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Part IV

## Department of Veterans Affairs

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38 CFR Part 3

Net Worth, Asset Transfers, and Income Exclusions for Needs-Based Benefits; Proposed Rule

**DEPARTMENT OF VETERANS  
AFFAIRS**

**38 CFR Part 3**

**RIN 2900-AO73**

**Net Worth, Asset Transfers, and  
Income Exclusions for Needs-Based  
Benefits**

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of Veterans Affairs (VA) proposes to amend its regulations governing entitlement to VA pension to maintain the integrity of the pension program and to implement recent statutory changes. The proposed regulations would establish new requirements pertaining to the evaluation of net worth and asset transfers for pension purposes and would identify those medical expenses that may be deducted from countable income for VA's needs-based benefit programs. The intended effect of these changes is to respond to recent recommendations made by the Government Accountability Office (GAO), to maintain the integrity of VA's needs-based benefit programs, and to clarify and address issues necessary for the consistent adjudication of pension and parents' dependency and indemnity compensation claims. We also propose to implement statutory changes pertaining to certain pension beneficiaries who receive Medicaid-covered nursing home care, as well as a statutory income exclusion for certain disabled veterans and a non-statutory income exclusion pertaining to annuities.

**DATES:** VA must receive comments on or before March 24, 2015.

**ADDRESSES:** Written comments may be submitted through <http://www.regulations.gov>; by mail or hand-delivery to: Director, Regulation Policy and Management (02REG), Department of Veterans Affairs, 810 Vermont Ave. NW., Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. Comments should indicate that they are submitted in response to "RIN 2900-AO73, Net Worth, Asset Transfers, and Income Exclusions for Needs-Based Benefits." Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1068, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments may be

viewed online through the Federal Docket Management System (FDMS) at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Martha Schimpf, Analyst, Pension and Fiduciary Service, Veterans Benefits Administration, Department of Veterans Affairs, 21P1, 810 Vermont Ave. NW., Washington, DC 20420, (202) 632-8863. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** The Department of Veterans Affairs (VA) administers a needs-based benefit, "pension," for wartime veterans and for surviving spouses and children of wartime veterans. The current pension program was established by the Veterans' and Survivors' Pension Improvement Act of 1978, Public Law 95-588, 92 Stat. 2497, and became effective January 1, 1979. The statutory authority for pension is 38 U.S.C. chapter 15, implemented at 38 CFR 3.271 through 3.277. As further explained later in this Notice of Proposed Rulemaking (NPRM), VA proposes to amend 38 CFR part 3 to preserve program integrity because we have received information that, under current regulations, claimants who are not actually in need may qualify for these needs-based benefits. For clarity and consistency, some of the changes we propose would apply to other needs-based benefits as well. Although new pension claimants may qualify for pension only under the current program, VA still pays benefits under two prior pension programs. In addition, new claimants may qualify for parents' dependency and indemnity compensation (parents' DIC) under 38 U.S.C. 1315. Regulations pertaining to all of these older programs are found at current 38 CFR 3.250 through 3.263.

As a preliminary matter, we propose to refer to the current pension benefit as "pension," rather than referring to "improved pension." See 38 CFR 3.3(a)(3). When specificity is required in VA regulations to distinguish between veterans and survivors, we propose to refer to "veterans pension" and "survivors pension" instead of "disability pension" and "death pension." We have determined that the term "disability pension" is a misnomer because a veteran who has attained age 65 does not need to be disabled to receive pension. See 38 U.S.C. 1513. We also note that subchapter II of 38 U.S.C. chapter 15 is titled "Veterans' Pensions" and subchapter III is titled "Pensions to Surviving Spouses and Children." The proposed terms would be consistent with the titles used in the statutes.

We would not amend current § 3.3(a)(3) in this rulemaking or amend

other references in part 3 to "improved pension," "disability pension," or "death pension," but would implement the terminology changes over time. We also would not amend references to VA's prior pension programs, "section 306" and "old law" pension.

**Executive Summary**

*1. Legal Authority and Need for Rulemaking*

Section 501 of title 38, United States Code, authorizes VA to prescribe regulations necessary for administration of its programs. In the context of VA's needs-based pension benefit, sections 1522 and 1543 of title 38, United States Code, direct VA to deny, reduce, or discontinue the payment of pension when it is reasonable that a claimant consume some portion of his or her net worth for his or her maintenance. Because nothing in sections 1522 and 1543 define when "it is reasonable" for a claimant to consume some part of his or her net worth or provide criteria for determining when net worth is excessive, VA may interpret the law by filling these gaps.

