trial due to death or flight to avoid prosecution, the cemetery director will provide the personal representative of the deceased with a written summary of the evidence of record and a written notice of procedural options.

(2) The notice of procedural options will inform the personal representative that he or she may, within 15 days of receipt of the notice:

(i) Request a hearing on the matter;

(ii) Submit a written statement, with or without supporting documentation, for inclusion in the record;

(iii) Waive a hearing and submission of a written statement and have the matter forwarded immediately to the Under Secretary for Memorial Affairs for a finding; or

(iv) Notify the cemetery director that the personal representative is withdrawing the request for interment or memorialization, thereby, closing the claim.

(3) The notice of procedural options will also inform the personal representative that, if he or she does not exercise one or more of the stated options within the prescribed period, the matter will be forwarded to the Under Secretary for Memorial Affairs for a finding based on the existing record.

(d) *Hearing.* If a hearing is requested, the Director, Memorial Services Network will conduct the hearing. The purpose of the hearing is to permit the personal representative of the deceased to present evidence concerning whether the deceased committed a crime which would render the deceased ineligible for interment or memorialization in a national cemetery. Testimony at the hearing will be presented under oath, and the personal representative will have the right to representation by counsel and the right to call witnesses. The VA official conducting the hearing will have the authority to administer oaths. The hearing will be conducted in an informal manner and court rules of evidence will not apply. The hearing will be recorded on audiotape and, unless the personal representative waives transcription, a transcript of the hearing will be produced and included in the record.

(e) *Decision of approval or referral for a finding after a proceeding.* Following a hearing or the timely submission of a written statement, or in the event a hearing is waived or no hearing is requested and no written statement is submitted within the time specified:

(1) If the cemetery director determines that it has not been established by clear and convincing evidence that the deceased committed a Federal or State capital crime of which he or she was not convicted due to death or flight to avoid prosecution, and the deceased remains otherwise eligible, the cemetery director will make a decision approving interment or memorialization; or

(2) If the cemetery director believes that there is clear and convincing evidence that the deceased committed a Federal or State capital crime of which he or she was not convicted due to death or flight to avoid prosecution, the cemetery director will forward a request for a finding on that issue, together with the cemetery director's recommendation and a copy of the record to the Under Secretary for Memorial Affairs.

(f) *Finding by the Under Secretary for Memorial Affairs.* Upon receipt of a request from the cemetery director under

paragraph (e) of this section, the Under Secretary for Memorial Affairs will make a finding concerning whether the deceased committed a Federal or State capital crime of which he or she was not convicted by reason of unavailability for trial due to death or flight to avoid prosecution. The finding will be based on consideration of the cemetery director's recommendation and the record supplied by the cemetery director.

(1) A finding that the deceased committed a crime referred to in paragraph (f) of this section must be based on clear and convincing evidence.

(2) The cemetery director will be provided with written notification of the finding of the Under Secretary for Memorial Affairs.

(g) *Decision after finding.* Upon receipt of notification of the finding of the Under Secretary for Memorial Affairs, the cemetery director will make a decision on the request for interment or memorialization pursuant to 38 U.S.C. 2411. In making that decision, the cemetery director will be bound by the finding of the Under Secretary for Memorial Affairs.

(h) *Notice of decision.* The cemetery director will provide written notice of the finding of the Under Secretary for Memorial Affairs and of a decision under paragraph (b), (e)(1), or (g) of this section. With notice of any decision denying a request for interment or memorialization, the cemetery director will provide written notice of appellate rights to the personal representative of the deceased, in accordance with § 19.25 of this title. This will include notice of the opportunity to file a notice of disagreement with the decision of the cemetery director and the finding of the Under Secretary for Memorial Affairs. Action following receipt of a notice of disagreement with a denial of eligibility for interment or memorialization under this section will be in accordance with §§ 19.26 through 19.38 of this title.

(Authority: 38 U.S.C. 512, 2411)

### § 38.620 Persons eligible for burial.

The following is a list of those individuals who are eligible for burial in a national cemetery:

(a) Any veteran (which for purposes of this section includes a person who died in the active military, naval, or air service).

(b) Any member of a Reserve component of the Armed Forces, and any member of the Army National Guard or the Air National Guard, whose death occurs under honorable conditions while such member is hospitalized or undergoing treatment, at the expense of the United States, for injury or disease contracted or incurred under honorable conditions while such member is performing active duty for training, inactive duty training, or undergoing that hospitalization or treatment at the expense of the United States.

(c) Any Member of the Reserve Officers' Training Corps of the Army, Navy, or Air Force whose death occurs under honorable conditions while such member is—

(1) Attending an authorized training camp or on an authorized practice cruise;

(2) Performing authorized travel to or from that camp or cruise; or

(3) Hospitalized or undergoing treatment, at the expense of the United States, for injury or disease contracted or incurred under honorable conditions while such member is—

(i) Attending that camp or on that cruise;

(ii) Performing that travel; or

(iii) Undergoing that hospitalization or treatment at the expense of the United States.

(d) Any person who, during any war in which the United States is or has been engaged, served in the armed forces of any government allied with the United States during that war, whose last such service terminated honorably, and who was a citizen of the United States at the time of entry on such service and at the time of his or her death.

(e) The spouse, surviving spouse, minor child, or unmarried adult child of a person eligible under paragraph (a), (b), (c), (d), or (g) of this section. For purposes of this section—

(1) A surviving spouse includes a surviving spouse who had a subsequent remarriage;

(2) A minor child means an unmarried child under 21 years of age, or

under 23 years of age if pursuing a full-time course of instruction at an approved educational institution; and

(3) An unmarried adult child means a child who became permanently physically or mentally disabled and incapable of self-support before reaching 21 years of age, or before reaching 23 years of age if pursuing a full-time course of instruction at an approved educational institution.

(f) Such other persons or classes of persons as may be designated by the Secretary.

(g) Any person who at the time of death was entitled to retired pay under chapter 1223 of title 10, United States Code, or would have been entitled to retired pay under that chapter but for the fact that the person was under 60 years of age.

(h) Any person who:

(1) Was a citizen of the United States or an alien lawfully admitted for permanent residence in the United States at the time of their death; and

(2) Resided in the United States at the time of their death; and

(3) Either was a—

(i) Commonwealth Army veteran or member of the organized guerillas—a person who served before July 1, 1946, in the organized military forces of the Government of the Commonwealth of the Philippines, while such forces were in the service of the Armed Forces of the United States pursuant to the military order of the President dated July 26, 1941, including organized guerilla forces under commanders appointed, designated, or subsequently recognized by the Commander in Chief, Southwest Pacific Area, or other competent authority in the Army of the United States, and who died on or after November 1, 2000; or

(ii) New Philippine Scout—a person who enlisted between October 6, 1945, and June 30, 1947, with the Armed Forces of the United States with the consent of the Philippine government, pursuant to section 14 of the Armed Forces Voluntary Recruitment Act of 1945, and who died on or after December 16, 2003.

(Authority: 38 U.S.C. 107, 501, 2402)

## § 38.621 Disinterments.

(a) Interments of eligible decedents in national cemeteries are considered permanent and final. Disinterment will be permitted only for cogent reasons and with the prior written authorization of the National Cemetery Area Office Director or Cemetery Director responsible for the cemetery involved. Disinterment from a national cemetery will be approved only when all living immediate family members of the decedent, and the person who initiated the interment (whether or not he or she is a member of the immediate family), give their written consent, or when a court order or State instrumentality of competent jurisdiction directs the disinterment. For purposes of this section, ''immediate family members'' are defined as surviving spouse, whether or not he or she is remarried; all adult children of the decedent; the appointed guardian(s) of minor children; and the appointed guardian(s) of the surviving spouse or of the adult child(ren) of the decedent. If the surviving spouse and all of the children of the decedent are deceased, the decedent's parents will be considered ''immediate family members.''

(b) All requests for authority to disinter remains will be submitted on VA Form 40–4970, Request for Disinterment, and will include the following information:

(1) A full statement of reasons for the proposed disinterment.

(2) Notarized statement(s) by all living immediate family members of the decedent, and the person who initiated the interment (whether or not he or she is a member of the immediate family), that they consent to the proposed disinterment.

(3) A notarized statement, by the person requesting the disinterment that those who supplied affidavits comprise all the living immediate family members of the deceased.

(Authority: 38 U.S.C. 2404)

(c) In lieu of the documents required in paragraph (b) of this section, an order of a court of competent jurisdiction will be considered.

(d) Any disinterment that may be authorized under this section must be accomplished without expense to the Government.

(The reporting and recordkeeping requirements contained in paragraph (b) have been approved by the Office of Management and Budget under OMB control number 2900–0365)

### § 38.629 Outer Burial Receptacle Allowance.

(a) *Definitions—Outer burial receptacle.* For purposes of this section, an outer burial receptacle means a graveliner, burial vault, or other similar type of container for a casket.

(b) *Purpose.* This section provides for payment of a monetary allowance for an outer burial receptacle for any interment in a VA national cemetery where a privately-purchased outer burial receptacle has been used in lieu of a Government-furnished graveliner.

(c) *Second interments.* In burials where a casket already exists in a grave with or without a graveliner, placement of a second casket in an outer burial receptacle will not be permitted in the same grave unless the national cemetery director determines that the already interred casket will not be damaged.

(d) *Payment of monetary allowance.* VA will pay a monetary allowance for each burial in a VA national cemetery where a privately-purchased outer burial receptacle was used on and after October 9, 1996. For burials on and after January 1, 2000, the person identified in records contained in the National Cemetery Administration Burial Operations Support System as the person who privately purchased the outer burial receptacle will be paid the monetary allowance. For burials during the period October 9, 1996 through December 31, 1999, the allowance will be paid to the person identified as the next of kin in records contained in the National Cemetery Administration Burial Operations Support System based on the presumption that such person privately purchased the outer burial receptacle (however, if a person who is not listed as the next of kin provides evidence that he or she privately purchased the outer burial receptacle, the allowance will be paid instead to that person). No application is required to receive payment of a monetary allowance.

(e) *Amount of the allowance.* (1) For calendar year 2000 and each calendar year thereafter, the allowance will be the average cost, as determined by VA, of Government-furnished graveliners, less the administrative costs incurred by VA in processing and paying the allowance.

(i) The average cost of Government-furnished graveliners will be based upon the actual average cost to the Government of such graveliners during the most recent fiscal year ending prior to the start of the calendar year for which the amount of the allowance will be used. This average cost will be determined by taking VA's total cost during that fiscal year for single-depth graveliners which were procured for placement at the time of interment and dividing it by the total number of such graveliners procured by VA during that fiscal year. The calculation shall exclude both graveliners procured and pre-placed in gravesites as part of cemetery gravesite development projects and all double-depth graveliners.

(ii) The administrative costs incurred by VA will consist of those costs that relate to processing and paying an allowance, as determined by VA, for the calendar year ending prior to the start of the calendar year for which the amount of the allowance will be used.

(2) For calendar year 2000 and each calendar year thereafter, the amount of the allowance for each calendar year will be published in the ''Notices'' section of the FEDERAL REGISTER. The FEDERAL REGISTER notice will also provide, as information, the determined average cost of Government-furnished graveliners and the determined amount of the administrative costs to be deducted.

(3) The published allowance amount for interments which occur during calendar year 2000 will also be used for payment of any allowances for interments which occurred during the period from October 9, 1996 through December 31, 1999.

(Authority: 38 U.S.C. 2306(d))

### § 38.630 Headstones and markers.

(a) Types of Government headstones and markers and inscriptions will be in accordance with policies approved by the Secretary.

(b) Inscriptions on Government headstones, markers, and private monuments will be in accordance with policies and specifications of the Under Secretary for Memorial Affairs.

(c) A memorial headstone or marker furnished for a deceased veteran by the Government may be erected in a private cemetery or in a national cemetery section established for this purpose. The headstones or markers for national cemeteries will be of the standard design authorized for the cemetery in which they are to be erected. In addition to the authorized inscription, the words ''In Memory Of'' are mandatory.

(Authority: 38 U.S.C. 501)

### § 38.631 Graves marked with a private headstone or marker.

(a) VA will furnish an appropriate Government marker for the grave of a decedent described in paragraph (b) of this section, but only if the individual requesting the marker certifies on VA Form 40–1330 that it will be placed on the grave for which it is requested or, if placement on the grave is impossible or impracticable, as close to the grave as possible within the grounds of the private cemetery where the grave is located.

(b) The decedent referred to in paragraph (a) of this section is one who:

(1) Died on or after September 11, 2001;

(2) Is buried in a private cemetery; and

(3) Was eligible for burial in a national cemetery, but is not an individual described in 38 U.S.C. 2402(4), (5), or (6).

(c) VA will deliver the marker directly to the cemetery where the grave is located or to a receiving agent for delivery to the cemetery.

(d) VA will not pay the cost of installing a Government marker in a private cemetery.

(e) The applicant must obtain certification on VA Form 40–1330 from a cemetery representative that the type and placement of the marker requested adheres to the policies and guidelines of the selected private cemetery.

(f) VA will furnish its full product line of Government markers for private cemeteries.

(g) The authority to furnish a marker under this section expires on December 31, 2006.

(Authority: 38 U.S.C. 501, 2306)

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0222.)

### § 38.632 Headstone and marker application process.

(a) Headstones and markers for graves in national cemeteries shall be ordered from the Record of Interment (VA Form 40–4956) prepared by the national cemetery superintendent at the time of interment. No further application is required.

(b) Submission of VA Form 40–1330, Application for Headstone or Marker, is required for the purpose of:

(1) Ordering a Government headstone or marker for any unmarked grave of any eligible veteran buried in a private or local cemetery.

(2) Ordering a Government headstone or marker for any unmarked grave in a post cemetery of the Armed Forces.

(3) Ordering a Government memorial headstone or marker for placement in a national cemetery, in a private or local cemetery and any post cemetery of the Armed Forces.

### § 38.633 Group memorial monuments.

(a) *Definitions of terms.* For the purpose of this section, the following definitions apply:

(1) *Group*—all the known and unknown dead who perished in a common military event.

(2) *Memorial Monument*—a monument commemorating veterans, whose remains have not been recovered or identified. Monuments will be selected in accordance with policies established under 38 CFR 38.630.

(3) *Next of kin*—recognized in order: Surviving spouse; children, according to age; parents, including adoptive, stepparents, and foster parents; brothers or sisters, including half or stepbrothers and stepsisters; grandparents;

grandchildren; uncles or aunts; nephews or nieces; cousins; and/or other lineal descendent.

(4) *Documentary evidence*—Official documents, records, or correspondence signed by an Armed Services branch historical center representative attesting to the accuracy of the evidence.

(b) The Secretary may furnish at government expense a group memorial monument upon request of next of kin. The group memorial monument will commemorate two or more identified members of the Armed Forces, including their reserve components, who died in a sanctioned common military event, (*e.g.*, battle or other hostile action, bombing or other explosion, disappearance of aircraft, vessel or other vehicle) while in active military, naval or air service, and whose remains were not recovered or identified, were buried at sea, or are otherwise unavailable for interment.

(c) A group memorial monument furnished by VA may be placed only in a national cemetery in an area reserved for such purpose. If a group memorial monument has already been provided under this regulation or by any governmental body, *e.g.*, the American Battle Monuments Commission, to commemorate the dead from a common military event, an additional group memorial monument will not be provided by VA for the same purpose.

(d) Application for a group memorial monument shall be submitted in a manner specified by the Secretary. Evidence used to establish and determine eligibility for a group memorial monument will conform to paragraph (a)(4) of this section.

(Authority: 38 U.S.C. 501, 2403)

# PART 39—AID TO STATES FOR ESTABLISHMENT, EXPANSION, AND IMPROVEMENT OF VETERANS' CEMETERIES

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39.26 Forms.

AUTHORITY: 38 U.S.C. 101, 501, 2408.

SOURCE: 69 FR 16346, Mar. 29, 2004, unless otherwise noted.

## Subpart A—General Provisions

### § 39.1 Purpose.

This part sets forth the mechanism for a State to obtain a grant to establish, expand, or improve veterans' cemeteries that are or will be owned by the State.

(Authority: 38 U.S.C. 501, 2408.)

### § 39.2 Definitions.

For the purpose of this part:

(a) *Establishment* means the process of site selection, land acquisition, design and planning, earthmoving, landscaping, construction and provision of

initial operating equipment necessary to convert a tract of land to an operational veterans' cemetery.

(b) *Expansion* means an increase in the burial capacity or acreage of an existing cemetery through the addition of gravesites and other cemeterial facilities.

(c) *Improvement* means the enhancement of a cemetery through landscaping, nonrecurring maintenance, or addition of other features appropriate to cemeteries.

(d) *Establishment, expansion and improvement* include the installation of facilities necessary for the functioning of the cemetery, such as committal-service shelters, crypts (preplaced grave liners), and columbaria.

(e) *Time-phased development plan* means a detailed, narrative description of the proposed site's characteristics, schedule for development, and estimates of costs by phases of construction.

(f) *Project* means an undertaking to establish, expand, or improve a specific site for use as a State-owned veterans' cemetery.

(g) *State* means each of the States, Territories, and possessions of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

(h) *Veteran* means a person who served in the active military, naval, or air service and who died while in service or was discharged or released under conditions other than dishonorable.

(i) *Secretary* means the Secretary of the United States Department of Veterans Affairs.

(j) *VA* means the United States Department of Veterans Affairs.

(k) *State Cemetery Grants Service (SCGS)* means the State Cemetery Grants Service within VA's National Cemetery Administration.

(Authority: 38 U.S.C. 101, 501, 2408.)

### §39.3 Decisionmakers, notifications, and additional information.

Decisions required under this part will be made by the Director, State Cemetery Grants Service, National Cemetery Administration, unless otherwise specified in this part. The VA decisionmaker will provide written notice to affected States of approvals, denials, or requests for additional information under this part.

(Authority: 38 U.S.C. 501, 2408.)

### §39.4 Submissions of information and documents to VA.

All information and documents required to be submitted to VA must be submitted, unless otherwise specified under this part, to the Director of State Cemetery Grants Service, National Cemetery Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420.

(Authority: 38 U.S.C. 501, 2408.)

## Subpart B—Grant Requirements and Procedures

### §39.5 General requirements for a grant.

(a) In order to qualify for a grant, a State veterans' cemetery must be operated solely for the interment of veterans, their spouses, surviving spouses, minor children, and unmarried adult children who were physically or mentally disabled and incapable of self-support.

(b) For a State to obtain a grant under this part for the establishment, expansion, or improvement of a State veterans' cemetery:

(1) Its preapplication for the grant must be approved under §39.6;

(2) Its project must be ranked sufficiently high on the priority list in §39.7 for the current fiscal year so that funds are available for the project;

(3) Its plans and specifications for the project must be approved under §39.8;

(4) The State must meet the application requirements in §39.10; and

(5) Other requirements specified in §§39.9 and 39.13 must be satisfied.

(c) VA may approve under §39.11 any application up to the amount of the grant requested once the requirements under paragraph (b) of this section have been satisfied, provided that sufficient funds are available. In determining whether sufficient funds are available, VA shall consider the project's priority ranking, the total amount of funds available for cemetery grant awards during the applicable fiscal year, and the prospects of higher

ranking projects being ready for the award of a grant before the end of the applicable fiscal year.

(Authority: 38 U.S.C. 501, 2408.)

### § 39.6 Preapplication requirements.

(a) A State seeking a grant for the establishment, expansion, or improvement of a veterans' cemetery must submit a preapplication if the State seeks more than $100,000.

(b) No detailed drawings, plans, or specifications are required with the preapplication. As a part of the preapplication, the State must submit each of the following:

(1) Standard Form 424 (''Face Sheet'') and Standard Form 424C (''Budget Information'') signed by the authorized representative of the State. These forms document the amount of the grant requested, which may not exceed 100 percent of the estimated cost of the project to be funded with the grant.

(2) A program narrative describing the objectives of the project, the need for a grant, the method of accomplishment, the projected interment rate, and the results or benefits expected to be obtained from the assistance requested.

(3) If a site has been selected, a description of the geographic location of the project (*i.e.*, a map showing the location of the project and all appropriate geographic boundaries, and any other supporting documentation, as needed).

(4) A design concept describing the major features of the project including the number and types of gravesites, such as columbarium niches.

(5) Any comments or recommendations made by the State's ''Single Point of Contact'' reviewing agency.

(c) In addition, the State must submit written assurance that:

(1) Any cemetery established, expanded, or improved through a grant will be used exclusively for the interment of eligible persons as set forth in § 39.5(a).

(2) Title to the site is or will be vested solely in the State.

(3) It possesses legal authority to apply for the grant, and to finance and construct the proposed facilities; *i.e.*, legislation or similar action has been duly adopted or passed as an official act of the applicant's governing body, authorizing the filing of the application, including all understandings and assurances contained therein, and directing and authorizing the person identified as the official representative of the State to act in connection with the application and to provide such additional information as may be required.

(4) Any cemetery established, expanded, or improved through a grant will be maintained and operated in accordance with the operational standards and measures of the National Cemetery Administration.

(5) It will assist VA in assuring that the grant complies with section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470), Executive Order 11593 (identification and protection of historic properties), and the Archaeological and Historic Preservation Act of 1974 (16 U.S.C. 469a–1 *et seq.*).

(6) It will obtain approval by VA of the final construction drawings and specifications before the project is advertised or placed on the market for bidding; it will construct the project, or cause it to be constructed, to completion in accordance with the application and approved plans and specifications; it will submit to the Director of the State Cemetery Grants Service, for prior approval, changes that alter the costs of the project, use of space, or functional layout; and it will not enter into a construction contract(s) for the project or undertake other activities until the conditions of the grant program have been met.

(7) It will comply with the Federal requirements in 38 CFR parts 43 and 44 and submit Standard Form 424D (''Assurances—Construction Programs'').

(8) It will prepare an Environmental Assessment to determine whether an Environmental Impact Statement is necessary, and certify that funds are available to finance any costs related to preparation of the Environmental Assessment.

(d) The State must submit a copy of the legislation, as enacted into law, authorizing the establishment, maintenance and operation of the facility as a veterans' cemetery in accordance with 38 CFR 39.5(a).

(e) Upon receipt of a preapplication for a grant, including all necessary assurances and all required supporting documentation, VA shall determine whether the preapplication conforms to all requirements listed in paragraphs (a) through (d) of this section, including whether it contains sufficient information necessary to establish the project's priority. VA will notify the State of any nonconformity. If the preapplication does conform, VA shall notify the State that the preapplication has been found to meet the preapplication requirements, and the proposed project will be included in the next scheduled ranking of projects, as indicated in §39.7(d).

(Authority: 38 U.S.C. 501, 2408.)

(The Office of Management and Budget has approved the information collection requirements in this section under control numbers 0348–0043, 0348–0041; 0348–0042.)

### §39.7 Priority list.

(a) The priority groups, with Priority Group 1 having the highest priority and Priority Group 4 the lowest priority, are:

(1) Priority Group 1—Projects needed to avoid disruption in burial service that would otherwise occur at existing veterans' cemeteries within 4 years of the date of the preapplication. Such projects would include expansion projects as well as improvement projects (such as construction of additional or replacement facilities) when such improvements are required to continue interment operations.

(2) Priority Group 2—Projects for the establishment of new veterans' cemeteries.

(3) Priority Group 3—Expansion projects at existing veterans' cemeteries when a disruption in burial service due to the exhaustion of existing gravesites is not expected to occur within 4 years of the date of the preapplication.

(4) Priority Group 4—Other improvement projects to cemetery infrastructure such as building expansion and upgrades to roads and irrigation systems that are not directly related to the development of new gravesites.

(b) Within Priority Groups 1, 2, and 3, highest priority will be given to projects in geographical locations with the greatest number of veterans who will benefit from the project as determined by VA. This prioritization system, based on veteran population data, will assist VA in maintaining and improving access to burial in a veterans cemetery to more veterans and their eligible family members. Within Priority Group 1, at the discretion of VA, higher priority may be given to a project that must be funded that fiscal year to avoid disruption in burial service.

(c) Within Priority Group 4, projects will be ranked in priority order based upon VA's determination of the relative importance and necessity to operations of the proposed improvements.

(d) By August 15 of each year, VA will make a list prioritizing the preapplications that were received on or before July 1 of that year and that were approved under §39.6, ranking them in their order of priority for funding during the fiscal year that begins the following October 1. Preapplications from previous years will be re-prioritized each year.

(Authority: 38 U.S.C. 501, 2408.)

### §39.8 Plan preparation.

The State must prepare plans and specifications in accordance with the requirements of this section for review by the SCGS. The plans and specifications must be approved by the SCGS prior to the State's solicitation for construction bids. Once SCGS grants approval, the State must obtain construction bids and determine the successful bidder prior to submission of the application. The State must establish procedures for determining that costs are reasonable, necessary and allocable in accordance with the provisions of Office of Management and Budget (OMB) Circular No. A–87. Once the preapplication and the project's plans and specifications have been approved, an application for assistance must be submitted in compliance with the uniform requirements for grants-in-aid to State and local governments prescribed by Office of Management and Budget Circular No. A–102, Revised.

(a) *General.* These requirements have been established for the guidance of the State agency and the design team to

provide a standard for preparation of drawings, specifications and estimates.

(b) *Technical requirements.* The State should meet these technical requirements as soon as possible after VA approves the preapplication.

(1) *Boundary and site survey.* The State agency shall provide a survey of the site and furnish a legal description of the site. A boundary and site survey need not be submitted if one was submitted for a previously approved project and there have been no changes. Relevant information may then be shown on the site plan. If required, the survey shall show:

(i) The outline and location referenced to boundaries, of all existing buildings, streets, alleys (whether public or private), block boundaries, easements, encroachments, the names of streets, railroads and streams, and other information as specified. If there is nothing of this character affecting the property, the Surveyor shall so state on the drawings.

(ii) The point of beginning, bearing, distances, and interior angles. Closure computations shall be furnished with the survey and error of closure shall not exceed 1 foot for each 10,000 feet of lineal traverse. Boundaries of an unusual nature (curvilinear, off-set, or having other change or direction between corners) shall be referenced with curve data (including measurement chord) and other data sufficient for replacement and such information shall be shown on the map. For boundaries of such nature, coordinates shall be given for all angles and other pertinent points.

(iii) The area of the parcel in acres or in square feet.

(iv) The location of all monuments.

(v) Delineation of 100–year floodplain and source.

(vi) The signature and certification of the Surveyor.

(2) *Soil investigation.* The State shall provide a soil investigation of the scope necessary to ascertain site characteristics for construction and burial or to determine foundation requirements and utility service connections. A new soil investigation is not required if one was done for a previously approved project on the same site and information contained is adequate and unchanged. Soil investigation, when done, shall be documented in a signed report. Adequate investigation shall be made to determine the subsoil conditions. The investigation shall include a sufficient number of test pits or test borings as will determine, in the judgment of the architect, the true conditions. The following information will be covered in the report:

(i) Thickness, consistency, character, and estimated safe bearing value where needed for structural foundation design of the various strata encountered in each pit or boring.

(ii) Amount and elevation of ground water encountered in each pit or boring, its probable variation with the seasons, and effect on the subsoil.

(iii) The elevation of rock, if known, and the probability of encountering quicksand.

(iv) If the site is under laid with mines, the elevations and location of the tops of the mine workings relative to the site, or old workings located in the vicinity.

(3) *Topographical survey.* A topographical survey in 1–foot contour intervals shall be prepared for projects establishing new cemeteries and for significant expansion projects in previously undeveloped land.

(c) *Master plan.* A master plan showing the proposed layout of all facilities—including buildings, roadways and burial sections—on the selected site shall be prepared for all new cemetery establishment projects for approval by the SCGS. If the project is to be phased into different year programs, the phasing shall be indicated. The master plan shall analyze all factors affecting the design, including climate, soil conditions, site boundaries, topography, views, hydrology, environmental constraints, transportation access, etc. It should provide a discussion of alternate designs that were considered. In the case of an expansion or improvement project, the work contemplated should be consistent with the VA-approved master plan or a justification for the deviation should be provided.

(d) *Preliminary or ''design development'' drawings.* Following VA approval of the master plan, the State must submit design development drawings that show all current phase construction

elements to be funded by the grant. The drawings must comply with the following requirements:

(1) Site development and environmental plans must include locations of structures, demolition, parking, roads, service areas, walks, plazas, memorial paths, other paved areas, landscape buffer and major groupings, interment areas (including quantity of gravesites in each area). A grading plan including existing and proposed contours at 1–foot intervals of the entire area affected by the site work must be submitted. A site plan of the immediate area around each building shall be drawn to a convenient scale and shall show the building floor plan, utility connections, walks, gates, walls or fences, flagpoles, drives, parking areas, indication of handicapped provisions, landscaping, north arrow and any other appropriate items.

(2) Floor plans of all levels at a convenient scale shall be double line drawings and shall show overall dimensions, construction materials, door swings, names and square feet for each space, toilet room fixtures and interior finish schedule.

(3) Elevations of the exteriors of all buildings shall be drawn to the same scale as the plan and shall include all material indications.

(4) Preliminary mechanical and electrical layout plans shall be drawn at a convenient scale and shall have an equipment and plumbing fixture schedule.

(e) *Final construction drawings and specifications.* Funds for the construction of any project being assisted under this program will not be released until VA approves the final construction drawings and specifications. If VA approves them, VA shall send the State a written letter of approval indicating the project complies with the terms and conditions as prescribed by VA, but this does not constitute approval of the contract documents. It is the responsibility of the State to ascertain that all State and Federal requirements have been met and that the drawings and specifications are acceptable for bid purposes.

(1) The State shall prepare final working drawings so that clear and distinct prints may be obtained. These drawings must be accurately dimensioned to include all necessary explanatory notes, schedules and legends. Working drawings shall be complete and adequate for VA review and comment. The State shall prepare separate drawings for each of the following types of work: architectural, equipment, layout, structural, heating and ventilating, plumbing, and electrical.

(2) *Architectural drawings.* The State shall submit drawings which include: All structures and other work to be removed; all floor plans if any new work is involved; all elevations, which are affected by the alterations; building sections; demolition drawings; all details to complete the proposed work and finish schedules; and fully dimensioned floor plans at ⅛″ or ¼″ scale.

(3) *Equipment drawings.* The State shall submit a list of all equipment to be provided under terms of the grant in the case of an establishment project. Large-scale drawings of typical special rooms indicating all fixed equipment and major items of furniture and moveable equipment shall be included.

(4) *Layout drawings.* The State shall submit a layout plan that shows:

(i) All proposed features such as roads, buildings, walks, utility lines, burial layout, etc.

(ii) Contours, scale, north arrow, legend showing existing trees.

(iii) A graphic or keyed method of showing plant types as well as quantities of each plant.

(iv) Plant list with the following: Key, quantity, botanical name, common name, size and remarks.

(v) Typical tree and shrub planting details.

(vi) Areas to be seeded or sodded.

(vii) Areas to be mulched.

(viii) Gravesite section layout with permanent section monument markers and lettering system.

(ix) Individual gravesite layout and numbering system. If the cemetery is existing and the project is expansion or renovation, show available, occupied, obstructed and reserved gravesites.

(x) Direction the headstone faces.

(5) *Structural drawings.* The State shall submit complete foundation and framing plans and details, with general notes to include: Governing code, material strengths, live loads, wind loads,

foundation design values, and seismic zone.

(6) *Mechanical drawings.* The State shall submit:

(i) Heating and ventilation drawings showing complete systems and details of air conditioning, heating, ventilation and exhaust; and

(ii) Plumbing drawings showing sizes and elevations of soil and waste systems, sizes of all hot and cold water piping, drainage and vent systems, plumbing fixtures, and riser diagrams.

(7) *Electrical drawings.* The State shall submit separate drawings for lighting and power, including drawings of:

(i) Service entrance, feeders and all characteristics;

(ii) All panel, breaker, switchboard and fixture schedules;

(iii) All lighting outlets, receptacles, switches, power outlets and circuits; and

(iv) Telephone layout, fire alarm systems and emergency lighting.

(8) Final specifications (to be used for bid purposes) shall be in completed format. Specifications shall include the invitations for bids, cover or title sheet, index, general requirements, form of bid bond, form of agreement, performance and payment bond forms, and sections describing materials and workmanship in detail for each class of work.

(9) The State shall show in convenient form and detail the estimated total cost of the work to be performed under the contract including provisions of fixed equipment shown by the plans and specifications, if applicable, to reflect the changes of the approved financial plan. Estimates shall be summarized and totaled under each trade or type of work. Estimates shall also be provided for each building structure and other important features such as the assembly area and include burial facilities.

(Authority: 38 U.S.C. 501, 2408.)

### § 39.9 Conferences.

(a) *Predesign conference.* A predesign conference is required for all major construction projects primarily to ensure that the State agency becomes oriented to VA procedures and requirements plus any technical comments pertaining to the project. These conferences will take place at an appropriate location near the proposed site and should include a site visit to ensure that all parties to the process, including NCA staff, are familiar with the site and its characteristics.

(b) *Additional conferences.* At any time, VA may recommend an additional conference (such as a design development conference) be held in VA Central Office in Washington, DC, to provide an opportunity for the State and its architects to discuss requirements for a grant with VA officials.

(Authority: 38 U.S.C. 501, 2408.)

### § 39.10 Application requirements.

(a) For a project to be considered for grant funding under this part, the State must submit an application (as opposed to a preapplication) consisting of the following:

(1) Standard Form 424 (''Face Sheet'') with the box labeled ''application'' marked;

(2) Standard Form 424C (''Budget Information''), which documents the amount of funds requested based on the construction costs as estimated by the successful construction bid;

(3) A copy of itemized bid tabulations (If there are non-VA participating areas, these shall be itemized separately.); and

(4) Standard Form 424D (''Assurances—Construction Program'').

(Authority: 38 U.S.C. 501, 2408)

(b) Prior to submission of the application, the State must submit a copy of an Environmental Assessment to determine if an Environmental Impact Statement is necessary for compliance with section 102(2)(C) of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4332). The Environmental Assessment must briefly describe the project's possible beneficial and harmful effects on the following impact categories:

(1) Transportation,

(2) Air quality,

(3) Noise,

(4) Solid waste,

(5) Utilities,

(6) Geology (Soils/Hydrology/Floodplains),

(7) Water quality,

(8) Land use,

(9) Vegetation, Wildlife, Aquatic, Ecology/Wetlands, etc.,

(10) Economic activities,

(11) Cultural resources,

(12) Aesthetics,

(13) Residential population,

(14) Community services and facilities,

(15) Community plans and projects, and

(16) Other.

(c) If an adverse environmental impact is anticipated, the State must explain what action will be taken to minimize the impact. The assessment shall comply with the requirements of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*).

(The Office of Management and Budget has approved the information collection requirements in this section under control numbers 0348–0043; 0348–0041; 0348–0042.)

### §39.11 Final review and approval of application.

Following VA approval of bid tabulations and cost estimates, the complete grant application will be reviewed for approval in accordance with the requirements of §39.5. If the application is approved, the grant will be awarded by a Notification of Award of Federal Grant Funds.

(Authority: 38 U.S.C. 501, 2408.)

### §39.12 Hearings.

(a) No application for a grant to establish, expand, or improve a State veterans' cemetery shall be disapproved until the applicant has been afforded an opportunity for a hearing.

(b) Whenever a hearing is requested under this section, notice of the hearing, procedure for the conduct of such hearing, and procedures relating to decisions and notices shall accord with the provisions of §§18.9 and 18.10 of this chapter. Failure of an applicant to request a hearing under this section or to appear at a hearing for which a date has been set shall be deemed to be a waiver of the right to be heard and constitutes consent to the making of a decision on the basis of such information as is available.

(Authority: 38 U.S.C. 501, 2408.)

### §39.13 Amendments to application.

Any amendment of an application that changes the scope of the application or increases the cost of the grant requested, whether or not the application has already been approved, shall be subject to approval in the same manner as an original application.

(Authority: 38 U.S.C. 501, 2408.)

### §39.14 Withdrawal of application.

A State representative may withdraw an application by submitting to VA a written document requesting withdrawal.

(Authority: 38 U.S.C. 501, 2408.)

## Subpart C—Award of Grant

### §39.15 Amount of grant.

(a) The amount of a grant awarded under this part may not exceed 100 percent of the total cost of the project, but may be less than that amount.

(b) The total cost of a project under this part may include:

(1) Administration and design costs, *e.g.*, architectural and engineering fees, inspection fees, and printing and advertising cost.

(2) The cost of cemetery features, *e.g.*, entry features, flag plaza and assembly areas, columbarium, preplaced liners or crypts, irrigation, committal-service shelters, and administration/maintenance buildings.

(3) In the case of an establishment grant, the cost of equipment necessary for the operation of the State cemetery. This may include the cost of nonfixed equipment such as grounds maintenance equipment, burial equipment, and office equipment.

(4) In the case of an improvement or expansion grant, the cost of equipment necessary for operation of the State cemetery, but only if:

(i) Included in the construction contract;

(ii) Installed during construction; and

(iii) Permanently affixed to a building or connected to the heating, ventilating, air conditioning, or other service distributed through a building via ducts, pipes, wires, or other connecting device, such as kitchen and

intercommunication equipment, built-in cabinets, and equipment lifts.

(5) A contingency allowance not to exceed five percent of the total cost of the project for new construction or eight percent for renovation projects.

(c) The total cost of a project under this part may not include the cost of:

(1) Land acquisition;

(2) Building space that exceeds the space guidelines specified in this part;

(3) Improvements not on cemetery land, such as access roads or utilities;

(4) Maintenance or repair work;

(5) Office supplies or consumable goods (such as fuel and fertilizer) which are routinely used in a cemetery; or

(6) Fully enclosed, climate-controlled, committal-service facilities, freestanding chapels or chapels that are part of an administrative building or information center.

(d) VA shall certify approved applications to the Secretary of the Treasury in the amount of the grant, and shall designate the appropriation from which it shall be paid. Funds paid for the establishment, expansion, or improvement of a veterans' cemetery must be used solely for carrying out approved projects.

(Authority: 38 U.S.C. 501, 2408.)

### § 39.16 Line item adjustment to grant.

After a grant has been awarded, upon request from the State representative, VA may approve a change in a line item (line items are identified in Standard Form 424C, which is set forth in § 39.26(c)) of up to 10 percent (increase or decrease) of the cost of the line item if the change would be within the scope or objective of the project and would not change the amount of the grant.

(Authority: 38 U.S.C. 501, 2408.)

(The Office of Management and Budget has approved the information collection requirements in this section under control number 0348–0041.)

### § 39.17 Payment of grant award.

The amount of the grant award will be paid to the State or, if designated by the State representative, the State veterans' cemetery for which such project is being carried out, or any other State agency or instrumentality. Such amount shall be paid by way of reimbursement, and in such installments consistent with the progress of the project, as the Director of State Cemetery Grants Service may determine and certify for payment to the appropriate Federal institution. Funds paid under this section for an approved project shall be used solely for carrying out such project as so approved. As a condition for the final payment, the State representative must submit to VA the following:

(a) Standard Form 271 (''Outlay Report and Request for Reimbursement for Construction Programs'') (The form is set forth at § 39.26(a)).

(b) A request in writing for the final architectural/engineering inspection, including the name and telephone number of the local point of contact for the project;

(c) The written statement ''It is hereby agreed that the monetary commitment of the federal government will have been met and the project will be considered terminated upon payment of this voucher,'' and

(d) Evidence that the State has met its responsibility for an audit under the Single Audit Act of 1984 (31 U.S.C. 7501 *et seq.*) and § 39.19, if applicable.

(Authority: 38 U.S.C. 501, 2408.)

(The Office of Management and Budget has approved the information collection requirements in this section under control number 0348–0002.)

### § 39.18 Recapture provisions.

(a) If a State which has received a grant to establish, expand, or improve a veterans' cemetery ceases to own such cemetery, ceases to operate such cemetery as a veterans' cemetery in accordance with § 39.5(a), or uses any part of the funds provided through such grant for a purpose other than that for which the grant was made, the United States shall be entitled to recover from the State the total of all grants made to the State in connection with the establishment, expansion or improvement of such cemetery.

(b) If all funds from a grant have not been used by a State for the purpose for which the grant was made within 3 years after the VA has certified the approved application for such grant to the Department of the Treasury, the

United States shall be entitled to recover any unused grant funds from the State.

(Authority: 38 U.S.C. 501, 2408.)

## Subpart D—Standards and Requirements for Project

### § 39.19 General requirements for site selection and construction of veterans' cemeteries.

(a) The various codes, requirements, and recommendations of State and local authorities or technical and professional organizations, to the extent and manner in which those codes, requirements, and recommendations are referenced in this subpart, are applicable to grants for construction of veterans' cemeteries. Additional information concerning these codes, requirements, and recommendations may be obtained from the Department of Veterans Affairs, National Cemetery Administration, 810 Vermont Avenue, NW., Washington, DC 20420.

(b) The standards in §§ 39.19 through 39.22 constitute general design and construction criteria and shall apply to all projects for which Federal assistance is requested under 38 U.S.C. 2408.

(c) In developing these standards, no attempt has been made to comply with all of the various State and local codes and regulations. The standards contained in §§ 39.19 through 39.22 shall be followed where they exceed State or local codes and regulations. Departure will be permitted, however, when alternate standards are demonstrated to provide equivalent or better design criteria than the standards in these sections. Conversely, compliance is required with State and local codes where such requirements provide a standard higher than those in these sections. The additional cost, if any, in using standards that are higher than those of VA should be documented and justified in the application.

(d) The space criteria and area requirements referred to in these standards shall be used as a guide in planning. Additional area and facilities beyond those specified as basic may be included if found to be necessary to meet the functional requirements of the project but are subject to approval by VA. Substantial deviation from the space or area standards shall be carefully considered and justified. Failing to meet the standards or exceeding them by more than 10 percent in the completed plan would be regarded as evidence of inferior design or as exceeding the boundaries of professional requirements. In those projects that unjustifiably exceed maximum space or area criteria, VA funding may be subject to proportionate reduction in proportion to the amount by which the space or area of the cemetery exceeds the maximum specified in these standards.

(Authority: 38 U.S.C. 501, 2408.)

### § 39.20 Site planning standards.

(a) *Site selection*—(1) *Location.* The land should be located as close as possible to the densest veteran population in the area under consideration.

(2) *Size.* Sufficient acreage shall be available to provide gravesites for estimated needs for at least 20 years. More acreage should be provided where feasible. Acreage could vary depending on the State veteran population and national cemetery availability.

(3) *Accessibility.* The site should be readily accessible by highway. Offsite improvements shall not be funded by the grant.

(4) *Topography.* The land should range from comparatively level to rolling and moderately hilly terrain. Natural rugged contours are suitable only if development and maintenance costs would not be excessive and burial areas would be accessible to elderly or infirm visitors. The land shall not be subject to flooding.

(5) *Water table.* The water table should be lower than the maximum proposed depth of burial.

(6) *Soil requirements.* The soil should be free from rock, muck, unstable composition, and other materials that would hamper the economical excavation of graves by normal methods. In general, the soil should meet the standards of good agricultural land that is capable of supporting turf and trees, with normal care and without the addition of topsoil.

(7) *Utilities.* Electricity and gas, if required, should be available. Offsite improvements shall not be funded by the grant.

(8) *Water supply.* An adequate supply of water should be available. Offsite improvements shall not be funded by the grant.

(9) *Sewerage.* An approved means to dispose of storm flow and sewage from the facility should be available. Offsite improvements shall not be funded by the grant.

(b) *Site development requirements*—(1) *General.* The development plan shall provide for adequate hard surfaced roads, walks, parking areas, public rest rooms, flag circle, and a main gate.

(2) *Parking.* All parking facilities shall include provisions to accommodate the physically handicapped. A minimum of one space shall be set aside and identified with signage in each parking area with additional spaces provided in the ratio of 1 handicapped space to every 20 regular spaces. Handicapped spaces shall not be placed between two conventional diagonal or head-on parking spaces. Each of the handicapped parking spaces shall not be less than 9 feet wide; in addition, a clear space 4 feet wide shall be provided between the adjacent conventional parking spaces and also on the outside of the end spaces. Parking is not provided for large numbers of people attending ceremonial events such as Memorial Day services.

(3) *Roads.* Roads should generally follow the topography of the cemetery, and allow pedestrian access to burial sections on both sides. Roads should generally not be used as ''boundaries'' outlining burial sections. Extensive bridging should be avoided. The grant program funding cannot be used to build access roads on property that is not part of the cemetery. Road widths shall be compatible with proposed traffic flows and volumes. Primary roads are generally 24 feet wide.

(4) *Pavement design.* The pavement section of all roads, service areas and parking areas shall be designed for the maximum anticipated traffic loads and existing soil conditions and in accordance with local and State design criteria.

(5) *Curbs.* Bituminous roads may be provided with integral curbs and gutters constructed of portland cement concrete. Freestanding curbs may be substituted when the advantage of using them is clearly indicated. All curbs shall have a ''roll-type'' cross section for vehicle and equipment access to lawn areas except as may be necessary for traffic control. The radii of curbs at road intersections shall not be less than 20 feet–0 inches. Curb ramps shall be provided to accommodate the physically handicapped and maintenance equipment. Curb ramps shall be provided at all intersections of roads and walks. The curb ramps shall not be less than 4 feet wide; they shall not have a slope greater than 8 percent, and preferably not greater than 5 percent. The vertical angle between the surface of a curb ramp and the surface of a road or gutter shall not be less than 176 degrees; the transition between the two surfaces shall be smooth. Curb ramps shall have nonskid surfaces.

(6) *Walks.* Walks shall be designed with consideration for the physically handicapped and elderly. Walks and ramps designed on an incline shall have periodic level platforms. All walks, ramps and platforms shall have nonskid surfaces. Any walk shall be ramped if the slope exceeds 3 percent. Walks that have gradients from 2 to 3 percent shall be provided with level platforms at 200-foot intervals and at intersections with other walks. Ramps shall not have a slope greater than 8 percent, and preferably not greater than 5 percent. The ramps shall have handrails on both sides unless other protective devices are provided; every handrail shall have clearance of not less than 1½ inches between the back of the handrail and the wall or any other vertical surface behind it. Ramps shall not be less than 4 feet wide between curbs; curbs shall be provided on both sides. The curbs shall not be less than 4 inches high and 4 inches wide. A level platform in a ramp shall not be less than the full width of the ramp and not less than 5 feet long. Entrance platforms and ramps shall be provided with protective weather barriers to shield them against hazardous conditions resulting from inclement weather.

(7) *Steps.* Exterior steps may be included in the site development as long as provisions are also provided for use by physically handicapped persons.

(8) *Grading.* Minimum lawn slopes shall be 2 percent; critical spot grade elevations shall be shown on the contract drawings. Insofar as practicable, lawn areas shall be designed without steep slopes.

(9) *Landscaping.* The landscaping plan should provide for a park-like setting of harmonious open spaces balanced with groves of indigenous and cultivated deciduous and evergreen trees. Shrubbery should be kept to a minimum. Steep slopes that are unsuitable for interment areas should be kept in their natural state.

(10) *Surface drainage.* Surface grades shall be determined in coordination with the architectural, structural and mechanical design of buildings and facilities so as to provide proper surface drainage.

(11) *Burial areas.* A site plan of the cemetery shall include a burial layout. If appropriate, the burial layout should reflect the phases of development in the various sections. The first phase of construction should contain sufficient burial sites to meet the foreseeable demand for at least 10 years. All applicable dimensions to roadways, fences, utilities or other structures shall be indicated on the layout.

(12) *Gravesites.* Gravesites shall be laid out in uniform pattern. There shall be a minimum of 10 feet from the edge of roads and drives and a minimum of 20 feet from the boundaries or fence lines. Maximum distance from the edge of a permanent road to any gravesite shall not be over 275 feet. Temporary roads may be provided to serve areas in phase developments.

(13) *Monumentation.* Each grave shall be marked with an appropriate marker and each cemetery shall maintain a register of burials setting forth the name of each person buried and the designation of the grave in which he/she is buried. Permanent gravesite control markers shall be installed based on a grid system throughout the burial area unless otherwise specified. This will facilitate the gravesite layout, placement of utility lines, and alignment of headstones.

(14) *Entrance.* The entrance should be an architectural or landscape feature that creates a sense of arrival.

(15) *Memorial walkway.* Each cemetery should have an area for the display of memorials donated by veterans groups and others. Such areas may take the form of a path or walkway and should provide a contemplative setting for visitors.

(16) *Donation items.* Family members and others often wish to donate items such as benches and trees. Acceptable items of donation should be specified in the cemetery plan. The plan should also designate appropriate locations for such items.

(17) *Flag/assembly area.* There shall be one primary flagpole for the United States flag. This flag shall be lighted. A turf assembly area should be developed for major gatherings such as Memorial Day. The assembly area may be focused on the flag. The area may also incorporate an architectural or a landscape feature that functions as a platform or backdrop for speakers.

(18) *Site furnishings.* Site furnishings include signage, trash receptacles, benches, and flower containers. These items should be coordinated and complement each other, the architectural design and the cemetery as a whole. They should be simple, durable, standardized and properly scaled.

(19) *Carillons.* The cemetery development plan should include a location for a carillon tower. Carillons are normally donated. They are not provided for in the grant.

(Authority: 38 U.S.C. 501, 2408.)

### §39.21 Space criteria for support facilities.

These criteria are based on a projected average burial rate of one to six per day, staffing by position, and a defined complement of maintenance and service equipment. For cemeteries with less than one or more than six burials per day, support facilities are considered on an individual basis in accordance with §39.19(d). In converting Net Square Feet (NSF) to Gross Square Feet (GSF), a conversion factor of 1.5 is the maximum allowed. The applicant shall, in support of the design, include the following as an attachment to the application: a list of all grounds maintenance supplies and equipment and the number of Full Time Employees

(FTE) by job assignment for the next 10 years.

(a) *Administrative building.* The administrative building should be approximately 1,600 NSF in total, providing space, as needed, for the following functions:

(1) Cemetery director's office;

(2) Other offices (as needed);

(3) Administrative staff (lobby/office area);

(4) Operations (file/office/equipment/work area);

(5) Family/conference room;

(6) Military honors team;

(7) Refreshment unit;

(8) Housekeeping aide's closet; and

(9) Restroom facilities.

(b) *Maintenance/service building.* The maintenance/service building may be combined with the administrative building. The maintenance/service building should be approximately 2,200 NSF in total, providing heated and air conditioned space, as needed, for the following functions:

(1) Foreman's office;

(2) Lunch room;

(3) Kitchen unit;

(4) Toilet and locker room facilities;

(5) Housekeeping aide's closet; and

(6) Vehicle and equipment maintenance and storage.

(c) *Vehicle and equipment storage.* Approximately 275 NSF/Bay as needed. Not all types of vehicles and equipment require storage in heated space. Based on climatic conditions, it may be justified to rely completely on open structures rather than heated structures to protect the following types of vehicles and equipment: Dump Trucks, Pickup Trucks, Cemetery Automobiles, Gang and Circular Mowers.

(d) *Interment/committal service shelter.* One permanent shelter is authorized for every five interments per day. The shelter may include a covered area to provide seating for approximately 20 people and an uncovered paved area to provide space for approximately 50 additional people. The shelter may also include a small, enclosed equipment/storage area. Provisions must be made for the playing of Taps by recorded means.

(e) *Public Information Center.* One permanent Public Information Center is authorized per facility. A Public Information Center is used to provide orientation to visitors and funeral corteges. It should include the gravesite locator. The public restrooms may also be combined with this structure. Space determinations for separate structures for public restrooms shall be considered on an individual basis. The Public Information Center, including public restrooms, may be combined with the administrative building.

(f) *Other interment structures.* Space determinations for other support facilities such as columbaria, preplaced graveliners (or crypts), garden niches, etc., will be considered on an individual basis in accordance with § 39.19(d).

(Authority: 38 U.S.C. 501, 2408.)

### § 39.22 Architectural design standards.

The publications listed in this section are incorporated by reference. The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of these publications may be inspected at the office of the State Cemetery Grants Service, National Cemetery Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or at the Office of the Federal Register, 800 North Capitol Street, NW., Suite 700, Washington, DC. Copies of the 2003 edition of the National Fire Protection Association Life Safety Code and Errata (NFPA 101), the 2003 edition of the NFPA 5000, Building Construction and Safety Code, and the 2002 edition of the National Electrical Code, NFPA 70, may be obtained from the National Fire Protection Association, Inc. (NFPA), 1 Batterymarch Park, P.O. Box 9101, Quincy, MA 02269–9101. Copies of the 2003 edition of the Uniform Mechanical Code, and the 2003 edition of the Uniform Plumbing Code, may be obtained from the International Association of Plumbing and Mechanical Officials, 5001 E. Philadelphia Street, Ontario, CA 91761–2816.

(a) *Architectural and structural requirements*—(1) *Life Safety Code.* Standards must be in accordance with the 2003 edition of the National Fire Protection Association Life Safety Code, NFPA 101. Fire safety construction features

not included in NFPA 101 shall be designed in accordance with the requirements of the 2003 edition of the NFPA 5000, Building Construction and Safety Code. Where the adopted codes state conflicting requirements, the NFPA National Fire Codes shall govern.

(2) *State and local codes.* In addition to compliance with the standards set forth in this section, all applicable local and State building codes and regulations must be observed. In areas not subject to local or State building codes, the recommendations contained in the 2003 edition of the NFPA 5000, Building Construction and Safety Code shall apply.

(3) *Occupational safety and health standards.* Applicable standards as contained in the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 *et seq.*) must be observed.

(b) *Mechanical requirements.* The heating system, boilers, steam system, ventilation system and air-conditioning system shall be furnished and installed to meet all requirements of the local and State codes and regulations. Where no local or State codes are in force, the 2003 edition of the Uniform Mechanical Code shall apply.

(c) *Plumbing requirements.* Plumbing systems shall comply with all applicable local and State codes, the requirements of the State Department of Health, and the minimum general standards as set forth in this part. Where no local or State codes are in force, the 2003 edition of the Uniform Plumbing Code shall apply.

(d) *Electrical requirements.* The installation of electrical work and equipment shall comply with all local and State codes and laws applicable to electrical installations and the minimum general standards, as set forth in the NFPA 70, National Electrical Code, 2002 edition (NEC 2002 Code). The regulations of the local utility company shall govern service connections. Aluminum bus ways shall not be used as a conducting medium in the electrical distribution system.

(Authority: 38 U.S.C. 501, 2408.)

## Subpart E—Responsibilities, Inspections, and Reports Following Project Completion

### §39.23 Responsibilities following project completion.

(a) States shall monitor use of the cemetery by various subgroups and minority groups, including women veterans. To the extent that under-utilization by any of these groups is determined to exist, a program shall be established to inform members of these groups about benefits available to them. The information regarding the benefits shall be available in a language other than English where a significant number or portion of the population eligible to be served or likely to be directly affected by the grant program needs such service or information.

(b) State veterans' cemeteries established, expanded, or improved with assistance under the grant program shall be operated and maintained as follows:

(1) Buildings, grounds, roads, walks, and other structures shall be kept in reasonable repair to prevent undue deterioration and hazards to users.

(2) The cemetery shall be kept open for public use at reasonable hours based on the time of the year.

(c) VA, in coordination with the State, shall inspect the project at completion for compliance with the standards set forth in §§39.19 through 39.22 and at least once in every 3-year period following completion of the project throughout the period the facility is operated as a State veterans' cemetery. A copy of the inspection report shall be forwarded to the Director, State Cemetery Grants Service, giving the date and location the inspection was made and citing any deficiencies and corrective action taken or proposed.

(d) Failure of a State to comply with any of paragraphs (a) through (c) of this section shall be considered cause for the Department of Veterans Affairs to suspend any payments due the State on any or all projects until the situation involved is corrected.

(Authority: 38 U.S.C. 501, 2408; and issued under authority of the President by E.O. 13166, 65 FR 50121)

### § 39.24 State to retain control of operations.

Neither the Secretary nor any employee of the Department of Veterans Affairs shall exercise any supervision or control over the administration, personnel, maintenance, or operation of any State veterans' cemetery established, expanded, or improved with assistance received under this program except as prescribed in this part.

(Authority: 38 U.S.C. 501, 2408.)

### § 39.25 Inspections, audits, and reports.

(a) A State will allow VA inspectors and auditors to conduct inspections as necessary to ensure compliance with the provisions of this part. The State will provide to VA evidence that it has met its responsibility under the Single Audit Act of 1984 (see part 41 of this chapter).

(b) A State will make an annual report on VA Form 40–0241 (''State Cemetery Data'') signed by the authorized representative of the State. These forms document current burial activity at the cemetery, use of gravesites, remaining gravesites, and additional operational information intended to answer questions about the status of the grant program.

(Authority: 38 U.S.C. 501, 2408.)

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0559.)

## Subpart F—Forms

### § 39.26 Forms.

All forms set forth in this part are available on the Internet at *http://www.va.gov/forms.*

(a) Standard Form 271—Outlay Report and Request for Reimbursement for Construction Programs

| OUTLAY REPORT AND REQUEST FOR REIMBURSEMENT FOR CONSTRUCTION PROGRAMS (See instructions on back) | OMB APPROVAL NO. 0348-0002 | PAGE OF PAGES |
|---|---|---|
| | 1. TYPE OF REQUEST ☐ FINAL ☐ PARTIAL | 2. BASIS OF REQUEST ☐ CASH ☐ ACCRUAL |
| 3. FEDERAL SPONSORING AGENCY AND ORGANIZATIONAL ELEMENT TO WHICH THIS REPORT IS SUBMITTED | 4. FEDERAL GRANT OR OTHER IDENTIFYING NUMBER ASSIGNED BY FEDERAL AGENCY | 5. PARTIAL PAYMENT REQUEST NO |
| 6. EMPLOYER IDENTIFICATION NUMBER / 7. RECIPIENT'S ACCOUNT NUMBER OR IDENTIFYING NUMBER | PERIOD COVERED BY THIS REQUEST<br>FROM *(Month, day, year)* TO *(Month, day, year)* | |
| 9. RECIPIENT ORGANIZATION<br>*Name:*<br>*No. and Street:*<br>*City, State and ZIP Code:* | 10. PAYEE *(Where check is to be sent if different than item 9)*<br>*Name:*<br>*No. and Street:*<br>*City, State and ZIP Code:* | |

11. STATUS OF FUNDS

| CLASSIFICATION | PROGRAMS -- FUNCTIONS -- ACTIVITIES (a) | (b) | (c) | TOTAL |
|---|---|---|---|---|
| a. Administrative expense | $ | $ | $ | $ 0.00 |
| b. Preliminary expense | | | | 0.00 |
| c. Land, structures, right-of-way | | | | 0.00 |
| d. Architectural engineering basic fees | | | | 0.00 |
| e. Other architectural engineering fee | | | | 0.00 |
| f. Project inspection fees | | | | 0.00 |
| g. Land development | | | | 0.00 |
| h. Relocation expense | | | | 0.00 |
| i. Relocation payments to individuals and businesses | | | | 0.00 |
| j. Demolition and removal | | | | 0.00 |
| k. Construction and project improvement cost | | | | 0.00 |
| l. Equipment | | | | 0.00 |
| m. Miscellaneous cost | | | | 0.00 |
| n. Total cumulative to date *(sum of lines a thru m)* | 0.00 | 0.00 | 0.00 | 0.00 |
| o. Deductions for program income | | | | 0.00 |
| p. Net cumulative to date *(line n minus line o)* | 0.00 | 0.00 | 0.00 | 0.00 |
| q. Federal share to date | | | | 0.00 |
| r. Rehabilitation grants (100% reimbursement) | | | | 0.00 |
| s. Total Federal share *(sum of lines q and r)* | 0.00 | 0.00 | 0.00 | 0.00 |
| t. Federal payments previously requested | | | | 0.00 |
| u. Amount requested for reimbursement | $ | $ | $ | $ 0.00 |
| v. Percentage of physical completion of project | % | % | % | % |

| 12. CERTIFICATION | | | |
|---|---|---|---|
| I certify that to the best of my knowledge and belief the billed costs or disbursements are in accordance with the terms of the project and that the reimbursement represents the Federal share due which has not been previously requested and that an inspection has been performed and all work is in accordance with the terms of the award. | a. RECIPIENT | SIGNATURE OF AUTHORIZED CERTIFYING OFFICIAL | DATE REPORT SUBMITTED |
| | | TYPED OR PRINTED NAME AND TITLE | TELEPHONE *(Area code, number, and extension)* |
| | b. REPRESENTATIVE CERTIFYING TO LINE 11V | SIGNATURE OF AUTHORIZED CERTIFYING OFFICIAL | DATE SIGNED |
| | | TYPED OR PRINTED NAME AND TITLE | TELEPHONE *(Area code, number, and extension)* |

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271-103

STANDARD FORM 271 (Rev. 7-97)
Prescribed by OMB Circular A-102 and A-110

**INSTRUCTIONS**

Public reporting burden for this collection of information is estimated to average 60 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0004), Washington, DC 20503.

**PLEASE DO NOT RETURN YOUR COMPLETED FORM TO THE OFFICE OF MANAGEMENT AND BUDGET. SEND IT TO THE ADDRESS PROVIDED BY THE SPONSORING AGENCY.**

Please type or print legibly. Items 3, 4, 5, 8, 9, 10, 11s and 11v are self explanatory; specific instructions for other items are as follows:

| *Item* | *Entry* |
|---|---|
| 1 | Mark the appropriate box. If the request is final, the amounts billed should represent the final cost of the project. |
| 2 | Show whether amounts are computed on an accrued expenditure or cash disbursement basis. |
| 6 | Enter the Employer Identification Number (EIN) assigned by the U.S. Internal Revenue Service or FICE (institution) code if requested by the Federal agency. |
| 7 | This space is reserved for an account number or other identifying number that may be assigned by the recipient. |
| 11 | The purpose of vertical columns (a) through (c) is to provide space for separate cost breakdowns when a large project has been planned and budgeted by program, function or activity. If additional columns are needed, use as many additional forms as needed and indicate page number in space provided in upper right; however, the summary totals of all programs, functions, or activities should be shown in the "total" column on the first page. All amounts are reported on a cumulative basis. |
| 11a | Enter amounts expended for such items as travel, legal fees, rental of vehicles and any other administrative expenses. Include the amount of interest expense when authorized by program legislation. Also show the amount of interest expense on a separate sheet. |
| 11b | Enter amounts pertaining to the work of locating and designing, making surveys and maps, sinking test holes, and all other work required prior to actual construction. |
| 11c | Enter all amounts directly associated with the acquisition of land, existing structures and related right-of-way. |
| 11d | Enter basic fees for services of architectural engineers. |
| 11e | Enter other architectural engineering services. Do not include any amounts shown on line d. |
| 11f | Enter inspection and audit fees of construction and related programs. |
| 11g | Enter all amounts associated with the development of land where the primary purpose of the grant is land improvement. The amount pertaining to land development normally associated with major construction should be excluded from this category and entered on line k. |
| 11h | Enter the dollar amounts used to provide relocation advisory assistance and net costs of replacement housing (last resort). Do not include amounts needed for relocation administrative expenses; these amounts should be included in amounts shown on line a. |
| 11i | Enter the amount of relocation payments made by the recipient to displaced persons, farms, business concerns, and nonprofit organizations. |
| 11j | Enter gross salaries and wages of employees of the recipient and payments to third party contractors directly engaged in performing demolition or removal of structures from developed land. All proceeds from the sale of salvage or the removal of structures should be credited to this account; thereby reflecting net amounts if required by the Federal agency. |
| 11k | Enter those amounts associated with the actual construction of, addition to, or restoration of a facility. Also, include in this category, the amounts for project improvements such as sewers, streets, landscaping, and lighting. |
| 11l | Enter amounts for all equipment, both fixed and movable, exclusive of equipment used for construction. For example, permanently attached laboratory tables, built-in audio visual systems, movable desks, chairs, and laboratory equipment. |
| 11m | Enter the amounts of all items not specifically mentioned above. |
| 11n | Enter the total cumulative amount to date which should be the sum of lines a through m. |
| 11o | Enter the total amount of program income applied to the grant or contract agreement except income included on line j. Identify on a separate sheet of paper the sources and types of the income. |
| 11p | Enter the net cumulative amount to date which should be the amount shown on line n minus the amount on line o. |
| 11q | Enter the Federal share of the amount shown on line p. |
| 11r | Enter the amount of rehabilitation grant payments made to individuals when program legislation provides 100 percent payment by the Federal agency. |
| 11t | Enter the total amount of Federal payments previously requested, if this form is used for requesting reimbursement. |
| 11u | Enter the amount now being requested for reimbursement. This amount should be the difference between the amounts shown on lines s and t. If different, explain on a separate sheet. |
| 12a | To be completed by the official recipient official who is responsible for the operation of the program. The date should be the actual date the form is submitted to the Federal agency. |
| 12b | To be completed by the official representative who is certifying to the percent of project completion as provided for in the terms of the grant or agreement. |

STANDARD FORM 271 (Rev 7-97) Back

(Authority: 38 U.S.C. 501, 2408.)

(The Office of Management and Budget has approved the information collection requirements in this section under control number 0348–0002.)

(b) Standard Form 424—Application for Federal Assistance.

**APPLICATION FOR FEDERAL ASSISTANCE**

OMB Approval No. 0348-0043

| | | |
|---|---|---|
| **2. DATE SUBMITTED** October 28, 2003 | Applicant Identifier | |
| **3. DATE RECEIVED BY STATE** | State Application Identifier | |
| **4. DATE RECEIVED BY FEDERAL AGENCY** | Federal Identifier | |

**1. TYPE OF SUBMISSION:**

Application: ☐ **Construction** ☐ **Non-Construction**

Preapplication: ☐ **Construction** ☐ **Non-Construction**

**5. APPLICANT INFORMATION**

Legal Name:

Organizational Unit:

Address *(give city, county, State, and zip code):*

Name and telephone number of person to be contacted on matters involving this application *(give area code)*

**6. EMPLOYER IDENTIFICATION NUMBER** *(EIN):*

☐☐ – ☐☐☐☐☐☐☐

**7. TYPE OF APPLICANT:** *(enter appropriate letter in box)* ☐

A. State
B. County
C. Municipal
D. Township
E. Interstate
F. Intermunicipal
G. Special District
H. Independent School Dist.
I. State Controlled Institution of Higher Learning
J. Private University
K. Indian Tribe
L. Individual
M. Profit Organization
N. Other (Specify) _____

**8. TYPE OF APPLICATION:**

☐ **New** ☐ **Continuation** ☐ **Revision**

If Revision, enter appropriate letter(s) in box(es) ☐ ☐

A. Increase Award B. Decrease Award C. Increase Duration
D. Decrease Duration Other*(specify):*

_____

**9. NAME OF FEDERAL AGENCY:**

**10. CATALOG OF FEDERAL DOMESTIC ASSISTANCE NUMBER:**

☐☐ – ☐☐☐

TITLE:

**11. DESCRIPTIVE TITLE OF APPLICANT'S PROJECT:**

**12. AREAS AFFECTED BY PROJECT** *(Cities, Counties, States, etc.):*

**13. PROPOSED PROJECT**

| Start Date | Ending Date |
|---|---|
| | |

**14. CONGRESSIONAL DISTRICTS OF:**

a. Applicant

b. Project

**15. ESTIMATED FUNDING:**

| | |
|---|---|
| a. Federal | $ .00 |
| b. Applicant | $ .00 |
| c. State | $ .00 |
| d. Local | $ .00 |
| e. Other | $ .00 |
| f. Program Income | $ .00 |
| g. TOTAL | $ 0.00 |

**16. IS APPLICATION SUBJECT TO REVIEW BY STATE EXECUTIVE ORDER 12372 PROCESS?**

a. YES. THIS PREAPPLICATION/APPLICATION WAS MADE AVAILABLE TO THE STATE EXECUTIVE ORDER 12372 PROCESS FOR REVIEW ON:

DATE _____

b. No. ☐ PROGRAM IS NOT COVERED BY E. O. 12372
☐ OR PROGRAM HAS NOT BEEN SELECTED BY STATE FOR REVIEW

**17. IS THE APPLICANT DELINQUENT ON ANY FEDERAL DEBT?**

☐ **Yes** **If "Yes," attach an explanation.** ☐ **No**

**18. TO THE BEST OF MY KNOWLEDGE AND BELIEF, ALL DATA IN THIS APPLICATION/PREAPPLICATION ARE TRUE AND CORRECT, THE DOCUMENT HAS BEEN DULY AUTHORIZED BY THE GOVERNING BODY OF THE APPLICANT AND THE APPLICANT WILL COMPLY WITH THE ATTACHED ASSURANCES IF THE ASSISTANCE IS AWARDED.**

| | | |
|---|---|---|
| a. Type Name of Authorized Representative | b. Title | c. Telephone Number |
| d. Signature of Authorized Representative | | e. Date Signed |

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Standard Form 424 (Rev. 7-97)
Prescribed by OMB Circular A-102

**INSTRUCTIONS FOR THE SF-424**

Public reporting burden for this collection of information is estimated to average 45 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0043), Washington, DC 20503.

**PLEASE DO NOT RETURN YOUR COMPLETED FORM TO THE OFFICE OF MANAGEMENT AND BUDGET. SEND IT TO THE ADDRESS PROVIDED BY THE SPONSORING AGENCY.**

This is a standard form used by applicants as a required facesheet for preapplications and applications submitted for Federal assistance. It will be used by Federal agencies to obtain applicant certification that States which have established a review and comment procedure in response to Executive Order 12372 and have selected the program to be included in their process, have been given an opportunity to review the applicant's submission.

| Item: | Entry: |
|---|---|
| 1. | Self-explanatory. |
| 2. | Date application submitted to Federal agency (or State if applicable) and applicant's control number (if applicable). |
| 3. | State use only (if applicable). |
| 4. | If this application is to continue or revise an existing award, enter present Federal identifier number. If for a new project, leave blank. |
| 5. | Legal name of applicant, name of primary organizational unit which will undertake the assistance activity, complete address of the applicant, and name and telephone number of the person to contact on matters related to this application. |
| 6. | Enter Employer Identification Number (EIN) as assigned by the Internal Revenue Service. |
| 7. | Enter the appropriate letter in the space provided. |
| 8. | Check appropriate box and enter appropriate letter(s) in the space(s) provided:<br>-- "New" means a new assistance award.<br>-- "Continuation" means an extension for an additional funding/budget period for a project with a projected completion date.<br>-- "Revision" means any change in the Federal Government's financial obligation or contingent liability from an existing obligation. |
| 9. | Name of Federal agency from which assistance is being requested with this application. |
| 10. | Use the Catalog of Federal Domestic Assistance number and title of the program under which assistance is requested. |
| 11. | Enter a brief descriptive title of the project. If more than one program is involved, you should append an explanation on a separate sheet. If appropriate (e.g., construction or real property projects), attach a map showing project location. For preapplications, use a separate sheet to provide a summary description of this project. |
| 12. | List only the largest political entities affected (e.g., State, counties, cities). |
| 13. | Self-explanatory. |
| 14. | List the applicant's Congressional District and any District(s) affected by the program or project. |
| 15. | Amount requested or to be contributed during the first funding/budget period by each contributor. Value of in-kind contributions should be included on appropriate lines as applicable. If the action will result in a dollar change to an existing award, indicate *only* the amount of the change. For decreases, enclose the amounts in parentheses. If both basic and supplemental amounts are included, show breakdown on an attached sheet. For multiple program funding, use totals and show breakdown using same categories as item 15. |
| 16. | Applicants should contact the State Single Point of Contact (SPOC) for Federal Executive Order 12372 to determine whether the application is subject to the State intergovernmental review process. |
| 17. | This question applies to the applicant organization, not the person who signs as the authorized representative. Categories of debt include delinquent audit disallowances, loans and taxes. |
| 18. | To be signed by the authorized representative of the applicant. A copy of the governing body's authorization for you to sign this application as official representative must be on file in the applicant's office. (Certain Federal agencies may require that this authorization be submitted as part of the application.) |

SF-424 (Rev. 7-97) Back

(Authority: 38 U.S.C. 501, 2408)

(The Office of Management and Budget has approved the information collection requirements in this section under control number 0348–0041.)

(c) Standard Form 424C—Instructions for the SF–424C.

OMB Approval No. 0348-0041

## BUDGET INFORMATION - Construction Programs

*NOTE: Certain Federal assistance programs require additional computations to arrive at the Federal share of project costs eligible for participation. If such is the case, you will be notified.*

| COST CLASSIFICATION | a. Total Cost | b. Costs Not Allowable for Participation | c. Total Allowable Costs (Columns a-b) |
|---|---|---|---|
| 1. Administrative and legal expenses | $ .00 | $ .00 | $ 0.00 |
| 2. Land, structures, rights-of-way, appraisals, etc. | $ .00 | $ .00 | $ 0.00 |
| 3. Relocation expenses and payments | $ .00 | $ .00 | $ 0.00 |
| 4. Architectural and engineering fees | $ .00 | $ .00 | $ 0.00 |
| 5. Other architectural and engineering fees | $ .00 | $ .00 | $ 0.00 |
| 6. Project inspection fees | $ .00 | $ .00 | $ 0.00 |
| 7. Site work | $ .00 | $ .00 | $ 0.00 |
| 8. Demolition and removal | $ .00 | $ .00 | $ 0.00 |
| 9. Construction | $ .00 | $ .00 | $ 0.00 |
| 10. Equipment | $ .00 | $ .00 | $ 0.00 |
| 11. Miscellaneous | $ .00 | $ .00 | $ 0.00 |
| 12. SUBTOTAL *(sum of lines 1-11)* | $ 0.00 | $ 0.00 | $ 0.00 |
| 13. Contingencies | $ .00 | $ .00 | $ 0.00 |
| 14. SUBTOTAL | $ 0.00 | $ 0.00 | $ 0.00 |
| 15. Project (program) income | $ .00 | $ .00 | $ 0.00 |
| 16. TOTAL PROJECT COSTS *(subtract #15 from #14)* | $ 0.00 | $ 0.00 | $ 0.00 |
| FEDERAL FUNDING | | | |
| 17. Federal assistance requested, calculate as follows: (Consult Federal agency for Federal percentage share.) Enter the resulting Federal share. | Enter eligible costs from line 16c Multiply X _____% | | $ 0.00 |

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**Prescribed by OMB Circular A-102**

**INSTRUCTIONS FOR THE SF-424C**

Public reporting burden for this collection of information is estimated to average 180 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0041), Washington, DC 20503.

**PLEASE DO NOT RETURN YOUR COMPLETED FORM TO THE OFFICE OF MANAGEMENT AND BUDGET. SEND IT TO THE ADDRESS PROVIDED BY THE SPONSORING AGENCY.**

This sheet is to be used for the following types of applications: (1) "New" (means a new [previously unfunded] assistance award); (2) "Continuation" (means funding in a succeeding budget period which stemmed from a prior agreement to fund); and (3) "Revised" (means any changes in the Federal Government's financial obligations or contingent liability from an existing obligation). If there is no change in the award amount, there is no need to complete this form. Certain Federal agencies may require only an explanatory letter to effect minor (no cost) changes. If you have questions, please contact the Federal agency.

*Column* a. - If this is an application for a "New" project, enter the total estimated cost of each of the items listed on lines 1 through 16 (as applicable) under "COST CLASSIFICATION."

If this application entails a change to an existing award, enter the eligible amounts *approved under the previous award* for the items under "COST CLASSIFICATION."

*Column* b. - If this is an application for a "New" project, enter that portion of the cost of each item in Column a. which is *not* allowable for Federal assistance. Contact the Federal agency for assistance in determining the allowability of specific costs.

If this application entails a change to an existing award, enter the adjustment [+ or (-)] to the previously approved costs (from column a.) reflected in this application.

*Column*. - This is the net of lines 1 through 16 in columns "a." and "b."

---

Line 1 - Enter estimated amounts needed to cover administrative expenses. Do not include costs which are related to the normal functions of government. Allowable legal costs are generally only those associated with the purchases of land which is allowable for Federal participation and certain services in support of construction of the project.

Line 2 - Enter estimated site and right(s)-of-way acquisition costs (this includes purchase, lease, and/or easements).

Line 3 - Enter estimated costs related to relocation advisory assistance, replacement housing, relocation payments to displaced persons and businesses, etc.

Line 4 - Enter estimated basic engineering fees related to construction (this includes start-up services and preparation of project performance work plan).

Line 5 - Enter estimated engineering costs, such as surveys, tests, soil borings, etc.

Line 6 - Enter estimated engineering inspection costs.

Line 7 - Enter estimated costs of site preparation and restoration which are not included in the basic construction contract.

Line 9 - Enter estimated cost of the construction contract.

Line 10 - Enter estimated cost of office, shop, laboratory, safety equipment, etc. to be used at the facility, if such costs are not included in the construction contract.

Line 11 - Enter estimated miscellaneous costs.

Line 12 - Total of items 1 through 11.

Line 13 - Enter estimated contingency costs. (Consult the Federal agency for the percentage of the estimated construction cost to use.)

Line 14 - Enter the total of lines 12 and 13.

Line 15 - Enter estimated program income to be earned during the grant period, e.g., salvaged materials, etc.

Line 16 - Subtract line 15 from line 14.

Line 17 - This block is for the computation of the Federal share. Multiply the total allowable project costs from line 16, column "c." by the Federal percentage share (this may be up to 100 percent; consult Federal agency for Federal percentage share) and enter the product on line 17.

**SF-424C (Rev. 7-97) Back**

(Authority: 38 U.S.C. 501, 2408.)

(The Office of Management and Budget has approved the information collection requirements in this section under control number 0348–0041.)

(d) Standard Form 424D—Assurances—Construction Programs.

OMB Approval No. 0348-0042

**ASSURANCES - CONSTRUCTION PROGRAMS**

Public reporting burden for this collection of information is estimated to average 15 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0042), Washington, DC 20503.

**PLEASE DO NOT RETURN YOUR COMPLETED FORM TO THE OFFICE OF MANAGEMENT AND BUDGET. SEND IT TO THE ADDRESS PROVIDED BY THE SPONSORING AGENCY.**

**NOTE:** Certain of these assurances may not be applicable to your project or program. If you have questions, please contact the Awarding Agency. Further, certain Federal assistance awarding agencies may require applicants to certify to additional assurances. If such is the case, you will be notified.

As the duly authorized representative of the applicant, I certify that the applicant:

1. Has the legal authority to apply for Federal assistance, and the institutional, managerial and financial capability (including funds sufficient to pay the non-Federal share of project costs) to ensure proper planning, management and completion of the project described in this application.

2. Will give the awarding agency, the Comptroller General of the United States and, if appropriate, the State, through any authorized representative, access to and the right to examine all records, books, papers, or documents related to the assistance; and will establish a proper accounting system in accordance with generally accepted accounting standards or agency directives.

3. Will not dispose of, modify the use of, or change the terms of the real property title, or other interest in the site and facilities without permission and instructions from the awarding agency. Will record the Federal interest in the title of real property in accordance with awarding agency directives and will include a covenant in the title of real property aquired in whole or in part with Federal assistance funds to assure non-discrimination during the useful life of the project.

4. Will comply with the requirements of the assistance awarding agency with regard to the drafting, review and approval of construction plans and specifications.

5. Will provide and maintain competent and adequate engineering supervision at the construction site to ensure that the complete work conforms with the approved plans and specifications and will furnish progress reports and such other information as may be required by the assistance awarding agency or State.

6. Will initiate and complete the work within the applicable time frame after receipt of approval of the awarding agency.

7. Will establish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest, or personal gain.

8. Will comply with the Intergovernmental Personnel Act of 1970 (42 U.S.C. §§4728-4763) relating to prescribed standards for merit systems for programs funded under one of the 19 statutes or regulations specified in Appendix A of OPM's Standards for a Merit System of Personnel Administration (5 C.F.R. 900, Subpart F).

9. Will comply with the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. §§4801 et seq.) which prohibits the use of lead-based paint in construction or rehabilitation of residence structures.

10. Will comply with all Federal statutes relating to non-discrimination. These include but are not limited to: (a) Title VI of the Civil Rights Act of 1964 (P.L. 88-352) which prohibits discrimination on the basis of race, color or national origin; (b) Title IX of the Education Amendments of 1972, as amended (20 U.S.C. §§1681 1683, and 1685-1686), which prohibits discrimination on the basis of sex; (c) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. §794), which prohibits discrimination on the basis of handicaps; (d) the Age Discrimination Act of 1975, as amended (42 U.S.C. §§6101-6107), which prohibits discrimination on the basis of age; (e) the Drug Abuse Office and Treatment Act of 1972 (P.L. 92-255), as amended, relating to nondiscrimination on the basis of drug abuse; (f) the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (P.L. 91-616), as amended, relating to nondiscrimination on the basis of alcohol abuse or alcoholism; (g) §§523 and 527 of the Public Health Service Act of 1912 (42 U.S.C. §§290 dd-3 and 290 ee 3), as amended, relating to confidentiality of alcohol and drug abuse patient records; (h) Title VIII of the Civil Rights Act of 1968 (42 U.S.C. §§3601 et seq.), as amended, relating to nondiscrimination in the sale, rental or financing of housing; (i) any other nondiscrimination provisions in the specific statute(s) under which application for Federal assistance is being made; and, (j) the requirements of any other nondiscrimination statute(s) which may apply to the application.

**Standard Form 424D (Rev. 7-97)**

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11. Will comply, or has already complied, with the requirements of Titles II and III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646) which provide for fair and equitable treatment of persons displaced or whose property is acquired as a result of Federal and federally-assisted programs. These requirements apply to all interests in real property acquired for project purposes regardless of Federal participation in purchases.

12. Will comply with the provisions of the Hatch Act (5 U.S.C. §§1501-1508 and 7324-7328) which limit the political activities of employees whose principal employment activities are funded in whole or in part with Federal funds.

13. Will comply, as applicable, with the provisions of the Davis-Bacon Act (40 U.S.C. §§276a to 276a-7), the Copeland Act (40 U.S.C. §276c and 18 U.S.C. §874), and the Contract Work Hours and Safety Standards Act (40 U.S.C. §§327-333) regarding labor standards for federally-assisted construction subagreements.

14. Will comply with flood insurance purchase requirements of Section 102(a) of the Flood Disaster Protection Act of 1973 (P.L. 93-234) which requires recipients in a special flood hazard area to participate in the program and to purchase flood insurance if the total cost of insurable construction and acquisition is $10,000 or more.

15. Will comply with environmental standards which may be prescribed pursuant to the following: (a) institution of environmental quality control measures under the National Environmental Policy Act of 1969 (P.L. 91-190) and Executive Order (EO) 11514; (b) notification of violating facilities pursuant to EO 11738; (c) protection of wetlands pursuant to EO 11990; (d) evaluation of flood hazards in floodplains in accordance with EO 11988; (e) assurance of project consistency with the approved State management program developed under the Coastal Zone Management Act of 1972 (16 U.S.C. §§1451 et seq.); (f) conformity of Federal actions to State (Clean Air) Implementation Plans under Section 176(c) of the Clean Air Act of 1955, as amended (42 U.S.C. §§7401 et seq.); (g) protection of underground sources of drinking water under the Safe Drinking Water Act of 1974, as amended (P.L. 93-523); and, (h) protection of endangered species under the Endangered Species Act of 1973, as amended (P.L. 93-205).

16. Will comply with the Wild and Scenic Rivers Act of 1968 (16 U.S.C. §§1271 et seq.) related to protecting components or potential components of the national wild and scenic rivers system.

17. Will assist the awarding agency in assuring compliance with Section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. §470), EO 11593 (identification and protection of historic properties), and the Archaeological and Historic Preservation Act of 1974 (16 U.S.C. §§469a-1 et seq.).

18. Will cause to be performed the required financial and compliance audits in accordance with the Single Audit Act Amendments of 1996 and OMB Circular No. A-133, "Audits of States, Local Governments, and Non-Profit Organizations."

19. Will comply with all applicable requirements of all other Federal laws, executive orders, regulations, and policies governing this program.

| SIGNATURE OF AUTHORIZED CERTIFYING OFFICIAL | TITLE |
|---|---|
| APPLICANT ORGANIZATION | DATE SUBMITTED |

**SF-424D (Rev. 7-97) Back**

(Authority: 38 U.S.C. 501, 2408.)

(The Office of Management and Budget has approved the information collection requirements in this section under control number 0348–0042.)

(e) VA Form 10–0148c—Certification Regarding Debarment, Suspension, and Other Responsibility Matters—Primary Covered Transactions.

Department of Veterans Affairs

## Certification Regarding Debarment, Suspension, and Other Responsibility Matters Primary Covered Transactions

This certification is required by the regulations implementing Executive Order 12549, Debarment and Suspension, 38 CFR Part 44, Section 44.510, Participants' responsibilities

**(BEFORE COMPLETING CERTIFICATION, READ INSTRUCTIONS ON REVERSE)**

(1) The prospective primary participant certifies to the best of its knowledge and belief, that it and its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;

(b) Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local ) transaction or contract under a public transaction; violation of Federal or State antitrust statues or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(c) Are not presently indicted for otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and

(d) Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default.

(2) Where the prospective primary participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

Organization Name PR/Award Number of Project Name

Name and Title of Authorized Representative

Signature Date

VA FROM MAR 2001 10-0148c

## Instructions for Certification

1. By signing and submitting this proposal, the prospective primary participant is providing the certification set out below.

2. The inability of a person to provide the certification required below will not necessarily result in denial of participation in this covered tranaction. The prospective participant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the department or agency's determination whether to enter into this transaction. However, failure of the prospective primary participant to furnish a certification or an explanation shall disqualify such person from participation in this transaction.

3. The certification in this clause is a material representation of fact upon which reliance was placed when the department or agency determined to enter into this transaction. If it is later determined that the prospective primary participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

4. The prospective primary participant shall provide immediate written notice to the department or agency to whom this proposal is submitted it at any time the prospective primary participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

5. The terms "covered transaction," "debarred," "suspended," "ineligible," "lower tier covered transaction," "participant," "person," "primary covered transaction," "principal" "proposal," and "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the department or agency to which this proposal is being submitted for assistance in obtain a copy of those regulations.

6. The prospective primary participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency entering into this transaction.

7. The prospective primary participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion-Lower Tier Covered Transactions," provided by the department or agency entering into this covered transaction, without modification, in all lwer tier covered transactions and in all solications for lower tier covered transactions.

8. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List.

9. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

10. Except for transactions authorized under paragraph 6 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

(Authority: 38 U.S.C. 501, 2408.)

(f) VA Form 40–0241—State Cemetery Data.

FORM APPROVED OMB NO. 2900-0559
RESPONDENT BURDEN: ONE HOUR

**Department of Veterans Affairs** | **STATE CEMETERY DATA** | FISCAL YEAR ENDING *(State)*

**RESPONDENT BURDEN:** Public reporting burden for this collection of information is estimated to average 60 minutes per response. Statutory authority for the State Cemetery Grants Program is 38 U.S.C., subchapter 2408. This form is approved under OMB No. 2900-0559, and when form is completed it provides VA with data regarding the number of interments conducted at states veterans cemeteries each year.