Similarly, section 1503(a)(8) of title 38, United States Code, authorizes VA to deduct from a pension claimant's countable income payments for unreimbursed medical expenses but does not define a medical expense for VA purposes. This rulemaking would fill that gap.

This proposed rulemaking would amend regulations governing VA's needs-based pension programs to promote consistency in benefit decisions, reduce opportunities for attorneys and financial advisors to take advantage of pension claimants, and preserve the integrity of the pension program. The revised regulations would promote consistent decisions by establishing a bright-line net worth limit and re-defining net worth as the sum of assets and annual income. The revised regulations would also promote consistent decisions by defining in regulations those unreimbursed medical expenses that VA will deduct from a claimant's annual income for purposes of determining a claimant's annual pension payment.

By establishing in regulations a look-back and penalty period for claimants who transfer assets before applying for pension to create the appearance of economic need where it does not exist, the revised rules would reduce opportunities for financial advisors to provide advice for the restructuring of assets that, in many cases, renders the claimant ineligible for other needs-based benefits. Establishing a look-back

and penalty period for pre-application transfers of assets would also preserve the integrity of the pension program by ensuring that VA only pays the benefit to those with genuine need.

## 2. Summary of Major Provisions

Proposed § 3.274 would establish a clear net worth limit. VA does not currently have a bona fide net worth limit. The proposed net worth limit is the dollar amount of the maximum community spouse resource allowance established for Medicaid purposes at the time the final rule is published. This amount is currently \$119,220, which would be indexed for inflation by adjusting it at the same time and by the same percentage as cost-of-living increases provided to Social Security beneficiaries. The amount of a claimant's net worth would be determined by adding the claimant's annual income to his or her assets. VA would calculate the amount of a claimant's net worth when it receives an original or new pension claim; a request to establish a new dependent; or information that net worth has increased or decreased. Proposed § 3.274 would provide that a claimant's net worth can decrease if the claimant's annual income decreases or if the claimant spends down assets on basic necessities such as food, clothing, shelter, or health care. Proposed § 3.274 would include effective dates for benefit rate adjustments due to net worth.

Proposed § 3.275 would describe how VA calculates assets. It would provide that VA would not consider a claimant's primary residence, including a residential lot area not to exceed 2 acres, as an asset. Proposed § 3.275 would also provide that if the residence is sold, proceeds from the sale are assets unless the proceeds are used to purchase another residence within the calendar year of the sale.

Proposed § 3.276 would provide new requirements pertaining to pre-application asset transfers and net worth evaluations to qualify for VA pension. The changes respond to recommendations that the Government Accountability Office (GAO) made in a May 2012 report, "Veterans Pension Benefits: Improvements Needed to Ensure Only Qualified Veterans and Survivors Receive Benefits." Section 3.276 would establish a presumption, absent clear and convincing evidence showing otherwise, that asset transfers made during the look-back period were made to establish pension entitlement. The changes would establish a 36-month look-back period and establish a penalty period not to exceed 10 years for those who dispose of assets to

qualify for pension. The penalty period would be calculated based on the total assets transferred during the look-back period to the extent they would have made net worth excessive. The penalty period would begin the first day of the month that follows the last asset transfer.

Proposed § 3.278 would define and clarify what VA considers to be a deductible medical expense for all of its needs-based benefits. The medical expense amendments will help to ensure that those who process VA needs-based claims process them fairly and consistently and that only needy claimants receive needs-based benefits. It would provide definitions for several terms, including activities of daily living (ADLs) and instrumental activities of daily living (IADLs), and provide that custodial care means regular assistance with two or more activities of ADLs or assistance because a person with a mental disorder is unsafe if left alone due to the mental disorder. It would provide that generally, payments to facilities such as independent living facilities are not medical expenses, nor are payments for assistance with IADLs. However, there would be exceptions for disabled individuals who require health care services or custodial care. The proposed rule would place a limit on the hourly payment rate that VA may deduct for in-home attendants.