VA may not conduct or sponsor, and you are not required to respond to, this collection of information unless it displays a valid OMB Control Number. Responding to this information collection is voluntary. Send comments regarding this burden estimate or any other aspects of this collection of information, including suggestions for reducing this burden, to VA Clearance Officer (045A4), 810 Vermont Avenue, NW, Washington, DC 20420. *Please do not send applications for benefits to this address.*

| NAME OF CEMETERY | STATUS OF CEMETERY | NAME OF DIRECTOR | AREA CODE AND PHONE NO. |
|---|---|---|---|
| | ☐ OPEN<br>☐ CLOSED | | FAX NO. |

| MAILING ADDRESS | DATE ESTABLISHED | DATE OPENED | DATE OF FIRST BURIAL | DATE OF ESTIMATED CLOSURE |
|---|---|---|---|---|
| | AUTHORITY | | | |

NAME OF STATE AGENCY RESPONSIBLE *(Organizationally)* FOR CEMETERY *(For example: Department of Veterans Affairs. Please include Director's name, telephone no., and fax no.)*

| TOTAL ACREAGE *(Usable/unusable)* | TOTAL BURIAL ACREAGE | BURIAL ACREAGE DEVELOPED | COLUMBARIA NICHES | TOTAL COLUMBARIA NICHES AVAIL. |
|---|---|---|---|---|
| SIZE OF GRAVESITE *(e.g. 5' x 10')* | GRAVESITES PER ACRE | GRAVESITES AVAILABLE | TOTAL IN-GROUND NICHES | TOTAL IN-GROUND NICHES AVAIL. |

COMMENTS *(i.e., The acreage developed is almost full and additional funds (estimated amount) for expansion in a particular year/month to develop the remaining acreage is requested. If additional space is needed please provide your comments on plain paper and attach to form.)*

| NUMBER OF CUMULATIVE INTERMENTS | | | | NUMBER OF INTERMENTS | | | TYPE OF HEADSTONE/MARKER *(Check applicable boxes)* |
|---|---|---|---|---|---|---|---|
| | FULL CASKET | CREMATIONS | | | VETERAN | DEPENDENT | |
| | | IN-GROUND | COLUMBARIA | | | | |
| VETERAN | | | | FY PRIOR | | | ☐ FLAT BRONZE<br>☐ BRONZE NICHE |
| NON-VETERAN | | | | FY CURRENT | | | ☐ FLAT GRANITE<br>☐ UPRIGHT GRANITE |
| GRAVESITES MAINTAINED | | | | FY FUTURE *(Estimated)* | | | ☐ FLAT MARBLE<br>☐ UPRIGHT MARBLE |

| PERSONNEL | | OPERATING COSTS | | |
|---|---|---|---|---|
| NO. OF ADMINISTRATIVE | NO. OF GROUNDS MAINTENANCE | PRIOR YEAR<br>$ | CURRENT YEAR<br>$ | FUTURE YEAR<br>$ |

| NO. OF OTHER *(Specify)* | AMOUNT CHARGED TO VETERAN FOR INTERMENT *(Do not include burial plot allowance)*<br>$ | AMOUNT CHARGED TO DEPENDENT FOR INTERMENT<br>$ |
|---|---|---|

COST COMMENTS *(Use this area to list total costs associated with operating your cemetery. For example if the Superintendent of the cemetery is also in charge of the adjacent Vets Home and their salary is paid by them, then please reflect their salary in this space with a brief explanation. If convicts are used for labor then please note in above block and explain here. If additional space is required, please provide your comments on plain paper and attach to form.)*

LOCATION AND GENERAL DESCRIPTION OF CEMETERY *(Please include precise directions from the nearest large airport to cemetery. Please provide comments on historical matters relating to the cemetery. For example, cemetery is located near an old civil war battlefield or is part of the state veterans home. Also, describe your facilities, e.g., the cemetery has a separate maintenance facility with three, heated maintenance bays, a separate administrative building and a chapel. In sum, tell us what you want a visitor to know about your cemetery. What makes your cemetery unique. If additional space is require please provide your comments on plain paper and attach to form.)*

DESCRIBE ELIGIBILITY REQUIREMENTS AND FACTS OF SPECIAL INTEREST OR HISTORICAL SIGNIFICANCE *(Are there state residency requirements, if so, how many years? Who is your first interment? Are there any Medal of Honor veterans buried in your cemetery, or other highly decorated or well-known soldiers? If additional space is required please provide your comments on plain paper and attach to form.)*

VA FORM MAY 1997(RS) **40-0241** NATIONAL CEMETERY SYSTEM (VACO) COPY - 1

(Authority: 38 U.S.C. 501, 2408.)

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0559.)

# PART 40—INTERGOVERNMENTAL REVIEW OF DEPARTMENT OF VETERANS AFFAIRS PROGRAMS AND ACTIVITIES

Sec.
40.1 Purpose.

40.2 Definitions.
40.3 Programs and activities.
40.4 General.
40.5 Federal interagency coordination.
40.6 Selection of programs and activities.
40.7 Communicating with State and local officials concerning VA's programs and activities.
40.8 Commenting on proposed Federal financial assistance and direct Federal development.
40.9 Comment receipt and response to comments.
40.10 Making efforts to accommodate intergovernmental concerns.
40.11 Interstate.
40.12 [Reserved]
40.13 Waiver.

AUTHORITY: E.O. 12372, July 14, 1982 (47 FR 30959), as amended April 8, 1983 (48 FR 15887): section 401 of the Intergovernmental Cooperation Act of 1968, as amended (31 U.S.C. 6506); sec. 204 of the Demonstration Cities and Metropolitan Development Act of 1966, as amended (42 U.S.C. 3334).

SOURCE: 48 FR 29413, June 24, 1983; 48 FR 31854, July 12, 1983, unless otherwise noted.

## § 40.1 Purpose.

(a) The regulations in this part implement Executive Order 12372, ''Intergovernmental Review of Federal Programs'', issued on July 14, 1982 and amended on April 8, 1983. These regulations also implement applicable provisions of section 401 of the Intergovernmental Cooperation Act of 1968 and section 204 of the Demonstration Cities and Metropolitan Development Act of 1966.

(b) These regulations are intended to foster an intergovernmental partnership and a strengthened Federalism by relying on State processes and on State, areawide, regional, and local coordination for review of proposed Federal financial assistance and direct Federal development.

(c) These regulations are intended to improve the internal management of the VA, and are not intended to create any right or benefit enforceable at law by a party against the VA or its officers.

(Authority: 42 U.S.C. 4231(b))

## § 40.2 Definitions.

For the purposes of §§ 40.1 through 40.13, the following definitions apply:

(a) *VA* means the Department of Veterans Affairs.

(b) *Order* means Executive Order 12372, issued July 14, 1982, and amended April 8, 1983, and titled ''Intergovernmental Review of Federal Programs.''

(c) *Secretary* means the Secretary of Veterans Affairs of the Department of Veterans Affairs or an official or employee of VA acting for the Secretary under delegation of authority.

(d) *State* means any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, the U.S. Virgin Islands, or the Trust Territory of the Pacific Islands.

(e) *Emergency* means a sudden, urgent, unforeseen situation in which immediate action is needed to prevent or respond to significant harm to life or property. Harm to property would include damage to the environment.

(f) *Unusual circumstances* means the end of a fiscal year, a statutory deadline or any other circumstance making it impracticable for the agency to provide 60 days for comment.

(g) *Affected* means for purposes of interstate situations those States physically affected by the specific plans and projects.

(Authority: 42 U.S.C. 4231(b))

## § 40.3 Programs and activities.

The Secretary publishes in the FEDERAL REGISTER a list of VA's programs and activities that are subject to these regulations and identifies which of these are subject to the requirements of section 204 of the Demonstration Cities and Metropolitan Development Act.

(Authority: 42 U.S.C. 4231(b))

## § 40.4 General.

(a) The Secretary provides opportunities for consultation by elected officials of those State and local governments that would provide the non-Federal funds for, or that would be directly affected by, proposed Federal financial assistance from, or direct Federal development by, VA.

(b) If a State adopts a process under the order to review and coordinate proposed Federal financial assistance and direct Federal development, the Secretary, to the extent permitted by law:

(1) Uses the State process to determine official views of State and local elected officials;

(2) Communicates with State and local elected officials as early in a program planning cycle as is reasonably feasible to explain specific plans and actions;

(3) Makes efforts to accommodate State and local elected officials' concerns with proposed Federal financial assistance and direct Federal development that are communicated through the State process;

(4) Seeks the coordination of views of affected State and local elected officials in one State with those of another State when proposed Federal financial assistance or direct Federal development has an impact on interstate metropolitan urban centers or other interstate areas; and

(5) Supports State and local governments by discouraging the reauthorization or creation of any planning organization which is federally-funded, which has a limited purpose, and which is not adequately representative of, or accountable to, State or local elected officials.

(Authority: 42 U.S.C. 4231(b))

### §40.5 Federal interagency coordination.

The Secretary, to the extent practicable, consults with and seeks advice from all other substantially affected Federal departments and agencies in an effort to assure full coordination between such agencies and VA regarding programs and activities covered under these regulations.

(Authority: 42 U.S.C. 4231(b))

### §40.6 Selection of programs and activities.

(a) A State may select any program or activity published in the FEDERAL REGISTER in accordance with §40.3 of this part, for intergovernmental review under these regulations. Each State, before selecting programs and activities shall consult with local elected officials.

(b) Each State that adopts a process shall notify the Secretary of the VA's programs and activities selected for that process.

(c) A State may notify the Secretary of changes in its selections at any time. For each change, the State shall submit to the Secretary an assurance that the State has consulted with local elected officials regarding the change. The VA may establish deadlines by which States are required to inform the Secretary of changes in their program selections.

(d) The Secretary uses a State's process as soon as feasible, depending on individual programs and activities, after the Secretary is notified of its selections.

(Authority: 42 U.S.C. 4231(b))

### §40.7 Communicating with State and local officials concerning VA's programs and activities.

The Secretary provides notice to directly affected State, areawide, regional, and local entities in a State of proposed Federal financial assistance or direct Federal development if:

(a) The State has not adopted a process under the order; or

(b) The assistance or development involves a program or activity not selected for the State process.

This notice may be made by publication in the FEDERAL REGISTER or other appropriate means, which VA in its discretion deems appropriate.

(Authority: 42 U.S.C. 4231(b))

### §40.8 Commenting on proposed Federal financial assistance and direct Federal development.

(a) Except in unusual circumstances, the Secretary gives State processes or State, areawide, regional and local officials and entities at least 60 days from the date established by the Secretary to comment on proposed direct Federal development or Federal financial assistance.

(b) This section also applies to comments in cases in which the review, coordination, and communication with VA have been delegated.

(c) Applicants for programs and activities subject to section 204 of the Demonstration Cities and Metropolitan Act shall allow areawide agencies a 60-day opportunity for review and comment.

(Authority: 42 U.S.C. 4231(b))

### § 40.9 Comment receipt and response to comments.

(a) The Secretary follows the procedures in § 40.10 if:

(1) A State office or official is designated to act as a single point of contact between a State process and all Federal agencies, and

(2) That office or official transmits a State process recommendation for a program selected under § 40.6.

(b)(1) The single point of contact is not obligated to transmit comments from State, areawide, regional or local officials and entities where there is no State process recommendation.

(2) If a State process recommendation is transmitted by a single point of contact, all comments from State, areawide, regional, and local officials and entities that differ from it must also be transmitted.

(c) If a State has not established a process, or is unable to submit a State process recommendation, State, areawide, regional and local officials and entities may submit comments either to the applicant or to VA.

(d) If a program or activity is not selected for a State process, State, areawide, regional and local officials and entities may submit comments either to the applicant or to VA. In addition, if a State process recommendation for a nonselected program or activity is transmitted to VA by the single point of contact, the Secretary follows the procedures of § 40.10 of this part.

(e) The Secretary considers comments which do not constitute a State process recommendation submitted under these regulations and for which the Secretary is not required to apply the procedures of § 40.10 of this part, when such comments are provided by a single point of contact, by the applicant, or directly to the VA by a commenting party.

(Authority: 42 U.S.C. 4231(b))

### § 40.10 Making efforts to accommodate intergovernmental concerns.

(a) If a State process provides a State process recommendation to VA through its single point of contact, the Secretary either:

(1) Accepts the recommendation;

(2) Reaches a mutually agreeable solution with the State process; or

(3) Provides the single point of contact with such written explanation of the decision, as the Secretary in his or her discretion deems appropriate. The Secretary may also supplement the written explanation by providing the explanation to the single point of contact by telephone, other telecommunication, or other means.

(b) In any explanation under paragraph (a)(3) of this section, the Secretary informs the single point of contact that:

(1) The VA will not implement its decision for at least ten days after the single point of contact receives the explanation; or

(2) The Secretary has reviewed the decision and determined that, because of unusual circumstances, the waiting period of at least ten days is not feasible.

(c) For purposes of computing the waiting period under paragraph (b)(1) of this section, a single point of contact is presumed to have received written notification five days after the date of mailing of such notification.

(Authority: 42 U.S.C. 4231(b))

### § 40.11 Interstate.

(a) The Secretary is responsible for:

(1) Identifying proposed Federal financial assistance and direct Federal development that have an impact on interstate areas;

(2) Notifying appropriate officials and entities in States which have adopted a process and which select VA's program or activity.

(3) Making efforts to identify and notify the affected State, areawide, regional, and local officials and entities in those States that have not adopted a process under the order or do not select VA's program or activity;

(4) Responding pursuant to § 40.10 of this part if the Secretary receives a recommendation from a designated areawide agency transmitted by a single point of contact, in cases in which the review, coordination, and communication with VA have been delegated, or

(b) The Secretary uses the procedures in § 40.10 if a State process provides a

State process recommendation to VA through a single point of contact.

(Authority: 42 U.S.C. 4231(b))

### §40.12 [Reserved]

### §40.13 Waiver.

In an emergency, the Secretary may waive any provision of these regulations.

(Authority: 42 U.S.C. 4231(b))

## PART 41—AUDITING REQUIREMENTS

Sec.
41.1 Purpose.
41.2–41.4 [Reserved]
41.5 Definitions.
41.6 Scope of audit.
41.7 Frequency of audit.
41.8 Internal control and compliance reviews.
41.9 Subrecipients.
41.10 Relation to other audit requirements.
41.11 Cognizant agency responsibilities.
41.12 Illegal acts or irregularities.
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41.14 Audit resolution.
41.15 Audit workpapers and reports.
41.16 Audit costs.
41.17 Sanctions.
41.18 Auditor selection.
41.19 Small and minority audit firms.
41.20 Reporting.

AUTHORITY: Pub. L. 98–502, 31 U.S.C. ch. 75; 38 U.S.C. 501.

SOURCE: 50 FR 30937, July, 31, 1985, unless otherwise noted.

### §41.1 Purpose.

These regulations (38 CFR 41.1 through 41.20) are issued pursuant to the Single Audit Act of 1984, Pub. L. 98–502. The act establishes audit requirements for State and local governments that receive Federal aid, and defines Federal responsibilities for implementing and monitoring those requirements. The Single Audit act requires the following:

(a) State or local governments that receive $100,000 or more a year in Federal financial assistance shall have an audit made in accordance with these regulations.

(b) State or local governments that receive between $25,000 and $100,000 a year shall have an audit made in accordance with these regulations, or in accordance with Federal laws and regulations governing the programs they participate in.

(c) State or local governments that receive less than $25,000 a year shall be exempt from compliance with the Act and other Federal audit requirements. These State and local governments shall be governed by audit requirements prescribed by State or local law or regulation.

(d) Nothing in this section exempts State or local governments from maintaining records of Federal financial assistance or from providing access to such records to Federal agencies, as provided for in Federal law or in Circular A–102, ''Uniform requirements for grants to State or local governments.''

(Authority: Pub. L. 98–502)

### §§41.2–41.4 [Reserved]

### §41.5 Definitions.

For the purposes of these regulations, the following definitions from the Single Audit Act apply:

(a) *Cognizant agency* means the Federal agency assigned by the OMB (Office of Management and Budget) to carry out the responsibilities described in §41.11.

(b) *Federal financial assistance* means assistance provided by a Federal agency in the form of grants, contracts, cooperative agreements, loans, loan guarantees, property, interest subsidies, insurance, or direct appropriations, but does not include direct Federal cash assistance to individuals. It includes awards received directly from Federal agencies, or indirectly through other units of State and local governments.

(c) *Federal agency* has the same meaning as the term 'agency' in section 551(1) of Title 5 U.S.C.

(d) *Generally accepted accounting principles* has the meaning specified in the generally accepted government auditing standards.

(e) *Generally accepted government auditing standards* means the *Standards For Audit of Government Organizations, Programs, Activities, and Functions,* developed by the Comptroller General, dated February 27, 1981.

(f) *Independent auditor* means:

(1) A State or local government auditor who meets the independence standards specified in generally accepted government auditing standards; or

(2) A public accountant who meets such independence standards.

(g) *Internal controls* means the plan of organization and methods and procedures adopted by management to ensure that:

(1) Resource use is consistent with laws, regulations, and policies;

(2) Resources are safeguarded against waste, loss, and misuse; and

(3) Reliable data are obtained, maintained, and fairly disclosed in reports.

(h) *Indian tribe* means any Indian tribe, band, nations, or other organized group or community, including any Alaskan Native village or regional or village corporations (as defined in, or established under, the Alaskan Native Claims Settlement Act) that is recognized by the United States as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(i) *Local government* means any unit of local government within a State, including a county, a borough, municipality, city, town, township, parish, local public authority, special district, school district, intrastate district, council of governements, and any other instrumentality of local government.

(j) *Major Federal Assistance Program,* for State and local governments having Federal assistance expenditures between $100,000 and $100,000,000, means any program for which Federal expenditures during the applicable year exceed the larger of $300,000, or 3 percent of such total expenditures. Where total expenditures of Federal assistance exceed $100,000,000, the following criteria apply:

| Total Expenditures of Federal Financial Assistance of all Programs | | Major Federal Assistance Program Means Any Program That Exceeds |
|---|---|---|
| More Than | But Less Than | |
| $100 million | 1 billion | $ 3 million |
| 1 billion | 2 billion | 4 million |
| 2 billion | 3 billion | 7 million |
| 3 billion | 4 billion | 10 million |
| 4 billion | 5 billion | 13 million |
| 5 billion | 6 billion | 16 million |
| 6 billion | 7 billion | 19 million |
| over 7 billion | | 20 million |

(k) *Public accountants* means those individuals who meet the qualification standards included in generally accepted government auditing standards for personnel performing government audits.

(l) *State* means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands, any instrumentality thereof, and any multi-State, regional or interstate entity that has governmental functions and any Indian tribe.

(m) *Subrecipient* means any person or government department, agency, or establishment that receives Federal financial assistance to carry out a program through a State or local government, but does not include an individual that is a beneficiary of such a program. A subrecipient may also be a direct recipient of Federal financial assistance.

(Authority: Pub. L. 98–502)

## § 41.6 Scope of audit.

The Single Audit Act provides that:

(a) The audit shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial and compliance audits.

(b) The audit shall cover the entire operations of a State or local government or, at the option of that government, it may cover departments, agencies or establishments that received, expended, or otherwise administered Federal financial assistance during the year. However, if a State or local government receives $25,000 or more in General Revenue Sharing Funds in a fiscal year, it shall have an audit of its entire operations. A series of audits of individual departments, agencies, and establishments for the same fiscal year may be considered a single audit.

(c) Public hospitals and public colleges and universities may be excluded from State and local audits and the requirements of this Circular. However, if such entities are excluded, audits of these entities shall be made in accordance with statutory requirements and

the provisions of Circular A–110, ''Uniform requirements for grants to universities, hospitals, and other nonprofit organizations.''

(d) The auditor shall determine whether:

(1) The financial statements of the government, department, agency or establishment present fairly its financial position and the results of its financial operations in accordance with generally accepted accounting principles;

(2) The organization has internal accounting and other control systems to provide reasonable assurance that it is managing Federal financial assistance programs in compliance with applicable laws and regulations; and

(3) The organization has complied with laws and regulations that may have material effect on its financial statements and on each major Federal assistance program.

(Authority: Pub. L. 98–502)

### §41.7 Frequency of audit.

Audits shall be made annually unless the State or local government has, by January 1, 1987, a constitutional or statutory requirement for less frequent audits. For those governments, the cognizant agency shall permit biennial audits, covering both years, if the government so requests. It shall also honor requests for biennial audits by governments that have an administrative policy calling for audits less frequent than annual, but only for fiscal years beginning before January 1, 1987.

(Authority: Pub. L. 98–502)

### §41.8 Internal control and compliance reviews.

The Single Audit Act requires that the independent auditor determine and report on whether the organization has internal control systems to provide reasonable assurance that it is managing Federal assistance programs in compliance with applicable laws and regulations.

(a) *Internal control review*. In order to provide this assurance the auditor must make a study and evaluation of internal control systems used in administering Federal assistance programs. The study and evaluation must be made whether or not the auditor intends to place reliance on such systems. As part of this review, the auditor shall:

(1) Test whether these internal control systems are functioning in accordance with prescribed procedures.

(2) Examine the recipient's systems for monitoring subrecipients and obtaining and acting on subrecipient audit reports.

(b) *Compliance review*. The law also requires the auditor to determine whether the organization has complied with laws and regulations that may have a material effect on each major Federal assistance program.

(1) In order to determine which major programs are to be tested for compliance, State and local governments shall identify in their accounts all Federal funds received and expended and the programs under which they were received. This shall include funds received directly from Federal agencies and through other State and local governments.

(2) The review must include the selection and testing of a representative number of charges from each major Federal assistance program. The selection and testing of transactions shall be based on the auditor's professional judgment considering such factors as the amount of expenditures for the program and the individual awards; the newness of the program or changes in its conditions; prior experience with the program, particularly as revealed in audits and other evaluations (e.g., inspections, program reviews); the extent to which the program is carried out through subrecipients; the extent to which the program contracts for goods or services; the level to which the program is already subject to program reviews or other forms of independent oversight; the adequacy of the controls for ensuring compliance; the expectation of adherence or lack of adherence to the applicable laws and regulations; and the potential impact of adverse findings.

(i) In making the test of transactions, the auditor shall determine whether:

(A) The amounts reported as expenditures were for allowable services, and

(B) The records show that those who received services or benefits were eligible to receive them.

(ii) In addition to transaction testing, the auditor shall determine whether:

(A) Matching requirements, levels of effort and earmarking limitations were met,

(B) Federal financial reports and claims for advances and reimbursements contain information that is supported by the books and records from which the basic financial statements have been prepared, and

(C) Amounts claimed or used for matching were determined in accordance with OMB Circular A–87, ''Cost principles for State and local governments,'' and Attachment F of Circular A–102, ''Uniform requirements for grants to State and local governments.''

(iii) The principal compliance requirements of the largest Federal aid programs may be ascertained by referring to the *Compliance Supplement for Single Audits of State and Local Governments,* issued by OMB and available from the Government Printing Office. For those programs not covered in the Compliance Supplement, the auditor may ascertain compliance requirements by researching the statutes, regulations, and agreements governing individual programs.

(3) Transactions related to other Federal assistance programs that are selected in connection with examinations of financial statements and evaluations of internal controls shall be tested for compliance with Federal laws and regulations that apply to such transactions.

(Authority: Pub. L. 98–502)

### § 41.9 Subrecipients.

State or local governments that receive Federal financial assistance and provide $25,000 or more of it in a fiscal year to a subrecipient shall:

(a) Determine whether State or local subrecipients have met the audit requirements of these regulations and whether subrecipients covered by Circular A–110, ''Uniform requirements for grants to universities, hospitals, and other nonprofit organizations,'' have met that requirement;

(b) Determine whether the subrecipient spent Federal assistance funds in accordance with applicable laws and regulations. This may be accomplished by reviewing an audit of the subrecipient made in accordance with these regulations, Circular A–110, or through other means (e.g., program reviews) if the subrecipient has not yet had such an audit;

(c) Ensure that appropriate corrective action is taken within six months after receipt of the audit report in instances of non-compliance with Federal laws and regulations;

(d) Consider whether subrecipient audits necessitate adjustment of the recipient's own records; and

(e) Require each subrecipient to permit independent auditors to have access to the records and financial statements as necessary to comply with these regulations.

(Authority: Pub. L. 98–502)

### § 41.10 Relation to other audit requirements.

The Single Audit Act provides that an audit made in accordance with these regulations shall be in lieu of any financial or financial compliance audit required under individual Federal assistance programs. To the extent that a single audit provides Federal agencies with information and assurances they need to carry out their overall responsibilities, they shall rely upon and use such information. However, a Federal agency shall make any additional audits which are necessary to carry out its responsibilities under Federal law and regulation. Any additional Federal audit effort shall be planned and carried out in such a way as to avoid duplication.

(a) The provisions of these regulations do not limit the authority of Federal agencies to make, or contract for audits and evaluations of Federal financial assistance programs, nor do they limit the authority of any Federal agency Inspector General or other Federal audit official.

(b) The provisions of these regulations do not authorize any State or local government or subrecipient thereof to constrain Federal agencies, in any manner, from carrying out additional audits.

(c) A Federal agency that makes or contracts for audits in addition to the audits made by recipients pursuant to these regulations shall, consistent with other applicable laws and regulations, arrange for funding the cost of such additional audits. Such additional audits include economy and efficiency audits, program results audits, and program evaluations.

(Authority: Pub. L. 98–502)

### §41.11 Cognizant agency responsibilities.

The Single Audit Act provides for cognizant Federal agencies to oversee the implementation of OMB Circular A–128:

(a) The Office of Management and Budget will assign cognizant agencies for States and their subdivisions and larger local governments and their subdivisions. Other Federal agencies may participate with an assigned cognizant agency, in order to fulfill the cognizance responsibilities. Smaller governments not assigned a cognizant agency will be under the general oversight of the Federal agency that provides them the most funds whether directly or indirectly.

(b) A cognizant agency shall have the following responsibilities:

(1) Ensure that audits are made and reports are received in a timely manner and in accordance with the requirements of these regulations.

(2) Provide technical advice and liaison to State and local governments and independent auditors.

(3) Obtain or make quality control reviews of selected audits made by non-Federal audit organizations, and provide the results, when appropriate, to other interested organizations.

(4) Promptly inform other affected Federal agencies and appropriate Federal law enforcement officials of any reported illegal acts or irregularities. They should also inform State or local law enforcement and prosecuting authorities, if not advised by the recipient, of any violation of law within their jurisdiction.

(5) Advise the recipient of audits that have been found not to have met the requirements set forth in these regulations. In such instances, the recipient will be expected to work with the auditor to take corrective action. If corrective action is not taken, the cognizant agency shall notify the recipient and Federal awarding agencies of the facts and make recommendations for followup action. Major inadequacies or repetitive substandard performance of independent auditors shall be referred to appropriate professional bodies for disciplinary action.

(6) Coordinate, to the extent practicable, audits made by or for Federal agencies that are in addition to the audits made pursuant to these regulations; so that the additional audits build upon such audits.

(7) Oversee the resolution of audit findings that affect the programs of more than one agency.

(Authority: Pub. L. 98–502)

### §41.12 Illegal acts or irregularities.

If the auditor becomes aware of illegal acts or other irregularities, prompt notice shall be given to recipient management officials above the level of involvement. (See also §41.13(a)(3) for the auditor's reporting responsibilities.) The recipient, in turn, shall promptly notify the cognizant agency of the illegal acts or irregularities and of proposed and actual actions, if any. Illegal acts and irregularities include such matters as conflicts of interest, falsification of records or reports, and misappropriations of funds or other assets.

(Authority: Pub. L. 98–502)

### §41.13 Audit reports.

Audit reports must be prepared at the completion of the audit. Reports serve many needs of State and local governments as well as meeting the requirements of the Single Audit Act.

(a) The audit report shall state that the audit was made in accordance with the provisions of these regulations. The report shall be made up of at least:

(1) The auditor's report on financial statements and on a schedule of Federal assistance; the financial statements; and a schedule of Federal assistance, showing the total expenditures for each Federal assistance program as identified in the *Catalog of Federal Domestic Assistance.* Federal programs or grants that have not been

assigned a catalog number shall be identified under the caption ''other Federal assistance.''

(2) The auditor's report on the study and evaluation of internal control systems must identify the organization's significant internal accounting controls, and those controls designed to provide reasonable assurance that Federal programs are being managed in compliance with laws and regulations. It must also identify the controls that were evaluated, the controls that were not evaluated, and the material weaknesses identified as a result of the evaluation.

(3) The auditor's report on compliance containing:

(i) A statement of positive assurance with respect to those items tested for compliance, including compliance with law and regulations pertaining to financial reports and claims for advances and reimbursements;

(ii) Negative assurance on those items not tested;

(iii) A summary of all instances of noncompliance; and

(iv) An identification of total amounts questioned, if any, for each Federal assistance award, as a result of noncompliance.

(b) The three parts of the audit report may be bound into a single report, or presented at the same time as separate documents.

(c) All fraud, abuse, or illegal acts or indications of such acts, including all questioned costs found as the result of these acts that auditors become aware of, should normally be covered in a separate written report submitted in accordance with § 41.13(f).

(d) In addition to the audit report, the recipient shall provide comments on the findings and recommendations in the report, including a plan for corrective action taken or planned and comments on the status of corrective action taken on prior findings. If corrective action is not necessary, a statement describing the reason it is not should accompany the audit report.

(e) The reports shall be made available by the State or local government for public inspection within 30 days after the completion of the audit.

(f) In accordance with generally accepted government audit standards, reports shall be submitted by the auditor to the organization audited and to those requiring or arranging for the audit. In addition, the recipient shall submit copies of the reports to each Federal department or agency that provided Federal assistance funds to the recipient. Subrecipients shall submit copies to recipients that provided them Federal assistance funds. The reports shall be sent with 30 days after the completion of the audit, but not later than one year after the end of the audit period unless a longer period is agreed to with the cognizant agency.

(g) Recipients of more than $100,000 Federal funds shall submit one copy of the audit report within 30 days after issuance to a central clearinghouse to be designated by the Office of Management and Budget. The clearinghouse will keep completed audits on file and follow up with State and local governments that have not submitted required audit reports.

(h) Recipients shall keep audit reports on file for three years from their issuance.

(Authority: Pub. L. 98–502)

### § 41.14 Audit resolution.

As provided in § 41.11, the cognizant agency shall be responsible for monitoring the resolution of audit findings that affect the programs of more than one Federal agency. Resolution of findings that relate to the programs of a single Federal agency will be the responsibility of the recipient and that agency. Alternate arrangement may be made on a case-by-case basis by agreement among the agencies concerned. Resolution shall be made within six months after receipt of the report by the Federal departments and agencies. Corrective action should proceed as rapidly as possible.

(Authority: Pub. L. 98–502)

### § 41.15 Audit workpapers and reports.

Workpapers and reports shall be retained for a minimum of three years from the date of the audit report, unless the auditor is notified in writing by the cognizant agency to extend the retention period. Audit workpapers shall be made available upon request to the cognizant agency or its designee or

the General Accounting Office, at the completion of the audit.

(Authority: Pub. L. 98–502)

### §41.16 Audit costs.

The cost of audits made in accordance with the provisions of these regulations are allowable charges to Federal assistance programs.

(a) The charges may be considered a direct cost or an allocated indirect cost, determined in accordance with the provision of Circular A–87, ''Cost principles for State and local governments.''

(b) Generally, the percentage of costs charged to Federal assistance programs for a single audit shall not exceed the percentage that Federal funds expended represent of total funds expended by the recipient during the fiscal year. The percentage may be exceeded, however, if appropriate documentation demonstrates higher actual cost.

(Authority: Pub. L. 98–502)

### §41.17 Sanctions.

The Single Audit Act provides that no cost may be charged to Federal assistance programs for audits required by the Act that are not made in accordance with these regulations. In cases of continued inability or unwillingness to have a proper audit, Federal agencies must consider other appropriate sanctions including:

(a) Withholding a percentage of assistance payments until the audit is completed satisfactorily,

(b) Withholding or disallowing overhead costs, and

(c) Suspending the Federal assistance agreement until the audit is made.

(Authority: Pub. L. 98–502)

### §41.18 Auditor selection.

In arranging for audit services State and local governments shall follow the procurement standards prescribed by Attachment O of Circular A–102, ''Uniform requirements for grants to State and local governments.'' The standards provide that while recipients are encouraged to enter into intergovernmental agreements for audit and other services, analysis should be made to determine whether it would be more economical to purchase the services from private firms. In instances where use of such intergovernmental agreements are required by State statutes (e.g., audit services) these statutes will take precedence.

(Authority: Pub. L. 98–502)

### §41.19 Small and minority audit firms.

Small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in contracts awarded to fulfill the requirements of these regulations. Recipients of Federal assistance shall take the following steps to further this goal:

(a) Assure that small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals are used to the fullest extent practicable.

(b) Make information on forthcoming opportunities available and arrange timeframes for the audit so as to encourage and facilitate participation by small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals.

(c) Consider in the contract process whether firms competing for larger audits intend to subcontract with small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals.

(d) Encourage contracting with small audit firms or audit firms owned and controlled by socially and economically disadvantaged individuals which have traditionally audited government programs and, in such cases where this is not possible, assure that these firms are given consideration for audit subcontracting opportunities.

(e) Encourage contracting with consortiums of small audit firms as described in paragraph (a) of this section when a contract is too large for an individual small audit firm or audit firm owned and controlled by socially and economically disadvantaged individuals.

(f) Use the services and assistance, as appropriate, of such organizations as the Small Business Administration in the solicitation and utilization of

small audit firms or audit firms owned and controlled by socially and economically disadvantaged individuals.

(Authority: Pub. L. 98–502)

### § 41.20 Reporting.

Each Federal agency will report to the Director of OMB on or before March 1, 1987, and annually thereafter on the effectiveness of State and local governments in carrying out the provisions of these regulations. The report must identify each State or local government or Indian tribe that, in the opinion of the agency, is failing to comply with these regulations.

(Authority: Pub. L. 98–502)

## PART 42—STANDARDS IMPLEMENTING THE PROGRAM FRAUD CIVIL REMEDIES ACT

Sec.

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AUTHORITY: Pub. L. 99–509, secs. 6101–6104, 100 Stat. 1874, to be codified at 31 U.S.C. 3801–3812.

SOURCE: 53 FR 16710, May 11, 1988, unless otherwise noted.

### § 42.1 Basis and purpose.

(a) *Basis.* This part implements the Program Fraud Civil Remedies Act of 1986, Pub. L. 99–509, 6101–6104, 100 Stat. 1874 (October 21, 1986), to be codified at 31 U.S.C. 3801–3812. Section 3809 of title 31 U.S.C., requires each authority head, such as the Secretary of Veterans Affairs, to promulgate regulations necessary to implement the provisions of the statute.

(b) *Purpose.* This part:

(1) Establishes and provides the only administrative procedures and actions for imposing civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to authorities or to their agents, and

(2) Specifies the hearing and appeal rights of persons subject to allegations of liability for such penalties and assessments.

### § 42.2 Definitions.

For the purposes of this part, the following definitions apply:

*ALJ* means an Administrative Law Judge in the Department of Veterans Affairs pursuant to 5 U.S.C. 3105 or detailed to the Department of Veterans Affairs pursuant to 5 U.S.C. 3344.

*Benefit* means, in the context of statement, anything of value, including, but not limited to, any advantage, preference, privilege, license, permit,

favorable decision, ruling, status, or loan guarantee.

*Claim* means any request, demand, or submission—

(a) Made to the Department of Veterans Affairs for property, services, or money (including money representing grants, loans, insurance, or benefits);

(b) Made to a recipient of property, services, or money from the Department of Veterans Affairs or to a party to a contract with the Department of Veterans Affairs—

(1) For property or services if the United States—

(i) Provided the property or services;

(ii) Provided any portion of the funds for the purchase of the property or services; or

(iii) Will reimburse the recipient or party for the purchase of the property or services; or

(2) For the payment of money (including money representing grants, loans, insurance, or benefits) if the United States—

(i) Provided any portion of the money requested or demanded; or

(ii) Will reimburse the recipient or party for any portion of the money paid on the request or demand; or

(iii) Made to the Department of Veterans Affairs which has the effect of decreasing an obligation to pay or account for property, services, or money.

*Complaint* means the administrative complaint served by the reviewing official on the defendant under §42.7 of this part.

*Defendant* means any person alleged in a complaint under §42.7 of this part to be liable for a civil penalty or assessment under §42.3 of this part.

*Government* means the United States Government.

*Individual* means a natural person.

*Initial Decision* means the written decision of the ALJ required by §42.10 or §42.37 of this part, and includes a revised initial decision issued following a remand or a motion for reconsideration.

*Investigating official* means the Inspector General of the Department of Veterans Affairs or an officer or employee of the Office of the Inspector General and serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS–16 under the General Schedule.

*Knows or has reason to know* means that a person, with respect to a claim or statement—

(a) Has actual knowledge that the claim or statement is false, fictitious, or fraudulent;

(b) Acts in deliberate ignorance of the truth or falsity of the claim or statement; or

(c) Acts in reckless disregard of the truth or falsity of the claim or statement.

*Makes,* wherever it appears, shall include the terms presents, submits, and causes to be made, presented, or submitted. As the context requires, *making* or *made,* shall likewise include the corresponding forms of such terms.

*Person* means any individual, partnership, corporation, association or private organization and includes the plural of that term.

*Representative* means any person designated by a party in writing.

*Reviewing official* means the General Counsel of the Department of Veterans Affairs or designee who is—

(a) Not subject to supervision by, or required to report to, the investigating official;

(b) Not employed in the organization unit of the Department of Veterans Affairs in which the investigating official is employed; and

(c) Serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS–16 under the General Schedule.

*Secretary* means the Secretary of Veterans Affairs.

*Statement* means any representation, certification, affirmation, document, record, or accounting or bookkeeping entry made—

(a) With respect to a claim or to obtain the approval or payment of a claim (including relating to eligibility to make a claim); or

(b) With respect to (including relating to eligibility for)—

(1) A contract with, or a bid or proposal for a contract with; or

(2) A grant, loan, or benefit from, the Department of Veterans Affairs, or any State, political subdivision of a State, or other party, if the United States

Government provides any portion of the money or property under the contract or for the grant, loan, or benefit, or if the Government will reimburse such State, political subdivision, or party for any portion of the money or property under the contract or for the grant, loan, or benefit.

[53 FR 16710, May 11, 1988, as amended at 54 FR 34988, Aug. 23, 1989]

### § 42.3 Basis for civil penalties and assessments.

(a) *Claims.* (1) Except as provided in paragraph (c) of this section, any person who makes a claim that the person knows or has reason to know—

(i) Is false, fictitious, or fraudulent;

(ii) Includes or is supported by any written statement which asserts a material fact which is false, fictitious, or fraudulent;

(iii) Includes or is supported by any written statement that—

(A) Omits a material fact;

(B) Is false, fictitious, or fraudulent as a result of such omission; and

(C) Is a statement in which the person making the statement has a duty to include the material fact; or

(iv) Is for payment for the provision of property or services which the person has not provided as claimed,

shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,500 for each claim.

(2) Each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim.

(3) A claim shall be considered made to the Department of Veterans Affairs, or to a recipient or party when such claim is actually made to an agency, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of the Department of Veterans Affairs, recipient, or party.

(4) Each claim for property, services, or money is subject to a civil penalty regardless of whether the property, services, or money is actually delivered or paid.

(5) If the Government has made any payment (including transferred property or provided services) on a claim, a person subject to a civil penalty under paragraph (a)(1) of this section shall also be subject to an assessment of not more than twice the amount of the claim or that portion thereof that is determined to be in violation of paragraph (a)(1) of this section. Such assessment shall be in lieu of damages by the Government because of the claim.

(b) *Statements.* (1) Except as provided in paragraph (c) of this section, any person who makes a written statement that—

(i) The person knows or has reason to know—

(A) Asserts a material fact which is false, fictitious, or fraudulent; or

(B) Is false, fictitious, or fraudulent because it omits a material fact that the person making the statement has a duty to include in the statement; and

(ii) Contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement,

shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,500 for each statement.

(2) Each written representation, certification, or affirmation constitutes a separate statement, except that a certification or affirmation of the truthfulness and accuracy of the contents of a statement is not a separate statement.

(3) A statement shall be considered made to the Department of Veterans Affairs when the statement is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of the Department of Veterans Affairs.

(c) *Applications for certain benefits.* (1) In the case of any claim or statement made by an individual relating to any of the benefits listed in paragraph (c)(2) of this section received by the individual, the individual may be held liable for penalties and assessments under this section only if such claim or statement is made by the individual in making application for such benefits with respect to any element required to establish the individual's initial eligibility to receive or continue to receive the benefits.

(2) For purposes of paragraph (c) of this section, the term *benefits* means

benefits under chapters 11, 13, 15, 17, and 21 of title 38 which are intended for the personal use of the individual who receives the benefits or for a member of the individual's family.

(3) For purposes of this paragraph, the term *application* shall include, but is not limited to, any report or statement made or submitted by or for applicant or recipient of a benefit under chapters 11, 13, or 15 of title 38, United States Code, to establish eligibility or to remain eligible for the benefit.

(4) This paragraph is not applicable to an individual receiving benefits in a fiduciary capacity in behalf of an individual eligible for any of the benefits listed in paragraph (c)(2) of this section.

(d) No proof of specific intent to defraud is required to establish liability under this section.

(e) In any case in which it is determined that more than one person is liable for making a claim or statement under this section, each person making the claim or statement may be held liable for a civil penalty under this section.

(f) In any case in which it is determined that more than one person is liable for making a claim under this section on which the Government has made a payment (including transferred property or provided services), an assessment may be imposed against any of these persons or jointly and severally against any combination of these persons.

(Authority: 31 U.S.C. 3802)

[53 FR 16710, May 11, 1988, as amended at 61 FR 56449, Nov. 1, 1996]

### §42.4 Investigation.

(a) All allegations of liability under §42.3 shall be promptly referred to the investigating official.

(b) If an investigating official concludes that a subpoena pursuant to the authority conferred by 31 U.S.C. 3804(a) is warranted—

(1) The subpoena so issued shall notify the person to whom it is addressed of the authority under which the subpoena is issued and shall identify the records or documents sought;

(2) The investigating official may designate a person to act on his or her behalf to receive the documents sought; and

(3) The person receiving the subpoena shall be required to tender to the investigating official or the person designated to receive the documents a certification that the documents sought have been produced, or that the documents are not available and the reasons therefor, or that the documents, suitably identified, have been withheld based upon the assertion of an identified privilege.

(c) If the investigating official concludes that an action under the Program Fraud Civil Remedies Act may be warranted, the investigating official shall submit a report containing the findings and conclusions of the investigation to the reviewing official.

(d) Nothing in this section shall preclude or limit an investigating official's discretion to refer allegations directly to the Department of Justice for suit under the False Claims Act or other civil relief, or to defer or postpone a report or referral to the reviewing official to avoid interference with a criminal investigation or prosecution.

(e) Nothing in this section modifies any responsibility of an investigating official to report violations of criminal law to the Attorney General.

### §42.5 Review by the reviewing official.

(a) The report of the investigating official will be examined by the reviewing official to determine if there is adequate evidence to believe a person is liable under §42.3 of this part. The review will be completed within 90 days.

(b) If, based on the report of the investigating official under §42.4(b) of this part, the reviewing official determines that there is adequate evidence to believe that a person is liable under §42.3 of this part, the reviewing official shall transmit to the Attorney General a written notice of the reviewing official's intention to issue a complaint under §42.7 of this part.

(c) The notice shall include—

(1) A statement of the reviewing official's reasons for issuing a complaint;

(2) A statement specifying the evidence that supports the allegations of liability;

(3) A description of the claims or statements upon which the allegations of liability are based;

(4) An estimate of the amount of money or the value of property, services, or other benefits requested or demanded in violation of § 42.3 of this part;

(5) A statement of any exculpatory or mitigating circumstances that may relate to the claims or statements known by the reviewing official or the investigating official; and

(6) A statement that there is a reasonable prospect of collecting an appropriate amount of penalties and assessments.

(d) If the reviewing official finds that there is not adequate evidence that a person is liable, the reviewing official will inform the department or office of the Department of Veterans Affairs concerned with the claim or statement and the investigating official.

### § 42.6 Prerequisites for issuing a complaint.

(a) The reviewing official may issue a complaint under § 42.7 of this part only if—

(1) The Department of Justice approves the issuance of a complaint in a written statement described in 31 U.S.C. 3803(b)(1), and

(2) In the case of allegations of liability under § 42.3 of this part with respect to a claim, the reviewing official determines that, with respect to the claim or a group of related claims submitted at the same time such claim is submitted (as defined in paragraph (b) of this section), the amount of money or the value of property or services, or both, demanded or requested in violation of § 42.3(a) of this part does not exceed $150,000.

(b) For the purposes of this section, a related group of claims submitted at the same time shall include only those claims arising from the same transaction (e.g., grant, loan, application, or contract) that are submitted simultaneously as part of a single request, demand, or submission.

(c) Nothing in this section shall be construed to limit the reviewing official's authority to join in a single complaint against a person's claims that are unrelated or were not submitted simultaneously, regardless of the amount of money, or the value of property or services, demanded or requested.

### § 42.7 Complaint.

(a) On or after the date the Department of Justice approves the issuance of a complaint in accordance with 31 U.S.C. 3803(b)(1), the reviewing official may serve a complaint on the defendant, as provided in § 42.8 of this part.

(b) The complaint shall state—

(1) The allegations of liability against the defendant, including the statutory basis for liability, an identification of the claims or statements that are the basis for the alleged liability, and the reasons why liability allegedly arises from the claims or statements;

(2) The maximum amount of penalties and assessments for which the defendant may be held liable;

(3) Instructions for filing an answer to request a hearing, including a specific statement of the defendant's right to request a hearing by filing an answer and to be represented by a representative; and

(4) That failure to file an answer within 30 days of service of the complaint will result in the imposition of the maximum amount of penalties and assessments without right to appeal, as provided in § 42.10 of this part.

(c) The reviewing official shall serve the defendant with a copy of these regulations at the same time as service of the complaint.

### § 42.8 Service of complaint.

(a) Service of a complaint must be made by certified or registered mail or by delivery in any manner authorized by Rule 4(d) of the Federal Rules of Civil Procedure. Service is complete upon receipt.

(b) Proof of service, stating the name and address of the person on whom the complaint was served, and the manner and date of service, may be made by—

(1) Affidavit of the individual serving the complaint by delivery;

(2) A United States Postal Service return receipt card acknowledging receipt; or

(3) Written acknowledgment of receipt by the defendant or his or her representative.

**§42.9 Answer.**

(a) The defendant may request a hearing by filing an answer with the reviewing official within 30 days of service of the complaint. An answer shall be deemed to be a request for hearing.

(b) In the answer, the defendant—

(1) Shall admit or deny each of the allegations of liability made in the complaint;

(2) Shall state any defense on which the defendant intends to rely;

(3) May state any reasons why the defendant contends that the penalties and assessments should be less than the statutory maximum; and

(4) Shall state the name, address, and telephone number of the person authorized by the defendant to act as defendant's representative, if any.

(c) If the defendant is unable to file an answer meeting the requirements of paragraph (b) of this section within the time provided, the defendant may, before the expiration of 30 days from service of the complaint, file with the reviewing official a general answer denying liability and requesting a hearing, and a request for an extension of time within which to file an answer meeting the requirements of paragraph (b) of this section. The reviewing official shall file promptly with the ALJ the complaint, the general answer denying liability, and the request for an extension of time as provided in §42.11 of this part. For good cause shown, the ALJ may grant the defendant up to 30 additional days within which to file an answer meeting the requirements of paragraph (b) of this section.

**§42.10 Default upon failure to file an answer.**

(a) If the defendant does not file an answer within the time prescribed in §42.9(a) of this part, the reviewing official may refer the complaint to the ALJ.

(b) Upon the referral of the complaint, the ALJ shall promptly serve on the defendant in the manner prescribed in §42.8 of this part, a notice that an initial decision will be issued under this section.

(c) The ALJ shall assume the facts alleged in the complaint to be true, and, if such facts establish liability under §42.3 of this part, the ALJ shall issue an initial decision imposing the maximum amount of penalties and assessments allowed under the statute.

(d) Except as otherwise provided in this section, by failing to file a timely answer, the defendant waives any right to further review of the penalties and assessments imposed under paragraph (c) of this section, and the initial decision shall become final and binding upon the parties 30 days after it is issued.

(e) If, before the initial decision becomes final, the defendant files a motion with the ALJ seeking to reopen on the grounds that extraordinary circumstances prevented the defendant from filing an answer, the initial decision shall be stayed pending the ALJ's decision on the motion.

(f) If, on such motion, the defendant can demonstrate extraordinary circumstances excusing the failure to file a timely answer, the ALJ shall withdraw the initial decision in paragraph (c) of this section, if the decision has been issued, and shall grant the defendant an opportunity to answer the complaint.

(g) A decision of the ALJ denying a defendant's motion under paragraph (e) of this section is not subject to reconsideration under §42.38 of this part.

(h) The defendant may appeal to the Secretary the decision denying a motion to reopen by filing a notice of appeal with the Secretary within 15 days after the ALJ denies the motion. The timely filing of a notice of appeal shall stay the initial decision until the Secretary decides the issue.

(i) If the defendant files a timely notice of appeal with the Secretary, the ALJ shall forward the record of the proceeding to the Secretary.

(j) The Secretary shall decide expeditiously whether extraordinary circumstances excuse the defendant's failure to file a timely answer based solely on the record before the ALJ.

(k) If the Secretary decides that extraordinary circumstances excuse the

defendant's failure to file a timely answer, the Secretary shall remand the case to the ALJ with instructions to grant the defendant an opportunity to answer.

(l) If the Secretary decides that the defendant's failure to file a timely answer is not excused, the Secretary shall reinstate the initial decision of the ALJ, which shall become final and binding upon the parties 30 days after the authority head issues such decision.

### § 42.11 Referral of complaint and answer to the Administrative Law Judge (ALJ).

Upon receipt of an answer, the reviewing official shall file the complaint and answer with the ALJ.

### § 42.12 Notice of hearing.

(a) When the ALJ receives the complaint and answer, the ALJ shall promptly serve a notice of hearing upon the defendant in the manner prescribed by §42.8 of this part. At the same time, the ALJ shall send a copy of such notice to the representative for the Government.

(b) The notice shall include—

(1) The tentative time and place, and the nature of the hearing;

(2) The legal authority and jurisdiction under which the hearing is to be held;

(3) The matters of fact and law to be asserted;

(4) A description of the procedures for the conduct of the hearing;

(5) The name, address, and telephone number of the representative of the Government and the defendant, if any; and

(6) Other matters the ALJ deems appropriate.

### § 42.13 Parties to the hearing.

(a) The parties to the hearing shall be the defendant and the Department of Veterans Affairs.

(b) Pursuant to 31 U.S.C. 3730(c)(5), a private plaintiff under the False Claims Act may participate in these proceedings to the extent authorized by the provisions of that Act.

### § 42.14 Separation of functions.

(a) The investigating official, the reviewing official, and any employee or agent of the Department of Veterans Affairs who takes part in investigating, preparing, or presenting a particular case may not, in the case or a factually related case—

(1) Participate in the hearing as the ALJ;

(2) Participate or advise in the initial decision or the review of the initial decision by the Secretary, except as a witness or a representative in public proceedings; or

(3) Make the collection of penalties and assessments under 31 U.S.C. 3806.

(b) The ALJ shall not be responsible to, or subject to, the supervision or direction of the investigating official or the reviewing official.

(c) Except as provided in paragraph (a) of this section, the representative for the Government may be employed anywhere in the Department of Veterans Affairs, including in the offices of either the investigating official or the reviewing official.

### § 42.15 Ex parte contacts.

No party or person (except employees of the ALJ's office) shall communicate in any way with the ALJ on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

### § 42.16 Disqualification of reviewing official or ALJ.

(a) A reviewing official or ALJ in a particular case may disqualify himself or herself at any time.

(b) A party may file with the ALJ a motion for disqualification of a reviewing official or an ALJ. The motion shall be accompanied by an affidavit alleging personal bias or other reason for disqualification.

(c) The motion and affidavit shall be filed promptly upon the party's discovery of reasons requiring disqualification, or such objections shall be deemed waived.

(d) The affidavit shall state specific facts that support the party's belief

that personal bias or other reason for disqualification exists and the time and circumstances of the party's discovery of the facts. It shall be accompanied by a certificate of the representative of record that it is made in good faith.

(e) Upon the filing of the motion and affidavit, the ALJ shall proceed no further in the case until the ALJ resolves the matter of disqualification in accordance with paragraph (f) of this section.

(f)(1) If the ALJ determines that a reviewing official is disqualified, the ALJ shall dismiss the complaint without prejudice.

(2) If the ALJ disqualifies himself or herself, the case shall be reassigned promptly to another ALJ.

(3) If the ALJ denies a motion to disqualify, the Secretary may determine the matter only as part of the review of the initial decision upon appeal, if any.

### §42.17 Rights of parties.

Except as otherwise limited by this part, all parties may—

(a) Be accompanied, represented, and advised by a representative;

(b) Participate in any conference held by the ALJ;

(c) Conduct discovery;

(d) Agree to stipulations of fact or law, which shall be made part of the record;

(e) Present evidence relevant to the issue at the hearing;

(f) Present and cross-examine witnesses;

(g) Present oral arguments at the hearing as permitted by the ALJ; and

(h) Submit written briefs and proposed findings of fact and conclusions of law after the hearing.

### §42.18 Authority of the ALJ.

(a) The ALJ shall conduct a fair and impartial hearing, avoid delay, maintain order, and assure that a record of the proceeding is made.

(b) The ALJ has the authority to—

(1) Set and change the date, time, and place of the hearing upon reasonable notice to the parties;

(2) Continue or recess the hearing in whole or in part for a reasonable period of time;

(3) Hold conference to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;

(4) Administer oaths and affirmations;

(5) Issue subpoenas requiring the attendance of witnesses and the production of documents at deposition or at hearings;

(6) Rule on motions and other procedural matters;

(7) Regulate the scope and timing of discovery;

(8) Regulate the course of the hearing and the conduct of representatives and parties;

(9) Examine witnesses;

(10) Receive, rule on, exclude, or limit evidence;

(11) Upon motion of a party, take official notice of facts;

(12) Upon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact;

(13) Conduct any conference, argument, or hearing on motions in person or by telephone; and

(14) Exercise any other authority as is necessary to carry out the responsibilities of the ALJ under this part.

(c) The ALJ does not have the authority to find invalid Federal statutes or regulations.

### §42.19 Prehearing conferences.

(a) The ALJ may schedule prehearing conferences as appropriate.

(b) Upon the motion of any party, the ALJ shall schedule at least one prehearing conference at a reasonable time in advance of the hearing.

(c) The ALJ may use prehearing conferences to discuss the following:

(1) Simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings, including the need for a more definite statement;

(3) Stipulations and admissions of fact or as to the contents and authenticity of documents;

(4) Whether the parties can agree to submission of the case on a stipulated record;

(5) Whether a party chooses to waive appearance at an oral hearing and to submit only documentary evidence

(subject to the objection of other parties) and written argument;

(6) Limitation of the number of witnesses;

(7) Scheduling dates for the exchange of witness lists and of proposed exhibits;

(8) Discovery;

(9) The time and place for the hearing; and

(10) Other matters that may tend to expedite the fair and just disposition of the proceedings.

(d) The ALJ may issue an order containing all matters agreed upon by the parties or ordered by the ALJ at a prehearing conference.

### § 42.20 Disclosure of documents.

(a) Upon written request to the reviewing official, the defendant may review any relevant and material documents, transcripts, records, and other materials that relate to the allegations set out in the complaint and upon which the findings and conclusions of the investigating official under § 42.4(b) of this part are based, unless the documents are subject to a privilege under Federal law. Upon payment of fees for duplication, the defendant may obtain copies of the documents.

(b) Upon written request to the reviewing official, the defendant also may obtain a copy of all exculpatory information in the possession of the reviewing official or investigating official relating to the allegations in the complaint, even if it is contained in a document that would otherwise be privileged. If the document would otherwise be privileged, only that portion containing exculpatory information must be disclosed.

(c) The notice sent to the Attorney General from the reviewing official as described in § 42.5 of this part is not discoverable under any circumstances.

(d) The defendant may file a motion to compel disclosure of the documents subject to the provision of this section. The motion may only be filed with the ALJ following the filing of an answer pursuant to § 42.9 of this part.

### § 42.21 Discovery.

(a) The following types of discovery are authorized:

(1) Requests for production of documents for inspection and copying;

(2) Requests for admissions of the authenticity of any relevant document or the truth of any relevant fact;

(3) Written interrogatories; and

(4) Depositions.

(b) For the purpose of this section and §§ 42.22 and 42.23 of this part, the term ''documents'' includes information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence. Nothing contained herein shall be interpreted to require the creation of a document.

(c) Unless mutually agreed to by the parties, discovery is available only as ordered by the ALJ. The ALJ shall regulate the timing of discovery.

(d) *Motions for discovery.* (1) A party seeking discovery may file a motion with the ALJ. The motion shall be accompanied by a copy of the requested discovery, or in the case of depositions, a summary of the scope of the proposed deposition.

(2) Within ten days of service, a party may file an opposition to the motion and/or a motion for protective order as provided in § 42.24 of this part.

(3) The ALJ may grant a motion for discovery only if the ALJ finds that the discovery sought—

(i) Is necessary for the expeditious, fair, and reasonable consideration of the issues;

(ii) Is not unduly costly or burdensome;

(iii) Will not unduly delay the proceeding; and

(iv) Does not seek privileged information.

(4) The burden of showing that discovery should be allowed is on the party seeking discovery.

(5) The ALJ may grant discovery subject to a protective order under § 42.24 of this part.

(e) *Depositions.* (1) If a motion for deposition is granted, the ALJ shall issue a subpoena for the deponent, which may require the deponent to produce documents. The subpoena shall specify the time and place at which the deposition will be held.

(2) The party seeking to depose shall serve the subpoena in the manner prescribed in § 42.8 of this part.

(3) The deponent may file with the ALJ a motion to quash the subpoena or a motion for a protective order within ten days of service.

(4) The party seeking to depose shall provide for the taking of a verbatim transcript of the deposition, which it shall make available to all other parties for inspection and copying.

(f) Each party shall bear its own costs of discovery.

### §42.22 Exchange of witness lists, statements, and exhibits.

(a) At least 15 days before the hearing or at such other time as may be ordered by the ALJ, the parties shall exchange witness lists, copies of prior statements of proposed witnesses, and copies of proposed hearing exhibits, including copies of any written statements that the party intends to offer in lieu of live testimony in accordance with §42.33(b) of this part. At the time the above documents are exchanged, any party that intends to rely on the transcript of deposition testimony in lieu of live testimony at the hearing, if permitted by the ALJ, shall provide each party with a copy of the specific pages of the transcript it intends to introduce into evidence.

(b) If a party objects, the ALJ shall not admit into evidence the testimony of any witness whose name does not appear on the witness list or any exhibit not provided to the opposing party as provided above unless the ALJ finds good cause for the failure or that there is no prejudice to the objecting party.

(c) Unless another party objects within the time set by the ALJ, documents exchanged in accordance with paragraph (a) of this section shall be deemed to be authentic for the purpose of admissibility at the hearing.

### §42.23 Subpoenas for attendance at hearing.

(a) A party wishing to procure the appearance and testimony of any individual at the hearing may request that the ALJ issue a subpoena.

(b) A subpoena requiring the attendance and testimony of an individual may also require the individual to produce documents at the hearing.

(c) A party seeking a subpoena shall file a written request therefor not less than 15 days before the date fixed for the hearing unless otherwise allowed by the ALJ for good cause shown. The request shall specify any documents to be produced and shall designate the witnesses and describe the address and location thereof with sufficient particularity to permit the witnesses to be found.

(d) The subpoena shall specify the time and place at which the witness is to appear and any documents the witness is to produce.

(e) The party seeking the subpoena shall serve it in the manner prescribed in §42.8 of this part. A subpoena on a party or upon an individual under the control of a party may be served by first class mail.

(f) A party or the individual to whom the subpoena is directed may file with the ALJ a motion to quash the subpoena within ten days after service or on or before the time specified in the subpoena for compliance if it is less than ten days after service.

### §42.24 Protective order.

(a) A party or a prospective witness or deponent may file a motion for a protective order with respect to discovery sought by an opposing party or with respect to the hearing, seeking to limit the availability or disclosure of evidence.

(b) In issuing a protective order, the ALJ may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That the discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That discovery may be had only through a method of discovery other than that requested;

(4) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the ALJ;

(6) That the contents of discovery or evidence be sealed;

(7) That a deposition after being sealed be opened only by order of the ALJ;

(8) That a trade secret or other confidential research, development, commercial information, or facts pertaining to any criminal investigation, proceeding, or other administrative investigation only be disclosed in a designated way; or

(9) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the ALJ.

### § 42.25 Fees.

The party requesting a subpoena shall pay the cost of the fees and mileage of any witnesses subpoenaed in the amounts that would be payable to a witness in a proceeding in United States District Court. A check for witness fees and mileage shall accompany the subpoena when served, except that when a subpoena is issued on behalf of the Department of Veterans Affairs, a check for witness fees and mileage need not accompany the subpoena.

### § 42.26 Form, filing and service of papers.

(a) *Form.* (1) Documents filed with the ALJ shall include an original and two copies.

(2) Every pleading and paper filed in the proceeding shall contain a caption setting forth the title of the action, the case number assigned by the ALJ, and a designation of the paper (e.g. motion to quash subpoena).

(3) Every pleading and paper shall be signed by, and shall contain the address and telephone number of, the party or the person on whose behalf the paper was filed, or his or her representative.

(4) Papers are considered filed when they are mailed. Date of mailing may be established by a certificate from the party or representative or by proof that the document was sent by certified or registered mail.

(b) *Service.* A party filing a document with the ALJ shall, at the time of filing, serve a copy of such document on every other party. Service upon any party of any document other than those required to be served as prescribed in §42.8 of this part shall be made by delivering a copy or by placing a copy of the document in the United States mail, postage prepaid and addressed, to the party's last known address. When a party is represented by a representative, service shall be made upon the representative in lieu of the actual party.

(c) *Proof of service.* A certificate of the individual serving the document by personal delivery or by mail, setting forth the manner of service, shall be proof of service.

### § 42.27 Computation of time.

(a) In computing any period of time under this part or in an order issued thereunder, the time begins with the date following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed by the Federal government, in which event it includes the next business day.

(b) When the period of time allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays observed by the Federal government shall be excluded from the computation.

(c) Where a document has been served or issued by placing it in the mail, an additional five days will be added to the time permitted for any response.

### § 42.28 Motions.

(a) Any application to the ALJ for an order or ruling shall be by motion. Motions shall state the relief sought, the authority relied upon, and the facts alleged, and shall be filed with the ALJ and served on all other parties.

(b) Except for motions made during a prehearing conference or at the hearing, all motions shall be in writing. The ALJ may require that oral motions be reduced to writing.

(c) Within 15 days after a written motion is served, or such other time as may be fixed by the ALJ, any part may file a response to such motion.

(d) The ALJ may not grant a written motion before the time for filing responses thereto has expired, except upon consent of the parties or following a hearing on the motion, but may overrule or deny the motion without awaiting a response.

(e) The ALJ shall make a reasonable effort to dispose of all outstanding motions prior to the beginning of the hearing.

**§42.29 Sanctions.**

(a) The ALJ may sanction a person, including any party or representative for—

(1) Failing to comply with an order, rule, or procedure governing the proceeding;

(2) Failing to prosecute or defend an action; or

(3) Engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

(b) Any sanction, including but not limited to those listed in paragraphs (c), (d), and (e) of this section, shall reasonably relate to the severity and nature of the failure or misconduct.

(c) When a party fails to comply with an order, including an order for taking a deposition, the production of evidence within the party's control, or a request for admission, the ALJ may—

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) In the case of requests for admission, deem each matter of which an admission is requested to be admitted;

(3) Prohibit the party failing to comply with the order from introducing evidence concerning, or otherwise relying upon, testimony relating to the information sought; and

(4) Strike any part of the pleadings or other submissions of the party failing to comply with the request.

(d) If a party fails to prosecute or defend an action under this part commenced by service of a notice of hearing, the ALJ may dismiss the action or may issue an initial decision imposing penalties and assessments.

(e) The ALJ may refuse to consider any motion, request, response, brief or other document which is not filed in a timely fashion.

**§42.30 The hearing and burden of proof.**

(a) The ALJ shall conduct a hearing on the record in order to determine whether the defendant is liable for a civil penalty or assessment under §42.3 of this part and, if so, the appropriate amount of any civil penalty or assessment considering any aggravating or mitigating factors.

(b) The Department of Veterans Affairs shall prove defendant's liability and any aggravating factors by a preponderance of the evidence.

(c) The defendant shall prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

(d) The hearing shall be open to the public unless otherwise ordered by the ALJ for good cause shown.

**§42.31 Determining the amount of penalties and assessments.**

(a) In determining an appropriate amount of civil penalties and assessments, the ALJ and the Secretary of Veterans Affairs, upon appeal, should evaluate any circumstances that mitigate or aggravate the violation and should articulate in their opinions the reasons that support the penalties and assessments they impose. Because of the intangible costs of fraud, the expense of investigating the conduct, and the need to deter others who might be similarly tempted, ordinarily double damages and a significant civil penalty should be imposed.

(b) Although not exhaustive, the following factors are among those that may influence the ALJ and the Secretary or Veterans Affairs in determining the amount of penalties and assessments to impose with respect to the misconduct (i.e., the false, fictitious, or fraudulent claims or statements) charged in the complaint:

(1) The number of false, fictitious, or fraudulent claims or statements;

(2) The time period over which the claims or statements were made;

(3) The degree of the defendant's culpability with respect to the misconduct;

(4) The amount of money or the value of the property, services, or benefit falsely claimed;

(5) The value of the Government's actual loss as a result of the misconduct, including foreseeable consequential damages and the costs of investigation;

(6) The relationship of the amount imposed as civil penalties to the amount of the Government's loss;

(7) The potential or actual impact of the misconduct upon national defense, public health or safety, or public confidence in the management of Government programs and operations, including particularly the impact on the intended beneficiaries of the programs;

(8) Whether the defendant has engaged in a pattern of the same or similar misconduct;

(9) Whether the defendant attempted to conceal the miscounduct;

(10) The degree to which the defendant has involved others in the misconduct or in concealing it;

(11) Where the misconduct of employees or agents is imputed to the defendant, the extent to which the defendant's practices fostered or attempted to preclude such misconduct;

(12) Whether the defendant cooperated in or obstructed an investigation of the misconduct;

(13) Whether the defendant assisted in identifying or prosecuting other wrongdoers;

(14) The complexity of the program or transaction, and the degree of the defendant's sophistication with respect to it, including the extent of the defendant's prior participation in the program or in similar transactions;

(15) Whether the defendant has been found, in any criminal, civil, or administrative proceeding to have engaged in similar misconduct or to have dealt dishonestly with the Government of the United States or of a State, directly or indirectly; and

(16) The need to deter the defendant and others from engaging in the same or similar misconduct.

### § 42.32 Location of hearing.

(a) The hearing may be held—

(1) In any judicial district of the United States in which the defendant resides or transacts business;

(2) In any judicial district of the United States in which the claim or statement in issue was made; or

(3) Any place as may be agreed upon by the defendant and the ALJ.

(b) Each party shall have the opportunity to present argument with respect to the location of the hearing.

(c) The hearing shall be held at a place and time orderd by the ALJ.

### § 42.33 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing shall be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony may be admitted in the form of a written statement or deposition. Any written statement must be provided to all other parties along with the last known address of such witness, in a manner which allows sufficient time for other parties to subpoena the witness for cross-examination at the hearing. Prior written statements of witnesses proposed to testify at the hearing and deposition transcripts shall be exchanged as provided in § 42.22(a) of this part.

(c) The ALJ shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

(1) Make the interrogation and presentation effective for the ascertainment of the truth,

(2) Avoid needless consumption of time, and

(3) Protect witnesses from harassment or undue embarrassment.

(d) The ALJ shall permit the parties to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(e) At the discretion of the ALJ, a witness may be cross-examined on matters relevant to the proceeding without regard to the scope of the direct examination. To the extent permitted by the ALJ, cross-examination on matters outside the scope of direct examination shall be conducted in the manner of direct examination and may proceed by leading questions only if the witness is a hostile witness, an adverse party, or a witness identified with an adverse party.

(f) Upon motion of any party, the ALJ shall order witnesses excluded so that they cannot hear the testimony of other witnesses. This rule does not authorize the exclusion of—

(1) A party who is an individual;

(2) In the case of a party that is not an individual, an officer or employee of the party appearing for the entity *pro se* or designated by the party's representative; or

(3) An individual whose presence is shown by a party to be essential to the presentation of its case, including an individual employed by the Government engaged in assisting the representative for the Government.

**§42.34 Evidence.**

(a) The ALJ shall determine the admissibility of evidence.

(b) Except as provided in this part, the ALJ shall not be bound by the Federal Rules of Evidence. However, the ALJ may apply the Federal Rules of Evidence where appropriate, e.g., to exclude unreliable evidence.

(c) The ALJ shall exclude irrelevant and immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(e) Although relevant, evidence may be excluded if it is privileged under Federal law.

(f) Evidence concerning offers of compromise or settlement shall be inadmissible to the extent provided in Rule 408 of the Federal Rules of Evidence.

(g) The ALJ shall permit the parties to introduce rebuttal witnesses and evidence.

(h) All documents and other evidence offered or taken for the record shall be open to examination by all parties, unless otherwise ordered by the ALJ pursuant to §42.24 of this part.

**§42.35 The record.**

(a) The hearing will be recorded and transcribed. Transcripts may be obtained following the hearing from the ALJ at a cost not to exceed the actual cost of duplication.

(b) The transcription of testimony, exhibits and other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ and the Secretary of Veterans Affairs.

(c) The record may be inspected and copied (upon payment of a reasonable fee) by anyone, unless otherwise ordered by the ALJ pursuant to §42.24 of this part.

**§42.36 Post-hearing briefs.**

The ALJ may require the parties to file post-hearing briefs. In any event, any party may file a post-hearing brief. The ALJ shall fix the time for filing the briefs, not to exceed 60 days from the date the parties receive the transcript of the hearing or, if applicable, the stipulated record. The briefs may be accompanied by proposed findings of fact and conclusions of law. The ALJ may permit the parties to file reply briefs.

**§42.37 Initial decision.**

(a) The ALJ shall issue an initial decision based only on the record, which shall contain findings of fact, conclusions of law, and the amount of any penalties and assessments imposed.

(b) The findings of fact shall include a finding on each of the following issues:

(1) Whether the claims or statements identified in the complaint, or any portions thereof, violate §42.3 of this part;

(2) If the person is liable for penalties or assessments, the appropriate amount of the penalties or assessments considering any mitigating or aggravating factors that the ALJ finds in the case, such as those described in §42.31 of this part.

(c) The ALJ shall promptly serve the initial decision on all parties within 90 days after the time for submission of post-hearing briefs and reply briefs (if permitted) has expired. The ALJ shall at the same time serve all parties with a statement describing the right of any defendant determined to be liable for a civil penalty or assessment to file a motion for reconsideration with the ALJ or a notice of appeal with the Secretary. If the ALJ fails to meet the deadline contained in this paragraph, the ALJ shall notify the parties of the reason for the delay and shall set a new deadline.

(d) Unless the initial decision of the ALJ is timely appealed to the Secretary, or a motion for reconsideration of the initial decision is timely filed, the initial decision shall constitute the final decision of the Secretary and shall be final and binding on the parties 30 days after it is issued by the ALJ.

### § 42.38 Reconsideration of initial decision.

(a) Except as provided in paragraph (d) of this section, any party may file a motion for reconsideration of the initial decision within 20 days of receipt of the initial decision. If service was made by mail, receipt will be presumed to be five days from the mailing in the absence of contrary proof.

(b) Every motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. The motion shall be accompanied by a supporting brief.

(c) Responses to the motions shall be allowed only upon request of the ALJ.

(d) No party may file a motion for reconsideration of an initial decision that has been revised in response to a previous motion for reconsideration.

(e) The ALJ may dispose of a motion for reconsideration by denying it or by issuing a revised initial decision.

(f) If the ALJ denies a motion for reconsideration, the initial decision shall constitute the final decision of the Secretary and shall be final and binding on the parties 30 days after the ALJ denies the motion, unless the initial decision is timely appealed to the Secretary in accordance with § 42.39 of this part.

(g) If the ALJ issues a revised initial decision, that decision shall constitute the final decision of the Secretary and shall be final and binding on the parties 30 days after it is issued, unless it is timely appealed to the Secretary in accordance with § 42.39 of this part.

### § 42.39 Appeal to the Secretary of Veterans Affairs.

(a) Any defendant who has filed a timely answer and who is determined in an initial decision to be liable for a civil penalty or assessment may appeal the decision to the Secretary of Veterans Affairs by filing a notice of appeal with the Secretary in accordance with this section.

(b)(1) A notice of appeal may be filed at any time within 30 days after the ALJ issues an initial decision. However, if another party files a motion for reconsideration under § 42.8 of this part, consideration of the appeal shall be stayed automatically pending resolution of the motion for reconsideration.

(2) If a motion for reconsideration is timely filed, a notice of appeal may be filed within 30 days after the ALJ denies the motion or issues a revised initial decision, whichever applies.

(3) The Secretary may extend the initial 30 day period for an additional 30 days if the defendant files with the Secretary a request for an extension within the initial 30 day period and shows good cause.

(c) If the defendant files a timely notice of appeal with the Secretary, and the time for filing motions for reconsideration under § 42.38 of this part has expired, the ALJ shall forward the record of the proceeding to the Secretary.

(d) A notice of appeal shall be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions.

(e) The representative for the Government may file a brief in opposition to exceptions within 30 days of receiving the notice of appeal and accompanying brief.

(f) There is no right to appear personally before the Secretary.

(g) There is no right to appeal any interlocutory ruling by the ALJ.

(h) In reviewing the initial decision, the Secretary shall not consider any objection that was not raised before the ALJ unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection.

(i) If any party demonstrates to the satisfaction of the Secretary that additional evidence not presented at the hearing is material and that there were reasonable grounds for the failure to present the evidence at the hearing, the Secretary shall remand the matter to the ALJ for consideration of such additional evidence.

(j) The Secretary may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment, determined by the ALJ in any initial decision.

(k) The Secretary shall promptly serve each party to the appeal with a copy of the decision of the Secretary and a statement describing the right of any person to seek judicial review.

(l) Unless a petition for review is filed as provided in 31 U.S.C. 3805 after a defendant has exhausted all administrative remedies under this part and within 60 days after the date on which the Secretary serves the defendant with a copy of the Secretary's decision, a determination that a defendant is liable under §42.3 of this part is final and is not subject to judicial review.

### §42.40 Stays ordered by the Department of Justice.

If at any time the Attorney General or Assistant Attorney General designated by the Attorney General transmits to the Secretary a written finding that continuation of the administrative process described in this part with respect to a claim or statement may adversely affect any pending or potential criminal or civil action related to the claim or statement, the Secretary shall stay the process immediately. The Secretary may order the process resumed only upon receipt of the written authorization of the Attorney General.

### §42.41 Stay pending appeal.

(a) An initial decision is stayed automatically pending disposition of a motion for reconsideration or of an appeal to the Secretary.

(b) No administrative stay is available following a final decision of the Secretary.

### §42.42 Judicial review.

Section 3805 of title 31 U.S.C., authorizes judicial review by an appropriate United States District Court of a final decision of the Secretary imposing penalties or assessments under this part and specifies the procedures for the review.

### §42.43 Collection of civil penalties and assessments.

Sections 3806 and 3808(b) of title 31 U.S.C., authorizes actions for collection of civil penalties and assessments imposed under this part and specify the procedures for the action.

### §42.44 Right to administrative offset.

The amount of any penalty or assessment which has become final, or for which a judgment has been entered under §42.42 or §42.43 of this part, or any amount agreed upon in a compromise or settlement under §42.46 of this part, may be collected by administrative offset under 31 U.S.C. 3716, except that an administrative offset may not be made under this subsection against a refund of an overpayment of Federal taxes, then or later owing by the United States to the defendant.

### §42.45 Deposit in Treasury of United States.

All amounts collected pursuant to this part shall be deposited as miscellaneous receipts in the Treasury of the United States, except as provided in 31 U.S.C. 3806(b).

### §42.46 Compromise and settlement.

(a) Parties may make offers of compromise or settlement at any time.

(b) The reviewing official has the exclusive authority to compromise or settle a case under this part at any time after the date on which the reviewing official is permitted to issue a complaint and before the date on which the ALJ issues an initial decision.

(c) The Secretary has exclusive authority to compromise or settle a case under this part at any time after the date on which the ALJ issues an initial decision, except during the pendency of any review under §42.42 of this part or during the pendency of any action to collect penalties and assessments under §42.43 of this part.

(d) The Attorney General has exclusive authority to compromise or settle a case under this part during the pendency of any review under §42.42 of this part, or of any action to recover penalties and assessments under 31 U.S.C. 3806.

(e) The investigating official may recommend settlement terms to the reviewing official, the Secretary, or the Attorney General, as appropriate. The reviewing official may recommend settlement terms to the Secretary, or the Attorney General, as appropriate.

(f) Any compromise or settlement must be in writing.

### §42.47 Limitations.

(a) The notice of hearing with respect to a claim or statement must be served in the manner specified in §42.8 of this

part within 6 years after the date on which such claim or statement is made.

(b) If the defendant fails to file a timely answer, service of a notice under §42.10(b) of this part shall be deemed a notice of hearing of purposes of this section.

(c) The statute of limitations may be extended by agreement of the parties.

# PART 43—UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND COOPERATIVE AGREEMENTS TO STATE AND LOCAL GOVERNMENTS

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AUTHORITY: 38 U.S.C. 501, 1712.

SOURCE: 53 FR 8073 and 8087, Mar. 11, 1988, unless otherwise noted.

## Subpart A—General

### §43.1 Purpose and scope of this part.

This part establishes uniform administrative rules for Federal grants and cooperative agreements and subawards to State, local and Indian tribal governments.

### §43.2 Scope of subpart.

This subpart contains general rules pertaining to this part and procedures for control of exceptions from this part.

### §43.3 Definitions.

As used in this part:

*Accrued expenditures* mean the charges incurred by the grantee during a given period requiring the provision of funds for:

(1) Goods and other tangible property received;

(2) Services performed by employees, contractors, subgrantees, subcontractors, and other payees; and

(3) Other amounts becoming owed under programs for which no current services or performance is required, such as annuities, insurance claims, and other benefit payments.

*Accrued income* means the sum of:

(1) Earnings during a given period from services performed by the grantee and goods and other tangible property delivered to purchasers, and

(2) Amounts becoming owed to the grantee for which no current services or performance is required by the grantee.

*Acquisition cost* of an item of purchased equipment means the net invoice unit price of the property including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges such as the cost of installation, transportation, taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the grantee's regular accounting practices.

*Administrative* requirements mean those matters common to grants in general, such as financial management, kinds and frequency of reports, and retention of records. These are distinguished from *programmatic* requirements, which concern matters that can be treated only on a program-by-program or grant-by-grant basis, such as kinds of activities that can be supported by grants under a particular program.

*Awarding agency* means (1) with respect to a grant, the Federal agency, and (2) with respect to a subgrant, the party that awarded the subgrant.

*Cash contributions* means the grantee's cash outlay, including the outlay of money contributed to the grantee or subgrantee by other public agencies and institutions, and private organizations and individuals. When authorized by Federal legislation, Federal funds received from other assistance agreements may be considered as grantee or subgrantee cash contributions.

*Contract* means (except as used in the definitions for *grant* and *subgrant* in this section and except where qualified by *Federal*) a procurement contract under a grant or subgrant, and means a procurement subcontract under a contract.

*Cost sharing or matching* means the value of the third party in-kind contributions and the portion of the costs of a federally assisted project or program not borne by the Federal Government.

*Cost-type contract* means a contract or subcontract under a grant in which the contractor or subcontractor is paid on the basis of the costs it incurs, with or without a fee.

*Equipment* means tangible, nonexpendable, personal property having a useful life of more than one year and an acquisition cost of $5,000 or more per unit. A grantee may use its own definition of equipment provided that such definition would at least include all equipment defined above.

*Expenditure report* means: (1) For nonconstruction grants, the SF–269 ''Financial Status Report'' (or other equivalent report); (2) for construction grants, the SF–271 ''Outlay Report and Request for Reimbursement'' (or other equivalent report).

*Federally recognized Indian tribal government* means the governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community (including any Native village as defined in section 3 of the Alaska Native Claims Settlement Act, 85 Stat 688) certified by the Secretary of the Interior as eligible for the special programs and services provided by him through the Bureau of Indian Affairs.

*Government* means a State or local government or a federally recognized Indian tribal government.

*Grant* means an award of financial assistance, including cooperative agreements, in the form of money, or property in lieu of money, by the Federal Government to an eligible grantee. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, interest subsidies, insurance, or direct appropriations. Also, the term does not include assistance, such as a fellowship or other lump sum award, which the grantee is not required to account for.

*Grantee* means the government to which a grant is awarded and which is accountable for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award document.

*Local government* means a county, municipality, city, town, township, local public authority (including any public and Indian housing agency under the United States Housing Act of 1937) school district, special district,

intrastate district, council of governments (whether or not incorporated as a nonprofit corporation under state law), any other regional or interstate government entity, or any agency or instrumentality of a local government.

*Obligations* means the amounts of orders placed, contracts and subgrants awarded, goods and services received, and similar transactions during a given period that will require payment by the grantee during the same or a future period.

*OMB* means the United States Office of Management and Budget.

*Outlays* (expenditures) mean charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of actual cash disbursement for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the amount of cash advances and payments made to contractors and subgrantees. For reports prepared on an accrued expenditure basis, outlays are the sum of actual cash disbursements, the amount of indirect expense incurred, the value of inkind contributions applied, and the new increase (or decrease) in the amounts owed by the grantee for goods and other property received, for services performed by employees, contractors, subgrantees, subcontractors, and other payees, and other amounts becoming owed under programs for which no current services or performance are required, such as annuities, insurance claims, and other benefit payments.

*Percentage of completion method* refers to a system under which payments are made for construction work according to the percentage of completion of the work, rather than to the grantee's cost incurred.

*Prior approval* means documentation evidencing consent prior to incurring specific cost.

*Real property* means land, including land improvements, structures and appurtenances thereto, excluding movable machinery and equipment.

*Share,* when referring to the awarding agency's portion of real property, equipment or supplies, means the same percentage as the awarding agency's portion of the acquiring party's total costs under the grant to which the acquisition costs under the grant to which the acquisition cost of the property was charged. Only costs are to be counted—not the value of third-party in-kind contributions.

*State* means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. The term does not include any public and Indian housing agency under United States Housing Act of 1937.

*Subgrant* means an award of financial assistance in the form of money, or property in lieu of money, made under a grant by a grantee to an eligible subgrantee. The term includes financial assistance when provided by contractual legal agreement, but does not include procurement purchases, nor does it include any form of assistance which is excluded from the definition of *grant* in this part.

*Subgrantee* means the government or other legal entity to which a subgrant is awarded and which is accountable to the grantee for the use of the funds provided.

*Supplies* means all tangible personal property other than *equipment* as defined in this part.

*Suspension* means depending on the context, either (1) temporary withdrawal of the authority to obligate grant funds pending corrective action by the grantee or subgrantee or a decision to terminate the grant, or (2) an action taken by a suspending official in accordance with agency regulations implementing E.O. 12549 to immediately exclude a person from participating in grant transactions for a period, pending completion of an investigation and such legal or debarment proceedings as may ensue.

*Termination* means permanent withdrawal of the authority to obligate previously-awarded grant funds before that authority would otherwise expire. It also means the voluntary relinquishment of that authority by the grantee or subgrantee. *Termination* does not include:

(1) Withdrawal of funds awarded on the basis of the grantee's underestimate of the unobligated balance in a prior period;

(2) Withdrawal of the unobligated balance as of the expiration of a grant;

(3) Refusal to extend a grant or award additional funds, to make a competing or noncompeting continuation, renewal, extension, or supplemental award; or

(4) Voiding of a grant upon determination that the award was obtained fraudulently, or was otherwise illegal or invalid from inception.

*Terms of a grant or subgrant* mean all requirements of the grant or subgrant, whether in statute, regulations, or the award document.

*Third party in-kind contributions* mean property or services which benefit a federally assisted project or program and which are contributed by non-Federal third parties without charge to the grantee, or a cost-type contractor under the grant agreement.

*Unliquidated obligations* for reports prepared on a cash basis mean the amount of obligations incurred by the grantee that has not been paid. For reports prepared on an accrued expenditure basis, they represent the amount of obligations incurred by the grantee for which an outlay has not been recorded.

*Unobligated balance* means the portion of the funds authorized by the Federal agency that has not been obligated by the grantee and is determined by deducting the cumulative obligations from the cumulative funds authorized.

### §43.4 Applicability.

(a) *General.* Subparts A–D of this part apply to all grants and subgrants to governments, except where inconsistent with Federal statutes or with regulations authorized in accordance with the exception provision of §43.6, or:

(1) Grants and subgrants to State and local institutions of higher education or State and local hospitals.

(2) The block grants authorized by the Omnibus Budget Reconciliation Act of 1981 (Community Services; Preventive Health and Health Services; Alcohol, Drug Abuse, and Mental Health Services; Maternal and Child Health Services; Social Services; Low-Income Home Energy Assistance; States' Program of Community Development Block Grants for Small Cities; and Elementary and Secondary Education other than programs administered by the Secretary of Education under Title V, subtitle D, Chapter 2, Section 583—the Secretary's discretionary grant program) and Titles I-III of the Job Training Partnership Act of 1982 and under the Public Health Services Act (Section 1921), Alcohol and Drug Abuse Treatment and Rehabilitation Block Grant and part C of Title V, Mental Health Service for the Homeless Block Grant).

(3) Entitlement grants to carry out the following programs of the Social Security Act:

(i) Aid to Needy Families with Dependent Children (Title IV-A of the Act, not including the Work Incentive Program (WIN) authorized by section 402(a)19(G); HHS grants for WIN are subject to this part);

(ii) Child Support Enforcement and Establishment of Paternity (Title IV-D of the Act);

(iii) Foster Care and Adoption Assistance (Title IV-E of the Act);

(iv) Aid to the Aged, Blind, and Disabled (Titles I, X, XIV, and XVI-AABD of the Act); and

(v) Medical Assistance (Medicaid) (Title XIX of the Act) not including the State Medicaid Fraud Control program authorized by section 1903(a)(6)(B).

(4) Entitlement grants under the following programs of The National School Lunch Act:

(i) School Lunch (section 4 of the Act),

(ii) Commodity Assistance (section 6 of the Act),

(iii) Special Meal Assistance (section 11 of the Act),

(iv) Summer Food Service for Children (section 13 of the Act), and

(v) Child Care Food Program (section 17 of the Act).

(5) Entitlement grants under the following programs of The Child Nutrition Act of 1966:

(i) Special Milk (section 3 of the Act), and

(ii) School Breakfast (section 4 of the Act).

(6) Entitlement grants for State Administrative expenses under The Food Stamp Act of 1977 (section 16 of the Act).

(7) A grant for an experimental, pilot, or demonstration project that is also supported by a grant listed in paragraph (a)(3) of this section;

(8) Grant funds awarded under subsection 412(e) of the Immigration and Nationality Act (8 U.S.C. 1522(e)) and subsection 501(a) of the Refugee Education Assistance Act of 1980 (Pub. L. 96–422, 94 Stat. 1809), for cash assistance, medical assistance, and supplemental security income benefits to refugees and entrants and the administrative costs of providing the assistance and benefits;

(9) Grants to local education agencies under 20 U.S.C. 236 through 241–1(a), and 242 through 244 (portions of the Impact Aid program), except for 20 U.S.C. 238(d)(2)(c) and 240(f) (Entitlement Increase for Handicapped Children); and

(10) Payments to States at per diem rates for veterans receiving care in recognized State homes.

(Authority: 38 U.S.C. 1741–1743)

(b) *Entitlement programs.* Entitlement programs enumerated above in § 43.4(a)(3)–(8) are subject to subpart E.

[53 FR 8073 and 8087, Mar. 11, 1988, as amended at 53 FR 8073, Mar. 11, 1988]

### § 43.5 Effect on other issuances.

All other grants administration provisions of codified program regulations, program manuals, handbooks and other nonregulatory materials which are inconsistent with this part are superseded, except to the extent they are required by statute, or authorized in accordance with the exception provision in § 43.6.

### § 43.6 Additions and exceptions

(a) For classes of grants and grantees subject to this part, Federal agencies may not impose additional administrative requirements except in codified regulations published in the FEDERAL REGISTER.

(b) Exceptions for classes of grants or grantees may be authorized only by OMB.

(c) Exceptions on a case-by-case basis and for subgrantees may be authorized by the affected Federal agencies.

## Subpart B—Pre-Award Requirements

### § 43.10 Forms for applying for grants.

(a) *Scope.* (1) This section prescribes forms and instructions to be used by governmental organizations (except hospitals and institutions of higher education operated by a government) in applying for grants. This section is not applicable, however, to formula grant programs which do not require applicants to apply for funds on a project basis.

(2) This section applies only to applications to Federal agencies for grants, and is not required to be applied by grantees in dealing with applicants for subgrants. However, grantees are encouraged to avoid more detailed or burdensome application requirements for subgrants.

(b) *Authorized forms and instructions for governmental organizations.* (1) In applying for grants, applicants shall only use standard application forms or those prescribed by the granting agency with the approval of OMB under the Paperwork Reduction Act of 1980.

(2) Applicants are not required to submit more than the original and two copies of preapplications or applications.

(3) Applicants must follow all applicable instructions that bear OMB clearance numbers. Federal agencies may specify and describe the programs, functions, or activities that will be used to plan, budget, and evaluate the work under a grant. Other supplementary instructions may be issued only with the approval of OMB to the extent required under the Paperwork Reduction Act of 1980. For any standard form, except the SF–424 facesheet, Federal agencies may shade out or instruct the applicant to disregard any line item that is not needed.

(4) When a grantee applies for additional funding (such as a continuation or supplemental award) or amends a previously submitted application, only the affected pages need be submitted.

Previously submitted pages with information that is still current need not be resubmitted.

### §43.11 State plans.

(a) *Scope.* The statutes for some programs require States to submit plans before receiving grants. Under regulations implementing Executive Order 12372, ''Intergovernmental Review of Federal Programs,'' States are allowed to simplify, consolidate and substitute plans. This section contains additional provisions for plans that are subject to regulations implementing the Executive Order.

(b) *Requirements.* A State need meet only Federal administrative or programmatic requirements for a plan that are in statutes or codified regulations.

(c) *Assurances.* In each plan the State will include an assurance that the State shall comply with all applicable Federal statutes and regulations in effect with respect to the periods for which it receives grant funding. For this assurance and other assurances required in the plan, the State may:

(1) Cite by number the statutory or regulatory provisions requiring the assurances and affirm that it gives the assurances required by those provisions,

(2) Repeat the assurance language in the statutes or regulations, or

(3) Develop its own language to the extent permitted by law.

(d) *Amendments.* A State will amend a plan whenever necessary to reflect:

(1) New or revised Federal statutes or regulations or

(2) A material change in any State law, organization, policy, or State agency operation. The State will obtain approval for the amendment and its effective date but need submit for approval only the amended portions of the plan.

### §43.12 Special grant or subgrant conditions for "high-risk" grantees.

(a) A grantee or subgrantee may be considered ''high risk'' if an awarding agency determines that a grantee or subgrantee:

(1) Has a history of unsatisfactory performance, or

(2) Is not financially stable, or

(3) Has a management system which does not meet the management standards set forth in this part, or

(4) Has not conformed to terms and conditions of previous awards, or

(5) Is otherwise not responsible; and if the awarding agency determines that an award will be made, special conditions and/or restrictions shall correspond to the high risk condition and shall be included in the award.

(b) Special conditions or restrictions may include:

(1) Payment on a reimbursement basis;

(2) Withholding authority to proceed to the next phase until receipt of evidence of acceptable performance within a given funding period;

(3) Requiring additional, more detailed financial reports;

(4) Additional project monitoring;

(5) Requiring the grante or subgrantee to obtain technical or management assistance; or

(6) Establishing additional prior approvals.

(c) If an awarding agency decides to impose such conditions, the awarding official will notify the grantee or subgrantee as early as possible, in writing, of:

(1) The nature of the special conditions/restrictions;

(2) The reason(s) for imposing them;

(3) The corrective actions which must be taken before they will be removed and the time allowed for completing the corrective actions and

(4) The method of requesting reconsideration of the conditions/restrictions imposed.

## Subpart C—Post-Award Requirements

FINANCIAL ADMINISTRATION

### §43.20 Standards for financial management systems.

(a) A State must expand and account for grant funds in accordance with State laws and procedures for expending and accounting for its own funds. Fiscal control and accounting procedures of the State, as well as its subgrantees and cost-type contractors, must be sufficient to—

(1) Permit preparation of reports required by this part and the statutes authorizing the grant, and

(2) Permit the tracing of funds to a level of expenditures adequate to establish that such funds have not been used in violation of the restrictions and prohibitions of applicable statutes.

(b) The financial management systems of other grantees and subgrantees must meet the following standards:

(1) *Financial reporting.* Accurate, current, and complete disclosure of the financial results of financially assisted activities must be made in accordance with the financial reporting requirements of the grant or subgrant.

(2) *Accounting records.* Grantees and subgrantees must maintain records which adequately identify the source and application of funds provided for financially-assisted activities. These records must contain information pertaining to grant or subgrant awards and authorizations, obligations, unobligated balances, assets, liabilities, outlays or expenditures, and income.

(3) *Internal control.* Effective control and accountability must be maintained for all grant and subgrant cash, real and personal property, and other assets. Grantees and subgrantees must adequately safeguard all such property and must assure that it is used solely for authorized purposes.

(4) *Budget control.* Actual expenditures or outlays must be compared with budgeted amounts for each grant or subgrant. Financial information must be related to performance or productivity data, including the development of unit cost information whenever appropriate or specifically required in the grant or subgrant agreement. If unit cost data are required, estimates based on available documentation will be accepted whenever possible.

(5) *Allowable cost.* Applicable OMB cost principles, agency program regulations, and the terms of grant and subgrant agreements will be followed in determining the reasonableness, allowability, and allocability of costs.

(6) *Source documentation.* Accounting records must be supported by such source documentation as cancelled checks, paid bills, payrolls, time and attendance records, contract and subgrant award documents, etc.

(7) *Cash management.* Procedures for minimizing the time elapsing between the transfer of funds from the U.S. Treasury and disbursement by grantees and subgrantees must be followed whenever advance payment procedures are used. Grantees must establish reasonable procedures to ensure the receipt of reports on subgrantees' cash balances and cash disbursements in sufficient time to enable them to prepare complete and accurate cash transactions reports to the awarding agency. When advances are made by letter-of-credit or electronic transfer of funds methods, the grantee must make drawdowns as close as possible to the time of making disbursements. Grantees must monitor cash drawdowns by their subgrantees to assure that they conform substantially to the same standards of timing and amount as apply to advances to the grantees.

(c) An awarding agency may review the adequacy of the financial management system of any applicant for financial assistance as part of a preaward review or at any time subsequent to award.

### § 43.21 Payment.

(a) *Scope.* This section prescribes the basic standard and the methods under which a Federal agency will make payments to grantees, and grantees will make payments to subgrantees and contractors.

(b) *Basic standard.* Methods and procedures for payment shall minimize the time elapsing between the transfer of funds and disbursement by the grantee or subgrantee, in accordance with Treasury regulations at 31 CFR part 205.

(c) *Advances.* Grantees and subgrantees shall be paid in advance, provided they maintain or demonstrate the willingness and ability to maintain procedures to minimize the time elapsing between the transfer of the funds and their disbursement by the grantee or subgrantee.

(d) *Reimbursement.* Reimbursement shall be the preferred method when the requirements in paragraph (c) of this

section are not met. Grantees and subgrantees may also be paid by reimbursement for any construction grant. Except as otherwise specified in regulation, Federal agencies shall not use the percentage of completion method to pay construction grants. The grantee or subgrantee may use that method to pay its construction contractor, and if it does, the awarding agency's payments to the grantee or subgrantee will be based on the grantee's or subgrantee's actual rate of disbursement.

(e) *Working capital advances.* If a grantee cannot meet the criteria for advance payments described in paragraph (c) of this section, and the Federal agency has determined that reimbursement is not feasible because the grantee lacks sufficient working capital, the awarding agency may provide cash or a working capital advance basis. Under this procedure the awarding agency shall advance cash to the grantee to cover its estimated disbursement needs for an initial period generally geared to the grantee's disbursing cycle. Thereafter, the awarding agency shall reimburse the grantee for its actual cash disbursements. The working capital advance method of payment shall not be used by grantees or subgrantees if the reason for using such method is the unwillingness or inability of the grantee to provide timely advances to the subgrantee to meet the subgrantee's actual cash disbursements.

(f) *Effect of program income, refunds, and audit recoveries on payment.* (1) Grantees and subgrantees shall disburse repayments to and interest earned on a revolving fund before requesting additional cash payments for the same activity.

(2) Except as provided in paragraph (f)(1) of this section, grantees and subgrantees shall disburse program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

(g) *Withholding payments.* (1) Unless otherwise required by Federal statute, awarding agencies shall not withhold payments for proper charges incurred by grantees or subgrantees unless—

(i) The grantee or subgrantee has failed to comply with grant award conditions or

(ii) The grantee or subgrantee is indebted to the United States.

(2) Cash withheld for failure to comply with grant award condition, but without suspension of the grant, shall be released to the grantee upon subsequent compliance. When a grant is suspended, payment adjustments will be made in accordance with § 43.43(c).

(3) A Federal agency shall not make payment to grantees for amounts that are withheld by grantees or subgrantees from payment to contractors to assure satisfactory completion of work. Payments shall be made by the Federal agency when the grantees or subgrantees actually disburse the withheld funds to the contractors or to escrow accounts established to assure satisfactory completion of work.

(h) *Cash depositories.* (1) Consistent with the national goal of expanding the opportunities for minority business enterprises, grantees and subgrantees are encouraged to use minority banks (a bank which is owned at least 50 percent by minority group members). A list of minority owned banks can be obtained from the Minority Business Development Agency, Department of Commerce, Washington, DC 20230.

(2) A grantee or subgrantee shall maintain a separate bank account only when required by Federal-State agreement.

(i) *Interest earned on advances.* Except for interest earned on advances of funds exempt under the Intergovernmental Cooperation Act (31 U.S.C. 6501 *et seq.*) and the Indian Self-Determination Act (23 U.S.C. 450), grantees and subgrantees shall promptly, but at least quarterly, remit interest earned on advances to the Federal agency. The grantee or subgrantee may keep interest amounts up to $100 per year for administrative expenses.

### §43.22 Allowable costs.

(a) *Limitation on use of funds.* Grant funds may be used only for:

(1) The allowable costs of the grantees, subgrantees and cost-type contractors, including allowable costs in the form of payments to fixed-price contractors; and

(2) Reasonable fees or profit to cost-type contractors but not any fee or profit (or other increment above allowable costs) to the grantee or subgrantee.

(b) *Applicable cost principles.* For each kind of organization, there is a set of Federal principles for determining allowable costs. Allowable costs will be determined in accordance with the cost principles applicable to the organization incurring the costs. The following chart lists the kinds of organizations and the applicable cost principles.

| For the costs of a— | Use the principles in— |
|---|---|
| State, local or Indian tribal government. | OMB Circular A–87. |
| Private nonprofit organization other than an (1) institution of higher education, (2) hospital, or (3) organization named in OMB Circular A–122 as not subject to that circular. | OMB Circular A–122. |
| Educational institutions. ..... | OMB Circular A–21. |
| For-profit organization other than a hospital and an organization named in OMB Circular A–122 as not subject to that circular. | 48 CFR part 31. Contract Cost Principles and Procedures, or uniform cost accounting standards that comply with cost principles acceptable to the Federal agency. |

## § 43.23 Period of availability of funds.

(a) *General.* Where a funding period is specified, a grantee may charge to the award only costs resulting from obligations of the funding period unless carryover of unobligated balances is permitted, in which case the carryover balances may be charged for costs resulting from obligations of the subsequent funding period.

(b) *Liquidation of obligations.* A grantee must liquidate all obligations incurred under the award not later than 90 days after the end of the funding period (or as specified in a program regulation) to coincide with the submission of the annual Financial Status Report (SF–269). The Federal agency may extend this deadline at the request of the grantee.

## § 43.24 Matching or cost sharing.

(a) *Basic rule: Costs and contributions acceptable.* With the qualifications and exceptions listed in paragraph (b) of this section, a matching or cost sharing requirement may be satisfied by either or both of the following:

(1) Allowable costs incurred by the grantee, subgrantee or a cost-type contractor under the assistance agreement. This includes allowable costs borne by non-Federal grants or by others cash donations from non-Federal third parties.

(2) The value of third party in-kind contributions applicable to the period to which the cost sharing or matching requirements applies.

(b) *Qualifications and exceptions*—(1) *Costs borne by other Federal grant agreements.* Except as provided by Federal statute, a cost sharing or matching requirement may not be met by costs borne by another Federal grant. This prohibition does not apply to income earned by a grantee or subgrantee from a contract awarded under another Federal grant.

(2) *General revenue sharing.* For the purpose of this section, general revenue sharing funds distributed under 31 U.S.C. 6702 are not considered Federal grant funds.

(3) *Cost or contributions counted towards other Federal costs-sharing requirements.* Neither costs nor the values of third party in-kind contributions may count towards satisfying a cost sharing or matching requirement of a grant agreement if they have been or will be counted towards satisfying a cost sharing or matching requirement of another Federal grant agreement, a Federal procurement contract, or any other award of Federal funds.

(4) *Costs financed by program income.* Costs financed by program income, as defined in § 43.25, shall not count towards satisfying a cost sharing or matching requirement unless they are expressly permitted in the terms of the assistance agreement. (This use of general program income is described in § 43.25(g).)

(5) *Services or property financed by income earned by contractors.* Contractors under a grant may earn income from the activities carried out under the contract in addition to the amounts earned from the party awarding the contract. No costs of services or property supported by this income may count toward satisfying a cost sharing or matching requirement unless other

provisions of the grant agreement expressly permit this kind of income to be used to meet the requirement.

(6) *Records.* Costs and third party in-kind contributions counting towards satisfying a cost sharing or matching requirement must be verifiable from the records of grantees and subgrantee or cost-type contractors. These records must show how the value placed on third party in-kind contributions was derived. To the extent feasible, volunteer services will be supported by the same methods that the organization uses to support the allocability of regular personnel costs.

(7) *Special standards for third party in-kind contributions.* (i) Third party in-kind contributions count towards satisfying a cost sharing or matching requirement only where, if the party receiving the contributions were to pay for them, the payments would be allowable costs.

(ii) Some third party in-kind contributions are goods and services that, if the grantee, subgrantee, or contractor receiving the contribution had to pay for them, the payments would have been an indirect costs. Costs sharing or matching credit for such contributions shall be given only if the grantee, subgrantee, or contractor has established, along with its regular indirect cost rate, a special rate for allocating to individual projects or programs the value of the contributions.

(iii) A third party in-kind contribution to a fixed-price contract may count towards satisfying a cost sharing or matching requirement only if it results in:

(A) An increase in the services or property provided under the contract (without additional cost to the grantee or subgrantee) or

(B) A cost savings to the grantee or subgrantee.

(iv) The values placed on third party in-kind contributions for cost sharing or matching purposes will conform to the rules in the succeeding sections of this part. If a third party in-kind contribution is a type not treated in those sections, the value placed upon it shall be fair and reasonable.

(c) *Valuation of donated services*—(1) *Volunteer services.* Unpaid services provided to a grantee or subgrantee by individuals will be valued at rates consistent with those ordinarily paid for similar work in the grantee's or subgrantee's organization. If the grantee or subgrantee does not have employees performing similar work, the rates will be consistent with those ordinarily paid by other employers for similar work in the same labor market. In either case, a reasonable amount for fringe benefits may be included in the valuation.

(2) *Employees of other organizations.* When an employer other than a grantee, subgrantee, or cost-type contractor furnishes free of charge the services of an employee in the employee's normal line of work, the services will be valued at the employee's regular rate of pay exclusive of the employee's fringe benefits and overhead costs. If the services are in a different line of work, paragraph (c)(1) of this section applies.

(d) *Valuation of third party donated supplies and loaned equipment or space.* (1) If a third party donates supplies, the contribution will be valued at the market value of the supplies at the time of donation.

(2) If a third party donates the use of equipment or space in a building but retains title, the contribution will be valued at the fair rental rate of the equipment or space.

(e) *Valuation of third party donated equipment, buildings, and land.* If a third party donates equipment, buildings, or land, and title passes to a grantee or subgrantee, the treatment of the donated property will depend upon the purpose of the grant or subgrant, as follows:

(1) *Awards for capital expenditures.* If the purpose of the grant or subgrant is to assist the grantee or subgrantee in the acquisition of property, the market value of that property at the time of donation may be counted as cost sharing or matching,

(2) *Other awards.* If assisting in the acquisition of property is not the purpose of the grant or subgrant, paragraphs (e)(2) (i) and (ii) of this section apply:

(i) If approval is obtained from the awarding agency, the market value at the time of donation of the donated equipment or buildings and the fair rental rate of the donated land may be

counted as cost sharing or matching. In the case of a subgrant, the terms of the grant agreement may require that the approval be obtained from the Federal agency as well as the grantee. In all cases, the approval may be given only if a purchase of the equipment or rental of the land would be approved as an allowable direct cost. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost-sharing or matching.

(ii) If approval is not obtained under paragraph (e)(2)(i) of this section, no amount may be counted for donated land, and only depreciation or use allowances may be counted for donated equipment and buildings. The depreciation or use allowances for this property are not treated as third party in-kind contributions. Instead, they are treated as costs incurred by the grantee or subgrantee. They are computed and allocated (usually as indirect costs) in accordance with the cost principles specified in § 43.22, in the same way as depreciation or use allowances for purchased equipment and buildings. The amount of depreciation or use allowances for donated equipment and buildings is based on the property's market value at the time it was donated.

(f) *Valuation of grantee or subgrantee donated real property for construction/acquisition.* If a grantee or subgrantee donates real property for a construction or facilities acquisition project, the current market value of that property may be counted as cost sharing or matching. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost sharing or matching.

(g) *Appraisal of real property.* In some cases under paragraphs (d), (e) and (f) of this section, it will be necessary to establish the market value of land or a building or the fair rental rate of land or of space in a building. In these cases, the Federal agency may require the market value or fair rental value be set by an independent appraiser, and that the value or rate be certified by the grantee. This requirement will also be imposed by the grantee on subgrantees.

## § 43.25 Program income.

(a) *General.* Grantees are encouraged to earn income to defray program costs. Program income includes income from fees for services performed, from the use or rental of real or personal property acquired with grant funds, from the sale of commodities or items fabricated under a grant agreement, and from payments of principal and interest on loans made with grant funds. Except as otherwise provided in regulations of the Federal agency, program income does not include interest on grant funds, rebates, credits, discounts, refunds, etc. and interest earned on any of them.

(b) *Definition of program income.* Program income means gross income received by the grantee or subgrantee directly generated by a grant supported activity, or earned only as a result of the grant agreement during the grant period. *During the grant period* is the time between the effective date of the award and the ending date of the award reflected in the final financial report.

(c) *Cost of generating program income.* If authorized by Federal regulations or the grant agreement, costs incident to the generation of program income may be deducted from gross income to determine program income.

(d) *Governmental revenues.* Taxes, special assessments, levies, fines, and other such revenues raised by a grantee or subgrantee are not program income unless the revenues are specifically identified in the grant agreement or Federal agency regulations as program income.

(e) *Royalties.* Income from royalties and license fees for copyrighted material, patents, and inventions developed by a grantee or subgrantee is program income only if the revenues are specifically identified in the grant agreement or Federal agency regulations as program income. (See § 43.34.)

(f) *Property.* Proceeds from the sale of real property or equipment will be handled in accordance with the requirements of §§ 43.31 and 43.32.

(g) *Use of program income.* Program income shall be deducted from outlays which may be both Federal and non-Federal as described below, unless the Federal agency regulations or the

grant agreement specify another alternative (or a combination of the alternatives). In specifying alternatives, the Federal agency may distinguish between income earned by the grantee and income earned by subgrantees and between the sources, kinds, or amounts of income. When Federal agencies authorize the alternatives in paragraphs (g) (2) and (3) of this section, program income in excess of any limits stipulated shall also be deducted from outlays.

(1) *Deduction.* Ordinarily program income shall be deducted from total allowable costs to determine the net allowable costs. Program income shall be used for current costs unless the Federal agency authorizes otherwise. Program income which the grantee did not anticipate at the time of the award shall be used to reduce the Federal agency and grantee contributions rather than to increase the funds committed to the project.

(2) *Addition.* When authorized, program income may be added to the funds committed to the grant agreement by the Federal agency and the grantee. The program income shall be used for the purposes and under the conditions of the grant agreement.

(3) *Cost sharing or matching.* When authorized, program income may be used to meet the cost sharing or matching requirement of the grant agreement. The amount of the Federal grant award remains the same.

(h) *Income after the award period.* There are no Federal requirements governing the disposition of program income earned after the end of the award period (i.e., until the ending date of the final financial report, see paragraph (a) of this section), unless the terms of the agreement or the Federal agency regulations provide otherwise.

### §43.26 Non-Federal audit.

(a) *Basic rule.* Grantees and subgrantees are responsible for obtaining audits in accordance with the Single Audit Act Amendments of 1996 (31 U.S.C. 7501–7507) and revised OMB Circular A–133, ''Audits of States, Local Governments, and Non-Profit Organizations.'' The audits shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial audits.

(b) *Subgrantees.* State or local governments, as those terms are defined for purposes of the Single Audit Act Amendments of 1996, that provide Federal awards to a subgrantee, which expends $300,000 or more (or other amount as specified by OMB) in Federal awards in a fiscal year, shall:

(1) Determine whether State or local subgrantees have met the audit requirements of the Act and whether subgrantees covered by OMB Circular A–110, ''Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations,'' have met the audit requirements of the Act. Commercial contractors (private for-profit and private and governmental organizations) providing goods and services to State and local governments are not required to have a single audit performed. State and local governments should use their own procedures to ensure that the contractor has complied with laws and regulations affecting the expenditure of Federal funds;

(2) Determine whether the subgrantee spent Federal assistance funds provided in accordance with applicable laws and regulations. This may be accomplished by reviewing an audit of the subgrantee made in accordance with the Act, Circular A–110, or through other means (e.g., program reviews) if the subgrantee has not had such an audit;

(3) Ensure that appropriate corrective action is taken within six months after receipt of the audit report in instance of noncompliance with Federal laws and regulations;

(4) Consider whether subgrantee audits necessitate adjustment of the grantee's own records; and

(5) Require each subgrantee to permit independent auditors to have access to the records and financial statements.

(c) *Auditor selection.* In arranging for audit services, §43.36 shall be followed.

[53 FR 8073 and 8087, Mar. 11, 1988, as amended at 62 FR 45939, 45943, Aug. 29, 1997]

CHANGES, PROPERTY, AND SUBAWARDS

## § 43.30 Changes

(a) *General.* Grantees and subgrantees are permitted to rebudget within the approved direct cost budget to meet unanticipated requirements and may make limited program changes to the approved project. However, unless waived by the awarding agency, certain types of post-award changes in budgets and projects shall require the prior written approval of the awarding agency.

(b) *Relation to cost principles.* The applicable cost principles (see § 43.22) contain requirements for prior approval of certain types of costs. Except where waived, those requirements apply to all grants and subgrants even if paragraphs (c) through (f) of this section do not.

(c) *Budget changes*—(1) *Nonconstruction projects.* Except as stated in other regulations or an award document, grantees or subgrantees shall obtain the prior approval of the awarding agency whenever any of the following changes is anticipated under a nonconstruction award:

(i) Any revision which would result in the need for additional funding.

(ii) Unless waived by the awarding agency, cumulative transfers among direct cost categories, or, if applicable, among separately budgeted programs, projects, functions, or activities which exceed or are expected to exceed ten percent of the current total approved budget, whenever the awarding agency's share exceeds $100,000.

(iii) Transfer of funds allotted for training allowances (i.e., from direct payments to trainees to other expense categories).

(2) *Construction projects.* Grantees and subgrantees shall obtain prior written approval for any budget revision which would result in the need for additional funds.

(3) *Combined construction and nonconstruction projects.* When a grant or subgrant provides funding for both construction and nonconstruction activities, the grantee or subgrantee must obtain prior written approval from the awarding agency before making any fund or budget transfer from nonconstruction to construction or vice versa.

(d) *Programmatic changes.* Grantees or subgrantees must obtain the prior approval of the awarding agency whenever any of the following actions is anticipated:

(1) Any revision of the scope or objectives of the project (regardless of whether there is an associated budget revision requiring prior approval).

(2) Need to extend the period of availability of funds.

(3) Changes in key persons in cases where specified in an application or a grant award. In research projects, a change in the project director or principal investigator shall always require approval unless waived by the awarding agency.

(4) Under nonconstruction projects, contracting out, subgranting (if authorized by law) or otherwise obtaining the services of a third party to perform activities which are central to the purposes of the award. This approval requirement is in addition to the approval requirements of § 43.36 but does not apply to the procurement of equipment, supplies, and general support services.

(e) *Additional prior approval requirements.* The awarding agency may not require prior approval for any budget revision which is not described in paragraph (c) of this section.

(f) *Requesting prior approval.* (1) A request for prior approval of any budget revision will be in the same budget formal the grantee used in its application and shall be accompanied by a narrative justification for the proposed revision.

(2) A request for a prior approval under the applicable Federal cost principles (see § 43.22) may be made by letter.

(3) A request by a subgrantee for prior approval will be addressed in writing to the grantee. The grantee will promptly review such request and shall approve or disapprove the request in writing. A grantee will not approve any budget or project revision which is inconsistent with the purpose or terms and conditions of the Federal grant to the grantee. If the revision, requested by the subgrantee would result in a change to the grantee's approved

project which requires Federal prior approval, the grantee will obtain the Federal agency's approval before approving the subgrantee's request.

### §43.31 Real property.

(a) *Title.* Subject to the obligations and conditions set forth in this section, title to real property acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *Use.* Except as otherwise provided by Federal statutes, real property will be used for the originally authorized purposes as long as needed for that purposes, and the grantee or subgrantee shall not dispose of or encumber its title or other interests.

(c) *Disposition.* When real property is no longer needed for the originally authorized purpose, the grantee or subgrantee will request disposition instructions from the awarding agency. The instructions will provide for one of the following alternatives:

(1) *Retention of title.* Retain title after compensating the awarding agency. The amount paid to the awarding agency will be computed by applying the awarding agency's percentage of participation in the cost of the original purchase to the fair market value of the property. However, in those situations where a grantee or subgrantee is disposing of real property acquired with grant funds and acquiring replacement real property under the same program, the net proceeds from the disposition may be used as an offset to the cost of the replacement property.

(2) *Sale of property.* Sell the property and compensate the awarding agency. The amount due to the awarding agency will be calculated by applying the awarding agency's percentage of participation in the cost of the original purchase to the proceeds of the sale after deduction of any actual and reasonable selling and fixing-up expenses. If the grant is still active, the net proceeds from sale may be offset against the original cost of the property. When a grantee or subgrantee is directed to sell property, sales procedures shall be followed that provide for competition to the extent practicable and result in the highest possible return.

(3) *Transfer of title.* Transfer title to the awarding agency or to a third-party designated/approved by the awarding agency. The grantee or subgrantee shall be paid an amount calculated by applying the grantee or subgrantee's percentage of participation in the purchase of the real property to the current fair market value of the property.

### §43.32 Equipment.

(a) *Title.* Subject to the obligations and conditions set forth in this section, title to equipment acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *States.* A State will use, manage, and dispose of equipment acquired under a grant by the State in accordance with State laws and procedures. Other grantees and subgrantees will follow paragraphs (c) through (e) of this section.

(c) *Use.* (1) Equipment shall be used by the grantee or subgrantee in the program or project for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds. When no longer needed for the original program or project, the equipment may be used in other activities currently or previously supported by a Federal agency.

(2) The grantee or subgrantee shall also make equipment available for use on other projects or programs currently or previously supported by the Federal Government, providing such use will not interfere with the work on the projects or program for which it was originally acquired. First preference for other use shall be given to other programs or projects supported by the awarding agency. User fees should be considered if appropriate.

(3) Notwithstanding the encouragement in §43.25(a) to earn program income, the grantee or subgrantee must not use equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide equivalent services, unless specifically permitted or contemplated by Federal statute.

(4) When acquiring replacement equipment, the grantee or subgrantee

may use the equipment to be replaced as a trade-in or sell the property and use the proceeds to offset the cost of the replacement property, subject to the approval of the awarding agency.

(d) *Management requirements.* Procedures for managing equipment (including replacement equipment), whether acquired in whole or in part with grant funds, until disposition takes place will, as a minimum, meet the following requirements:

(1) Property records must be maintained that include a description of the property, a serial number or other identification number, the source of property, who holds title, the acquisition date, and cost of the property, percentage of Federal participation in the cost of the property, the location, use and condition of the property, and any ultimate disposition data including the date of disposal and sale price of the property.

(2) A physical inventory of the property must be taken and the results reconciled with the property records at least once every two years.

(3) A control system must be developed to ensure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft shall be investigated.

(4) Adequate maintenance procedures must be developed to keep the property in good condition.

(5) If the grantee or subgrantee is authorized or required to sell the property, proper sales procedures must be established to ensure the highest possible return.

(e) *Disposition.* When original or replacement equipment acquired under a grant or subgrant is no longer needed for the original project or program or for other activities currently or previously supported by a Federal agency, disposition of the equipment will be made as follows:

(1) Items of equipment with a current per-unit fair market value of less than $5,000 may be retained, sold or otherwise disposed of with no further obligation to the awarding agency.

(2) Items of equipment with a current per unit fair market value in excess of $5,000 may be retained or sold and the awarding agency shall have a right to an amount calculated by multiplying the current market value or proceeds from sale by the awarding agency's share of the equipment.

(3) In cases where a grantee or subgrantee fails to take appropriate disposition actions, the awarding agency may direct the grantee or subgrantee to take excess and disposition actions.

(f) *Federal equipment.* In the event a grantee or subgrantee is provided federally-owned equipment:

(1) Title will remain vested in the Federal Government.

(2) Grantees or subgrantees will manage the equipment in accordance with Federal agency rules and procedures, and submit an annual inventory listing.

(3) When the equipment is no longer needed, the grantee or subgrantee will request disposition instructions from the Federal agency.

(g) *Right to transfer title.* The Federal awarding agency may reserve the right to transfer title to the Federal Government or a third part named by the awarding agency when such a third party is otherwise eligible under existing statutes. Such transfers shall be subject to the following standards:

(1) The property shall be identified in the grant or otherwise made known to the grantee in writing.

(2) The Federal awarding agency shall issue disposition instruction within 120 calendar days after the end of the Federal support of the project for which it was acquired. If the Federal awarding agency fails to issue disposition instructions within the 120 calendar-day period the grantee shall follow 43.32(e).

(3) When title to equipment is transferred, the grantee shall be paid an amount calculated by applying the percentage of participation in the purchase to the current fair market value of the property.

### § 43.33 Supplies.

(a) *Title.* Title to supplies acquired under a grant or subgrant will vest, upon acquisition, in the grantee or subgrantee respectively.

(b) *Disposition.* If there is a residual inventory of unused supplies exceeding $5,000 in total aggregate fair market value upon termination or completion of the award, and if the supplies are

not needed for any other federally sponsored programs or projects, the grantee or subgrantee shall compensate the awarding agency for its share.

### §43.34 Copyrights.

The Federal awarding agency reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Federal Government purposes:

(a) The copyright in any work developed under a grant, subgrant, or contract under a grant or subgrant; and

(b) Any rights of copyright to which a grantee, subgrantee or a contractor purchases ownership with grant support.

### §43.35 Subawards to debarred and suspended parties.

Grantees and subgrantees must not make any award or permit any award (subgrant or contract) at any tier to any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in Federal assistance programs under Executive Order 12549, ''Debarment and Suspension.''

### §43.36 Procurement

(a) *States.* When procuring property and services under a grant, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds. The State will ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations. Other grantees and subgrantees will follow paragraphs (b) through (i) in this section.

(b) *Procurement standards.* (1) Grantees and subgrantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.

(2) Grantees and subgrantees will maintain a contract administration system which ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(3) Grantees and subgrantees will maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. No employee, officer or agent of the grantee or subgrantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

(i) The employee, officer or agent,

(ii) Any member of his immediate family,

(iii) His or her partner, or

(iv) An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award. The grantee's or subgrantee's officers, employees or agents will neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements. Grantee and subgrantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or local law or regulations, such standards or conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee's and subgrantee's officers, employees, or agents, or by contractors or their agents. The awarding agency may in regulation provide additional prohibitions relative to real, apparent, or potential conflicts of interest.

(4) Grantee and subgrantee procedures will provide for a review of proposed procurements to avoid purchase of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(5) To foster greater economy and efficiency, grantees and subgrantees are encouraged to enter into State and local intergovernmental agreements

for procurement or use of common goods and services.

(6) Grantees and subgrantees are encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

(7) Grantees and subgrantees are encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative anaylsis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(8) Grantees and subgrantees will make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(9) Grantees and subgrantees will maintain records sufficient to detail the significant history of a procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

(10) Grantees and subgrantees will use time and material type contracts only—

(i) After a determination that no other contract is suitable, and

(ii) If the contract includes a ceiling price that the contractor exceeds at its own risk.

(11) Grantees and subgrantees alone will be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to source evaluation, protests, disputes, and claims. These standards do not relieve the grantee or subgrantee of any contractual responsibilities under its contracts. Federal agencies will not substitute their judgment for that of the grantee or subgrantee unless the matter is primarily a Federal concern. Violations of law will be referred to the local, State, or Federal authority having proper jurisdiction.

(12) Grantees and subgrantees will have protest procedures to handle and resolve disputes relating to their procurements and shall in all instances disclose information regarding the protest to the awarding agency. A protestor must exhaust all administrative remedies with the grantee and subgrantee before pursuing a protest with the Federal agency. Reviews of protests by the Federal agency will be limited to:

(i) Violations of Federal law or regulations and the standards of this section (violations of State or local law will be under the jurisdiction of State or local authorities) and

(ii) Violations of the grantee's or subgrantee's protest procedures for failure to review a complaint or protest. Protests received by the Federal agency other than those specified above will be referred to the grantee or subgrantee.

(c) *Competition*. (1) All procurement transactions will be conducted in a manner providing full and open competition consistent with the standards of § 43.36. Some of the situations considered to be restrictive of competition include but are not limited to:

(i) Placing unreasonable requirements on firms in order for them to qualify to do business,

(ii) Requiring unnecessary experience and excessive bonding,

(iii) Noncompetitive pricing practices between firms or between affiliated companies,

(iv) Noncompetitive awards to consultants that are on retainer contracts,

(v) Organizational conflicts of interest,

(vi) Specifying only a ''brand name'' product instead of allowing ''an equal'' product to be offered and describing the performance of other relevant requirements of the procurement, and

(vii) Any arbitrary action in the procurement process.

(2) Grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except

in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts State licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criteria provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(3) Grantees will have written selection procedures for procurement transactions. These procedures will ensure that all solicitations:

(i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a ''brand name or equal'' description may be used as a means to define the performance or other salient requirements of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated; and

(ii) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(4) Grantees and subgrantees will ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, grantees and subgrantees will not preclude potential bidders from qualifying during the solicitation period.

(d) *Methods of procurement to be followed*—(1) *Procurement by small purchase procedures.* Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (currently set at $100,000). If small purchase procedures are used, price or rate quotations shall be obtained from an adequate number of qualified sources.

(2) Procurement by *sealed bids* (formal advertising). Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in §43.36(d)(2)(i) apply.

(i) In order for sealed bidding to be feasible, the following conditions should be present:

(A) A complete, adequate, and realistic specification or purchase description is available;

(B) Two or more responsible bidders are willing and able to compete effectively and for the business; and

(C) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(ii) If sealed bids are used, the following requirements apply:

(A) The invitation for bids will be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids;

(B) The invitation for bids, which will include any specifications and pertinent attachments, shall define the items or services in order for the bidder to properly respond;

(C) All bids will be publicly opened at the time and place prescribed in the invitation for bids;

(D) A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs shall be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such

discounts are usually taken advantage of; and

(E) Any or all bids may be rejected if there is a sound documented reason.

(3) Procurement by *competitive proposals.* The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:

(i) Requests for proposals will be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals shall be honored to the maximum extent practical;

(ii) Proposals will be solicited from an adequate number of qualified sources;

(iii) Grantees and subgrantees will have a method for conducting technical evaluations of the proposals received and for selecting awardees;

(iv) Awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

(v) Grantees and subgrantees may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

(4) Procurement by *noncompetitive proposals* is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate.

(i) Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies:

(A) The item is available only from a single source;

(B) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;

(C) The awarding agency authorizes noncompetitive proposals; or

(D) After solicitation of a number of sources, competition is determined inadequate.

(ii) Cost analysis, i.e., verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profits, is required.

(iii) Grantees and subgrantees may be required to submit the proposed procurement to the awarding agency for pre-award review in accordance with paragraph (g) of this section.

(e) *Contracting with small and minority firms, women's business enterprise and labor surplus area firms.* (1) The grantee and subgrantee will take all necessary affirmative steps to assure that minority firms, women's business enterprises, and labor surplus area firms are used when possible.

(2) Affirmative steps shall include:

(i) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(ii) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(iii) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business, and women's business enterprises;

(iv) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority business, and women's business enterprises;

(v) Using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce; and

(vi) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (e)(2)(i) through (v) of this section.

(f) *Contract cost and price.* (1) Grantees and subgrantees must perform a cost or price analysis in connection with every procurement action including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals. A cost analysis must be performed when the offeror is required to submit the elements of his estimated cost, e.g., under professional, consulting, and architectural engineering services contracts. A cost analysis will be necessary when adequate price competition is lacking, and for sole source procurements, including contract modifications or change orders, unless price resonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation. A price analysis will be used in all other instances to determine the reasonableness of the proposed contract price.

(2) Grantees and subgrantees will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(3) Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles (see §43.22). Grantees may reference their own cost principles that comply with the applicable Federal cost principles.

(4) The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.

(g) *Awarding agency review.* (1) Grantees and subgrantees must make available, upon request of the awarding agency, technical specifications on proposed procurements where the awarding agency believes such review is needed to ensure that the item and/or service specified is the one being proposed for purchase. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the grantee or subgrantee desires to have the review accomplished after a solicitation has been developed, the awarding agency may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

(2) Grantees and subgrantees must on request make available for awarding agency pre-award review procurement documents, such as requests for proposals or invitations for bids, independent cost estimates, etc. when:

(i) A grantee's or subgrantee's procurement procedures or operation fails to comply with the procurement standards in this section; or

(ii) The procurement is expected to exceed the simplified acquisition threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation; or

(iii) The procurement, which is expected to exceed the simplified acquisition threshold, specifies a ''brand name'' product; or

(iv) The proposed award is more than the simplified acquisition threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or

(v) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the simplified acquisition threshold.

(3) A grantee or subgrantee will be exempt from the pre-award review in paragraph (g)(2) of this section if the awarding agency determines that its procurement systems comply with the standards of this section.

(i) A grantee or subgrantee may request that its procurement system be reviewed by the awarding agency to determine whether its system meets these standards in order for its system

to be certified. Generally, these reviews shall occur where there is a continuous high-dollar funding, and third-party contracts are awarded on a regular basis.

(ii) A grantee or subgrantee may self-certify its procurement system. Such self-certification shall not limit the awarding agency's right to survey the system. Under a self-certification procedure, awarding agencies may wish to rely on written assurances from the grantee or subgrantee that it is complying with these standards. A grantee or subgrantee will cite specific procedures, regulations, standards, etc., as being in compliance with these requirements and have its system available for review.

(h) *Bonding requirements.* For construction or facility improvement contracts or subcontracts exceeding the simplified acquisition threshold, the awarding agency may accept the bonding policy and requirements of the grantee or subgrantee provided the awarding agency has made a determination that the awarding agency's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows:

(1) *A bid guarantee from each bidder equivalent to five percent of the bid price.* The ''bid guarantee'' shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) *A performance bond on the part of the contractor for 100 percent of the contract price.* A ''performance bond'' is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(3) *A payment bond on the part of the contractor for 100 percent of the contract price.* A ''payment bond'' is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

(i) *Contract provisions.* A grantee's and subgrantee's contracts must contain provisions in paragraph (i) of this section. Federal agencies are permitted to require changes, remedies, changed conditions, access and records retention, suspension of work, and other clauses approved by the Office of Federal Procurement Policy.

(1) Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate. (Contracts more than the simplified acquisition threshold)

(2) Termination for cause and for convenience by the grantee or subgrantee including the manner by which it will be effected and the basis for settlement. (All contracts in excess of $10,000)

(3) Compliance with Executive Order 11246 of September 24, 1965, entitled ''Equal Employment Opportunity,'' as amended by Executive Order 11375 of October 13, 1967, and as supplemented in Department of Labor regulations (41 CFR chapter 60). (All construction contracts awarded in excess of $10,000 by grantees and their contractors or subgrantees)

(4) Compliance with the Copeland ''Anti-Kickback'' Act (18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR Part 3). (All contracts and subgrants for construction or repair)

(5) Compliance with the Davis-Bacon Act (40 U.S.C. 276a to 276a–7) as supplemented by Department of Labor regulations (29 CFR Part 5). (Construction contracts in excess of $2000 awarded by grantees and subgrantees when required by Federal grant program legislation)

(6) Compliance with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327–330) as supplemented by Department of Labor regulations (29 CFR Part 5). (Construction contracts awarded by grantees and subgrantees in excess of $2000, and in excess of $2500 for other contracts which involve the employment of mechanics or laborers)

(7) Notice of awarding agency requirements and regulations pertaining to reporting.

(8) Notice of awarding agency requirements and regulations pertaining

to patent rights with respect to any discovery or invention which arises or is developed in the course of or under such contract.

(9) Awarding agency requirements and regulations pertaining to copyrights and rights in data.

(10) Access by the grantee, the subgrantee, the Federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions.

(11) Retention of all required records for three years after grantees or subgrantees make final payments and all other pending matters are closed.

(12) Compliance with all applicable standards, orders, or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR part 15). (Contracts, subcontracts, and subgrants of amounts in excess of $100,000)

(13) Mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94–163, 89 Stat. 871).

[53 FR 8073 and 8087, Mar. 11, 1988, as amended at 60 FR 19639, 19644, Apr. 19, 1995]

### §43.37 Subgrants.

(a) *States.* States shall follow state law and procedures when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. States shall:

(1) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations;

(2) Ensure that subgrantees are aware of requirements imposed upon them by Federal statute and regulation;

(3) Ensure that a provision for compliance with Section 43.42 is placed in every cost reimbursement subgrant; and

(4) Conform any advances of grant funds to subgrantees substantially to the same standards of timing and amount that apply to cash advances by Federal agencies.

(b) *All other grantees.* All other grantees shall follow the provisions of this part which are applicable to awarding agencies when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. Grantees shall:

(1) Ensure that every subgrant includes a provision for compliance with this part;

(2) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations; and

(3) Ensure that subgrantees are aware of requirements imposed upon them by Federal statutes and regulations.

(c) *Exceptions.* By their own terms, certain provisions of this part do not apply to the award and administration of subgrants:

(1) Section 43.10;

(2) Section 43.11;

(3) The letter-of-credit procedures specified in Treasury Regulations at 31 CFR part 205, cited in §43.21; and

(4) Section 43.50.

## REPORTS, RECORDS, RETENTION, AND ENFORCEMENT

### §43.40 Monitoring and reporting program performance.

(a) *Monitoring by grantees.* Grantees are responsible for managing the day-to-day operations of grant and subgrant supported activities. Grantees must monitor grant and subgrant supported activities to assure compliance with applicable Federal requirements and that performance goals are being achieved. Grantee monitoring must cover each program, function or activity.

(b) *Nonconstruction performance reports.* The Federal agency may, if it decides that performance information available from subsequent applications contains sufficient information to meet its programmatic needs, require

the grantee to submit a performance report only upon expiration or termination of grant support. Unless waived by the Federal agency this report will be due on the same date as the final Financial Status Report.

(1) Grantees shall submit annual performance reports unless the awarding agency requires quarterly or semi-annual reports. However, performance reports will not be required more frequently than quarterly. Annual reports shall be due 90 days after the grant year, quarterly or semi-annual reports shall be due 30 days after the reporting period. The final performance report will be due 90 days after the expiration or termination of grant support. If a justified request is submitted by a grantee, the Federal agency may extend the due date for any performance report. Additionally, requirements for unnecessary performance reports may be waived by the Federal agency.

(2) Performance reports will contain, for each grant, brief information on the following:

(i) A comparison of actual accomplishments to the objectives established for the period. Where the output of the project can be quantified, a computation of the cost per unit of output may be required if that information will be useful.

(ii) The reasons for slippage if established objectives were not met.

(iii) Additional pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(3) Grantees will not be required to submit more than the original and two copies of performance reports.

(4) Grantees will adhere to the standards in this section in prescribing performance reporting requirements for subgrantees.

(c) *Construction performance reports.* For the most part, on-site technical inspections and certified percentage-of-completion data are relied on heavily by Federal agencies to monitor progress under construction grants and subgrants. The Federal agency will require additional formal performance reports only when considered necessary, and never more frequently than quarterly.

(d) *Significant developments.* Events may occur between the scheduled performance reporting dates which have significant impact upon the grant or subgrant supported activity. In such cases, the grantee must inform the Federal agency as soon as the following types of conditions become known:

(1) Problems, delays, or adverse conditions which will materially impair the ability to meet the objective of the award. This disclosure must include a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

(2) Favorable developments which enable meeting time schedules and objectives sooner or at less cost than anticipated or producing more beneficial results than originally planned.

(e) Federal agencies may make site visits as warranted by program needs.

(f) *Waivers, extensions.* (1) Federal agencies may waive any performance report required by this part if not needed.

(2) The grantee may waive any performance report from a subgrantee when not needed. The grantee may extend the due date for any performance report from a subgrantee if the grantee will still be able to meet its performance reporting obligations to the Federal agency.

### § 43.41 Financial reporting.

(a) *General.* (1) Except as provided in paragraphs (a)(2) and (5) of this section, grantees will use only the forms specified in paragraphs (a) through (e) of this section, and such supplementary or other forms as may from time to time be authorized by OMB, for:

(i) Submitting financial reports to Federal agencies, or

(ii) Requesting advances or reimbursements when letters of credit are not used.

(2) Grantees need not apply the forms prescribed in this section in dealing with their subgrantees. However, grantees shall not impose more burdensome requirements on subgrantees.

(3) Grantees shall follow all applicable standard and supplemental Federal agency instructions approved by OMB to the extend required under the Paperwork Reduction Act of 1980 for use in connection with forms specified in

paragraphs (b) through (e) of this section. Federal agencies may issue substantive supplementary instructions only with the approval of OMB. Federal agencies may shade out or instruct the grantee to disregard any line item that the Federal agency finds unnecessary for its decisionmaking purposes.

(4) Grantees will not be required to submit more than the original and two copies of forms required under this part.

(5) Federal agencies may provide computer outputs to grantees to expedite or contribute to the accuracy of reporting. Federal agencies may accept the required information from grantees in machine usable format or computer printouts instead of prescribed forms.

(6) Federal agencies may waive any report required by this section if not needed.

(7) Federal agencies may extend the due date of any financial report upon receiving a justified request from a grantee.

(b) *Financial Status Report*—(1) *Form.* Grantees will use Standard Form 269 or 269A, Financial Status Report, to report the status of funds for all nonconstruction grants and for construction grants when required in accordance with paragraph §43.41(e)(2)(iii) of this section.

(2) *Accounting basis.* Each grantee will report program outlays and program income on a cash or accrual basis as prescribed by the awarding agency. If the Federal agency requires accrual information and the grantee's accounting records are not normally kept on the accural basis, the grantee shall not be required to convert its accounting system but shall develop such accrual information through and analysis of the documentation on hand.

(3) *Frequency.* The Federal agency may prescribe the frequency of the report for each project or program. However, the report will not be required more frequently than quarterly. If the Federal agency does not specify the frequency of the report, it will be submitted annually. A final report will be required upon expiration or termination of grant support.

(4) *Due date.* When reports are required on a quarterly or semiannual basis, they will be due 30 days after the reporting period. When required on an annual basis, they will be due 90 days after the grant year. Final reports will be due 90 days after the expiration or termination of grant support.

(c) *Federal Cash Transactions Report*—(1) *Form.* (i) For grants paid by letter or credit, Treasury check advances or electronic transfer of funds, the grantee will submit the Standard Form 272, Federal Cash Transactions Report, and when necessary, its continuation sheet, Standard Form 272a, unless the terms of the award exempt the grantee from this requirement.

(ii) These reports will be used by the Federal agency to monitor cash advanced to grantees and to obtain disbursement or outlay information for each grant from grantees. The format of the report may be adapted as appropriate when reporting is to be accomplished with the assistance of automatic data processing equipment provided that the information to be submitted is not changed in substance.

(2) *Forecasts of Federal cash requirements.* Forecasts of Federal cash requirements may be required in the ''Remarks'' section of the report.

(3) *Cash in hands of subgrantees.* When considered necessary and feasible by the Federal agency, grantees may be required to report the amount of cash advances in excess of three days' needs in the hands of their subgrantees or contractors and to provide short narrative explanations of actions taken by the grantee to reduce the excess balances.

(4) *Frequency and due date.* Grantees must submit the report no later than 15 working days following the end of each quarter. However, where an advance either by letter of credit or electronic transfer of funds is authorized at an annualized rate of one million dollars or more, the Federal agency may require the report to be submitted within 15 working days following the end of each month.

(d) *Request for advance or reimbursement*—(1) *Advance payments.* Requests for Treasury check advance payments will be submitted on Standard Form 270, Request for Advance or Reimbursement. (This form will not be used for drawdowns under a letter of credit, electronic funds transfer or when

Treasury check advance payments are made to the grantee automatically on a predetermined basis.)

(2) *Reimbursements.* Requests for reimbursement under nonconstruction grants will also be submitted on Standard Form 270. (For reimbursement requests under construction grants, see paragraph (e)(1) of this section.)

(3) The frequency for submitting payment requests is treated in § 43.41(b)(3).

(e) *Outlay report and request for reimbursement for construction programs.* (1) Grants that support construction activities paid by reimbursement method.

(i) Requests for reimbursement under construction grants will be submitted on Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. Federal agencies may, however, prescribe the Request for Advance or Reimbursement form, specified in § 43.41(d), instead of this form.

(ii) The frequency for submitting reimbursement requests is treated in § 43.41(b)(3).

(2) Grants that support construction activities paid by letter of credit, electronic funds transfer or Treasury check advance.

(i) When a construction grant is paid by letter of credit, electronic funds transfer or Treasury check advances, the grantee will report its outlays to the Federal agency using Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. The Federal agency will provide any necessary special instruction. However, frequency and due date shall be governed by § 43.41(b)(3) and (4).

(ii) When a construction grant is paid by Treasury check advances based on periodic requests from the grantee, the advances will be requested on the form specified in § 43.41(d).

(iii) The Federal agency may substitute the Financial Status Report specified in § 43.41(b) for the Outlay Report and Request for Reimbursement for Construction Programs.

(3) *Accounting basis.* The accounting basis for the Outlay Report and Request for Reimbursement for Construction Programs shall be governed by § 43.41(b)(2).

## § 43.42 Retention and access requirements for records.

(a) *Applicability.* (1) This section applies to all financial and programmatic records, supporting documents, statistical records, and other records of grantees or subgrantees which are:

(i) Required to be maintained by the terms of this part, program regulations or the grant agreement, or

(ii) Otherwise reasonably considered as pertinent to program regulations or the grant agreement.

(2) This section does not apply to records maintained by contractors or subcontractors. For a requirement to place a provision concerning records in certain kinds of contracts, see § 43.36(i)(10).

(b) *Length of retention period.* (1) Except as otherwise provided, records must be retained for three years from the starting date specified in paragraph (c) of this section.

(2) If any litigation, claim, negotiation, audit or other action involving the records has been started before the expiration of the 3-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular 3-year period, whichever is later.

(3) To avoid duplicate recordkeeping, awarding agencies may make special arrangements with grantees and subgrantees to retain any records which are continuously needed for joint use. The awarding agency will request transfer of records to its custody when it determines that the records possess long-term retention value. When the records are transferred to or maintained by the Federal agency, the 3-year retention requirement is not applicable to the grantee or subgrantee.

(c) *Starting date of retention period*—(1) *General.* When grant support is continued or renewed at annual or other intervals, the retention period for the records of each funding period starts on the day the grantee or subgrantee submits to the awarding agency its single or last expenditure report for that period. However, if grant support is continued or renewed quarterly, the retention period for each year's records starts on the day the grantee submits

its expenditure report for the last quarter of the Federal fiscal year. In all other cases, the retention period starts on the day the grantee submits its final expenditure report. If an expenditure report has been waived, the retention period starts on the day the report would have been due.

(2) *Real property and equipment records.* The retention period for real property and equipment records starts from the date of the disposition or replacement or transfer at the direction of the awarding agency.

(3) *Records for income transactions after grant or subgrant support.* In some cases grantees must report income after the period of grant support. Where there is such a requirement, the retention period for the records pertaining to the earning of the income starts from the end of the grantee's fiscal year in which the income is earned.

(4) *Indirect cost rate proposals, cost allocations plans, etc.* This paragraph applies to the following types of documents, and their supporting records: indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(i) *If submitted for negotiation.* If the proposal, plan, or other computation is required to be submitted to the Federal Government (or to the grantee) to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts from the date of such submission.

(ii) *If not submitted for negotiation.* If the proposal, plan, or other computation is not required to be submitted to the Federal Government (or to the grantee) for negotiation purposes, then the 3-year retention period for the proposal plan, or computation and its supporting records starts from end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

(d) *Substitution of microfilm.* Copies made by microfilming, photocopying, or similar methods may be substituted for the original records.

(e) *Access to records*—(1) *Records of grantees and subgrantees.* The awarding agency and the Comptroller General of the United States, or any of their authorized representatives, shall have the right of access to any pertinent books, documents, papers, or other records of grantees and subgrantees which are pertinent to the grant, in order to make audits, examinations, excerpts, and transcripts.

(2) *Expiration of right of access.* The rights of access in this section must not be limited to the required retention period but shall last as long as the records are retained.

(f) *Restrictions on public access.* The Federal Freedom of Information Act (5 U.S.C. 552) does not apply to records Unless required by Federal, State, or local law, grantees and subgrantees are not required to permit public access to their records.

### §43.43 Enforcement.

(a) *Remedies for noncompliance.* If a grantee or subgrantee materially fails to comply with any term of an award, whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere, the awarding agency may take one or more of the following actions, as appropriate in the circumstances:

(1) Temporarily withhold cash payments pending correction of the deficiency by the grantee or subgrantee or more severe enforcement action by the awarding agency,

(2) Disallow (that is, deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance,

(3) Wholly or partly suspend or terminate the current award for the grantee's or subgrantee's program,

(4) Withhold further awards for the program, or

(5) Take other remedies that may be legally available.

(b) *Hearings, appeals.* In taking an enforcement action, the awarding agency will provide the grantee or subgrantee an opportunity for such hearing, appeal, or other administrative proceeding to which the grantee or subgrantee is entitled under any statute or regulation applicable to the action involved.

(c) *Effects of suspension and termination.* Costs of grantee or subgrantee resulting from obligations incurred by the grantee or subgrantee during a suspension or after termination of an award are not allowable unless the awarding agency expressly authorizes them in the notice of suspension or termination or subsequently. Other grantee or subgrantee costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if:

(1) The costs result from obligations which were properly incurred by the grantee or subgrantee before the effective date of suspension or termination, are not in anticipation of it, and, in the case of a termination, are noncancellable, and,

(2) The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) *Relationship to Debarment and Suspension.* The enforcement remedies identified in this section, including suspension and termination, do not preclude grantee or subgrantee from being subject to ''Debarment and Suspension'' under E.O. 12549 (see § 43.35).

### § 43.44 Termination for convenience.

Except as provided in § 43.43 awards may be terminated in whole or in part only as follows:

(a) By the awarding agency with the consent of the grantee or subgrantee in which case the two parties shall agree upon the termination conditions, including the effective date and in the case of partial termination, the portion to be terminated, or

(b) By the grantee or subgrantee upon written notification to the awarding agency, setting forth the reasons for such termination, the effective date, and in the case of partial termination, the portion to be terminated. However, if, in the case of a partial termination, the awarding agency determines that the remaining portion of the award will not accomplish the purposes for which the award was made, the awarding agency may terminate the award in its entirety under either § 43.43 or paragraph (a) of this section.

## Subpart D—After-The-Grant Requirements

### § 43.50 Closeout.

(a) *General.* The Federal agency will close out the award when it determines that all applicable administrative actions and all required work of the grant has been completed.

(b) *Reports.* Within 90 days after the expiration or termination of the grant, the grantee must submit all financial, performance, and other reports required as a condition of the grant. Upon request by the grantee, Federal agencies may extend this timeframe. These may include but are not limited to:

(1) *Final performance or progress report.*

(2) *Financial Status Report (SF 269) or Outlay Report and Request for Reimbursement for Construction Programs (SF–271) (as applicable.)*

(3) *Final request for payment (SF–270) (if applicable).*

(4) *Invention disclosure (if applicable).*

(5) *Federally-owned property report:*

In accordance with § 43.32(f), a grantee must submit an inventory of all federally owned property (as distinct from property acquired with grant funds) for which it is accountable and request disposition instructions from the Federal agency of property no longer needed.

(c) *Cost adjustment.* The Federal agency will, within 90 days after receipt of reports in paragraph (b) of this section, make upward or downward adjustments to the allowable costs.

(d) *Cash adjustments.* (1) The Federal agency will make prompt payment to the grantee for allowable reimbursable costs.

(2) The grantee must immediately refund to the Federal agency any balance of unobligated (unencumbered) cash advanced that is not authorized to be retained for use on other grants.

### § 43.51 Later disallowances and adjustments.

The closeout of a grant does not affect:

(a) The Federal agency's right to disallow costs and recover funds on the basis of a later audit or other review;

(b) The grantee's obligation to return any funds due as a result of later refunds, corrections, or other transactions;

(c) Records retention as required in § 43.42;

(d) Property management requirements in § 43.31 and § 43.32; and

(e) Audit requirements in § 43.26.

**§ 43.52 Collection of amounts due.**

(a) Any funds paid to a grantee in excess of the amount to which the grantee is finally determined to be entitled under the terms of the award constitute a debt to the Federal Government. If not paid within a reasonable period after demand, the Federal agency may reduce the debt by:

(1) Making an adminstrative offset against other requests for reimbursements,

(2) Withholding advance payments otherwise due to the grantee, or

(3) Other action permitted by law.

(b) Except where otherwise provided by statutes or regulations, the Federal agency will charge interest on an overdue debt in accordance with the Federal Claims Collection Standards (4 CFR Ch. II). The date from which interest is computed is not extended by litigation or the filing of any form of appeal.

## Subpart E—Entitlement [Reserved]

# PART 44—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT)

Sec.

44.25 How is this part organized?
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44.75 Do terms in this part have special meanings?

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44.140 How do I know if a person is excluded?
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APPENDIX TO PART 44—COVERED TRANSACTIONS

AUTHORITY: 38 U.S.C. 501 and 38 U.S.C. 3703(c); Sec. 2455, Pub. L. 103–355, 108 Stat. 3327 (31 U.S.C. 6101 note); E.O. 11738 (3 CFR, 1973 Comp., p.799); E.O. 12549 (3 CFR 1986 comp., p.189) E.O. 12689 (3 CFR 1989 Comp., p. 235.)

SOURCE: 68 FR 66544, 66618, 66619, Nov. 26, 2003, unless otherwise noted.

### §44.25 How is this part organized?

(a) This part is subdivided into ten subparts. Each subpart contains information related to a broad topic or specific audience with special responsibilities, as shown in the following table:

| In subpart . . . | You will find provisions related to . . . |
|---|---|
| A | general information about this rule. |
| B | the types of Department of Veterans Affairs transactions that are covered by the Governmentwide nonprocurement suspension and debarment system. |
| C | the responsibilities of persons who participate in covered transactions. |
| D | the responsibilities of Department of Veterans Affairs officials who are authorized to enter into covered transactions. |
| E | the responsibilities of Federal agencies for the *Excluded Parties List System* (Disseminated by the General Services Administration). |
| F | the general principles governing suspension, debarment, voluntary exclusion and settlement. |
| G | suspension actions. |
| H | debarment actions. |
| I | definitions of terms used in this part. |
| J | [Reserved] |

(b) The following table shows which subparts may be of special interest to you, depending on who you are:

| If you are . . . | See subpart(s) . . . |
|---|---|
| (1) a participant or principal in a nonprocurement transaction. | A, B, C, and I. |
| (2) a respondent in a suspension action. | A, B, F, G and I. |
| (3) a respondent in a debarment action. | A, B, F, H and I. |
| (4) a suspending official | A, B, D, E, F, G and I. |
| (5) a debarring official | A, B, D, E, F, H and I. |
| (6) a (n) Department of Veterans Affairs official authorized to enter into a covered transaction. | A, B, D, E and I. |
| (7) Reserved | J. |

### §44.50 How is this part written?

(a) This part uses a ''plain language'' format to make it easier for the general public and business community to

use. The section headings and text, often in the form of questions and answers, must be read together.

(b) Pronouns used within this part, such as ''I'' and ''you,'' change from subpart to subpart depending on the audience being addressed. The pronoun ''we'' always is the Department of Veterans Affairs.

(c) The ''Covered Transactions'' diagram in the appendix to this part shows the levels or ''tiers'' at which the Department of Veterans Affairs enforces an exclusion under this part.

### § 44.75 Do terms in this part have special meanings?

This part uses terms throughout the text that have special meaning. Those terms are defined in Subpart I of this part. For example, three important terms are—

(a) *Exclusion or excluded,* which refers only to discretionary actions taken by a suspending or debarring official under this part or the Federal Acquisition Regulation (48 CFR part 9, subpart 9.4);

(b) *Disqualification or disqualified,* which refers to prohibitions under specific statutes, executive orders (other than Executive Order 12549 and Executive Order 12689), or other authorities. Disqualifications frequently are not subject to the discretion of an agency official, may have a different scope than exclusions, or have special conditions that apply to the disqualification; and

(c) *Ineligibility or ineligible,* which generally refers to a person who is either excluded or disqualified.

## Subpart A—General

### § 44.100 What does this part do?

This part adopts a governmentwide system of debarment and suspension for Department of Veterans Affairs nonprocurement activities. It also provides for reciprocal exclusion of persons who have been excluded under the Federal Acquisition Regulation, and provides for the consolidated listing of all persons who are excluded, or disqualified by statute, executive order, or other legal authority. This part satisfies the requirements in section 3 of Executive Order 12549, ''Debarment and Suspension'' (3 CFR 1986 Comp., p. 189), Executive Order 12689, ''Debarment and Suspension'' (3 CFR 1989 Comp., p. 235) and 31 U.S.C. 6101 note (Section 2455, Public Law 103–355, 108 Stat. 3327).

### § 44.105 Does this part apply to me?

Portions of this part (see table at § 44.25(b)) apply to you if you are a(n)—

(a) Person who has been, is, or may reasonably be expected to be, a participant or principal in a covered transaction;

(b) Respondent (a person against whom the Department of Veterans Affairs has initiated a debarment or suspension action);

(c) Department of Veterans Affairs debarring or suspending official; or

(d) Department of Veterans Affairs official who is authorized to enter into covered transactions with non-Federal parties.

### § 44.110 What is the purpose of the nonprocurement debarment and suspension system?

(a) To protect the public interest, the Federal Government ensures the integrity of Federal programs by conducting business only with responsible persons.

(b) A Federal agency uses the nonprocurement debarment and suspension system to exclude from Federal programs persons who are not presently responsible.

(c) An exclusion is a serious action that a Federal agency may take only to protect the public interest. A Federal agency may not exclude a person or commodity for the purposes of punishment.

### § 44.115 How does an exclusion restrict a person's involvement in covered transactions?

With the exceptions stated in §§ 44.120, 44.315, and 44.420, a person who is excluded by the Department of Veterans Affairs or any other Federal agency may not:

(a) Be a participant in a(n) Department of Veterans Affairs transaction that is a covered transaction under subpart B of this part;

(b) Be a participant in a transaction of any other Federal agency that is a

covered transaction under that agency's regulation for debarment and suspension; or

(c) Act as a principal of a person participating in one of those covered transactions.

### § 44.120 May we grant an exception to let an excluded person participate in a covered transaction?

(a) The Secretary may grant an exception permitting an excluded person to participate in a particular covered transaction. If the Secretary grants an exception, the exception must be in writing and state the reason(s) for deviating from the governmentwide policy in Executive Order 12549.

(b) An exception granted by one agency for an excluded person does not extend to the covered transactions of another agency.

### § 44.125 Does an exclusion under the nonprocurement system affect a person's eligibility for Federal procurement contracts?

If any Federal agency excludes a person under its nonprocurement common rule on or after August 25, 1995, the excluded person is also ineligible to participate in Federal procurement transactions under the FAR. Therefore, an exclusion under this part has reciprocal effect in Federal procurement transactions.

### § 44.130 Does exclusion under the Federal procurement system affect a person's eligibility to participate in nonprocurement transactions?

If any Federal agency excludes a person under the FAR on or after August 25, 1995, the excluded person is also ineligible to participate in nonprocurement covered transactions under this part. Therefore, an exclusion under the FAR has reciprocal effect in Federal nonprocurement transactions.

### § 44.135 May the Department of Veterans Affairs exclude a person who is not currently participating in a nonprocurement transaction?

Given a cause that justifies an exclusion under this part, we may exclude any person who has been involved, is currently involved, or may reasonably be expected to be involved in a covered transaction.

### § 44.140 How do I know if a person is excluded?

Check the *Excluded Parties List System (EPLS)* to determine whether a person is excluded. The General Services Administration (GSA) maintains the *EPLS* and makes it available, as detailed in subpart E of this part. When a Federal agency takes an action to exclude a person under the nonprocurement or procurement debarment and suspension system, the agency enters the information about the excluded person into the *EPLS*.

### § 44.145 Does this part address persons who are disqualified, as well as those who are excluded from nonprocurement transactions?

Except if provided for in Subpart J of this part, this part—

(a) Addresses disqualified persons only to—

(1) Provide for their inclusion in the *EPLS;* and

(2) State responsibilities of Federal agencies and participants to check for disqualified persons before entering into covered transactions.

(b) Does not specify the—

(1) Department of Veterans Affairs transactions for which a disqualified person is ineligible. Those transactions vary on a case-by-case basis, because they depend on the language of the specific statute, Executive order, or regulation that caused the disqualification;

(2) Entities to which the disqualification applies; or

(3) Process that the agency uses to disqualify a person. Unlike exclusion, disqualification is frequently not a discretionary action that a Federal agency takes.

## Subpart B—Covered Transactions

### § 44.200 What is a covered transaction?

A covered transaction is a nonprocurement or procurement transaction that is subject to the prohibitions of this part. It may be a transaction at—

(a) The primary tier, between a Federal agency and a person (see appendix to this part); or

(b) A lower tier, between a participant in a covered transaction and another person.

### § 44.205 Why is it important if a particular transaction is a covered transaction?

The importance of a covered transaction depends upon who you are.

(a) As a participant in the transaction, you have the responsibilities laid out in Subpart C of this part. Those include responsibilities to the person or Federal agency at the next higher tier from whom you received the transaction, if any. They also include responsibilities if you subsequently enter into other covered transactions with persons at the next lower tier.

(b) As a Federal official who enters into a primary tier transaction, you have the responsibilities laid out in subpart D of this part.

(c) As an excluded person, you may not be a participant or principal in the transaction unless—

(1) The person who entered into the transaction with you allows you to continue your involvement in a transaction that predates your exclusion, as permitted under § 44.310 or § 44.415; or

(2) A(n) Department of Veterans Affairs official obtains an exception from the Secretary to allow you to be involved in the transaction, as permitted under § 44.120.

### § 44.210 Which nonprocurement transactions are covered transactions?

All nonprocurement transactions, as defined in § 44.970, are covered transactions unless listed in § 44.215. (See appendix to this part.)

### § 44.215 Which nonprocurement transactions are not covered transactions?

The following types of nonprocurement transactions are not covered transactions:

(a) A direct award to—

(1) A foreign government or foreign governmental entity;

(2) A public international organization;

(3) An entity owned (in whole or in part) or controlled by a foreign government; or

(4) Any other entity consisting wholly or partially of one or more foreign governments or foreign governmental entities.

(b) A benefit to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted). For example, if a person receives social security benefits under the Supplemental Security Income provisions of the Social Security Act, 42 U.S.C. 1301 et seq., those benefits are not covered transactions and, therefore, are not affected if the person is excluded.

(c) Federal employment.

(d) A transaction that the Department of Veterans Affairs needs to respond to a national or agency-recognized emergency or disaster.

(e) A permit, license, certificate, or similar instrument issued as a means to regulate public health, safety, or the environment, unless the Department of Veterans Affairs specifically designates it to be a covered transaction.

(f) An incidental benefit that results from ordinary governmental operations.

(g) Any other transaction if the application of an exclusion to the transaction is prohibited by law.

### § 44.220 Are any procurement contracts included as covered transactions?

(a) Covered transactions under this part—

(1) Do not include any procurement contracts awarded directly by a Federal agency; but

(2) Do include some procurement contracts awarded by non-Federal participants in nonprocurement covered transactions (see appendix to this part).

(b) Specifically, a contract for goods or services is a covered transaction if any of the following applies:

(1) The contract is awarded by a participant in a nonprocurement transaction that is covered under § 44.210, and the amount of the contract is expected to equal or exceed $25,000.

(2) The contract requires the consent of a(n) Department of Veterans Affairs official. In that case, the contract, regardless of the amount, always is a covered transaction, and it does not matter who awarded it. For example, it could be a subcontract awarded by a

contractor at a tier below a nonprocurement transaction, as shown in the appendix to this part.

(3) The contract is for federally-required audit services.

### § 44.225 How do I know if a transaction in which I may participate is a covered transaction?

As a participant in a transaction, you will know that it is a covered transaction because the agency regulations governing the transaction, the appropriate agency official, or participant at the next higher tier who enters into the transaction with you, will tell you that you must comply with applicable portions of this part.

## Subpart C—Responsibilities of Participants Regarding Transactions

DOING BUSINESS WITH OTHER PERSONS

### § 44.300 What must I do before I enter into a covered transaction with another person at the next lower tier?

When you enter into a covered transaction with another person at the next lower tier, you must verify that the person with whom you intend to do business is not excluded or disqualified. You do this by:

(a) Checking the *EPLS;* or

(b) Collecting a certification from that person if allowed by this rule; or

(c) Adding a clause or condition to the covered transaction with that person.

### § 44.305 May I enter into a covered transaction with an excluded or disqualified person?

(a) You as a participant may not enter into a covered transaction with an excluded person, unless the Department of Veterans Affairs grants an exception under § 44.120.

(b) You may not enter into any transaction with a person who is disqualified from that transaction, unless you have obtained an exception under the disqualifying statute, Executive order, or regulation.

### § 44.310 What must I do if a Federal agency excludes a person with whom I am already doing business in a covered transaction?

(a) You as a participant may continue covered transactions with an excluded person if the transactions were in existence when the agency excluded the person. However, you are not required to continue the transactions, and you may consider termination. You should make a decision about whether to terminate and the type of termination action, if any, only after a thorough review to ensure that the action is proper and appropriate.

(b) You may not renew or extend covered transactions (other than no-cost time extensions) with any excluded person, unless the Department of Veterans Affairs grants an exception under § 44.120.

### § 44.315 May I use the services of an excluded person as a principal under a covered transaction?

(a) You as a participant may continue to use the services of an excluded person as a principal under a covered transaction if you were using the services of that person in the transaction before the person was excluded. However, you are not required to continue using that person's services as a principal. You should make a decision about whether to discontinue that person's services only after a thorough review to ensure that the action is proper and appropriate.

(b) You may not begin to use the services of an excluded person as a principal under a covered transaction unless the Department of Veterans Affairs grants an exception under § 44.120.

### § 44.320 Must I verify that principals of my covered transactions are eligible to participate?

Yes, you as a participant are responsible for determining whether any of your principals of your covered transactions is excluded or disqualified from participating in the transaction. You may decide the method and frequency by which you do so. You may, but you are not required to, check the *EPLS.*

### § 44.325 What happens if I do business with an excluded person in a covered transaction?

If as a participant you knowingly do business with an excluded person, we may disallow costs, annul or terminate the transaction, issue a stop work order, debar or suspend you, or take other remedies as appropriate.

### § 44.330 What requirements must I pass down to persons at lower tiers with whom I intend to do business?

Before entering into a covered transaction with a participant at the next lower tier, you must require that participant to—

(a) Comply with this subpart as a condition of participation in the transaction. You may do so using any method(s), unless § 44.440 requires you to use specific methods.

(b) Pass the requirement to comply with this subpart to each person with whom the participant enters into a covered transaction at the next lower tier.

## DISCLOSING INFORMATION—PRIMARY TIER PARTICIPANTS

### § 44.335 What information must I provide before entering into a covered transaction with the Department of Veterans Affairs?

Before you enter into a covered transaction at the primary tier, you as the participant must notify the Department of Veterans Affairs office that is entering into the transaction with you, if you know that you or any of the principals for that covered transaction:

(a) Are presently excluded or disqualified;

(b) Have been convicted within the preceding three years of any of the offenses listed in § 44.800(a) or had a civil judgment rendered against you for one of those offenses within that time period;

(c) Are presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses listed in § 44.800(a); or

(d) Have had one or more public transactions (Federal, State, or local) terminated within the preceding three years for cause or default.

### § 44.340 If I disclose unfavorable information required under § 44.335, will I be prevented from participating in the transaction?

As a primary tier participant, your disclosure of unfavorable information about yourself or a principal under § 44.335 will not necessarily cause us to deny your participation in the covered transaction. We will consider the information when we determine whether to enter into the covered transaction. We also will consider any additional information or explanation that you elect to submit with the disclosed information.

### § 44.345 What happens if I fail to disclose information required under § 44.335?

If we later determine that you failed to disclose information under § 44.335 that you knew at the time you entered into the covered transaction, we may—

(a) Terminate the transaction for material failure to comply with the terms and conditions of the transaction; or

(b) Pursue any other available remedies, including suspension and debarment.

### § 44.350 What must I do if I learn of information required under § 44.335 after entering into a covered transaction with the Department of Veterans Affairs?

At any time after you enter into a covered transaction, you must give immediate written notice to the Department of Veterans Affairs office with which you entered into the transaction if you learn either that—

(a) You failed to disclose information earlier, as required by § 44.335; or

(b) Due to changed circumstances, you or any of the principals for the transaction now meet any of the criteria in § 44.335.

## DISCLOSING INFORMATION—LOWER TIER PARTICIPANTS

### § 44.355 What information must I provide to a higher tier participant before entering into a covered transaction with that participant?

Before you enter into a covered transaction with a person at the next

higher tier, you as a lower tier participant must notify that person if you know that you or any of the principals are presently excluded or disqualified.

### § 44.360 What happens if I fail to disclose the information required under § 44.355?

If we later determine that you failed to tell the person at the higher tier that you were excluded or disqualified at the time you entered into the covered transaction with that person, we may pursue any available remedies, including suspension and debarment.

### § 44.365 What must I do if I learn of information required under § 44.355 after entering into a covered transaction with a higher tier participant?

At any time after you enter into a lower tier covered transaction with a person at a higher tier, you must provide immediate written notice to that person if you learn either that—

(a) You failed to disclose information earlier, as required by § 44.355; or

(b) Due to changed circumstances, you or any of the principals for the transaction now meet any of the criteria in § 44.355.

## Subpart D—Responsibilities of Department of Veterans Affairs Officials Regarding Transactions

### § 44.400 May I enter into a transaction with an excluded or disqualified person?

(a) You as an agency official may not enter into a covered transaction with an excluded person unless you obtain an exception under § 44.120.

(b) You may not enter into any transaction with a person who is disqualified from that transaction, unless you obtain a waiver or exception under the statute, Executive order, or regulation that is the basis for the person's disqualification.

### § 44.405 May I enter into a covered transaction with a participant if a principal of the transaction is excluded?

As an agency official, you may not enter into a covered transaction with a participant if you know that a principal of the transaction is excluded, unless you obtain an exception under § 44.120.

### § 44.410 May I approve a participant's use of the services of an excluded person?

After entering into a covered transaction with a participant, you as an agency official may not approve a participant's use of an excluded person as a principal under that transaction, unless you obtain an exception under § 44.120.

### § 44.415 What must I do if a Federal agency excludes the participant or a principal after I enter into a covered transaction?

(a) You as an agency official may continue covered transactions with an excluded person, or under which an excluded person is a principal, if the transactions were in existence when the person was excluded. You are not required to continue the transactions, however, and you may consider termination. You should make a decision about whether to terminate and the type of termination action, if any, only after a thorough review to ensure that the action is proper.

(b) You may not renew or extend covered transactions (other than no-cost time extensions) with any excluded person, or under which an excluded person is a principal, unless you obtain an exception under § 44.120.

### § 44.420 May I approve a transaction with an excluded or disqualified person at a lower tier?

If a transaction at a lower tier is subject to your approval, you as an agency official may not approve—

(a) A covered transaction with a person who is currently excluded, unless you obtain an exception under § 44.120; or

(b) A transaction with a person who is disqualified from that transaction, unless you obtain a waiver or exception under the statute, Executive order, or regulation that is the basis for the person's disqualification.

### § 44.425 When do I check to see if a person is excluded or disqualified?

As an agency official, you must check to see if a person is excluded or disqualified before you—

(a) Enter into a primary tier covered transaction;

(b) Approve a principal in a primary tier covered transaction;

(c) Approve a lower tier participant if agency approval of the lower tier participant is required; or

(d) Approve a principal in connection with a lower tier transaction if agency approval of the principal is required.

### § 44.430 How do I check to see if a person is excluded or disqualified?

You check to see if a person is excluded or disqualified in two ways:

(a) You as an agency official must check the *EPLS* when you take any action listed in § 44.425.

(b) You must review information that a participant gives you, as required by § 44.335, about its status or the status of the principals of a transaction.

### § 44.435 What must I require of a primary tier participant?

You as an agency official must require each participant in a primary tier covered transaction to—

(a) Comply with subpart C of this part as a condition of participation in the transaction; and

(b) Communicate the requirement to comply with Subpart C of this part to persons at the next lower tier with whom the primary tier participant enters into covered transactions.

### § 44.440 What method do I use to communicate those requirements to participants?

To communicate the requirement, you must include a term or condition in the transaction requiring the participants' compliance with subpart C of this part and requiring them to include a similar term or condition in lower-tier covered transactions.

[68 FR 66619, Nov. 26, 2003]

### § 44.445 What action may I take if a primary tier participant knowingly does business with an excluded or disqualified person?

If a participant knowingly does business with an excluded or disqualified person, you as an agency official may refer the matter for suspension and debarment consideration. You may also disallow costs, annul or terminate the transaction, issue a stop work order, or take any other appropriate remedy.

### § 44.450 What action may I take if a primary tier participant fails to disclose the information required under § 44.335?

If you as an agency official determine that a participant failed to disclose information, as required by § 44.335, at the time it entered into a covered transaction with you, you may—

(a) Terminate the transaction for material failure to comply with the terms and conditions of the transaction; or

(b) Pursue any other available remedies, including suspension and debarment.

### § 44.455 What may I do if a lower tier participant fails to disclose the information required under § 44.355 to the next higher tier?

If you as an agency official determine that a lower tier participant failed to disclose information, as required by § 44.355, at the time it entered into a covered transaction with a participant at the next higher tier, you may pursue any remedies available to you, including the initiation of a suspension or debarment action.

## Subpart E—Excluded Parties List System

### § 44.500 What is the purpose of the Excluded Parties List System (EPLS)?

The *EPLS* is a widely available source of the most current information about persons who are excluded or disqualified from covered transactions.

### § 44.505 Who uses the EPLS?

(a) Federal agency officials use the *EPLS* to determine whether to enter

into a transaction with a person, as required under §44.430.

(b) Participants also may, but are not required to, use the *EPLS* to determine if—

(1) Principals of their transactions are excluded or disqualified, as required under §44.320; or

(2) Persons with whom they are entering into covered transactions at the next lower tier are excluded or disqualified.

(c) The *EPLS* is available to the general public.

### §44.510 Who maintains the EPLS?

In accordance with the OMB guidelines, the General Services Administration (GSA) maintains the *EPLS*. When a Federal agency takes an action to exclude a person under the nonprocurement or procurement debarment and suspension system, the agency enters the information about the excluded person into the *EPLS*.

### §44.515 What specific information is in the EPLS?

(a) At a minimum, the *EPLS* indicates—

(1) The full name (where available) and address of each excluded or disqualified person, in alphabetical order, with cross references if more than one name is involved in a single action;

(2) The type of action;

(3) The cause for the action;

(4) The scope of the action;

(5) Any termination date for the action;

(6) The agency and name and telephone number of the agency point of contact for the action; and

(7) The Dun and Bradstreet Number (DUNS), or other similar code approved by the GSA, of the excluded or disqualified person, if available.

(b)(1) The database for the *EPLS* includes a field for the Taxpayer Identification Number (TIN) (the social security number (SSN) for an individual) of an excluded or disqualified person.

(2) Agencies disclose the SSN of an individual to verify the identity of an individual, only if permitted under the Privacy Act of 1974 and, if appropriate, the Computer Matching and Privacy Protection Act of 1988, as codified in 5 U.S.C. 552(a).

### §44.520 Who places the information into the EPLS?

Federal officials who take actions to exclude persons under this part or officials who are responsible for identifying disqualified persons must enter the following information about those persons into the *EPLS*:

(a) Information required by §44.515(a);

(b) The Taxpayer Identification Number (TIN) of the excluded or disqualified person, including the social security number (SSN) for an individual, if the number is available and may be disclosed under law;

(c) Information about an excluded or disqualified person, generally within five working days, after—

(1) Taking an exclusion action;

(2) Modifying or rescinding an exclusion action;

(3) Finding that a person is disqualified; or

(4) Finding that there has been a change in the status of a person who is listed as disqualified.

### §44.525 Whom do I ask if I have questions about a person in the EPLS?

If you have questions about a person in the *EPLS*, ask the point of contact for the Federal agency that placed the person's name into the *EPLS*. You may find the agency point of contact from the *EPLS*.

### §44.530 Where can I find the EPLS?

(a) You may access the *EPLS* through the Internet, currently at *http://epls.arnet.gov*.

(b) As of November 26, 2003, you may also subscribe to a printed version. However, we anticipate discontinuing the printed version. Until it is discontinued, you may obtain the printed version by purchasing a yearly subscription from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, or by calling the Government Printing Office Inquiry and Order Desk at (202) 783–3238.

## Subpart F—General Principles Relating to Suspension and Debarment Actions

### § 44.600 How do suspension and debarment actions start?

When we receive information from any source concerning a cause for suspension or debarment, we will promptly report and investigate it. We refer the question of whether to suspend or debar you to our suspending or debarring official for consideration, if appropriate.

### § 44.605 How does suspension differ from debarment?

Suspension differs from debarment in that—

| A suspending official . . . | A debarring official . . . |
|---|---|
| (a) Imposes suspension as a temporary status of ineligibility for procurement and nonprocurement transactions, pending completion of an investigation or legal proceedings. | Imposes debarment for a specified period as a final determination that a person is not presently responsible. |
| (b) Must— ..... (1) Have *adequate evidence* that there may be a cause for debarment of a person; and. (2) Conclude that *immediate action* is necessary to protect the Federal interest. | Must conclude, based on a *preponderance of the evidence,* that the person has engaged in conduct that warrants debarment. |
| (c) Usually imposes the suspension *first,* and then promptly notifies the suspended person, giving the person an opportunity to contest the suspension and have it lifted. | Imposes debarment *after* giving the respondent notice of the action and an opportunity to contest the proposed debarment. |

### § 44.610 What procedures does the Department of Veterans Affairs use in suspension and debarment actions?

In deciding whether to suspend or debar you, we handle the actions as informally as practicable, consistent with principles of fundamental fairness.

(a) For suspension actions, we use the procedures in this subpart and subpart G of this part.

(b) For debarment actions, we use the procedures in this subpart and subpart H of this part.

### § 44.615 How does the Department of Veterans Affairs notify a person of a suspension or debarment action?

(a) The suspending or debarring official sends a written notice to the last known street address, facsimile number, or e-mail address of—

(1) You or your identified counsel; or

(2) Your agent for service of process, or any of your partners, officers, directors, owners, or joint venturers.

(b) The notice is effective if sent to any of these persons.

### § 44.620 Do Federal agencies coordinate suspension and debarment actions?

Yes, when more than one Federal agency has an interest in a suspension or debarment, the agencies may consider designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods and procedures for coordinating their suspension and debarment actions.

### § 44.625 What is the scope of a suspension or debarment?

If you are suspended or debarred, the suspension or debarment is effective as follows:

(a) Your suspension or debarment constitutes suspension or debarment of all of your divisions and other organizational elements from all covered transactions, unless the suspension or debarment decision is limited—

(1) By its terms to one or more specifically identified individuals, divisions, or other organizational elements; or

(2) To specific types of transactions.

(b) Any affiliate of a participant may be included in a suspension or debarment action if the suspending or debarring official—

(1) Officially names the affiliate in the notice; and

(2) Gives the affiliate an opportunity to contest the action.

### § 44.630 May the Department of Veterans Affairs impute conduct of one person to another?

For purposes of actions taken under this rule, we may impute conduct as follows:

(a) *Conduct imputed from an individual to an organization.* We may impute the fraudulent, criminal, or other improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with an organization, to that organization when the improper conduct occurred in connection with the individual's performance of duties for or on behalf of that organization, or with the organization's knowledge, approval or acquiescence. The organization's acceptance of the benefits derived from the conduct is evidence of knowledge, approval or acquiescence.

(b) *Conduct imputed from an organization to an individual, or between individuals.* We may impute the fraudulent, criminal, or other improper conduct of any organization to an individual, or from one individual to another individual, if the individual to whom the improper conduct is imputed either participated in, had knowledge of, or reason to know of the improper conduct.

(c) *Conduct imputed from one organization to another organization.* We may impute the fraudulent, criminal, or other improper conduct of one organization to another organization when the improper conduct occurred in connection with a partnership, joint venture, joint application, association or similar arrangement, or when the organization to whom the improper conduct is imputed has the power to direct, manage, control or influence the activities of the organization responsible for the improper conduct. Acceptance of the benefits derived from the conduct is evidence of knowledge, approval or acquiescence.

### § 44.635 May the Department of Veterans Affairs settle a debarment or suspension action?

Yes, we may settle a debarment or suspension action at any time if it is in the best interest of the Federal Government.

### § 44.640 May a settlement include a voluntary exclusion?

Yes, if we enter into a settlement with you in which you agree to be excluded, it is called a voluntary exclusion and has governmentwide effect.

### § 44.645 Do other Federal agencies know if the Department of Veterans Affairs agrees to a voluntary exclusion?

(a) Yes, we enter information regarding a voluntary exclusion into the *EPLS*.

(b) Also, any agency or person may contact us to find out the details of a voluntary exclusion.

## Subpart G—Suspension

### § 44.700 When may the suspending official issue a suspension?

Suspension is a serious action. Using the procedures of this subpart and subpart F of this part, the suspending official may impose suspension only when that official determines that—

(a) There exists an indictment for, or other adequate evidence to suspect, an offense listed under § 44.800(a), or

(b) There exists adequate evidence to suspect any other cause for debarment listed under § 44.800(b) through (d); and

(c) Immediate action is necessary to protect the public interest.

### § 44.705 What does the suspending official consider in issuing a suspension?

(a) In determining the adequacy of the evidence to support the suspension, the suspending official considers how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result. During this assessment, the suspending official may examine the basic documents, including grants, cooperative agreements, loan authorizations, contracts, and other relevant documents.

(b) An indictment, conviction, civil judgment, or other official findings by Federal, State, or local bodies that determine factual and/or legal matters, constitutes adequate evidence for purposes of suspension actions.

(c) In deciding whether immediate action is needed to protect the public interest, the suspending official has wide discretion. For example, the suspending official may infer the necessity for immediate action to protect the public interest either from the nature of the circumstances giving rise to

a cause for suspension or from potential business relationships or involvement with a program of the Federal Government.

### § 44.710 When does a suspension take effect?

A suspension is effective when the suspending official signs the decision to suspend.

### § 44.715 What notice does the suspending official give me if I am suspended?

After deciding to suspend you, the suspending official promptly sends you a Notice of Suspension advising you—

(a) That you have been suspended;

(b) That your suspension is based on—

(1) An indictment;

(2) A conviction;

(3) Other adequate evidence that you have committed irregularities which seriously reflect on the propriety of further Federal Government dealings with you; or

(4) Conduct of another person that has been imputed to you, or your affiliation with a suspended or debarred person;

(c) Of any other irregularities in terms sufficient to put you on notice without disclosing the Federal Government's evidence;

(d) Of the cause(s) upon which we relied under § 44.700 for imposing suspension;

(e) That your suspension is for a temporary period pending the completion of an investigation or resulting legal or debarment proceedings;

(f) Of the applicable provisions of this subpart, Subpart F of this part, and any other Department of Veterans Affairs procedures governing suspension decision making; and

(g) Of the governmentwide effect of your suspension from procurement and nonprocurement programs and activities.