Proposed § 3.279 would place in one central location all statutory exclusions from income and assets that apply to all VA needs-based benefits.

Proposed § 3.503 would incorporate in regulations statutory changes regarding Medicaid-covered nursing home care and applicability to surviving child beneficiaries.

## 3. Assessment of Costs and Benefits

VA's impact analysis can be found as a supporting document at <http://www.regulations.gov>, usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's Web site at <http://www1.va.gov/orpm/>, by following the link for "VA Regulations Published."

### Background Information on Net Worth and Asset Transfers for Pension

Under 38 U.S.C. 1522 and 1543, VA may not pay pension to a veteran or survivor when the corpus of the individual's estate is such that under all the circumstances, including consideration of the individual's income and that of the individual's spouse or dependent children, it is reasonable that the individual consume some part of the

estate for his or her maintenance prior to receiving pension. However, Congress has not prescribed criteria for determining whether it would be reasonable to require an individual to consume his or her assets before receiving pension. VA implemented sections 1522 and 1543 in current 38 CFR 3.274 and 3.275. We have determined that the current implementing regulations also do not prescribe effective criteria for determining whether or not net worth bars pension entitlement.

The Veterans Benefits Administration's (VBA) Adjudication Procedures Manual (manual), M21-1MR, which interprets VA regulations and establishes procedures for implementing regulations, instructs adjudicators to deny pension on excessive net worth grounds if "a claimant's assets are sufficiently large that the claimant could live off these assets for a reasonable period of time." M21-1MR, Part V, Subpart iii, Chapter 1, Section J.67.g. The manual also provides that "[p]ension entitlement is based on need and that need does not exist if a claimant's estate is of such size that he/she could use it for living expenses." *Id.* at J.67.h. However, neither current regulations nor the manual defines "reasonable period of time" or establish definitive pension net worth limits. Accordingly, GAO concluded in its May 2012 report that VA adjudicators "lack[ ] specific guidance on how to determine whether or not a claimant's financial resources are sufficient to meet their basic needs without the pension benefit." U.S. Government Accountability Office, GAO-12-540, Veterans' Pension Benefits: Improvements Needed to Ensure Only Qualified Veterans and Survivors Receive Benefits 14 (2012).

The GAO report also identified over 200 organizations that market services, primarily financial planning services, to assist veterans and survivors with transferring assets in order to reduce net worth and qualify for VA pension. As GAO noted, "[c]urrent federal law allows veterans to transfer significant assets" before applying for pension and still qualify for pension, which is inconsistent with the purpose of the program." GAO-12-540, at 22. Currently, a pension claimant may lawfully transfer significant assets before applying for pension. Current § 3.276(b) provides that a pension claimant's gift of property to a relative residing in the same household is not recognized as reducing the claimant's corpus of estate and a pension claimant's sale of property to such a relative is not recognized as reducing

the claimant's corpus of estate if the purchase price or other consideration for the sale is so low as to equate to a gift. However, there is currently no objective standard for determining whether the purchase price or other consideration for the sale is so low as to equate to a gift. Current § 3.276 also provides that a pension claimant's gift of property to someone other than a relative living in the claimant's household will not be recognized as reducing the claimant's corpus of estate unless it is clear that the claimant has relinquished "all rights of ownership, including the right of control" over the property. However, current § 3.276 does not prohibit a claimant from making a gift of property to an individual not living in the claimant's household immediately before applying for pension, so currently such a gift would reduce the claimant's corpus of estate. Also, the regulation does not define the terms "ownership" and "control."

Sections 1522 and 1543 require VA to deny or discontinue pension when it is reasonable to require the individual to consume some portion of his or her net worth for personal maintenance. The legislative history of the current pension program reveals Congress' intent that "a needs-based system . . . apply only to those veterans who are, in fact, in need." H.R. Rep. No. 95-1225, at 33 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5583, 5614. We interpret the statutory requirement to consume excessive net worth prior to receiving needs-based pension as precluding pension entitlement based upon transferring assets that a claimant or beneficiary could use for his or her maintenance. Congress did not intend that a claimant who has sufficient assets for self-support could preserve those assets for his or her heirs or transfer them as gifts and still qualify for pension at the expense of taxpayers. In our view, it would be an unreasonable interpretation of current law to conclude that Congress intended that veterans and survivors could use the pension program as an estate planning tool, under which they may preserve or gift assets and shift responsibility for their support to the Government. Accordingly, we propose to amend VA's net worth and asset transfer regulations to ensure program integrity and preserve the program for wartime veterans and their survivors who actually need Government support.

#### Proposed Net Worth and Asset Transfer Amendments

Current 38 CFR 3.274, 3.275, and 3.276 use the terms "net worth" and "corpus of the estate" to describe the assets available to a claimant or

beneficiary that could bar pension entitlement if sufficiently great. In particular, current § 3.275(b) gives the same definition to both terms. We propose to use the term "net worth" in proposed §§ 3.274, 3.275, and 3.276 because it is the more commonly understood term. In addition, as explained in more detail below, net worth would be defined as the sum of a claimant's or beneficiary's assets and annual income.

#### Section 3.274—Net Worth and VA Pension

We propose to revise § 3.274 to establish new policies pertaining to pension and net worth. As we explained above, sections 1522 and 1543 require VA to deny or discontinue pension when, under all the circumstances, "it is reasonable" that the claimant or beneficiary use some portion of the applicable net worth for his or her maintenance. VA implemented this statutory requirement in current § 3.274, which essentially tracks the language of the statutes and prescribes denial or discontinuance of pension when it is reasonable that the individual consume "some part" of his or her net worth for personal maintenance. Current § 3.274(a) pertains to denial or discontinuance of veterans' pension entitlement based on excessive net worth, and § 3.274(c) pertains to denial or discontinuance of surviving spouses' pension entitlement based on excessive net worth. Current paragraphs (b) and (d) prescribe when VA must deny or discontinue increased pension paid to a veteran or surviving spouse, respectively, on account of a child. Current paragraph (e) pertains to denial or discontinuance of surviving children's pension entitlement based on excessive net worth.

Unlike the regulatory framework governing other Federal needs-based programs, such as the Social Security Administration's Supplemental Security Income (SSI) program, *see e.g.*, 20 CFR 416.1205, which prescribes a \$2,000 limit on resources (*i.e.*, assets) for unmarried individuals and a \$3,000 limit for married individuals, VA's net worth regulations do not prescribe clear limits for pension entitlement. Rather, for determining whether some part of a claimant's net worth should be consumed for his or her maintenance, current § 3.275(d) requires VA to consider the claimant's income with (1) the liquidity of the property, (2) the life expectancy of the claimant, (3) the number of dependent family members, and (4) the potential rate of depletion of available assets. Absent from current §§ 3.274 and 3.275(d) are clear rules for

evaluating these factors and determining whether a claimant's assets and income are sufficient to meet his or her needs without pension. As a result, GAO concluded that VA adjudicators had to use their own discretion, leading to inconsistent decisions for similarly situated claimants. *See* GAO-12-540, at 14-15.

In addition to producing inconsistent decisions, current rules require development of additional information not solicited in the initial application for compensation and pension, VA Form 21-526, or the application for survivors' benefits, VA Form 21P-534. For example, to determine the potential rate of depletion of a claimant's net worth, VA must gather information about a claimant's living expenses and reconcile those expenses with the claimant's income over an unspecified period of time. This development necessarily adds time and complexity to the adjudication of these needs-based benefits, potentially creating greater financial hardship for claimants as they wait for VA to decide their claims.

As stated above, the statutory authorities for net worth, 38 U.S.C. 1522 and 1543, require VA to consider a veteran's, surviving spouse's, or child's annual income when determining whether excessive net worth bars pension entitlement. Current regulations governing VA's assessment of net worth, 38 CFR 3.275(d), require VA, in making net worth determinations, to consider "the amount of the claimant's income," together with other considerations. In order to account for the statutory annual income component of net worth determinations, we propose a new net worth definition which VA would calculate by adding assets and annual income.

Proposed § 3.274(a) would establish a clear net worth limit for pension entitlement. Establishing a clear limit would promote uniformity and consistency in pension entitlement determinations consistent with the purpose of the pension program. Additionally, under a clear bright-line limit, it would no longer be necessary for claim adjudicators to complete lengthy, subjective net-worth determinations, which would free up limited resources for other claim-related activities, specifically timely delivery of benefits to individuals who immediately need Government support.