### § 44.720 How may I contest a suspension?

If you as a respondent wish to contest a suspension, you or your representative must provide the suspending official with information in opposition to the suspension. You may do this orally or in writing, but any information provided orally that you consider important must also be submitted in writing for the official record.

### § 44.725 How much time do I have to contest a suspension?

(a) As a respondent you or your representative must either send, or make rrangements to appear and present, the information and argument to the suspending official within 30 days after you receive the Notice of Suspension.

(b) We consider the notice to be received by you—

(1) When delivered, if we mail the notice to the last known street address, or five days after we send it if the letter is undeliverable;

(2) When sent, if we send the notice by facsimile or five days after we send it if the facsimile is undeliverable; or

(3) When delivered, if we send the notice by e-mail or five days after we send it if the e-mail is undeliverable.

### § 44.730 What information must I provide to the suspending official if I contest a suspension?

(a) In addition to any information and argument in opposition, as a respondent your submission to the suspending official must identify—

(1) Specific facts that contradict the statements contained in the Notice of Suspension. A general denial is insufficient to raise a genuine dispute over facts material to the suspension;

(2) All existing, proposed, or prior exclusions under regulations implementing E.O. 12549 and all similar actions taken by Federal, state, or local agencies, including administrative agreements that affect only those agencies;

(3) All criminal and civil proceedings not included in the Notice of Suspension that grew out of facts relevant to the cause(s) stated in the notice; and

(4) All of your affiliates.

(b) If you fail to disclose this information, or provide false information, the Department of Veterans Affairs may seek further criminal, civil or administrative action against you, as appropriate.

### § 44.735 Under what conditions do I get an additional opportunity to challenge the facts on which the suspension is based?

(a) You as a respondent will not have an additional opportunity to challenge the facts if the suspending official determines that—

(1) Your suspension is based upon an indictment, conviction, civil judgment, or other finding by a Federal, State, or local body for which an opportunity to contest the facts was provided;

(2) Your presentation in opposition contains only general denials to information contained in the Notice of Suspension;

(3) The issues raised in your presentation in opposition to the suspension are not factual in nature, or are not material to the suspending official's initial decision to suspend, or the official's decision whether to continue the suspension; or

(4) On the basis of advice from the Department of Justice, an office of the United States Attorney, a State attorney general's office, or a State or local prosecutor's office, that substantial interests of the government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced by conducting fact-finding.

(b) You will have an opportunity to challenge the facts if the suspending official determines that—

(1) The conditions in paragraph (a) of this section do not exist; and

(2) Your presentation in opposition raises a genuine dispute over facts material to the suspension.

(c) If you have an opportunity to challenge disputed material facts under this section, the suspending official or designee must conduct additional proceedings to resolve those facts.

### § 44.740 Are suspension proceedings formal?

(a) Suspension proceedings are conducted in a fair and informal manner. The suspending official may use flexible procedures to allow you to present matters in opposition. In so doing, the suspending official is not required to follow formal rules of evidence or procedure in creating an official record upon which the official will base a final suspension decision.

(b) You as a respondent or your representative must submit any documentary evidence you want the suspending official to consider.

### § 44.745 How is fact-finding conducted?

(a) If fact-finding is conducted—

(1) You may present witnesses and other evidence, and confront any witness presented; and

(2) The fact-finder must prepare written findings of fact for the record.

(b) A transcribed record of fact-finding proceedings must be made, unless you as a respondent and the Department of Veterans Affairs agree to waive it in advance. If you want a copy of the transcribed record, you may purchase it.

### § 44.750 What does the suspending official consider in deciding whether to continue or terminate my suspension?

(a) The suspending official bases the decision on all information contained in the official record. The record includes—

(1) All information in support of the suspending official's initial decision to suspend you;

(2) Any further information and argument presented in support of, or opposition to, the suspension; and

(3) Any transcribed record of fact-finding proceedings.

(b) The suspending official may refer disputed material facts to another official for findings of fact. The suspending official may reject any resulting findings, in whole or in part, only after specifically determining them to be arbitrary, capricious, or clearly erroneous.

### § 44.755 When will I know whether the suspension is continued or terminated?

The suspending official must make a written decision whether to continue, modify, or terminate your suspension within 45 days of closing the official record. The official record closes upon the suspending official's receipt of final submissions, information and findings of fact, if any. The suspending official may extend that period for good cause.

### § 44.760 How long may my suspension last?

(a) If legal or debarment proceedings are initiated at the time of, or during your suspension, the suspension may continue until the conclusion of those proceedings. However, if proceedings are not initiated, a suspension may not exceed 12 months.

(b) The suspending official may extend the 12 month limit under paragraph (a) of this section for an additional 6 months if an office of a U.S. Assistant Attorney General, U.S. Attorney, or other responsible prosecuting official requests an extension in writing. In no event may a suspension exceed 18 months without initiating proceedings under paragraph (a) of this section.

(c) The suspending official must notify the appropriate officials under paragraph (b) of this section of an impending termination of a suspension at least 30 days before the 12 month period expires to allow the officials an opportunity to request an extension.

## Subpart H—Debarment

### § 44.800 What are the causes for debarment?

We may debar a person for—

(a) Conviction of or civil judgment for—

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

(2) Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, receiving stolen property, making false claims, or obstruction of justice; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects your present responsibility;

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as—

(1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or

(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction;

(c) Any of the following causes:

(1) A nonprocurement debarment by any Federal agency taken before October 1, 1988, or a procurement debarment by any Federal agency taken pursuant to 48 CFR part 9, subpart 9.4, before August 25, 1995;

(2) Knowingly doing business with an ineligible person, except as permitted under § 44.120;

(3) Failure to pay a single substantial debt, or a number of outstanding debts (including disallowed costs and overpayments, but not including sums owed the Federal Government under the Internal Revenue Code) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted;

(4) Violation of a material provision of a voluntary exclusion agreement entered into under § 44.640 or of any settlement of a debarment or suspension action; or

(5) Violation of the provisions of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701); or

(d) Any other cause of so serious or compelling a nature that it affects your present responsibility.

### § 44.805 What notice does the debarring official give me if I am proposed for debarment?

After consideration of the causes in § 44.800 of this subpart, if the debarring official proposes to debar you, the official sends you a Notice of Proposed Debarment, pursuant to § 44.615, advising you—

(a) That the debarring official is considering debarring you;

(b) Of the reasons for proposing to debar you in terms sufficient to put

you on notice of the conduct or transactions upon which the proposed debarment is based;

(c) Of the cause(s) under § 44.800 upon which the debarring official relied for proposing your debarment;

(d) Of the applicable provisions of this subpart, Subpart F of this part, and any other Department of Veterans Affairs procedures governing debarment; and

(e) Of the governmentwide effect of a debarment from procurement and nonprocurement programs and activities.

### § 44.810 When does a debarment take effect?

A debarment is not effective until the debarring official issues a decision. The debarring official does not issue a decision until the respondent has had an opportunity to contest the proposed debarment.

### § 44.815 How may I contest a proposed debarment?

If you as a respondent wish to contest a proposed debarment, you or your representative must provide the debarring official with information in opposition to the proposed debarment. You may do this orally or in writing, but any information provided orally that you consider important must also be submitted in writing for the official record.

### § 44.820 How much time do I have to contest a proposed debarment?

(a) As a respondent you or your representative must either send, or make arrangements to appear and present, the information and argument to the debarring official within 30 days after you receive the Notice of Proposed Debarment.

(b) We consider the Notice of Proposed Debarment to be received by you—

(1) When delivered, if we mail the notice to the last known street address, or five days after we send it if the letter is undeliverable;

(2) When sent, if we send the notice by facsimile or five days after we send it if the facsimile is undeliverable; or

(3) When delivered, if we send the notice by e-mail or five days after we send it if the e-mail is undeliverable.

### § 44.825 What information must I provide to the debarring official if I contest a proposed debarment?

(a) In addition to any information and argument in opposition, as a respondent your submission to the debarring official must identify—

(1) Specific facts that contradict the statements contained in the Notice of Proposed Debarment. Include any information about any of the factors listed in § 44.860. A general denial is insufficient to raise a genuine dispute over facts material to the debarment;

(2) All existing, proposed, or prior exclusions under regulations implementing E.O. 12549 and all similar actions taken by Federal, State, or local agencies, including administrative agreements that affect only those agencies;

(3) All criminal and civil proceedings not included in the Notice of Proposed Debarment that grew out of facts relevant to the cause(s) stated in the notice; and

(4) All of your affiliates.

(b) If you fail to disclose this information, or provide false information, the Department of Veterans Affairs may seek further criminal, civil or administrative action against you, as appropriate.

### § 44.830 Under what conditions do I get an additional opportunity to challenge the facts on which a proposed debarment is based?

(a) You as a respondent will not have an additional opportunity to challenge the facts if the debarring official determines that—

(1) Your debarment is based upon a conviction or civil judgment;

(2) Your presentation in opposition contains only general denials to information contained in the Notice of Proposed Debarment; or

(3) The issues raised in your presentation in opposition to the proposed debarment are not factual in nature, or are not material to the debarring official's decision whether to debar.

(b) You will have an additional opportunity to challenge the facts if the debarring official determines that—

(1) The conditions in paragraph (a) of this section do not exist; and

(2) Your presentation in opposition raises a genuine dispute over facts material to the proposed debarment.

(c) If you have an opportunity to challenge disputed material facts under this section, the debarring official or designee must conduct additional proceedings to resolve those facts.

### § 44.835 Are debarment proceedings formal?

(a) Debarment proceedings are conducted in a fair and informal manner. The debarring official may use flexible procedures to allow you as a respondent to present matters in opposition. In so doing, the debarring official is not required to follow formal rules of evidence or procedure in creating an official record upon which the official will base the decision whether to debar.

(b) You or your representative must submit any documentary evidence you want the debarring official to consider.

### § 44.840 How is fact-finding conducted?

(a) If fact-finding is conducted—

(1) You may present witnesses and other evidence, and confront any witness presented; and

(2) The fact-finder must prepare written findings of fact for the record.

(b) A transcribed record of fact-finding proceedings must be made, unless you as a respondent and the Department of Veterans Affairs agree to waive it in advance. If you want a copy of the transcribed record, you may purchase it.

### § 44.845 What does the debarring official consider in deciding whether to debar me?

(a) The debarring official may debar you for any of the causes in § 44.800. However, the official need not debar you even if a cause for debarment exists. The official may consider the seriousness of your acts or omissions and the mitigating or aggravating factors set forth at § 44.860.

(b) The debarring official bases the decision on all information contained in the official record. The record includes—

(1) All information in support of the debarring official's proposed debarment;

(2) Any further information and argument presented in support of, or in opposition to, the proposed debarment; and

(3) Any transcribed record of fact-finding proceedings.

(c) The debarring official may refer disputed material facts to another official for findings of fact. The debarring official may reject any resultant findings, in whole or in part, only after specifically determining them to be arbitrary, capricious, or clearly erroneous.

### § 44.850 What is the standard of proof in a debarment action?

(a) In any debarment action, we must establish the cause for debarment by a preponderance of the evidence.

(b) If the proposed debarment is based upon a conviction or civil judgment, the standard of proof is met.

### § 44.855 Who has the burden of proof in a debarment action?

(a) We have the burden to prove that a cause for debarment exists.

(b) Once a cause for debarment is established, you as a respondent have the burden of demonstrating to the satisfaction of the debarring official that you are presently responsible and that debarment is not necessary.

### § 44.860 What factors may influence the debarring official's decision?

This section lists the mitigating and aggravating factors that the debarring official may consider in determining whether to debar you and the length of your debarment period. The debarring official may consider other factors if appropriate in light of the circumstances of a particular case. The existence or nonexistence of any factor, such as one of those set forth in this section, is not necessarily determinative of your present responsibility. In making a debarment decision, the debarring official may consider the following factors:

(a) The actual or potential harm or impact that results or may result from the wrongdoing.

(b) The frequency of incidents and/or duration of the wrongdoing.

(c) Whether there is a pattern or prior history of wrongdoing. For example, if you have been found by another Federal agency or a State agency to have engaged in wrongdoing similar to that found in the debarment action, the existence of this fact may be used by the debarring official in determining that you have a pattern or prior history of wrongdoing.

(d) Whether you are or have been excluded or disqualified by an agency of the Federal Government or have not been allowed to participate in State or local contracts or assistance agreements on a basis of conduct similar to one or more of the causes for debarment specified in this part.

(e) Whether you have entered into an administrative agreement with a Federal agency or a State or local government that is not governmentwide but is based on conduct similar to one or more of the causes for debarment specified in this part.

(f) Whether and to what extent you planned, initiated, or carried out the wrongdoing.

(g) Whether you have accepted responsibility for the wrongdoing and recognize the seriousness of the misconduct that led to the cause for debarment.

(h) Whether you have paid or agreed to pay all criminal, civil and administrative liabilities for the improper activity, including any investigative or administrative costs incurred by the government, and have made or agreed to make full restitution.

(i) Whether you have cooperated fully with the government agencies during the investigation and any court or administrative action. In determining the extent of cooperation, the debarring official may consider when the cooperation began and whether you disclosed all pertinent information known to you.

(j) Whether the wrongdoing was pervasive within your organization.

(k) The kind of positions held by the individuals involved in the wrongdoing.

(l) Whether your organization took appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence.

(m) Whether your principals tolerated the offense.

(n) Whether you brought the activity cited as a basis for the debarment to the attention of the appropriate government agency in a timely manner.

(o) Whether you have fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.

(p) Whether you had effective standards of conduct and internal control systems in place at the time the questioned conduct occurred.

(q) Whether you have taken appropriate disciplinary action against the individuals responsible for the activity which constitutes the cause for debarment.

(r) Whether you have had adequate time to eliminate the circumstances within your organization that led to the cause for the debarment.

(s) Other factors that are appropriate to the circumstances of a particular case.

### §44.865 How long may my debarment last?

(a) If the debarring official decides to debar you, your period of debarment will be based on the seriousness of the cause(s) upon which your debarment is based. Generally, debarment should not exceed three years. However, if circumstances warrant, the debarring official may impose a longer period of debarment.

(b) In determining the period of debarment, the debarring official may consider the factors in §44.860. If a suspension has preceded your debarment, the debarring official must consider the time you were suspended.

(c) If the debarment is for a violation of the provisions of the Drug-Free Workplace Act of 1988, your period of debarment may not exceed five years.

### §44.870 When do I know if the debarring official debars me?

(a) The debarring official must make a written decision whether to debar within 45 days of closing the official record. The official record closes upon the debarring official's receipt of final

submissions, information and findings of fact, if any. The debarring official may extend that period for good cause.

(b) The debarring official sends you written notice, pursuant to § 44.615 that the official decided, either—

(1) Not to debar you; or

(2) To debar you. In this event, the notice:

(i) Refers to the Notice of Proposed Debarment;

(ii) Specifies the reasons for your debarment;

(iii) States the period of your debarment, including the effective dates; and

(iv) Advises you that your debarment is effective for covered transactions and contracts that are subject to the Federal Acquisition Regulation (48 CFR chapter 1), throughout the executive branch of the Federal Government unless an agency head or an authorized designee grants an exception.

### § 44.875 May I ask the debarring official to reconsider a decision to debar me?

Yes, as a debarred person you may ask the debarring official to reconsider the debarment decision or to reduce the time period or scope of the debarment. However, you must put your request in writing and support it with documentation.

### § 44.880 What factors may influence the debarring official during reconsideration?

The debarring official may reduce or terminate your debarment based on—

(a) Newly discovered material evidence;

(b) A reversal of the conviction or civil judgment upon which your debarment was based;

(c) A bona fide change in ownership or management;

(d) Elimination of other causes for which the debarment was imposed; or

(e) Other reasons the debarring official finds appropriate.

### § 44.885 May the debarring official extend a debarment?

(a) Yes, the debarring official may extend a debarment for an additional period, if that official determines that an extension is necessary to protect the public interest.

(b) However, the debarring official may not extend a debarment solely on the basis of the facts and circumstances upon which the initial debarment action was based.

(c) If the debarring official decides that a debarment for an additional period is necessary, the debarring official must follow the applicable procedures in this subpart, and subpart F of this part, to extend the debarment.

## Subpart I—Definitions

### § 44.900 Adequate evidence.

*Adequate evidence* means information sufficient to support the reasonable belief that a particular act or omission has occurred.

### § 44.905 Affiliate.

Persons are *affiliates* of each other if, directly or indirectly, either one controls or has the power to control the other or a third person controls or has the power to control both. The ways we use to determine control include, but are not limited to—

(a) Interlocking management or ownership;

(b) Identity of interests among family members;

(c) Shared facilities and equipment;

(d) Common use of employees; or

(e) A business entity which has been organized following the exclusion of a person which has the same or similar management, ownership, or principal employees as the excluded person.

### § 44.910 Agency.

*Agency* means any United States executive department, military department, defense agency, or any other agency of the executive branch. Other agencies of the Federal government are not considered ''agencies'' for the purposes of this part unless they issue regulations adopting the governmentwide Debarment and Suspension system under Executive orders 12549 and 12689.

### § 44.915 Agent or representative.

*Agent or representative* means any person who acts on behalf of, or who is authorized to commit, a participant in a covered transaction.

### § 44.920 Civil judgment.

*Civil judgment* means the disposition of a civil action by any court of competent jurisdiction, whether by verdict, decision, settlement, stipulation, other disposition which creates a civil liability for the complained of wrongful acts, or a final determination of liability under the Program Fraud Civil Remedies Act of 1988 (31 U.S.C. 3801–3812).

### § 44.925 Conviction.

*Conviction* means—

(a) A judgment or any other determination of guilt of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or plea, including a plea of nolo contendere; or

(b) Any other resolution that is the functional equivalent of a judgment, including probation before judgment and deferred prosecution. A disposition without the participation of the court is the functional equivalent of a judgment only if it includes an admission of guilt.

### § 44.930 Debarment.

*Debarment* means an action taken by a debarring official under subpart H of this part to exclude a person from participating in covered transactions and transactions covered under the Federal Acquisition Regulation (48 CFR chapter 1). A person so excluded is debarred.

### § 44.935 Debarring official.

(a) *Debarring official* means an agency official who is authorized to impose debarment. A debarring official is either—

(1) The agency head; or

(2) An official designated by the agency head.

(b) For the Department of Veterans Affairs the debarring official is:

(1) For the Veterans Health Administration, the Under Secretary for Health;

(2) For the Veterans Benefits Administration, the Under Secretary for Benefits; and

(3) For the National Cemetery Administration, the Deputy Under Secretary for Operations.

### § 44.940 Disqualified.

*Disqualified* means that a person is prohibited from participating in specified Federal procurement or nonprocurement transactions as required under a statute, Executive order (other than Executive Orders 12549 and 12689) or other authority. Examples of disqualifications include persons prohibited under—

(a) The Davis-Bacon Act (40 U.S.C. 276(a));

(b) The equal employment opportunity acts and Executive orders; or

(c) The Clean Air Act (42 U.S.C. 7606), Clean Water Act (33 U.S.C. 1368) and Executive Order 11738 (3 CFR, 1973 Comp., p. 799).

### § 44.945 Excluded or exclusion.

*Excluded or exclusion* means—

(a) That a person or commodity is prohibited from being a participant in covered transactions, whether the person has been suspended; debarred; proposed for debarment under 48 CFR part 9, subpart 9.4; voluntarily excluded; or

(b) The act of excluding a person.

### § 44.950 Excluded Parties List System

*Excluded Parties List System (EPLS)* means the list maintained and disseminated by the General Services Administration (GSA) containing the names and other information about persons who are ineligible. The *EPLS* system includes the printed version entitled, ''List of Parties Excluded or Disqualified from Federal Procurement and Nonprocurement Programs,'' so long as published.

### § 44.955 Indictment.

*Indictment* means an indictment for a criminal offense. A presentment, information, or other filing by a competent authority charging a criminal offense shall be given the same effect as an indictment.

### § 44.960 Ineligible or ineligibility.

*Ineligible or ineligibility* means that a person or commodity is prohibited from covered transactions because of an exclusion or disqualification.

### § 44.965 Legal proceedings.

*Legal proceedings* means any criminal proceeding or any civil judicial proceeding, including a proceeding under the Program Fraud Civil Remedies Act (31 U.S.C. 3801–3812), to which the Federal Government or a State or local government or quasi-governmental authority is a party. The term also includes appeals from those proceedings.

### § 44.970 Nonprocurement transaction.

(a) *Nonprocurement transaction* means any transaction, regardless of type (except procurement contracts), including, but not limited to the following:

(1) Grants.
(2) Cooperative agreements.
(3) Scholarships.
(4) Fellowships.
(5) Contracts of assistance.
(6) Loans.
(7) Loan guarantees.
(8) Subsidies.
(9) Insurances.
(10) Payments for specified uses.
(11) Donation agreements.

(b) A nonprocurement transaction at any tier does not require the transfer of Federal funds.

### § 44.975 Notice.

*Notice* means a written communication served in person, sent by certified mail or its equivalent, or sent electronically by e-mail or facsimile. (See § 44. 615.)

### § 44.980 Participant.

*Participant* means any person who submits a proposal for or who enters into a covered transaction, including an agent or representative of a participant.

### § 44.985 Person.

*Person* means any individual, corporation, partnership, association, unit of government, or legal entity, however organized.

### § 44.990 Preponderance of the evidence.

*Preponderance of the evidence* means proof by information that, compared with information opposing it, leads to the conclusion that the fact at issue is more probably true than not.

### § 44.995 Principal.

*Principal* means—

(a) An officer, director, owner, partner, principal investigator, or other person within a participant with management or supervisory responsibilities related to a covered transaction; or

(b) A consultant or other person, whether or not employed by the participant or paid with Federal funds, who—

(1) Is in a position to handle Federal funds;

(2) Is in a position to influence or control the use of those funds; or,

(3) Occupies a technical or professional position capable of substantially influencing the development or outcome of an activity required to perform the covered transaction.

(c) In the Department of Veterans Affairs loan guaranty program, principals include, but are not limited to the following:

(1) Loan officers.
(2) Loan solicitors,
(3) Loan processors.
(4) Loan servicers.
(5) Loan supervisors.
(6) Mortgage brokers.
(7) Office managers.
(8) Staff appraisers and inspectors.
(9) Fee appraisers and inspectors.
(10) Underwriters.
(11) Bonding companies.
(12) Real estate agents and brokers.
(13) Management and marketing agents.
(14) Accountants, consultants, investments bankers, architects, engineers, attorneys, and others in a business relationship with participants in connection with a covered transaction under the Department of Veterans Affairs loan guaranty program.
(15) Contractors involved in the construction, improvement or repair of properties financed with Department of Veterans Affairs guaranteed loans.
(16) Closing Agents.

### § 44.1000 Respondent.

*Respondent* means a person against whom an agency has initiated a debarment or suspension action.

### § 44.1005 State.

(a) *State* means—

(1) Any of the states of the United States;

(2) The District of Columbia;

(3) The Commonwealth of Puerto Rico;

(4) Any territory or possession of the United States; or

(5) Any agency or instrumentality of a state.

(b) For purposes of this part, *State* does not include institutions of higher education, hospitals, or units of local government.

### §44.1010 Suspending official.

(a) *Suspending official* means an agency official who is authorized to impose suspension. The suspending official is either:

(1) The agency head; or

(2) An official designated by the agency head.

(b) For the Department of Veterans Affairs the suspending official is:

(1) For the Veterans Health Administration, the Under Secretary for Health;

(2) For the Veterans Benefits Administration, the Under Secretary for Benefits; and

(3) For the National Cemetery Administration, the Deputy Under Secretary for Operations.

### §44.1015 Suspension.

*Suspension* is an action taken by a suspending official under subpart G of this part that immediately prohibits a person from participating in covered transactions and transactions covered under the Federal Acquisition Regulation (48 CFR chapter 1) for a temporary period, pending completion of an agency investigation and any judicial or administrative proceedings that may ensue. A person so excluded is suspended.

### §44.1020 Voluntary exclusion or voluntarily excluded.

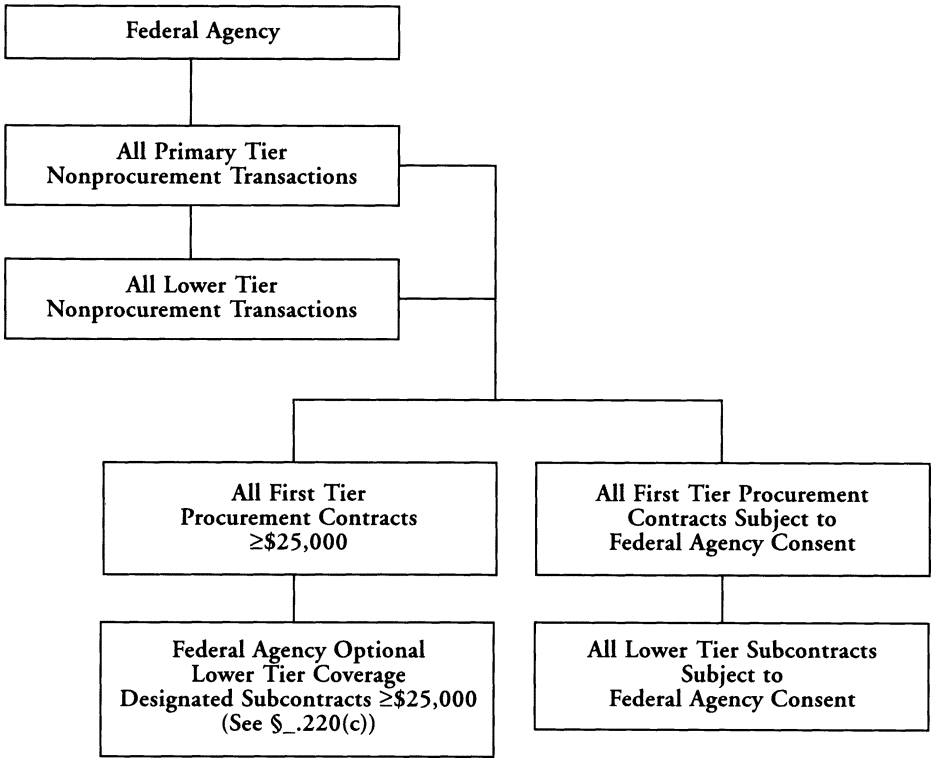
(a) *Voluntary exclusion* means a person's agreement to be excluded under the terms of a settlement between the person and one or more agencies. Voluntary exclusion must have governmentwide effect.

(b) *Voluntarily excluded* means the status of a person who has agreed to a voluntary exclusion.

## Subpart J [Reserved]

APPENDIX TO PART 44—COVERED TRANSACTIONS

COVERED TRANSACTIONS




# PART 45—NEW RESTRICTIONS ON LOBBYING

## Subpart A—General

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45.100 Conditions on use of funds.
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APPENDIX A TO PART 45—CERTIFICATION REGARDING LOBBYING
APPENDIX B TO PART 45—DISCLOSURE FORM TO REPORT LOBBYING

AUTHORITY: Section 319, Pub. L. 101–121 (31 U.S.C. 1352); 38 U.S.C. 501.

CROSS REFERENCE: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

SOURCE: 55 FR 6737, 6752, Feb. 26, 1990, unless otherwise noted.

## Subpart A—General

### §45.100 Conditions on use of funds.

(a) No appropriated funds may be expended by the recipient of a Federal contract, grant, loan, or cooperative ageement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(b) Each person who requests or receives from an agency a Federal contract, grant, loan, or cooperative agreement shall file with that agency a certification, set forth in appendix A, that the person has not made, and will not make, any payment prohibited by paragraph (a) of this section.

(c) Each person who requests or receives from an agency a Federal contract, grant, loan, or a cooperative agreement shall file with that agency a disclosure form, set forth in appendix B, if such person has made or has agreed to make any payment using nonappropriated funds (to include profits from any covered Federal action), which would be prohibited under paragraph (a) of this section if paid for with appropriated funds.

(d) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a statement, set forth in appendix A, whether that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

(e) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a disclosure form, set forth in appendix B, if that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

### §45.105 Definitions.

For purposes of this part:

(a) *Agency*, as defined in 5 U.S.C. 552(f), includes Federal executive departments and agencies as well as independent regulatory commissions and Government corporations, as defined in 31 U.S.C. 9101(1).

(b) *Covered Federal action* means any of the following Federal actions:

(1) The awarding of any Federal contract;

(2) The making of any Federal grant;

(3) The making of any Federal loan;

(4) The entering into of any cooperative agreement; and,

(5) The extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

Covered Federal action does not include receiving from an agency a commitment providing for the United States to insure or guarantee a loan. Loan guarantees and loan insurance are addressed independently within this part.

(c) *Federal contract* means an acquisition contract awarded by an agency, including those subject to the Federal Acquisition Regulation (FAR), and any other acquisition contract for real or personal property or services not subject to the FAR.

(d) *Federal cooperative agreement* means a cooperative agreement entered into by an agency.

(e) *Federal grant* means an award of financial assistance in the form of money, or property in lieu of money, by the Federal Government or a direct

appropriation made by law to any person. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, loan insurance, interest subsidies, insurance, or direct United States cash assistance to an individual.

(f) *Federal loan* means a loan made by an agency. The term does not include loan guarantee or loan insurance.

(g) *Indian tribe* and *tribal organization* have the meaning provided in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450B). Alaskan Natives are included under the definitions of Indian tribes in that Act.

(h) *Influencing or attempting to influence* means making, with the intent to influence, any communication to or appearance before an officer or employee or any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any covered Federal action.

(i) *Loan guarantee* and *loan insurance* means an agency's guarantee or insurance of a loan made by a person.

(j) *Local government* means a unit of government in a State and, if chartered, established, or otherwise recognized by a State for the performance of a governmental duty, including a local public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, and any other instrumentality of a local government.

(k) *Officer or employee of an agency* includes the following individuals who are employed by an agency:

(1) An individual who is appointed to a position in the Government under title 5, U.S.C., including a position under a temporary appointment;

(2) A member of the uniformed services as defined in section 101(3), title 37, U.S.C.;

(3) A special Government employee as defined in section 202, title 18, U.S.C.; and,

(4) An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Committee Act, title 5, U.S.C., appendix 2.

(l) *Person* means an individual, corporation, company, association, authority, firm, partnership, society, State, and local government, regardless of whether such entity is operated for profit or not for profit. This term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(m) *Reasonable compensation* means, with respect to a regularly employed officer or employee of any person, compensation that is consistent with the normal compensation for such officer or employee for work that is not furnished to, not funded by, or not furnished in cooperation with the Federal Government.

(n) *Reasonable payment* means, with respect to perfessional and other technical services, a payment in an amount that is consistent with the amount normally paid for such services in the private sector.

(o) *Recipient* includes all contractors, subcontractors at any tier, and subgrantees at any tier of the recipient of funds received in connection with a Federal contract, grant, loan, or cooperative agreement. The term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(p) *Regularly employed* means, with respect to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or a commitment providing for the United States to insure or guarantee a loan, an officer or employee who is employed by such person for at least 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person for receipt of such contract, grant, loan, cooperative agreement, loan insurance commitment, or loan guarantee commitment. An officer or employee who is employed by such person for less than 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person shall be considered to be regularly employed as

soon as he or she is employed by such person for 130 working days.

(q) *State* means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, an agency or instrumentality of a State, and a multi-State, regional, or interstate entity having governmental duties and powers.

**§45.110 Certification and disclosure.**

(a) Each person shall file a certification, and a disclosure form, if required, with each submission that initiates agency consideration of such person for:

(1) Award of a Federal contract, grant, or cooperative agreement exceeding $100,000; or

(2) An award of a Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000.

(b) Each person shall file a certification, and a disclosure form, if required, upon receipt by such person of:

(1) A Federal contract, grant, or cooperative agreement exceeding $100,000; or

(2) A Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000,

Unless such person previously filed a certification, and a disclosure form, if required, under paragraph (a) of this section.

(c) Each person shall file a disclosure form at the end of each calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed by such person under paragraphs (a) or (b) of this section. An event that materially affects the accuracy of the information reported includes:

(1) A cumulative increase of $25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or

(2) A change in the person(s) or individual(s) influencing or attempting to influence a covered Federal action; or,

(3) A change in the officer(s), employee(s), or Member(s) contacted to influence or attempt to influence a covered Federal action.

(d) Any person who requests or receives from a person referred to in paragraphs (a) or (b) of this section:

(1) A subcontract exceeding $100,000 at any tier under a Federal contract;

(2) A subgrant, contract, or subcontract exceeding $100,000 at any tier under a Federal grant;

(3) A contract or subcontract exceeding $100,000 at any tier under a Federal loan exceeding $150,000; or,

(4) A contract or subcontract exceeding $100,000 at any tier under a Federal cooperative agreement,

Shall file a certification, and a disclosure form, if required, to the next tier above.

(e) All disclosure forms, but not certifications, shall be forwarded from tier to tier until received by the person referred to in paragraphs (a) or (b) of this section. That person shall forward all disclosure forms to the agency.

(f) Any certification or disclosure form filed under paragraph (e) of this section shall be treated as a material representation of fact upon which all receiving tiers shall rely. All liability arising from an erroneous representation shall be borne solely by the tier filing that representation and shall not be shared by any tier to which the erroneous representation is forwarded. Submitting an erroneous certification or disclosure constitutes a failure to file the required certification or disclosure, respectively. If a person fails to file a required certification or disclosure, the United States may pursue all available remedies, including those authorized by section 1352, title 31, U.S.C.

(g) For awards and commitments in process prior to December 23, 1989, but not made before that date, certifications shall be required at award or commitment, covering activities occurring between December 23, 1989, and the date of award or commitment. However, for awards and commitments in process prior to the December 23, 1989 effective date of these provisions, but not made before December 23, 1989, disclosure forms shall not be required at time of award or commitment but shall be filed within 30 days.

(h) No reporting is required for an activity paid for with appropriated funds

if that activity is allowable under either Subpart B or C.

## Subpart B—Activities by Own Employees

### § 45.200 Agency and legislative liaison.

(a) The prohibition on the use of appropriated funds, in § 45.100(a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement if the payment is for agency and legislative liaison activities not directly related to a covered Federal action.

(b) For purposes of paragraph (a) of this section, providing any information specifically requested by an agency or Congress is allowable at any time.

(c) For purposes of paragraph (a) of this section, the following agency and legislative liaison activities are allowable at any time only where they are not related to a specific solicitation for any covered Federal action:

(1) Discussing with an agency (including individual demonstrations) the qualities and characteristics of the person's products or services, conditions or terms of sale, and service capabilities; and,

(2) Technical discussions and other activities regarding the application or adaptation of the person's products or services for an agency's use.

(d) For purposes of paragraph (a) of this section, the following agencies and legislative liaison activities are allowable only where they are prior to formal solicitation of any covered Federal action:

(1) Providing any information not specifically requested but necessary for an agency to make an informed decision about initiation of a covered Federal action;

(2) Technical discussions regarding the preparation of an unsolicited proposal prior to its official submission; and,

(3) Capability presentations by persons seeking awards from an agency pursuant to the provisions of the Small Business Act, as amended by Pub. L. 95–507 and other subsequent amendments.

(e) Only those activities expressly authorized by this section are allowable under this section.

### § 45.205 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 45.100(a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or an extension, continuation, renewal, amendment, or modification of a Federal contract, grant, loan, or cooperative agreement if payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) For purposes of paragraph (a) of this section, ''professional and technical services'' shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting of a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of

his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(c) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(d) Only those services expressly authorized by this section are allowable under this section.

### § 45.210 Reporting.

No reporting is required with respect to payments of reasonable compensation made to regularly employed officers or employees of a person.

## Subpart C—Activities by Other Than Own Employees

### § 45.300 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 45.100(a), does not apply in the case of any reasonable payment to a person, other than an officer or employee of a person requesting or receiving a covered Federal action, if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) The reporting requirements in § 45.110(a) and (b) regarding filing a disclosure form by each person, if required, shall not apply with respect to professional or technical services rendered directly in the preparation, submission, or negotiation of any commitment providing for the United States to insure or guarantee a loan.

(c) For purposes of paragraph (a) of this section, ''professional and technical services'' shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting or a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(d) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(e) Persons other than officers or employees of a person requesting or receiving a covered Federal action include consultants and trade associations.

(f) Only those services expressly authorized by this section are allowable under this section.

## Subpart D—Penalties and Enforcement

### § 45.400 Penalties.

(a) Any person who makes an expenditure prohibited herein shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such expenditure.

(b) Any person who fails to file or amend the disclosure form (see appendix B) to be filed or amended if required herein, shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

(c) A filing or amended filing on or after the date on which an administrative action for the imposition of a civil penalty is commenced does not prevent the imposition of such civil penalty for a failure occurring before that date. An administrative action is commenced with respect to a failure when an investigating official determines in writing to commence an investigation of an allegation of such failure.

(d) In determining whether to impose a civil penalty, and the amount of any such penalty, by reason of a violation by any person, the agency shall consider the nature, circumstances, extent, and gravity of the violation, the effect on the ability of such person to continue in business, any prior violations by such person, the degree of culpability of such person, the ability of the person to pay the penalty, and such other matters as may be appropriate.

(e) First offenders under paragraphs (a) or (b) of this section shall be subject to a civil penalty of $10,000, absent aggravating circumstances. Second and subsequent offenses by persons shall be subject to an appropriate civil penalty between $10,000 and $100,000, as determined by the agency head or his or her designee.

(f) An imposition of a civil penalty under this section does not prevent the United States from seeking any other remedy that may apply to the same conduct that is the basis for the imposition of such civil penalty.

### § 45.405 Penalty procedures.

Agencies shall impose and collect civil penalties pursuant to the provisions of the Program Fraud and Civil Remedies Act, 31 U.S.C. sections 3803 (except subsection (c)), 3804, 3805, 3806, 3807, 3808, and 3812, insofar as these provisions are not inconsistent with the requirements herein.

### § 45.410 Enforcement.

The head of each agency shall take such actions as are necessary to ensure that the provisions herein are vigorously implemented and enforced in that agency.

## Subpart E—Exemptions

### § 45.500 Secretary of Defense.

(a) The Secretary of Defense may exempt, on a case-by-case basis, a covered Federal action from the prohibition whenever the Secretary determines, in writing, that such an exemption is in the national interest. The Secretary shall transmit a copy of each such written exemption to Congress immediately after making such a determination.

(b) The Department of Defense may issue supplemental regulations to implement paragraph (a) of this section.

## Subpart F—Agency Reports

### § 45.600 Semi-annual compilation.

(a) The head of each agency shall collect and compile the disclosure reports (see appendix B) and, on May 31 and November 30 of each year, submit to the Secretary of the Senate and the Clerk of the House of Representatives a report containing a compilation of the information contained in the disclosure reports received during the six-month period ending on March 31 or September 30, respectively, of that year.

(b) The report, including the compilation, shall be available for public inspection 30 days after receipt of the report by the Secretary and the Clerk.

(c) Information that involves intelligence matters shall be reported only to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, and the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(d) Information that is classified under Executive Order 12356 or any successor order shall be reported only to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives or the Committees on Armed Services of the Senate and the House of Representatives (whichever such committees have jurisdiction of matters involving such information) and to the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(e) The first semi-annual compilation shall be submitted on May 31, 1990, and shall contain a compilation of the disclosure reports received from December 23, 1989 to March 31, 1990.

(f) Major agencies, designated by the Office of Management and Budget (OMB), are required to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives no later than with the compilations due on May 31, 1991. OMB shall provide detailed specifications in a memorandum to these agencies.

(g) Non-major agencies are requested to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives.

(h) Agencies shall keep the originals of all disclosure reports in the official files of the agency.

### § 45.605 Inspector General report.

(a) The Inspector General, or other official as specified in paragraph (b) of this section, of each agency shall prepare and submit to Congress each year, commencing with submission of the President's Budget in 1991, an evaluation of the compliance of that agency with, and the effectiveness of, the requirements herein. The evaluation may include any recommended changes that may be necessary to strengthen or improve the requirements.

(b) In the case of an agency that does not have an Inspector General, the agency official comparable to an Inspector General shall prepare and submit the annual report, or, if there is no such comparable official, the head of the agency shall prepare and submit the annual report.

(c) The annual report shall be submitted at the same time the agency submits its annual budget justifications to Congress.

(d) The annual report shall include the following: All alleged violations relating to the agency's covered Federal actions during the year covered by the report, the actions taken by the head of the agency in the year covered by the report with respect to those alleged violations and alleged violations in previous years, and the amounts of civil penalties imposed by the agency in the year covered by the report.

## APPENDIX A TO PART 45—CERTIFICATION REGARDING LOBBYING

*Certification for Contracts, Grants, Loans, and Cooperative Agreements*

The undersigned certifies, to the best of his or her knowledge and belief, that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, ''Disclosure

Form to Report Lobbying,'' in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

*Statement for Loan Guarantees and Loan Insurance*

The undersigned states, to the best of his or her knowledge and belief, that:

If any funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United States to insure or guarantee a loan, the undersigned shall complete and submit Standard Form-LLL, ''Disclosure Form to Report Lobbying,'' in accordance with its instructions.

Submission of this statement is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required statement shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

APPENDIX B TO PART 45—DISCLOSURE FORM TO REPORT LOBBYING

## DISCLOSURE OF LOBBYING ACTIVITIES

Approved by OMB
0348-0046

Complete this form to disclose lobbying activities pursuant to 31 U.S.C. 1352
(See reverse for public burden disclosure.)

| | | |
|---|---|---|
| **1. Type of Federal Action:**<br>☐ a. contract<br>b. grant<br>c. cooperative agreement<br>d. loan<br>e. loan guarantee<br>f. loan insurance | **2. Status of Federal Action:**<br>☐ a. bid/offer/application<br>b. initial award<br>c. post-award | **3. Report Type:**<br>☐ a. initial filing<br>b. material change<br>**For Material Change Only:**<br>year _____ quarter _____<br>date of last report _____ |
| **4. Name and Address of Reporting Entity:**<br>☐ Prime ☐ Subawardee<br>Tier _____, *if known:*<br>**Congressional District,** *if known:* | **5. If Reporting Entity in No. 4 is Subawardee, Enter Name and Address of Prime:**<br>**Congressional District,** *if known:* | |
| **6. Federal Department/Agency:** | **7. Federal Program Name/Description:**<br>CFDA Number, *if applicable:* _____ | |
| **8. Federal Action Number,** *if known:* | **9. Award Amount,** *if known:*<br>$ | |
| **10. a. Name and Address of Lobbying Entity**<br>*(if individual, last name, first name, MI):* | **b. Individuals Performing Services** *(including address if different from No. 10a)*<br>*(last name, first name, MI):* | |
| *(attach Continuation Sheet(s) SF-LLL-A, if necessary)* | | |
| **11. Amount of Payment** *(check all that apply):*<br>$ _____ ☐ actual ☐ planned | **13. Type of Payment** *(check all that apply):*<br>☐ a. retainer<br>☐ b. one-time fee<br>☐ c. commission<br>☐ d. contingent fee<br>☐ e. deferred<br>☐ f. other; specify: _____ | |
| **12. Form of Payment** *(check all that apply):*<br>☐ a. cash<br>☐ b. in-kind; specify: nature _____<br>value _____ | | |
| **14. Brief Description of Services Performed or to be Performed and Date(s) of Service, including officer(s), employee(s), or Member(s) contacted, for Payment Indicated in Item 11:** | | |
| *(attach Continuation Sheet(s) SF-LLL-A, if necessary)* | | |
| **15. Continuation Sheet(s) SF-LLL-A attached:** ☐ Yes ☐ No | | |
| **16.** Information requested through this form is authorized by title 31 U.S.C. section 1352. This disclosure of lobbying activities is a material representation of fact upon which reliance was placed by the tier above when this transaction was made or entered into. This disclosure is required pursuant to 31 U.S.C. 1352. This information will be reported to the Congress semi-annually and will be available for public inspection. Any person who fails to file the required disclosure shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure. | **Signature:** _____<br>**Print Name:** _____<br>**Title:** _____<br>**Telephone No.:** _____ **Date:** _____ | |
| **Federal Use Only:** | | **Authorized for Local Reproduction Standard Form - LLL** |

## DISCLOSURE OF LOBBYING ACTIVITIES
### CONTINUATION SHEET

Approved by OMB
0348-0046

**Reporting Entity:** _____ **Page** _____ **of** _____

**Authorized for Local Reproduction**
**Standard Form - LLL-A**

## INSTRUCTIONS FOR COMPLETION OF SF-LLL, DISCLOSURE OF LOBBYING ACTIVITIES

This disclosure form shall be completed by the reporting entity, whether subawardee or prime Federal recipient, at the initiation or receipt of a covered Federal action, or a material change to a previous filing, pursuant to title 31 U.S.C. section 1352. The filing of a form is required for each payment or agreement to make payment to any lobbying entity for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a covered Federal action. Use the SF-LLL-A Continuation Sheet for additional information if the space on the form is inadequate. Complete all items that apply for both the initial filing and material change report. Refer to the implementing guidance published by the Office of Management and Budget for additional information.

1. Identify the type of covered Federal action for which lobbying activity is and/or has been secured to influence the outcome of a covered Federal action.
2. Identify the status of the covered Federal action.
3. Identify the appropriate classification of this report. If this is a followup report caused by a material change to the information previously reported, enter the year and quarter in which the change occurred. Enter the date of the last previously submitted report by this reporting entity for this covered Federal action.
4. Enter the full name, address, city, state and zip code of the reporting entity. Include Congressional District, if known. Check the appropriate classification of the reporting entity that designates if it is, or expects to be, a prime or subaward recipient. Identify the tier of the subawardee, e.g., the first subawardee of the prime is the 1st tier. Subawards include but are not limited to subcontracts, subgrants and contract awards under grants.
5. If the organization filing the report in item 4 checks "Subawardee", then enter the full name, address, city, state and zip code of the prime Federal recipient. Include Congressional District, if known.
6. Enter the name of the Federal agency making the award or loan commitment. Include at least one organizational level below agency name, if known. For example, Department of Transportation, United States Coast Guard.
7. Enter the Federal program name or description for the covered Federal action (item 1). If known, enter the full Catalog of Federal Domestic Assistance (CFDA) number for grants, cooperative agreements, loans, and loan commitments.
8. Enter the most appropriate Federal identifying number available for the Federal action identified in item 1 (e.g., Request for Proposal (RFP) number; Invitation for Bid (IFB) number; grant announcement number; the contract, grant, or loan award number; the application/proposal control number assigned by the Federal agency). Include prefixes, e.g., "RFP-DE-90-001."
9. For a covered Federal action where there has been an award or loan commitment by the Federal agency, enter the Federal amount of the award/loan commitment for the prime entity identified in item 4 or 5.
10. (a) Enter the full name, address, city, state and zip code of the lobbying entity engaged by the reporting entity identified in item 4 to influence the covered Federal action.

    (b) Enter the full names of the individual(s) performing services, and include full address if different from 10 (a). Enter Last Name, First Name, and Middle Initial (MI).
11. Enter the amount of compensation paid or reasonably expected to be paid by the reporting entity (item 4) to the lobbying entity (item 10). Indicate whether the payment has been made (actual) or will be made (planned). Check all boxes that apply. If this is a material change report, enter the cumulative amount of payment made or planned to be made.
12. Check the appropriate box(es). Check all boxes that apply. If payment is made through an in-kind contribution, specify the nature and value of the in-kind payment.
13. Check the appropriate box(es). Check all boxes that apply. If other, specify nature.
14. Provide a specific and detailed description of the services that the lobbyist has performed, or will be expected to perform, and the date(s) of any services rendered. Include all preparatory and related activity, not just time spent in actual contact with Federal officials. Identify the Federal official(s) or employee(s) contacted or the officer(s), employee(s), or Member(s) of Congress that were contacted.
15. Check whether or not a SF-LLL-A Continuation Sheet(s) is attached.
16. The certifying official shall sign and date the form, print his/her name, title, and telephone number.

Public reporting burden for this collection of information is estimated to average 30 mintues per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0046), Washington, D.C. 20503.

# PART 46—POLICY REGARDING PARTICIPATION IN NATIONAL PRACTITIONER DATA BANK

## Subpart A—General Provisions

Sec.
46.1 Definitions.
46.2 Purpose.

## Subpart B—National Practitioner Data Bank Reporting

46.3 Malpractice payment reporting.
46.4 Clinical privileges actions reporting.

## Subpart C—National Practitioner Data Bank Inquiries

46.5 National Practitioner Data Bank inquiries.

## Subpart D—Miscellaneous

46.6 Medical quality assurance records confidentiality.
46.7 Prohibitions concerning negotiations.
46.8 Independent contractors.

AUTHORITY: 38 U.S.C. 501; 42 U.S.C. 11101–11152.

SOURCE: 67 FR 19679, Apr. 23, 2002, unless otherwise noted.

## Subpart A—General Provisions

### § 46.1 Definitions.

(a) *Act* means The Health Care Quality Improvement Act of 1986, as amended (42 U.S.C. 11101–11152).

(b) *Claim of medical malpractice* means a written claim or demand for payment based on an act or omission of a physician, dentist, or other health care practitioner in furnishing (or failing to furnish) health care services, and includes the filing of a complaint or administrative tort claim under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671–2680.

(c) *Clinical privileges* means privileges granted by a health care entity to individuals to furnish health care.

(d) *Dentist* means a doctor of dental surgery or dental medicine legally authorized to practice dental surgery or dentistry by a State (or any individual who holds himself or herself out to be so authorized).

(e) *Director* means the duly appointed director of a Department of Veterans Affairs health care facility or any individual with authorization to act for that person in the director's absence.

(f) *Gross negligence* is materially worse than substandard care, and consists of an entire absence of care, or an absence of even slight care or diligence; it implies a thoughtless disregard of consequences or indifference to the rights of others.

(g) *Health care facility* means a hospital, domiciliary, outpatient clinic, or any other entity that provides health care services.

(h) *Other health care practitioner* means an individual other than a physician or dentist who is licensed or otherwise authorized by a State to provide health care services.

(i) *Physician* means a doctor of medicine or osteopathy authorized to practice medicine or surgery by a State (or any individual who holds himself or herself out to be so authorized).

(j) *Professional review action* means a recommendation by a professional review panel (with at least a majority vote) to affect adversely the clinical privileges of a physician or dentist taken as a result of a professional review activity based on the competence or professional conduct of an individual physician or dentist in cases in which such conduct affects or could affect adversely the health or welfare of a patient, or patients. An action is not considered to be based on the competence or professional conduct of a physician or dentist, if the action is primarily based on:

(1) A physician's or dentist's association with, administrative supervision of, delegation of authority to, support for, or training of, a member or members of a particular class of health care practitioner or professional, or

(2) Any other matter that does not relate to the competence or professional conduct of a physician or dentist in his/her practice at a Department of Veterans Affairs health care facility.

(k) *Professional review activity* means an activity with respect to an individual physician or dentist to establish a recommendation regarding:

(1) Whether the physician or dentist may have clinical privileges with respect to the medical staff of the facility;

(2) The scope or conditions of such privileges or appointment; or

(3) Change or modification of such privileges.

(l) *State* means the fifty States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, and any other territories or possessions of the United States.

(m) *State Licensing Board* means, with respect to a physician, dentist, or other health care practitioner in a State, the agency of the State, which is primarily responsible for the licensing of the physician, dentist, or practitioner to furnish health care services.

(n) *Willful professional misconduct* means worse than mere substandard care, and contemplates the intentional doing of something with knowledge that it is likely to result in serious injuries or in reckless disregard of its probable consequences.

### §46.2 Purpose.

The National Practitioner Data Bank, authorized by the Act and administered by the Department of Health and Human Services, was established for the purpose of collecting and releasing certain information concerning physicians, dentists, and other health care practitioners. The Act mandates that the Department of Health and Human Services seek to enter into a Memorandum of Understanding with the Department of Veterans Affairs (VA) for the purpose of having VA participate in the National Practitioner Data Bank. Such a Memorandum of Understanding has been established. Pursuant to the Memorandum of Understanding, VA will obtain information from the Data Bank concerning physicians, dentists, and other health care practitioners who provide or seek to provide health care services at VA facilities and also report information regarding malpractice payments and adverse clinical privileges actions to the Data Bank. This part essentially restates or interprets provisions of that Memorandum of Understanding and constitutes the policy of VA for participation in the National Practitioner Data Bank.

## Subpart B—National Practitioner Data Bank Reporting

### §46.3 Malpractice payment reporting.

(a) VA will file a report with the National Practitioner Data Bank, in accordance with regulations at 45 CFR part 60, subpart B, as applicable, regarding any payment for the benefit of a physician, dentist, or other licensed health care practitioner which was made as the result of a settlement or judgment of a claim of medical malpractice. The report will identify the physician, dentist, or other licensed health care practitioner for whose benefit the payment is made. It is intended that the report be filed within 30 days of the date payment is made. This may not be possible in all cases; e.g., sometimes notification of payment is delayed, and sometimes the malpractice payment review process cannot be completed within the timeframe. The report will provide the following information:

(1) With respect to the physician, dentist, or other licensed health care practitioner for whose benefit the payment is made—

(i) Name;

(ii) Work address;

(iii) Home address, if known;

(iv) Social Security number, if known, and if obtained in accordance with section 7 of the Privacy Act of 1974;

(v) Date of birth;

(vi) Name of each professional school attended and year of graduation;

(vii) For each professional license: the license number, the field of licensure, and the State in which the license is held;

(viii) Drug Enforcement Administration registration number, if applicable and known;

(ix) Name of each health care entity with which affiliated, if known.

(2) With respect to the reporting VA entity—

(i) Name and address of the reporting entity;

(ii) Name, title and telephone number of the responsible official submitting the report on behalf of the Federal government; and

(iii) Relationship of the entity to the physician, dentist, or other health care practitioner being reported.

(3) With respect to the judgment or settlement resulting in the payment—

(i) Where an action or claim has been filed with an adjudicative body, identification of the adjudicative body and the case number;

(ii) Date or dates on which the act(s) or omission(s), which gave rise to the action or claim occurred;

(iii) Date of judgment or settlement;

(iv) Amount paid, date of payment, and whether payment is for a judgment or a settlement;

(v) Description and amount of judgment or settlement and any conditions attached thereto, including terms of payment;

(vi) A description of the acts or omissions and injuries or illnesses upon which the action or claim was based; and

(vii) Classification of the acts or omissions in accordance with a reporting code adopted by the Secretary of Health and Human Services.

(b) Payment will be considered to have been made for the benefit of a physician, dentist, or other licensed health care practitioner only if (at least a majority of) a malpractice payment review panel concludes that payment was related to substandard care, professional incompetence, or professional misconduct on the part of the physician, dentist, or other licensed health care practitioner. For purposes of this part, a panel shall have a minimum of three individuals appointed by the Director, Medical-Legal Affairs (including at least one member of the profession/occupation of the practitioner(s) whose actions are under review). The conclusions of the panel shall, at a minimum, be based on review of documents pertinent to the care that led to the claim. These documents include the medical records of the patient whose care led to the claim, any report of an administrative investigation board appointed to investigate the care, and the opinion of any consultant which the panel may request in its discretion. These documents do not include those generated primarily for consideration or litigation of the claim of malpractice. In addition, to the extent practicable, the documents shall include written statements of the individual(s) involved in the care which led to the claim. The practitioner(s) whose actions are under review will receive a written notice, hand-delivered or sent to the practitioner's last known address (return receipt requested), from the VA facility director at the time the VA facility director receives the Notice of Payment. That notice from the VA facility director will indicate that VA is considering whether to report the practitioner to the National Practitioner Data Bank because of a specified malpractice payment made, and provide the practitioner the opportunity, within 60 days of receipt, to submit a written statement concerning the care that led to the claim. Inability to notify or non-response from the identified practitioner(s) will not preclude completion of the review and reporting process. The panel, at its discretion, may request additional information from the practitioner or the VA facility where the incident occurred. The review panel's notification to the VA facility Director shall include the acts or omissions considered, the reporting conclusion, and the rationale for the conclusion.

(c) Attending staff (including contract employees, such as scarce medical specialists providing care pursuant to a contract under 38 U.S.C. 7409) are responsible for actions of licensed trainees assigned under their supervision. Notwithstanding the provisions of paragraph (b) of this section, actions of a licensed trainee (intern or resident) acting within the scope of his or her training program that otherwise would warrant reporting for substandard care, professional incompetence, or professional misconduct under the provisions of paragraph (b) of this section, will be reported only if the panel, by at least a majority, concludes that such actions constitute gross negligence or willful professional misconduct. For purposes of paragraph (b) of this section, payment will be considered to be made for the benefit of a physician, dentist, or other health care practitioner, in their supervisory capacity, if the panel concludes, by at least a majority, that the physician,

dentist or other health care practitioner was acting in a supervisory capacity; that the payment was related to substandard care, professional incompetence, or professional misconduct of the trainee and not the supervisor; and that the trainee did not commit gross negligence or willful professional misconduct. Such report will note that the physician, dentist, or other health care practitioner is being reported in a supervisory capacity.

NOTE TO PARAGRAPH (c): Licensed trainees acting outside the scope of their training program (e.g. acting as admitting officer of the day) will be reported under the provisions of paragraph (b) of this section.

(d) The Director of the facility at which the claim arose has the primary responsibility for submitting the report to the National Practitioner Data Bank and for providing a copy to the practitioner, to the State Licensing Board in each State where the practitioner holds a license, and to the State Licensing Board in which the facility is located. However, the Chief Patient Care Services Officer is also authorized to submit the report to the National Practitioner Data Bank and provide copies to the practitioner and State Licensing Boards in cases where the Chief Patient Care Services Officer deems it appropriate to do so. The Director of the facility also shall provide to the practitioner a copy of the review panel's notification to the Director.

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0621.)

### §46.4 Clinical privileges actions reporting.

(a) VA will file an adverse action report with the National Practitioner Data Bank in accordance with regulations at 45 CFR part 60, subpart B, as applicable, regarding any of the following actions:

(1) An action of a Director after consideration of a professional review action that, for a period longer than 30 days, adversely affects (by reducing, restricting, suspending, revoking, or failing to renew) the clinical privileges of a physician or dentist relating to possible incompetence or improper professional conduct.

(2) Acceptance of the surrender of clinical privileges, including the surrender of clinical privileges inherent in resignation or retirement, or any restriction of such privileges by a physician or dentist either while under investigation by the health care entity relating to possible incompetence or improper professional conduct, or in return for not conducting such an investigation or proceeding whether or not the individual remains in VA service.

(b) The report specified in paragraph (a) of this section will provide the following information—

(1) With respect to the physician or dentist:

(i) Name;

(ii) Work address;

(iii) Home address, if known;

(iv) Social Security number, if known (and if obtained in accordance with section 7 of the Privacy Act of 1974);

(v) Date of birth;

(vi) Name of each professional school attended and year of graduation;

(vii) For each professional license: the license number, the field of licensure, and the name of the State in which the license is held;

(viii) Drug Enforcement Administration registration number, if applicable and known;

(ix) A description of the acts or omissions or other reasons for privilege loss, or, if known, for surrender; and

(x) Action taken, date action was made final, length of action and effective date of the action.

(2) With respect to the VA facility—

(i) Name and address of the reporting facility; and

(ii) Name, title, and telephone number of the responsible official submitting the report.

(c) A copy of the report referred to in paragraph (a) of this section will also be filed with the State Licensing Board in the State(s) in which the practitioner is licensed and in which the facility is located. It is intended that the report be filed within 15 days of the date the action is made final, that is, subsequent to any internal (to the facility) appeal.

(d) As soon as practicable after it is determined that a report shall be filed with the National Practitioner Data

Bank and State Licensing Boards under paragraphs (a)(2) and (c) of this section, VA shall provide written notice to the practitioner that a report will be filed with the National Practitioner Data Bank with a copy to the State Licensing Board in each State in which the practitioner is licensed and in the State in which the facility is located.

## Subpart C—National Practitioner Data Bank Inquiries

### § 46.5 National Practitioner Data Bank inquiries.

VA will request information from the National Practitioner Data Bank, in accordance with the regulations published at 45 CFR part 60, subpart C, as applicable, concerning a physician, dentist, or other licensed health care practitioner as follows:

(a) At the time a physician, dentist, or other health care practitioner applies for a position at VA Central Office, any of its regional offices, or on the medical staff, or for clinical privileges at a VA hospital or other health care entity operated under the auspice of VA;

(b) No less often than every 2 years concerning any physician, dentist, or other health care practitioner who is on the medical staff or who has clinical privileges at a VA hospital or other health care entity operated under the auspice of VA; and

(c) At other times pursuant to VA policy and needs and consistent with the Act and Department of Health and Human Services Regulations (45 CFR part 60).

## Subpart D—Miscellaneous

### § 46.6 Medical quality assurance records confidentiality.

Note that medical quality assurance records that are confidential and privileged under the provisions of 38 U.S.C. 5705 may not be used as evidence for reporting individuals to the National Practitioner Data Bank.

### § 46.7 Prohibitions concerning negotiations.

Reporting under this part (including the submission of copies) may not be the subject of negotiation in any settlement agreement, employee action, legal proceedings, or any other negotiated settlement.

### § 46.8 Independent contractors.

Independent contractors acting on behalf of the Department of Veterans Affairs are subject to the National Practitioner Data Bank reporting provisions of this part. In the following circumstances, VA will provide the contractor with notice that a report of a clinical privileges action will be filed with the National Practitioner Data Bank with a copy with the State Licensing Board in the State(s) in which the contractor is licensed and in which the facility is located: where VA terminates a contract for possible incompetence or improper professional conduct, thereby automatically revoking the contractor's clinical privileges, or where the contractor terminates the contract, thereby surrendering clinical privileges, either while under investigation relating to possible incompetence or improper professional conduct or in return for not conducting such an investigation or proceeding.

(Authority: 38 U.S.C. 5705)

# PART 47—POLICY REGARDING REPORTING HEALTH CARE PROFESSIONALS TO STATE LICENSING BOARDS

Sec.
47.1 Definitions.
47.2 Reporting to State Licensing Boards.

AUTHORITY: Pub. L. 99–166, 99 Stat. 941; 38 U.S.C. 501.

SOURCE: 58 FR 48455, Sept. 16, 1993, unless otherwise noted.

### § 47.1 Definitions.

(a) *Dentist* means a doctor of dental surgery or dental medicine legally authorized to practice dental surgery or medical dentistry by a State (or any individual who, without authority, holds himself or herself out to be so authorized).

(b) *Other health care professional* means an individual other than a physician or dentist who is licensed or otherwise authorized by a State to provide health care services (or any individual

who, without authority, holds himself or herself out to be so licensed or authorized).

(c) *Physician* means a doctor of medicine or osteopathy legally authorized to practice medicine or surgery by a State (or any individual who, without authority, holds himself or herself out to be so authorized).

(d) *State* means the fifty States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands and any other territories or possessions of the United States.

(e) *State Licensing Board* means, with respect to a physician, dentist or other health care practitioner in a State, the agency of the State which is primarily responsible for the licensing of the physician, dentist or practitioner to provide health care services.

(f) *Generally accepted standards of clinical practice* means reasonable competence in the clinical aspects of one's responsibilities, as well as the moral and ethical behavior necessary to carry out those responsibilities.

(g) *Separated licensed health care professional* means a licensed health care professional who is no longer on VA rolls, regardless of whether the individual left voluntarily or involuntarily and regardless of the reason why the individual left.

(h) *Currently employed licensed health care professional* means a licensed health care professional who is on VA rolls.

(i) *On VA rolls* means on VA rolls, regardless of the status of the professional, such as full-time, part-time, contract service, fee-basis, or without compensation.

(Authority: 38 U.S.C. 501, 7401–7405; Section 204(b) of Pub. L. 99–166, 99 Stat. 952–953; Pub. L. 99–660, 100 Stat. 3743)

[58 FR 48455, Sept. 16, 1993, as amended at 63 FR 23665, Apr. 30, 1998]

### § 47.2 Reporting to State Licensing Boards.

It is the policy of VA to report to State Licensing Boards any currently employed licensed health care professional or separated licensed health care professional whose clinical practice during VA employment so significantly failed to meet generally accepted standards of clinical practice as to raise reasonable concern for the safety of patients. The following are examples of actions that meet the criteria for reporting:

(a) Significant deficiencies in clinical practice such as lack of diagnostic or treatment capability; errors in transcribing, administering or documenting medication; inability to perform clinical procedures considered basic to the performance of one's occupation; performing procedures not included in one's clinical privileges in other than emergency situations;

(b) Patient neglect or abandonment;

(c) Mental health impairment sufficient to cause the individual to behave inappropriately in the patient care environment;

(d) Physical health impairment sufficient to cause the individual to provide unsafe patient care;

(e) Substance abuse when it affects the individual's ability to perform appropriately as a health care provider or in the patient care environment;

(f) Falsification of credentials;

(g) Falsification of medical records or prescriptions;

(h) Theft of drugs;

(i) Inappropriate dispensing of drugs;

(j) Unethical behavior or moral turpitude;

(k) Mental, physical, sexual, or verbal abuse of a patient (examples of patient abuse include intentional omission of care, willful violation of a patient's privacy, willful physical injury, intimidation, harassment, or ridicule); and

(l) Violation of research ethics.

(Authority: 38 U.S.C. 501; 7401–7405; Section 204(b) of Pub. L. 99–166, 99 Stat. 952–953; Pub. L. 99–660, 100 Stat. 3743)

[63 FR 23665, Apr. 30, 1998]

## PART 48—GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (FINANCIAL ASSISTANCE)

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AUTHORITY: 41 U.S.C. 701, *et seq.*; 38 U.S.C 501

SOURCE: 68 FR 66557, 66619, 66620, Nov. 26, 2003, unless otherwise noted.

## Subpart A—Purpose and Coverage

### § 48.100 What does this part do?

This part carries out the portion of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 *et seq.*, as amended) that applies to grants. It also applies the provisions of the Act to cooperative agreements and other financial assistance awards, as a matter of Federal Government policy.

### § 48.105 Does this part apply to me?

(a) Portions of this part apply to you if you are either—

(1) A recipient of an assistance award from the Department of Veterans Affairs; or

(2) A(n) Department of Veterans Affairs awarding official. (See definitions of award and recipient in §§ 48.605 and 48.660, respectively.)

(b) The following table shows the subparts that apply to you:

| If you are . . . | see subparts . . . |
|---|---|
| (1) A recipient who is not an individual | A, B and E. |
| (2) A recipient who is an individual ..... | A, C and E. |
| (3) A(n) Department of Veterans Affairs awarding official. | A, D and E. |

### § 48.110 Are any of my Federal assistance awards exempt from this part?

This part does not apply to any award that the Secretary determines that the application of this part would be inconsistent with the international obligations of the United States or the laws or regulations of a foreign government.

### § 48.115 Does this part affect the Federal contracts that I receive?

It will affect future contract awards indirectly if you are debarred or suspended for a violation of the requirements of this part, as described in § 48.510(c). However, this part does not apply directly to procurement contracts. The portion of the Drug-Free Workplace Act of 1988 that applies to

Federal procurement contracts is carried out through the Federal Acquisition Regulation in chapter 1 of Title 48 of the Code of Federal Regulations (the drug-free workplace coverage currently is in 48 CFR part 23, subpart 23.5).

## Subpart B—Requirements for Recipients Other Than Individuals

### § 48.200 What must I do to comply with this part?

There are two general requirements if you are a recipient other than an individual.

(a) First, you must make a good faith effort, on a continuing basis, to maintain a drug-free workplace. You must agree to do so as a condition for receiving any award covered by this part. The specific measures that you must take in this regard are described in more detail in subsequent sections of this subpart. Briefly, those measures are to—

(1) Publish a drug-free workplace statement and establish a drug-free awareness program for your employees (see §§ 48.205 through 48.220); and

(2) Take actions concerning employees who are convicted of violating drug statutes in the workplace (see § 48.225).

(b) Second, you must identify all known workplaces under your Federal awards (see § 48.230).

### § 48.205 What must I include in my drug-free workplace statement?

You must publish a statement that—

(a) Tells your employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in your workplace;

(b) Specifies the actions that you will take against employees for violating that prohibition; and

(c) Lets each employee know that, as a condition of employment under any award, he or she:

(1) Will abide by the terms of the statement; and

(2) Must notify you in writing if he or she is convicted for a violation of a criminal drug statute occurring in the workplace and must do so no more than five calendar days after the conviction.

### § 48.210 To whom must I distribute my drug-free workplace statement?

You must require that a copy of the statement described in § 48.205 be given to each employee who will be engaged in the performance of any Federal award.

### § 48.215 What must I include in my drug-free awareness program?

You must establish an ongoing drug-free awareness program to inform employees about—

(a) The dangers of drug abuse in the workplace;

(b) Your policy of maintaining a drug-free workplace;

(c) Any available drug counseling, rehabilitation, and employee assistance programs; and

(d) The penalties that you may impose upon them for drug abuse violations occurring in the workplace.

### § 48.220 By when must I publish my drug-free workplace statement and establish my drug-free awareness program?

If you are a new recipient that does not already have a policy statement as described in § 48.205 and an ongoing awareness program as described in § 48.215, you must publish the statement and establish the program by the time given in the following table:

| If . . . | then you . . . |
|---|---|
| (a) The performance period of the award is less than 30 days. | must have the policy statement and program in place as soon as possible, but before the date on which performance is expected to be completed. |
| (b) The performance period of the award is 30 days or more. | must have the policy statement and program in place within 30 days after award. |
| (c) You believe there are extraordinary circumstances that will require more than 30 days for you to publish the policy statement and establish the awareness program. | may ask the Department of Veterans Affairs awarding official to give you more time to do so. The amount of additional time, if any, to be given is at the discretion of the awarding official. |

### § 48.225 What actions must I take concerning employees who are convicted of drug violations in the workplace?

There are two actions you must take if an employee is convicted of a drug violation in the workplace:

(a) First, you must notify Federal agencies if an employee who is engaged in the performance of an award informs you about a conviction, as required by § 48.205(c)(2), or you otherwise learn of the conviction. Your notification to the Federal agencies must__

(1) Be in writing;

(2) Include the employee's position title;

(3) Include the identification number(s) of each affected award;

(4) Be sent within ten calendar days after you learn of the conviction; and

(5) Be sent to every Federal agency on whose award the convicted employee was working. It must be sent to every awarding official or his or her official designee, unless the Federal agency has specified a central point for the receipt of the notices.

(b) Second, within 30 calendar days of learning about an employee's conviction, you must either__

(1) Take appropriate personnel action against the employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973 (29 U.S.C. 794), as amended; or

(2) Require the employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for these purposes by a Federal, State or local health, law enforcement, or other appropriate agency.

### § 48.230 How and when must I identify workplaces?

(a) You must identify all known workplaces under each Department of Veterans Affairs award. A failure to do so is a violation of your drug-free workplace requirements. You may identify the workplaces__

(1) To the Department of Veterans Affairs official that is making the award, either at the time of application or upon award; or

(2) In documents that you keep on file in your offices during the performance of the award, in which case you must make the information available for inspection upon request by Department of Veterans Affairs officials or their designated representatives.

(b) Your workplace identification for an award must include the actual address of buildings (or parts of buildings) or other sites where work under the award takes place. Categorical descriptions may be used (*e.g.*, all vehicles of a mass transit authority or State highway department while in operation, State employees in each local unemployment office, performers in concert halls or radio studios).

(c) If you identified workplaces to the Department of Veterans Affairs awarding official at the time of application or award, as described in paragraph (a)(1) of this section, and any workplace that you identified changes during the performance of the award, you must inform the Department of Veterans Affairs awarding official.

## Subpart C—Requirements for Recipients Who Are Individuals

### § 48.300 What must I do to comply with this part if I am an individual recipient?

As a condition of receiving a(n) Department of Veterans Affairs award, if you are an individual recipient, you must agree that—

(a) You will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity related to the award; and

(b) If you are convicted of a criminal drug offense resulting from a violation occurring during the conduct of any award activity, you will report the conviction:

(1) In writing.

(2) Within 10 calendar days of the conviction.

(3) To the Department of Veterans Affairs awarding official or other designee for each award that you currently have, unless § 48.301 or the award document designates a central point for the receipt of the notices. When notice is made to a central point, it must include the identification number(s) of each affected award.

**§ 48.301 [Reserved]**

## Subpart D—Responsibilities of Department of Veterans Affairs Awarding Officials

**§ 48.400 What are my responsibilities as a(n) Department of Veterans Affairs awarding official?**

As a(n) Department of Veterans Affairs awarding official, you must obtain each recipient's agreement, as a condition of the award, to comply with the requirements in—

(a) Subpart B of this part, if the recipient is not an individual; or

(b) Subpart C of this part, if the recipient is an individual.

## Subpart E—Violations of this Part and Consequences

**§ 48.500 How are violations of this part determined for recipients other than individuals?**

A recipient other than an individual is in violation of the requirements of this part if the Secretary determines, in writing, that—

(a) The recipient has violated the requirements of subpart B of this part; or

(b) The number of convictions of the recipient's employees for violating criminal drug statutes in the workplace is large enough to indicate that the recipient has failed to make a good faith effort to provide a drug-free workplace.

**§ 48.505 How are violations of this part determined for recipients who are individuals?**

An individual recipient is in violation of the requirements of this part if the Secretary determines, in writing, that—

(a) The recipient has violated the requirements of subpart C of this part; or

(b) The recipient is convicted of a criminal drug offense resulting from a violation occurring during the conduct of any award activity.

**§ 48.510 What actions will the Federal Government take against a recipient determined to have violated this part?**

If a recipient is determined to have violated this part, as described in § 48.500 or § 48.505, the Department of Veterans Affairs may take one or more of the following actions—

(a) Suspension of payments under the award;

(b) Suspension or termination of the award; and

(c) Suspension or debarment of the recipient under 38 CFR Part 44, for a period not to exceed five years.

**§ 48.515 Are there any exceptions to those actions?**

The Secretary may waive with respect to a particular award, in writing, a suspension of payments under an award, suspension or termination of an award, or suspension or debarment of a recipient if the Secretary determines that such a waiver would be in the public interest. This exception authority cannot be delegated to any other official.

## Subpart F—Definitions

**§ 48.605 Award.**

*Award* means an award of financial assistance by the Department of Veterans Affairs or other Federal agency directly to a recipient.

(a) The term award includes:

(1) A Federal grant or cooperative agreement, in the form of money or property in lieu of money.

(2) A block grant or a grant in an entitlement program, whether or not the grant is exempted from coverage under the Governmentwide rule 38 CFR Part 43 that implements OMB Circular A–102 (for availability, see 5 CFR 1310.3) and specifies uniform administrative requirements.

(b) The term award does not include:

(1) Technical assistance that provides services instead of money.

(2) Loans.

(3) Loan guarantees.

(4) Interest subsidies.

(5) Insurance.

(6) Direct appropriations.

(7) Veterans' benefits to individuals (*i.e.*, any benefit to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States).

### § 48.610 Controlled substance.

*Controlled substance* means a controlled substance in schedules I through V of the Controlled Substances Act (21 U.S.C. 812), and as further defined by regulation at 21 CFR 1308.11 through 1308.15.

### § 48.615 Conviction.

*Conviction* means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes.

### § 48.620 Cooperative agreement.

*Cooperative agreement* means an award of financial assistance that, consistent with 31 U.S.C. 6305, is used to enter into the same kind of relationship as a grant (see definition of grant in § 48.650), except that substantial involvement is expected between the Federal agency and the recipient when carrying out the activity contemplated by the award. The term does not include cooperative research and development agreements as defined in 15 U.S.C. 3710a.

### § 48.625 Criminal drug statute.

*Criminal drug statute* means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance.

### § 48.630 Debarment.

*Debarment* means an action taken by a Federal agency to prohibit a recipient from participating in Federal Government procurement contracts and covered nonprocurement transactions. A recipient so prohibited is debarred, in accordance with the Federal Acquisition Regulation for procurement contracts (48 CFR part 9, subpart 9.4) and the common rule, Government-wide Debarment and Suspension (Nonprocurement), that implements Executive Order 12549 and Executive Order 12689.

### § 48.635 Drug-free workplace.

*Drug-free workplace* means a site for the performance of work done in connection with a specific award at which employees of the recipient are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance.

### § 48.640 Employee.

(a) *Employee* means the employee of a recipient directly engaged in the performance of work under the award, including—

(1) All direct charge employees;

(2) All indirect charge employees, unless their impact or involvement in the performance of work under the award is insignificant to the performance of the award; and

(3) Temporary personnel and consultants who are directly engaged in the performance of work under the award and who are on the recipient's payroll.

(b) This definition does not include workers not on the payroll of the recipient (*e.g.*, volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the payroll; or employees of subrecipients or subcontractors in covered workplaces).

### § 48.645 Federal agency or agency.

*Federal agency or agency* means any United States executive department, military department, government corporation, government controlled corporation, any other establishment in the executive branch (including the Executive Office of the President), or any independent regulatory agency.

### § 48.650 Grant.

*Grant* means an award of financial assistance that, consistent with 31 U.S.C. 6304, is used to enter into a relationship—

(a) The principal purpose of which is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by a law of the United States, rather than to acquire property or services for the Federal Government's direct benefit or use; and

(b) In which substantial involvement is not expected between the Federal agency and the recipient when carrying out the activity contemplated by the award.

### §48.655 Individual.

*Individual* means a natural person.

### §48.660 Recipient.

*Recipient* means any individual, corporation, partnership, association, unit of government (except a Federal agency) or legal entity, however organized, that receives an award directly from a Federal agency.

### §48.665 State.

*State* means any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

### §48.670 Suspension.

*Suspension* means an action taken by a Federal agency that immediately prohibits a recipient from participating in Federal Government procurement contracts and covered nonprocurement transactions for a temporary period, pending completion of an investigation and any judicial or administrative proceedings that may ensue. A recipient so prohibited is suspended, in accordance with the Federal Acquisition Regulation for procurement contracts (48 CFR part 9, subpart 9.4) and the common rule, Governmentwide Debarment and Suspension (Nonprocurement), that implements Executive Order 12549 and Executive Order 12689. Suspension of a recipient is a distinct and separate action from suspension of an award or suspension of payments under an award.

# PART 51—PER DIEM FOR NURSING HOME CARE OF VETERANS IN STATE HOMES

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AUTHORITY: 38 U.S.C. 101, 501, 1710, 1741–1743.

SOURCE: 65 FR 968, Jan. 6, 2000, unless otherwise noted.

## Subpart A—General

### §51.1 Purpose.

This part sets forth the mechanism for paying per diem to State homes providing nursing home care to eligible veterans and is intended to ensure that veterans receive high quality care in State homes.

### §51.2 Definitions.

For purposes of this part:

*Clinical nurse specialist* means a licensed professional nurse with a master's degree in nursing with a major in a clinical nursing specialty from an academic program accredited by the National League for Nursing and at least 2 years of successful clinical practice in the specialized area of nursing practice following this academic preparation.

*Facility* means a building or any part of a building for which a State has submitted an application for recognition as a State home for the provision of nursing home care or a building or any part of a building which VA has recognized as a State home for the provision of nursing home care.

*Nurse practitioner* means a licensed professional nurse who is currently licensed to practice in the State; who meets the State's requirements governing the qualifications of nurse practitioners; and who is currently certified as an adult, family, or gerontological nurse practitioner by the American Nurses' Association.

*Nursing home care* means the accommodation of convalescents or other persons who are not acutely ill and not in need of hospital care, but who require skilled nursing care and related medical services.

*Physician* means a doctor of medicine or osteopathy legally authorized to practice medicine or surgery in the State.

*Physician assistant* means a person who meets the applicable State requirements for physician assistant, is currently certified by the National Commission on Certification of Physician Assistants (NCCPA) as a physician assistant, and has an individualized written scope of practice that determines the authorization to write medical orders, prescribe medications and other clinical tasks under appropriate physician supervision which is approved by the primary care physician.

*Primary physician or primary care physician* means a designated generalist physician responsible for providing, directing and coordinating all health care that is indicated for the residents.

*State* means each of the several States, territories, and possessions of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

*State home* means a home approved by VA which a State established primarily for veterans disabled by age, disease, or otherwise, who by reason of such disability are incapable of earning a living. A State home may provide domiciliary care, nursing home care, adult day health care, and hospital care. Hospital care may be provided only when the State home also provides domiciliary and/or nursing home care.

*VA* means the U.S. Department of Veterans Affairs.

## Subpart B—Obtaining Per Diem for Nursing Home Care in State Homes

### § 51.10 Per diem based on recognition and certification.

VA will pay per diem to a State for providing nursing home care to eligible veterans in a facility if the Under Secretary for Health recognizes the facility as a State home based on a current certification that the facility and facility management meet the standards of subpart D of this part. Also, after recognition has been granted, VA will continue to pay per diem to a State for providing nursing home care to eligible veterans in such a facility for a temporary period based on a certification that the facility and facility management provisionally meet the standards of subpart D.

(Authority: 38 U.S.C. 101, 501, 1710, 1741–1743)

### § 51.20 Application for recognition based on certification.

To apply for recognition and certification of a State home for nursing home care, a State must:

(a) Send a request for recognition and certification to the Under Secretary for Health (10), VA Headquarters, 810 Vermont Avenue, NW., Washington, DC 20420. The request must be in the form of a letter and must be signed by the State official authorized to establish the State home;

(b) Allow VA to survey the facility as set forth in § 51.30(c); and

(c) Upon request from the director of the VA medical center of jurisdiction, submit to the director all documentation required under subpart D of this part.

(Authority: 38 U.S.C. 101, 501, 1710, 1741–1743)

### § 51.30 Recognition and certification.

(a)(1) The Under Secretary for Health will make the determination regarding recognition and the initial determination regarding certification, after receipt of a tentative determination from the director of the VA medical center of jurisdiction regarding whether, based on a VA survey, the facility and facility management meet or do not meet the standards of subpart D of this part. The Under Secretary for Health

will notify the official in charge of the facility, the State official authorized to oversee operations of the State home, the VA Network Director (10N 1–22), Chief Network Officer (10N), and the Chief Consultant, Geriatrics and Extended Care Strategic Healthcare Group (114) of the action taken.

(2) For each facility recognized as a State home, the director of the VA medical center of jurisdiction will certify annually whether the facility and facility management meet, provisionally meet, or do not meet the standards of subpart D of this part (this certification should be made every 12 months during the recognition anniversary month or during a month agreed upon by the VA medical care center director and officials of the State home facility). A provisional certification will be issued by the director only upon a determination that the facility or facility management does not meet one or more of the standards in subpart D, that the deficiencies do not jeopardize the health or safety of the residents, and that the facility management and the director have agreed to a plan of correction to remedy the deficiencies in a specified amount of time (not more time than the VA medical center of jurisdiction director determines is reasonable for correcting the specific deficiencies). The director of the VA medical center of jurisdiction will notify the official in charge of the facility, the State official authorized to oversee the operations of the State home, the VA Network Director (10N 1–22), Chief Network Officer (10N) and the Chief Consultant, Geriatrics and Extended Care Strategic Healthcare Group (114) of the certification, provisional certification, or noncertification.

(b) Once a facility has achieved recognition, the recognition will remain in effect unless the State requests that the recognition be withdrawn or the Under Secretary for Health makes a final decision that the facility or facility management does not meet the standards of subpart D. Recognition of a facility will apply only to the facility as it exists at the time of recognition; any annex, branch, enlargement, expansion, or relocation must be separately recognized.

(c) Both during the application process for recognition and after the Under Secretary for Health has recognized a facility, VA may survey the facility as necessary to determine if the facility and facility management comply with the provisions of this part. Generally, VA will provide advance notice to the State before a survey occurs; however, surveys may be conducted without notice. A survey, as necessary, will cover all parts of the facility, and include a review and audit of all records of the facility that have a bearing on compliance with any of the requirements of this part (including any reports from State or local entities). For purposes of a survey, at the request of the director of the VA medical center of jurisdiction, the State home facility management must submit to the director a completed VA Form 10–3567, Staffing Profile, set forth at §58.10 of this chapter. The director of the VA medical center of jurisdiction will designate the VA officials to survey the facility. These officials may include physicians; nurses; pharmacists; dietitians; rehabilitation therapists; social workers; representatives from health administration, engineering, environmental management systems, and fiscal officers.

(d) If the director of the VA medical center of jurisdiction determines that the State home facility or facility management does not meet the standards of this part, the director will notify the State home facility in writing of the standards not met. The director will send a copy of this notice to the State official authorized to oversee operations of the facility, the VA Network Director (10N 1–22), the Chief Network Officer (10N), and the Chief Consultant, Geriatrics and Extended Care Strategic Healthcare Group (114). The letter will include the reasons for the decision and indicate that the State has the right to appeal the decision.

(e) The State must submit the appeal to the Under Secretary for Health in writing, within 30 days of receipt of the notice of failure to meet the standards. In its appeal, the State must explain why the determination is inaccurate or incomplete and provide any new and relevant information not previously considered. Any appeal that does not

identify a reason for disagreement will be returned to the sender without further consideration.

(f) After reviewing the matter, including any relevant supporting documentation, the Under Secretary for Health will issue a written determination that affirms or reverses the previous determination. If the Under Secretary for Health decides that the facility does not meet the standards of subpart D of this part, the Under Secretary for Health will withdraw recognition and stop paying per diem for care provided on and after the date of the decision. The decision of Under Secretary for Health will constitute a final VA decision. The Under Secretary for Health will send a copy of this decision to the State home facility and to the State official authorized to oversee the operations of the State home.

(g) In the event that a VA survey team or other VA medical center staff identifies any condition that poses an immediate threat to public or patient safety or other information indicating the existence of such a threat, the director of VA medical center of jurisdiction will immediately report this to the VA Network Director (10N 1–22), Chief Network Officer (10N), Chief Consultant, Geriatrics and Extended Care Strategic Healthcare Group (114) and State official authorized to oversee operations of the State home.

(Authority: 38 U.S.C. 101, 501, 1710, 1741–1743)

### § 51.31 Automatic recognition.

Notwithstanding other provisions of this part, a facility that already is recognized by VA as a State home for nursing home care at the time this part becomes effective, automatically will continue to be recognized as a State home for nursing home care but will be subject to all of the provisions of this part that apply to facilities that have achieved recognition, including the provisions requiring that the facility meet the standards set forth in subpart D and the provisions for withholding per diem payments and withdrawal of recognition.

## Subpart C—Per Diem Payments

### § 51.40 Monthly payment.

(a)(1) VA will pay per diem monthly for nursing home care provided to an eligible veteran in a facility recognized as a State home for nursing home care. During Fiscal Year 2000, VA will pay the lesser of the following:

(i) One-half of the cost of the care for each day the veteran is in the facility; or

(ii) $50.55 for each day the veteran is in the facility.

(2) Per diem will be paid only for the days that the veteran is a resident at the facility. For purposes of paying per diem, VA will consider a veteran to be a resident at the facility during each full day that the veteran is receiving care at the facility. VA will not deem the veteran to be a resident at the facility if the veteran is receiving care outside the State home facility at VA expense. Otherwise, VA will deem the veteran to be a resident at the facility during any absence from the facility that lasts for no more than 96 consecutive hours. This absence will be considered to have ended when the veteran returns as a resident if the veteran's stay is for at least a continuous 24-hour period.

(3) As a condition for receiving payment of per diem under this part, the State must submit a completed VA Form 10–5588, State Home Report and Statement of Federal Aid Claimed. This form is set forth in full at § 58.11 of this chapter.

(4) Initial payments will not be made until the Under Secretary for Health recognizes the State home. However, payments will be made retroactively for care that was provided on and after the date of the completion of the VA survey of the facility that provided the basis for determining that the facility met the standards of this part.

(5) As a condition for receiving payment of per diem under this part, the State must submit to the VA medical center of jurisdiction for each veteran the following completed VA Forms 10–10EZ, Application for Medical Benefits, and 10–10SH, State Home Program Application for Care—Medical Certification, at the time of admission and with any request for a change in the

level of care (domiciliary, hospital care or adult day health care). These forms are set forth in full at §§58.12 and 58.13 of this chapter, respectively, of this part. If the facility is eligible to receive per diem payments for a veteran, VA will pay per diem under this part from the date of receipt of the completed forms required by this paragraph, except that VA will pay per diem from the day on which the veteran was admitted to the facility if the completed forms are received within 10 days after admission.

(b) Total per diem costs for an eligible veteran's nursing home care consist of those direct and indirect costs attributable to nursing home care at the facility divided by the total number of patients at the nursing home. Relevant cost principles are set forth in the Office of Management and Budget (OMB) Circular number A–87, dated May 4, 1995, ''Cost Principles for State, Local, and Indian Tribal Governments.''

(Authority: 38 U.S.C. 101, 501, 1710, 1741–1743)

### §51.50 Eligible veterans.

A veteran is an eligible veteran under this part if VA determines that the veteran needs nursing home care and the veteran is within one of the following categories:

(a) Veterans with service-connected disabilities;

(b) Veterans who are former prisoners of war;

(c) Veterans who were discharged or released from active military service for a disability incurred or aggravated in the line of duty;

(d) Veterans who receive disability compensation under 38 U.S.C. 1151;

(e) Veterans whose entitlement to disability compensation is suspended because of the receipt of retired pay;

(f) Veterans whose entitlement to disability compensation is suspended pursuant to 38 U.S.C. 1151, but only to the extent that such veterans' continuing eligibility for nursing home care is provided for in the judgment or settlement described in 38 U.S.C. 1151;

(g) Veterans who VA determines are unable to defray the expenses of necessary care as specified under 38 U.S.C. 1722(a);

(h) Veterans of the Mexican border period or of World War I;

(i) Veterans solely seeking care for a disorder associated with exposure to a toxic substance or radiation or for a disorder associated with service in the Southwest Asia theater of operations during the Persian Gulf War, as provided in 38 U.S.C. 1710(e);

(j) Veterans who agree to pay to the United States the applicable co-payment determined under 38 U.S.C. 1710(f) and 1710(g).

(Authority: 38 U.S.C. 101, 501, 1710, 1741–1743)

## Subpart D—Standards

### §51.60 Standards applicable for payment of per diem.

The provisions of this subpart are the standards that a State home and facility management must meet for the State to receive per diem for nursing home care.

### §51.70 Resident rights.

The resident has a right to a dignified existence, self-determination, and communication with and access to persons and services inside and outside the facility. The facility management must protect and promote the rights of each resident, including each of the following rights:

(a) *Exercise of rights.* (1) The resident has the right to exercise his or her rights as a resident of the facility and as a citizen or resident of the United States.

(2) The resident has the right to be free of interference, coercion, discrimination, and reprisal from the facility management in exercising his or her rights.

(3) The resident has the right to freedom from chemical or physical restraint.

(4) In the case of a resident determined incompetent under the laws of a State by a court of jurisdiction, the rights of the resident are exercised by the person appointed under State law to act on the resident's behalf.

(5) In the case of a resident who has not been determined incompetent by the State court, any legal-surrogate designated in accordance with State law may exercise the resident's rights to the extent provided by State law.

(b) *Notice of rights and services.* (1) The facility management must inform the resident both orally and in writing in a language that the resident understands of his or her rights and all rules and regulations governing resident conduct and responsibilities during the stay in the facility. Such notification must be made prior to or upon admission and periodically during the resident's stay.

(2) The resident or his or her legal representative has the right:

(i) Upon an oral or written request, to access all records pertaining to himself or herself including current clinical records within 24 hours (excluding weekends and holidays); and

(ii) After receipt of his or her records for review, to purchase at a cost not to exceed the community standard photocopies of the records or any portions of them upon request and with 2 working days advance notice to the facility management.

(3) The resident has the right to be fully informed in language that he or she can understand of his or her total health status;

(4) The resident has the right to refuse treatment, to refuse to participate in experimental research, and to formulate an advance directive as specified in paragraph (b)(7) of this section; and

(5) The facility management must inform each resident before, or at the time of admission, and periodically during the resident's stay, of services available in the facility and of charges for those services to be billed to the resident.

(6) The facility management must furnish a written description of legal rights which includes:

(i) A description of the manner of protecting personal funds, under paragraph (c) of this section;

(ii) A statement that the resident may file a complaint with the State (agency) concerning resident abuse, neglect, misappropriation of resident property in the facility, and non-compliance with the advance directives requirements.

(7) The facility management must have written policies and procedures regarding advance directives (*e.g.,* living wills) that include provisions to inform and provide written information to all residents concerning the right to accept or refuse medical or surgical treatment and, at the individual's option, formulate an advance directive. This includes a written description of the facility's policies to implement advance directives and applicable State law. If an individual is incapacitated at the time of admission and is unable to receive information (due to the incapacitating conditions) or articulate whether or not he or she has executed an advance directive, the facility may give advance directive information to the individual's family or surrogate in the same manner that it issues other materials about policies and procedures to the family of the incapacitated individual or to a surrogate or other concerned persons in accordance with State law. The facility management is not relieved of its obligation to provide this information to the individual once he or she is no longer incapacitated or unable to receive such information. Follow-up procedures must be in place to provide the information to the individual directly at the appropriate time.

(8) The facility management must inform each resident of the name and way of contacting the primary physician responsible for his or her care.

(9) Notification of changes. (i) Facility management must immediately inform the resident; consult with the primary physician; and if known, notify the resident's legal representative or an interested family member when there is—

(A) An accident involving the resident which results in injury and has the potential for requiring physician intervention;

(B) A significant change in the resident's physical, mental, or psychosocial status (*i.e.,* a deterioration in health, mental, or psychosocial status in either life-threatening conditions or clinical complications);

(C) A need to alter treatment significantly (*i.e.,* a need to discontinue an existing form of treatment due to adverse consequences, or to commence a new form of treatment); or

(D) A decision to transfer or discharge the resident from the facility as specified in § 51.80(a) of this part.

(ii) The facility management must also promptly notify the resident and, if known, the resident's legal representative or interested family member when there is—

(A) A change in room or roommate assignment as specified in §51.100(f)(2); or

(B) A change in resident rights under Federal or State law or regulations as specified in paragraph (b)(1) of this section.

(iii) The facility management must record and periodically update the address and phone number of the resident's legal representative or interested family member.

(c) *Protection of resident funds.* (1) The resident has the right to manage his or her financial affairs, and the facility management may not require residents to deposit their personal funds with the facility.

(2) *Management of personal funds.* Upon written authorization of a resident, the facility management must hold, safeguard, manage, and account for the personal funds of the resident deposited with the facility, as specified in paragraphs (c)(3) through (c)(6) of this section.

(3) *Deposit of funds.* (i) Funds in excess of $100. The facility management must deposit any residents' personal funds in excess of $100 in an interest bearing account (or accounts) that is separate from any of the facility's operating accounts, and that credits all interest earned on resident's funds to that account. (In pooled accounts, there must be a separate accounting for each resident's share.)

(ii) *Funds less than $100.* The facility management must maintain a resident's personal funds that do not exceed $100 in a non-interest bearing account, interest-bearing account, or petty cash fund.

(4) *Accounting and records.* The facility management must establish and maintain a system that assures a full and complete and separate accounting, according to generally accepted accounting principles, of each resident's personal funds entrusted to the facility on the resident's behalf.

(i) The system must preclude any commingling of resident funds with facility funds or with the funds of any person other than another resident.

(ii) The individual financial record must be available through quarterly statements and on request from the resident or his or her legal representative.

(5) *Conveyance upon death.* Upon the death of a resident with a personal fund deposited with the facility, the facility management must convey within 30 days the resident's funds, and a final accounting of those funds, to the individual or probate jurisdiction administering the resident's estate; or other appropriate individual or entity, if State law allows.

(6) *Assurance of financial security.* The facility management must purchase a surety bond, or otherwise provide assurance satisfactory to the Under Secretary for Health, to assure the security of all personal funds of residents deposited with the facility.

(d) *Free choice.* The resident has the right to—

(1) Be fully informed in advance about care and treatment and of any changes in that care or treatment that may affect the resident's well-being; and

(2) Unless determined incompetent or otherwise determined to be incapacitated under the laws of the State, participate in planning care and treatment or changes in care and treatment.

(e) *Privacy and confidentiality.* The resident has the right to personal privacy and confidentiality of his or her personal and clinical records.

(1) Residents have a right to personal privacy in their accommodations, medical treatment, written and telephone communications, personal care, visits, and meetings of family and resident groups. This does not require the facility management to give a private room to each resident.

(2) Except as provided in paragraph (e)(3) of this section, the resident may approve or refuse the release of personal and clinical records to any individual outside the facility;

(3) The resident's right to refuse release of personal and clinical records does not apply when—

(i) The resident is transferred to another health care institution; or

(ii) Record release is required by law.

(f) *Grievances.* A resident has the right to—

(1) Voice grievances without discrimination or reprisal. Residents may voice grievances with respect to treatment received and not received; and

(2) Prompt efforts by the facility to resolve grievances the resident may have, including those with respect to the behavior of other residents.

(g) *Examination of survey results.* A resident has the right to—

(1) Examine the results of the most recent VA survey with respect to the facility. The facility management must make the results available for examination in a place readily accessible to residents, and must post a notice of their availability; and

(2) Receive information from agencies acting as client advocates, and be afforded the opportunity to contact these agencies.

(h) *Work.* The resident has the right to—

(1) Refuse to perform services for the facility;

(2) Perform services for the facility, if he or she chooses, when—

(i) The facility has documented the need or desire for work in the plan of care;

(ii) The plan specifies the nature of the services performed and whether the services are voluntary or paid;

(iii) Compensation for paid services is at or above prevailing rates; and

(iv) The resident agrees to the work arrangement described in the plan of care.

(i) *Mail.* The resident must have the right to privacy in written communications, including the right to—

Send and promptly receive mail that is unopened; and

(2) Have access to stationery, postage, and writing implements at the resident's own expense.

(j) *Access and visitation rights.* (1) The resident has the right and the facility management must provide immediate access to any resident by the following:

(i) Any representative of the Under Secretary for Health;

(ii) Any representative of the State;

(iii) Physicians of the resident's choice (to provide care in the nursing home, physicians must meet the provisions of § 51.210(j));

(iv) The State long term care ombudsman;

(v) Immediate family or other relatives of the resident subject to the resident's right to deny or withdraw consent at any time; and

(vi) Others who are visiting subject to reasonable restrictions and the resident's right to deny or withdraw consent at any time.

(2) The facility management must provide reasonable access to any resident by any entity or individual that provides health, social, legal, or other services to the resident, subject to the resident's right to deny or withdraw consent at any time.

(3) The facility management must allow representatives of the State Ombudsman Program, described in paragraph (j)(1)(iv) of this section, to examine a resident's clinical records with the permission of the resident or the resident's legal representative, subject to State law.

(k) *Telephone.* The resident has the right to reasonable access to use a telephone where calls can be made without being overheard.

(l) *Personal property.* The resident has the right to retain and use personal possessions, including some furnishings, and appropriate clothing, as space permits, unless to do so would infringe upon the rights or health and safety of other residents.

(m) *Married couples.* The resident has the right to share a room with his or her spouse when married residents live in the same facility and both spouses consent to the arrangement.

(n) *Self-Administration of Drugs.* An individual resident may self-administer drugs if the interdisciplinary team, as defined by § 51.110(d)(2)(ii) of this part, has determined that this practice is safe.

(Authority: 38 U.S.C. 101, 501, 1710, 1741–1743)

### § 51.80 Admission, transfer and discharge rights.

(a) *Transfer and discharge.* (1) Definition: Transfer and discharge includes movement of a resident to a bed outside of the facility whether that bed is in the same physical plant or not. Transfer and discharge does not refer to movement of a resident to a bed within the same facility.

(2) *Transfer and discharge requirements.* The facility management must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless—

(i) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the nursing home;

(ii) The transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the nursing home;

(iii) The safety of individuals in the facility is endangered;

(iv) The health of individuals in the facility would otherwise be endangered;

(v) The resident has failed, after reasonable and appropriate notice to pay for a stay at the facility; or

(vi) The nursing home ceases to operate.

(3) *Documentation.* When the facility transfers or discharges a resident under any of the circumstances specified in paragraphs (a)(2)(i) through (a)(2)(vi) of this section, the primary physician must document this in the resident's clinical record.

(4) *Notice before transfer.* Before a facility transfers or discharges a resident, the facility must—

(i) Notify the resident and, if known, a family member or legal representative of the resident of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand.

(ii) Record the reasons in the resident's clinical record; and

(iii) Include in the notice the items described in paragraph (a)(6) of this section.

(5) *Timing of the notice.* (i) The notice of transfer or discharge required under paragraph (a)(4) of this section must be made by the facility at least 30 days before the resident is transferred or discharged, except when specified in paragraph (a)(5)(ii) of this section,

(ii) Notice may be made as soon as practicable before transfer or discharge when—

(A) The safety of individuals in the facility would be endangered;

(B) The health of individuals in the facility would be otherwise endangered;

(C) The resident's health improves sufficiently so the resident no longer needs the services provided by the nursing home;

(D) The resident's needs cannot be met in the nursing home;

(6) *Contents of the notice.* The written notice specified in paragraph (a)(4) of this section must include the following:

(i) The reason for transfer or discharge;

(ii) The effective date of transfer or discharge;

(iii) The location to which the resident is transferred or discharged;

(iv) A statement that the resident has the right to appeal the action to the State official designated by the State; and

(v) The name, address and telephone number of the State long term care ombudsman.

(7) *Orientation for transfer or discharge.* A facility management must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility.

(b) *Notice of bed-hold policy and readmission.*—(1) *Notice before transfer.* Before a facility transfers a resident to a hospital or allows a resident to go on therapeutic leave, the facility management must provide written information to the resident and a family member or legal representative that specifies—

(i) The duration of the facility's bed-hold policy, if any, during which the resident is permitted to return and resume residence in the facility; and

(ii) The facility's policies regarding bed-hold periods, which must be consistent with paragraph (b)(3) of this section, permitting a resident to return.

(2) *Bed-hold notice upon transfer.* At the time of transfer of a resident for hospitalization or therapeutic leave, facility management must provide to the resident and a family member or legal representative written notice which specifies the duration of the bed-hold policy described in paragraph (b)(1) of this section.

(3) *Permitting resident to return to facility.* A nursing facility must establish and follow a written policy under which a resident, whose hospitalization

or therapeutic leave exceeds the bed-hold period is readmitted to the facility immediately upon the first availability of a bed in a semi-private room, if the resident requires the services provided by the facility.

(c) *Equal access to quality care.* The facility management must establish and maintain identical policies and practices regarding transfer, discharge, and the provision of services for all individuals regardless of source of payment.

(d) *Admissions policy.* The facility management must not require a third party guarantee of payment to the facility as a condition of admission or expedited admission, or continued stay in the facility. However, the facility may require an individual who has legal access to a resident's income or resources available to pay for facility care to sign a contract to pay the facility from the resident's income or resources.

(Authority: 38 U.S.C. 101, 501, 1710, 1741–1743)

### § 51.90 Resident behavior and facility practices.

(a) *Restraints.* (1) The resident has a right to be free from any chemical or physical restraints imposed for purposes of discipline or convenience. When a restraint is applied or used, the purpose of the restraint is reviewed and is justified as a therapeutic intervention.

(i) Chemical restraint is the inappropriate use of a sedating psychotropic drug to manage or control behavior.

(ii) Physical restraint is any method of physically restricting a person's freedom of movement, physical activity or normal access to his or her body. Bed rails and vest restraints are examples of physical restraints.

(2) The facility management uses a system to achieve a restraint-free environment.

(3) The facility management collects data about the use of restraints.

(4) When alternatives to the use of restraint are ineffective, a restraint must be safely and appropriately used.

(b) *Abuse.* The resident has the right to be free from mental, physical, sexual, and verbal abuse or neglect, corporal punishment, and involuntary seclusion.

(1) Mental abuse includes humiliation, harassment, and threats of punishment or deprivation.

(2) Physical abuse includes hitting, slapping, pinching, or kicking. Also includes controlling behavior through corporal punishment.

(3) Sexual abuse includes sexual harassment, sexual coercion, and sexual assault.

(4) Neglect is any impaired quality of life for an individual because of the absence of minimal services or resources to meet basic needs. Includes withholding or inadequately providing food and hydration (without physician, resident, or surrogate approval), clothing, medical care, and good hygiene. May also include placing the individual in unsafe or unsupervised conditions.

(5) Involuntary seclusion is a resident's separation from other residents or from the resident's room against his or her will or the will of his or her legal representative.

(c) *Staff treatment of residents.* The facility management must develop and implement written policies and procedures that prohibit mistreatment, neglect, and abuse of residents and misappropriation of resident property.

(1) The facility management must:

(i) Not employ individuals who—

(A) Have been found guilty of abusing, neglecting, or mistreating individuals by a court of law; or

(B) Have had a finding entered into an applicable State registry or with the applicable licensing authority concerning abuse, neglect, mistreatment of individuals or misappropriation of their property; and

(ii) Report any knowledge it has of actions by a court of law against an employee, which would indicate unfitness for service as a nurse aide or other facility staff to the State nurse aide registry or licensing authorities.

(2) The facility management must ensure that all alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source, and misappropriation of resident property are reported immediately to the administrator of the facility and to other officials in accordance with State law through established procedures.

(3) The facility management must have evidence that all alleged violations are thoroughly investigated, and must prevent further potential abuse while the investigation is in progress.

(4) The results of all investigations must be reported to the administrator or the designated representative and to other officials in accordance with State law within 5 working days of the incident, and appropriate corrective action must be taken if the alleged violation is verified.

(Authority: 38 U.S.C. 101, 501, 1710, 1741–1743)

### §51.100 Quality of life.

A facility management must care for its residents in a manner and in an environment that promotes maintenance or enhancement of each resident's quality of life.

(a) *Dignity*. The facility management must promote care for residents in a manner and in an environment that maintains or enhances each resident's dignity and respect in full recognition of his or her individuality.

(b) *Self-determination and participation*. The resident has the right to—

(1) Choose activities, schedules, and health care consistent with his or her interests, assessments, and plans of care;

(2) Interact with members of the community both inside and outside the facility; and

(3) Make choices about aspects of his or her life in the facility that are significant to the resident.

(c) *Resident Council.* The facility management must establish a council of residents that meet at least quarterly. The facility management must document any concerns submitted to the management of the facility by the council.

(d) *Participation in resident and family groups.* (1) A resident has the right to organize and participate in resident groups in the facility;

(2) A resident's family has the right to meet in the facility with the families of other residents in the facility;

(3) The facility management must provide the council and any resident or family group that exists with private space;

(4) Staff or visitors may attend meetings at the group's invitation;

(5) The facility management must provide a designated staff person responsible for providing assistance and responding to written requests that result from group meetings;

(6) The facility management must listen to the views of any resident or family group, including the council established under paragraph (c) of this section, and act upon the concerns of residents, families, and the council regarding policy and operational decisions affecting resident care and life in the facility.

(e) *Participation in other activities.* A resident has the right to participate in social, religious, and community activities that do not interfere with the rights of other residents in the facility. The facility management must arrange for religious counseling by clergy of various faith groups.

(f) *Accommodation of needs.* A resident has the right to—

(1) Reside and receive services in the facility with reasonable accommodation of individual needs and preferences, except when the health or safety of the individual or other residents would be endangered; and

(2) Receive notice before the resident's room or roommate in the facility is changed.

(g) *Patient Activities.* (1) The facility management must provide for an ongoing program of activities designed to meet, in accordance with the comprehensive assessment, the interests and the physical, mental, and psychosocial well-being of each resident.

(2) The activities program must be directed by a qualified professional who is a qualified therapeutic recreation specialist or an activities professional who—

(i) Is licensed or registered, if applicable, by the State in which practicing; and

(ii) Is certified as a therapeutic recreation specialist or as an activities professional by a recognized accrediting body.

(h) *Social Services.* (1) The facility management must provide medically related social services to attain or maintain the highest practicable mental and psychosocial well-being of each resident.

(2) A nursing home with 100 or more beds must employ a qualified social worker on a full-time basis.

(3) Qualifications of social worker. A qualified social worker is an individual with—

(i) A bachelor's degree in social work from a school accredited by the Council of Social Work Education (Note: A master's degree social worker with experience in long-term care is preferred), and

(ii) A social work license from the State in which the State home is located, if offered by the State, and

(iii) A minimum of one year of supervised social work experience in a health care setting working directly with individuals.

(4) The facility management must have sufficient support staff to meet patients' social services needs.

(5) Facilities for social services must ensure privacy for interviews.

(i) *Environment.* The facility management must provide—

(1) A safe, clean, comfortable, and homelike environment, allowing the resident to use his or her personal belongings to the extent possible;

(2) Housekeeping and maintenance services necessary to maintain a sanitary, orderly, and comfortable interior;

(3) Clean bed and bath linens that are in good condition;

(4) Private closet space in each resident room, as specified in § 51.200(d)(2)(iv) of this part;

(5) Adequate and comfortable lighting levels in all areas;

(6) Comfortable and safe temperature levels. Facilities must maintain a temperature range of 71–81 degrees Fahrenheit; and

(7) For the maintenance of comfortable sound levels.

(Authority: 38 U.S.C. 101, 501, 1710, 1741–1743)

### § 51.110 Resident assessment.

The facility management must conduct initially, annually and as required by a change in the resident's condition a comprehensive, accurate, standardized, reproducible assessment of each resident's functional capacity.

(a) *Admission orders.* At the time each resident is admitted, the facility management must have physician orders for the resident's immediate care and a medical assessment, including a medical history and physical examination, within a time frame appropriate to the resident's condition, not to exceed 72 hours after admission, except when an examination was performed within five days before admission and the findings were recorded in the medical record on admission.

(b) *Comprehensive assessments.* (1) The facility management must make a comprehensive assessment of a resident's needs:

(i) Using the Health Care Financing Administration Long Term Care Resident Assessment Instrument Version 2.0; and

(ii) Describing the resident's capability to perform daily life functions, strengths, performances, needs as well as significant impairments in functional capacity.

(iii) All nursing homes must be in compliance with the use of the Health Care Financing Administration Long Term Care Resident Assessment Instrument Version 2.0 by no later than January 1, 2000.

(2) *Frequency.* Assessments must be conducted—

(i) No later than 14 days after the date of admission;

(ii) Promptly after a significant change in the resident's physical, mental, or social condition; and

(iii) In no case less often than once every 12 months.

(3) *Review of assessments.* The nursing facility management must examine each resident no less than once every 3 months, and as appropriate, revise the resident's assessment to assure the continued accuracy of the assessment.

(4) *Use.* The results of the assessment are used to develop, review, and revise the resident's individualized comprehensive plan of care, under paragraph (d) of this section.

(c) *Accuracy of assessments.* (1) Coordination—

(i) Each assessment must be conducted or coordinated with the appropriate participation of health professionals.

(ii) Each assessment must be conducted or coordinated by a registered nurse that signs and certifies the completion of the assessment.

(2) Certification. Each person who completes a portion of the assessment must sign and certify the accuracy of that portion of the assessment.

(d) *Comprehensive care plans.* (1) The facility management must develop an individualized comprehensive care plan for each resident that includes measurable objectives and timetables to meet a resident's physical, mental, and psychosocial needs that are identified in the comprehensive assessment. The care plan must describe the following—

(i) The services that are to be furnished to attain or maintain the resident's highest practicable physical, mental, and psychosocial well-being as required under §51.120; and

(ii) Any services that would otherwise be required under §51.120 of this part but are not provided due to the resident's exercise of rights under §51.70, including the right to refuse treatment under §51.70(b)(4) of this part.

(2) A comprehensive care plan must be—

(i) Developed within 7 calendar days after completion of the comprehensive assessment;

(ii) Prepared by an interdisciplinary team, that includes the primary physician, a registered nurse with responsibility for the resident, and other appropriate staff in disciplines as determined by the resident's needs, and, to the extent practicable, the participation of the resident, the resident's family or the resident's legal representative; and

(iii) Periodically reviewed and revised by a team of qualified persons after each assessment.

(3) The services provided or arranged by the facility must—

(i) Meet professional standards of quality; and

(ii) Be provided by qualified persons in accordance with each resident's written plan of care.

(e) *Discharge summary.* Prior to discharging a resident, the facility management must prepare a discharge summary that includes—

(1) A recapitulation of the resident's stay;

(2) A summary of the resident's status at the time of the discharge to include items in paragraph (b)(2) of this section; and

(3) A post-discharge plan of care that is developed with the participation of the resident and his or her family, which will assist the resident to adjust to his or her new living environment.

(Authority: 38 U.S.C. 101, 501, 1710, 1741–1743)

### §51.120 Quality of care.

Each resident must receive and the facility management must provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care.

(a) *Reporting of Sentinel Events*—(1) *Definition.* A sentinel event is an adverse event that results in the loss of life or limb or permanent loss of function.

(2) Examples of sentinel events are as follows:

(i) Any resident death, paralysis, coma or other major permanent loss of function associated with a medication error; or

(ii) Any suicide of a resident, including suicides following elopement (unauthorized departure) from the facility; or

(iii) Any elopement of a resident from the facility resulting in a death or a major permanent loss of function; or

(iv) Any procedure or clinical intervention, including restraints, that result in death or a major permanent loss of function; or

(v) Assault, homicide or other crime resulting in patient death or major permanent loss of function; or

(vi) A patient fall that results in death or major permanent loss of function as a direct result of the injuries sustained in the fall.

(3) The facility management must report sentinel events to the director of VA medical center of jurisdiction within 24 hours of identification. The VA medical center of jurisdiction must report sentinel events by calling VA Network Director (10N 1–22) and Chief Consultant, Geriatrics and Extended Care Strategic Healthcare Group (114) within 24 hours of notification.

(4) The facility management must establish a mechanism to review and

analyze a sentinel event resulting in a written report no later than 10 working days following the event. The purpose of the review and analysis of a sentinel event is to prevent injuries to residents, visitors, and personnel, and to manage those injuries that do occur and to minimize the negative consequences to the injured individuals and facility.

(b) *Activities of daily living.* Based on the comprehensive assessment of a resident, the facility management must ensure that—

(1) A resident's abilities in activities of daily living do not diminish unless circumstances of the individual's clinical condition demonstrate that diminution was unavoidable. This includes the resident's ability to—

(i) Bathe, dress, and groom;

(ii) Transfer and ambulate;

(iii) Toilet;

(iv) Eat; and

(v) Talk or otherwise communicate.

(2) A resident is given the appropriate treatment and services to maintain or improve his or her abilities specified in paragraph (b)(1) of this section; and

(3) A resident who is unable to carry out activities of daily living receives the necessary services to maintain good nutrition, hydration, grooming, personal and oral hygiene, mobility, and bladder and bowel elimination.

(c) *Vision and hearing.* To ensure that residents receive proper treatment and assistive devices to maintain vision and hearing abilities, the facility must, if necessary, assist the resident—

(1) In making appointments, and

(2) By arranging for transportation to and from the office of a practitioner specializing in the treatment of vision or hearing impairment or the office of a professional specializing in the provision of vision or hearing assistive devices.

(d) *Pressure sores.* Based on the comprehensive assessment of a resident, the facility management must ensure that—

(1) A resident who enters the facility without pressure sores does not develop pressure sores unless the individual's clinical condition demonstrates that they were unavoidable; and

(2) A resident having pressure sores receives necessary treatment and services to promote healing, prevent infection and prevent new sores from developing.

(e) *Urinary and Fecal Incontinence.* Based on the resident's comprehensive assessment, the facility management must ensure that—

(1) A resident who enters the facility without an indwelling catheter is not catheterized unless the resident's clinical condition demonstrates that catheterization was necessary;

(2) A resident who is incontinent of urine receives appropriate treatment and services to prevent urinary tract infections and to restore as much normal bladder function as possible; and

(3) A resident who has persistent fecal incontinence receives appropriate treatment and services to treat reversible causes and to restore as much normal bowel function as possible.

(f) *Range of motion.* Based on the comprehensive assessment of a resident, the facility management must ensure that—

(1) A resident who enters the facility without a limited range of motion does not experience reduction in range of motion unless the resident's clinical condition demonstrates that a reduction in range of motion is unavoidable; and

(2) A resident with a limited range of motion receives appropriate treatment and services to increase range of motion and/or to prevent further decrease in range of motion.

(g) *Mental and Psychosocial functioning.* Based on the comprehensive assessment of a resident, the facility management must ensure that a resident who displays mental or psychosocial adjustment difficulty, receives appropriate treatment and services to correct the assessed problem.

(h) *Enteral Feedings.* Based on the comprehensive assessment of a resident, the facility management must ensure that—

(1) A resident who has been able to adequately eat or take fluids alone or with assistance is not fed by enteral feedings unless the resident's clinical condition demonstrates that use of enteral feedings was unavoidable; and

(2) A resident who is fed by enteral feedings receives the appropriate treatment and services to prevent aspiration pneumonia, diarrhea, vomiting, dehydration, metabolic abnormalities, nasal-pharyngeal ulcers and other skin breakdowns, and to restore, if possible, normal eating skills.

(i) *Accidents.* The facility management must ensure that—

(1) The resident environment remains as free of accident hazards as is possible; and

(2) Each resident receives adequate supervision and assistance devices to prevent accidents.

(j) *Nutrition.* Based on a resident's comprehensive assessment, the facility management must ensure that a resident—

(1) Maintains acceptable parameters of nutritional status, such as body weight and protein levels, unless the resident's clinical condition demonstrates that this is not possible; and

(2) Receives a therapeutic diet when a nutritional deficiency is identified.

(k) *Hydration.* The facility management must provide each resident with sufficient fluid intake to maintain proper hydration and health.

(l) *Special needs.* The facility management must ensure that residents receive proper treatment and care for the following special services:

(1) Injections;

(2) Parenteral and enteral fluids;

(3) Colostomy, ureterostomy, or ileostomy care;

(4) Tracheostomy care;

(5) Tracheal suctioning;

(6) Respiratory care;

(7) Foot care; and

(8) Prostheses.

(m) *Unnecessary drugs*—(1) *General.* Each resident's drug regimen must be free from unnecessary drugs. An unnecessary drug is any drug when used:

(i) In excessive dose (including duplicate drug therapy); or

(ii) For excessive duration; or

(iii) Without adequate monitoring; or

(iv) Without adequate indications for its use; or

(v) In the presence of adverse consequences which indicate the dose should be reduced or discontinued; or

(vi) Any combinations of the reasons above.

(2) *Antipsychotic Drugs.* Based on a comprehensive assessment of a resident, the facility management must ensure that—

(i) Residents who have not used antipsychotic drugs are not given these drugs unless antipsychotic drug therapy is necessary to treat a specific condition as diagnosed and documented in the clinical record; and

(ii) Residents who use antipsychotic drugs receive gradual dose reductions, and behavioral interventions, unless clinically contraindicated, in an effort to discontinue these drugs.

(n) *Medication Errors.* The facility management must ensure that—

(1) Medication errors are identified and reviewed on a timely basis; and

(2) strategies for preventing medication errors and adverse reactions are implemented.

(Authority: 38 U.S.C. 101, 501, 1710, 1741–1743)

### §51.130 Nursing services.

The facility management must provide an organized nursing service with a sufficient number of qualified nursing personnel to meet the total nursing care needs, as determined by resident assessment and individualized comprehensive plans of care, of all patients within the facility 24 hours a day, 7 days a week.

(a) The nursing service must be under the direction of a full-time registered nurse who is currently licensed by the State and has, in writing, administrative authority, responsibility, and accountability for the functions, activities, and training of the nursing services staff.

(b) The facility management must provide registered nurses 24 hours per day, 7 days per week.

(c) The director of nursing service must designate a registered nurse as a supervising nurse for each tour of duty.

(1) Based on the application and results of the case mix and staffing methodology, the director of nursing may serve in a dual role as director and as an onsite-supervising nurse only when the facility has an average daily occupancy of 60 or fewer residents in nursing home.

(2) Based on the application and results of the case mix and staffing methodology, the evening or night supervising nurse may serve in a dual role as supervising nurse as well as provides direct patient care only when the facility has an average daily occupancy of 60 or fewer residents in nursing home.

(d) The facility management must provide nursing services to ensure that there is direct care nurse staffing of no less than 2.5 hours per patient per 24 hours, 7 days per week in the portion of any building providing nursing home care.

(e) Nurse staffing must be based on a staffing methodology that applies case mix and is adequate for meeting the standards of this part.

(Authority: 38 U.S.C. 101, 501, 1710, 1741–1743)

### § 51.140 Dietary services.

The facility management must provide each resident with a nourishing, palatable, well-balanced diet that meets the daily nutritional and special dietary needs of each resident.

(a) *Staffing.* The facility management must employ a qualified dietitian either full-time, part-time, or on a consultant basis.

(1) If a dietitian is not employed, the facility management must designate a person to serve as the director of food service who receives at least a monthly scheduled consultation from a qualified dietitian.

(2) A qualified dietitian is one who is qualified based upon registration by the Commission on Dietetic Registration of the American Dietetic Association.

(b) *Sufficient staff.* The facility management must employ sufficient support personnel competent to carry out the functions of the dietary service.

(c) *Menus and nutritional adequacy.* Menus must—

(1) Meet the nutritional needs of residents in accordance with the recommended dietary allowances of the Food and Nutrition Board of the National Research Council, National Academy of Sciences;

(2) Be prepared in advance; and

(3) Be followed.

(d) *Food.* Each resident receives and the facility provides—

(1) Food prepared by methods that conserve nutritive value, flavor, and appearance;

(2) Food that is palatable, attractive, and at the proper temperature;

(3) Food prepared in a form designed to meet individual needs; and

(4) Substitutes offered of similar nutritive value to residents who refuse food served.

(e) *Therapeutic diets.* Therapeutic diets must be prescribed by the primary care physician.

(f) *Frequency of meals.* (1) Each resident receives and the facility provides at least three meals daily, at regular times comparable to normal mealtimes in the community.

(2) There must be no more than 14 hours between a substantial evening meal and the availability of breakfast the following day, except as provided in (f)(4) of this section.

(3) The facility staff must offer snacks at bedtime daily.

(4) When a nourishing snack is provided at bedtime, up to 16 hours may elapse between a substantial evening meal and breakfast the following day.

(g) *Assistive devices.* The facility management must provide special eating equipment and utensils for residents who need them.

(h) *Sanitary conditions.* The facility must—

(1) Procure food from sources approved or considered satisfactory by Federal, State, or local authorities;

(2) Store, prepare, distribute, and serve food under sanitary conditions; and (3) Dispose of garbage and refuse properly.

(Authority: 38 U.S.C. 101, 501, 1710, 1741–1743)

### § 51.150 Physician services.

A physician must personally approve in writing a recommendation that an individual be admitted to a facility. Each resident must remain under the care of a physician.

(a) *Physician supervision.* The facility management must ensure that—

(1) The medical care of each resident is supervised by a primary care physician;

(2) Each resident's medical record lists the name of the resident's primary physician, and

(3) Another physician supervises the medical care of residents when their primary physician is unavailable.

(b) *Physician visits.* The physician must—

(1) Review the resident's total program of care, including medications and treatments, at each visit required by paragraph (c) of this section;

(2) Write, sign, and date progress notes at each visit; and

(3) Sign and date all orders.

(c) *Frequency of physician visits.* (1) The resident must be seen by the primary physician at least once every 30 days for the first 90 days after admission, and at least once every 60 days thereafter, or more frequently based on the condition of the resident.

(2) A physician visit is considered timely if it occurs not later than 10 days after the date the visit was required.

(3) Except as provided in paragraphs (c)(4) of this section, all required physician visits must be made by the physician personally.

(4) At the option of the physician, required visits in the facility after the initial visit may alternate between personal visits by the physician and visits by a physician assistant, nurse practitioner, or clinical nurse specialist in accordance with paragraph (e) of this section.

(d) *Availability of physicians for emergency care.* The facility management must provide or arrange for the provision of physician services 24 hours a day, 7 days per week, in case of an emergency.

(e) *Physician delegation of tasks.* (1) Except as specified in paragraph (e)(2) of this section, a primary physician may delegate tasks to:

(i) a certified physician assistant or a certified nurse practitioner, or

(ii) a clinical nurse specialist who—

(A) Is acting within the scope of practice as defined by State law; and

(B) Is under the supervision of the physician.

NOTE TO PARAGRAPH (e): An individual with experience in long term care is preferred.

(2) The primary physician may not delegate a task when the regulations specify that the primary physician must perform it personally, or when the delegation is prohibited under State law or by the facility's own policies.

(Authority: 38 U.S.C. 101, 501, 1710, 1741–1743)

### §51.160 Specialized rehabilitative services.

(a) *Provision of services.* If specialized rehabilitative services such as but not limited to physical therapy, speech therapy, occupational therapy, and mental health services for mental illness are required in the resident's comprehensive plan of care, facility management must—

(1) Provide the required services; or

(2) Obtain the required services from an outside resource, in accordance with §51.210(h) of this part, from a provider of specialized rehabilitative services.

(b) Specialized rehabilitative services must be provided under the written order of a physician by qualified personnel.

(Authority: 38 U.S.C. 101, 501, 1710, 1741–1743)

### §51.170 Dental services.

(a) A facility must provide or obtain from an outside resource, in accordance with §51.210(h) of this part, routine and emergency dental services to meet the needs of each resident;

(b) A facility may charge a resident an additional amount for routine and emergency dental services; and

(c) A facility must, if necessary, assist the resident—

(1) In making appointments;

(2) By arranging for transportation to and from the dental services; and

(3) Promptly refer residents with lost or damaged dentures to a dentist.

(Authority: 38 U.S.C. 101, 501, 1710, 1741–1743)

### §51.180 Pharmacy services.

The facility management must provide routine and emergency drugs and biologicals to its residents, or obtain them under an agreement described in §51.210(h) of this part. The facility management must have a system for disseminating drug information to medical and nursing staff.

(a) *Procedures.* The facility management must provide pharmaceutical services (including procedures that assure the accurate acquiring, receiving, dispensing, and administering of all

drugs and biologicals) to meet the needs of each resident.

(b) *Service consultation.* The facility management must employ or obtain the services of a pharmacist licensed in a State in which the facility is located or a VA pharmacist under VA contract who—

(1) Provides consultation on all aspects of the provision of pharmacy services in the facility;

(2) Establishes a system of records of receipt and disposition of all controlled drugs in sufficient detail to enable an accurate reconciliation; and

(3) Determines that drug records are in order and that an account of all controlled drugs is maintained and periodically reconciled.

(c) *Drug regimen review.* (1) The drug regimen of each resident must be reviewed at least once a month by a licensed pharmacist.

(2) The pharmacist must report any irregularities to the primary physician and the director of nursing, and these reports must be acted upon.

(d) *Labeling of drugs and biologicals.* Drugs and biologicals used in the facility management must be labeled in accordance with currently accepted professional principles, and include the appropriate accessory and cautionary instructions, and the expiration date when applicable.

(e) *Storage of drugs and biologicals.* (1) In accordance with State and Federal laws, the facility management must store all drugs and biologicals in locked compartments under proper temperature controls, and permit only authorized personnel to have access to the keys.

(2) The facility management must provide separately locked, permanently affixed compartments for storage of controlled drugs listed in Schedule II of the Comprehensive Drug Abuse Prevention and Control Act of 1976 and other drugs subject to abuse.

(Authority: 38 U.S.C. 101, 501, 1710, 1741–1743)

### § 51.190 Infection control.

The facility management must establish and maintain an infection control program designed to provide a safe, sanitary, and comfortable environment and to help prevent the development and transmission of disease and infection.

(a) *Infection control program.* The facility management must establish an infection control program under which it—

(1) Investigates, controls, and prevents infections in the facility;

(2) Decides what procedures, such as isolation, should be applied to an individual resident; and

(3) Maintains a record of incidents and corrective actions related to infections.

(b) *Preventing spread of infection.* (1) When the infection control program determines that a resident needs isolation to prevent the spread of infection, the facility management must isolate the resident.

(2) The facility management must prohibit employees with a communicable disease or infected skin lesions from engaging in any contact with residents or their environment that would transmit the disease.

(3) The facility management must require staff to wash their hands after each direct resident contact for which hand washing is indicated by accepted professional practice.

(c) *Linens.* Personnel must handle, store, process, and transport linens so as to prevent the spread of infection.

(Authority: 38 U.S.C. 101, 501, 1710, 1741–1743)

### § 51.200 Physical environment.

The facility management must be designed, constructed, equipped, and maintained to protect the health and safety of residents, personnel and the public.

(a) *Life safety from fire.* The facility must meet the applicable provisions of the National Fire Protection Association's NFPA 101, Life Safety Code (1997 edition) and the NFPA 99, Standard for Health Care Facilities (1996 edition). Incorporation by reference of these materials was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. These materials incorporated by reference are available for inspection at the Department of Veterans Affairs, Office of Regulations Management (02D), Room 1154, 810 Vermont Avenue, NW., Washington, DC 20420 or at the

National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.* Copies may be obtained from the National Fire Protection Association, 1 Batterymarch Park, P.O. Box 9101, Quincy, MA 02269–9101. (For ordering information, call toll-free 1–800–344–3555.)

(b) *Emergency power.* (1) An emergency electrical power system must be provided to supply power adequate for illumination of all exit signs and lighting for the means of egress, fire alarm and medical gas alarms, emergency communication systems, and generator task illumination.

(2) The system must be the appropriate type essential electrical system in accordance with the applicable provisions of the National Fire Protection Association's NFPA 101, Life Safety Code (1997 edition) and the NFPA 99, Standard for Health Care Facilities (1996 edition). Incorporation by reference of these materials was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. The availability of these materials is described in paragraph (a) of this section.

(3) When electrical life support devices are used, an emergency electrical power system must also be provided for devices in accordance with NFPA 99, Standard for Health Care Facilities (1996 edition).

(4) The source of power must be an on-site emergency standby generator of sufficient size to serve the connected load or other approved sources in accordance with the National Fire Protection Association's NFPA 101, Life Safety Code (1997 edition) and the NFPA 99, Standard for Health Care Facilities (1996 edition). Incorporation by reference of these materials was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. The availability of these materials is described in paragraph (a) of this section.

(c) *Space and equipment.* Facility management must—

(1) Provide sufficient space and equipment in dining, health services, recreation, and program areas to enable staff to provide residents with needed services as required by these standards and as identified in each resident's plan of care; and

(2) Maintain all essential mechanical, electrical, and patient care equipment in safe operating condition.

(d) *Resident rooms.* Resident rooms must be designed and equipped for adequate nursing care, comfort, and privacy of residents:

(1) Bedrooms must—

(i) Accommodate no more than four residents;

(ii) Measure at least 115 net square feet per resident in multiple resident bedrooms;

(iii) Measure at least 150 net square feet in single resident bedrooms;

(iv) Measure at least 245 net square feet in small double resident bedrooms; and

(v) Measure at least 305 net square feet in large double resident bedrooms used for spinal cord injury residents. It is recommended that the facility have one large double resident bedroom for every 30 resident bedrooms.

(vi) Have direct access to an exit corridor;

(vii) Be designed or equipped to assure full visual privacy for each resident;

(viii) Except in private rooms, each bed must have ceiling suspended curtains, which extend around the bed to provide total visual privacy in combination with adjacent walls and curtains;

(ix) Have at least one window to the outside; and

(x) Have a floor at or above grade level.

(2) The facility management must provide each resident with—

(i) A separate bed of proper size and height for the safety of the resident;

(ii) A clean, comfortable mattress;

(iii) Bedding appropriate to the weather and climate; and

(iv) Functional furniture appropriate to the resident's needs, and individual closet space in the resident's bedroom with clothes racks and shelves accessible to the resident.

(e) *Toilet facilities.* Each resident room must be equipped with or located near toilet and bathing facilities. It is

recommended that public toilet facilities be also located near the resident's dining and recreational areas.

(f) *Resident call system.* The nurse's station must be equipped to receive resident calls through a communication system from—

(1) Resident rooms; and

(2) Toilet and bathing facilities.

(g) *Dining and resident activities.* The facility management must provide one or more rooms designated for resident dining and activities. These rooms must—

(1) Be well lighted;

(2) Be well ventilated;

(3) Be adequately furnished; and

(4) Have sufficient space to accommodate all activities.

(h) *Other environmental conditions.* The facility management must provide a safe, functional, sanitary, and comfortable environment for the residents, staff and the public. The facility must—

(1) Establish procedures to ensure that water is available to essential areas when there is a loss of normal water supply;

(2) Have adequate outside ventilation by means of windows, or mechanical ventilation, or a combination of the two;

(3) Equip corridors with firmly secured handrails on each side; and

(4) Maintain an effective pest control program so that the facility is free of pests and rodents.

(Authority: 38 U.S.C. 101, 501, 1710, 1741–1743)

### § 51.210 Administration.

A facility must be administered in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well being of each resident.

(a) *Governing body.* (1) The State must have a governing body, or designated person functioning as a governing body, that is legally responsible for establishing and implementing policies regarding the management and operation of the facility; and

(2) The governing body or State official with oversight for the facility appoints the administrator who is—

(i) Licensed by the State where licensing is required; and

(ii) Responsible for operation and management of the facility.

(b) *Disclosure of State agency and individual responsible for oversight of facility.* The State must give written notice to the Chief Consultant, Geriatrics and Extended Care Strategic Healthcare Group (114), VA Headquarters, 810 Vermont Avenue, NW, Washington, DC 20420, at the time of the change, if any of the following change:

(1) The State agency and individual responsible for oversight of a State home facility;

(2) The State home administrator; and

(3) The State employee responsible for oversight of the State home facility if a contractor operates the State home.

(c) *Required Information.* The facility management must submit the following to the director of the VA medical center of jurisdiction as part of the application for recognition and thereafter as often as necessary to be current or as specified:

(1) The copy of legal and administrative action establishing the State-operated facility (*e.g.*, State laws);

(2) Site plan of facility and surroundings;

(3) Legal title, lease, or other document establishing right to occupy facility;

(4) Organizational charts and the operational plan of the facility;

(5) The number of the staff by category indicating full-time, part-time and minority designation (annual at time of survey);

(6) The number of nursing home patients who are veterans and non-veterans, the number of veterans who are minorities and the number of non-veterans who are minorities (annual at time of survey);

(7) Annual State Fire Marshall's report;

(8) Annual certification from the responsible State Agency showing compliance with Section 504 of the Rehabilitation Act of 1973 (Public Law 93–112) (VA Form 10–0143A set forth at § 58.14 of this chapter);

(9) Annual certification for Drug-Free Workplace Act of 1988 (VA Form 10–0143 set forth at § 58.15 of this chapter);

(10) Annual certification regarding lobbying in compliance with Public Law 101–121 (VA Form 10–0144 set forth at §58.16 of this chapter); and

(11) Annual certification of compliance with Title VI of the Civil Rights Act of 1964 as incorporated in Title 38 CFR 18.1–18.3 (VA Form 10–0144A located at §58.17 of this chapter).

(d) *Percentage of Veterans.* The percent of the facility residents eligible for VA nursing home care must be at least 75 percent veterans except that the veteran percentage need only be more than 50 percent if the facility was constructed or renovated solely with State funds. All non-veteran residents must be spouses of veterans or parents all of whose children died while serving in the armed forces of the United States.

(e) *Management Contract Facility.* If a facility is operated by an entity contracting with the State, the State must assign a State employee to monitor the operations of the facility on a full-time onsite basis.

(f) *Licensure.* The facility and facility management must comply with applicable State and local licensure laws.

(g) *Staff qualifications.* (1) The facility management must employ on a full-time, part-time or consultant basis those professionals necessary to carry out the provisions of these requirements.

(2) Professional staff must be licensed, certified, or registered in accordance with applicable State laws.

(h) *Use of outside resources.* (1) If the facility does not employ a qualified professional person to furnish a specific service to be provided by the facility, the facility management must have that service furnished to residents by a person or agency outside the facility under a written agreement described in paragraph (h)(2) of this section.

(2) Agreements pertaining to services furnished by outside resources must specify in writing that the facility management assumes responsibility for—

(i) Obtaining services that meet professional standards and principles that apply to professionals providing services in such a facility; and

(ii) The timeliness of the services.

(i) *Medical director.* (1) The facility management must designate a primary care physician to serve as medical director.

(2) The medical director is responsible for—

(i) Participating in establishing policies, procedures, and guidelines to ensure adequate, comprehensive services;

(ii) Directing and coordinating medical care in the facility;

(iii) Helping to arrange for continuous physician coverage to handle medical emergencies;

(iv) Reviewing the credentialing and privileging process;

(v) Participating in managing the environment by reviewing and evaluating incident reports or summaries of incident reports, identifying hazards to health and safety, and making recommendations to the administrator; and

(vi) Monitoring employees' health status and advising the administrator on employee-health policies.

(j) *Credentialing and Privileging.* Credentialing is the process of obtaining, verifying, and assessing the qualifications of a health care practitioner, which may include physicians, podiatrists, dentists, psychologists, physician assistants, nurse practitioners, licensed nurses to provide patient care services in or for a health care organization. Privileging is the process whereby a specific scope and content of patient care services are authorized for a health care practitioner by the facility management, based on evaluation of the individual's credentials and performance.

(1) The facility management must uniformly apply credentialing criteria to licensed practitioners applying to provide resident care or treatment under the facility's care.

(2) The facility management must verify and uniformly apply the following core criteria: current licensure; current certification, if applicable, relevant education, training, and experience; current competence; and a statement that the individual is able to perform the services he or she is applying to provide.

(3) The facility management must decide whether to authorize the independent practitioner to provide resident care or treatment, and each credentials file must indicate that these criteria are uniformly and individually applied.

(4) The facility management must maintain documentation of current credentials for each licensed independent practitioner practicing within the facility.

(5) When reappointing a licensed independent practitioner, the facility management must review the individual's record of experience.

(6) The facility management systematically must assess whether individuals with clinical privileges act within the scope of privileges granted.

(k) *Required training of nursing aides.* (1) Nurse aide means any individual providing nursing or nursing-related services to residents in a facility who is not a licensed health professional, a registered dietitian, or a volunteer who provide such services without pay.

(2) The facility management must not use any individual working in the facility as a nurse aide whether permanent or not unless:

(i) That individual is competent to provide nursing and nursing related services; and

(ii) That individual has completed a training and competency evaluation program, or a competency evaluation program approved by the State.

(3) *Registry verification.* Before allowing an individual to serve as a nurse aide, facility management must receive registry verification that the individual has met competency evaluation requirements unless the individual can prove that he or she has recently successfully completed a training and competency evaluation program or competency evaluation program approved by the State and has not yet been included in the registry. Facilities must follow up to ensure that such an individual actually becomes registered.

(4) *Multi-State registry verification.* Before allowing an individual to serve as a nurse aide, facility management must seek information from every State registry established under HHS regulations at 42 CFR 483.156 which the facility believes will include information on the individual.

(5) *Required retraining.* If, since an individual's most recent completion of a training and competency evaluation program, there has been a continuous period of 24 consecutive months during none of which the individual provided nursing or nursing-related services for monetary compensation, the individual must complete a new training and competency evaluation program or a new competency evaluation program.

(6) *Regular in-service education.* The facility management must complete a performance review of every nurse aide at least once every 12 months, and must provide regular in-service education based on the outcome of these reviews. The in-service training must—

(i) Be sufficient to ensure the continuing competence of nurse aides, but must be no less than 12 hours per year;

(ii) Address areas of weakness as determined in nurse aides' performance reviews and may address the special needs of residents as determined by the facility staff; and

(iii) For nurse aides providing services to individuals with cognitive impairments, also address the care of the cognitively impaired.

(l) *Proficiency of Nurse aides.* The facility management must ensure that nurse aides are able to demonstrate competency in skills and techniques necessary to care for residents' needs, as identified through resident assessments, and described in the plan of care.

(m) *Level B Requirement Laboratory services.* (1) The facility management must provide or obtain laboratory services to meet the needs of its residents. The facility is responsible for the quality and timeliness of the services.

(i) If the facility provides its own laboratory services, the services must meet all applicable certification standards, statutes, and regulations for laboratory services.

(ii) If the facility provides blood bank and transfusion services, it must meet all applicable certification standards, statutes, and regulations.

(iii) If the laboratory chooses to refer specimens for testing to another laboratory, the referral laboratory must

be certified in the appropriate specialities and subspecialties of services and meet certification standards, statutes, and regulations.

(iv) The laboratory performing the testing must have a current, valid CLIA number (Clinical Laboratory Improvement Amendments of 1988). The facility management must provide VA surveyors with the CLIA number and a copy of the results of the last CLIA inspection.

(v) Such services must be available to the resident seven days a week, 24 hours a day.

(2) The facility management must—

(i) Provide or obtain laboratory services only when ordered by the primary physician;

(ii) Promptly notify the primary physician of the findings;

(iii) Assist the resident in making transportation arrangements to and from the source of service, if the resident needs assistance; and

(iv) File in the resident's clinical record laboratory reports that are dated and contain the name and address of the testing laboratory.

(n) *Radiology and other diagnostic services.* (1) The facility management must provide or obtain radiology and other diagnostic services to meet the needs of its residents. The facility is responsible for the quality and timeliness of the services.

(i) If the facility provides its own diagnostic services, the services must meet all applicable certification standards, statutes, and regulations.

(ii) If the facility does not provide its own diagnostic services, it must have an agreement to obtain these services. The services must meet all applicable certification standards, statutes, and regulations.

(iii) Radiologic and other diagnostic services must be available 24 hours a day, seven days a week.

(2) The facility must—

(i) Provide or obtain radiology and other diagnostic services when ordered by the primary physician;

(ii) Promptly notify the primary physician of the findings;

(iii) Assist the resident in making transportation arrangements to and from the source of service, if the resident needs assistance; and

(iv) File in the resident's clinical record signed and dated reports of x-ray and other diagnostic services.

(o) *Clinical records.* (1) The facility management must maintain clinical records on each resident in accordance with accepted professional standards and practices that are—

(i) Complete;

(ii) Accurately documented;

(iii) Readily accessible; and

(iv) Systematically organized.

(2) Clinical records must be retained for—

(i) The period of time required by State law; or

(ii) Five years from the date of discharge when there is no requirement in State law.

(3) The facility management must safeguard clinical record information against loss, destruction, or unauthorized use;

(4) The facility management must keep confidential all information contained in the resident's records, regardless of the form or storage method of the records, except when release is required by—

(i) Transfer to another health care institution;

(ii) Law;

(iii) Third party payment contract;

(iv) The resident or;

(v) The resident's authorized agent or representative.

(5) The clinical record must contain—

(i) Sufficient information to identify the resident;

(ii) A record of the resident's assessments;

(iii) The plan of care and services provided;

(iv) The results of any pre-admission screening conducted by the State; and

(v) Progress notes.

(p) *Quality assessment and assurance.* (1) Facility management must maintain a quality assessment and assurance committee consisting of—

(i) The director of nursing services;

(ii) A primary physician designated by the facility; and

(iii) At least 3 other members of the facility's staff.

(2) The quality assessment and assurance committee—

(i) Meets at least quarterly to identify issues with respect to which quality assessment and assurance activities are necessary; and

(ii) Develops and implements appropriate plans of action to correct identified quality deficiencies; and

(3) Identified quality deficiencies are corrected within an established time period.

(4) The VA Under Secretary for Health may not require disclosure of the records of such committee unless such disclosure is related to the compliance with requirements of this section.

(q) *Disaster and emergency preparedness.* (1) The facility management must have detailed written plans and procedures to meet all potential emergencies and disasters, such as fire, severe weather, and missing residents.

(2) The facility management must train all employees in emergency procedures when they begin to work in the facility, periodically review the procedures with existing staff, and carry out unannounced staff drills using those procedures.

(r) *Transfer agreement.* (1) The facility management must have in effect a written transfer agreement with one or more hospitals that reasonably assures that—

(i) Residents will be transferred from the nursing home to the hospital, and ensured of timely admission to the hospital when transfer is medically appropriate as determined by the primary physician; and

(ii) Medical and other information needed for care and treatment of residents, and, when the transferring facility deems it appropriate, for determining whether such residents can be adequately cared for in a less expensive setting than either the nursing home or the hospital, will be exchanged between the institutions.

(2) The facility is considered to have a transfer agreement in effect if the facility has an agreement with a hospital sufficiently close to the facility to make transfer feasible.

(s) *Compliance with Federal, State, and local laws and professional standards.* The facility management must operate and provide services in compliance with all applicable Federal, State, and local laws, regulations, and codes, and with accepted professional standards and principles that apply to professionals providing services in such a facility. This includes the Single Audit Act of 1984 (Title 31, Section 7501 *et seq.*) and the Cash Management Improvement Acts of 1990 and 1992 (Public Laws 101–453 and 102–589, see 31 USC 3335, 3718, 3720A, 6501, 6503)

(t) *Relationship to other Federal regulations.* In addition to compliance with the regulations set forth in this subpart, facilities are obliged to meet the applicable provisions of other Federal laws and regulations, including but not limited to those pertaining to nondiscrimination on the basis of race, color, national origin, handicap, or age (38 CFR part 18); protection of human subjects of research (45 CFR part 46), section 504 of the Rehabilitation Act of 1993, Public Law 93–112; Drug-Free Workplace Act of 1988, 38 CFR part 44, section 44.100 through 44.420; section 319 of Public Law 101–121; Title VI of the Civil Rights Act of 1964, 38 CFR 18.1–18.3. Although these regulations are not in themselves considered requirements under this part, their violation may result in the termination or suspension of, or the refusal to grant or continue payment with Federal funds.

(u) *Intermingling.* A building housing a facility recognized as a State home for providing nursing home care may only provide nursing home care in the areas of the building recognized as a State home for providing nursing home care.

(v) *VA Management of State Veterans Homes.* Except as specifically provided by statute or regulations, VA employees have no authority regarding the management or control of State homes providing nursing home care.

(Authority: 38 U.S.C. 101, 501, 1710, 1741–1743, 8135)

# PART 52—PER DIEM FOR ADULT DAY HEALTH CARE OF VETERANS IN STATE HOMES

## Subpart A—General

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AUTHORITY: 38 U.S.C. 101, 501, 1741–1743, unless otherwise noted.

SOURCE: 67 FR 662, Jan. 7, 2002, unless otherwise noted.

## Subpart A—General

### §52.1 Purpose.

This part sets forth the mechanism for paying per diem to State homes providing adult day health care to eligible veterans and includes quality assurance requirements that are intended to ensure that veterans receive high quality care in State homes.

### §52.2 Definitions.

For purposes of this part—

*Activities of daily living (ADLs)* means the functions or tasks for self-care usually performed in the normal course of a day, i.e., mobility, bathing, dressing, grooming, toileting, transferring, and eating.

*Clinical nurse specialist* means a licensed professional nurse with a master's degree in nursing and a major in a clinical nursing specialty from an academic program accredited by the National League for Nursing.

*Facility* means a building or any part of a building for which a State has submitted an application for recognition as a State home for the provision of adult day health care or a building, or any part of a building, which VA has recognized as a State home for the provision of adult day health care.

*Instrumental activities of daily living (IADLs)* means functions or tasks of independent living, i.e., shopping, housework, meal preparation and cleanup, laundry, taking medication, money management, transportation, correspondence, and telephone use.

*Nurse practitioner* means a licensed professional nurse who is currently licensed to practice in the State; who meets the State's requirements governing the qualifications of nurse practitioners; and who is currently certified as an adult, family, or gerontological nurse practitioner by the American Nurses Association.

*Physician* means a doctor of medicine or osteopathy legally authorized to practice medicine or surgery in the State.

*Physician assistant* means a person who meets the applicable State requirements for physician assistant, is currently certified by the National Commission on Certification of Physician Assistants (NCCPA) as a physician assistant, and has an individualized written scope of practice that determines the authorization to write medical orders, prescribe medications and to accomplish other clinical tasks under the appropriate supervision by the primary care physician.

*Primary physician* or *Primary care physician* means a designated generalist physician responsible for providing, directing and coordinating health care that is indicated for the residents.

*State* means each of the several States, territories, and possessions of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

*State home* means a home approved by VA which a State established primarily for veterans disabled by age, disease, or otherwise, who by reason of such disability are incapable of earning a living. A State home may provide domiciliary care, nursing home care, adult day health care, and hospital care. Hospital care may be provided only when the State home also provides domiciliary and/or nursing home care.

*VA* means the U.S. Department of Veterans Affairs.

(Authority: 38 U.S.C. 101, 501, 1741–1743)

## Subpart B—Obtaining Per Diem for Adult Day Health Care in State Homes

### § 52.10 Per diem based on recognition and certification.

VA will pay per diem to a State for providing adult day health care to eligible veterans in a facility if the Under Secretary for Health recognizes the facility as a State home based on a current certification that the facility management meet the standards of subpart D of this part.

(Authority: 38 U.S.C. 101, 501, 1741–1743)

### § 52.20 Application for recognition based on certification.

To apply for recognition and certification of a State home for adult day health care, a State must:

(a) Send a request for recognition and certification to the Under Secretary for Health (10), VA Central Office, 810 Vermont Avenue, NW, Washington, DC 20420. The request must be in the form of a letter and must be signed by the State official authorized to establish the State home;

(b) Allow VA to survey the facility as set forth in § 52.30(c); and

(c) Upon request from the director of the VA medical center of jurisdiction, submit to the director all documentation required under subpart D of this part.

(Authority: 38 U.S.C. 101, 501, 1741–1743)

(The Office of Management and Budget has approved the information collection requirements in this paragraph under control number 2900–0160.)

### § 52.30 Recognition and certification.

(a)(1) The Under Secretary for Health will make the determination regarding recognition and the initial determination regarding certification, after receipt of a tentative determination from the director of the VA medical center of jurisdiction, regarding whether the facility and program management meet or do not meet the standards of subpart D of this part. The Under Secretary for Health will notify the official in charge of the program, the State official authorized to oversee operations of the State home, the VA Network Director (10N1–22), Assistant Deputy Under Secretary for Health (10N), and the Chief Consultant, Geriatrics and Extended Care Strategic Healthcare Group (114), of the action taken.

(2) For each facility recognized as a State home, the director of the VA medical center of jurisdiction will certify annually whether the facility and program management meet, provisionally meet, or do not meet the standards of subpart D of this part (this certification should be made every 12 months during the recognition anniversary month or during a month agreed upon by the VA medical center director and officials of the State home facility). A provisional certification will be issued by the director only upon a determination that the facility or program management does not meet one or more of the standards in subpart D of this part, that the deficiencies do not jeopardize the health or safety of the residents, and that the program management and the director have agreed to a plan of correction to remedy the deficiencies in a specified amount of time (not more time than the VA medical center of jurisdiction director determines is reasonable for correcting the specific deficiencies). The director of the VA medical center of jurisdiction will notify the official in charge of the program, the State official authorized to oversee the operations of the State home, the VA Network Director (10N1–22), Assistant Deputy Under Secretary for Health (10N) and the Chief Consultant, Geriatrics and Extended Care Strategic Healthcare Group (114), of the certification, provisional certification, or noncertification.

(b) Once a program has achieved recognition, the recognition will remain in effect unless the State requests that the recognition be withdrawn or the Under Secretary for Health makes a final decision that the facility or program management does not meet the standards of subpart D of this part. Recognition of a program will apply only to the facility as it exists at the time of recognition; any annex, branch, enlargement, expansion, or relocation must be separately recognized.

(c) Both during the application process for recognition and after the Under Secretary for Health has recognized a facility, VA may survey the facility as necessary to determine if the facility and program management comply with the provisions of this part. Generally, VA will provide advance notice to the State before a survey occurs; however, surveys may be conducted without notice. A survey, as necessary, will cover all parts of the facility, and include a review and audit of all records of the program that have a bearing on compliance with any of the requirements of this part (including any reports from State or local entities). For purposes of a survey, at the request of the director of the VA medical center of jurisdiction, the State home adult day care health program management must submit to the director a completed VA Form 10–3567, ''Staffing Profile'', set forth at 38 CFR 58.10. The director of the VA medical center of jurisdiction will designate the VA officials to survey the facility. These officials may include physicians; nurses; pharmacists; dietitians; rehabilitation therapists; social workers; and representatives from health administration, engineering, environmental management systems, and fiscal officers.

(d) If the director of the VA medical center of jurisdiction determines that the State home facility or program management does not meet the standards of this part, the director will notify the State home program manager in writing of the standards not met. The director will send a copy of this notice to the State official authorized to oversee operations of the facility, the VA Network Director (10N1–22), the Assistant Deputy Under Secretary for Health (10N), and the Chief Consultant, Geriatrics and Extended Care Strategic Healthcare Group (114). The letter will include the reasons for the decision and indicate that the State has the right to appeal the decision.

(e) The State must submit an appeal to the Under Secretary for Health in writing within 30 days of receipt of the notice of failure to meet the standards. In its appeal, the State must explain why the determination is inaccurate or incomplete and provide any new and relevant information not previously considered. Any appeal that does not identify a reason for disagreement will be returned to the sender without further consideration.

(f) After reviewing the matter, including any relevant supporting documentation, the Under Secretary for Health will issue a written determination that affirms or reverses the previous determination. If the Under Secretary for Health decides that the State home facility or program management does not meet the standards of subpart D of this part, the Under Secretary for Health will withdraw recognition and stop paying per diem for care provided on and after the date of the decision. The decision of the Under Secretary for Health will constitute a final VA decision. The Under Secretary for Health will send a copy of this decision to the State home facility and to the State official authorized to oversee the operations of the State home.

(g) In the event that a VA survey team or other VA medical center staff identifies any condition at the State home facility that poses an immediate threat to public or patient safety or other information indicating the existence of such a threat, the director of the VA medical center of jurisdiction will immediately report this to the VA Network Director (10N1–22), Assistant Deputy Under Secretary for Health (10N), Chief Consultant, Geriatrics and Extended Care Strategic Healthcare Group (114), and State official authorized to oversee operations of the State home.

(Authority: 38 U.S.C. 101, 501, 1741–1743)

(The Office of Management and Budget has approved the information collection requirements in this paragraph under control number 2900–0160.)

## Subpart C—Per Diem Payments

### § 52.40 Monthly payment.

(a)(1) During Fiscal Year 2002, VA will pay monthly one-half of the total cost of each eligible veteran's adult day health care for each day the veteran is in a facility recognized as a State home for adult day health care, not to exceed $34.64 per diem.

(2) Per diem will be paid only for a day that the veteran is under the care of the facility at least six hours. For purposes of this paragraph a day means

(i) Six hours or more in one calendar day; or

(ii) Any two periods of at least 3 hours each (but each less than six hours) in any two calendar days in a calendar month.

(3) As a condition for receiving payment of per diem under this part, the State must submit a completed VA Form 10–5588, ''State Home Report and Statement of Federal Aid Claimed.'' This form is set forth in full at 38 CFR 58.11.

(4) Initial payments will not be made until the Under Secretary for Health recognizes the State home. However, payments will be made retroactively for care that was provided on and after the date of the completion of the VA survey of the facility that provided the basis for determining that the facility met the standards of this part.

(5) As a condition for receiving payment of per diem under this part, the State must submit to the VA medical center of jurisdiction for each veteran the following completed VA forms: 10–10EZ, ''Application for Medical Benefits'', and 10–10SH, ''State Home Program Application for Care—Medical Certification'', at the time of enrollment and with any request for a change in the level of care (nursing home, domiciliary or hospital care). These forms are set forth in full at 38 CFR 58.12 and 58.13, respectively. If the program is eligible to receive per diem payments for adult day health care for a veteran, VA will pay per diem under this part from the date of receipt of the completed forms required by this paragraph (a)(5), except that VA will pay per diem from the day on which the veteran was enrolled in the program if VA receives the completed forms within 10 days after enrollment.

(b) For determining ''the one-half of the total cost'' under paragraph (a)(1) of this section, total per diem costs for an eligible veteran's adult day health care consist of those direct and indirect costs attributable to adult day health care at the facility divided by the total number of participants enrolled in the adult day health care program. Relevant cost principles are set forth in the Office of Management and Budget (OMB) Circular number A–87, dated May 4, 1995, ''Cost Principles for State, Local, and Indian Tribal Governments'' (OMB Circulars are available at the addresses in 5 CFR 1310.3).

(Authority: 38 U.S.C. 101, 501, 1741–1743)

(The Office of Management and Budget has approved the information collection requirements in this paragraph under control number 2900–0160.)

### § 52.50 Eligible veterans.

A veteran is an eligible veteran under this part if VA determines that the veteran meets the definition of a veteran in 38 U.S.C. 101, is not barred from receiving this VA care under 38 U.S.C. 5303–5303A, needs adult day health care, and is within one of the following categories:

(a) Veterans with service-connected disabilities;

(b) Veterans who are former prisoners of war;

(c) Veterans who were discharged or released from active military service for a disability incurred or aggravated in the line of duty;

(d) Veterans who receive disability compensation under 38 U.S.C. 1151;

(e) Veterans whose entitlement to disability compensation is suspended because of the receipt of retired pay;

(f) Veterans whose entitlement to disability compensation is suspended pursuant to 38 U.S.C. 1151, but only to the extent that such veterans' continuing eligibility for adult day health care is provided for in the judgment or settlement described in 38 U.S.C. 1151;

(g) Veterans who VA determines are unable to defray the expenses of necessary care as specified under 38 U.S.C. 1722(a);

(h) Veterans of the Mexican Border period or of World War I;

(i) Veterans solely seeking care for a disorder associated with exposure to a toxic substance or radiation or for a disorder associated with service in the Southwest Asia theater of operations during the Gulf War, as provided in 38 U.S.C. 1710(e);

(j) Veterans who agree to pay to the United States the applicable co-payment determined under 38 U.S.C. 1710(f) and 1710(g), if they seek VA (U.S. Department of Veterans Affairs) hospital, nursing home, or outpatient care.

(Authority: 38 U.S.C. 101, 501, 1741–1743)

## Subpart D—Standards

### § 52.60 Standards applicable for payment of per diem.

The provisions of this subpart are the standards that a State home and program management must meet for the State to receive per diem for adult day health care provided at that facility.

### § 52.61 General requirements for adult day health care program.

Adult day health care must be a therapeutically-oriented outpatient day program, which provides health maintenance and rehabilitative services to participants. The program must provide individualized care delivered by an interdisciplinary health care team and support staff, with an emphasis on helping participants and their caregivers to develop the knowledge and skills necessary to manage care requirements in the home. Adult day health care is principally targeted for complex medical and/or functional needs of geriatric patients.

(Authority: 38 U.S.C. 101, 501, 1741–1743)

### § 52.70 Participant rights.

The participant has a right to a dignified existence, self-determination, and communication with and access to persons and services inside and outside the facility. The program management must protect and promote the rights of each participant, including each of the following rights:

(a) *Exercise of rights.* (1) The participant has the right to exercise his or her rights as a participant of the program and as a citizen or resident of the United States.

(2) The participant has the right to be free of interference, coercion, discrimination, and reprisal from the program management in exercising his or her rights.

(3) The participant has the right to freedom from chemical or physical restraint.

(4) In the case of a participant determined incompetent under the laws of a State by a court of jurisdiction, the rights of the participant are exercised by the person appointed under State law to act on the participant's behalf.

(b) *Notice of rights and services.* (1) The program management must inform the participant both orally and in writing in a language that the participant understands of his or her rights and all rules and regulations governing participant conduct and responsibilities during enrollment in the program. Such notification must be made prior to or upon enrollment and periodically during the participant's enrollment.

(2) Participants or their legal representatives have the right—

(i) Upon an oral or written request, to access all records pertaining to them including current participant records within 24 hours (excluding weekends and holidays); and

(ii) After receipt of their records for review, to purchase, at a cost not to exceed the community standard, photocopies of the records or any portions of them upon request and with two working days advance notice to the facility management.

(3) Participants have the right to be fully informed in language that they can understand of their total health status.

(4) Participants have the right to refuse treatment, to refuse to participate in patient activities, to refuse to participate in experimental research, and to formulate an advance directive as specified in paragraph (a)(7) of this section.

(5) The program management must inform each participant before, or at the time of enrollment, and periodically during the participant's stay, of services available in the facility and of charges for those services to be billed to the participant.

(6) The program management must furnish a written description of legal

rights which includes a statement that the participant may file a complaint with the State (agency) concerning participant abuse and neglect.

(7) The program management must have written policies and procedures regarding advance directives (e.g., living wills). These requirements include provisions to inform and provide written information to all participants concerning the right to accept or refuse medical or surgical treatment and, at the individual's option, formulate an advance directive. This includes a written description of the facility's policies to implement advance directives and applicable State law.

(8) Notification of changes. (i) Program management must immediately inform the participant; consult with the primary physician; and notify the participant's legal representative or an interested family member when there is—

(A) An accident involving the participant which results in injury and has the potential for requiring physician intervention;

(B) A significant change in the participant's physical, mental, or psychosocial status (e.g., a deterioration in health, mental, or psychosocial status in either life-threatening conditions or clinical complications);

(C) A need to alter treatment significantly (i.e., a need to discontinue an existing form of treatment due to adverse consequences, or to commence a new form of treatment); or

(D) A decision to transfer or discharge the participant from the program.

(ii) The program management must also promptly notify the participant and the participant's legal representative or interested family member when there is a change in resident rights under Federal or State law or regulations as specified in paragraph (b)(1) of this section.

(iii) The program management must record and periodically update the address and phone number of the participant's legal representative, or interested family member, and the primary physician.

(c) *Free choice.* (1) The participant has the right to—

(i) Be fully informed in advance about care and treatment and of any changes in that care or treatment that may affect the participant's well-being; and

(ii) Unless determined incompetent or otherwise determined to be incapacitated under the laws of the State, participate in planning care and treatment or changes in care and treatment.

(2) If the participant is determined incompetent or otherwise determined to be incapacitated under the laws of the State, the participant's legal representative or interested family member(s) has the right to participate in planning care and treatment or changes in care and treatment.

(d) *Privacy and confidentiality.* Participants have the right to privacy and confidentiality of their personal and clinical records.

(1) Participants have a right to privacy in their medical treatment and personal care.

(2) Except as provided in paragraph (d)(3) of this section, participants may approve or refuse the release of personal and clinical records to any individual outside the facility.

(3) The participant's right to refuse release of personal and clinical records does not apply when—

(i) The participant is transferred to another health care institution; or

(ii) The release is required by law.

(e) *Grievances.* A participant has the right to—

(1) Voice grievances without discrimination or reprisal. Participants may voice grievances with respect to treatment received and not received; and

(2) Prompt efforts by facility management to resolve grievances the participant may have, including those with respect to the behavior of other participants.

(f) *Examination of survey results.* A participant has the right to—

(1) Examine the results of the most recent VA survey with respect to the program. The program management must make the results available for examination in a place readily accessible to participants, and must post a notice of their availability; and

(2) Receive information from agencies acting as client advocates, and be

afforded the opportunity to contact these agencies.

(g) *Work*. The participant has the right to—

(1) Refuse to perform services for the facility;

(2) Perform services for the facility, if he or she chooses, when—

(i) The facility has documented the need or desire for work therapy in the plan of care;

(ii) The plan specifies the nature of the services performed and whether the services are voluntary or paid;

(iii) Compensation for (work therapy) paid services is at or above prevailing rates; and

(iv) The participant agrees to the work therapy arrangement described in the plan of care.

(h) *Access and visitation rights.* (1) The program management must provide immediate access to any participant by the following:

(i) Any representative of the Under Secretary for Health;

(ii) Any representative of the State;

(iii) The State long-term care ombudsman;

(iv) Immediate family or other relatives of the participant subject to the participant's right to deny or withdraw consent at any time; and

(v) Others who are visiting subject to reasonable restrictions and the participant's right to deny or withdraw consent at any time.

(2) The program management must provide reasonable access to any participant by any entity or individual that provides health, social, legal, or other services to the participant, subject to the participant's right to deny or withdraw consent at any time.

(3) The program management must allow representatives of the State Ombudsman Program to examine a participant's clinical records with the permission of the participant or the participant's legal representative, subject to State law.

(i) *Telephone.* The participant has the right to reasonable access to use a telephone where calls can be made without being overheard.

(j) *Personal property*. The participant has the right to have at least one change of personal clothing.

(k) *Self-administration of drugs.* An individual participant may self-administer drugs if the interdisciplinary team has determined that this practice is safe for the individual and is a part of the care plan.

(Authority: 38 U.S.C. 101, 501, 1741–1743)

(The Office of Management and Budget has approved the information collection requirements in this paragraph under control number 2900–0160.)

### § 52.71 Participant and family caregiver responsibilities.

The program management has a written statement of participant and family caregiver responsibilities that are posted in the facility and provided to the participant and caregiver at the time of the intake screening. The Statement of responsibilities must include the following:

(a) Treat personnel with respect and courtesy;

(b) Communicate with staff to develop a relationship of trust;

(c) Make appropriate choices and seek appropriate care;

(d) Ask questions and confirm understanding of instructions;

(e) Share opinions, concerns, and complaints with the program director;

(f) Communicate any changes in the participant's condition;

(g) Communicate to the program director about medications and remedies used by the participant;

(h) Let the program director know if the participant decides not to follow any instructions or treatment; and

(i) Communicate with the adult day health care staff if the participant is unable to attend the adult day health care program.

(The Office of Management and Budget has approved the information collection requirements in this paragraph under control number 2900–0160.)

### § 52.80 Enrollment, transfer and discharge rights.

(a) Participants in the adult day health care program must meet the provisions of this part that apply to participants and—

(1) Must meet at least two of the following indicators:

(i) Dependence in two or more activities of daily living (ADLs).

(ii) Dependence in three or more instrumental activities of daily living (IADLs).

(iii) Advanced age, i.e., 75 years old or over.

(iv) High use of medical services, i.e., three or more hospitalizations in past 12 months; or 12 or more hospitalizations, outpatient clinic visits; or emergency evaluation unit visits, in the past 12 months.

(v) Diagnosis of clinical depression.

(vi) Recent discharge from nursing home or hospital.

(vii) Significant cognitive impairment, particularly when characterized by multiple behavior problems;

(2) Must have a supportive living arrangement sufficient to meet their health care needs when not participating in the adult day health care program; and

(3) Must be able to benefit from the adult day health care program.

(b) *Transfer and discharge.* (1) *Definition.* Transfer and discharge includes movement of a participant to a program outside of the adult day health care program whether or not that program or facility is in the same physical plant.

(2) *Transfer and discharge requirements.* All participants' preparedness for discharge from adult day health care must be a part of a comprehensive care plan. The possible reasons for discharge must be discussed with the participant and family members at the time of intake screening. Program management must permit each participant to remain in the program, and not transfer or discharge the participant from the program unless—

(i) The transfer or discharge is necessary for the participant's welfare and the participant's needs cannot be met in the adult day health care setting;

(ii) The transfer or discharge is appropriate because the participant's health has improved sufficiently so the participant no longer needs the services provided in the adult day health care setting;

(iii) The safety of individuals in the program is endangered;

(iv) The health of individuals in the program would otherwise be endangered;

(v) The participant has failed, after reasonable and appropriate notice, to pay for participation in the adult day health care program; or

(vi) The adult day health care program ceases to operate.

(3) *Documentation.* When the facility transfers or discharges a participant under any of the circumstances specified in paragraphs (b)(2)(i) through (vi) of this section, the primary physician must document the reason for such action in the participant's clinical record.

(4) *Notice before transfer.* Before a facility transfers or discharges a participant, the program management must—

(i) Notify the participant and a family member or legal representative of the participant of the transfer or discharge and the reasons for the move in writing and in a language and manner they can understand;

(ii) Record the reasons in the participant's clinical record; and

(iii) Include in the notice the items described in paragraph (a)(6) of this section.

(5) *Timing of the notice.* (i) The notice of transfer or discharge required under paragraph (b)(4) of this section must be made by program management at least 30 days before the participant is transferred or discharged, except when specified in paragraph (b)(5)(ii) of this section.

(ii) Notice may be made as soon as practicable before transfer or discharge when—

(A) The safety of individuals in the program would be endangered;

(B) The health of individuals in the program would be otherwise endangered;

(C) The participant's health improves sufficiently so the participant no longer needs the services provided by the adult day health care program;

(D) The resident's needs cannot be met in the adult day health care program.

(6) *Contents of the notice.* The written notice specified in paragraph (b)(4) of this section must include the following:

(i) The reason for transfer or discharge;

(ii) The effective date of transfer or discharge;

(iii) The location to which the participant is transferred or discharged, if any;

(iv) A statement that the participant has the right to appeal the action to the State official responsible for the oversight of State Veterans Home programs; and

(v) The name, address and telephone number of the State long-term care ombudsman.

(7) *Orientation for transfer or discharge.* The program management must provide sufficient preparation and orientation to participants to ensure safe and orderly transfer or discharge from the program.

(c) *Equal access to quality care.* The program management must establish and maintain identical policies and practices regarding transfer, discharge, and the provision of services for all individuals regardless of source of payment.

(d) *Enrollment policy.* The program management must not require a third party guarantee of payment to the program as a condition of enrollment or expedited enrollment, or continued enrollment in the program. However, program management may require a participant or an individual who has legal access to a participant's income or resources to pay for program care from the participant's income or resources, when available.

(e) *Hours of operation.* Each adult day health care program must provide at least 8 hours of operation five days a week. The hours of operation must be flexible and responsive to caregiver needs.

(f) *Caregiver support.* The adult day health care program must develop a Caregiver Program which offers mutual support, information and education.

(Authority: 38 U.S.C. 101, 501, 1741–1743)

(The Office of Management and Budget has approved the information collection requirements in this paragraph under control number 2900–0160.)

### § 52.90 Participant behavior and program practices.

(a) *Restraints.* (1) The participant has a right to be free from any chemical or physical restraints imposed for purposes of discipline or convenience. When a restraint is applied or used, the purpose of the restraint is reviewed and is justified as a therapeutic intervention and documented in the participant's clinical record.

(i) Chemical restraint is the inappropriate use of a sedating psychotropic drug to manage or control behavior.

(ii) Physical restraint is any method of physically restricting a person's freedom of movement, physical activity or normal access to his or her body.

(2) The program management uses a system to achieve a restraint-free environment.

(3) The program management collects data about the use of restraints.

(4) When alternatives to the use of restraint are ineffective, restraint is safely and appropriately used.

(b) *Abuse.* (1) The participant has the right to be free from mental, physical, sexual, and verbal abuse or neglect, corporal punishment, and involuntary seclusion.

(i) Mental abuse includes humiliation, harassment, and threats of punishment or deprivation.

(ii) Physical abuse includes hitting, slapping, pinching, kicking or controlling behavior through corporal punishment.

(iii) Sexual abuse includes sexual harassment, sexual coercion, and sexual assault.

(iv) Neglect is any impaired quality of life for an individual because of the absence of minimal services or resources to meet basic needs. Neglect may include withholding or inadequately providing food and hydration, clothing, medical care, and good hygiene. It also includes placing the individual in unsafe or unsupervised conditions.

(v) Involuntary seclusion is a participant's separation from other participants against his or her will or the will of his or her legal representative.

(2) [Reserved]

(c) *Staff treatment of participants.* The program management must develop and implement written policies and procedures that prohibit mistreatment, neglect, and abuse of participants and misappropriation of participant property.

(1) The program management must—

(i) Not employ individuals who—

(A) Have been found guilty of abusing, neglecting, or mistreating individuals by a court of law; or

(B) Have had a finding entered into an applicable State registry or with the applicable licensing authority concerning abuse, neglect, mistreatment of individuals or misappropriation of their property; and

(ii) Report any knowledge it has of actions by a court of law against an employee, which would indicate unfitness for service as a program assistant or other program staff to the State oversight agency director and licensing authorities.

(2) The program management must ensure that all alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source, and misappropriation of participant property are reported immediately to the State oversight agency director and to other officials in accordance with State law through established procedures.

(3) The program management must have evidence that all alleged violations are thoroughly investigated, and must prevent potential abuse while the investigation is in progress.

(4) The results of all investigations must be reported to the State oversight agency director or the designated representative and to other officials in accordance with State law within five working days of the incident, and appropriate corrective action must be taken if the alleged violation is verified.

(Authority: 38 U.S.C. 101, 501, 1741–1743)

(The Office of Management and Budget has approved the information collection requirements in this paragraph under control number 2900–0160.)

### § 52.100 Quality of life.

Program management must provide an environment and provide or coordinate care that supports the quality of life of each participant by maximizing the individual's potential strengths and skills.

(a) *Dignity*. The program management must promote care for participants in a manner and in an environment that maintains or enhances each participant's dignity and respect in full recognition of his or her individuality.

(b) *Self-determination and participation*. The participant has the right to—

(1) Choose activities, schedules, and health care consistent with his or her interests, assessments, and plans of care;

(2) Interact with members of the community both inside and outside the program; and

(3) Make choices about aspects of his or her life in the program that are significant to the participant.

(c) *Participant and family concerns.* The program management must document any concerns submitted to the management of the program by participants or family members.

(1) A participant's family has the right to meet with families of other participants in the program.

(2) Staff or visitors may attend participant or family meetings at the group's invitation.

(3) The program management must respond to written requests that result from group meetings.

(4) The program management must listen to the views of any participant or family group and act upon the concerns of participants and families regarding policy and operational decisions affecting participant care in the program.

(d) *Participation in other activities.* A participant has the right to participate in social, religious, and community activities that do not interfere with the rights of other participants in the program.

(e) *Therapeutic participant activities.* (1) The program management must provide for an ongoing program of activities designed to meet, in accordance with the comprehensive assessment, the interests and the physical, mental, and psychosocial well being of each participant.

(2) The activities program must be directed by a qualified professional who is a qualified therapeutic recreation specialist or an activities professional who—

(i) Is licensed, if applicable, by the State in which practicing; and

(ii) Is certified as a therapeutic recreation specialist or an activities professional by a recognized certifying body.

(3) A critical role of the adult day health care program is to build relationships and create a culture that supports, involves, and validates the participant. Therapeutic activity refers to that supportive culture and is a significant aspect of the individualized plan of care. A participant's activity includes everything the individual experiences during the day, not just arranged events. As part of effective therapeutic activity the adult day health care program must:

(i) Provide direction and support for participants, including breaking down activities into small, discrete steps or behaviors, if needed by a participant;

(ii) Have alternative programming available for any participant unable or unwilling to take part in group activity;

(iii) Design activities that promote personal growth and enhance the self-image and/or improve or maintain the functioning level of participants to the extent possible;

(iv) Provide opportunities for a variety of involvement (social, intellectual, cultural, economic, emotional, physical, and spiritual) at different levels, including community activities and events;

(v) Emphasize participants' strengths and abilities rather than impairments and contribute to participant feelings of competence and accomplishment; and

(vi) Provide opportunities to voluntarily perform services for community groups and organizations.

(f) *Social services.* (1) The facility management must provide medically-related social services to participants and their families.

(2) An adult day health care program must employ or contract for a qualified social worker to provide social services.

(3) Qualifications of social worker. A qualified social worker is an individual with—

(i) A bachelor's degree in social work from a school accredited by the Council of Social Work Education (Note: A master's degree social worker with experience in long-term care is preferred);

(ii) A social work license from the State in which the State home is located, if license is offered by the State; and

(iii) A minimum of one year of supervised social work experience in a health care setting working directly with individuals.

(4) The facility management must have sufficient social worker and support staff to meet participant and family social services needs. The adult day health care social services must:

(i) Provide counseling to participants and families/caregivers;

(ii) Facilitate the participant's adaptation to the adult day health care program and active involvement in the plan of care, if appropriate;

(iii) Arrange for services not provided by the adult day health care program and work with these resources to coordinate services;

(iv) Serve as participant advocate by asserting and safeguarding the human and civil rights of the participants;

(v) Assess signs of mental illness and/or dementia and make appropriate referrals;

(vi) Provide information and referral for persons not appropriate for adult day health care program;

(vii) Provide family conferences and serve as liaison between participant, family/caregiver and program staff;

(viii) Provide individual or group counseling and support to caregivers and participants;

(ix) Conduct support groups or facilitate participant or family/caregiver participation in support groups;

(x) Assist program staff in adapting to changes in participants' behavior; and

(xi) Provide or arrange for individual, group, or family psychotherapy for participants' with significant psychosocial needs.

(5) Space for social services must be adequate to ensure privacy for interviews.

(g) *Environment.* The program management must provide—

(1) A safe, clean, comfortable, and homelike environment, and support the participants' ability to function as independently as possible and to engage in program activities;

(2) Housekeeping and maintenance services necessary to maintain a sanitary, orderly, and comfortable interior;

(3) Private storage space for each participant sufficient for a change of clothes;

(4) Interior signs to facilitate participants' ability to move about the facility independently and safely;

(5) A clean bed available for acute illness, when indicated;

(6) A shower for resident's need, when indicated;

(7) Adequate and comfortable lighting levels in all areas;

(8) Comfortable and safe temperature levels; and

(9) Comfortable sound levels.