The net worth limit for pension entitlement that we propose to use is the standard maximum community spouse resource allowance (CSRA) prescribed by Congress for Medicaid, another Federal needs-based benefit program, which we consider sufficiently

analogous to VA's pension program to use the Congressional resource limit on Medicaid entitlement in VA's program. For the Medicaid program, Congress has established a standard maximum resource amount that the "community spouse" of an institutionalized individual may be allowed to retain without the institutionalized spouse losing entitlement to Medicaid because of excessive resources. Congress established this standard maximum amount, referred to as the maximum CSRA, at \$60,000 in 1989 and indexed that amount for inflation by increasing it by the same percentage as the percentage increase in the average consumer price index for all urban consumers. See 42 U.S.C. 1396r-5(f) and (g). For calendar-year 2014, the maximum CSRA is \$117,240. See <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Eligibility/Downloads/Spousal-Impoverishment-2014.pdf>. As described in further detail below, we would use the dollar amount of the maximum CSRA that is in effect at the effective date of the final rule after publication in the **Federal Register** and have inserted a temporary placeholder in the proposed rule.

Congress' intent in establishing the CSRA was to prevent the impoverishment of the non-institutionalized spouse of a Medicaid-covered individual. VA's intent in proposing to adopt the maximum CSRA as the net worth limit for pension entitlement is similar in that we seek to prevent the impoverishment of wartime veterans and their dependents or survivors as a prerequisite for obtaining VA pension. We recognize that a veteran or a veteran's surviving spouse may have built up a modest amount of savings prior to applying for pension and that there might be a need to retain a reasonable portion of these assets to respond to unforeseen events, such as medical conditions requiring care in an assisted living facility or nursing home.

The current cost of nursing home and assisted living care supports our proposal to adopt the maximum CSRA. A recent survey found that the average annual cost of a semi-private room in a nursing home was over \$81,000, and the cost of a private room was over \$90,000. MetLife Mature Market Institute, "Market Survey of Long-Term Care Costs" 4 (2012). A 2010 survey also found that the average annual cost of a private room in a nursing home was over \$90,000. Prudential Research Report, "Long-Term Care Cost Study" 15 (2010). One survey found that the average cost of a residence in an assisted living facility was \$3,550 monthly or

\$42,600 annually. MetLife Mature Market Institute, "Market Survey of Long-Term Care Costs" 4 (2012). The cost of such facilities would quickly deplete the savings permitted by our proposed use of the maximum CSRA even with the supplemental income provided by VA's pension program, which for 2014 is established at a maximum of \$25,022 annually for a veteran with a spouse and \$13,563 annually for a surviving spouse. Given the high cost of such care and the fact that many veterans or survivors may have to pay for the care, we have determined that it would be reasonable to establish the maximum CSRA as the net worth limit for pension entitlement. This limit would correspond roughly to the cost of residential care in a nursing home or assisted living facility for 1 to 2 years.

Proposed § 3.274(a) includes several placeholders that describe what the final rule would contain if implemented. The net worth limit would be the dollar amount of the current maximum CSRA as of the effective date of the final rule, to be increased by the same percentage as the increase in Social Security benefits whenever there is a cost-of-living increase in benefit amounts payable under the Social Security Act. VA would publish the current limit on its Web site. The proposed regulation text also does not include the Web site address because VA has not yet determined the address at which the net worth limit would be published. We have inserted "location to be determined" in the proposed regulation text as a placeholder and would provide the Web site address, current net worth limit, and effective date in the final rule.

Under proposed § 3.274(b), VA would deny or discontinue pension if a claimant's or beneficiary's net worth exceeds the net worth limit. It would not be necessary to retain the reasonableness language in the current regulation under this bright-line limit. We have determined that it would be reasonable and consistent with the purpose of the pension program to fairly and consistently assess net worth and to make pension entitlement determinations using standardized criteria. Proposed § 3.274(b)(1) would define a claimant's or beneficiary's net worth as the sum of his or her assets and annual income. We propose this new definition because under VA's net worth statutes, 38 U.S.C. 1522 and 1543, VA must consider a claimant's or child's annual income when determining if net worth bars pension entitlement. To account for this statutory requirement, net worth for VA pension purposes

would include both an asset component and an income component. This would be reflected for veterans, surviving spouses, and surviving children in proposed § 3.274(b)(1) and for dependent children in proposed § 3.274(d)(2).