(Authority: 38 U.S.C. 101, 501, 1741–1743)

(The Office of Management and Budget has approved the information collection requirements in this paragraph under control number 2900–0160.)

### § 52.110 Participant assessment.

The program management must conduct initially, semi-annually and as required by a change in the participant's condition a comprehensive, accurate, standardized, reproducible assessment of each participant's functional capacity.

(a) *Intake screening.* An intake screening must be completed to determine the appropriateness of the adult day health care program for each participant.

(b) *Enrollment orders.* The program management must have physician orders for the participant's immediate care and a medical assessment, including a medical history and physical examination, within a time frame appropriate to the participant's condition, not to exceed 72 hours after enrollment, except when an examination was performed within five days before enrollment and the findings were provided and placed in the clinical record on enrollment.

(c) *Comprehensive assessments*—(1) The program management must make a comprehensive assessment of a participant's needs using (on and after January 1, 2002) the Minimum Data Set for Home Care (MSD-HC) Instrument Version 2.0, August 2, 2000.

(2) Frequency. Participant assessments must be completed—

(i) No later than 14 calendar days after the date of enrollment; and

(ii) Promptly after a significant change in the participant's physical, mental, or social condition.

(3) Review of assessments. Program management must review each participant no less than once every six months and as appropriate and revise the participant's assessment to assure the continued accuracy of the assessment.

(4) Use. The results of the assessment are used to develop, review, and revise the participant's individualized comprehensive plan of care, under paragraph (e) of this section.

(d) *Accuracy of assessments*—(1) *Coordination.* (i) Each assessment must be conducted or coordinated with the appropriate participation of health professionals.

(ii) Each assessment must be conducted or coordinated by a registered nurse who signs and certifies the completion of the assessment.

(2) *Certification.* Each person who completes a portion of the assessment must sign and certify the accuracy of that portion of the assessment.

(e) *Comprehensive care plans*—(1) The program management must develop an individualized comprehensive care plan for each participant that includes measurable objectives and timetables to meet a participant's physical, mental, and psychosocial needs that are identified in the comprehensive assessment. The care plan must describe the following—

(i) The services that are to be provided by the program and by other sources to attain or maintain the participant's highest physical, mental, and psychosocial well-being as required under § 52.120;

(ii) Any services that would otherwise be required under § 52.120 but are not provided due to the participant's exercise of rights under § 52.70, including the right to refuse treatment under § 52.70(b)(4);

(iii) Type and scope of interventions to be provided in order to reach desired, realistic outcomes;

(iv) Roles of participant and family/caregiver; and

(v) Discharge or transition plan, including specific criteria for discharge or transfer.

(2) A comprehensive care plan must be—

(i) Developed within 21 calendar days from the date of the adult day care enrollment and after completion of the comprehensive assessment;

(ii) Assigned to one team member for the accountability of coordinating the completion of the interdisciplinary plan;

(iii) Prepared by an interdisciplinary team that includes the primary physician, a registered nurse with responsibility for the participant, social worker, recreational therapist and other appropriate staff in disciplines as determined by the participant's needs, the participation of the participant, and the participant's family or the participant's legal representative; and

(iv) Periodically reviewed and revised by a team of qualified persons after each assessment.

(3) The services provided or arranged by the facility must—

(i) Meet professional standards of quality; and

(ii) Be provided by qualified persons in accordance with each participant's written plan of care.

(f) *Discharge summary.* Prior to discharging a participant, the program management must prepare a discharge summary that includes—

(1) A recapitulation of the participant's care;

(2) A summary of the participant's status at the time of the discharge to include items in paragraph (c)(2) of this section; and

(3) A discharge/transition plan related to changes in service needs and changes in functional status that prompted another level of care.

(Authority: 38 U.S.C. 101, 501, 1741–1743)

(The Office of Management and Budget has approved the information collection requirements in this paragraph under control number 2900–0160.)

### § 52.120 Quality of care.

Each participant must receive, and the program management must provide, the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care.

(a) *Reporting of sentinel events.* (1) Definition. A *sentinel event* is an adverse event that results in the loss of life or limb or permanent loss of function.

(2) Examples of sentinel events are as follows:

(i) Any participant death, paralysis, coma or other major permanent loss of function associated with a medication error; or

(ii) Any suicide or attempted suicide of a participant, including suicides following elopement (unauthorized departure) from the program; or

(iii) Any elopement of a participant from the program resulting in a death or a major permanent loss of function; or

(iv) Any procedure or clinical intervention, including restraints, that result in death or a major permanent loss of function; or

(v) Assault, homicide or other crime resulting in a participant's death or major permanent loss of function; or

(vi) A participant's fall that results in death or major permanent loss of function as a direct result of the injuries sustained in the fall; or

(vii) A serious injury requiring hospitalization.

(3) The program management must report sentinel events to the director of the VA medical center of jurisdiction within 24 hours of identification. The director of the VA medical center of jurisdiction must report sentinel events to the VA Network Director (10N1–22), Assistant Deputy Under Secretary for Health (10N), and Chief Consultant, Geriatrics and Extended Care Strategic Healthcare Group (114), within 24 hours of identification and/or notification by the State home.

(4) The program management must establish a mechanism to review and analyze a sentinel event resulting in a written report no later than 10 working days following the event. The purpose of the review and analysis of a sentinel event in an adult day health care program is to prevent future injuries to residents, visitors, and personnel.

(b) *Activities of daily living.* Based on the comprehensive assessment of a resident, the program management must ensure that—

(1) A participant's abilities in activities of daily living do not diminish unless circumstances of the individual's clinical condition demonstrate that diminution was unavoidable. This includes the participant's ability to—

(i) Bathe, dress, and groom;

(ii) Transfer and ambulate;

(iii) Toilet; and

(iv) Eat.

(2) A participant is given the appropriate treatment and services to maintain or improve his or her abilities specified in paragraph (b)(1) of this section.

(3) A participant who is unable to carry out activities of daily living receives the necessary services to maintain good nutrition, hydration, grooming, personal and oral hygiene, mobility, and bladder and bowel elimination.

(c) *Vision and hearing.* To ensure that participants receive proper treatment and assistive devices to maintain vision and hearing abilities, the program management must, if necessary, assist the participant and family—

(1) In making appointments; and

(2) Arranging for transportation to and from the office of a practitioner specializing in the treatment of vision or hearing impairment or the office of a professional specializing in the provision of vision or hearing assistive devices.

(d) *Pressure ulcers.* Based on the comprehensive assessment of a participant, the program management must ensure that—

(1) A participant who enters the program without pressure ulcers does not develop pressure ulcers unless the individual's clinical condition demonstrates that they were unavoidable; and

(2) A participant having pressure ulcers receives necessary treatment and services to promote healing, prevent infection and prevent new ulcers from developing.

(e) *Urinary and fecal incontinence.* Based on the participant's comprehensive assessment, the program management must ensure that—

(1) A participant who enters the program without an indwelling catheter is not catheterized unless the participant's clinical condition demonstrates that catheterization was necessary;

(2) A participant who is incontinent of urine receives appropriate treatment and services to prevent urinary tract infections and to restore as much normal bladder function as possible; and

(3) A participant who has persistent fecal incontinence receives appropriate treatment and services to treat reversible causes and to restore as much normal bowel function as possible.

(f) *Range of motion.* Based on the comprehensive assessment of a participant, the program management must ensure that—

(1) A participant who enters the program without a limited range of motion does not experience reduction in range of motion unless the participant's clinical condition demonstrates that a reduction in range of motion is unavoidable; and

(2) A participant with a limited range of motion receives appropriate treatment and services to increase range of motion and/or to prevent further decrease in range of motion.

(g) *Mental and psychosocial functioning.* Based on the comprehensive assessment of a participant, the program management must ensure that a participant who displays mental or psychosocial adjustment difficulty, receives appropriate treatment and services to correct the assessed problem.

(h) *Accidents.* The program management must ensure that—

(1) The participant environment remains as free of accident hazards as is possible; and

(2) Each participant receives adequate supervision and assistance devices to prevent accidents.

(i) *Nutrition.* Based on a participant's comprehensive assessment, the program management must ensure, by working with the family, that a participant—

(1) Maintains acceptable parameters of nutritional status, such as body weight and protein levels, unless the participant's clinical condition demonstrates that this is not possible; and

(2) Receives a therapeutic diet when a nutritional deficiency is identified.

(j) *Hydration.* The program management must provide each participant with sufficient fluid intake during the day to maintain proper hydration and health.

(k) *Unnecessary drugs.* (1) *General.* Each participant's drug regimen must be free from unnecessary drugs. An unnecessary drug is any drug when used:

(i) In excessive dose (including duplicate drug therapy); or

(ii) For excessive duration; or

(iii) Without adequate monitoring; or

(iv) Without adequate indications for its use; or

(v) In the presence of adverse consequences which indicate the dose should be reduced or discontinued; or

(vi) Any combinations of the reasons in paragraphs (k)(1)(i) through (v) of this section.

(2) *Antipsychotic drugs.* Based on a comprehensive assessment of a participant, the program management must ensure that—

(i) Participants who have not used antipsychotic drugs are not given these drugs unless antipsychotic drug therapy is necessary to treat a specific condition as diagnosed by the primary physician and documented in the clinical record; and

(ii) Participants who use antipsychotic drugs receive gradual dose reductions, and behavioral interventions, unless clinically contraindicated, in an effort to discontinue these drugs.

(l) *Medication errors.* The program management must ensure that—

(1) Medication errors are identified and reviewed on a timely basis; and

(2) Strategies for preventing medication errors and adverse reactions are implemented.

(Authority: 38 U.S.C. 101, 501, 1741–1743)

(The Office of Management and Budget has approved the information collection requirements in this paragraph under control number 2900–0160.)

### § 52.130 Nursing services.

The program management must provide an organized nursing service with a sufficient number of qualified nursing personnel to meet the total nursing care needs, as determined by participant assessment and individualized comprehensive plans of care, of all participants in the program.

(a) There must be at least one registered nurse on duty each day of operation of the adult day health care program. This nurse must be currently licensed by the State and must have, in writing, administrative authority, responsibility, and accountability for the functions, activities, and training of the nursing and program assistants. VA recommends that this nurse be a geriatric nurse practitioner or a clinical nurse specialist.

(b) The number and level of nursing staff is determined by the authorized capacity of participants and the nursing care needs of the participants.

(c) Nurse staffing must be adequate for meeting the standards of this part.

(Authority: 38 U.S.C. 101, 501, 1741–1743)

(The Office of Management and Budget has approved the information collection requirements in this paragraph under control number 2900–0160.)

### § 52.140 Dietary services.

The program management must provide each participant with a nourishing, palatable, well-balanced meal that proportionally meets the daily nutritional and special dietary needs of each participant.

(a) *Food and nutritional services.* The program management provides and/or contracts with a food service entity and provides and/or contracts sufficient support personnel competent to carry out the functions of the food service.

(1) The program management must employ a qualified dietitian either part-time or on a contract consultant basis to provide nutritional guidance.

(2) A qualified dietitian is one who is qualified based upon registration by the Commission on Dietetic Registration of the American Dietetic Association.

(3) The dietitian must—

(i) Conduct participant nutritional assessments and recommend nutritional intervention as appropriate.

(ii) Consult and provide nutrition education to participants, family/caregivers, and program staff as needed.

(iii) Consult and provide education and training to the food service staff.

(iv) Monitor and evaluate participants receiving enteral tube feedings and parenteral line solutions, and recommend changes as appropriate.

(b) *Menus and nutritional adequacy.* (1) The participant's total dietary intake is of concern but is not the adult day health care program's responsibility.

(2) The program is responsible for the meals served in the facility.

(c) *Food.* Each participant receives and the program provides—

(1) Food prepared by methods that conserve nutritive value, flavor, and appearance;

(2) Food that is palatable, attractive, and at the proper temperature;

(3) Food prepared in a form designed to meet individual needs; and

(4) Substitutes offered of similar nutritive value to participants who refuse food served.

(d) *Therapeutic diets.* (1) Therapeutic diets must be prescribed by the primary care physician.

(2) Special, modified, or therapeutic diets must be provided as necessary for participants with medical conditions or functional impairments.

(3) An adult day health care program must not admit nor continue to serve a participant whose dietary requirements cannot be accommodated by the program.

(e) *Frequency of meals.* (1) At regular times comparable to normal mealtimes in the community, each participant may receive and program management must provide at least two meals daily for those veterans staying more than four hours and at least one meal for those staying less than four hours.

(2) The program management must offer snacks and fluids as appropriate to meet the participants' nutritional and fluid needs.

(f) *Assistive devices.* The program management must provide special eating equipment and utensils for participants who need them.

(g) *Sanitary conditions.* The program must—

(1) Procure food from sources approved or considered satisfactory by Federal, State, or local authorities;

(2) Store, prepare, distribute, and serve food under sanitary conditions; and

(3) Dispose of garbage and refuse properly.

(Authority: 38 U.S.C. 101, 501, 1741–1743)

### § 52.150 Physician services.

As a condition of enrollment in adult day health care program, a participant must obtain a written physician order for enrollment. Each participant must remain under the care of a physician.

(a) *Physician supervision.* The program management must ensure that—

(1) The medical care of each participant is supervised by a primary care physician;

(2) Each participant's medical record must contain the name of the participant's primary physician; and

(3) Another physician is available to supervise the medical care of participants when their primary physician is unavailable.

(b) *Frequency of physician reviews.* (1) The participant must be seen by the primary physician at least annually and as indicated by a change of condition.

(2) The program management must have a policy to help ensure that adequate medical services are provided to the participant.

(3) At the option of the primary physician, required reviews in the program after the initial review may alternate between personal physician reviews and reviews by a physician assistant, nurse practitioner, or clinical nurse specialist in accordance with paragraph (e) of this section.

(c) *Availability of acute care.* The program management must provide or arrange for the provision of acute care when it is indicated.

(d) *Availability of physicians for emergency care.* In case of an emergency, the program management must provide or arrange for the provision of physician services when the program has participants under its care.

(e) *Physician delegation of tasks.* (1) A primary physician may delegate tasks to:

(i) A certified physician assistant or a certified nurse practitioner, or

(ii) A clinical nurse specialist who—

(A) Is acting within the scope of practice as defined by State law; and

(B) Is under the supervision of the physician.

(2) The primary physician may not delegate a task when the provisions of this part specify that the primary physician must perform it personally, or when the delegation is prohibited

under State law or by the facility's own policies.

(Authority: 38 U.S.C. 101, 501, 1741–1743)

(The Office of Management and Budget has approved the information collection requirements in this paragraph under control number 2900–0160.)

### § 52.160 Specialized rehabilitative services.

(a) *Provision of services.* If specialized rehabilitative services such as, but not limited to, physical therapy, speech therapy, occupational therapy, and mental health services for mental illness are required in the participant's comprehensive plan of care, program management must—

(1) Provide the required services; or

(2) Obtain the required services and equipment from an outside resource, in accordance with § 52.210(h), from a provider of specialized rehabilitative services.

(b) Specialized rehabilitative services must be provided under the written order of a physician by qualified personnel.

(Authority: 38 U.S.C. 101, 501, 1741–1743)

(The Office of Management and Budget has approved the information collection requirements in this paragraph under control number 2900–0160.)

### § 52.170 Dental services.

(a) Program management must, if necessary, assist the participant and family/caregiver—

(1) In making appointments; and

(2) By arranging for transportation to and from the dental services.

(b) Program management must promptly assist and refer participants with lost or damaged dentures to a dentist.

(Authority: 38 U.S.C. 101, 501, 1741–1743)

### § 52.180 Administration of drugs.

The program management must assist with the management of medication and have a system for disseminating drug information to participants and program staff.

(a) *Procedures.* (1) The program management must provide reminders or prompts to participants to initiate and follow though with self-administration of medications.

(2) The program management must establish a system of records to document the administration of drugs by participants and/or staff.

(3) The program management must ensure that drugs and biologicals used by participants are labeled in accordance with currently accepted professional principles, and include the appropriate accessory and cautionary instructions, and the expiration dates when applicable.

(4) The program management must store all drugs, biologicals, and controlled schedule II drugs listed in 21 CFR 1308.12 in locked compartments under proper temperature controls, permit only authorized personnel to have access, and otherwise comply with all applicable State and Federal laws.

(b) *Service consultation.* The program management must employ or contract for the services of a pharmacist licensed in the State in which the program is located who provides consultation, as needed, on all the provision of drugs.

(Authority: 38 U.S.C. 101, 501, 1741–1743)

(The Office of Management and Budget has approved the information collection requirements in this paragraph under control number 2900–0160.)

### § 52.190 Infection control.

The program management must establish and maintain an infection control program designed to prevent the development and transmission of disease and infection.

(a) *Infection control program.* The program management must—

(1) Investigate, control, and prevent infections in the program participants and staff; and

(2) Maintain a record of incidents and corrective actions related to infections.

(b) *Preventing spread of infection.* (1) The program management must prevent participants or staff with a communicable disease or infected skin lesions from attending the adult day health care program if direct contact will transmit the disease.

(2) The program management must require staff to wash their hands after each direct participant contact for

which hand washing is indicated by accepted professional practice.

(Authority: 38 U.S.C. 101, 501, 1741–1743)

(The Office of Management and Budget has approved the information collection requirements in this paragraph under control number 2900–0160.)

### § 52.200 Physical environment.

The physical environment must be designed, constructed, equipped, and maintained to protect the health and safety of participants, personnel and the public.

(a) *Life safety from fire.* The facility must meet the applicable provisions of the National Fire Protection Association's NFPA 101, Life Safety Code, 2000 edition. Incorporation by reference this document was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. The document incorporated by reference is available for inspection at the Department of Veterans Affairs, Office of Regulations Management (02D), Room 1154, 810 Vermont Avenue, NW., Washington, DC 20420 or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.* Copies may be obtained from the National Fire Protection Association, Battery March Park, Quincy, MA 02269. (For ordering information, call toll-free 1–800–344–3555.)

(b) *Space and equipment.* (1) Program management must—

(i) Provide sufficient space and equipment in dining, health services, recreation, and program areas to enable staff to provide participants with needed services as required by these standards and as identified in each participant's plan of care; and

(ii) Maintain all essential mechanical, electrical, and patient care equipment in safe operating condition.

(2) Each adult day health care program, when it is co-located in a nursing home, domiciliary, or other care facility, must have its own separate designated space during operational hours.

(3) The indoor space for an adult day health care program must be at least 100 square feet per participant including office space for staff and must be 60 square feet per participant excluding office space for staff.

(4) Each program will need to design and partition its space to meet its own needs, but a minimal number of functional areas must be available. These include:

(i) A dividable multipurpose room or area for group activities, including dining, with adequate table-setting space.

(ii) Rehabilitation rooms or an area for individual and group treatments for occupational therapy, physical therapy, and other treatment modalities.

(iii) A kitchen area for refrigerated food storage, the preparation of meals and/or training participants in activities of daily living.

(iv) An examination and/or medication room.

(v) A quiet room (with at least one bed), which functions to isolate participants who become ill or disruptive, or who require rest, privacy, or observation, must include a bed. It should be separate from activity areas, near a restroom, and supervised.

(vi) Bathing facilities adequate to facilitate bathing of participants with functional impairments.

(vii) Toilet facilities and bathrooms easily accessible to people with mobility problems, including participants in wheelchairs. There must be at least one toilet for every eight participants. The toilets must be equipped for use by persons with limited mobility, easily accessible from all programs areas, i.e., preferably within 40 feet from that area, designed to allow assistance from one or two staff, and barrier-free.

(viii) Adequate storage space. There should be space to store arts and crafts materials, personal clothing and belongings, wheelchairs, chairs, individual handiwork, and general supplies. Locked cabinets must be provided for files, records, supplies, and medications.

(ix) An individual room for counseling and interviewing participants and family members.

(x) A reception area.

(xi) An outside space that is used for outdoor activities that is safe, accessible to indoor areas, and accessible to those with a disability. This space may include recreational space and garden

area. It should be easily supervised by staff.

(c) Furnishings must be available for all participants. This must include functional furniture appropriate to the participants' needs. Furnishings must be attractive, comfortable, and homelike, while being sturdy and safe.

(d) *Participant call system.* The coordinator's station must be equipped to receive participant calls through a communication system from—

(1) Clinic rooms; and

(2) Toilet and bathing facilities.

(e) *Other environmental conditions.* The program management must provide a safe, functional, sanitary, and comfortable environment for the participants, staff and the public. The program management must—

(1) Establish procedures to ensure that water is available to essential areas if there is a loss of normal water supply;

(2) Have adequate outside ventilation by means of windows, or mechanical ventilation, or a combination of the two;

(3) Equip corridors, when available, with firmly-secured handrails on each side; and

(4) Maintain an effective pest control program so that the facility is free of pests and rodents.

(Authority: 38 U.S.C. 101, 501, 1741–1743)

### § 52.210 Administration.

An adult day health care program must be administered in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well being of each participant.

(a) *Governing body.* (1) The State must have a governing body, or designated person functioning as a governing body, that is legally responsible for establishing and implementing policies regarding the management and operation of the program; and

(2) The governing body or State official with oversight for the program appoints the adult day health care program administrator who is:

(i) A qualified heath care professional experienced in clinical program management and, if required by the State, certified as a Certified Administrator in Adult Day Health Care; and

(ii) Responsible for the operation and management of the program including:

(A) Documentation of current credentials for each licensed independent practitioner employed by the program;

(B) Review of the practitioner's record of experience;

(C) Assessment of whether practitioners with clinical privileges act within the scope of privileges granted; and

(iii) Awareness of local trends in community adult day health care and other services, and participation in area adult day health care organizations.

(b) *Disclosure of State agency and individual responsible for oversight of facility.* The State must give written notice to the Chief Consultant, Geriatrics and Extended Care Strategic Healthcare Group (114), VA Central Office, 810 Vermont Avenue, NW, Washington, DC 20420, at the time of the change, if any of the following change:

(1) The State agency and individual responsible for oversight of a State home facility;

(2) The State adult day health care program administrator; or

(3) The State employee responsible for oversight of the State home adult day health care program if a contractor operates the State program.

(c) *Required information.* The program management must submit the following to the director of the VA medical center of jurisdiction as part of the application for recognition and thereafter as often as necessary to be current:

(1) The copy of the legal and administrative action establishing the State-operated facility (e.g., State laws);

(2) Site plan of facility and surroundings;

(3) Legal title, lease, or other document establishing the right to occupy the facility;

(4) Organizational charts and the operational plan of the adult day health care program;

(5) The number of the staff by category indicating full-time, part-time and minority designation, annually;

(6) The number of adult day health care participants who are veterans and

non-veterans, the number of veterans who are minorities and the number of non-veterans who are minorities, annually;

(7) Annual State Fire Marshall's report;

(8) Annual certification from the responsible State home showing compliance with Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) (VA Form 10–0143A set forth at 38 CFR 58.14);

(9) Annual certification for Drug-Free Workplace Act of 1988 (41 U.S.C. 701–707) (VA Form 10–0143 set forth at 38 CFR 58.15);

(10) Annual certification regarding lobbying in compliance with 31 U.S.C. 1352 (VA Form 10–0144 set forth at 38 CFR 58.16);

(11) Annual certification of compliance with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d–1) as effectuated in 38 CFR part 18 (VA Form 10–0144A located at 38 CFR 58.17);

(d) *Percentage of veterans.* At least 75 percent of the program participants must be eligible veterans except that the veteran percentage need only be more than 50 percent if the facility was acquired, constructed, or renovated solely with State funds. All non-veteran participants must be veteran-related family members or gold star parents of veterans.

(e) *Management contract facility.* If a program is operated by an entity contracting with the State, the State must assign a State employee to monitor the operations of the facility. The State employee may also monitor other levels of care at a colocated facility, but must monitor the adult day health care facility and any colocated facility on a full-time onsite basis.

(f) *Licensure.* The facility and program management must comply with applicable State and local licensure laws.

(g) *Staff qualifications.* (1) The program management must employ on a full-time, part-time or consultant basis those professionals necessary to carry out the provisions of these requirements. Professional disciplines involved in participant care must include registered nurses, program assistants, physicians, social workers, rehabilitation therapists, dietitians, and therapeutic activity therapists and pharmacists. Other disciplines may be considered depending upon the participant and/or program needs.

(2) Professional staff must be licensed, certified, or registered in accordance with applicable State laws.

(3) The staff-participant ratio must be sufficient in number and skills (at least one staff to 4 to 6 participants) to ensure compliance with the standards of this part. There must be at least two responsible persons (paid staff members) at the adult day health care center at all times when there are two or more participants in attendance.

(4) Persons counted in the staff to participant ratio must spend at least 70 percent of their time in direct service with participants.

(5) All professional team members will serve in the role of case manager for designated participants.

(6) All personnel, paid and volunteer, will be provided appropriate training to maintain the knowledge and skills required for the participant needs.

(h) *Use of outside resources.* (1) If the facility does not employ a qualified professional person to furnish a specific service to be provided by the facility, the program management must have that service furnished to participants by a person or agency outside the facility under a written agreement described in paragraph (h)(2) of this section.

(2) Agreements pertaining to services furnished by outside resources must specify in writing that the program management assumes responsibility for—

(i) Obtaining services that meet professional standards and principles that apply to professionals providing services in such a program; and

(ii) The timeliness of the services.

(i) *Medical director.* (1) The program management must provide a primary care physician to serve as medical director and a consultant to the interdisciplinary program team.

(2) The medical director is responsible for:

(i) Participating in establishing policies, procedures, and guidelines to ensure adequate, comprehensive services;

(ii) Directing and coordinating medical care in the program;

(iii) Ensuring continuous physician coverage to handle medical emergencies;

(iv) Participating in managing the environment by reviewing and evaluating incident reports or summaries of incident reports, identifying hazards to health and safety, and making recommendations to the adult day health care program administrator; and

(v) Monitoring employees' health status and advising the program administrator on employee health policies.

(3) The medical director may also provide hands-on assessment and/or treatment if authorized by the participant's primary care provider. In programs where a medical director is available to act as a member of the team and authorizes care, information concerning the care provided must be shared with the primary care physician who continues to provide the ongoing medical care.

(4) The program management must have written procedures for handling medical emergencies. The procedures must include, at least:

(i) Procedures for notification of the family;

(ii) Procedures for transportation arrangements;

(iii) Provision for an escort, if necessary; and

(iv) Procedures for maintaining a portable basic emergency information file for each participant that includes:

(A) Hospital preference;

(B) Physician of record and telephone number;

(C) Emergency contact (family);

(D) Insurance information;

(E) Medications/allergies;

(F) Current diagnosis and history; and

(G) Photograph for participant identification.

(j) *Required training of program assistants.* (1) Program assistants must have a high school diploma, or the equivalent, and must have at least one year of experience in working with adults in a health care setting. Program assistants also must complete the National Adult Day Services Association training course or complete equivalent training.

(2) The program management must not use any individual working in the program as a program assistant whether permanent or not unless:

(i) That individual is competent to provide appropriate services; and

(ii) That individual has completed training or is certified by the National Adult Day Services Association as a certified Program Assistant in Adult Day Services.

(3) Verification. Before allowing an individual to serve as a nurse aide or program assistant, program management must verify that the individual has successfully completed a training and competency evaluation program. Facilities must follow up to ensure that such an individual actually becomes certified, if available in the State.

(4) Multi-State registry verification. Before allowing an individual to serve as a nurse aide or program assistant, program management must seek information from every State registry established under HHS regulations at 42 CFR 483.156 which the facility believes may include information on the individual.

(5) Required retraining. If, since an individual's most recent completion of a training and competency evaluation program, there has been a continuous period of 24 consecutive months during none of which the individual provided nursing or nursing-related services for monetary compensation, the individual must complete a new training and competency evaluation program or a new competency evaluation program.

(6) Regular in-service education. The program management must complete a performance review of every nurse aide or program assistant at least once every 12 months, and must provide regular in-service education based on the outcome of these reviews. The in-service training must—

(i) Be sufficient to ensure the continuing competence of nurse aides or program assistants, but must be no less than 12 hours per year;

(ii) Address areas of weakness as determined in program assistants' performance reviews and address the special needs of participants as determined by the program staff; and

(iii) For program assistants or nurse aides providing services to individuals

with cognitive impairments, address the care of the cognitively impaired.

(k) *Proficiency of program assistants.* The program management must ensure that program assistants or nurse aides are able to demonstrate competency in skills and techniques necessary to care for participants' needs, as identified through participant assessments, and described in the plan of care.

(l) *Laboratory and radiology results.* The program management must—

(1) Obtain laboratory or radiology results from the participant's primary physician to support the needs of its participants.

(2) Assist the participant and/or family/caregiver in making transportation arrangements to and from the source of laboratory or radiology services, if the participant needs assistance.

(3) File in the participant's clinical record laboratory or radiology reports that are dated and contain the name and address of the testing laboratory or radiology service.

(m) *Participant records.* (1) The facility management must maintain clinical records on each participant in accordance with accepted professional standards and practices that are—

(i) Complete;

(ii) Accurately documented;

(iii) Readily accessible; and

(iv) Systematically organized.

(2) Clinical records must be retained for—

(i) The period of time required by State law; or

(ii) Five years from the date of discharge if there is no requirement in State law.

(3) The program management must safeguard clinical record information against loss, destruction, or unauthorized use.

(4) The program management must keep confidential all information contained in the participant's records, regardless of the form or storage method of the records, except when release is required by—

(i) Transfer to another health care institution;

(ii) Law;

(iii) A third-party payment contract;

(iv) The participant; or

(v) The participant's legal representative.

(5) The clinical record must contain—

(i) Sufficient information to identify the participant;

(ii) A record of the participant's assessments;

(iii) The plan of care and services provided;

(iv) The results of any pre-enrollment screening conducted by the State; and

(v) Progress notes.

(n) *Quality assessment and assurance.* (1) Program management must maintain a quality improvement program and a quality improvement committee consisting of—

(i) A registered nurse;

(ii) A medical director designated by the program; and

(iii) At least three other members of the program's staff.

(2) The quality improvement committee—

(i) Must implement a quality improvement plan for the evaluation of its operation and services and review and revise annually; and

(ii) Must meet at least quarterly to identify quality of care issues; and

(iii) Must develop and implement appropriate plans of action to correct identified quality deficiencies; and

(iv) Must ensure that identified quality deficiencies are corrected within an established time period.

(3) The VA Under Secretary for Health may not require disclosure of the records of such committee unless such disclosure is related to the compliance with the requirements of this section.

(o) *Disaster and emergency preparedness.* (1) The program management must have detailed written plans and procedures to meet all potential emergencies and disasters, such as fire, severe weather, bomb threats, and missing participants.

(2) The program management must train all employees in emergency procedures when they begin to work in the program, periodically review the procedures with existing staff, and carry out unannounced staff drills using those procedures.

(p) *Transfer procedure.* (1) The program management must have in effect a written transfer procedure that reasonably assures that—

(i) Participants will be transferred from the adult day health care program to the hospital, and ensured of timely admission to the hospital when transfer is medically appropriate as determined by a physician; and

(ii) Medical and other information needed for care and treatment of participants will be exchanged between the institutions.

(2) The transfer must be with a hospital sufficiently close to the adult day health care program to make transfer feasible.

(q) *Compliance with Federal, State, and local laws and professional standards.* The program management must operate and provide services in compliance with all applicable Federal, State, and local laws, regulations, and codes, and with accepted professional standards and principles that apply to professionals providing services in such a facility. This includes the Single Audit Act of 1984 (31 U.S.C. 7501 et seq.) and the Cash Management Improvement Acts of 1990 and 1992 (31 U.S.C. 3335, 3718, 3720A, 6501, 6503).

(r) *Relationship to other Federal regulations.* In addition to compliance with the regulations set forth in this subpart, the program must meet the applicable provisions of other Federal laws and regulations, including but not limited to, those pertaining to nondiscrimination on the basis of race, color, national origin, handicap, or age (38 CFR part 18); protection of human subjects of research (45 CFR part 46), section 504 of the Rehabilitation Act of 1993 (29 U.S.C. 794); Drug-Free Workplace Act of 1988 (41 U.S.C. 701–707); restrictions regarding lobbying (31 U.S.C. 1352); Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d–1). Although these regulations are not in themselves considered requirements under this part, their violation may result in the termination or suspension of, or the refusal to grant or continue payment with Federal funds.

(s) *Intermingling.* A facility recognized as a State home for providing adult day health care may only provide adult day health care in the areas of the facility recognized as a State home for providing adult day health care.

(t) *VA management of State veterans homes.* Except as specifically provided by statute or regulations, VA employees have no authority regarding the management or control of State homes providing adult day health care.

(Authority: 38 U.S.C. 101, 501, 1741–1743)

(The Office of Management and Budget has approved the information collection requirements in this paragraph under control number 2900–0160.)

### § 52.220 Transportation.

Transportation of participants to and from the adult day health care facility must be a component of the overall program.

(a)(1) Except as provided in paragraph (a)(2) of this section, the adult day health care program management must provide or contract for transportation to enable participants, including persons with disabilities, to attend the program and to participate in facility-sponsored outings.

(2) The veteran or the family of a veteran may decline transportation offered by the adult day health care program management and make their own arrangements for the transportation.

(b) The adult day health care program management must have a transportation policy that includes routine and emergency procedures, with a copy of the relevant procedures located in all program vehicles.

(c) All vehicles transporting participants to and from adult day health care must be equipped with a device for two-way communication.

(d) All facility-provided and contracted transportation systems must meet local, State and federal regulations.

(e) The time to transport participant to or from the facility must not be more than 60 minutes except under unusual conditions, e.g., bad weather.

(Authority: 38 U.S.C. 101, 501, 1741–1743)

## PART 58—FORMS

Sec.

58.10 VA Form 10–3567—State Home Inspection: Staffing Profile.
58.11 VA Form 10–5588—State Home Report and Statement of Federal Aid Claimed.
58.12 VA Form 10–10EZ—Application for Health Benefits.

58.13 VA Form 10–10SH—State Home Program Application for Veteran Care—Medical Certification.
58.14 VA Form 10–0143A—Statement of Assurance of Compliance with Section 504 of The Rehabilitation Act of 1973.
58.15 VA Form 10–0143—Department of Veterans Affairs Certification Regarding Drug-Free Workplace Requirements for Grantees Other Than Individuals.
58.16 VA Form 10–0144—Certification Regarding Lobbying.
58.17 VA Form 10–0144A—Statement of Assurance of Compliance with Equal Opportunity Laws.

AUTHORITY: 38 U.S.C. 101, 501, 1710, 1741–1743.

SOURCE: 65 FR 981, Jan. 6, 2000, unless otherwise noted.

## §58.10 VA Form 10–3567—State Home Inspection Staffing Profile.

OMB Approved No. 2900-0160
Estimated Burden Avg. 20 min.

Department of Veterans Affairs

**STATE HOME INSPECTION**

NAME OF HOME

DATE OF INSPECTION

| PART I | TOTAL FACILITY | HOSPITAL | NHC | DOM |
|---|---|---|---|---|
| OPERATING BEDS | | | | |
| AUTHORIZED APPROVALS | | | | |
| PATIENT CENSUS | | | | |
| POSITIONS AUTHORIZED | | | | |
| STAFF AVAILABLE | | | | |
| **PART II - STAFF** | **TOTAL FACILITY** | **HOSPITAL** | **NHC** | **DOM** |
| PHYSICIANS: | | | | |
| PHYSICIANS ASSISTANTS | | | | |
| DENTISTS | | | | |
| SOCIAL WORK: MSW | | | | |
| BSW | | | | |
| SOCIAL WORK ASSISTANT | | | | |
| PHARMACY: REG. PHARMACIST | | | | |
| DIETETICS: REG. DIETITIAN | | | | |
| FOOD SUPERVISOR | | | | |
| DIETARY ASSISTANTS | | | | |
| NURSING: | | | | |
| NURSING ADM./SUP. | | | | |
| DIRECT CARE: CERT. N.P./C.N.S. | | | | |
| R.N. | | | | |
| L.P.N./L.V.N. | | | | |
| N.A. | | | | |
| REHABILITATION THERAPY | | | | |
| REG. P.T./P.T. AIDES | | | | |
| REG. O.T./O.T. AIDES | | | | |
| MENTAL HEALTH: PSYCHOLOGIST | | | | |
| PSYCHIATRIST | | | | |
| PSYCHIATRIC SOCIAL WORKER | | | | |
| COUNSELOR | | | | |
| SPEECH AND AUDIOLOGY | | | | |
| OPHTHALMOLOGY/OPTOMETRY | | | | |
| PODIATRY | | | | |
| RADIOLOGY/LABORATORY | | | | |
| RECREATION/ACTIVITIES | | | | |
| DIRECTOR | | | | |
| ASSISTANTS | | | | |
| VOLUNTEERS | | | | |
| CHAPLAIN | | | | |
| ADMINISTRATION | | | | |
| ENGINEERING | | | | |
| MAINTENANCE/HOUSEKEEPING | | | | |
| MEDICAL RECORDS | | | | |
| OTHER *(Specify)* | | | | |

VA FORM MAY 1998 (RS) **10-3567** **SEE REVERSE**

| NAME OF HOME | DATE OF INSPECTION |
|---|---|
| | |

## NURSING SERVICE STAFFING PATTERN

*(Four Week Average)*

**PART III** **HOSPITAL** ***(Average hours Hosp. _____ )***

| SHIFT | SUNDAY | | | MONDAY | | | TUESDAY | | | WEDNESDAY | | | THURSDAY | | | FRIDAY | | | SATURDAY | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | RN | LPN | NA | RN | LPN | NA | RN | LPN | NA | RN | LPN | NA | RN | LPN | NA | RN | LPN | NA | RN | LPN | NA |
| DAY | | | | | | | | | | | | | | | | | | | | | |
| EVENING | | | | | | | | | | | | | | | | | | | | | |
| NIGHT | | | | | | | | | | | | | | | | | | | | | |

**PART IV** **NURSING HOME** ***(Average hours NHC _____ )***

| SHIFT | SUNDAY | | | MONDAY | | | TUESDAY | | | WEDNESDAY | | | THURSDAY | | | FRIDAY | | | SATURDAY | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | RN | LPN | NA | RN | LPN | NA | RN | LPN | NA | RN | LPN | NA | RN | LPN | NA | RN | LPN | NA | RN | LPN | NA |
| DAY | | | | | | | | | | | | | | | | | | | | | |
| EVENING | | | | | | | | | | | | | | | | | | | | | |
| NIGHT | | | | | | | | | | | | | | | | | | | | | |

**PART V** **DOMICILIARY** ***(Average hours Dom. _____ )***

| SHIFT | SUNDAY | | | MONDAY | | | TUESDAY | | | WEDNESDAY | | | THURSDAY | | | FRIDAY | | | SATURDAY | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | RN | LPN | NA | RN | LPN | NA | RN | LPN | NA | RN | LPN | NA | RN | LPN | NA | RN | LPN | NA | RN | LPN | NA |
| DAY | | | | | | | | | | | | | | | | | | | | | |
| EVENING | | | | | | | | | | | | | | | | | | | | | |
| NIGHT | | | | | | | | | | | | | | | | | | | | | |

VA FORM MAY 1998 (RS) **10-3567** **PAGE 2**

| NAME OF HOME | DATE OF INSPECTION |
| --- | --- |
| | |

**The Paperwork Reduction Act of 1995** requires us to notify you that this information collection is in accordance with the clearance requirements of section 3507 of the Paperwork Reduction Act of 1995. We may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a valid OMB number. We anticipate that the time expended by all individuals who must complete this form will average 30 minutes. This includes the time it will take to read instructions, gather the necessary facts and fill out the form.

## § 58.11 VA Form 10–5588—State Home Report and Statement of Federal Aid Claimed.

*OMB Approval No. 2900-0160*
*Estimated Burden: Avg. 30 min.*

Department of Veterans Affairs

### STATE HOME REPORT AND STATEMENT OF FEDERAL AID CLAIMED

| TO | VA FACILITY | FROM | NAME AND ADDRESS OF STATE HOME |
|---|---|---|---|
| | | | |

| PAY TO | FOR MONTH ENDING |
|---|---|
| | |

| LINE NO. | ITEM | | DOMICILIARY (A) | NURSING HOME CARE (B) | HOSPITAL (C) | ADULT DAY HEALTH CARE (D) |
|---|---|---|---|---|---|---|
| 1 | TOTAL VETERAN RESIDENTS REMAINING AT END OF PRIOR MONTH | | | | | |
| 2 | GAINS | ADMISSIONS *(Change of status)* | | | | |
| 3 | | ADMISSIONS *(Other)* | | | | |
| 4 | | RETURNS FROM LEAVE OF ABSENCE OF MORE THAN 96 HOURS | | | | |
| 5 | LOSSES | DISCHARGES *(Change of status)* | | | | |
| 6 | | DISCHARGES *(Other)* | | | | |
| 7 | | DEATHS | | | | |
| 8 | | LEAVES OF ABSENCE OF MORE THAN 96 HOURS | | | | |
| 9 | TOTAL VETERAN RESIDENTS REMAINING AT END OF THE MONTH | | | | | |
| 10 | TOTAL VETERAN DAYS OF CARE FURNISHED | | | | | |
| 11 | FEMALE VETERAN RESIDENTS REMAINING AT END OF THE MONTH | | | | | |
| 12 | **NON-VETERAN** RESIDENTS REMAINING AT END OF THE MONTH | | | | | |

#### MONTHLY STATEMENT OF ACCOUNT

| LINE NO. | FEDERAL AID CLAIMED UNDER SEC.1741, TITLE 38, U.S.C., AS AMENDED | DAYS OF CARE (J) | AVERAGE DAILY CENSUS (K) | TOTAL PER DIEM COST (L) | PER DIEM CLAIMED (M) | TOTAL AMOUNT CLAIMED (N) |
|---|---|---|---|---|---|---|
| 13 | DOMICILIARY CARE | | | $ | $ | $ |
| 14 | NURSING HOME CARE | | | $ | $ | $ |
| 15 | HOSPITAL CARE | | | $ | $ | $ |
| 16 | ADULT DAY HEALTH CARE | | | $ | $ | $ |
| 17 | **TOTAL AMOUNT CLAIMED** | | | | | $ |

#### FOR DEPARTMENT OF VETERANS AFFAIR USE ONLY

**RECEIVING REPORT** - Services authorized under provisions of Sec. 1741, 1742 and 1743, Title 38, U.S.C., have been rendered in the quantity claimed and payment is recommended except as follows:

| SIGNATURE AND TITLE OF STATE HOME COORDINATOR | DATE |
|---|---|
| | |

ACCOUNTING CERTIFICATION - AUDIT BLOCK

| AMOUNT DUE | DATE | VOUCHER AUDITOR |
|---|---|---|
| | | |

VA FORM SEP 1998 (RS) **10-5588** PAGE 1

Department of Veterans Affairs

## STATE HOME REPORT AND STATEMENT OF FEDERAL AID CLAIMED

I certify that this report is correct, that all residents included in the report were physically present during the period for which Federal aid is claimed, except for authorized absences of 96 hours or less, and that facility management has complied with all provisions of Title VI, Public Law 88-352, entitled Civil Rights Act of

| TOTAL STATE OPERATING BEDS AT END OF THE MONTH | | | |
|---|---|---|---|
| DOMICILIARY CARE | NURSING HOME CARE | HOSPITAL CARE | ADULT DAY HEALTH CARE |
| | | | |
| **BED CAPACITY APPROVED BY VA** | | | |
| DOMICILIARY CARE | NURSING HOME CARE | HOSPITAL CARE | ADULT DAY HEALTH CARE |
| | | | |
| SIGNATURE OF STATE HOME ADMINISTRATOR | | | DATE |
| SIGNATURE OF STATE EMPLOYEE WHEN APPLICABLE | | | DATE |
| REMARKS | | | |

**The Paperwork Reduction Act of 1995** requires us to notify you that this information collection is in accordance with the clearance requirements of section 3507 of the Paperwork Reduction Act of 1995. We may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a valid OMB number. We anticipate that the time expended by all individuals who must complete this form will average 30 minutes. This includes the time it will take to read instructions, gather the necessary facts and fill out the form.

VA FORM SEP 1998 (RS) **10-5588** PAGE 2

## § 58.12 VA Form 10–10EZ—Application for Health Benefits

OMB Approved No. 2900-0091
Estimated Burden Avg. 20 min

Department of Veterans Affairs

**APPLICATION FOR HEALTH BENEFITS**

**SECTION I - GENERAL INFORMATION**

1A. TYPE OF BENEFIT(S) APPLIED FOR *(You may check more than one)*
☐ HEALTH SERVICES ☐ NURSING HOME ☐ DOMICILIARY ☐ DENTAL ☐ ENROLLMENT

1B. IF APPLYING FOR HEALTH SERVICES, WHICH VA MEDICAL CENTER OR OUTPATIENT CLINIC DO YOU PREFER

2. VETERAN'S NAME *(Last, First, MI)* | 3. OTHER NAMES USED | 4. GENDER *(Check one)* ☐ M ☐ F

5. SOCIAL SECURITY NUMBER | 6. CLAIM NUMBER | 7. DATE OF BIRTH *(mm.dd.yyyy)* | 8. RELIGION

9A. CURRENT MAILING ADDRESS *(Street)* | 9B. CITY | 9C. STATE | 9D. ZIP

9E. COUNTY | 10. HOME TELEPHONE NUMBER ( ) | 11. WORK TELEPHONE NUMBER ( )

12. CURRENT MARITAL STATUS *(Check one)* ☐ MARRIED ☐ NEVER MARRIED ☐ SEPARATED ☐ WIDOWED ☐ DIVORCED ☐ UNKNOWN

13A. LAST BRANCH OF SERVICE | 13B. LAST ENTRY DATE | 13C. LAST DISCHARGE DATE | 13D. DISCHARGE TYPE | 13E. MILITARY SERVICE NUMBER

**14. CIRCLE YES OR NO**

| | | | | | |
|---|---|---|---|---|---|
| A. ARE YOU A FORMER PRISONER OF WAR | YES | NO | H. DO YOU HAVE A MILITARY DENTAL INJURY | YES | NO |
| B. DO YOU HAVE A VA SERVICE-CONNECTED RATING | YES | NO | I. DO YOU HAVE A SPINAL CORD INJURY | YES | NO |
| B1. IF YES, WHAT IS YOUR RATED PERCENTAGE | | % | J. ARE YOU ELIGIBLE FOR MEDICAID | YES | NO |
| C. ARE YOU RECEIVING A VA PENSION | YES | NO | K. ARE YOU ENROLLED IN MEDICARE HOSPITAL INSURANCE PART A | YES | NO |
| D. ARE YOU RETIRED FROM THE MILITARY | YES | NO | K1. EFFECTIVE DATE | | |
| D1. WAS YOUR RETIREMENT THE RESULT OF A DISABILITY | YES | NO | L. ARE YOU ENROLLED IN MEDICARE HOSPITAL INSURANCE PART B | YES | NO |
| D2. WERE YOU REGULARLY RETIRED - (20 + yrs.) | YES | NO | L1. EFFECTIVE DATE | | |
| E. WERE YOU EXPOSED TO TOXINS IN THE GULF WAR | YES | NO | M. MEDICARE CLAIM NUMBER | | |
| F. WERE YOU EXPOSED TO AGENT ORANGE | YES | NO | N. NAME EXACTLY AS IT APPEARS ON YOUR MEDICARE CARD | | |
| G. WERE YOU EXPOSED TO RADIATION | YES | NO | | | |

15A. VETERAN'S EMPLOYMENT STATUS *(check one)* ☐ NOT EMPLOYED ☐ EMPLOYED ☐ RETIRED
*If employed or retired, complete item 15B* / / *Date of retirement*
15B. COMPANY NAME, ADDRESS AND TELEPHONE NUMBER

16A. SPOUSE'S EMPLOYMENT STATUS *(check one)* ☐ NOT EMPLOYED ☐ EMPLOYED ☐ RETIRED
*If employed or retired, complete item 16B* / / *Date of retirement*
16B. COMPANY NAME, ADDRESS AND TELEPHONE NUMBER

17A. VETERAN'S HEALTH INSURANCE COMPANY | 18A. SPOUSE'S HEALTH INSURANCE COMPANY

17B. NAME OF POLICY HOLDER | 18B. NAME OF POLICY HOLDER

17C. POLICY NUMBER | 17D. GROUP CODE | 18C. POLICY NUMBER | 18D. GROUP CODE

19A. NAME, ADDRESS AND RELATIONSHIP OF NEXT OF KIN | 19B. NEXT OF KIN'S HOME TELEPHONE NUMBER ( ) | 19C. NEXT OF KIN'S WORK TELEPHONE NUMBER ( )

20A. NAME, ADDRESS AND RELATIONSHIP OF EMERGENCY CONTACT | 20B. EMERGENCY CONTACT'S HOME TELEPHONE NUMBER ( ) | 20C. EMERGENCY CONTACT'S WORK TELEPHONE NUMBER ( )

21. I DESIGNATE THE FOLLOWING INDIVIDUAL TO RECEIVE POSSESSION OF ALL MY PERSONAL PROPERTY LEFT ON PREMISES UNDER VA CONTROL AFTER MY DEPARTURE OR AT THE TIME OF MY DEATH. *(Check one)* ***(This does not constitute a will or transfer of title.)***
☐ EMERGENCY CONTACT ☐ NEXT OF KIN

22A. IS NEED FOR CARE DUE TO ON THE JOB INJURY *(Check one)* ☐ YES ☐ NO
22B. IS NEED FOR CARE DUE TO ACCIDENT *(Check one)* ☐ YES ☐ NO

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| APPLICATION FOR HEALTH BENEFITS, Continued | VETERAN'S NAME | SOCIAL SECURITY NUMBER |
|---|---|---|

**SECTION II - FINANCIAL ASSESSMENT**

**IIA - DEPENDENT INFORMATION** ***(Use a separate sheet for additional dependents)***

| | | |
|---|---|---|
| 1. SPOUSE'S NAME *(Last, First, MI)* | 2. CHILD'S NAME *(Last, First, MI)* | |
| 3. SPOUSE'S SOCIAL SECURITY NUMBER | 4. SPOUSE'S DATE OF BIRTH *(mm/dd/yyyy)* | 5. CHILD'S DATE OF BIRTH *(mm/dd/yyyy)* |
| 6. SPOUSE'S ADDRESS *(Street, City, State, ZIP)* | 7. CHILD'S SOCIAL SECURITY NUMBER | |
| 8. SPOUSE'S TELEPHONE NUMBER | 9. CHILD'S RELATIONSHIP TO YOU *(Circle one)* *Son* *Daughter* *Stepson* *Stepdaughter* | |
| 10. DATE OF MARRIAGE *(mm/dd/yyyy)* | 11. DATE CHILD BECAME YOUR DEPENDENT | |
| 12. IF YOUR SPOUSE OR DEPENDENT CHILD DID NOT LIVE WITH YOU LAST YEAR, ENTER THE AMOUNT YOU CONTRIBUTED TO THEIR SUPPORT SPOUSE $ CHILD $ | 13. EXPENSES PAID BY YOUR DEPENDENT CHILD FOR COLLEGE, VOCATIONAL REHABILITATION OR TRAINING *(tuition, books, materials, etc.)* $ | |
| 14. WAS CHILD PERMANENTLY AND TOTALLY DISABLED BEFORE THE AGE OF 18? ☐ YES ☐ NO | 15. IF CHILD IS BETWEEN 18 AND 23 YEARS OF AGE, DID CHILD ATTEND SCHOOL LAST CALENDAR YEAR? ☐ YES ☐ NO | |

**IIB - FINANCIAL DISCLOSURE**

You are not required to provide the financial information in this Section. However, current law may require VA to consider your household financial situation to determine your eligibility for enrollment and/or cost-free care of your nonservice-connected (NSC) conditions. If you are 0% SC noncompensable or NSC (and are not an Ex-POW, WWI veteran or VA pensioner) and your annual household income (or combined income and net worth) exceeds the established threshold, you must agree to pay VA co-payments for care of your NSC conditions to be eligible for enrollment. See Section III - Consent and Signature.

☐ **YES,** I WILL PROVIDE SPECIFIC INCOME AND/OR ASSET INFORMATION TO HAVE ELIGIBILITY FOR CARE DETERMINED. *Complete all sections below that apply to you with last calendar year's information. Sign and date the application.*

☐ **NO,** I DO NOT WISH TO PROVIDE MY DETAILED FINANCIAL INFORMATION. *I understand I will be assigned the appropriate enrollment priority based on nondisclosure of my financial information. By checking NO and signing below, I am agreeing to pay the applicable VA co-payment. Sign and date the application.*

**IIC - PREVIOUS CALENDAR YEAR GROSS ANNUAL INCOME OF VETERAN, SPOUSE AND DEPENDENT CHILDREN**

| | VETERAN | SPOUSE | CHILDREN |
|---|---|---|---|
| 1. WHAT WAS YOUR GROSS ANNUAL INCOME FROM EMPLOYMENT *(wages, bonuses, tips, etc.)*, AS WELL AS INCOME FROM YOUR FARM, RANCH, PROPERTY OR BUSINESS | $ | $ | $ |
| 2. LIST OTHER INCOME AMOUNTS *(Social Security, compensation, pension, interest, dividends). Exclude welfare.* | $ | $ | $ |
| 3. WAS INCOME FROM YOUR FARM, RANCH, PROPERTY OR BUSINESS *(If yes, refer to page 2, Section IIC of the instructions.)* ☐ YES ☐ NO | | | |

**IID - DEDUCTIBLE EXPENSES**

| | |
|---|---|
| 1. NON-REIMBURSED MEDICAL EXPENSES PAID BY YOU OR YOUR SPOUSE *(payments for doctors, dentists, drugs, Medicare, health insurance, hospital and nursing home)* | $ |
| 2. AMOUNT YOU PAID LAST CALENDAR YEAR FOR FUNERAL AND BURIAL EXPENSES FOR YOUR DECEASED SPOUSE OR DEPENDENT CHILD *(Also enter spouse or child's information in Section IIA)* | $ |
| 3. AMOUNT YOU PAID LAST CALENDAR YEAR FOR YOUR COLLEGE OR VOCATIONAL EDUCATIONAL EXPENSES *(tuition, books, fees, materials, etc.) DO NOT LIST YOUR DEPENDENTS' EDUCATIONAL EXPENSES.* | $ |

**IIE - NET WORTH**

| | VETERAN | SPOUSE |
|---|---|---|
| 1. CASH, AMOUNT IN BANK ACCOUNTS *(Checking and savings accounts, certificates of deposit, individual retirement accounts, etc.)* | $ | $ |
| 2. MARKET VALUE OF LAND AND BUILDINGS MINUS MORTGAGES AND LIENS. *Do not count your primary home. Include value of farm, ranch, or business assets.* | $ | $ |
| 3. STOCKS AND BONDS AND VALUE OF OTHER PROPERTY OR ASSETS *(art, rare coins, etc.)* MINUS THE AMOUNT YOU OWE ON THESE ITEMS. *Exclude household effects and family vehicles.* | $ | $ |

**SECTION III - CONSENT AND SIGNATURE**

**CO-PAYMENT NOTICE:** If you are a 0% service-connected noncompensable or a nonservice-connected veteran (and are not an Ex-POW, WWI veteran or VA pensioner) **and** your household income (or combined income and net worth) exceeds the established threshold, you may be eligible for enrollment only if you agree to pay VA co-payments for treatment of your NSC conditions. By signing this application you are agreeing to pay the applicable VA co-payment if required by law.

| I CERTIFY THE FOREGOING STATEMENT(S) ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND ABILITY. | DATE *(mm/dd/yyyy)* |
|---|---|
| **SIGN HERE** *(Signature of applicant or applicant's representative)* | |

**THE LAW PROVIDES SEVERE PENALTIES FOR WILLFUL SUBMISSION OF FALSE INFORMATION.**

VA FORM APR. 1998 **10-10EZ** PAGE 2

## § 58.13 VA Form 10–10SH—State Home Program Application for Veteran Care Medical Certification.

*OMB Approval No. 2900-0160*
*Estimated Burden: Avg. 30 min.*

Department of Veterans Affairs

**STATE HOME PROGRAM APPLICATION FOR VETERAN CARE MEDICAL CERTIFICATION**

**PART I - ADMINISTRATIVE**

| | | |
|---|---|---|
| STATE HOME FACILITY | DATE ADMITTED | GENDER M F |
| RESIDENT'S NAME (*Last, First, Middle* ) | SOCIAL SECURITY NUMBER | |
| RESIDENT'S STREET ADDRESS | AGE | DATE OF BIRTH |
| CITY, STATE AND ZIP CODE | ADVANCED MEDICAL DIRECTIVE NO YES | |

**PART II - HISTORY AND PHYSICAL** ***(Use separate sheet if necessary)***

HISTORY

| HEIGHT | WEIGHT | TEMP | PULSE | BP | HEAD/EYES/EAR/NOSE AND THROAT |
|---|---|---|---|---|---|
| | | | | | |

| | |
|---|---|
| NECK | CARDIOPULMONARY |
| ABDOMEN | GENITOURINARY |
| RECTAL | EXTREMITIES |
| NEUROLOGICAL | ALLERGY/DRUG SENSITIVITY |

| | | | | | | |
|---|---|---|---|---|---|---|
| X-RAY/ LAB | CHEST X-RAY | DATE: | RESULTS | CBC | DATE: | RESULTS |
| | SEROLOGY | | | | | |
| | URINALYSIS | DATE | ALBUMEN | SUGAR | ACETONE | |

**CHECK ALL BOXES THAT APPLY OR CIRCLE NA**

| IS DEMENTIA THE PRIMARY DIAGNOSIS | IS THERE A DIAGNOSIS OF MENTAL ILLNESS | HAS RESIDENT RECEIVED MENTAL SERVICES WITHIN THE PAST 2 YEARS | IS CLIENT A DANGER TO SELF OR OTHERS |
|---|---|---|---|
| YES NO | YES NO | YES NO | YES NO |

IS THERE ANY PRESSING EVIDENCE OF MENTAL ILLNESS SUCH AS:

SCHIZOPHRENIA PARANOIA OTHER PSYCHOTIC OR MENTAL DISORDERS LEADING TO CHRONIC DISABILITY
MOOD SWINGS SOMATOFORM DISORDER PANIC OR SEVERE ANXIETY DISORDER PERSONALITY DISORDER

| OXYGEN | | TUBE FEEDING | DECUBITUS ULCERS | FOLEY CATHETER |
|---|---|---|---|---|
| MASK | PRN | OSTOMY | DRAINING WOUND | TEMPORARY |
| NASAL CANULAR | CONTINUOUS | TRACHOSTOMY | WOUND CULTURED | PERMANENT |

| | |
|---|---|
| REFERRING PHYSICIAN | PRIMARY DIAGNOSIS |
| SECONDARY DIAGNOSIS | TERTIARY DIAGNOSIS |

**TYPE OF CARE RECOMMENDED:** SKILLED NURSING HOME CARE DOMICILIARY CARE ADULT DAY HEALTH CARE HOSPITAL

MEDICATION AND TREATMENT ORDERS ON ADMISSION, CONTINUE ON SEPARATE SHEET IF NECESSARY

| | |
|---|---|
| PRINTED OR TYPED NAME OF PRIMARY PHYSICIAN ASSIGNED | SIGNATURE OF PRIMARY PHYSICIAN ASSIGNED |

VA FORM JUL 1998 **10-10SH** **PAGE 1**

**STATE HOME PROGRAM APPLICATION FOR VETERAN CARE - MEDICAL CERTIFICATION, CONTINUED**

| RESIDENT'S NAME (*Last, First, Middle*) | SOCIAL SECURITY NUMBER |
|---|---|
| | |

**EVALUATION (Circle appropriate number in each category)**

| | | | |
|---|---|---|---|
| **COMMUNICATION** | 1. Transmits messages/receives information<br>2. Limited ability<br>3. Nearly or totally unable | **SPEECH** | 1. Speaks clearly with others of same language<br>2. Limited ability<br>3. Unable to speak clearly or not at all |
| **HEARING** | 1. Good<br>2. Hearing slightly impaired.<br>3. Limited hearing (e.g.- must speak loudly)<br>4. Virtually/completely deaf | **SIGHT** | 1. Good<br>2. Vision adequate - Unable to read/see details<br>3. Vision limited - Gross object differentiation<br>4. Blind |
| **TRANSFER** | 1. No assistance<br>2. Equipment only<br>3. Supervision only<br>4. Requires human transfer w/wo equipment<br>5. Bedfast | **AMBULATION** | 1. Independence w/wo assistive device<br>2. Walks with supervision<br>3. Walks with continuous human support<br>4. Bed to chair (total help)<br>5. Bedfast |
| **ENDURANCE** | 1. Tolerates distances (250 feet sustained activity)<br>2. Needs intermittent rest<br>3. Rarely tolerates short activities<br>4. No tolerance | **MENTAL AND BEHAVIOR STATUS** | 1. Alert<br>2. Confused<br>3. Disoriented<br>4. Comatose<br>5. Agreeable<br>6. Disruptive<br>7. Apathetic<br>8. Well motivated |
| **TIOLETING** | 1. No assistance<br>2. Assistance to and from and transfer<br>3. Total assistance including personal hygiene, help with clothes<br>A. Bathroom<br>B. Bedside commode<br>C. Bedpan | **BATHING** | 1. No assistance<br>2. Supervision only<br>3. Assistance<br>4. Is bathed<br>A. Tub<br>B. Shower<br>C. Sponge bath |
| **DRESSING** | 1. Dresses self<br>2. Minor assistance<br>3. Needs help to complete dressing<br>4. Has to be dressed | **FEEDING** | 1. No assistance<br>2. Minor assistance, needs tray set up only<br>3. Help feeding/encouraging<br>4. Is fed |
| **BLADDER CONTROL** | 1. Continent<br>2. Rarely incontinent<br>3. Occasional - once/week or less<br>4. Frequent - up to once a day<br>5. Total incontinence<br>6. Catheter, indwelling | **BOWEL CONTROL** | 1. Continent<br>2. Rarely incontinent<br>3. Occasional - once/week or less<br>4. Frequent, - up to once a day<br>5. Total incontinence<br>6. Ostomy |
| **SKIN CONDITION** | 1. Intact<br>2. Dry/Fragile<br>3. Irritations (Rash)<br>4. Open wound<br>5. Decubitus<br>Number _____<br>Stage _____ | **WHEEL CHAIR USE** | 1. Independence<br>2. Assistance in difficult maneuvering<br>3. Wheels a few feet<br>4. Unable to use<br>☐ **NA** |

| SIGNATURE OF REGISTERED NURSE OR REFERRING PHYSICIAN | DATE |
|---|---|
| | |

**PHYSICAL THERAPY** ***(To be completed by Physical Therapist or Referring Physician*** ☐ NEW REFERRAL ☐ CONTINUATION OF THERAPY

| SENSATION IMPAIRED | RESTRICT ACTIVITY | PRECAUTIONS | FREQUENCY OF TREATMENT |
|---|---|---|---|
| ☐ **YES** ☐ **NO** | ☐ **YES** ☐ **NO** | ☐ CARDIAC ☐ (OTHER *Specify*) | |

**TREATMENT GOALS:**

| | | | |
|---|---|---|---|
| ☐ STRETCHING | ☐ ACTIVE | ☐ COORDINATING ACTIVITIES | ☐ FULL WEIGHT BEARING | ☐ WHEELCHAIR INDEPENDENT |
| ☐ PASSIVE ROM | ☐ ACTIVE ASSISTIVE | ☐ NON-WEIGHT BEARING | ☐ PROGRESS BED TO WHEELCHAIR | ☐ COMPLETE AMBULATION |
| | ☐ PROGRESSIVE RESISTIVE | ☐ PARTIAL WEIGHT BEARING | ☐ RECOVERY TO FULL FUNCTION | |

| **ADDITIONAL THERAPIES** | SIGNATURE OF AND TITLE OF THERAPIST | DATE |
|---|---|---|
| ☐ **O.T.** ☐ **SPEECH** ☐ **DIETARY** | | |

**SOCIAL WORK ASSESSMENT** ***(To be completed by Social Worker)***

| PRIOR LIVING ARRANGEMENTS | LONG RANGE PLAN | |
|---|---|---|
| ADJUSTMENT TO ILLNESS OR DISABILITY | SIGNATURE OF SOCIAL WORKER | DATE |

**VA AUTHORIZATION FOR PAYMENT**

| DATE RECEIVED BY VA | ELIGIBILITY FOR PER DIEM PAYMENT | LEVEL OF CARE RECOMMENDED | |
|---|---|---|---|
| | ☐ APPROVED ☐ DISAPPROVED | ☐ NHC ☐ DOMICILIARY ☐ HOSPITAL ☐ ADHC | |
| REASON FOR DISAPPROVAL | | ☐ APPROVED<br>☐ DISAPPROVED | REASON FOR DISAPPROVAL |
| SIGNATURE OF VA OFFICIAL | DATE | SIGNATURE OF VA PHYSICIAN | DATE |

VA FORM JUL 1998 **10-10SH** **PAGE 2**

*OMB Approval No. 2900-0160*
*Estimated Burden: Avg. 30 min.*

**PAPERWORK REDUCTION ACT AND PRIVACY ACT NOTICE**

**The Paperwork Reduction Act of 1995** requires us to notify you that this information collection is in accordance with the clearance requirements of section 3507 of the Paperwork Reduction Act of 1995. We may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a valid OMB number. We anticipate that the time expended by all individuals who must complete this form will average 30 minutes. This includes the time it will take to read instructions, gather the necessary facts and fill out the form.

**Privacy Act Information** The information requested on this form is solicited under the authority of Title 38, U.S.C., Sections 1741, 1742 and 1743. It is being collected to enable us to determine your eligibility for medical benefits in the State Home Program and will be used for that purpose. The income and eligibility you supply may be verified through a computer matching program at any time and information may be disclosed outside the VA as permitted by law; possible disclosures include those described in the "routine uses" identified in the VA system of records 24VA136, Patient Medical Record-VA, published in the Federal Register in accordance with the Privacy Act of 1974. Disclosure is voluntary; however, the information is required in order for us to determine your eligibility for the medical benefit for which you have applied. Failure to furnish the information will have no adverse affect on any other benefits to which you may be entitled. Disclosure of Social Security number(s) of those for whom benefits are claimed is requested under the authority of Title 38, U.S.C., and is voluntary. Social Security numbers will be used in the administration of veterans benefits, in the identification of veterans or persons claiming or receiving VA benefits and their records and may be used for other purposes where authorized by Title 38, U.S.C., and the Privacy Act of 1974 (5 U.S.C. 552a) or where required by other statute.

VA FORM JUL 1998 **10-10SH**

## §58.14 VA Form 10–0143A—Statement of Assurance of Compliance with Section 504 of The Rehabilitation Act of 1973.

OMB Number: 2900-0160
Estimated Burden: 5 minutes

Department of Veterans Affairs

**STATEMENT OF ASSURANCE OF COMPLIANCE WITH SECTION 504 OF THE REHABILITATION ACT OF 1973**

The Paperwork Reduction Act of 1995 requires us to notify you that this information collection is in accordance with the clearance requirements of section 3507 of the Paperwork Reduction Act of 1995. We may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a valid OMB number. We anticipate that the time expended by all individuals who must complete this form will average 5 minutes. This includes the time it will take to read instructions, gather the necessary facts and fill out the form.

_____(hereinafter called the "Signatory")
*(Name and location of State Veterans Home)*

**HEREBY AGREES THAT**

It will comply with section 504 of the Rehabilitation Act of 1973 (Pub. L. No. 93-112) and all regulations adopted pursuant to such section, for instance, VA Regulations 7800 Series (38 CFR Section 18), to the end that no person in the United States shall, on the ground of handicap, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity of the Signatory receiving Federal financial assistance or other benefits under statues administered by the VA; and HEREBY GIVES ASSURANCE THAT it will immediately take any measures necessary to effectuate the agreement.

If any real property or structure thereon is provided or improved with the aid of the Federal financial assistance extended to the Signatory by the VA, this assurance shall obligate the Signatory, or in the case of transfer of such property, any transferee, for the period during which the real property or structure is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. In all cases this assurance shall obligate the Signatory for the period during which the Federal financial assistance is extended to any of its programs by the VA.

THIS ASSURANCE is given in consideration of and for the purpose of obtaining Federal financial assistance, including facilities furnished or payments made under Section 1741 of Title 38 USC. Federal financial assistance is understood to include benefits paid directly to the Signatory, and/or benefits paid to a beneficiary contingent upon such beneficiary being enrolled in a program offered by the Signatory.

The Signatory recognizes and agrees that such Federal financial assistance or other benefits will be extended in reliance on the representations and agreements made in this assurance, and that the VA will withhold financial assistance, facilities, or other benefits to ensure fulfillment of this assurance of compliance, and that the United States shall have the right to seek judicial enforcement of this assurance. This assurance is binding on the Signatory, its successors, transferees, and assignees. The person or persons whose signatures appear below are authorized to sign this assurance.

| SIGNATURE OF AUTHORIZED OFFICIAL | |
|---|---|
| TITLE | DATE |
| MAILING ADDRESS | |

VA FORM SEP1998 (R) **10-0143A** **REPRODUCE LOCALLY** JetForm

## § 58.15 VA Form 10–0143—Department of Veterans Affairs Certification Regarding Drug-Free Workplace Requirements for Grantees Other Than Individuals.

OMB Number: 2900-0160
Estimated Burden: 5 minutes

Department of Veterans Affairs

**DEPARTMENT OF VETERANS AFFAIRS CERTIFICATION REGARDING DRUG-FREE WORKPLACE REQUIREMENTS FOR GRANTEES OTHER THAN INDIVIDUALS**

The Paperwork Reduction Act of 1995 requires us to notify you that this information collection is in accordance with the clearance requirements of section 3507 of the Paperwork Reduction Act of 1995. We may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a valid OMB number. We anticipate that the time expended by all individuals who must complete this form will average 5 minutes. This includes the time it will take to read instructions, gather the necessary facts and fill out the form.

This certification is required by the regulations implementing the Drug-Free Workplace Act of 1988, 38 CFR 44, Subpart F. The regulations, published in the January 31, 1989, Federal Register (pages 4950-4952) require certification by grantees, prior to award, that they will maintain a drug-free workplace. The certification set out below is a material representation of fact upon which reliance will be placed when the agency determines to award the grant. False certification or violation of the certification shall be grounds for suspension of payments, suspension or termination of grants, or government-wide suspension or debarment (see CFR Part 44, Section 44.100 through 44.420).

**The grantee certifies that it will provide a drug-free workplace by:**

(1) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;

(2) Establishing a drug-free awareness program to inform employees about

(a) The dangers of drug abuse in the workplace;
(b) The grantee's policy of maintaining a drug-free workplace;
(c) Any available drug counseling, rehabilitation, and employee assistance programs; and
(d) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(3) Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (1);

(4) Notifying the employee in the statement required by paragraph (1) that, as a condition of employment under the grant, the employee will

(a) Abide by the terms of the statement; and
(b) Notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than five days after such conviction;

(5) Notifying the agency within ten days after receiving notice under subparagraph (4) (b) from an employee or otherwise receiving actual notice of such convictions;

(6) Taking one of the following actions, within 30 days of receiving notice under subparagraph (4) (b), with respect to any employee who is so convicted;

(a) Taking appropriate personnel action against such employee, up to and including termination; or
(b) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

(7) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (1), (2), (3), (4), (5) and (6).

VA FORM SEP1998 (R) **10-0143** **REPRODUCE LOCALLY** JetForm

OMB Number: 2900-0188
Estimated Burden: 15 minutes

Department of Veterans Affairs

**DEPARTMENT OF VETERANS AFFAIRS CERTIFICATION REGARDING DRUG-FREE WORKPLACE REQUIREMENTS FOR GRANTEES OTHER THAN INDIVIDUALS**

Places of Performance: The grantee shall insert in the space provided below the site(s) for performance of work done in connection with the specific grant (street address, city, county, state, zip code)

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

| ORGANIZATION NAME | GRANT NUMBER OR NAME |
|---|---|
| NAME AND TITLE OF AUTHORIZED REPRESENTATIVE | |
| SIGNATURE | DATE |

VA FORM SEP1998 (R) **10-0143** **REPRODUCE LOCALLY** JetForm

## § 58.16 VA Form 10–0144—Certification Regarding Lobbying.

OMB Number: 2900-0160
Estimated Burden: 5 minutes

Department of Veterans Affairs

**CERTIFICATION REGARDING LOBBYING**

The Paperwork Reduction Act of 1995 requires us to notify you that this information collection is in accordance with the clearance requirements of section 3507 of the Paperwork Reduction Act of 1995. We may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a valid OMB number. We anticipate that the time expended by all individuals who must complete this form will average 5 minutes. This includes the time it will take to read instructions, gather the necessary facts and fill out the form.

This certification is made in compliance with Section 319 of Public Law 101-121; and pursuant to the Interim Final guidance published as part VII of the December 20, 1989, Federal Register (Pages 57306-52332).

Certification for Contracts, Grants, Loans, and Cooperative Agreements

The undersigned certified, to the best of their knowledge and belief, that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Forms-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31 U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

| SIGNATURE OF CERTIFYING OFFICIAL | DATE |
|---|---|
| NAME AND TITLE OF CERTIFYING OFFICIAL | PROJECT (FAI NUMBER) |
| NAME AND ADDRESS OF STATE AGENCY | |

VA FORM SEP1999 (R) **10-0144** **REPRODUCE LOCALLY**

## §58.17 VA Form 10–0144A—Statement of Assurance of Compliance with Equal Opportunity Laws.

OMB Number: 2900-0160
Estimated Burden: 5 minutes

Department of Veterans Affairs

### STATEMENT OF ASSURANCE OF COMPLIANCE WITH EQUAL OPPORTUNITY LAWS

The Paperwork Reduction Act of 1995 requires us to notify you that this information collection is in accordance with the clearance requirements of section 3507 of the Paperwork Reduction Act of 1995. We may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a valid OMB number. We anticipate that the time expended by all individuals who must complete this form will average 5 minutes. This includes the time it will take to read instructions, gather the necessary facts and fill out the form.

_____(hereinafter called the"Signatory")
(Name of Organization, Institution, or Individual)

**HEREBY AGREES THAT:**

It will comply with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681 et seq.), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), and all Federal regulations adopted to carry out such laws. This assurance is directed to the end that no person in the United States shall, on the ground of race, color, national origin (Title VI), handicap (Section 504), sex (Title IX, in education programs and activities only), or age (Age Discrimination Act) be excluded from participation in , be denied the benefits of, or be subjected to discrimination under any program or activity of the Signatory receiving Federal financial assistance or other benefits under statutes administered by VA (Department of Veteran Affairs), the ED (Department of Education), or any other Federal agency. This assurance applies whether assistance is given directly to the recipient or indirectly through benefits paid to a student, trainee, or other beneficiary because of enrollment or participation in a program of the Signatory.

The Signatory HEREBY GIVES ASSURANCE that it will promptly take measures to effect this agreement.

If any real property or structure thereon is provided or improved with the aid of Federal financial assistance extended to the Signatory or ED, this assurance-shall obligate the Signatory, or in the case of transfer of such property any transferee, for the period during which the real property or structure is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. In all cases, this assurance shall obligate the Signatory for the period during which the Federal financial assistance is extended to any of its programs by VA, ED or any other Federal agency.

THIS ASSURANCE is given in consideration of and for the purpose of obtaining Federal financial assistance, including facilities furnished or payments made under sections 104 and 244(1) of Title 38, U.S.C. Also, sections 1713, 1720, 1720A, 1741-1743, 2408, 5902(a)(2), 8131-8137, 8151-8156 (formerly 613, 620, 620A, 641-643, 1008, 3402(a)(2), 5031-5037, 5051-5056 respectively) and 38 U.S.C. chapters 30, 31, 32, 35, 36, 82, and 10 U.S.C. chapter 106. Under the terms of an agreement between VA and ED, this assurance also includes Federal financial assistance given by ED through programs administered by that agency. Federal financial assistance is understood to include benefits paid directly to the Signatory and/or benefits paid to a beneficiary contingent upon the beneficiary's enrollment in a program or using services offered by the Signatory.

The Signatory agrees that Federal financial assistance or other benefits will be extended in reliance on the representations and agreements made in this assurance; that VA or ED will withhold financial assistance, facilities, or other benefits to assure compliance with the equal opportunity laws; and that the United States shall have the right to seek judicial enforcement of this assurance.

THIS ASSURANCE is binding on the Signatory, its successors, transferees, and assignees for the period during which assistance is provided. The Signatory assures that all contractors, subcontractors, subgrantees, or others with whom it arranges to provide services or benefits to its students or trainees in connection with the Signatory's programs or services are not discriminating against those students or trainees in violation of the above statutes.

| SIGNATURE OF AUTHORIZED OFFICIAL | DATE |
|---|---|
| NAME AND TITLE OF AUTHORIZED OFFICIAL | |
| MAILING ADDRESS OF AUTHORIZED OFFICIAL | |

VA FORM APR 1999 (R) **10-0144A**

# PART 59—GRANTS TO STATES FOR CONSTRUCTION OR ACQUISITION OF STATE HOMES

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AUTHORITY: 38 U.S.C. 101, 501, 1710, 1742, 8105, 8131–8137).

SOURCE: 66 FR 33847, June 26, 2001, unless otherwise noted.

## § 59.1 Purpose.

This part sets forth the mechanism for a State to obtain a grant:

(a) To construct State home facilities (or to acquire facilities to be used as State home facilities) for furnishing domiciliary or nursing home care to veterans, and

(b) To expand, remodel, or alter existing buildings for furnishing domiciliary, nursing home, adult day health, or hospital care to veterans in State homes.

(Authority: 38 U.S.C. 101, 501, 1710, 1742, 8105, 8131–8137)

## § 59.2 Definitions.

For the purpose of this part:

*Acquisition* means the purchase of a facility in which to establish a State home for the provision of domiciliary and/or nursing home care to veterans.

*Adult day health care* is a therapeutically-oriented outpatient day program, which provides health maintenance and rehabilitative services to participants. The program must provide individualized care delivered by an interdisciplinary health care team and support staff, with an emphasis on helping participants and their caregivers to develop the knowledge and skills necessary to manage care requirements in the home. Adult day health care is principally targeted for complex medical and/or functional needs of elderly veterans.

*Construction* means the construction of new domiciliary or nursing home buildings, the expansion, remodeling, or alteration of existing buildings for the provision of domiciliary, nursing home, or adult day health care, or hospital care in State homes, and the provision of initial equipment for any such buildings.

*Domiciliary care* means providing shelter, food, and necessary medical care on an ambulatory self-care basis (this is more than room and board). It assists eligible veterans who are suffering from a disability, disease, or defect of such a degree that incapacitates veterans from earning a living, but who are not in need of hospitalization or nursing care services. It assists in attaining physical, mental, and social well-being through special rehabilitative programs to restore residents to their highest level of functioning.

*Nursing home care* means the accommodation of convalescents or other persons who are not acutely ill and not in need of hospital care, but who require skilled nursing care and related medical services.

*Secretary* means the Secretary of the United States Department of Veterans Affairs.

*State* means each of the several States, the District of Columbia, the Virgin Islands, and the Commonwealth of Puerto Rico.

*State representative* means the official designated in accordance with State authority with responsibility for matters relating to the request for a grant under this part.

*VA* means the United States Department of Veterans Affairs.

(Authority: 38 U.S.C. 101, 501, 1710, 1742, 8105, 8131–8137)

### § 59.3 Federal Application Identifier.

Once VA has provided the State representative with a Federal Application Identifier Number for a project, the number must be included on all subsequent written communications to VA from the State, or its agent, regarding a request for a grant for that project under this part.

(Authority: 38 U.S.C. 101, 501, 1710, 1742, 8105, 8131–8137)

### § 59.4 Decisionmakers, notifications, and additional information.

The decisionmaker for decisions required under this part will be the Chief Consultant, Geriatrics and Extended Care, unless specified to be the Secretary or other VA official. The VA decisionmaker will provide written notice to affected States of approvals, denials, or requests for additional information under this part.

(Authority: 38 U.S.C. 101, 501, 1710, 1742, 8105, 8131–8137)

### § 59.5 Submissions of information and documents to VA.

All submissions of information and documents required to be presented to VA must be made, unless otherwise specified under this part, to the Chief Consultant, Geriatrics and Extended Care (114), VA Central Office, 810 Vermont Avenue, NW., Washington, DC 20420.

(Authority: 38 U.S.C. 101, 501, 1710, 1742, 8105, 8131–8137)

### § 59.10 General requirements for a grant.

For a State to obtain a grant under this part and grant funds, its initial application for the grant must be approved under § 59.20, and the project must be ranked sufficiently high on the priority list for the current fiscal year so that funding is available for the project. It must meet the additional application requirements in § 59.60, and it must meet all other requirements under this part for obtaining a grant and grant funds.

(Authority: 38 U.S.C. 101, 501, 1710, 1742, 8105, 8131–8137)

### § 59.20 Initial application requirements.

(a) For a project to be considered for inclusion on the priority list in § 59.50 of this part for the next fiscal year, a State must submit to VA an original and one copy of a completed VA Form 10–0388 and all information, documentation, and other forms specified by VA form 10–0388 (these forms are set forth at § 59.170 of this part).

(b) The Secretary, based on the information submitted for a project pursuant to paragraph (a) of this section, will approve the project for inclusion on the priority list in § 59.50 of this part if the submission includes all of the information requested under paragraph (a) of this section and if the submission represents a project that, if further developed, could meet the requirements for a grant under this part.

(c) The information requested under paragraph (a) of this section should be submitted to VA by April 15, and must be received by VA by August 15, if the State wishes an application to be included on the priority list for the award of grants during the next fiscal year.

(d) If a State representative believes that VA may not award a grant to the State for a grant application during the current fiscal year and wants to ensure that VA includes the application on the priority list for the next fiscal year, the State representative must, prior to August 15 of the current fiscal year,

(1) Request VA to include the application in those recommended to the Secretary for inclusion on the priority list, and

(2) Send any updates to VA.

(Authority: 38 U.S.C. 101, 501, 1710, 1742, 8105, 8131–8137)

### § 59.30 Documentation.

For a State to obtain a grant and grant funds under this part, the State must submit to VA documentation

that the site of the project is in reasonable proximity to a sufficient concentration and population of veterans that are 65 years of age and older and that there is a reasonable basis to conclude that the facility when complete will be fully occupied. This documentation must be included in the initial application submitted to VA under § 59.20.

(Authority: 38 U.S.C. 101, 501, 1710, 1742, 8105, 8131–8137)

### § 59.40 Maximum number of nursing home care and domiciliary care beds for veterans by State.

(a) Except as provided in paragraph (b) of this section, a State may not request a grant for a project to construct or acquire a new State home facility, to increase the number of beds available at a State home facility, or to replace beds at a State home facility if the project would increase the total number of State home nursing home and domiciliary beds beyond the maximum number designated for that State. The maximum number of State home nursing home and domiciliary beds designated for each State is (for maximum numbers see VA website at *http://www.va.gov/About_VA/Orgs/VHA/VHAProg.htm*). the number in the following chart for the State, minus the sum of the number of nursing home and domiciliary beds already in operation at State home facilities, and the number of State home nursing home and domiciliary beds not yet in operation but for which a grant has either been requested or awarded under this part (the availability of VA and community nursing home beds in each State will also be considered at the time of grant application for bed-producing projects):

| State | State home nursing home and domiciliary beds |
|---|---|
| Alabama | 883 |
| Alaska | 79 |
| Arizona | 1,068 |
| Arkansas | 557 |
| California | 5,754 |
| Colorado | 717 |
| Connecticut | 738 |
| Delaware | 165 |
| District of Columbia | 104 |
| Florida | 4,471 |
| Georgia | 1,202 |
| Hawaii | 216 |
| Idaho | 233 |
| Illinois | 2,271 |
| Indiana | 1,209 |
| Iowa | 632 |
| Kansas | 542 |
| Kentucky | 759 |
| Louisiana | 785 |
| Maine | 301 |
| Maryland | 1,020 |
| Massachusetts | 1,348 |
| Michigan | 1,896 |
| Minnesota | 932 |
| Mississippi | 500 |
| Missouri | 1,230 |
| Montana | 198 |
| Nebraska | 355 |
| Nevada | 428 |
| New Hampshire | 264 |
| New Jersey | 1,683 |
| New Mexico | 344 |
| New York | 3,220 |
| North Carolina | 1,454 |
| North Dakota | 121 |
| Ohio | 2,530 |
| Oklahoma | 747 |
| Oregon | 804 |
| Pennsylvania | 3,173 |
| Puerto Rico | 350 |
| Rhode Island | 254 |
| South Carolina | 750 |
| South Dakota | 155 |
| Tennessee | 1,050 |
| Texas | 3,226 |
| Utah | 304 |
| Vermont | 124 |
| Virginia | 1,312 |
| Virgin Islands | 8 |
| Washington | 1,215 |
| West Virginia | 455 |
| Wisconsin | 1,070 |
| Wyoming | 93 |

NOTE TO PARAGRAPH (a): The provisions of 38 U.S.C. 8134 require VA to prescribe for each State the number of nursing home and domiciliary beds for which grants may be furnished. This is required to be based on the projected demand for nursing home and domiciliary care on November 30, 2009 (10 years after the date of enactment of the Veterans Millennium Health Care and Benefits Act (P.L. 106–117)), by veterans who at such time are 65 years of age or older and who reside in that State. In determining the projected demand, VA must take into account travel distances for veterans and their families.

(b) A State may request a grant for a project that would increase the total number of State nursing home and domiciliary beds beyond the maximum number for that State, if the State submits to VA, documentation to establish a need for the exception based on travel distances of at least two hours (by land transportation or any other usual mode of transportation if land

transportation is not available) between a veteran population center sufficient for the establishment of a State home and any existing State home. The determination regarding a request for an exception will be made by the Secretary.

(Authority: 38 U.S.C. 101, 501, 1710, 1742, 8105, 8131–8137)

### §59.50 Priority list.

(a) The Secretary will make a list prioritizing the applications that were received on or before August 15 and that were approved under §59.20 of this part. Except as provided in paragraphs (b) and (c) of this section, applications will be prioritized from the highest to the lowest in the following order:

(1) *Priority group 1.* An application from a State that has made sufficient funds available for the project for which the grant is requested so that such project may proceed upon approval of the grant without further action required by the State (such as subsequent issuance of bonds) to make such funds available for the project. To meet this criteria, the State must provide to VA a letter from an authorized State budget official certifying that the State funds are, or will be, available for the project, so that if VA awards the grant, the project may proceed without further State action to make such funds available (such as further action to issue bonds). If the certification is based on an Act authorizing the project and making available the State's matching funds for the project, a copy of the Act must be submitted with the certification.

(i) *Priority group 1—subpriority 1.* An application for a project to remedy a condition, or conditions, at an existing facility that have been cited as threatening to the lives or safety of the residents in the facility by a VA Life Safety Engineer, a State or local government agency (including a Fire Marshal), or an accrediting institution (including the Joint Commission on Accreditation of Healthcare Organizations). This priority group does not include applications for the addition or replacement of building utility systems, such as heating and air conditioning systems or building features, such as roof replacements. Projects in this subpriority will be further prioritized in the following order: seismic; building construction; egress; building compartmentalization (e.g., smoke barrier, fire walls); fire alarm/detection; asbestos/hazardous materials; and all other projects. Projects in this subpriority will be further prioritized based on the date the application for the project was received in VA (the earlier the application was received, the higher the priority given).

(ii) *Priority group 1—subpriority 2.* An application from a State that has not previously applied for a grant under 38 U.S.C. 8131–8137 for construction or acquisition of a State nursing home. Projects in this subpriority will be further prioritized based on the date the application for the project was received in VA (the earlier the application was received, the higher the priority given).

(iii) *Priority group 1—subpriority 3.* An application for construction or acquisition of a nursing home or domiciliary from a State that has a great need for the beds that the State, in that application, proposes to establish. Projects in this subpriority will be further prioritized based on the date the application for the project was received in VA (the earlier the application was received, the higher the priority given).