Proposed § 3.274(b)(2) would provide that VA calculates a claimant's or beneficiary's assets under this section and § 3.275; and paragraph (b)(3) would provide cross-references to make it clear that "annual income" for net worth purposes is the same "annual income" used for calculating a pension entitlement rate for a claimant or a beneficiary. Proposed paragraph (b)(4) gives an example of a net worth calculation.

Proposed § 3.274(c) generally restates provisions in current § 3.274(a), (c), and (e) and explains whose assets VA includes as a claimant's or beneficiary's assets. A veteran's assets include the assets of the veteran as well as the assets of the veteran's spouse, if the veteran has a spouse. See 38 U.S.C. 1522(a). A surviving child's assets include those of his or her custodian unless the custodian is an institution. We also propose to refer to the provisions of current 38 CFR 3.57(d) and clarify that, when a surviving child is in the joint custody of a natural or adoptive parent and a stepparent, the surviving child's assets also include the assets of the stepparent. This provision is consistent with 38 U.S.C. 1543(b), pertaining to a surviving child's net worth.

Proposed § 3.274(d) would clarify paragraphs (b) and (d) of current § 3.274 prescribing how a child's net worth affects a veteran's or surviving spouse's pension entitlement. The current paragraphs restate statutory provisions in providing that "increased pension" payable to a veteran or a surviving spouse on account of a child is barred if it is reasonable that some part of the child's net worth be consumed for the child's maintenance. See 38 U.S.C. 1522(b) and 1543(a)(2). In this context, VA has interpreted the statutory phrase "increased pension" to refer to the statutory maximum pension rates rather than the pension entitlement rate. The pension entitlement rate is the pension amount that a claimant or beneficiary is entitled to receive after VA subtracts the claimant's or beneficiary's income from the statutory maximum rate. If a child has sufficient income, a veteran's or surviving spouse's entitlement rate can decrease rather than increase when the child is established as a dependent. Sections 1522(b) and 1543(a)(2) refer to the increased pension payable under the applicable subsections of sections 1521 and 1542 respectively, which provide

the maximum pension rates. Sections 38 U.S.C. 1522(b) and 1543(a)(2) also explicitly provide that a child with excessive net worth “shall not be considered as the veteran’s [or surviving spouse’s] child for [pension purposes]. Accordingly, proposed § 3.274(d) states that VA would not consider a child to be a veteran’s or surviving spouse’s dependent for pension purposes when the child’s net worth exceeds the net worth limit. This would be true even if removing the child as a dependent results in an increased pension entitlement rate for the veteran or surviving spouse.

Proposed § 3.274(d)(1) would clarify two issues pertaining to dependent children. Proposed paragraph (d)(1)(i) would provide that a “dependent child” refers, for the purposes of this section, to a child for whom a veteran or a surviving spouse is entitled to an increased maximum annual pension rate. The maximum annual pension rates are the annual pension rates set forth in 38 U.S.C. 1521 for veterans and 38 U.S.C. 1541 for surviving spouses. These maximum rates are then reduced by countable annual income, divided by 12, and rounded down to the nearest whole number to calculate the monthly pension entitlement rate. The maximum annual pension rate is the annual amount to which an eligible claimant is entitled to receive if his or her annual income is zero.

Technically, surviving spouses do not have dependent children for VA purposes. For VA purposes, any child must be a child of the veteran. A veteran’s child who is not in the custody of a surviving spouse, as custody is defined at § 3.57(d), is a surviving child who is eligible for pension in his or her own right. However, referring to a veteran’s child in the custody of a surviving spouse as a “dependent child” makes the necessarily complex net worth regulations somewhat easier to understand. There is statutory and regulatory precedent for referring to a child in this manner. Under 38 U.S.C. 1506(1) and 38 CFR 3.277(a), a “dependent child” is a child for whom a person is receiving or entitled to receive increased pension.

Proposed § 3.274(d)(1)(ii) would provide that a “potential dependent child” refers to a child who is excluded from a veteran’s or surviving spouse’s pension award solely or partly because the child’s net worth exceeds the limit and provides that references to a “dependent child” also include such potential dependent children.

Similar to proposed paragraphs (b)(1) through (b)(3) for claimants and

beneficiaries, paragraphs (d)(2) through (d)(4) of proposed § 3.274 set forth the meaning of net worth for dependent children, and describe how VA calculates a dependent child’s assets and annual income to determine the amount of the child’s net worth. The applicable net worth statutes, 38 U.S.C. 1522(b) and 1543(a)(2), provide that a dependent child’s estate includes only the estate of the child, but VA must consider the income of the child, the veteran or surviving spouse, and other dependents when determining if the child’s net worth is excessive.

Therefore, § 3.274(d)(2) would provide that a dependent child’s assets include the child’s assets only, and § 3.274(d)(3) would provide that VA will calculate a dependent child’s annual income under § 3.275 and will include the annual income of the child as well as the annual income of the veteran or surviving spouse that would be included if VA were calculating a pension entitlement rate for the veteran or the surviving spouse. See 38 U.S.C. 1522(b) and 1543(a)(2).

Nothing in current § 3.274 or any other current regulation prescribes when VA must calculate net worth for purposes of determining initial, continued, or increased pension entitlement. Accordingly, in § 3.274(e), we propose to prescribe that VA would calculate net worth when VA receives: (1) An original pension claim, (2) a new pension claim after a period of non-entitlement, (3) a request to establish a new dependent, or (4) information that a veteran’s, surviving spouse’s, or child’s net worth has increased or decreased.

Information about a claimant’s net worth may come from the claimant him or herself or from VA matching programs with the Internal Revenue Service (IRS) or the Social Security Administration (SSA). Such matching programs are authorized under 38 U.S.C. 5317. VA would obtain information from the IRS and the SSA before paying pension and when recalculating net worth for pension under § 3.274(e). We intend that proposed paragraph (e) would provide notice to VA adjudicators, claimants, and beneficiaries regarding the types of claims or benefit adjustments that require a net worth calculation. As explained above in the information pertaining to § 3.274(b)(1), net worth would be defined as the sum of a claimant’s assets and his or her annual income. Proposed paragraph (e) would also clarify that generally, VA calculates net worth only when the claimant meets other factors necessary for pension entitlement. Proposed § 3.274(e) would

clarify for readers that if, for example, a veteran is not entitled to pension because he or she lacks wartime service or because his or her annual income exceeds the maximum annual pension rate, VA will not calculate net worth. However, paragraph (e)(3) would provide an exception. If the evidence of record shows that net worth exceeds the net worth limit, VA may decide the pension claim before determining if the claimant meets other pension entitlement factors. In such a case, VA would notify the claimant of the entitlement factors not established. This prevents VA from developing a case when the evidence clearly shows that a claimant is not entitled to the benefit.

Nothing in current § 3.274 or any other VA regulation addresses the issue of whether claimants denied pension due to excessive net worth may lawfully decrease their net worth and qualify for pension. To remedy this omission, proposed § 3.274(f) would discuss the three ways in which claimants could decrease their net worth to lawfully qualify for pension. Under proposed § 3.274(f)(1), claimants could make certain expenditures that would decrease their assets and thereby establish entitlement, continue entitlement, or increase entitlement to pension. Proposed § 3.274(f)(1) would limit authorized expenditures to expenditures for basic living expenses or for education or vocational rehabilitation. Such a limitation is consistent with the requirement in sections 1522 and 1543 that the individual consume some part of net worth for his or her maintenance when net worth is excessive. Given the purpose of the needs-based program established by Congress, we interpret “maintenance” to mean basic necessities such as food, clothing, shelter, or health care. Because education or vocational rehabilitation expenses can lead to decreased reliance on pension, we believe that such expenses should also be considered part of an individual’s maintenance for this purpose.

Proposed § 3.274(f)(2) would simply cross-reference the regulations that apply to pension annual income calculations. By law, VA must consider annual income in determining net worth. A decrease in annual income is the second method by which net worth can decrease. In proposed § 3.274(f)(3), we address how VA will treat payments, e.g., unreimbursed medical expenses, which can decrease either annual income or assets. VA would not consider the same payments to decrease both the annual income and the asset components of net worth. Proposed

§ 3.274(f)(3) provides that VA will first apply the payment amounts to decrease annual income. We believe this is fair and reasonable because it is the amount of the annual income that determines the pension entitlement rate. If there are remaining deductible amounts and net worth still exceeds the limit, VA will use those amounts to reduce the asset component of net worth. We would provide two examples of this provision.