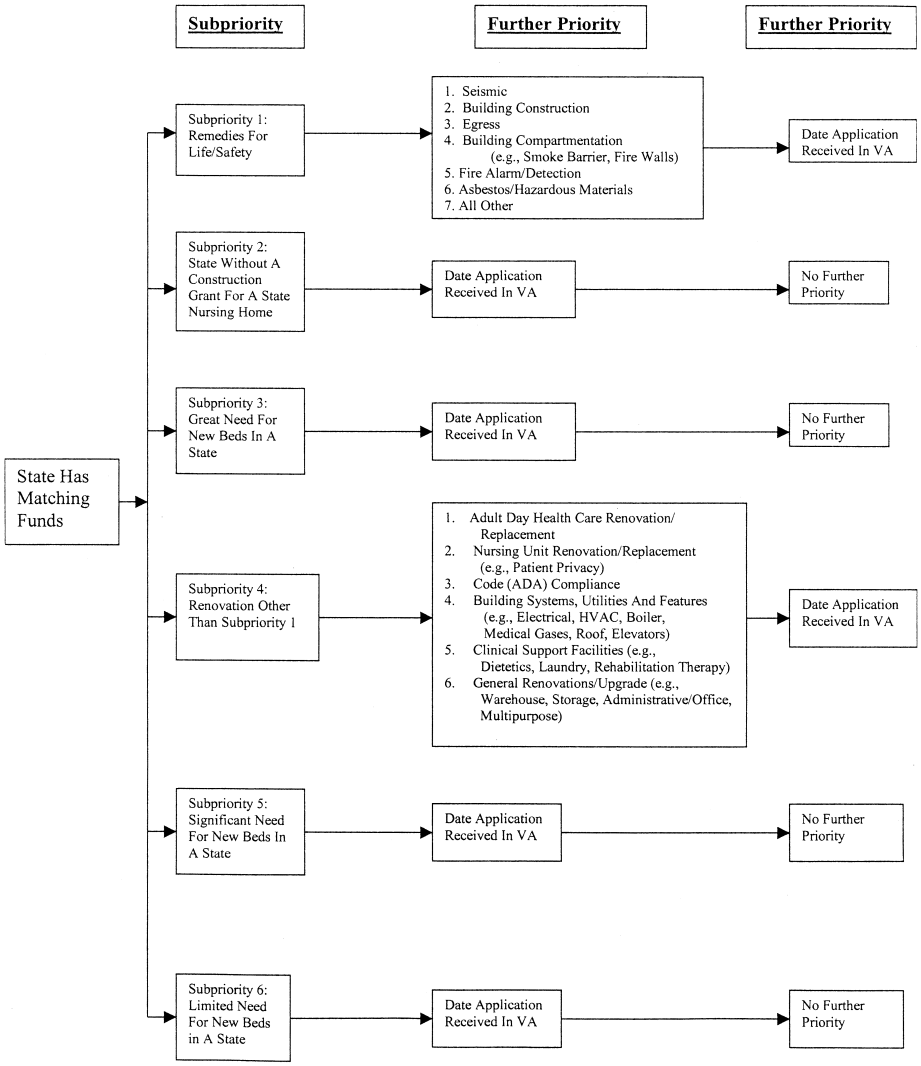
(iv) *Priority group 1—subpriority 4.* An application from a State for renovations to a State Home facility other than renovations that would be included in subpriority 1 of Priority group 1. Projects will be further prioritized in the following order: adult day health care construction; nursing home construction (e.g., patient privacy); code compliance under the Americans with Disabilities Act; building systems and utilities (e.g., electrical; heating, ventilation, and air conditioning (HVAC); boiler; medical gasses; roof; elevators); clinical-support facilities (e.g., for dietetics, laundry, rehabilitation therapy); and general renovation/upgrade (e.g., warehouse, storage, administration/office, multipurpose). Projects in this subpriority will be further prioritized based on the date the application for the project was received in VA (the earlier the application was received, the higher the priority given).

(v) *Priority group 1—subpriority 5.* An application for construction or acquisition of a nursing home or domiciliary from a State that has a significant need for the beds that the State in that application proposes to establish. Projects in this subpriority will be further prioritized based on the date the application for the project was received in VA (the earlier the application was received, the higher the priority given).

(vi) *Priority group 1—subpriority 6.* An application for construction or acquisition of a nursing home or domiciliary from a State that has a limited need for the beds that the State, in that application, proposes to establish. Projects in this subpriority will be further prioritized based on the date the application for the project was received in VA (the earlier the application was received, the higher the priority given).

NOTE TO PARAGRAPH (a)(1): The following chart is intended to provide a graphic aid for understanding Priority group 1 and its subpriorities.

**Example – Prioritization for Priority Group 1**




(2) *Priority group 2.* An application not meeting the criteria of paragraph (a)(1) of this section but meeting the criteria of paragraph (a)(1)(i) of this section. Projects within this priority group will be further prioritized the same as in paragraph (a)(1)(i) of this section.

(3) *Priority group 3.* An application not meeting the criteria of paragraph (a)(1) of this section but meeting the criteria of paragraph (a)(1)(ii) of this section. Projects within this priority group will be further prioritized the same as in paragraph (a)(1)(ii) of this section.

(4) *Priority group 4.* An application not meeting the criteria of paragraph (a)(1) of this section but meeting the criteria of paragraph (a)(1)(iii) of this

section. Projects within this priority group will be further prioritized the same as in paragraph (a)(1)(iii) of this section.

(5) *Priority group 5.* An application not meeting the criteria of paragraph (a)(1) of this section but meeting the criteria of paragraph (a)(1)(iv) of this section. Projects within this priority group will be further prioritized the same as in paragraph (a)(1)(iv) of this section.

(6) *Priority group 6.* An application not meeting the criteria of paragraph (a)(1) of this section but meeting the criteria of paragraph (a)(1)(v) of this section. Projects within this priority group will be further prioritized the same as in paragraph (a)(1)(v) of this section.

(7) *Priority group 7.* An application not meeting the criteria of paragraph (a)(1) of this section but meeting the criteria of paragraph (a)(1)(vi) of this section. Projects within this priority group will be further prioritized the same as in paragraph (a)(1)(vi) of this section.

(b) An application will be given highest priority on the priority list for the next fiscal year within the priority group to which it is assigned in paragraph (a) of this section (without consideration of subpriorities) if:

(1) During the current fiscal year the State accepted a grant for that application that was less than the amount that would have been awarded if VA had sufficient appropriations to award the full amount of the grant requested; and

(2) The application was the lowest-ranking application on the priority list for the current fiscal year for which grant funds were available.

(c) An application will be given priority on the priority list (after applications described in paragraph (b) of this section) for the next fiscal year ahead of all applications that had not been approved under § 59.20 on the date that the application was approved under § 59.20, if:

(1) During the current fiscal year VA would have awarded a grant based on the application except for the fact that VA determined that the State did not, by July 1, provide evidence that it had its matching funds for the project, and

(2) The State was notified prior to July 1 that VA had funding available for this grant application.

(d) The priority list will not contain any project for the construction or acquisition of a hospital or hospital beds.

(e) For purposes of establishing priorities under this section:

(1) A State has a great need for nursing home and domiciliary beds if the State:

(i) Has no State homes with nursing home or domiciliary beds, or

(ii) Has an unmet need of 2,000 or more nursing home and domiciliary beds;

(2) A State has a significant need for nursing home and domiciliary beds if the State has an unmet need of 1,000 to 1,999 nursing home and domiciliary beds; and

(3) A State has a limited need for nursing home and domiciliary beds if the State has an unmet need of 999 or fewer nursing home and domiciliary beds.

(f) Projects that could be placed in more than one subpriority will be placed in the subpriority toward which the preponderance of the cost of the project is allocated. For example, under priority group 1—subpriority 1, if a project for which 25 percent of the funds needed would concern seismic and 75 percent of the funds needed would concern building construction, the project would be placed in the subpriority for building construction.

(g) Once the Secretary prioritizes the applications in the priority list, VA will not change the priorities unless a change is necessary as a result of an appeal.

(Authority: 38 U.S.C. 101, 501, 1710, 1742, 8105, 8131–8137)

### § 59.60 Additional application requirements.

For a project to be eligible for a grant under this part for the fiscal year for which the priority list was made, during that fiscal year the State must submit to VA an original and a copy of the following:

(a) Complete, updated Standard Forms 424 (mark the box labeled application and submit the information requested for an application), 424C, and

424D (the forms are set forth at §59.170 of this part), and

(b) A completed VA Form 10–0388 and all information and documentation specified by VA Form 10–0388 (the form is set forth at §59.170h).

(Authority: 38 U.S.C. 101, 501, 1710, 1742, 8105, 8131–8137)

### §59.70 Award of grants.

(a) The Secretary, during the fiscal year for which a priority list is made under this part, will:

(1) Award a grant for each application that has been approved under §59.20, that is sufficiently high on the priority list so that funding is available for the application, that meets the additional application requirements in §59.60, and that meets all other requirements under this part for obtaining a grant, or

(2) Conditionally approve a grant for a project for which a State has submitted an application that substantially meets the requirements of this part if the State representative requests conditional approval and provides written assurance that the State will meet all requirements for a grant not later than 180 calendar days after the date of conditional approval. If a State that has obtained conditional approval for a project does not meet all of the requirements within 180 calendar days after the date of conditional approval, the Secretary will rescind the conditional approval and the project will be ineligible for a grant in the fiscal year in which the State failed to fully complete the application. The funds that were conditionally obligated for the project will be deobligated.

(b) As a condition of receiving a grant, a State must make sufficient funds available for the project for which the grant is requested so that such project may proceed upon approval of the grant without further action required by the State (such as subsequent issuance of bonds) to make such funds available for such purpose. To meet this criteria, the State must provide to VA a letter from an authorized State budget official certifying that the State funds are, or will be, available for the project, so that if VA awards the grant, the project may proceed without further State action to make such funds available (such as further action to issue bonds). If the certification is based on an Act authorizing the project and making available the State's matching funds for the project, a copy of the Act must be submitted with the certification. To be eligible for inclusion in priority group 1 under this part, a State must make such funds available by August 15 of the year prior to the fiscal year for which the grant is requested. To otherwise be eligible for a grant and grant funds based on inclusion on the priority list in other than priority group 1, a State must make such funds available by July 1 of the fiscal year for which the grant is requested.

(c) As a condition of receiving a grant, the State representative and the Secretary will sign three originals of the Memorandum of Agreement documents (one for the State and two for VA). A sample is in §59.170.

(Authority: 38 U.S.C. 101, 501, 1710, 1742, 8105, 8131–8137)

### §59.80 Amount of grant.

(a) The total cost of a project (VA and State) for which a grant is awarded under this part may not be less than $400,000 and, except as provided in paragraph (i) of this section, the total cost of a project will not exceed the total cost of new construction. The amount of a grant awarded under this part will be the amount requested by the State and approved in accordance with this part, not to exceed 65 percent of the total cost of the project except that:

(1) The total cost of a project will not include the cost of space that exceeds the maximum allowable space specified in this part, and

(2) The amount of the grant may be less than 65 percent of the total cost of the project if the State accepts less because VA did not have sufficient funds to award the full amount of the grant requested.

(b) The total cost of a project under this part for acquisition of a facility may also include construction costs.

(c) The total cost of a project under this part will not include any costs incurred before the date VA sent the State written notification that the application in §59.20 was approved.

(d) The total cost of a project under this part may include administration and production costs, e.g., architectural and engineering fees, inspection fees, and printing and advertising costs.

(e) The total cost of a project under this part may include the cost of projects on the grounds of the facility, e.g., parking lots, landscaping, sidewalks, streets, and storm sewers, only if they are inextricably involved with the construction of the project.

(f) The total cost of a project under this part may include the cost of equipment necessary for the operation of the State home facility. This may include the cost of:

(1) Fixed equipment included in the construction or acquisition contract. Fixed equipment must be permanently affixed to the building or connected to the heating, ventilating, air conditioning, or other service distributed through the building via ducts, pipes, wires, or other connecting device. Fixed equipment must be installed during construction. Examples of fixed equipment include kitchen and intercommunication equipment, built-in cabinets, and cubicle curtain rods; and

(2) Other equipment not included in the construction contract constituting no more than 10 percent of the total construction contract cost of the project. Other equipment includes: furniture, furnishings, wheeled equipment, kitchen utensils, linens, draperies, blinds, electric clocks, pictures and trash cans.

(g) The contingency allowance may not exceed five percent of the total cost of the project for new construction or eight percent for renovation projects.

(h) The total cost of a project under this part may not include the cost of:

(1) Land acquisition;

(2) Maintenance or repair work; or

(3) Office supplies or consumable goods (such as food, drugs, medical dressings, paper, printed forms, and soap) which are routinely used in a State home.

(i) A grant for expansion, remodeling, or alteration of an existing State home, which is on or eligible for inclusion in the National Register of Historic Places, for furnishing domiciliary, nursing home, or adult day health care to veterans may not be awarded for the expansion, remodeling, or alteration of such building if such action does not comply with National Historic Preservation Act procedures or if the total cost of remodeling, renovating, or adapting such building or facility exceeds the cost of comparable new construction by more than five percent. If demolition of an existing building or facility on, or eligible for inclusion in, the National Register of Historic Places is deemed necessary and such demolition action is taken in compliance with National Historic Preservation Act procedures, any mitigation cost negotiated in the compliance process and/or the cost to professionally record the building or facility in the Historic American Buildings Survey (HABS), plus the total cost for demolition and site restoration, shall be included by the State in calculating the total cost of new construction.

(j) The cost of demolition of a building cannot be included in the total cost of construction unless the proposed construction is in the same location as the building to be demolished or unless the demolition is inextricably linked to the design of the construction project.

(k) With respect to the final award of a conditionally-approved grant, the Secretary may not award a grant for an amount that is 10 percent more than the amount conditionally-approved.

(Authority: 38 U.S.C. 101, 501, 1710, 1742, 8105, 8131–8137)

### § 59.90 Line item adjustments to grants.

After a grant has been awarded, upon request from the State representative, VA may approve a change in a line item (line items are identified in Form 424C which is set forth in § 59.170(o) of this part) of up to 10 percent (increase or decrease) of the cost of the line item if the change would be within the scope or objective of the project and would not change the amount of the grant.

(Authority: 38 U.S.C. 101, 501, 1710, 1742, 8105, 8131–8137)

### § 59.100 Payment of grant award.

The amount of the grant award will be paid to the State or, if designated by the State representative, the State home for which such project is being carried out, or any other State agency or instrumentality. Such amount shall be paid by way of reimbursement, and in such installments consistent with the progress of the project, as the Chief Consultant, Geriatrics and Extended Care, may determine and certify for payment to the appropriate Federal institution. Funds paid under this section for an approved project shall be used solely for carrying out such project as so approved. As a condition for the final payment, the State must comply with the requirements of this part based on an architectural and engineering inspection approved by VA, must obtain VA approval of the final equipment list submitted by the State representative, and must submit to VA a completed VA Form 10–0388 (see § 59.170(i)). The equipment list and the completed VA form 10–0388 must be submitted to the Chief Consultant, Geriatrics and Extended Care (114), VA Central Office, 810 Vermont Avenue, NW., Washington, DC 20420.

(Authority: 38 U.S.C. 101, 501, 1710, 1742, 8105, 8131–8137)

### § 59.110 Recapture provisions.

If a facility for which a grant has been awarded ceases to be operated as a State home for the purpose for which the grant was made, the United States shall be entitled to recover from the State which was the recipient of the grant or from the then owner of such construction as follows:

(a) If less than 20 years has lapsed since the grant was awarded, and VA provided 65 percent of the estimated cost to construct, acquire or renovate a State home facility principally for furnishing domiciliary care, nursing home care, adult day health care, hospital care, or non-institutional care to veterans, VA shall be entitled to recover 65 percent of the current value of such facility (but in no event an amount greater than the amount of assistance provided for such under these regulations), as determined by agreement of the parties or by action brought in the district court of the United States for the district in which the facility is situated.

(b) Based on the time periods for grant amounts set forth below, if VA provided between 50 and 65 percent of the estimated cost of expansion, remodeling, or alteration of an existing State home facility, VA shall be entitled to recover the amount of the grant as determined by agreement of the parties or by action brought in the district court of the United States for the district in which the facility is situated:

| Grant amount (dollars in thousands) | Recovery period (in years) |
|---|---|
| 0–250 | 7 |
| 251–500 | 8 |
| 501–750 | 9 |
| 751–1,000 | 10 |
| 1,001–1,250 | 11 |
| 1,251–1,500 | 12 |
| 1,501–1,750 | 13 |
| 1,751–2,000 | 14 |
| 2,001–2,250 | 15 |
| 2,251–2,500 | 16 |
| 2,501–2,750 | 17 |
| 2,751–3,000 | 18 |
| Over 3,000 | 20 |

(c) If the magnitude of the VA contribution is below 50 percent of the estimated cost of the expansion, remodeling, or alteration of an existing State home facility recognized by the Department of Veterans Affairs, the Under Secretary for Health may authorize a recovery period between 7 and 20 years depending on the grant amount involved and the magnitude of the project.

(d) This section does not apply to any portion of a State home in which VA has established and operates an outpatient clinic.

(Authority: 38 U.S.C. 101, 501, 1710, 1742, 8105, 8131–8137)

### § 59.120 Hearings.

If the Secretary determines that a submission from a State does not meet the requirements of this part, the Secretary will advise the State by letter that a grant is tentatively denied, explain the reasons for the tentative denial, and inform the State of the opportunity to appeal to the Board of Veterans' Appeals pursuant to 38 U.S.C. 7105. Decisions under this part are not

subject to the provisions of § 17.133 of this order.

(Authority: 38 U.S.C. 101, 501, 511, 1710, 1742, 7101–7298, 8105, 8131–8137)

### § 59.121 Amendments to application.

Any amendment of an application that changes the scope of the application or changes the cost estimates by 10 percent or more shall be subject to approval in the same manner as an original application.

(Authority: 38 U.S.C. 101, 501, 1710, 1742, 8105, 8131–8137)

### § 59.122 Withdrawal of application.

A State representative may withdraw an application by submitting to VA a written document requesting withdrawal.

(Authority: 38 U.S.C. 101, 501, 1710, 1742, 8105, 8131–8137)

### § 59.123 Conference.

At any time, VA may recommend that a conference (such as a design development conference) be held in VA Central Office in Washington, DC, to provide an opportunity for the State and its architects to discuss requirements for a grant with VA officials.

(Authority: 38 U.S.C. 101, 501, 1710, 1742, 8105, 8131–8137)

### § 59.124 Inspections, audits, and reports.

(a) A State will allow VA inspectors and auditors to conduct inspections and audits as necessary to ensure compliance with the provisions of this part. The State will provide evidence that it has met its responsibility under the Single Audit Act of 1984 (see part 41 of this chapter) and submit that evidence to VA.

(b) A State will make such reports in such form and containing such information as the Chief Consultant, Geriatrics and Extended Care, may from time to time reasonably require and give the Chief Consultant, Geriatrics and Extended Care, upon demand, access to the records upon which such information is based.

(Authority: 38 U.S.C. 101, 501, 1710, 1742, 8105, 8131–8137)

### § 59.130 General requirements for all State home facilities.

As a condition for receiving a grant and grant funds under this part, States must comply with the requirements of this section.

(a) The physical environment of a State home must be designed, constructed, equipped, and maintained to protect the health and safety of participants, personnel and the public.

(b) A State home must meet the general conditions of the American Institute of Architects, or other general conditions required by the State, for awarding contracts for State home grant projects. Facilities must meet all Federal, State, and local requirements, including the Uniform Federal Accessibility Standards (UFAS) (24 CFR part 40, appendix A), during the design and construction of projects subject to this part. If the State or local requirements are different from the Federal requirements, compliance with the most stringent provisions is required. A State must design and construct the project to provide sufficient space and equipment in dining, health services, recreation, and program areas to enable staff to provide residents with needed services as required by this part and as identified in each resident's plan of care.

(c) State homes should be planned to approximate the home atmosphere as closely as possible. The interior and exterior should provide an attractive and home-like environment for elderly residents. The site will be located in a safe, secure, residential-type area that is accessible to acute medical care facilities, community activities and amenities, and transportation facilities typical of the area.

(d)(1) State homes must meet the applicable provisions of the National Fire Protection Association's NFPA 101, Life Safety Code (2000 edition) and the NFPA 99, Standard for Health Care Facilities (1999 edition). Incorporation by reference of these materials was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. These materials, incorporated by reference, are available for inspection at the Department of Veterans Affairs, Office of Regulations Management (02D), Room 1154,

810 Vermont Avenue, NW, Washington, DC 20420 or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.* Copies may be obtained from the National Fire Protection Association, 1 Batterymarch Park, P.O. Box 9101, Quincy, MA 02269–9101. (For ordering information, call toll free 1–800–344–3555.)

(2) Facilities must also meet the State and local fire codes.

(e) State homes must have an emergency electrical power system to supply power adequate to operate all exit signs and lighting for means of egress, fire and medical gas alarms, and emergency communication systems. The source of power must be an on-site emergency standby generator of sufficient size to serve the connected load or other approved sources.

(f) The nurse's station must be equipped to receive resident calls through a communication system from resident rooms, toilet and bathing facilities, dining areas, and activity areas.

(g) The State home must have one or more rooms designated for resident dining and activities. These rooms must be:

(1) Well lighted;

(2) Well ventilated; and

(3) Adequately furnished.

(h) The facility management must provide a safe, functional, sanitary, and comfortable environment for the residents, staff and the public. The facility must:

(1) Ensure that water is available to essential areas when there is a loss of normal water supply;

(2) Have adequate outside ventilation by means of windows, or mechanical ventilation, or a combination of the two;

(3) Equip corridors with firmly secured handrails on each side; and

(4) Maintain an effective pest control program so that the facility is free of pests and rodents.

(Authority: 38 U.S.C. 101, 501, 1710, 1742, 8105, 8131–8137)

## § 59.140 Nursing home care requirements.

As a condition for receiving a grant and grant funds for a nursing home facility under this part, States must comply with the requirements of this section.

(a) Resident rooms must be designed and equipped for adequate nursing care, comfort, and privacy of residents. Resident rooms must:

(1) Accommodate no more than four residents;

(2) Have direct access to an exit corridor;

(3) Have at least one window to the outside;

(4) Be equipped with, or located near, toilet and bathing facilities (VA recommends that public toilet facilities also be located near the residents dining and recreational areas);

(5) Be at or above grade level;

(6) Be designed or equipped to ensure full visual privacy for each resident;

(7) Except in private rooms, each bed must have ceiling suspended curtains that extend around the bed to provide total visual privacy in combination with adjacent walls and curtains;

(8) Have a separate bed for each resident of proper size and height for the safety of the resident;

(9) Have a clean, comfortable mattress;

(10) Have bedding appropriate to the weather and climate;

(11) Have functional furniture appropriate to the resident's needs, and

(12) Have individual closet space with clothes racks and shelves accessible to the resident.

(b) Unless determined by VA as necessary to accommodate an increased quality of care for patients, a nursing home project may propose a deviation of no more than 10 percent (more or less) from the following net square footage for the State to be eligible for a grant of 65 percent of the total estimated cost of the project. If the project proposes building more than the following net square footage and VA makes a determination that it is not needed, the cost of the additional net square footage will not be included in the estimated total cost of construction.

TABLE TO PARAGRAPH (b)—NURSING HOME

| | |
|---|---|
| I. Support facilities [allowable square feet (or metric equivalent) per facility for VA participation]: | |
| Administrator | 200 |
| Assistant administrator | 150 |
| Medical officer, director of nursing or equivalent | 150 |
| Nurse and dictation area | 120 |
| General administration (each office/person) | 120 |
| Clerical staff (each) | 80 |
| Computer area | 40 |
| Conference room (consultation area, in-service training) | 500 (for each room) |
| Lobby/waiting area. (150 minimum/600 maximum per facility) | 3 (per bed) |
| Public/resident toilets (male/female) | 25 (per fixture) |
| Pharmacy [1]. | |
| Dietetic service [1]. | |
| Dining area | 20 (per bed) |
| Canteen/retail sales | 2 (per bed) |
| Vending machines (450 max. per facility) | 1 (per bed) |
| Resident toilets (male/female) | 25 (per fixture) |
| Child day care [1]. | |
| Medical support (staff offices/exam/treatment room/family counseling, etc.). | 140 (for each room) |
| Barber and/or beauty shops | 140 |
| Mail room | 120 |
| Janitor's closet | 40 |
| Multipurpose room | 15 (per bed) |
| Employee lockers | 6 (per employee) |
| Employee lounge (500 max. per facility) | 120 |
| Employee toilets | 25 (per fixture) |
| Chapel | 450 |
| Physical therapy | 5 (per bed) |
| Office, if required | 120 |
| Occupational therapy | 5 (per bed). |
| Office, if required | 120 |
| Library | 1.5 (per bed) |
| Building maintenance storage | 2.5 (per bed) |
| Resident storage | 6 (per bed) |
| General warehouse storage | 6 (per bed) |
| Medical/dietary/pharmacy | 7 (per bed) |
| General laundry [1]. | |
| II. Bed units: | |
| One | 150 |
| Two | 245 |
| Large two-bed per unit | 305 |
| Four | 460 |
| Lounge areas (resident lounge with storage) | 8 (per bed) |
| Resident quiet room | 3 (per bed) |
| Clean utility | 120 |
| Soiled utility | 105 |
| Linen storage | 150 |
| General storage | 100 |
| Nurses station, ward secretary | 260 |
| Medication room | 75 |
| Exam/Treatment room | 140 |
| Waiting area | 50 |
| Unit supply and equipment | 50 |
| Staff toilet | 25 (per fixture) |
| Stretcher/wheelchair storage | 100 |

TABLE TO PARAGRAPH (b)—NURSING HOME—Continued

| | |
|---|---|
| Kitchenette | 150 |
| Janitor's closet | 40 |
| Resident laundry | 125 |
| Trash collection | 60 |
| III. Bathing and Toilet Facilities: | |
| (A) Private or shared facilities: | |
| Wheelchair facilities | 25 (per fixture) |
| Standard facilities | 15 (per fixture) |
| (B) Full bathroom | 75 |
| (C) Congregate bathing facilities: | |
| First tub/shower | 80 |
| Each additional fixture | 25 |

[1] The size to be determined by the Chief Consultant, Geriatrics and Extended Care, as necessary to accommodate projected patient care needs (must be justified by State in space program analysis).

(Authority: 38 U.S.C. 101, 501, 1710, 1742, 8105, 8131–8137; Sections 2, 3, 4, and 4a of the Architectural Barriers Act of 1968, as amended, Public Law 90–480, 42 U.S.C. 4151–4157)

### §59.150 Domiciliary care requirements.

As a condition for receiving a grant and grant funds for a domiciliary under this part, the domiciliary must meet the requirements for a nursing home specified in §59.140 of this part.

(Authority: 38 U.S.C. 101, 501, 1710, 1742, 8105, 8131–8137)

### §59.160 Adult day health care requirements.

As a condition for receiving a grant and grant funds under this part for an adult day health care facility, States must meet the requirements of this section.

(a) Each adult day health care program, when it is co-located in a nursing home, domiciliary, or other care facility, must have its own separate designated space during operational hours.

(b) The indoor space for an adult day health care program must be at least 100 square feet per participant including office space for staff, and must be 60 square feet per participant excluding office space for staff.

(c) Each program will need to design and partition its space to meet its own needs, but the following functional areas must be available:

(1) A dividable multipurpose room or area for group activities, including dining, with adequate table setting space.

(2) Rehabilitation rooms or an area for individual and group treatments for occupational therapy, physical therapy, and other treatment modalities.

(3) A kitchen area for refrigerated food storage, the preparation of meals and/or training participants in activities of daily living.

(4) An examination and/or medication room.

(5) A quiet room (with at least one bed), which functions to isolate participants who become ill or disruptive, or who require rest, privacy, or observation. It should be separate from activity areas, near a restroom, and supervised.

(6) Bathing facilities adequate to facilitate bathing of participants with functional impairments.

(7) Toilet facilities and bathrooms easily accessible to people with mobility problems, including participants in wheelchairs. There must be at least one toilet for every eight participants. The toilets must be equipped for use by persons with limited mobility, easily accessible from all programs areas, i.e. preferably within 40 feet from that area, designed to allow assistance from one or two staff, and barrier free.

(8) Adequate storage space. There should be space to store arts and crafts materials, personal clothing and belongings, wheelchairs, chairs, individual handiwork, and general supplies. Locked cabinets must be provided for files, records, supplies, and medications.

(9) An individual room for counseling and interviewing participants and family members.

(10) A reception area.

(11) An outside space that is used for outdoor activities that is safe, accessible to indoor areas, and accessible to those with a disability. This space may include recreational space and a garden area. It should be easily supervised by staff.

(d) *Furnishings* must be available for all participants. This must include functional furniture appropriate to the participants' needs.

(e) Unless determined by VA as necessary to accommodate an increased quality of care for patients, an adult day health care facility project may propose a deviation of no more than 10 percent (more or less) from the following net square footage for the State to be eligible for a grant of 65 percent of the total estimated cost of the project. If the project proposes building more than the following net square footage and VA makes a determination that it is not needed, the cost of the additional net square footage will not be included in the estimated total cost of construction.

TABLE TO PARAGRAPH (e)—ADULT DAY HEALTH CARE

| | |
|---|---|
| I. Support facilities [allowable square feet (or metric equivalent) per facility for VA participation]: | |
| Program Director | 200 |
| Assistant administrator | 150 |
| Medical officer, director of nursing or equivalent | 150 |
| Nurse and dictation area | 120 |
| General administration (each office/person) | 120 |
| Clerical staff (each) | 80 |
| Computer area | 40 |
| Conference room (consultation area, in-service training) | 500 (for each room). |
| Lobby/receiving/waiting area (150 minimum) | 3 (per participant) |
| Public/resident toilets (male/female) | 25 (per fixture). |
| Dining area (may be included in the multipurpose room) | 20 (per participant). |
| Vending machines | 1 (per participant). |
| Participant toilets (male/female) | 25 (per fixture). |
| Medical support (staff offices/family counseling, etc.) | 140 (for each room). |
| Janitor's closet | 40 |
| Dividable multipurpose room | 15 (per participant). |
| Employee lockers | 6 (per employee) |
| Employee lounge | 120 |
| Employee toilets | 25 (per fixture). |
| Physical therapy | 5 (per participant). |
| Office, if required | 120 |
| Occupational therapy | 5 (per participant). |
| Office, if required | 120 |
| Building maintenance storage | 2.5 (per participant). |
| Resident storage | 6 (per participant). |
| General warehouse storage | 6 (per participant). |
| Medical/dietary | 7 (per participant). |
| General laundry [1]. | |
| II. Other Areas: | |
| Participant quiet room | 3 (per participant). |
| Clean utility | 120 |
| Soiled utility | 105 |
| General storage | 100 |
| Nurses station, ward secretary | 260 |
| Medication/exam/treatment rooms | 75 |
| Waiting area | 50 |
| Program supply and equipment | 50 |
| Staff toilet | 25 (per fixture). |

TABLE TO PARAGRAPH (e)—ADULT DAY HEALTH CARE—Continued

| | |
|---|---|
| Wheelchair storage | 100 |
| Kitchen | 120 |
| Janitor's closet | 40 |
| Resident laundry | 125 |
| Trash collection | 60 |
| III. Bathing and Toilet Facilities: | |
| (A) Private or shared facilities: | |
| Wheelchair facilities | 25 (per fixture). |
| Standard facilities | 15 (per fixture). |
| (B) Full bathroom | 75 |

[1] The size to be determined by the Chief Consultant, Geriatrics and Extended Care, as necessary to accommodate projected patient care needs (must be justified by State in space program analysis).

(Authority: 38 U.S.C. 101, 501, 1710, 1742, 8105, 8131–8137; Sections 2, 3, 4, and 4a of the Architectural Barriers Act of 1968, as amended, Public Law 90–480, 42 U.S.C. 4151–4157)

### § 59.170 Forms.

All forms set forth in this part are available on the Internet at *http://www.va.gov/About__VA/Orgs/VHA/VHAProg.htm*.

(a) VA Form 10–0143—Department of Verterans Affairs Certification Regarding Drug-Free Workplace Requirements for Grantees Other Than Individuals.

OMB Number: 2900-0160
Estimated Burden: 5 minutes

Department of Veterans Affairs

**DEPARTMENT OF VETERANS AFFAIRS CERTIFICATION REGARDING DRUG-FREE WORKPLACE REQUIREMENTS FOR GRANTEES OTHER THAN INDIVIDUALS**

The Paperwork Reduction Act of 1995 requires us to notify you that this information collection is in accordance with the clearance requirements of section 3507 of the Paperwork Reduction Act of 1995. We may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a valid OMB number. We anticipate that the time expended by all individuals who must complete this form will average 5 minutes. This includes the time it will take to read instructions, gather the necessary facts and fill out the form.

This certification is required by the regulations implementing the Drug-Free Workplace Act of 1988, 38 CFR 44, Subpart F. The regulations, published in the January 31, 1989, Federal Register (pages 4950-4952) require certification by grantees, prior to award, that they will maintain a drug-free workplace. The certification set out below is a material representation of fact upon which reliance will be placed when the agency determines to award the grant. False certification or violation of the certification shall be grounds for suspension of payments, suspension or termination of grants, or government-wide suspension or debarment (see CFR Part 44, Section 44.100 through 44.420).

**The grantee certifies that it will provide a drug-free workplace by:**

(1) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;

(2) Establishing a drug-free awareness program to inform employees about

(a) The dangers of drug abuse in the workplace;
(b) The grantee's policy of maintaining a drug-free workplace;
(c) Any available drug counseling, rehabilitation, and employee assistance programs; and
(d) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(3) Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (1);

(4) Notifying the employee in the statement required by paragraph (1) that, as a condition of employment under the grant, the employee will

(a) Abide by the terms of the statement; and
(b) Notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than five days after such conviction;

(5) Notifying the agency within ten days after receiving notice under subparagraph (4) (b) from an employee or otherwise receiving actual notice of such convictions;

(6) Taking one of the following actions, within 30 days of receiving notice under subparagraph (4) (b), with respect to any employee who is so convicted;

(a) Taking appropriate personnel action against such employee, up to and including termination; or
(b) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

(7) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (1), (2), (3), (4), (5) and (6).

VA FORM SEP1998 (R) **10-0143** **REPRODUCE LOCALLY** JetForm

OMB Number: 2900-0188
Estimated Burden: 15 minutes

Department of Veterans Affairs

**DEPARTMENT OF VETERANS AFFAIRS CERTIFICATION REGARDING DRUG-FREE WORKPLACE REQUIREMENTS FOR GRANTEES OTHER THAN INDIVIDUALS**

Places of Performance: The grantee shall insert in the space provided below the site(s) for performance of work done in connection with the specific grant (street address, city, county, state, zip code)

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| ORGANIZATION NAME | GRANT NUMBER OR NAME |
|---|---|
| NAME AND TITLE OF AUTHORIZED REPRESENTATIVE | |
| SIGNATURE | DATE |

VA FORM SEP1998 (R) **10-0143** **REPRODUCE LOCALLY** JetForm

(b) VA Form 10–0144—Certification Regarding Lobbying.

OMB Number: 2900-0160
Estimated Burden: 5 minutes

Department of Veterans Affairs

**CERTIFICATION REGARDING LOBBYING**

The Paperwork Reduction Act of 1995 requires us to notify you that this information collection is in accordance with the clearance requirements of section 3507 of the Paperwork Reduction Act of 1995. We may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a valid OMB number. We anticipate that the time expended by all individuals who must complete this form will average 5 minutes. This includes the time it will take to read instructions, gather the necessary facts and fill out the form.

This certification is made in compliance with Section 319 of Public Law 101-121; and pursuant to the Interim Final guidance published as part VII of the December 20, 1989, Federal Register (Pages 57306-52332).

Certification for Contracts, Grants, Loans, and Cooperative Agreements

The undersigned certified, to the best of their knowledge and belief, that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Forms-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31 U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

| SIGNATURE OF CERTIFYING OFFICIAL | DATE |
|---|---|
| NAME AND TITLE OF CERTIFYING OFFICIAL | PROJECT (FAI NUMBER) |
| NAME AND ADDRESS OF STATE AGENCY | |

VA FORM SEP1999 (R) **10-0144** **REPRODUCE LOCALLY**

(c) VA Form 10–0148a—Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion Lower Tier Covered Transactions (To be signed by Contractor(s)).

Department of Veterans Affairs

**Certification Regarding**
**Debarment, Suspension, Ineligibility and Voluntary Exclusion**
**Lower Tier Covered Transactions**
(To be signed by Contractor(s))

This certification is required by the regulations implementing Executive Order 12549, Debarment and Suspension, 38 CFR Part 44.510. Participants' responsibilities. The regulations were published as Part VII of the May 26, 1988, Federal Register (pages 191600-19211). Copies of the regulations may be obtained by contacting the person to which this proposal is submitted.

**(BEFORE COMPLETING CERTIFICATION, READ INSTRUCTIONS ON REVERSE)**

(1) The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.

(2) Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

Organization Name PR/Award Number of Project Name

Name and Title of Authorized Representative

Signature Date

Title 38 CFR 44.510(b)

VA FORM MAR 2001 **10-0148a**

## Instructions for Certification

1. By signing and submitting this proposal, the prospective lower tier participant is providing the certification set out below.

2. The certification in this clause is a material representation of act upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available, remedies, including suspension and/or debarment.

3. The prospective lower tier participant shall provide immediate written notice to which this proposal is submitted it any any time the prospective lower tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

4. The terms "covered transaction," "participant," "person," "primary covered transaction," "principle," "proposal," and "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations.

5. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.

6. The prospective lower tier participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion-Lower Tier Covered Transactions," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List.

8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

(d) VA Form 10–0148b—CERTIFICATION OF STATE MATCHING FUNDS TO QUALIFY FOR GROUP 1 ON THE PRIORITY LIST.

Department of Veterans Affairs

**CERTIFICATION OF STATE MATCHING FUNDS TO QUALIFY FOR GROUP 1 ON THE PRIORITY LIST**

I certify that the total (35%) State matching funds in the amount of $ _____

is now available, or will be available by August 15, 20 __, for the proposed State home

project, FAI# _____. These State funds will remain available until _____

No further State action, other than administrative, is required to make these fund available.

| _____ | _____ | _____ |
|---|---|---|
| Type Name and Title of Authorized State Budget Official | Signature | Date |

Enclosure: Copy of Act, as approved by the Governor, authorizing the project and making available the State's 35 percent matching funds for the project. (If the State has not appropriated the State matching funds, then, sufficient documentation must be provided to show that the State has available the State has matching funds for the project.)

Title 38 USC 8135 (B) (2) (A)
Title 38 CFR 59.40

VA FORM MAR 2001 **10-0148b**

(e) VA Form 10–0148c—Certification Regarding Debarment, Suspension, and Other Responsibility Matters Primary Covered Transactions.

Department of Veterans Affairs

## Certification Regarding Debarment, Suspension, and Other Responsibility Matters Primary Covered Transactions

This certification is required by the regulations implementing Executive Order 12549, Debarment and Suspension, 38 CFR Part 44, Section 44.510, Participants' responsibilities

**(BEFORE COMPLETING CERTIFICATION, READ INSTRUCTIONS ON REVERSE)**

(1) The prospective primary participant certifies to the best of its knowledge and belief, that it and its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;

(b) Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local ) transaction or contract under a public transaction; violation of Federal or State antitrust statues or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(c) Are not presently indicted for otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and

(d) Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default.

(2) Where the prospective primary participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

Organization Name PR/Award Number of Project Name

Name and Title of Authorized Representative

Signature Date

VA FROM MAR 2001 **10-0148c**

## Instructions for Certification

1. By signing and submitting this proposal, the prospective primary participant is providing the certification set out below.

2. The inability of a person to provide the certification required below will not necessarily result in denial of participation in this covered tranaction. The prospective participant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the department or agency's determination whether to enter into this transaction. However, failure of the prospective primary participant to furnish a certification or an explanation shall disqualify such person from participation in this transaction.

3. The certification in this clause is a material representation of fact upon which reliance was placed when the department or agency determined to enter into this transaction. If it is later determined that the prospective primary participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

4. The prospective primary participant shall provide immediate written notice to the department or agency to whom this proposal is submitted it at any time the prospective primary participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

5. The terms "covered transaction," "debarred," "suspended," "ineligible," "lower tier covered transaction," "participant," "person," "primary covered transaction," "principal" "proposal," and "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the department or agency to which this proposal is being submitted for assistance in obtain a copy of those regulations.

6. The prospective primary participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency entering into this transaction.

7. The prospective primary participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion-Lower Tier Covered Transactions," provided by the department or agency entering into this covered transaction, without modification, in all lwer tier covered transactions and in all solications for lower tier covered transactions.

8. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List.

9. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

10. Except for transactions authorized under paragraph 6 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

(f) VA Form 10–0148d—CERTIFICATION OF COMPLIANCE WITH FEDERAL REQUIREMENTS STATE HOME CONSTRUCTION GRANT.

Department of Veterans Affairs

**CERTIFICATION OF COMPLIANCE WITH FEDERAL REQUIREMENTS STATE HOME CONSTRUCTION GRANT**

I certify that to the best of my knowledge and belief all Federal requirements: (1) outlined in 38 Code of federal Regulations Part 59 as they pertain to this State home project; (2) assurances outlined in SF 424D; and (3) all mandatory comments resulting from the design development review by the U.S. Department of Veterans Affairs (VA) have been incorporated into construction contact(s) for this State Veterans home project to be located at _____

_____,

project FAI# _____

| Type Name and Title of Authorized State Official | Signature | Date |
|---|---|---|

Title 38 CFR Part 59

VA FORM MAR 2001 **10-0148d**

(g) VA Form 10–0388—DOCUMENTS AND INFORMATION REQUIRED FOR STATE HOME CONSTRUCTION AND ACQUISITION GRANTS.

Department of Veterans Affairs

**DOCUMENTS AND INFORMATION REQUIRED FOR STATE HOME CONSTRUCTION AND ACQUISITION GRANTS**

**INITIAL APPLICATION**

*NOTE: An initial application should be submitted to the Chief Consultant, Geriatrics and Extended Care (114) by April 15, if the State wishes consideration of an initial application for placement on the priority list for the next fiscal year.*

1. TYPE OF GRANT APPLIED FOR:
   ☐ ACQUISITION ☐ CONSTRUCTION

2. DOCUMENTATION THAT THE SITE OF THE PROJECT IS IN REASONABLE PROXIMITY TO A SUFFICIENT CONCENTRATION AND POPULATION OF VETERANS THAT ARE 65 YEARS OF AGE AND OLDER AND THAT THERE IS A REASONABLE BASIS TO CONCLUDE THAT THE FACILITY WHEN COMPLETE WILL BE FULLY OCCUPIED.

3. APPLICANT'S RECOMMENDATION AS TO THE PRIORITY, ANY SUBPRIORITY, AND ANY FURTHER PRIORITY FOR PURPOSES OF PLACING THE PROJECT ON THE PRIORITY LIST FOR THE NEXT FISCAL YEAR *(see 38 CFR s 59.50).*

4. STANDARD FORM (SF) 424, "APPLICATION FOR FEDERAL ASSISTANCE" *(mark the box labeled "pre-application" and submit the information requested for a "preapplication")*; SF 424C, "BUDGET INFORMATION-CONSTRUCTION PROGRAMS"; SF 424D, "ASSURANCES-CONSTRUCTION PROGRAMS" AND A DESCRIPTION AND SCOPE OF THE PROJECT. *(Original and one copy required.)*

5. ON SF 424C INCLUDE:

   (1) COST ESTIMATE FOR EQUIPMENT NOT INCLUDED IN THE CONSTRUCTION CONTRACT (*Not to exceed 10 percent of the construction costs)* AND

   (2) CONTINGENCY COST ESTIMATE *(not to exceed 5 percent of the estimated cost of project for new construction or 8 percent for remodeling projects).*

6. PROJECT SITE DESCRIPTION, INCLUDING COUNTY LOCATION.

7. GOVERNOR'S LETTER OR A LETTER FROM THE AGENCY AUTHORIZED BY THE GOVERNOR WITH PROGRAM OVERSIGHT DESIGNATING THE STATE REPRESENTATIVE AND INFORMATION THAT WILL PERMIT VA TO CONTACT THE STATE REPRESENTATIVE. THE STATE REPRESENTATIVE MUST NOTIFY THE CHIEF CONSULTANT (114), IMMEDIATELY OF ANY CHANGES IN WHO THE STATE REPRESENTATIVE IS AND HOW TO REACH HIM OR HER.

8. NEEDS ASSESSMENT*( if adding or replacing nursing home or domiciliary beds).* INCLUDE THE FOLLOWING DOCUMENTS AND SUPPORTING JUSTIFICATIONS:

   (A) DEMOGRAPHIC CHARACTERISTICS OF THE VETERAN POPULATION OF THE PROPOSED CATCHMENT AREA;

   (B) AVAILABILITY OF BEDS IF GREAT TRAVEL DISTANCES *(over two hours)* ARE IMPOSED ON VETERANS AND THEIR FAMILIES;

   (C) NUMBER OF VA NURSING HOME AND DOMICILIARY BEDS AND THE OCCUPANCY RATE AT THOSE FACILITIES FOR THE PREVIOUS FISCAL YEAR

   (D) NUMBER OF STATE NURSING HOME AND DOMICILIARY BEDS AND THE OCCUPANCY RATE OF THOSE FACILITIES FOR THE PREVIOUS FISCAL YEAR;

   (E) NUMBER OF COMMUNITY-BASED NURSING HOME BEDS AND THE OCCUPANCY RATE AT THOSE FACILITIES FOR THE PREVIOUS FISCAL YEAR *(must have full State certification).* THE STATE CERTIFICATION MUST AUTHORIZE APPROPRIATE LEVEL(S) OF CARE TO ALLOW VETERAN PLACEMENT IN THOSE FACILITIES.

   (F) WAITING LISTS FOR EXISTING STATE HOME PROGRAMS;

   (G) PLANS FOR ACUTE MEDICAL CARE/EMERGENCY CARE SERVICES AS MAY BE REQUIRED BY THE STATE HOME RESIDENTS AND

   (H) AVAILABILITY OF QUALIFIED MEDICAL CARE PERSONNEL TO STAFF THE PROPOSED FACILITY.

9. NEEDS ASSESSMENT *(IF NOT ADDING OR REPLACING NURSING HOME OR DOMICILIARY BEDS)* (A) REASON FOR THE PROJECT AND (B) THE SCOPE OF THE PROJECT.

10. IF A STATE PROPOSES NEW BEDS THAT EXCEED THE MAXIMUM NUMBER OF STATE HOME BEDS AS DEFINED IN 38 CFR 59.40, THE STATE MUST PROVIDE DOCUMENTATION TO JUSTIFY AN EXCEPTION ON THE BASIS OF GREAT TRAVEL DISTANCES *(greater than two hours)* BETWEEN A SIGNIFICANT POPULATION CENTER AND AN EXISTING STATE HOME. THE SECRETARY WILL CONSIDER AND APPROVE/DISAPPROVE SUCH JUSTIFICATION IN THE DETERMINATION OF THE PRIORITY OF THE INITIAL APPLICATION.

11. AUTHORIZED STATE REPRESENTATIVE'S CERTIFIED STATEMENT THAT THE LIST OF THE TOTAL NUMBER OF STATE-OPERATED NURSING HOME AND DOMICILIARY BEDS FOR VETERANS IS THE TOTAL NUMBER OF SUCH BEDS EXISTING, UNDER CONSTRUCTION, OR PENDING APPROVAL BY VA AT THE TIME OF THE INITIAL APPLICATION.

12. SCHEMATIC DRAWINGS FOR THE PROPOSED PROJECT.

13. SPACE PROGRAM ANALYSIS ON VA FORM 10-0392, "SPACE PROGRAM ANALYSIS-NURSING HOME" *(or VA Form 10-0392a, "Space Program Analysis-Adult Day Health Care")*FOR THE PROPOSED PROJECT THAT INCLUDES A LIST OF EACH ROOM OR AREA AND THE SQUARE FOOTAGE PROPOSED. THE PLAN SHOULD NOTE SPECIAL OR UNUSUAL SERVICES OR EQUIPMENT. THE INFORMATION ON VA FORM 10-0392, "SPACE PROGRAM ANALYSIS-NURSING HOME" *(or VA Form 10-0392a, "Space Program Analysis-Adult Day Health Care") should correspond with the charts contained in 38 CFR 59.140 AND 59.160.*

14. STATE APPLICATION IDENTIFIER NUMBER *(IF APPLICABLE).*

15. FIVE-YEAR CAPITAL PLAN FOR STATE'S ENTIRE STATE HOME PROGRAM, INCLUDING THE PROPOSED PROJECT.

16. FINANCIAL PLAN FOR STATE FACILITY'S FIRST THREE YEARS OF OPERATION FOLLOWING CONSTRUCTION.

17. ANY COMMENTS OR RECOMMENDATIONS MADE BY THE APPROPRIATE STATE CLEARING HOUSE PURSUANT TO POLICIES OUTLINED IN EXECUTIVE ORDER 12372, INTERGOVERNMENTAL REVIEW OF FEDERAL PROGRAMS (PART 40 OF THIS CHAPTER). IF THE STATE HAS NO CLEARING HOUSE, THE DESIGNATED AUTHORIZED STATE REPRESENTATIVE MUST CERTIFY COMPLIANCE WITH THIS EXECUTIVE ORDER.

***I CERTIFY THAT THE INFORMATION SUBMITTED TO VA IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND ABILITY.***

| SIGNATURE OF STATE REPRESENTATIVE | DATE |
|---|---|
| | |

**THE LAW PROVIDES SEVERE PENALTIES FOR WILLFUL SUBMISSION OF FALSE INFORMATION.**

VA FORM JAN 2001 **10-0388**

(h) VA Form 10–0388a—ADDITIONAL DOCUMENTS AND INFORMATION REQUIRED FOR STATE HOME CONSTRUCTION AND ACQUISITION GRANTS.

Department of Veterans Affairs

**ADDITIONAL DOCUMENTS AND INFORMATION REQUIRED FOR STATE HOME CONSTRUCTION AND ACQUISITION GRANTS**

**APPLICATION**

1. THE STATE REPRESENTATIVE MUST SUBMIT THE FOLLOWING TO VA TO RECEIVE A GRANT:

(A) STANDARD FORM (SF) 424, "APPLICATION FOR FEDERAL ASSISTANCE" *(mark the box labeled "application" and submit the information requested for a "application")*; SF 424C, "BUDGET INFORMATION-CONSTRUCTION PROGRAMS"; SF 424D, "ASSURANCES-CONSTRUCTION PROGRAMS"; AND A COMPLETE DESCRIPTION AND SCOPE OF THE PROJECT. *(Original and one copy required.)*

ON FORM 424C INCLUDE:

(1) AN ESTIMATE FOR THE COST OF THE EQUIPMENT NOT INCLUDED IN THE CONSTRUCTION CONTRACT *(NOT TO EXCEED 10 PERCENT OF THE CONSTRUCTION COSTS).*

(2) A CONTINGENCY AND ESTIMATE *(NOT TO EXCEED 5 PERCENT OF THE ESTIMATED COST OF THE PROJECT FOR NEW CONSTRUCTION OR 8 PERCENT FOR REMODELING PROJECTS).*

(B) EVIDENCE OF THE STATE AUTHORIZATION OF THE PROJECT *(e.g.COPY OF THE SIGNED LEGISLATION).*

(C) EVIDENCE *(ACT, ISSUED BONDS, ETC.)* THAT THE STATE HAS ITS SHARE OF THE ESTIMATED TOTAL COSTS OF CONSTRUCTION.

(D) VA FORM 10-0148b, "CERTIFICATION OF STATE MATCHING FUNDS."

2. AN UPDATED SPACE PROGRAM ANALYSIS FOR THE PROPOSED PROJECT THAT INCLUDES A LIST OF EACH ROOM OR AREA AND THE SQUARE FOOTAGE PROPOSED. THE PLAN SHOULD NOTE SPECIAL OR UNUSUAL SERVICES OR EQUIPMENT. THE INFORMATION ON VA FORM 10-0392, "SPACE PROGRAM ANALYSIS-NURSING HOME" *(OR VA FORM 10-0392A, "SPACE PROGRAM ANALYSIS-ADULT DAY HEALTH CARE")* SHOULD CORRESPOND WITH THE CHARTS CONTAINED IN 38 CFR 59.140 AND 59.160. THIS ANALYS IS NEEDED ONLY IF THERE IS A CHANGE IN THE SPACE PROGRAM ANALYSIS THAT WAS PREVIOUSLY SUBMITTED.

3. THE STATE REPRESENTATIVE MUST SUBMIT THE FOLLOWING CERTIFICATIONS TO VA BY MARCH 15 OF EACH YEAR UNTIL THE PROJECT IS COMPLETED.

(A) VA FORM 10-0148C, "CERTIFICATION REGARDING DEBARMENT, SUSPENSION, AND OTHER RESPONSIBILITY MATTERS FOR PRIMARY COVERED TRANSACTIONS.

(B) VA FORM 10-0143, "DEPARTMENT OF VETERANS AFFAIRS CERTIFICATION REGARDING DRUG-FREE WORKPLACE REQUIREMENTS FOR GRANTEES OTHER THAN INDIVIDUALS"

(C) VA FORM 10-0144, "CERTIFICATION REGARDING LOBBYING"

4. IF THE STATE IS NOTIFIED THAT FEDERAL FUNDS ARE AVAILABLE, THE STATE MUST PROVIDE THESE ITEMS;

(A) A SCHEDULE OF WHEN EACH OF THE REMAINING REQUIREMENTS TO RECEIVE A PROPOSED GRANT WILL BE MET.

(B) PHASE 1 - ENVIRONMENTAL SURVEY. SITE PLAN/MAP, SITE SURVEY, AND SOIL INVESTIGATION *(if applicable).* DESIGN DEVELOPMENT SITE PLAN. THE APPLICANT SHALL SUBMIT A SITE SURVEY WHICH HAS BEEN PERFORMED BY A LICENSED LAND SURVEYOR. A DESCRIPTION OF THE SITE SHALL BE SUBMITTED NOTING THE GENERAL CHARACTERISTICS OF THE SITE. THIS SHOULD INCLUDE SOIL REPORTS AND SPECIFICATIONS, EASEMENTS, MAIN ROADWAY APPROACHES, SURROUNDING LAND USES, AVAILABILITY OF ELECTRICITY, WATER AND SEWER LINES, AND ORIENTATION. THE DESCRIPTION SHOULD ALSO INCLUDE A MAP LOCATING THE EXISTING AND/OR NEW BUILDINGS, MAJOR ROADS, AND PUBLIC SERVICES IN THE GEOGRAPHIC AREA. ADDITIONAL SITE PLANS SHOULD SHOW ALL SITE WORK INCLUDING PROPERTY LINES, EXISTING AND NEW TOPOGRAPHY, BUILDING LOCATIONS, UTILITY DATA, AND PROPOSED GRADES, ROADS, PARKING AREAS, WALKS, LANDSCAPING, AND SITE AMENITIES.

(C) PHASE II - ENVIRONMENTAL ASSESSMENT. *(Applies only if the outside construction exceeds 75,000 gross square feet (GSF))* THE ENVIRONMENTAL DOCUMENTATION WILL REQUIRE APPROVAL BY VA BEFORE A FINAL AWARD OF A CONSTRUCTION OR ACQUISITION GRANT FOR A STATE VETERANS HOME. (SEE 26.6 OF THIS CHAPTER FOR COMPLIANCE REQUIREMENTS.) WHEN THE APPLICATION SUBMISSION REQUIRES AN ENVIRONMENTAL ASSESSMENTS, THE STATE SHALL DESCRIBE THE POSSIBLE BENEFICIAL AND/OR HARMFUL EFFECT WHICH THE PROJECT MAY HAVE ON THE FOLLOWING IMPACT CATEGORIES:

(1) TRANSPORTATION
(2) AIR QUALITY;
(3) NOISE;
(4) SOLID WASTE;
(5) UTILITIES;
(6) GEOLOGY *(soils/hydrology/flood plains);*
(7) WATER QUALITY;
(8) LAND USE;
(9) VEGETATION, WILDLIFE, AQUATIC, AND ECOLOGY/WETLANDS;
(10) ECONOMIC ACTIVITIES;
(11) CULTURAL RESOURCES;
(12) AESTHETICS;
(13) RESIDENTIAL POPULATION;

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(14) COMMUNITY SERVICES AND FACILITIES;

(15) COMMUNITY PLANS AND PROJECTS; AND

(16) OTHER

IF AN ADVERSE ENVIRONMENTAL IMPACT IS ANTICIPATED, THE ACTION TO BE TAKEN TO MINIMIZE THE IMPACT SHOULD BE EXPLAINED IN THE ENVIRONMENTAL ASSESSMENT.

IF CONSTRUCTION OUTSIDE THE WALLS OF AN EXISTING STRUCTURE WILL INVOLVE MORE THAN 75,000 GSF, THE APPLICATION SHALL INCLUDE AN ENVIRONMENTAL ASSESSMENT TO DETERMINE IF AN ENVIRONMENTAL IMPACT STATEMENT IS NECESSARY FOR COMPLIANCE WITH SECTION 102(2)(C) OF THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969. IF THE PROPOSED ACTIONS INVOLVING CONSTRUCTION OR ACQUISITION DO NOT INDIVIDUALLY OR CUMULATIVELY HAVE A SIGNIFICANT EFFECT ON THE HUMAN ENVIRONMENT OR IF THE OUTSIDE CONSTRUCTION DOES NOT EXCEED 75,000 GSF, THE APPLICANT SHALL SUBMIT A LETTER NOTING A CATEGORICAL EXCLUSION, SUBJECT TO APPROVAL BY VA.

(D) LETTER FROM THE STATE HISTORICAL PRESERVATION OFFICER (SHPO) AND SUBSEQUENT CLEARANCE FROM THE VA HISTORICAL PRESERVATION OFFICER AND A COPY FROM THE SHPO STATING WHETHER THE PROJECT AREA INCLUDES ANY PROPERTIES ON, ELIGIBLE FOR, OR LIKELY TO MEET THE CRITERIA FOR THE NATIONAL REGISTER OF HISTORIC PLACES. IF THE PROPERTY DOES, OR MAY INCLUDE, NATIONAL REGISTER QUALITY PROPERTIES, THE LETTER FROM SHPO SHOULD DISCUSS THE DETERMINATION OF EFFECT OF THE PROPOSED PROJECT ON SUCH PROPERTY.

(E) DESIGN DEVELOPMENT *(35 percent)* DRAWINGS. THE APPLICANT SHALL PROVIDE TO THE DEPARTMENT OF VETERANS AFFAIRS ONE SET OF SEPIAS AND EIGHT SETS OF PRINTS, ROLLED INDIVIDUALLY PER SET, TO EXPEDITE THE REVIEW PROCESS. PLEASE SEND DIRECTLY TO THE OFFICE OF CONSTRUCTION MANAGEMENT, FACILITIES QUALITY SERVICE (181A), WITH A COPY OF THE TRANSMITTAL LETTER TO BE CHIEF, STATE HOME CONSTRUCTION PROGRAM (114). THE DRAWINGS MUST INDICATE THE DESIGNATION OF ALL SPACES, SIZE OF AREAS AND ROOMS AND INDICATE IN OUTLINE THE FIXED AND MOVABLE EQUIPMENT AND FURNITURE. THE DRAWINGS MUST BE DRAWN AT 1/4" SCALE. BEDROOM AND TOILET LAYOUTS, SHOWING CLEARANCES AND UFAS REQUIREMENTS, SHOULD BE SHOWN 1/4" SCALE. THE TOTAL FLOOR AND ROOM AREAS SHALL BE SHOWN IN THE DRAWINGS. THE DRAWINGS MUST INCLUDE:

(1) PLAN OF ANY PROPOSED DEMOLITION WORK;

(2) A PLAN FOR EACH FLOOR. FOR RENOVATIONS, THE EXISTING CONDITIONS AND EXTENT OF NEW WORK SHOULD BE CLEARLY DELINEATED;

(3) ELEVATIONS;

(4) SECTIONS AND TYPICAL DETAILS;

(5) ROOF PLAN;

(6) FIRE PROTECTION PLANS; AND

(8) TECHNICAL ENGINEERING PLANS, INCLUDING STRUCTURAL, MECHANICAL, PLUMBING, AND ELECTRICAL DRAWINGS.

IF THE PROJECT INVOLVES ACQUISITION, OR RENOVATION, THE STATE SHOULD INCLUDE THE CURRENT AS-BUILT SITE PLAN, FLOOR PLANS AND BUILDING SECTIONS THAT SHOW THE PRESENT STATUS OF THE BUILDING AND A DESCRIPTION OF THE BUILDING'S CURRENT USE AND TYPE OF CONSTRUCTION.

(F) DESIGN DEVELOPMENT OUTLINE SPECIFICATIONS. THE STATE SHALL PROVIDE EIGHT COPIES OF OUTLINE SPECIFICATIONS WHICH SHALL INCLUDE A GENERAL DESCRIPTION OF THE PROJECT, SITE, ARCHITECTURAL, STRUCTURAL, ELECTRICAL, AND MECHANICAL SYSTEMS SUCH AS ELEVATORS, NURSES' CALL SYSTEM, AIR CONDITIONING, HEATING PLUMBING, LIGHTING, POWER, AND INTERIOR FINISHES *(floor coverings, acoustical material, and wall and ceiling finishes).*

(G) DESIGN DEVELOPMENT COST ESTIMATES. TWO COPIES OF THE UPDATED SF 424 AND SF 424C COST ESTIMATES MUST BE INCLUDED IN THE APPLICATION TO VA. ESTIMATES MUST SHOW THE ESTIMATED COST OF THE BUILDINGS OR STRUCTURES TO BE ACQUIRED OR CONSTRUCTED IN THE PROJECT. COST ESTIMATES MUST LIST THE COST OF CONSTRUCTION, CONTRACT CONTINGENCY, FIXED EQUIPMENT NOT INCLUDED IN THE CONTRACT, OTHER EQUIPMENT, ARCHITECT'S FEES, AND CONSTRUCTION SUPERVISION AND INSPECTION. THE ALLOWANCE FOR EQUIPMENT, NOT INCLUDED IN THE CONSTRUCTION CONTRACT. MUST NOT EXCEED 10 PERCENT OF THE CONSTRUCTION OR ACQUISITION CONTRACT COST. THE VA ALLOWANCE FOR CONTINGENCIES SHALL NOT EXCEED 5 PERCENT OF THE TOTAL PROJECT COST FOR NEW CONSTRUCTION OR 8 PERCENT OF THE TOTAL PROJECT COST FOR RENOVATION PROJECTS. IF THE PROJECT INVOLVES NON-FEDERAL PARTICIPATING AREAS, SUCH COSTS SHOULD BE ITEMIZED SEPARATELY.

(H) REASONABLE ASSURANCE THAT THE STATE HOME, OR ANOTHER AGENCY OR INSTRUMENTALITY OF THE STATE HAS TITLE TO THE SITE FOR THE PROJECT.

5. IF ALL REQUIREMENTS FOR A GRANT ARE NOT MET PRIOR TO THE END OF A FISCAL YEAR, A STATE MAY BE ELIGIBLE FOR A CONDITIONAL APPROVAL OF A GRANT UNDER THE PROVISIONS OF 38 CFR 59.70.

6. THE STATE REPRESENTATIVE MUST SUBMIT THE FOLLOWING BY SEPTEMBER 15:

(A) FINAL DRAWINGS AND SPECIFICATIONS *(100 PERCENT) (ONE LABELED SET OF MICROFICHE APERTURE CARDS, MICROFILM, OR COMPACT DISC/READ ONLY MEMORY (CDROM) COMPACT LASER DISC, WITH 100% CONSTRUCTION DOCUMENTS (PLANS AND SPECIFICATIONS).*

(B) ADVERTISEMENT FOR THE PROPOSED PROJECT AND REQUEST FOR BIDS.

(C) TWO COPIES OF THE ITEMIZED BID TABULATIONS.

((D) COMPLETED VA FORM 10-0148D, CERTIFICATION OF COMPLIANCE WITH FEDERAL REQUIREMENTS STATE HOME CONSTRUCTION GRANT".

(E) REVISED SF 424, SF 424C BUDGET PAGES, BASED ON THE SELECTED BIDS *(including final cost for all items in the project)*.

(F) THREE SIGNED ORIGINALS OF THE MEMORANDUM OF AGREEMENT THAT INCLUDES PROVISIONS IN THE SAMPLE MEMORANDUM OF AGREEMENT VA FORM 10-5348 AS SET FORTH IN 38 CFR 59.160.

7 THE STATE REPRESENTATIVE MUST SUBMIT THE FOLLOWING TO VA PRIOR TO GRANT AWARD:

(A) VA FORM 10-0148a, "CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION LOWER TIER COVERED TRANSACTIONS *(TO BE SIGNED BY THE CONTRACTOR(S))*.

***I CERTIFY THAT THE INFORMATION SUBMITTED IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND ABILITY.***

| SIGNATURE OF STATE REPRESENTATIVE | DATE |
|---|---|
| | |

**THE LAW PROVIDES SEVERE PENALTIES FOR WILLFUL SUBMISSION OF FALSE INFORMATION.**

*PAGE 3 OF 3*

(i) VA Form 10–0388b—DOCUMENTS/CERTIFICATIONS REQUIRED FOR STATE HOME CONSTRUCTION AND ACQUISITION GRANTS.

Department of Veterans Affairs

**DOCUMENTS/CERTIFICATIONS REQUIRED FOR STATE HOME CONSTRUCTION AND ACQUISITION GRANTS**

**POST-GRANT REQUIREMENTS**

THE STATE REPRESENTATIVE MUST SUBMIT TO VA THE FOLLOWING PRIOR TO THE FINAL PAYMENT OF GRANT FUNDS OR WHEN SPECIFIED BELOW:

(1) A SF 271, "OUTLAY REPORT AND REQUEST FOR REIMBURSEMENT FOR CONSTRUCTION PROGRAMS".

(2) A FINAL EQUIPMENT LIST *(prior to completion of construction)* A SEPARATE, COMPLETE ITEMIZED LIST TO INCLUDE FIXED AND OTHER EQUIPMENT *(not including equipment in the construction contract)* BY CATEGORY WITH THE COST, QUANTITY, AND PLACEMENT IN ACCORDANCE WITH THE FINAL DRAWINGS, BUT NOT INCLUDING CONSUMABLE GOODS OR OFFICE SUPPLIES. *(NOTE: if no equipment is involved in the project, a statement to that effect should be included in the request for the final architectural/engineering inspection.)* THIS EQUIPMENT LIST MUST BE APPROVED BY VA PRIOR TO FINAL CLAIM PAYMENT.

(3) A REQUEST IN WRITING FOR THE FINAL ARCHITECTURAL/ENGINEERING INSPECTION, INCLUDING THE NAME AND TELEPHONE NUMBER OF THE LOCAL POINT OF CONTACT FOR THE PROJECT.

(4) A FINAL CLAIM FOR PAYMENT ON SF 271, "OUTLAY REPORT AND REQUEST FOR REIMBURSEMENT FOR CONSTRUCTION PROGRAMS". ADD THE STATEMENT "IT IS HEREBY AGREED THAT THE MONETARY COMMITMENT OF THE FEDERAL GOVERNMENT WILL HAVE BEEN MET AND THE PROJECT WILL BE CONSIDERED TERMINATED UPON PAYMENT OF THIS VOUCHER."

(5) EVIDENCE THAT THE STATE HAS MET ITS RESPONSIBILITY FOR AN AUDIT UNDER THE SINGLE AUDIT ACT OF 1984 AND 59.124 OF THIS PART, IF APPLICABLE.

***I CERTIFY THAT THE INFORMATION SUBMITTED IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND ABILITY.***

| SIGNATURE OF STATE REPRESENTATIVE | DATE |
|---|---|
| | |

**THE LAW PROVIDES SEVERE PENALTIES FOR WILLFUL SUBMISSION OF FALSE INFORMATION.**

VA FORM MAR 2001 **10-0388b**

(j) VA Form 10–0392—STATE HOME CONSTRUCTION GRANT PROGRAM SPACE PROGRAM ANALYSIS—NURSING HOME AND DOMICILIARY.

Department of Veterans Affairs

**STATE HOME CONSTRUCTION GRANT PROGRAM SPACE PROGRAM ANALYSIS - NURSING HOME AND DOMICILIARY**

PROJECT LOCATION

PROJECT NAME: | FAI# | NUMBER OF BEDS IN PROJECT

| 1. SUPPORT FACILITIES | PROPOSED BY STATE | VA CRITERIA | TOTAL VA ALLOWED |
|---|---|---|---|
| ADMINISTRATOR'S OFFICE | | 200 | |
| ASST. ADMINISTRATOR | | 150 | |
| MEDICAL OFFICER, DIRECTOR OF NURSING OR EQUIVALENT | | 150 | |
| NURSES' OFFICE AND DICTATION AREA | | 120 | |
| GENERAL ADMINISTRATION *(each office/person)* | | 120 | |
| | | 120 | |
| | | 120 | |
| | | 120 | |
| | | 120 | |
| | | 120 | |
| | | 120 | |
| | | 120 | |
| | | 120 | |
| MAY INCLUDE: MEDICAL RECORDS | | 120 | |
| SOCIAL SERVICES | | 120 | |
| RECEPTION/INFORMATION | | 120 | |
| CLERICAL STAFF (Each) # | | 80@ | |
| COMPUTER AREA | | 40 | |
| CONFERENCE ROOM/CONSULTATION AREA/IN-SERVICE TRAINING | | 500 | |
| LOBBY/WAITING AREA | | 3/BED (150 min. 600 | |
| PUBLIC TOILETS (MALE, FEMALE) | | 25/FIXTURE | |
| PHARMACY | AR | AS REQUIRED | AR |
| DIETETIC SERVICE | AR | AS REQUIRED | AR |
| DINING AREA | | 20/BED | |
| CANTEEN, RETAIL SALES | | 2/BED | |
| VENDING MACHINE | | 1/BED (450 max./facility) | |
| RESIDENTS TOILETS | | 25/FIXTURE | |
| CHILD DAYCARE | AR | AS REQUIRED | AR |
| MEDICAL SUPPORT (Each) | | 140 | |
| | | 140 | |
| | | 140 | |
| STAFF OFFICES (Each) | | 120 | |
| EXAM/TREATMENT (Each) | | 120 | |
| FAMILY COUNSELING (Each) | | 120 | |

VA FORM MAR 2001 **10-0392** *Page 1 or 4*

| 1. SUPPORT FACILITIES*(Continued)* | PROPOSED BY STATE | VA CRITERIA | TOTAL VA ALLOWED |
|---|---|---|---|
| BARBER AND/OR BEAUTY | | 140 | |
| MAIL ROOM | | 120 | |
| JANITORS CLOSET | | 40 | |
| MULTIPURPOSE ROOM | | 15/BED | |
| EMPLOYEE LOCKERS #EMPL. | | 6/EMPLOYMENT | |
| LOUNGE | | 120 | |
| TOILETS | | 25/FIXTURE | |
| CHAPEL | | 450 | |
| PHYSICAL THERAPY | | 5/BED | |
| OFFICE, IF REQUIRED | | 120 | |
| OCCUPATIONAL THERAPY | | 5/BED | |
| OFFICE, IF REQUIRED | | 120 | |
| LIBRARY | | 1.5/BED | |
| BUILDING MAINTENANCE STORAGE | | 2.5/BED | |
| RESIDENT STORAGE | | 6/BED | |
| GENERAL WAREHOUSE STORAGE *(medical, dietary)* | | 6/BED | |
| GENERAL LAUNDRY | AR | AS REQUIRED | AR |
| **SUPPORT FACILITIES SUB-TOTAL;(No "As Required" Areas)** | | | |
| **AS REQUIRED AREAS:** | AR | AS REQUIRED | AR |
| **2. BED UNITS** | | | |
| ONE # ROOMS X @ = | | 150 | |
| TWO # ROOMS X @ = | | 245 | |
| LARGE 2 # ROOMS X @ = (2 Unit Max) | | 305 | |
| THREE # ROOMS X @ = | | 370 | |
| FOUR # ROOMS X @ = | | 460 | |
| LOUNGE AREAS: RESIDENT LOUNGE W/STORAGE | | 8/BED | |
| RESIDENT QUIET ROOM | | 3/BED | |
| CLEAN UTILITY | | 120 | |
| SOILED UTILITY | | 105 | |
| LINEN STORAGE | | 150 | |
| GENERAL STORAGE | | 100 | |
| NURSES STATION, WARD SECRETARY | | 260 | |
| MEDICATION ROOM | | 75 | |
| EXAMINATION/TREATMENT ROOM | | 140 | |
| WAITING AREA | | 50 | |
| UNIT SUPPLY AND EQUIPMENT | | 50 | |
| STAFF TOILET | | 25/FIXTURE | |
| STRETCHER/WHEELCHAIR STORAGE | | 100 | |
| KITCHENETTE | | 120 | |

*Page 2 or 4*

| 1. SUPPORT FACILITIES *(Continued)* | PROPOSED BY STATE | VA CRITERIA | TOTAL VA ALLOWED |
|---|---|---|---|
| JANITOR CLOSET | | 40 | |
| RESIDENT LAUNDRY | | 125 | |
| TRASH COLLECTION | | 60 | |
| OTHER *(Justify)* | | | |
| **UNIT SUB-TOTAL:** | | | |
| **TIMES NO. OF UNITS:** | X | | X |
| | | | |
| **SUB TOTAL-ALL BED UNITS:** | | | |
| **3. BATHING AND TOILET FACILITIES** | | | |
| A. PRIVATE OR SHARED FACILITIES | | | |
| | | | |
| WHEELCHAIR FACILITIES # ROOMS X @ = | | 25/FIXTURE | |
| (50% OF TOTAL, MINIMUM COMPLIANCE WITH UFAS) | | 25/FIXTURE | |
| STANDARD FACILITIES # ROOMS X @ = | | 15/FIXTURE | |
| | | 25/FIXTURE | |
| B. FULL BATHROOM | | | |
| # ROOMS X @ = | | 75 | |
| | | 25/FIXTURE | |
| C. CONGREGATE BATHING FACILITIES | | | |
| FIRST TUB/SHOWER | | 80 | |
| EACH ADDITIONAL FIXTURE# | | 25 | |
| **UNIT SUB-TOTAL:** | | | |
| **TIMES NO.OF UNITS:** | X | | X |
| **SUB-TOTAL-ALL UNIT TOILETS** | | | |

**NOTE 1: If Bed Units vary in bed numbers, program, or design, reproduce Bed Unit forms, as required (pages 2 & 3), and fill out for each**

**NOTE 2: Mechanical, electrical and other engineering/utility areas, in addition to engineering workshops and circulation space, are not included in the Space Analysis or the Percentage of Participation calculations.**

**NOTE 3: All areas not shown on this form must be justified, on a programmatic medical care or state imposed regulatory basis, in order for VA to participate in the funding of that space.**

| TOTALS | PROPOSED BY STATE | VA CRITERIA | TOTAL VA ALLOWED |
|---|---|---|---|
| **COMPREHENSIVE SUB-TOTALS** | | | |
| SUPPORT FACILITIES - CRITERIA | | | |
| SUPPORT FACILITIES - AS REQUIRED | AR | | AR |
| BED UNITS | | | |
| BATHING AND TOILET FACILITIES | | | |
| **GRAND TOTALS - CRITERIA AREAS:** | | | |
| **GRAND TOTALS - AS REQUIRED AREAS:** | AR | | AR |

If prepared by State:
I certify that this accurately reflects the proposed Space Program Analysis for this project

_____ _____

*Page 3 or 4*

| COMPUTATIONS | PROPOSED BY STATE | TOTAL VA ALLOWED |
|---|---|---|
| ANALYSIS | | |
| CRITERIA AREAS | | |
| 10% DEVIATION | | + |
| AS REQUIRED AREAS | + AR | + AR |

| TOTAL STATE PROPOSED: | | TOTAL VA ALLOWED: | |
|---|---|---|---|

FORMULA FOR % OF VA PARTICIPATION:

VA ALLOWED: _____ x .65

_____ = _____%

STATE PROPOSED: _____

OFFICIAL PERCENTAGE OF VA STATE PROPOSED PARTICIPATION = _____ %

CERTIFIED _____ DATE _____

State Home Grant Program, Office of Facilities Management (181A)
811 Vermont Avenue, NW, Washington, D.C. 20420

*Page 4 or 4*

(k) VA Form 10–0392a—STATE HOME CONSTRUCTION GRANT PROGRAM SPACE PROGRAM ANALYSIS—ADULT DAY HEALTH CARE.

Department of Veterans Affairs

**STATE HOME CONSTRUCTION GRANT PROGRAM**
**SPACE PROGRAM ANALYSIS - ADULT DAY HEALTH CARE**

PROJECT LOCATION

PROJECT NAME: FAI# NUMBER BEDS IN PROJECT

| 1. SUPPORT FACILITIES | Number of Participants in Program _____ | PROPOSED BY STATE | VA CRITERIA | TOTAL VA ALLOWED |
|---|---|---|---|---|
| ADMINISTRATOR'S OFFICE | | | 200 | |
| ASST. ADMINISTRATOR | | | 150 | |
| MEDICAL OFFICER, DIRECTOR OF NURSING OR EQUIVALENT | | | 150 | |
| NURSES' OFFICE AND DICTATION AREA | | | 120 | |
| GENERAL ADMINISTRATION *(each office/person)* | | | 120 | |
| | | | 120 | |
| | | | 120 | |
| | | | 120 | |
| | | | 120 | |
| | | | 120 | |
| | | | 120 | |
| | | | 120 | |
| | | | 120 | |
| MAY INCLUDE: MEDICAL RECORDS | | | 120 | |
| SOCIAL SERVICES | | | 120 | |
| RECEPTION/INFORMATION | | | 120 | |
| CLERICAL STAFF (Each) # | | | 80@ | |
| COMPUTER AREA | | | 40 | |
| CONFERENCE ROOM/CONSULTATION AREA/IN-SERVICE TRAINING | | | 500 | |
| LOBBY/WAITING AREA | | | 3/PARTICIPANT (150 min. 600 | |
| PUBLIC TOILETS (MALE, FEMALE) | | | 25/FIXTURE | |
| DIETETIC SERVICE | | AR | AS REQUIRED | AR |
| DINING AREA | | | 20/PARTICIPANT | |
| CANTEEN, RETAIL SALES | | | 2/PARTICIPANT | |
| VENDING MACHINE | | | 1/PARTICIPANT | |
| PARTICIPANTS TOILETS | | | 25/FIXTURE | |
| MEDICAL SUPPORT (Each) | | | 140@ | |
| | | | 140 | |
| | | | 140 | |
| | | | 140 | |
| | | | 140 | |
| | | | 140 | |
| MAIL ROOM | | | 120 | |
| JANITORS CLOSET | | | 40 | |

VA FORM MAR 2001 **10-0392a** *Page 1 of 3*

| 1. SUPPORT FACILITIES*(Continued)* | PROPOSED BY STATE | VA CRITERIA | TOTAL VA ALLOWED |
|---|---|---|---|
| MULTIPURPOSE ROOM | | 15/PARTICIPANT | |
| EMPLOYEE LOCKERS #EMPL. | | 6/EMPL. | |
| LOUNGE | | 120 | |
| TOILETS | | 25/FIXTURE | |
| PHYSICAL THERAPY | | 5/PARTICIPANT | |
| OFFICE, IF REQUIRED | | 120 | |
| OCCUPATIONAL THERAPY | | 5/PARTICIPANT | |
| OFFICE, IF REQUIRED | | 120 | |
| LIBRARY | | 1.5/PARTICIPANT | |
| BUILDING MAINTENANCE STORAGE | | 2.5/PARTICIPANT | |
| RESIDENT STORAGE | | 6/PARTICIPANT | |
| GENERAL WAREHOUSE STORAGE *(medical, dietary)* | AR | 6/PARTICIPANT | AR |
| GENERAL LAUNDRY | | AS REQUIRED | |
| **SUPPORT FACILITIES SUB-TOTAL;(No "As Required" Areas)** | | | |
| **AS REQUIRED AREAS:** | AR | AS REQUIRED | AR |
| **2. OTHER AREAS** | | | |
| RESIDENT QUIET ROOM | | 3/PARTICIPANT | |
| CLEAN UTILITY | | 120 | |
| SOILED UTILITY | | 105 | |
| LINEN STORAGE | | 150 | |
| GENERAL STORAGE | | 100 | |
| NURSES STATION, WARD SECRETARY | | 260 | |
| MEDICATION ROOM | | 75 | |
| EXAMINATION/TREATMENT ROOM | | 140 | |
| WAITING AREA | | 50 | |
| PROGRAM SUPPLY AND EQUIPMENT | | 50 | |
| STAFF TOILET | | 25/FIXTURE | |
| STRETCHER/WHEELCHAIR STORAGE | | 100 | |
| KITCHENETTE | | 120 | |
| JANITOR CLOSET | | 40 | |
| RESIDENT LAUNDRY | | 120 | |
| TRASH COLLECTION | | 60 | |
| OTHER *(Justify)* | | | |
| **UNIT SUB-TOTAL:** | | | |
| **TIMES NO. UNITS:** | **X** | | **X** |
| | | | |
| **SUB TOTAL:** | | | |
| | | | |

*Page 2 of 3*

| 3. BATHING AND TOILET FACILITIES | PROPOSED BY STATE | VA CRITERIA | TOTAL VA ALLOWED |
|---|---|---|---|
| A. PRIVATE OF SHARED FACILITIES | | | |
| | | | |
| WHEELCHAIR FACILITIES # ROOMS X @ = | | 25/FIXTURE | |
| (50% OF TOTAL, MINIMUM COMPLIANCE WITH UFAS) | | 25/FIXTURE | |
| STANDARD FACILITIES # ROOMS X @ = | | 15/FIXTURE | |
| | | 25/FIXTURE | |
| FULL BATHROOM # ROOMS X @ = | | 75 | |
| | | 25/FIXTURE | |
| CONGREGATE BATHING FACILITIES - FIRST TUB/SHOWER | | 80 | |
| EACH ADDITIONAL FIXTURE # | | 25 | |
| **UNIT SUB-TOTAL:** | | | |
| **TIMES NO. OF UNITS:** | X | | X |
| **SUB-TOTAL - ALL UNIT TOILETS** | | | |

**NOTE 1:** *Mechanical, electrical and other engineering/utility areas, in addition to engineering workshops and circulation space, are not included in the Space Analysis or the Percentage of Participation calculations.*

**NOTE 2:** *All areas not shown on this form must be justified, on a programmatic medical care or state imposed regulatory basis, in order for VA to participate in the funding of that space.*

| TOTALS | PROPOSED BY STATE | | TOTAL VA ALLOWED |
|---|---|---|---|
| **COMPREHENSIVE SUB-TOTALS** | | | |
| SUPPORT FACILITIES - CRITERIA | | | |
| SUPPORT FACILITIES - AS REQUIRED | AR | | AR |
| BATHING AND TOILET FACILITIES | | | |
| **GRAND TOTALS - CRITERIA AREAS:** | | | |
| **GRAND TOTALS - AS REQUIRED AREAS:** | AR | | AR |

If prepared by State:
I certify that this accurately reflects the proposed Space Program Analysis for this project:

_____ *Signature* _____ *Date*

| COMPUTATIONS | PROPOSED BY STATE | ALLOWED BY VA |
|---|---|---|
| ANALYSIS | | |
| CRITERIA AREAS | | |
| 10% DEVIATION | | + |
| AS REQUIRED AREAS | + | + |
| **TOTAL STATE PROPOSED:** | **TOTAL VA ALLOWED:** | |

**FORMULA FOR % OF VA PARTICIPATION:**

**VA ALLOWED:** _____ **x .65**

_____ = _____ %

**STATE PROPOSED:** _____

**OFFICIAL PERCENTAGE OF VA PARTICIPATION =** _____ %

CERTIFIED _____ DATE _____

State Home Grant Program, Office of Facilities Management (181A)
811 Vermont Avenue, NW, Washington, D.C. 20420

*Page 3 of 3*

(l) VA Form 10–5348—SAMPLE MEMORANDUM OF AGREEMENT.

Department of Veterans Affairs

**SAMPLE MEMORANDUM OF AGREEMENT**
**(NOTE:** ***Contact Chief Consultant (114) for Electronic Version)***

Memorandum of Agreement for a Grant
to Construct or Acquire a State Veterans Home

This Memorandum of Agreement is hereby made by and between
**The Department of Veterans Affairs (VA)**
810 Vermont Avenue, NW, Washington, D.C. 20420, and

_____

_____

_____ has submitted to VA an application for a grant to (construct, acquire) a (nursing home, domiciliary, adult day healthcare) facility for veterans in _____ (Federal Application Identifier: FAI) for this project is _____. The parties agree that this application meets the requirements of Federal Law for this grant. The estimated total cost of (construction and/or acquisition), including equipment, in which VA will participate, is $ _____. The VA grant will total up to $ _____ , but will not exceed sixty-five(65) percent of the actual cost of (construction, acquisition) as determined by the final audit. In consideration of the foregoing, the parties hereto mutually agree as follows:

(1) _____ certifies that the plans and specifications included in the application meet all applicable Federal requirements.

(2) _____ agrees that it will (construct, acquire) the facility, (a description of the project, including number of beds are added or replaced), to be completed in accordance with the documentation submitted by the State.

(3) _____ agrees to comply strictly with the assurances contained in the documentation submitted.

(4) _____ agrees to enter into a contract to (construct, acquire) (a description of the project, including number of beds are added or replaced), within 90 days of the date on which both parties have signed this agreement.

(5) _____ agrees to periodically inspect the project and certify to the Chief Consultant for Geriatrics and Extended Care Strategic Healthcare Group, 810 Vermont Avenue, NW, Washington, D.C. 20420, for payment of such sums which it deems are payable by VA.

(6) _____ agrees to furnish any additional State funds needed to complete the project.

(7) _____ agrees that, upon completion of the project, it will provide adequate financial support to maintain and operate the facility.

(8) _____ agrees that following completion of the project, it will open at least eight beds per month until the project area is filled.

(9) _____ agrees that it will use the facilities principally to furnish veterans (nursing home care, domiciliary care, adult day health care) and that not more than 25 percent of the bed occupancy at any one time will consist of residents who are not receiving such level of care as veterans.

(10) _____ agrees that it will operate and maintain the facility in conformance with State standards and with all applicable State and local laws, codes, regulations and ordinances, and in conformance with the standards prescribed by VA.

(11) _____ agrees that it will make such reports in such form and containing such information as the Secretary may from time to time reasonably require, and give the Secretary, upon demand, access to the records upon which such information is based.

The Secretary of the Department of Veterans Affairs hereby approves the project. After _____ certifies its (construction, acquisition) costs as set forth in paragraph (5) above, the Secretary agrees to make partial payments of the grant to cover the costs certified. VA payments will be limited to the unpaid obligated balance of the grant for actual incurred costs for this project.

This grant is subject to the recapture provisions stated in 38 CFR 59.110.

IN WITNESS WHEREOF, the parties have hereunto affixed their signature on the dates indicated

_____

_____
State Representative Date

_____
Secretary of the Department of Veterans Affairs Date

VA FROM MAR 2001 **10-5348**

(m) Standard Form 271—OUTLAY REPORT AND REGUEST FOR REIMBURSEMENT FOR CONSTRUCTION PROGRAMS.

| OUTLAY REPORT AND REQUEST FOR REIMBURSEMENT FOR CONSTRUCTION PROGRAMS (*See instructions on back*) | Approved by Office of Management and Budget, No. 80–R0181 | PAGE OF PAGES |
|---|---|---|
| | 1. TYPE OF REQUEST ☐ FINAL ☐ PARTIAL | 2. BASIS OF REQUEST ☐ CASH ☐ ACCRUAL |
| 3. FEDERAL SPONSORING AGENCY AND ORGANIZATIONAL ELEMENT TO WHICH THIS REPORT IS SUBMITTED | 4. FEDERAL GRANT OR OTHER IDENTIFYING NUMBER ASSIGNED BY FEDERAL AGENCY | 5. PARTIAL PAYMENT REQUEST NO. |
| 6. EMPLOYER IDENTIFICATION NUMBER / 7. RECIPIENT ACCOUNT OR OTHER IDENTIFYING NUMBER | PERIOD COVERED BY THIS REPORT | |
| | FROM (*Month, day, year*) | TO (*Month, day, year*) |
| 9. RECIPIENT ORGANIZATION<br>*Name* :<br>*No. and Street* :<br>*City, State and ZIP Code* : | 10. PAYEE (*Where check should be sent if different than item 9*)<br>*Name* :<br>*No. and Street* :<br>*City, Street and ZIP Code* : | |

11. STATUS OF FUNDS

| CLASSIFICATION | PROGRAMS—FUNCTIONS—ACTIVITIES (a) | (b) | (c) | TOTAL |
|---|---|---|---|---|
| a. Administrative expense | $ | $ | $ | $ |
| b. Preliminary expense | | | | |
| c. Land, structures, right-of-way | | | | |
| d. Architectural engineering basic fees | | | | |
| e. Other architectural engineering fees | | | | |
| f. Project inspection fees | | | | |
| g. Land development | | | | |
| h. Relocation expense | | | | |
| i. Relocation payments to individuals and businesses | | | | |
| j. Demolition and removal | | | | |
| k. Construction and project improvement cost | | | | |
| l. Equipment | | | | |
| m. Miscellaneous cost | | | | |
| n. Total cumulative to date (sum of lines a thru m) | | | | |
| o. Deductions for program income | | | | |
| p. Net cumulative to date (Line n minus line o) | | | | |
| q. Federal share to date | | | | |
| r. Rehabilitation grants (100% reimbursement) | | | | |
| s. Total Federal share (sum of lines q and r) | | | | |
| t. Federal payments previously requested | | | | |
| u. Amount requested for reimbursement | $ | $ | $ | $ |
| v. Percentage of physical completion of project | % | % | % | % |

| 12. CERTIFICATION | | | |
|---|---|---|---|
| I certify that to the best of my knowledge and belief the billed costs or disbursements are in accordance with the terms of the project and that the reimbursement represents the Federal share due which has not been previously requested and that an inspection has been performed and all work is in accordance with the terms of the award. | a. RECIPIENT | SIGNATURE OF AUTHORIZED CERTIFYING OFFICIAL | DATE REPORT SUBMITTED |
| | | TYPED OR PRINTED NAME AND TITLE | TELEPHONE (*Area code, number and extension*) |
| | b. Representative certifying to line 11v. | SIGNATURE OF AUTHORIZED CERTIFYING OFFICIAL | DATE SIGNED |
| | | TYPED OR PRINTED NAME AND TITLE | TELEPHONE (*Area code number and extension*) |

271–102

STANDARD FORM 271 (7–76)
Prescribed by Office of Management and Budget
Cir. No. A–110

## INSTRUCTIONS

Please type or print legibly. Items 3, 4, 5, 8, 9, 10, 11s, and 11v are self-explanatory; specific instructions for other items are as follows:

| *Item* | *Entry* |
|---|---|
| 1 | Mark the appropriate box. If the request is final, the amounts billed should represent the final cost of the project. |
| 2 | Show whether amounts are computed on an accrued expenditure or cash disbursement basis. |
| 6 | Enter the employer identification number assigned by the U.S. Internal Revenue Service [or FICE (institution) code if requested by the Federal agency]. |
| 7 | This space is reserved for an account number or other identifying number that may be assigned by the recipient. |
| 11 | The purpose of vertical columns (a) through (c) is to provide space for separate cost breakdowns when a large project has been planned and budgeted by program, function or activity. If additional columns are needed, use as many additional forms as needed and indicate page number in space provided in upper right; however, the summary totals of all programs, functions, or activities should be shown in the "total" column on the first page. All amounts are reported on a cumulative basis. |
| 11a | Enter amounts expended for such items as travel, legal fees, rental, of vehicles and any other administrative expenses. Include the amount of interest expense when authorized by program legislation. Also show the amount of interest expense on a separate sheet. |
| 11b | Enter amounts pertaining to the work of locating and designing, making surveys and maps, sinking test holes, and all other work required prior to actual construction. |
| 11c | Enter all amounts directly associated with the acquisition of land, existing structures and related right-of-way. |
| 11d | Ener basic fees for services of architectural engineers. |
| 11e | Enter other architectural engineering services. Do not include any amounts shown on line d. |
| 11f | Enter inspection and audit fees of construction and related programs. |
| 11g | Enter all amounts associated with the development of land where the primary purpose of the grant is land improvement. The amount pertaining to land development normally associated with major construction should be excluded from this category and entered on line k. |
| 11h | Enter the dollar amounts used to provide relocation advisory assistance and net costs of replacement housing (last resort). Do not include amounts needed for relocation administrative expenses; these amounts should be included in amounts shown on line a. |
| 11i | Enter the amount of relocation payments made by the recipient to displaced persons, farms, business concerns, and nonprofit organizations. |
| 11j | Enter gross salaries and wages of employees of the recipient and payments to third party contractors directly engaged in performing demolition or removal of structures from developed land. All proceeds from the sale of salvage or the removal of structures should be credited to this account; thereby reflecting net amounts if required by the Federal agency. |
| 11k | Enter those amounts associated with the actual construction of, addition to, or restoration of a facility. Also, include in this category, the amounts for project improvements such as sewers, streets, landscaping, and lighting. |
| 11l | Enter amounts for all equipment, both fixed and movable, exclusive of equipment used for construction. For example, permanently attached laboratory tables, built-in audio visual systems, movable desks, chairs, and laboratory equipment. |
| 11m | Enter the amounts for all items not specifically mentioned above. |
| 11n | Enter the total cumulative amount to date which should be the sum of lines a through m. |
| 11o | Enter the total amount of program income applied to the grant or contract agreement except income included on line j. Identify on a separate sheet of paper the sources and types of the income. |
| 11p | Enter the net cumulative amount to date which should be the amount shown on line n minus the amount on line o. |
| 11q | Enter the Federal share of the amount shown on line p. |
| 11r | Enter the amount of rehabilitation grant payments made to individuals when program legislation provides 100 percent payment by the Federal agency. |
| 11t | Enter the total amount of Federal payments previously requested, if this form is used for requesting reimbursement. |
| 11u | Enter the amount now being requested for reimbursement. This amount should be the difference between the amounts shown on lines s and t. If different, explain on a separate sheet. |
| 12a | To be completed by the recipient official who is responsible for the operation of the program. The date should be the actual date the form is submitted to the Federal agency. |
| 12b | To be completed by the official representative who is certifying to the percent of project completion as provided for in the terms of the grant or agreement. |

STANDARD FORM 271 (7-76)

(n) Standard Form 424—APPLICATION FOR FEDERAL ASSISTANCE.

**APPLICATION FOR FEDERAL ASSISTANCE**

OMB Approval No. 0348-0043

| | | | |
|---|---|---|---|
| | | **2. DATE SUBMITTED** | Applicant Identifier |
| **1. TYPE OF SUBMISSION:** Application ☐ **Construction** ☐ **Non-Construction** | Preapplication ☐ **Construction** ☐ **Non-Construction** | **3. DATE RECEIVED BY STATE** | State Application Identifier |
| | | **4. DATE RECEIVED BY FEDERAL AGENCY** | Federal Identifier |

**5. APPLICANT INFORMATION**

| | |
|---|---|
| Legal Name: | Organizational Unit: |
| Address *(give city, county, State, and zip code):* | Name and telephone number of person to be contacted on matters involving this application *(give area code)* |

**6. EMPLOYER IDENTIFICATION NUMBER** *(EIN):*

☐☐ – ☐☐☐☐☐☐☐

**7. TYPE OF APPLICANT:** *(enter appropriate letter in box)* ☐

A. State
B. County
C. Municipal
D. Township
E. Interstate
F. Intermunicipal
G. Special District
H. Independent School Dist.
I. State Controlled Institution of Higher Learning
J. Private University
K. Indian Tribe
L. Individual
M. Profit Organization
N. Other (Specify) _____

**8. TYPE OF APPLICATION:**

☐ **New** ☐ **Continuation** ☐ **Revision**

If Revision, enter appropriate letter(s) in box(es) ☐ ☐

A. Increase Award B. Decrease Award C. Increase Duration
D. Decrease Duration Other*(specify):*

_____

**9. NAME OF FEDERAL AGENCY:**

**10. CATALOG OF FEDERAL DOMESTIC ASSISTANCE NUMBER:**

☐☐ – ☐☐☐

TITLE:

**11. DESCRIPTIVE TITLE OF APPLICANT'S PROJECT:**

**12. AREAS AFFECTED BY PROJECT** *(Cities, Counties, States, etc.):*

| **13. PROPOSED PROJECT** | | **14. CONGRESSIONAL DISTRICTS OF:** | |
|---|---|---|---|
| Start Date | Ending Date | a. Applicant | b. Project |

**15. ESTIMATED FUNDING:**

| | |
|---|---|
| a. Federal | $ .00 |
| b. Applicant | $ .00 |
| c. State | $ .00 |
| d. Local | $ .00 |
| e. Other | $ .00 |
| f. Program Income | $ .00 |
| g. TOTAL | $ .00 |

**16. IS APPLICATION SUBJECT TO REVIEW BY STATE EXECUTIVE ORDER 12372 PROCESS?**

a. YES. THIS PREAPPLICATION/APPLICATION WAS MADE AVAILABLE TO THE STATE EXECUTIVE ORDER 12372 PROCESS FOR REVIEW ON:

DATE _____

b. No. ☐ PROGRAM IS NOT COVERED BY E. O. 12372
☐ OR PROGRAM HAS NOT BEEN SELECTED BY STATE FOR REVIEW

**17. IS THE APPLICANT DELINQUENT ON ANY FEDERAL DEBT?**

☐ **Yes** **If "Yes," attach an explanation.** ☐ **No**

**18. TO THE BEST OF MY KNOWLEDGE AND BELIEF, ALL DATA IN THIS APPLICATION/PREAPPLICATION ARE TRUE AND CORRECT, THE DOCUMENT HAS BEEN DULY AUTHORIZED BY THE GOVERNING BODY OF THE APPLICANT AND THE APPLICANT WILL COMPLY WITH THE ATTACHED ASSURANCES IF THE ASSISTANCE IS AWARDED.**

| | | |
|---|---|---|
| a. Type Name of Authorized Representative | b. Title | c. Telephone Number |
| d. Signature of Authorized Representative | | e. Date Signed |

Previous Edition Usable
Authorized for Local Reproduction

Standard Form 424 (Rev. 7-97)
Prescribed by OMB Circular A-102

**INSTRUCTIONS FOR THE SF-424**

Public reporting burden for this collection of information is estimated to average 45 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0043), Washington, DC 20503.

**PLEASE DO NOT RETURN YOUR COMPLETED FORM TO THE OFFICE OF MANAGEMENT AND BUDGET. SEND IT TO THE ADDRESS PROVIDED BY THE SPONSORING AGENCY.**

This is a standard form used by applicants as a required facesheet for preapplications and applications submitted for Federal assistance. It will be used by Federal agencies to obtain applicant certification that States which have established a review and comment procedure in response to Executive Order 12372 and have selected the program to be included in their process, have been given an opportunity to review the applicant's submission.

| Item: | Entry: |
|---|---|
| 1. | Self-explanatory. |
| 2. | Date application submitted to Federal agency (or State if applicable) and applicant's control number (if applicable). |
| 3. | State use only (if applicable). |
| 4. | If this application is to continue or revise an existing award, enter present Federal identifier number. If for a new project, leave blank. |
| 5. | Legal name of applicant, name of primary organizational unit which will undertake the assistance activity, complete address of the applicant, and name and telephone number of the person to contact on matters related to this application. |
| 6. | Enter Employer Identification Number (EIN) as assigned by the Internal Revenue Service. |
| 7. | Enter the appropriate letter in the space provided. |
| 8. | Check appropriate box and enter appropriate letter(s) in the space(s) provided:<br>-- "New" means a new assistance award.<br>-- "Continuation" means an extension for an additional funding/budget period for a project with a projected completion date.<br>-- "Revision" means any change in the Federal Government's financial obligation or contingent liability from an existing obligation. |
| 9. | Name of Federal agency from which assistance is being requested with this application. |
| 10. | Use the Catalog of Federal Domestic Assistance number and title of the program under which assistance is requested. |
| 11. | Enter a brief descriptive title of the project. If more than one program is involved, you should append an explanation on a separate sheet. If appropriate (e.g., construction or real property projects), attach a map showing project location. For preapplications, use a separate sheet to provide a summary description of this project. |
| 12. | List only the largest political entities affected (e.g., State, counties, cities). |
| 13. | Self-explanatory. |
| 14. | List the applicant's Congressional District and any District(s) affected by the program or project. |
| 15. | Amount requested or to be contributed during the first funding/budget period by each contributor. Value of in-kind contributions should be included on appropriate lines as applicable. If the action will result in a dollar change to an existing award, indicate *only* the amount of the change. For decreases, enclose the amounts in parentheses. If both basic and supplemental amounts are included, show breakdown on an attached sheet. For multiple program funding, use totals and show breakdown using same categories as item 15. |
| 16. | Applicants should contact the State Single Point of Contact (SPOC) for Federal Executive Order 12372 to determine whether the application is subject to the State intergovernmental review process. |
| 17. | This question applies to the applicant organization, not the person who signs as the authorized representative. Categories of debt include delinquent audit disallowances, loans and taxes. |
| 18. | To be signed by the authorized representative of the applicant. A copy of the governing body's authorization for you to sign this application as official representative must be on file in the applicant's office. (Certain Federal agencies may require that this authorization be submitted as part of the application.) |

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(o) Standard Form 424C—INSTRUCTIONS FOR THE SF–424C.

OMB Approval No. 0348-0041

**BUDGET INFORMATION - Construction Programs**

*NOTE: Certain Federal assistance programs require additional computations to arrive at the Federal share of project costs eligible for participation. If such is the case, you will be notified.*

| COST CLASSIFICATION | a. Total Cost | b. Costs Not Allowable for Participation | c. Total Allowable Costs (Columns a-b) |
|---|---|---|---|
| 1. Administrative and legal expenses | $ .00 | $ .00 | $ .00 |
| 2. Land, structures, rights-of-way, appraisals, etc. | $ .00 | $ .00 | $ .00 |
| 3. Relocation expenses and payments | $ .00 | $ .00 | $ .00 |
| 4. Architectural and engineering fees | $ .00 | $ .00 | $ .00 |
| 5. Other architectural and engineering fees | $ .00 | $ .00 | $ .00 |
| 6. Project inspection fees | $ .00 | $ .00 | $ .00 |
| 7. Site work | $ .00 | $ .00 | $ .00 |
| 8. Demolition and removal | $ .00 | $ .00 | $ .00 |
| 9. Construction | $ .00 | $ .00 | $ .00 |
| 10. Equipment | $ .00 | $ .00 | $ .00 |
| 11. Miscellaneous | $ .00 | $ .00 | $ .00 |
| 12. SUBTOTAL *(sum of lines 1-11)* | $ .00 | $ .00 | $ .00 |
| 13. Contingencies | $ .00 | $ .00 | $ .00 |
| 14. SUBTOTAL | $ .00 | $ .00 | $ .00 |
| 15. Project (program) income | $ .00 | $ .00 | $ .00 |
| 16. TOTAL PROJECT COSTS *(subtract #15 from #14)* | $ .00 | $ .00 | $ .00 |
| FEDERAL FUNDING | | | |
| 17. Federal assistance requested, calculate as follows: (Consult Federal agency for Federal percentage share.) Enter the resulting Federal share. | Enter eligible costs from line 16c Multiply X _____% | | $ .00 |

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**INSTRUCTIONS FOR THE SF-424C**

Public reporting burden for this collection of information is estimated to average 180 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0041), Washington, DC 20503.

**PLEASE DO NOT RETURN YOUR COMPLETED FORM TO THE OFFICE OF MANAGEMENT AND BUDGET. SEND IT TO THE ADDRESS PROVIDED BY THE SPONSORING AGENCY.**

This sheet is to be used for the following types of applications: (1) "New" (means a new [previously unfunded] assistance award); (2) "Continuation" (means funding in a succeeding budget period which stemmed from a prior agreement to fund); and (3) "Revised" (means any changes in the Federal Government's financial obligations or contingent liability from an existing obligation). If there is no change in the award amount, there is no need to complete this form. Certain Federal agencies may require only an explanatory letter to effect minor (no cost) changes. If you have questions, please contact the Federal agency.

*Column* a. - If this is an application for a "New" project, enter the total estimated cost of each of the items listed on lines 1 through 16 (as applicable) under "COST CLASSIFICATION."

If this application entails a change to an existing award, enter the eligible amounts *approved under the previous award* for the items under "COST CLASSIFICATION."

*Column* b. - If this is an application for a "New" project, enter that portion of the cost of each item in Column a. which is *not* allowable for Federal assistance. Contact the Federal agency for assistance in determining the allowability of specific costs.

If this application entails a change to an existing award, enter the adjustment [+ or (-)] to the previously approved costs (from column a.) reflected in this application.

*Column*. - This is the net of lines 1 through 16 in columns "a." and "b."

---

Line 1 - Enter estimated amounts needed to cover administrative expenses. Do not include costs which are related to the normal functions of government. Allowable legal costs are generally only those associated with the purchases of land which is allowable for Federal participation and certain services in support of construction of the project.

Line 2 - Enter estimated site and right(s)-of-way acquisition costs (this includes purchase, lease, and/or easements).

Line 3 - Enter estimated costs related to relocation advisory assistance, replacement housing, relocation payments to displaced persons and businesses, etc.

Line 4 - Enter estimated basic engineering fees related to construction (this includes start-up services and preparation of project performance work plan).

Line 5 - Enter estimated engineering costs, such as surveys, tests, soil borings, etc.

Line 6 - Enter estimated engineering inspection costs.

Line 7 - Enter estimated costs of site preparation and restoration which are not included in the basic construction contract.

Line 9 - Enter estimated cost of the construction contract.

Line 10 - Enter estimated cost of office, shop, laboratory, safety equipment, etc. to be used at the facility, if such costs are not included in the construction contract.

Line 11 - Enter estimated miscellaneous costs.

Line 12 - Total of items 1 through 11.

Line 13 - Enter estimated contingency costs. (Consult the Federal agency for the percentage of the estimated construction cost to use.)

Line 14 - Enter the total of lines 12 and 13.

Line 15 - Enter estimated program income to be earned during the grant period, e.g., salvaged materials, etc.

Line 16 - Subtract line 15 from line 14.

Line 17 - This block is for the computation of the Federal share. Multiply the total allowable project costs from line 16, column "c." by the Federal percentage share (this may be up to 100 percent; consult Federal agency for Federal percentage share) and enter the product on line 17.

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(p) Standard Form 424D—ASSURANCES—CONSTRUCTION PROGRAMS.

OMB Approval No. 0348-0042

**ASSURANCES - CONSTRUCTION PROGRAMS**

Public reporting burden for this collection of information is estimated to average 15 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0042), Washington, DC 20503.

**PLEASE DO NOT RETURN YOUR COMPLETED FORM TO THE OFFICE OF MANAGEMENT AND BUDGET. SEND IT TO THE ADDRESS PROVIDED BY THE SPONSORING AGENCY.**

**NOTE:** Certain of these assurances may not be applicable to your project or program. If you have questions, please contact the Awarding Agency. Further, certain Federal assistance awarding agencies may require applicants to certify to additional assurances. If such is the case, you will be notified.

As the duly authorized representative of the applicant, I certify that the applicant:

1. Has the legal authority to apply for Federal assistance, and the institutional, managerial and financial capability (including funds sufficient to pay the non-Federal share of project costs) to ensure proper planning, management and completion of the project described in this application.

2. Will give the awarding agency, the Comptroller General of the United States and, if appropriate, the State, through any authorized representative, access to and the right to examine all records, books, papers, or documents related to the assistance; and will establish a proper accounting system in accordance with generally accepted accounting standards or agency directives.

3. Will not dispose of, modify the use of, or change the terms of the real property title, or other interest in the site and facilities without permission and instructions from the awarding agency. Will record the Federal interest in the title of real property in accordance with awarding agency directives and will include a covenant in the title of real property aquired in whole or in part with Federal assistance funds to assure non-discrimination during the useful life of the project.

4. Will comply with the requirements of the assistance awarding agency with regard to the drafting, review and approval of construction plans and specifications.

5. Will provide and maintain competent and adequate engineering supervision at the construction site to ensure that the complete work conforms with the approved plans and specifications and will furnish progress reports and such other information as may be required by the assistance awarding agency or State.

6. Will initiate and complete the work within the applicable time frame after receipt of approval of the awarding agency.

7. Will establish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest, or personal gain.

8. Will comply with the Intergovernmental Personnel Act of 1970 (42 U.S.C. §§4728-4763) relating to prescribed standards for merit systems for programs funded under one of the 19 statutes or regulations specified in Appendix A of OPM's Standards for a Merit System of Personnel Administration (5 C.F.R. 900, Subpart F).

9. Will comply with the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. §§4801 et seq.) which prohibits the use of lead-based paint in construction or rehabilitation of residence structures.

10. Will comply with all Federal statutes relating to non-discrimination. These include but are not limited to: (a) Title VI of the Civil Rights Act of 1964 (P.L. 88-352) which prohibits discrimination on the basis of race, color or national origin; (b) Title IX of the Education Amendments of 1972, as amended (20 U.S.C. §§1681 1683, and 1685-1686), which prohibits discrimination on the basis of sex; (c) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. §794), which prohibits discrimination on the basis of handicaps; (d) the Age Discrimination Act of 1975, as amended (42 U.S.C. §§6101-6107), which prohibits discrimination on the basis of age; (e) the Drug Abuse Office and Treatment Act of 1972 (P.L. 92-255), as amended, relating to nondiscrimination on the basis of drug abuse; (f) the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (P.L. 91-616), as amended, relating to nondiscrimination on the basis of alcohol abuse or alcoholism; (g) §§523 and 527 of the Public Health Service Act of 1912 (42 U.S.C. §§290 dd-3 and 290 ee 3), as amended, relating to confidentiality of alcohol and drug abuse patient records; (h) Title VIII of the Civil Rights Act of 1968 (42 U.S.C. §§3601 et seq.), as amended, relating to nondiscrimination in the sale, rental or financing of housing; (i) any other nondiscrimination provisions in the specific statute(s) under which application for Federal assistance is being made; and, (j) the requirements of any other nondiscrimination statute(s) which may apply to the application.

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11. Will comply, or has already complied, with the requirements of Titles II and III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646) which provide for fair and equitable treatment of persons displaced or whose property is acquired as a result of Federal and federally-assisted programs. These requirements apply to all interests in real property acquired for project purposes regardless of Federal participation in purchases.

12. Will comply with the provisions of the Hatch Act (5 U.S.C. §§1501-1508 and 7324-7328) which limit the political activities of employees whose principal employment activities are funded in whole or in part with Federal funds.

13. Will comply, as applicable, with the provisions of the Davis-Bacon Act (40 U.S.C. §§276a to 276a-7), the Copeland Act (40 U.S.C. §276c and 18 U.S.C. §874), and the Contract Work Hours and Safety Standards Act (40 U.S.C. §§327-333) regarding labor standards for federally-assisted construction subagreements.

14. Will comply with flood insurance purchase requirements of Section 102(a) of the Flood Disaster Protection Act of 1973 (P.L. 93-234) which requires recipients in a special flood hazard area to participate in the program and to purchase flood insurance if the total cost of insurable construction and acquisition is $10,000 or more.

15. Will comply with environmental standards which may be prescribed pursuant to the following: (a) institution of environmental quality control measures under the National Environmental Policy Act of 1969 (P.L. 91-190) and Executive Order (EO) 11514; (b) notification of violating facilities pursuant to EO 11738; (c) protection of wetlands pursuant to EO 11990; (d) evaluation of flood hazards in floodplains in accordance with EO 11988; (e) assurance of project consistency with the approved State management program developed under the Coastal Zone Management Act of 1972 (16 U.S.C. §§1451 et seq.); (f) conformity of Federal actions to State (Clean Air) Implementation Plans under Section 176(c) of the Clean Air Act of 1955, as amended (42 U.S.C. §§7401 et seq.); (g) protection of underground sources of drinking water under the Safe Drinking Water Act of 1974, as amended (P.L. 93-523); and, (h) protection of endangered species under the Endangered Species Act of 1973, as amended (P.L. 93-205).

16. Will comply with the Wild and Scenic Rivers Act of 1968 (16 U.S.C. §§1271 et seq.) related to protecting components or potential components of the national wild and scenic rivers system.

17. Will assist the awarding agency in assuring compliance with Section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. §470), EO 11593 (identification and protection of historic properties), and the Archaeological and Historic Preservation Act of 1974 (16 U.S.C. §§469a-1 et seq.).

18. Will cause to be performed the required financial and compliance audits in accordance with the Single Audit Act Amendments of 1996 and OMB Circular No. A-133, "Audits of States, Local Governments, and Non-Profit Organizations."

19. Will comply with all applicable requirements of all other Federal laws, executive orders, regulations, and policies governing this program.

| SIGNATURE OF AUTHORIZED CERTIFYING OFFICIAL | TITLE |
|---|---|
| APPLICANT ORGANIZATION | DATE SUBMITTED |

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(Authority: 38 U.S.C. 101, 501, 1710, 1742, 8105, 8131–8137; Sections 2, 3, 4, and 4a of the Architectural Barriers Act of 1968, as amended, Public Law 90–480, 42 U.S.C. 4151–4157)

# PART 60—FISHER HOUSES AND OTHER TEMPORARY LODGING

Sec.
60.1 Purpose.
60.2 Definitions.
60.3 Eligible persons.
60.4 Application.
60.5 Travel.
60.6 Condition of veteran.
60.7 Duration of temporary lodging.
60.8 Lodging availability.
60.9 Decisionmaker.
60.10 Costs.

AUTHORITY: 38 U.S.C. 501, 1708.

SOURCE: 68 FR 8549, Feb. 24, 2003, unless otherwise noted.

### § 60.1 Purpose.

This part sets forth requirements regarding the use of Fisher Houses and other temporary lodging by veterans receiving VA medical care or C&P examinations and a family member or other person accompanying the veteran to provide the equivalent of familial support.

(Authority: 38 U.S.C. 501, 1708)

### § 60.2 Definitions.

For the purposes of this part:

*C&P examination* means an examination requested by VA's Compensation and Pension Service to be conducted at a VA health care facility for the purpose of evaluating claims by veterans.

*Temporary lodging means:*

(1) Lodging at a Fisher House which is a housing facility that is located at or near a VA health care facility, that is available for residential use on a temporary basis by eligible persons, and that was constructed by and donated to VA by the Zachary and Elizabeth M. Fisher Armed Services Foundation or Fisher House Foundation; or

(2) Lodging at a temporary lodging facility located at a VA health care facility (generally referred to as a ''hoptel''), or a temporary non-VA lodging facility, such as a hotel or motel, provided by a VA health care facility.

*VA* means the Department of Veterans Affairs.

(Authority: 38 U.S.C. 501, 1708)

### § 60.3 Eligible persons.

The following are eligible to stay in temporary lodging subject to the conditions of this part:

(a) A veteran with an appointment at a VA health care facility for the purpose of receiving health care or a C&P examination; and

(b) A member of the family of such veteran or another person who accompanies such veteran to provide the equivalent of familial support.

(Authority: 38 U.S.C. 501, 1708)

### § 60.4 Application.

To obtain temporary lodging under this part, a veteran must make an application to the person responsible for coordinating the temporary lodging program at the VA health care facility of jurisdiction. This may be done by letter, electronic means (including telephone, e-mail, or facsimile), or in person at the VA health care facility of jurisdiction. The veteran shall provide the following information:

(a) Veteran's name;

(b) Beginning date and time and duration of scheduled care;

(c) Type of scheduled care;

(d) Name, gender, and relationship to the veteran of person accompanying veteran;

(e) Requested dates for temporary lodging;

(f) Distance, time, and means of travel from the veteran's home to VA health care facility;

(g) Circumstances that may affect the time of travel from the veteran's home to VA health care facility; and

(h) A statement that the veteran is medically stable and capable of self-care or will be accompanied by a caregiver able to provide the necessary care.

(Authority: 38 U.S.C. 501, 1708)

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0630.)

### § 60.5 Travel.

As a condition for receiving temporary lodging under this part, a veteran must be required to travel either 50 or more miles, or at least two hours from his or her home to the VA health care facility, except that the facility Director at the VA health care facility of jurisdiction may make an exception to distance or time provisions based on exceptional circumstances, such as condition of the veteran, inclement weather, road conditions, or the mode of transportation used by the veteran.

(Authority: 38 U.S.C. 501, 1708)

### § 60.6 Condition of veteran.

As a condition for receiving temporary lodging under this part, the veteran must be medically stable and

must be capable of self-care or be accompanied by a caregiver able to provide the necessary care. Questions regarding these issues will be resolved by an appropriate health care provider at the VA health care facility of jurisdiction.

(Authority: 38 U.S.C. 501, 1708)

### § 60.7 Duration of temporary lodging.

Temporary lodging may be furnished to eligible persons in connection with care or C&P examinations provided at a VA health care facility. When a veteran is undergoing extensive treatment or procedures, such as an organ transplant or chemotherapy, eligible persons may be furnished temporary lodging for the duration of the episode of care subject to limitations described in this section. Temporary lodging may be available the night before the day of the scheduled care, if the veteran leaving home by 8 a.m., would be unable to arrive at the health care facility by the time of the scheduled care. Temporary lodging may be available the night of the scheduled care if, after the completion of the care, the veteran would be unable to return home by 7 p.m.

(Authority: 38 U.S.C. 501, 1708)

### § 60.8 Lodging availability.

Fisher Houses are available solely for temporary lodging under this part. Non-utilized beds and rooms at a VA health care facility will be made available if not barred by law and if the Director of the VA health care facility determines that such action would not have a negative impact on patient care. Temporary lodging facilities, such as hotels or motels, will be utilized based on availability of local funding as determined by the Director of the health care facility of jurisdiction. Temporary lodging will be provided on a first-come first-serve basis.

(Authority: 38 U.S.C. 501, 1708)

### § 60.9 Decisionmaker.

Except as otherwise provided in this part, the person responsible for coordinating the temporary lodging program at the VA health care facility of jurisdiction is responsible for making decisions under this part.

(Authority: 38 U.S.C. 501, 1708)

### § 60.10 Costs.

Costs for temporary lodging under this part shall be borne by VA.

(Authority: 38 U.S.C. 501, 1708)

## PART 61—VA HOMELESS PROVIDERS GRANT AND PER DIEM PROGRAM

Sec.

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61.1 Definitions.
61.10 Capital grants—general.
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61.14 Selecting applications for capital grants.
61.15 Obtaining additional information and awarding capital grants.
61.16 Matching funds for capital grants.
61.17 Site control for capital grants.
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61.81 Outreach activities.
61.82 Resident rent for supportive housing.

AUTHORITY: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 *note*.

SOURCE: 68 FR 13594, Mar. 19, 2003, unless otherwise noted.

## § 61.0 Purpose.

This part implements the VA Homeless Providers Grant and Per Diem Program which consists of the following components: capital grants, per diem, special needs grants, and technical assistance grants.

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 *note*)

## § 61.1 Definitions.

For purposes of this part:

*Area or community* means a political subdivision or contiguous political subdivisions (such as precinct, ward, borough, city, county, State, Congressional district, etc.) with a separately identifiable population of homeless veterans.

*Capital grant* means a grant for construction, renovation, or acquisition of a facility; or for acquisition of a van.

*Capital lease* means a lease that will be in effect for the full period in which VA may recover all or portions of the capital grant amount under this part.

*Chronically mentally ill* means a condition of schizophrenia or major affective disorder (including bipolar disorder) or post-traumatic stress disorder (PTSD), based on a diagnosis from a licensed mental health professional, with at least one documented hospitalization for this condition sometime in the last 2 years or with documentation of a formal assessment on a standardized scale of any serious symptomology or serious impairment in the areas of work, family relations, thinking, or mood.

*Fee* means a fixed charge for a service offered by a recipient under this part, that is in addition to the services that are outlined in the recipient's application; and are not paid for by VA per diem or provided by VA, (*e.g.*, cable television, recreational outings, professional instruction or counseling).

*Fixed site* means a physical structure that under normal conditions is not capable of readily being moved from one location to another location.

*Frail elderly* means 65 years of age or older with one or more chronic health problems and limitations in performing one or more activities of daily living (such as bathing, toileting, transferring from bed to chair, etc.)

*Homeless means:* (1)(i) Lacking a fixed, regular and adequate nighttime residence; or

(ii) Having a primary nighttime residence that is—

(A) A supervised publicly or privately operated shelter designed to provide temporary living accommodations (including welfare hotels, congregate shelters, and transitional housing for the mentally ill);

(B) An institution that provides a temporary residence for persons intended to be institutionalized; or

(C) A public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.

(2) The term homeless does not include imprisonment or other detainment pursuant to Federal or State law. Imprisonment or other detainment does not include probation, parole or electronic custody.

*New construction* means the building of a structure where none existed or an addition to an existing structure that increases the floor area by more than 100 percent.

*Nonprofit organization* means a private organization, no part of the net earnings of which may inure to the benefit of any member, founder, contributor, or individual. The organization must be recognized as a 501(c)(3) or 501(c)(19) nonprofit organization by the United States Internal Revenue Service, and:

(1) Have a voluntary board;

(2) Have a functioning accounting system that is operated in accordance with generally accepted accounting principles, or designate an entity that will maintain a functioning accounting system for the organization in accordance with generally accepted accounting principles; and

(3) Practice nondiscrimination in the provision of supportive housing and supportive services assistance.

*Operating costs* means expenses incurred in operating supportive housing, supportive services or service centers with respect to:

(1) Administration (including staff salaries; costs associated with accounting for the use of grant funds, preparing reports for submission to VA, obtaining program audits, and securing accreditation; and similar costs related to administering the grant after the award), maintenance, repair and security for the supportive housing;

(2) Van costs or building rent (except under capital leases), *e.g.*, fuel, insurance, utilities, furnishings, and equipment;

(3) Conducting on-going assessments of supportive services provided for and needed by participants and the availability of such services;

(4) Other costs associated with operating the supportive housing.

*Outpatient health services* means outpatient health care, outpatient mental health services, outpatient alcohol and/or substance abuse services, and case management.

*Participant* means a person receiving services based on a grant or per diem provided under this part.

*Public entity* includes:

(1) A county, municipality, city, town, township, local public authority (including any public and Indian housing agency under the United States Housing Act of 1937), school district, special district, intrastate district, council of governments (whether or not incorporated as a nonprofit corporation under state law), any other regional or interstate government entity, or any agency or instrumentality of a local government, and

(2) The governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community (including any Native village as defined in section 3 of the Alaska Native Claims Settlement Act, 85 Stat 688) certified by the Secretary of the Interior as eligible for the special programs and services provided by the Bureau of Indian Affairs.

*Rehabilitation* means the improvement or repair of an existing structure. Rehabilitation does not include minor or routine repairs.

*State* means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. The term does not include any public and Indian housing agency under United States Housing Act of 1937.

*Supportive housing* means housing with supportive services provided for homeless veterans and is:

(1) Transitional housing, or

(2) A part of, a particularly innovative project for, or alternative method of, meeting the immediate and long-term needs of homeless veterans.

*Supportive services* means services, which may be designed by the recipient or program participants, that provide appropriate services or assist such persons in obtaining appropriate services to address the needs of homeless veterans to be served by the project. Supportive services does not include inpatient acute hospital care, but does include:

(1) Outreach activities;

(2) Providing food, nutritional advice, counseling, health care, mental health treatment, alcohol and other substance abuse services, case management services;

(3) Establishing and operating child care services for dependents of homeless veterans;

(4) Providing supervision and security arrangements necessary for the protection of residents of supportive housing and for homeless veterans using supportive housing or services;

(5) Providing assistance in obtaining permanent housing;

(6) Providing education, employment counseling and assistance, and job training;

(7) Providing assistance in obtaining other Federal, State and local assistance available for such residents including mental health benefits, employment counseling and assistance, veterans' benefits, medical assistance, and income support assistance; and

(8) Providing housing assistance, legal assistance, advocacy, transportation, and other services essential for achieving and maintaining independent living.

*Terminally ill* means a prognosis of 9 months or less to live based on a written medical diagnosis from a physician.

*VA* means the Department of Veterans Affairs.

*Veteran* means a person who served in the active military, naval, or air service, and who was discharged or released there from under conditions other than dishonorable.

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 *note*)

### § 61.10 Capital grants—general.

(a) VA provides capital grants to public or nonprofit private entities so they can assist homeless veterans by helping to ensure the availability of supportive housing and service centers to furnish outreach, rehabilitative services, vocational counseling and training, and transitional housing. Specifically, VA provides capital grants for up to 65 percent of the cost to:

(1) Construct structures and purchase the underlying land to establish new supportive housing facilities or service centers, or to expand existing supportive housing facilities or service centers;

(2) Acquire structures to establish new supportive housing facilities or service centers, or to expand existing supportive housing facilities or service centers;

(3) Renovate existing structures to establish new supportive housing facilities or service centers, or to expand existing supportive housing facilities or service centers; and

(4) Procure vans (purchase price, sales taxes, and title and licensing fees) to provide transportation or outreach for the purpose of providing supportive services.

(b) Capital grants may not be use for acquiring buildings located on VA-owned property. However, capital grants may be awarded for construction, expansion, or renovation of buildings located on VA-owned property.

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 *note*)

### § 61.11 Applications for capital grants.

(a) To apply for a capital grant, an applicant must obtain from VA a capital grant application package and submit to VA the information called for in the application package within the time period established in the Notice of Fund Availability under § 61.60 of this part.

(b) The capital grant application package includes exhibits to be prepared and submitted as part of the application process, including:

(1) Justification for the capital grant;

(2) Site description, site design, and site cost estimates;

(3) Documentation on eligibility to receive a capital grant under this part;

(4) Documentation on matching funds committed to the project;

(5) Documentation on operating budget and cost sharing;

(6) Documentation on supportive services committed to the project;

(7) Documentation on site control and appropriate zoning, and on the boundaries of the area or community proposed to be served;

(8) If capital grant funds are proposed to be used for acquisition or rehabilitation, documentation demonstrating that the costs associated with acquisition or rehabilitation are less than the costs associated with new construction;

(9) If grant funds are proposed to be used for new construction, documentation demonstrating that the costs associated with new construction are less than the costs associated with rehabilitation of an existing building, that there is a lack of available appropriate units that could be rehabilitated at a cost less than new construction, and that new construction is less costly than acquisition of an existing building, (for purposes of this cost comparison, costs associated with rehabilitation or new construction may include the cost of real property acquisition);

(10) If the proposed construction includes demolition, a demolition plan, including the extent and cost of existing site features to be removed, stored, or relocated and information establishing that the proposed construction is in the same location as the building to be demolished or that the demolition is inextricably linked to the design of the construction project (the cost of demolition of a building cannot be included in the cost of construction unless the proposed construction is in the same location as the building to be demolished or unless the demolition is

inextricably linked to the design of the construction project);

(11) Comments or recommendations by appropriate State (and area wide) clearinghouses pursuant to E.O. 12372 (3 CFR, 1982 Comp., p. 197), if the applicant is a State; and

(12) Reasonable assurances with respect to receipt of a capital grant under this part that:

(i) The project will be used principally to furnish to veterans the level of care for which such application is made; that not more than 25 percent of participants at any one time will be nonveterans; and that such services will meet the requirements of this part;

(ii) The recipient will continue to operate the project until the expiration of the period during which VA could seek recovery under §61.67;

(iii) Title to such site or van will vest solely in the applicant and the applicant will insure vans to the same extent they would insure a van bought with their own funds;

(iv) Adequate financial support will be available for the completion of the project or for the purchase and maintenance, repair, and operation of the van; and

(v) The recipient will keep records and submit reports as VA may reasonably require, within the time frames required; and give VA, upon demand, access to the records upon which such information is based.

(c) Applicants may apply for more than one capital grant.

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0554.)

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 *note*)

[68 FR 13594, Mar. 19, 2003, as amended at 68 FR 55468, Sept. 26, 2003]

### §61.12 Threshold requirements for capital grant applications.

To be eligible for a capital grant, an applicant must meet the following threshold requirements:

(a) The application was completed in all parts and included the information called for in the application package and was filed within the time period established in the Notice of Fund Availability;

(b) The applicant is a public or nonprofit private entity;

(c) The population proposed to be served is homeless veterans;

(d) The activities for which assistance is requested are eligible for funding under this part;

(e) The applicant has demonstrated that adequate financial support will be available to carry out the project for which the capital grant is sought consistent with the plans, specifications and schedule submitted by the applicant;

(f) The application has demonstrated compliance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA) (42 U.S.C. 4601–4655);

(g) The applicant has agreed to comply with the requirements of this part and has demonstrated the capacity to do so;

(h) The applicant does not have an outstanding obligation to VA that is in arrears, and does not have an overdue or unsatisfactory response to an audit; and

(i) The applicant is not in default, by failing to meet requirements for any previous assistance from VA under this part.

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 *note*)

### §61.13 Rating criteria for capital grant applications.

(a) Applicants that meet the threshold requirements in §61.12 of this part, will then be rated using the selection criteria listed in this section. To be eligible for a capital grant, an applicant must receive at least 600 points (out of a possible 1,200) and must receive points under criteria in paragraphs (b), (c), (d), (e), and (i) of this section.

(b) Quality of the project. VA will award up to 300 points based on the following:

(1) How program participants will achieve residential stability, including how available supportive services will help participants reach this goal;

(2) How program participants will increase their skill level and/or income, including how available supportive

services will help participants reach this goal;

(3) How program participants will be involved in making project decisions that affect their lives so that they achieve greater self-determination, including how they will be involved in selecting supportive services, establishing individual goals and developing plans to achieve these goals;

(4) How permanent affordable housing will be identified and made known to participants upon leaving the transitional housing, and how participants will be provided necessary follow-up services to help them achieve stability in the permanent housing;

(5) How the service needs of participants will be assessed on an ongoing basis;

(6) How the proposed housing, if any, will be managed and operated;

(7) How participants will be assisted in assimilating into the community through access to neighborhood facilities, activities, and services;

(8) How and when the progress of participants toward meeting their individual goals will be monitored, evaluated, and documented;

(9) How and when the effectiveness of the overall project in achieving its goals will be evaluated and documented; and how any needed program modifications will be made based on those evaluations; and how program modifications will be reported to VA; and

(10) How the proposed project will be implemented in a timely fashion.

(c) Targeting to persons on streets and in shelters. VA will award up to 150 points based on:

(1) The extent to which the project is designed to serve homeless veterans living in places not ordinarily meant for human habitation (*e.g.*, streets, parks, abandoned buildings, automobiles, under bridges, in transportation facilities) and those who reside in emergency shelters; and

(2) The likelihood that proposed plans for outreach and selection of participants will result in these populations being served.

(d) Ability of applicant to develop and operate a project. VA will award up to 200 points based on the extent to which the application demonstrates experience in the following areas:

(1) Engaging the participation of homeless veterans living in places not ordinarily meant for human habitation and in emergency shelters;

(2) Assessing the housing and relevant supportive service needs of homeless veterans;

(3) Accessing housing and relevant supportive service resources;

(4) If applicable, contracting for and/or overseeing the rehabilitation or construction of housing;

(5) If applicable, administering a rental assistance program;

(6) Providing supportive services or supportive housing for homeless veterans;

(7) Monitoring and evaluating the progress of persons toward meeting their individual goals;

(8) Evaluating the overall effectiveness of a program and using evaluation results to make program improvements, as needed; and

(9) Maintaining fiscal solvency as evidenced by providing their last complete yearly financial statements.

(e) Need. VA will award up to 150 points based on the extent to which the applicant demonstrates:

(1) Substantial unmet needs, particularly among the target population living in places not ordinarily meant for human habitation such as the streets, emergency shelters, based on reliable data from surveys of homeless populations or other reports or data gathering mechanisms that directly support claims made; and

(2) An understanding of the homeless population to be served and its unmet housing and supportive service needs.

(f) Innovative quality of the proposal. VA will award up to 50 points based on the innovative quality of the proposal, in terms of:

(1) Helping homeless veterans or homeless veterans with disabilities to reach residential stability, to increase their skill level and/or income, and to increase the influence they have over decisions that affect their lives;

(2) Establishing a clear link between the innovation(s) and its proposed effect(s); and

(3) Establishing usefulness as a model for other projects.

(g) Leveraging. VA will award up to 50 points based on the extent to which the applicant documents resources from other public and private sources, including cash and the value of third party contributions, have been committed to support the project at the time of application.

(h) Cost-effectiveness. VA will award up to 100 points for cost-effectiveness. Projects will be rated based on the cost and number of new supportive housing beds made available or the cost, amount, and types of supportive services made available, when compared to other transitional housing and supportive services projects, and when adjusted for high-cost areas. Cost-effectiveness may include using excess government properties (local, State, Federal), as well as demonstrating site control at the time of application.

(i) Coordination with other programs. VA will award up to 200 points based on the extent to which applicants demonstrate that they have coordinated with Federal, State, local, private and other entities serving homeless persons in the planning and operation of the project. Such entities may include shelter transitional housing, health care, or social service providers; providers funded through Federal initiatives; local planning coalitions or provider associations; or other program providers relevant to the needs of homeless veterans in the local community. Applicants are required to demonstrate that they have coordinated with the VA medical care facility of jurisdiction and VA Regional Offices of jurisdiction in their area. VA will award up to 50 points of the 200 points based on the extent to which commitments to provide supportive services are documented at the time of application. Up to 150 points of the 200 points will be given to the extent applicants demonstrate that:

(1) They are part of an ongoing community-wide planning process within the framework described above which is designed to share information on available resources and reduce duplication among programs that serve homeless veterans;

(2) They have consulted directly with the closest VA Medical Center and other providers within the framework described above regarding coordination of services for project participants; and

(3) They have coordinated with the closest VA Medical Center their plan to assure access to health care, case management, and other care services.

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 *note*)

### §61.14 Selecting applications for capital grants.

(a) Applicants will first be grouped in categories according to the funding priorities set forth in the NOFA, if any. Applicants will then be ranked, within their respective funding category if applicable. The highest-ranked applications for which funding is available, within highest priority funding category if applicable, will be conditionally selected to receive a capital grant in accordance with their ranked order, as determined under §61.13 of this part. If funding priorities have been established and funds are still available after selection of those applicants in the highest priority group VA will continue to conditionally select applicants in lower priority categories in accordance with the selection method set forth in this paragraph subject to available funding.

(b) In the event of a tie between applicants, VA will use the score from §61.13(e) of this part to determine the ranking.

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 *note*)

### §61.15 Obtaining additional information and awarding capital grants.

(a) Each applicant who has been conditionally selected for a capital grant will be requested by VA to submit additional information, including:

(1) Documentation to show that the project is feasible, including a plan from an architect, contractor, or other building professional that provides estimated costs for the proposed design;

(2) Documentation showing the sources of funding for the project and firm financing commitments for the matching requirements described in §61.16 of this part;

(3) Documentation establishing site control described in §61.17 of this part;

(4) Documentation establishing compliance with the National Historic Preservation Act (16 U.S.C. 470);

(5) Information necessary for VA to ensure compliance both with Uniform Federal Accessibility Standards (UFAS) and the Americans with Disabilities Act Accessibility Guidelines;

(6) Documentation establishing compliance with local and state zoning codes;

(7) Documentation in the form of one set of design development (35 percent completion) drawings demonstrating compliance with local codes, state codes, and the Life Safety Code of the National Fire Protection Association.

(8) Information necessary for VA to ensure compliance with the provisions of the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*);

(9) A site survey performed by a licensed land surveyor; and

(10) Such other documentation as specified by VA in writing to the applicant to confirm or clarify information provided in the application.

(b) The required additional information must be received by VA in acceptable form within the time frame established by VA in a Notice of Fund Availability published in the FEDERAL REGISTER.

(c) Following receipt of the additional information in acceptable form, VA will execute an agreement and make payments to the grant recipient in accordance with § 61.61 of this part and other applicable provisions of this part.

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0554.)

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 *note*)

[68 FR 13594, Mar. 19, 2003, as amended at 68 FR 55468, Sept. 26, 2003]

### § 61.16 Matching funds for capital grants.

The amount of a capital grant may not exceed 65 percent of the total cost of the project for which the capital grant was awarded. The recipient must, from sources other than grant funds received under this part, match the funds provided by VA to cover the percentage of the total cost of the project not funded by the capital grant. This matching share shall constitute at least 35 percent of the total cost. If the project is for supportive housing, or a service center that would be used for purposes under this part and for other purposes, a capital grant may be awarded only in proportion to the use under this part. Capital grants may include application costs, including site surveys, architectural, and engineering fees, but may not include relocation costs.

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 *note*)

### § 61.17 Site control for capital grants.

(a) As a condition for obtaining a capital grant for supportive housing or a fixed site service center, an applicant must demonstrate site control through a deed, a capital lease, or an executed contract of sale, unless the site is in a building or on land owned by VA. Such site control must be demonstrated within 1 year after execution of an agreement under § 61.61 of this part.

(b) A capital grant recipient may change the site to a new site meeting the requirements of this part subject to VA approval under § 61.62 of this part. However, the recipient is responsible for and must demonstrate ability to provide for any additional costs resulting from the change in site.

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0554.)

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 *note*)

[68 FR 13594, Mar. 19, 2003, as amended at 68 FR 55468, Sept. 26, 2003]

### § 61.20 Life Safety Code capital grants.

(a) This section sets forth provisions for obtaining a Life Safety Code capital grant under 38 U.S.C. 2012(c)(3). To be eligible to receive such a capital grant, an applicant already must have received a grant under section 3 of the Homeless Veterans Comprehensive Service Programs Act of 1992 (Public Law 102–590; 38 U.S.C. 7221 note) for construction, renovation, or acquisition of a facility and must obtain the Life Safety Code capital grant solely

for renovations to such facility to comply with the Life Safety Code of the National Fire Protection Association. The following sections of this part apply to the Life Safety Code grants §§61.60 through 61.66; and §61.80 and §61.82.

(b) To apply for a Life Safety Code capital grant under this section, an applicant must obtain from VA a Life Safety Code capital grant application package and submit to VA the information called for in the application package within the time period established in the Notice of Fund Availability. The Life Safety Code capital grant application package includes exhibits to be prepared and submitted as part of the application process, including:

(1) Justification for the modifications needed to meet the Life Safety Code or such other comparable fire and safety requirements;

(2) Site description, site design, and site cost estimates;

(3) Reasonable assurances with respect to receipt of a Life Safety Code capital grant under this part that:

(i) The project being renovated is being, and will continue to be, used principally to furnish veterans the level of care for which VA awarded the applicant a grant under the Homeless Veterans Comprehensive Service Program Act of 1992; that not more than 25 percent of participants at any one time will be nonveterans; and that such services will meet the requirements of this part;

(ii) The recipient will keep records and submit reports as VA may reasonably require, within the time frames required; and give VA, upon demand, access to the records upon which such information is based;

(iii) The applicant has agreed to comply with the applicable requirements of this part and has demonstrated the capacity to do so;

(iv) The applicant does not have an outstanding obligation to VA that is in arrears, and does not have an overdue or unsatisfactory response to an audit; and

(v) The applicant is not in default, by failing to meet requirements for any previous assistance from VA.

(c)(1) Cost-effectiveness. VA will award up to 300 points for cost-effectiveness with adjustments for high-cost areas. Applicants should address the following:

(i) Estimated cost of the renovation and the type of work to be done;

(ii) Estimated cost of any displacement of program participants or services due to the renovation; and

(iii) Cost-benefit analysis addressing the benefit of renovation to the structure compared to moving program to another site.

(2) Coordination. VA will award up to 200 points for a summary countersigned by the local VAMC Facilities Management of the discussions concerning renovation plans. The summaries should detail the following:

(i) Urgency of the renovation;

(ii) Adequacy of the renovation; and

(iii) Opinion of feasibility and cost benefit.

(d) The highest-ranked applications for the Life Safety Code capital grants for which funding is available will be selected to receive grants in accordance with their ranked order. The amount awarded will be 100 percent of the estimated total cost of the renovation as stated in the Life Safety Code application (this may include application costs, architectural fees, and engineering fees). VA will execute an agreement and make payments to the Life Safety Code capital grant recipient in accordance with §61.61 of this part and other applicable provisions of this part. In the event of a tie between applicants, VA will use the score from §61.20(c)(2) of this part to determine the ranking.

(e) Applicants may apply for more than one Life Safety Code capital grant.

(f) The authority to provide Life Safety Code grants expires on December 21, 2006.

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0554.)

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 *note*)

[68 FR 13594, Mar. 19, 2003, as amended at 68 FR 55468, Sept. 26, 2003]

### §61.30 Per diem-general.

VA provides per diem funds to capital grant recipients or to entities eligible

to receive a capital grant, which established a program of supportive housing or services after November 10, 1992 so they can assist homeless veterans by helping to offset operating costs to ensure the availability of supportive housing and service centers tasked with furnishing outreach, rehabilitative services, vocational counseling and training, and transitional housing assistance.

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 *note*)

### § 61.31 Application for per diem.

(a) To apply for per diem, a capital grant recipient need only indicate the intent to receive per diem on the capital grant application or may separately request per diem by submitting to VA a written statement requesting per diem.

(b) To apply for per diem, a non-capital grant recipient must obtain from VA a non-capital grant application package and submit to VA the information called for in the application package within the time period established in the Notice of Fund Availability. The non-capital grant application package includes exhibits to be prepared and submitted as part of the application process, including:

(1) Justification for per diem;

(2) Documentation on eligibility to receive per diem under this part;

(3) Documentation on operating budget and cost sharing;

(4) Documentation on supportive services committed to the project;

(5) Comments or recommendations by appropriate State (and area wide) clearinghouses pursuant to E.O. 12372 (3 CFR, 1982 Comp., p. 197), if the applicant is a State; and

(6) Reasonable assurances with respect to receipt of per diem under this part that:

(i) The project will be used principally to furnish to veterans the level of care for which such application is made; that not more than 25 percent of participants at any one time will be nonveterans; and that such services will meet the requirements of this part;

(ii) Adequate financial support will be available for the per diem program; and

(iii) The recipient will keep records and submit reports as VA may reasonably require, within the time frames required; and give VA, upon demand, access to the records upon which such information is based.

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0554.)

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 *note*)

[68 FR 13594, Mar. 19, 2003, as amended at 68 FR 55468, Sept. 26, 2003]

### § 61.32 Ranking non-capital grant recipients for per diem.

(a) Applications from non-capital grant recipients in response to a Notice of Fund Availability will be reviewed and grouped in categories according to the funding priorities set forth in the NOFA, if any. Such applications will then be ranked within their respective funding category according to scores achieved only if the applicant scores at least 500 cumulative points from paragraphs (b), (c), (d), (e), and (i) of § 61.13 of this part. The highest-ranked applications for which funding is available, within highest priority funding category if applicable, will be conditionally selected for eligibility to receive per diem payments in accordance with their ranked order. If funding priorities have been established and funds are still available after selection of those applicants in the highest priority group VA will continue to conditionally select applicants in lower priority categories in accordance with the selection method set forth in this paragraph subject to available funding.

(b) In the event of a tie between applicants, VA will use the score from § 61.13(e) of this part to determine the ranking.

(c) All applicants responding to a NOFA for ''Per Diem Only'' will be subject to the ranking method in paragraph (a) of this section.

NOTE TO § 61.32: Capital grant recipients are not required to be ranked, however, continuation of per diem payments to capital grant recipients will be subject to limitations set forth in § 61.33 of this part.

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 *note*)

**§61.33 Payment of per diem.**

(a) A capital grant recipient meeting the application requirements as outlined in §61.31(a) of this part is eligible for per diem subject to a site inspection establishing that the applicant continues to meet the requirements for a capital grant as outlined in the following sections, §§61.62, 61.64, 61.65, 61.66, 61.80, 61.81, and 61.82.

(b) For non-capital grant recipients who apply for per diem under this part, funds will be allocated to the highest-ranked applicants in descending order until funds are expended. Payments will be contingent upon verification of application information based on an initial site inspection and other inspections pursuant to §61.66 of this part and will be made for 3 years or as otherwise specified in the Notice of Fund Availability. Non-capital grant recipients may apply again thereafter only in response to a Notice of Fund Availability.

(c) For those applicants selected to receive per diem, VA will execute an agreement in accordance with §61.61of this part and make payments to the grant recipient or non-grant recipient for those homeless veterans—

(1) Who VA referred to the grant recipient or non-grant recipient; or

(2) For whom VA authorized the provision of supportive housing or supportive service.

(d)(1) The rate of per diem payments for each veteran in supportive housing shall be the lesser of—

(i) The daily cost of care estimated by the per diem recipient minus other sources of payments to the per diem recipient for furnishing services to homeless veterans that the per diem recipient certifies to be correct (other sources include payments and grants from other departments and agencies of the United States, from departments of State and local governments, from private entities or organizations, and from program participants), or

(ii) The current VA State Home Program per diem rate for domiciliary care.

(2) The per diem amount for service centers shall be 1/8 of the lesser of the amounts in paragraphs (d)(1)(i) and (d)(1)(ii) of this section per hour, not to exceed 8 hours in any day.

(e) Per diem payments may be paid retroactively for services provided not more than 3 days before VA approval is given or, where through no fault of the recipient, per diem payments should have been made but were not made. VA will not pay per diem for any additional days of absence when a veteran has already been absent for more than 72 hours consecutively (scheduled or unscheduled). In addition, VA will not pay per diem payments for supportive housing for any homeless veteran who has had three or more episodes (admission and discharge for each episode) of supportive housing services paid for under this part. VA may waive the episode requirement if the services offered are different from those previously provided and may lead to a successful outcome.

(f) Payment of per diem is subject to availability of funds. When necessary due to funding limitations, VA will reduce the rate of per diem as necessary.

(g) Capital grant recipients and non-capital grant recipients may continue to receive per diem assistance only so long as they continue to meet the minimum eligibility requirements for obtaining a grant. For grant recipients this is the minimum 600 points as provided for in §61.13(a) of this part. For non-grant recipients this is the minimum 500 points provided for in §61.32(a) of this part.

(h) Per diem payments will not be paid for both supportive housing and supportive services provided to the same veteran by the same per diem recipient.

(i) For non-capital grant recipients, only those portions of the service center or supportive housing described in the application will be considered for per diem assistance.

(j) At the time of receipt, a per diem recipient must report to VA all other sources of income for the project for which per diem was awarded. The information in this paragraph provides a basis for adjustments to the per diem payment.

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 *note*)

[68 FR 13594, Mar. 19, 2003; 68 FR 34332, June 9, 2003]

### § 61.40 Special needs grants—general.

(a) VA provides special needs grants to capital grant and per diem recipients under this part to assist with additional operational costs that would not otherwise be incurred but for the fact that the recipient is providing beds or services in supportive housing and at service centers for the following homeless veterans:

(1) Women, including women who have care of minor dependents;

(2) Frail elderly;

(3) Terminally ill; or

(4) Chronically mentally ill.

(b) No part of a special needs grant may be used for any purpose that would change significantly the scope of the project for which a capital grant or per diem was awarded.

(c) The following sections of this part apply to special needs grants: §§ 61.60 through 61.66; and § 61.80; § 61.82.

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 *note*)

### § 61.41 Special needs grants application.

(a) To apply for a special needs grant, an applicant must obtain from VA a special needs grant application package and submit to VA the information called for in the application package within the time period established in the Notice of Fund Availability.

(b) The special needs grant application package includes exhibits to be prepared and submitted as part of the application process, including:

(1) Justification for the special needs grant;

(2) Documentation on eligibility to receive a special needs grant under this part;

(3) Documentation concerning the estimated operating costs for the needs of the specific population for which the special needs grant is requested;

(4) Documentation concerning supportive services committed to the project;

(5) Comments or recommendations by appropriate State (and area wide) clearinghouses pursuant to E.O. 12372 (3 CFR, 1982 Comp., p. 197), if the applicant is a State; and

(6) Reasonable assurances with respect to receipt of a special needs grant under this part that:

(i) The funds will be used to furnish to veterans the level of care for which such application is made; and that the special needs program will comply with applicable requirements of this part;

(ii) The recipient will keep records and submit reports as VA may reasonably require, within the time frames required; and give VA, upon demand, access to the records upon which such information is based; and

(iii) Adequate financial support will be available for the special needs program.

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0554.)

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 *note*)

[68 FR 13594, Mar. 19, 2003, as amended at 68 FR 55468, Sept. 26, 2003]

### § 61.42 Threshold requirements for special needs grant applications.

To be eligible for a special needs grant, an applicant must meet the following threshold requirements:

(a) The application included the information called for in the application package and was filed within the time period established in the Notice of Fund Availability;

(b) The applicant still meets the requirements for receipt of per diem;

(c) The activities for which assistance is requested are eligible for funding under this part;

(d) The applicant has demonstrated that adequate financial support will be available to carry out the project for which the grant is sought consistent with the plans, specifications and schedule submitted by the applicant;

(e) The applicant does not have an outstanding obligation to VA that is in arrears, and does not have an overdue or unsatisfactory response to an audit;

(f) The applicant is not in default, by failing to meet requirements for any previous assistance from VA under this part; and

(g) The applicant has agreed to comply with applicable requirements of this part, to maintain eligibility for

special need payments and has demonstrated the capacity to do so.

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 *note*)

### §61.43 Rating criteria for special needs grant applications.

(a) Applicants that meet the threshold requirements in §61.42 of this part, will then be rated using the selection criteria listed in paragraphs (b) and (c) of this section. To be eligible for a special needs grant, an applicant must receive at least 300 points (out of a possible 500) and must score points in all areas (paragraphs (b)(1) through (c)(3)).

(b) VA will award up to 200 points based on the extent to which the applicant demonstrates why the service, operation, or personnel for which the special needs grant:

(1) Is needed for the project;

(2) Is integral to the project;

(3) Is appropriate to the population and overall project design; and

(4) Meets the special needs population provided per diem in the previous year.

(c) VA will award up to 300 points based on the extent the applicant's goals, objectives, and measures for the population to be served are:

(1) Appropriate;

(2) Reasonable; and

(3) Measurable.

(d) The information provided under paragraphs (b) and (c) of this section for women, including women who have care of minor dependents, should demonstrate how the program design will:

(1) Ensure transportation for women and their children, especially for health care and educational needs;

(2) Provide directly or offer referrals for adequate and safe child care;

(3) Ensure children's health care needs are met especially age appropriate wellness visits and immunizations; and

(4) Address safety and security issues including segregation procedures from other program participants if deemed appropriate.

(e) The information provided under paragraphs (b) and (c) of this section for the frail elderly should demonstrate how the program design will:

(1) Ensure the safety of the residents in the facility to include preventing harm and exploitation;

(2) Ensure opportunities to keep residents mentally and physically agile to the fullest extent through the incorporation of structured activities, physical activity, and plans for social engagement within the program and in the community;

(3) Provide opportunities for participants to address life transitional issues and separation and/or loss issues;

(4) Provide access to assistance devices such as walkers, grippers, or other devices necessary for optimal functioning;

(5) Ensure adequate supervision, including supervision of medication and monitoring of medication compliance; and

(6) Provide opportunities for participants either directly or through referral for other services particularly relevant for the frail elderly, including services or programs addressing emotional, social, spiritual, and generative needs.

(f) The information provided under paragraphs (b) and (c) of this section for the terminally ill should demonstrate how the program design will:

(1) Help participants address life-transition and life-end issues;

(2) Ensure that participants are afforded timely access to hospice services;

(3) Provide opportunities for participants to engage in ''tasks of dying,'' or activities of ''getting things in order'' or other therapeutic actions that help resolve end of life issues and enable transition and closure;

(4) Ensure adequate supervision including supervision of medication and monitoring of medication compliance; and

(5) Provide opportunities for participants either directly or through referral for other services particularly relevant for terminally ill such as legal counsel and pain management.

(g) The information provided under paragraphs (b) and (c) of this section for the chronically mentally ill should demonstrate how the program design will:

(1) Help participants join in and engage with the community;

(2) Facilitate reintegration with the community and provide services that may optimize reintegration such as life-skills education, recreational activities, and follow up case management;

(3) Ensure that participants have opportunities and services for re-establishing relationships with family;

(4) Ensure adequate supervision, including supervision of medication and monitoring of medication compliance; and

(5) Provide opportunities for participants, either directly or through referral, to obtain other services particularly relevant for a chronically mentally ill population, such as vocational development, benefits management, fiduciary or money management services, medication compliance, and medication education.

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 *note*)

### § 61.44 Awarding special needs grants.

(a) Applicants will first be grouped in categories according to the funding priorities set forth in the NOFA, if any. Applicants will then be ranked, within their respective funding category if applicable. The highest-ranked applications for which funding is available, within highest priority funding category if applicable, will be conditionally selected to receive a special needs grant in accordance with their ranked order, as determined under § 61.43 of this part. If funding priorities have been established and funds are still available after selection of those applicants in the highest priority group VA will continue to conditionally select applicants in lower priority categories in accordance with the selection method set forth in this paragraph subject to available funding.

(b) In the event of a tie between applicants, VA will use the score from § 61.43(b) of this part to determine the ranking.

(c) For those applicants selected for a special needs grant, VA will execute an agreement and make payments to the grant recipient in accordance with § 61.61of this part.

(d) The amount of the special needs grant will be the estimated total operational cost of the special need over the life of the special needs grant award as specified in the special needs grant agreement. Payments may be made for no more than 3 years. Recipients may apply again thereafter only in response to a Notice of Fund Availability.

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 *note*)

### § 61.50 Technical assistance grants-general.

VA provides grants to entities or organizations with expertise in preparing grant applications relating to the provision of assistance for homeless veterans. The recipients are to use the grants to provide technical assistance to those nonprofit community-based groups with experience in providing assistance to homeless veterans in order to help such groups apply for grants under 38 CFR part 61 or apply for other grants from any source for addressing the problems of homeless veterans. This includes:

(a) Group or individual seminars providing general instructions concerning grant applications;

(b) Group or individual seminars providing instructions for applying for a specific grant; or

(c) Group or individual instruction for preparing analyses to be included in a grant application.

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 *note*)

### § 61.51 Applications for technical assistance grants.

(a) To apply for a technical assistance grant under this part, an applicant must obtain from VA a technical assistance grant application package and submit to VA the information called for in the technical assistance grant application package within the time period established in the Notice of Fund Availability.

(b) The technical assistance grant application package includes exhibits to be prepared and submitted as part of the application process, including

(1) Justification for the technical assistance grant;

(2) Documentation on eligibility to receive a technical assistance grant under this part;

(3) Description of type of technical assistance that would be provided (see §61.50);

(4) Documentation concerning the estimated operating costs and operating budget for the technical assistance program for which a grant is sought;

(5) Documentation concerning expertise in preparing grant applications;

(6) Documentation on resources committed to the provision of technical expertise;

(7) Comments or recommendations by appropriate State (and area wide) clearinghouses pursuant to E.O. 12372 (3 CFR, 1982 Comp., p. 197), if the applicant is a State; and

(8) Reasonable assurances with respect to receipt of a technical assistance grant under this part that:

(i) The recipient will provide adequate financial and administrative support for providing the services set forth in the technical assistance grant application and will actually provide such services; and

(ii) The recipient will keep records and submit reports as VA may reasonably require, within the time frames required; and give VA, upon demand, access to the records upon which such information is based.

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0554.)

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 *note*)

[68 FR 13594, Mar. 19, 2003, as amended at 68 FR 55468, Sept. 26, 2003]

### §61.52 Threshold requirements for technical assistance grant applications.

To be eligible for a technical assistance grant, an applicant must meet the following threshold requirements:

(a) The application included the information called for in the application package and was filed within the time period established in the Notice of Fund Availability;

(b) The applicant established expertise in preparing grant applications;

(c) The activities for which assistance is requested are eligible for funding under this part;

(d) The applicant has demonstrated that adequate financial support will be available to carry out the project for which the grant is sought consistent with the plans, specifications and schedule submitted by the applicant;

(e) The applicant does not have an outstanding obligation to VA that is in arrears, and does not have an overdue or unsatisfactory response to an audit; and

(f) The applicant is not in default, by failing to meet requirements for any previous assistance from VA under this part.

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 *note*)

### §61.53 Rating criteria for technical assistance grant applications.

(a) Applicants that meet the threshold requirements in §61.52 of this part, will then be rated using the selection criteria listed in paragraphs (b) and (c) of this section. To be eligible for a technical assistance grant, an applicant must receive at least 600 points (out of a possible 800) and must score points under paragraphs (b) and (c) of this section.

(b) Quality of the technical assistance. VA will award up to 400 points based on the following:

(1) How the recipients of technical training will increase their skill level regarding the completion of applications;

(2) How the recipients of technical training will learn to find grant opportunities in a timely manner;

(3) How the technical assistance provided will be monitored and evaluated and changes made, if needed; and

(4) How the proposed technical assistance programs will be implemented in a timely fashion.

(c) Ability of applicant to demonstrate expertise in preparing grant applications develop and operate a technical assistance program. VA will award up to 400 points based on the extent to which the application demonstrates:

(1) Ability to find grants available for addressing the needs of homeless veterans;

(2) Ability to find and offer technical assistance to entities eligible for such assistance;

(3) Ability to administer a technical assistance program;

(4) Ability to provide grant technical assistance; and

(5) Ability to evaluate the overall effectiveness of the technical assistance program and to make adjustments, if necessary, based on those evaluations.

### § 61.54 Awarding technical assistance grants.

(a) Applicants will first be grouped in categories according to the funding priorities set forth in the NOFA, if any. Applicants will then be ranked, within their respective funding category if applicable. The highest-ranked applications for which funding is available, within highest priority funding category if applicable, will be conditionally selected to receive a technical assistance grant in accordance with their ranked order, as determined under § 61.53 of this part. If funding priorities have been established and funds are still available after selection of those applicants in the highest priority group VA will continue to conditionally select applicants in lower priority categories in accordance with the selection method set forth in this paragraph subject to available funding.

(b) In the event of a tie between applicants, VA will use the score from § 61.53(c) of this part to determine the ranking.

(c) For those applicants selected to receive a technical assistance grant, VA will execute an agreement and make payments to the grant recipient in accordance with § 61.61 of this part.

(d) The amount of the technical assistance grant will be the estimated total operational cost of the technical assistance over the life of the technical assistance grant award as specified in the technical assistance grant agreement. Payments may be made for no more than 3 years. Recipients may apply again thereafter only in response to a Notice of Fund Availability.

(e) The amount of a technical assistance grant under this part may not exceed the cost of the estimated cost of the provision of technical assistance.

(f) VA will not pay for sustenance or lodging under a technical assistance grant.

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 *note*)

### § 61.55 Technical assistance reports.

Each recipient of a technical assistance grant must submit to VA, quarterly, a report describing the activities for which the technical assistance grant funds were awarded, including the type and amount of technical assistance provided and the number of nonprofit community-based groups served.

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0554.)

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 *note*)

[68 FR 13594, Mar. 19, 2003, as amended at 68 FR 55468, Sept. 26, 2003]

### § 61.60 Notice of Fund Availability.

When funds are made available for capital grants, per diem for non-capital grant recipients, special needs grants, or technical assistance grants, VA will publish a Notice of Fund Availability in the FEDERAL REGISTER. The notice will:

(a) Give the location for obtaining application packages;

(b) Specify the date, time, and place for submitting completed applications;

(c) State the estimated amount and type of funding available; and

(d) State any priorities for or exclusions from funding to meet the statutory mandate of 38 U.S.C. 2011, to ensure that awards do not result in the duplication of ongoing services and to reflect the maximum extent practicable appropriate geographic dispersion and an appropriate balance between urban and nonurban locations.

(e) Provide other information necessary for the application process.

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 *note*)

### § 61.61 Agreement and funding actions.

(a) When an applicant for a capital grant, per diem, a special needs grant, or a technical assistance grant meets all of the requirements under this part for the type of assistance requested and VA has funding for such assistance, VA will incorporate requirements under this part into an agreement to be executed by VA and the applicant. Upon

execution of the agreement, grant funds are obligated to cover the amount of the approved assistance subject to the availability of funding. Payments will be for services rendered and are contingent upon submission of documentation in the form of invoices or purchase agreements and contingent on inspections, as VA deems necessary. VA will make payments on its own schedule to reimburse for amounts expended.

(b) Except for increases in the rate of per diem, VA will not make revisions to increase the amount obligated for assistance under this part after the initial obligation of funds.

(c) VA will enforce the obligations under this part through such action as may be appropriate, including temporarily withholding cash payments pending correction of a deficiency.

(d) VA may deobligate all or parts of assistance awarded under this part:

(1) If the actual total costs for assistance is less than the total cost stated in the application, or

(2) If the recipient fails to comply with the requirements of this part.

(e) However, before determining whether to deobligate under paragraph (d)(2) of this section, VA will issue a notice of intent to terminate payments. The recipient will then have 30 days to submit documentation demonstrating why payments should not be terminated. After review of any such documentation, VA will issue a final decision concerning termination of payment.

(f) VA may also seek recovery under §61.67 of this part where a capital grant recipient fails to provide supportive services and/or supportive housing for the minimum period of operation under §61.67.

(g) Where a recipient has no control over causes for delays in implementing a project, VA may change the due date, as appropriate.

(h) Grant recipients that concurrently receive per diem and special needs payments shall not be paid more than 100 percent of the cost of the bed per day, product, operation, personnel, or service provided.

(i) No funds provided under this part may be used to replace Federal, State or local funds previously used, or designated for use, to assist homeless veterans.

(j) VA may obligate any recovered funds without fiscal year limitation.

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 *note*)

### §61.62 Program changes.

(a) Except as provided in paragraphs (b) through (d) of this section, a recipient may not make any significant changes to a project for which a grant has been awarded without prior VA approval. Significant changes include, but are not limited to, a change in the recipient, a change in the project site (including relocating, adding an annex, a branch, or other expansion), additions or deletions of activities, shifts of funds from one approved type of activity to another, and a change in the category of participants to be served.

(b) Recipients of grants exceeding $100,000 for nonconstruction projects must receive prior VA approval for cumulative transfers among direct cost categories which exceed or are expected to exceed 10 percent of the current total approved budget.

(c) Recipients of grants for projects involving both construction and nonconstruction who are State or local governments must receive prior VA approval for any budget revision which would transfer funds between nonconstruction and construction categories.

(d) Approval for changes is contingent upon the application ranking remaining high enough after the approved change to have been competitively selected for funding in the year the application was selected.

(e) Any changes to an approved program must be fully documented in the recipient's records.

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 *note*)

### §61.63 Procedural error.

If an application would have been selected but for a procedural error committed by VA, VA will select that application for potential funding when sufficient funds become available if

there is no material change in the information that resulted in its selection. A new application will not be required for this purpose.

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 *note*)

### § 61.64 Religious organizations.

(a) Organizations that are religious or faith-based are eligible, on the same basis as any other organization, to participate in VA programs under this part. In the selection of service providers, neither the Federal Government nor a state or local government receiving funds under this part shall discriminate for or against an organization on the basis of the organization's religious character or affiliation.

(b)(1) No organization may use direct financial assistance from VA under this part to pay for any of the following:

(i) Inherently religious activities such as, religious worship, instruction, or proselytization; or

(ii) Equipment or supplies to be used for any of those activities.

(2) For purposes of this section, ''indirect financial assistance'' means Federal assistance in which a service provider receives program funds through a voucher, certificate, agreement or other form of disbursement, as a result of the independent and private choices of individual beneficiaries. ''Direct financial assistance,'' means Federal aid in the form of a grant, contract, or cooperative agreement where the independent choices of individual beneficiaries do not determine which organizations receive program funds.

(c) Organizations that engage in inherently religious activities, such as worship, religious instruction, or proselytization, must offer those services separately in time or location from any programs or services funded with direct financial assistance from VA, and participation in any of the organization's inherently religious activities must be voluntary for the beneficiaries of a program or service funded by direct financial assistance from VA.

(d) A religious organization that participates in VA programs under this part will retain its independence from Federal, State, or local governments and may continue to carry out its mission, including the definition, practice and expression of its religious beliefs, provided that it does not use direct financial assistance from VA under this part to support any inherently religious activities, such as worship, religious instruction, or proselytization. Among other things, faith-based organizations may use space in their facilities to provide VA-funded services under this part, without removing religious art, icons, scripture, or other religious symbols. In addition, a VA-funded religious organization retains its authority over its internal governance, and it may retain religious terms in its organization's name, select its board members and otherwise govern itself on a religious basis, and include religious reference in its organization's mission statements and other governing documents.

(e) An organization that participates in a VA program under this part shall not, in providing direct program assistance, discriminate against a program beneficiary or prospective program beneficiary regarding housing, supportive services, or technical assistance, on the basis of religion or religious belief.

(f) If a State or local government voluntarily contributes its own funds to supplement Federally funded activities, the State or local government has the option to segregate the Federal funds or commingle them. However, if the funds are commingled, this provision applies to all of the commingled funds.

(g) To the extent otherwise permitted by Federal law, the restrictions on inherently religious activities set forth in this section do not apply where VA funds are provided to religious organizations through indirect assistance as a result of a genuine and independent private choice of a beneficiary, provided the religious organizations otherwise satisfy the requirements of this Part. A religious organization may receive such funds as the result of a beneficiary's genuine and independent choice if, for example, a beneficiary redeems a voucher, coupon, or certificate, allowing the beneficiary to direct where funds are to be paid, or a similar funding mechanism provided to that

beneficiary and designed to give that beneficiary a choice among providers.

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 note.)

[69 FR 31888, June 8, 2004]

### §61.65 Inspections.

VA may inspect the facility and any records of an entity applying for or receiving assistance under this part at such times as are deemed necessary to determine compliance with the provisions of this part. The authority to inspect carries with it no authority over the management or control of any entity applying for or receiving assistance under this part.

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 *note*)

### §61.66 Financial management.

(a) All recipients shall comply with applicable requirements of the Single Audit Act Amendments of 1996, as implemented by OMB Circular A–133.

(b) All entities receiving assistance under this part must use a financial management system that follows generally accepted accounting principals and provides accounting records, including cost accounting records that are supported by documentation. Such cost accounting must be reflected in the entity's fiscal cycle financial statements to the extent that the actual costs can be determined for the program for which assistance is provided. All entities receiving per diem under this part must monitor the accuracy of the costs used to determine payment amounts per veteran. Entities receiving assistance must meet the applicable requirements of the appropriate OMB Circular for Cost-Principles (A–122 or A–87).

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 *note*)

### §61.67 Recovery provisions.

(a) If after 3 years from the date of award of a capital grant, the grant recipient has withdrawn from the VA Homeless Providers Grant and Per Diem Program (Program); does not establish the project for which the grant was made; or has established the project for which the grant was made but has not had final inspection, VA would be entitled to recover from the grant recipient all of the grant amounts provided for the project.

(b) Where the grant recipient is not subject to recovery under paragraph (a) of this section, VA will seek recovery of the grant amount on a prorated basis where the grant recipient ceases to provide services for which the grant was made or withdraws from the Program prior to the expiration of the applicable period of operation, which period shall begin on the date of final inspection for which the grant was made. The amount to be recaptured equals the total amount of the grant, multiplied by the fraction resulting from using the number of years the recipient was not operational as the numerator, and using the number of years of operation required under the following chart as the denominator.

| Grant amount (dollars in thousands) | Years of operation |
|---|---|
| 0–250 | 7 |
| 251–500 | 8 |
| 501–750 | 9 |
| 751–1,000 | 10 |
| 1,001–1,250 | 11 |
| 1,251–1,500 | 12 |
| 1,501–1,750 | 13 |
| 1,751–2,000 | 14 |
| 2,001–2,250 | 15 |
| 2,251–2,500 | 16 |
| 2,501–2,750 | 17 |
| 2,751–3,000 | 18 |
| Over 3,000 | 20 |

*Example A:* Grantee A is awarded a grant and does not bring the project to operational status within 3 years from the time of award. Grantee A may be subject to full recapture of the grant award.

*Example B:* Grantee B is awarded a grant in the amount of $300,000 and brings the project to operational status within 3 years from the time of award. Grantee B then provides services to homeless veterans for a period of 6 years from the date the program was operationalized, but now decides to close the program. As the original award was $300,000 and as a condition of receiving the grant funds Grantee B agreed to provide services for 8 years. Therefore, Grantee B would be subject to the prorated recapture of the grant award for the 2-year period not served or in this case 1/4 of the original grant would be subject to recapture.

*Example C:* Grantee C is awarded a grant in the amount of $400,000, becomes operational within 1 year of the date of the grant award and ceases operation 1 year later, 2 years after the date of the grant award. After the expiration of the 3-year period beginning on

the date of the grant award, Grantee C would be subject to prorated recapture for the 7 years it did not provide service of the required 8 years of operation. The amount subject to recapture would thus be 7/8 × $400,000 or $350,000.

(c) VA will seek to recover from the recipient of per diem, a special needs grant, or a technical assistance grant any funds that are not used in accordance with the requirements of this part.

(d) Before VA would take action to recover funds, VA will issue to the recipient a notice of intent to recover funds. The recipient will then have 30 days to submit documentation demonstrating why funds should not be recovered. After review of any such documentation, VA will issue a decision regarding whether action will be taken to recover funds.

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 *note*)

### § 61.80 General operation requirements for supportive housing and service centers.

(a) Supportive housing and service centers for which assistance is provided under this part must:

(1) Comply with the Life Safety Code of the National Fire Protection Association and all applicable State and local housing codes, licensing requirements, fire and safety requirements, and any other requirements in the jurisdiction in which the project is located regarding the condition of the structure and the operation of the supportive housing or service centers.

(2) Notwithstanding the provisions of paragraph(a)(1) of this section, recipients of grants prior to December 21, 2001, are required to comply with the Life Safety Code of the National Fire Protection Association by December 21, 2006. Such recipients are not excused from meeting the other requirements of paragraph (a)(1) of this section, including State and local fire and safety requirements.

(b) Except for such variations as are proposed by the recipient that would not affect compliance with paragraph (a) of this section and are approved by VA, supportive housing must meet the following requirements:

(1) The structures must be structurally sound so as not to pose any threat to the health and safety of the occupants and so as to protect the residents from the elements;

(2) Entry and exit locations to the structure must be capable of being utilized without unauthorized use of other private properties, and must provide alternate means of egress in case of fire;

(3) Buildings constructed or altered with Federal assistance must also be accessible to the disabled, as required by section 502 of the Americans with Disabilities Act, referred to as the Architectural Barriers Act;

(4) Each resident must be afforded appropriate space and security for themselves and their belongings, including an acceptable place to sleep that is in compliance with all applicable local, state, and federal requirements;

(5) Every room or space must be provided with natural or mechanical ventilation and the structures must be free of pollutants in the air at levels that threaten the health of residents;

(6) The water supply must be free from contamination;

(7) Residents must have access to sufficient sanitary facilities that are in proper operating condition, that may be used in privacy, and that are adequate for personal cleanliness and the disposal of human waste;

(8) The housing must have adequate heating and/ or cooling facilities in proper operating condition;

(9) The housing must have adequate natural or artificial illumination to permit normal indoor activities and to support the health and safety of residents and sufficient electrical sources must be provided to permit use of essential electrical appliances while assuring safety from fire;

(10) All food preparation areas must contain suitable space and equipment to store, prepare, and serve food in a sanitary manner;

(11) The housing and any equipment must be maintained in a sanitary manner;

(12) The residents with disabilities must be provided meals or meal preparation facilities must be available;

(13) Residential supervision from a paid staff member, volunteer, or senior

resident participant must be provided 24 hours per day, 7 days per week and for those times that a volunteer or senior resident participant is providing residential supervision a paid staff member must be on call for emergencies 24 hours a day 7 days a week (all supervision must be provided by individuals with sufficient knowledge for the position); and

(14) Residents must be provided a clean and sober (free from illicit drugs) environment and those supportive housing or service centers that provide medical or social detox at the same site as the supportive housing or service must ensure that those residents in detox are clearly separated from the general residential population.

(c) Each recipient of assistance under this part must conduct an ongoing assessment of the supportive services needed by the residents of the project and the availability of such services, and make adjustments as appropriate. The recipient will provide evidence of this ongoing assessment to VA at such times as are deemed necessary, but as a minimum, once annually in the form of a report that addresses the recipient's ability to meet the goals, objectives, measures, and special needs as set forth in the recipient's grant proposal.

(d) A homeless veteran may remain in transitional housing for which assistance is provided under this part for a period no longer than 24 months, except that a veteran may stay longer, if permanent housing for the veteran has not been located or if the veteran requires additional time to prepare for independent living. However, at any given time, no more than one-half of the veterans at such transitional housing facility may have resided at the facility for periods longer than 24 months.

(e) Each recipient of assistance under this part must provide for the consultation and participation of not less than one homeless veteran or formerly homeless veteran on the board of directors or an equivalent policymaking entity of the recipient, to the extent that such entity considers and makes policies and decisions regarding any project provided under this part. This requirement may be waived if an applicant, despite a good faith effort to comply, is unable to meet it and presents a plan, subject to VA approval, to otherwise consult with homeless or formerly homeless veterans in considering and making such policies and decisions.

(f) Each recipient of assistance under this part must, to the maximum extent practicable, involve homeless veterans and families, through employment, volunteer services, or otherwise, in constructing, rehabilitating, maintaining, and operating the project and in providing supportive services for the project.

(g) Each recipient of assistance under this part shall establish procedures for fiscal control and fund accounting to ensure proper disbursement and accounting of assistance received under this part.

(h) The recipient of assistance under this part that provides family violence prevention or treatment services must establish and implement procedures to ensure:

(1) The confidentiality of records pertaining to any individual provided services, and

(2) The confidentially of the address or location where the services are provided.

(i) Each recipient of assistance under this part must maintain the confidentiality of records kept on homeless veterans receiving services.

(j) VA may disapprove use of outpatient health services provided through the recipient if VA determines that such services are of unacceptable quality. Further, VA will not pay per diem where the Department concludes that services furnished by the recipient are unacceptable.

(k) A service center for homeless veterans shall provide services to homeless veterans for a minimum of 40 hours per week over a minimum of 5 days per week, as well as provide services on an as-needed, unscheduled basis. The calculation of average hours shall include travel time for mobile service centers. In addition:

(1) Space in a service center shall be made available as mutually agreeable for use by VA staff and other appropriate agencies and organizations to assist homeless veterans;

(2) A service center shall be equipped to provide, or assist in providing, health care, mental health services, hygiene facilities, benefits and employment counseling, meals, and transportation assistance;

(3) A service center shall provide other services as VA determines necessary based on the need for services otherwise not available in the geographic area; and

(4) A service center may be equipped and staffed to provide, or to assist in providing, job training and job placement services (including job readiness, job counseling, and literacy and skills training), as well as any outreach and case management services that may be necessary to meet the requirements of this paragraph.

(l) Fixed site service centers will prominently post at or near the entrance to the service center their hours of operation and contacts in case of emergencies. Mobile service centers must take some action reasonably calculated to provide in advance a tentative schedule of visits, (*e.g.*, newspapers, fliers, public service announcements on television or radio). The schedule should include but is not limited to:

(1) The region of operation;

(2) Times of operation;

(3) Expected services to be provided; and

(4) Contacts for specific information and changes.

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0554.)

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 *note*)

[68 FR 13594, Mar. 19, 2003, as amended at 68 FR 55468, Sept. 26, 2003]

## § 61.81 Outreach activities.

Recipients of capital grants and per diem under this part relating to supportive housing or service centers must use their best efforts to ensure that eligible hard-to-reach veterans are found, engaged, and provided assistance. Accordingly, a recipient should search for homeless veterans at places such as shelters, soup kitchens, parks, bus or train stations, and the streets. Outreach particularly should be directed toward veterans who have a nighttime residence that is an emergency shelter or a public or private place not ordinarily used as a regular sleeping accommodation for human beings (*e.g.*, cars, streets, or parks).

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 *note*)

## § 61.82 Resident rent for supportive housing.

(a) Each resident of supportive housing may be required to pay rent in an amount determined by the recipient, except that such rent may not exceed 30 percent of the resident's monthly income after deducting medical expenses, child care expenses, court ordered child support payments, or other court ordered payments.

(b) Resident rent may be used for costs of operating the supportive housing or to assist supportive housing residents move to permanent housing.

(c) In addition to resident rent, recipients may charge residents reasonable fees for services not covered by VA per diem funds and not otherwise provided by VA.

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 *note*)