Paragraphs (g), (h), and (i) of proposed § 3.274 are proposed net worth effective-date provisions. Proposed paragraph (g) is based on current § 3.660(d) and would prescribe the effective date of entitlement or increased entitlement after VA has denied, reduced, or discontinued a pension award based on excessive net worth. Proposed paragraph (g)(1) would describe the scope of the rule. Consistent with current § 3.660(d), proposed paragraph (g)(2) would prescribe the effective date of entitlement or increased entitlement as the day net worth ceases to exceed the limit as long as, before the pension claim has become finally adjudicated, the claimant or beneficiary submits a certified statement that net worth has decreased. “Finally adjudicated” is defined in 38 CFR 3.160(d), and for net worth decisions, means that the 1-year period for beginning the appeal process by filing a Notice of Disagreement (NOD) has expired or that the claim has been appealed and decided. If VA does not receive the certified statement within one year after VA’s decision notice to the claimant of the denial, reduction, or discontinuance (and does not appeal), the effective date is the date VA receives a new pension claim. VA always has the right, under 38 CFR 3.277(a), to require that a claimant or beneficiary submit additional evidence to support entitlement or continuing

entitlement as the situation warrants and proposed § 3.274(g)(2) would so provide.

Proposed § 3.274(h) pertains to reduction or discontinuance of a beneficiary’s pension entitlement based on excessive net worth. Proposed paragraph (h)(1) would restate the statutory end-of-year effective date for reducing or discontinuing a pension award because of excessive net worth. See 38 U.S.C. 5112(b)(4)(B). The first day of non-payment or reduced rate would be the first day of the year that follows the net worth change. This is consistent with longstanding VA implementation of reduction and discontinuance effective dates. See 38 CFR 3.500. Proposed paragraph (h)(2) would clarify that if net worth decreases to or below the limit before the effective date, VA will not reduce or discontinue the pension award on the basis of excessive net worth. Proposed § 3.274(h)(2) would provide that VA must receive the beneficiary’s certified statement that net worth has decreased and must receive it before VA has reduced or discontinued the pension award. (If VA does, in fact, reduce or discontinue the pension award, then proposed paragraph (g)(2) would apply and the claimant would be able to submit evidence of continuing entitlement for VA to retroactively resume the award.)

Proposed § 3.274(i) prescribes additional effective dates that pertain to changes in a dependent child’s net worth. As discussed above in the information pertaining to § 3.274(d), a child would not be considered a veteran’s or surviving spouse’s dependent child if the child’s net worth exceeds the net worth limit. In addition, we discussed how a veteran’s or surviving spouse’s pension entitlement may increase or decrease when a child

is established as a dependent based on the amount of annual income the child may have. Proposed § 3.274(i)(1) would refer readers to paragraphs (g) and (h) for the intuitive situation in which establishing a dependent child (because the child’s net worth has decreased) results in an increased pension entitlement rate for the veteran or surviving spouse.

Proposed § 3.274(i)(2) would address the situation in which establishing a dependent child results in a decreased pension entitlement rate for the veteran or surviving spouse. Paragraph (i)(2)(i) would establish an end-of-year effective date for a decreased pension entitlement rate when an increase in a dependent child’s net worth results in removing the child from the award when the child’s net worth is excessive. This end-of-year effective date is the same regardless of whether establishing or not establishing the dependent child due to a net worth change results in a decreased pension entitlement rate for the veteran or surviving spouse. Under 38 U.S.C. 5112(b), the “effective date of a reduction or discontinuance of . . . pension . . . by reason of change in [net worth] shall be the last day of the calendar year in which the *change* occurred.” Emphasis added.

Proposed paragraph (i)(2)(ii) would establish the effective date for an increased entitlement rate based on removing the child as a dependent as the date VA receives a claim for an increased pension rate based on the dependent child’s net worth increase. This is consistent with 38 CFR 3.660(c), effective March 24, 2015. See 79 FR 57697, September 25, 2014.

The explanatory derivation table below regarding net worth effective dates is provided as an aid for those reading this NPRM.

TABLE 1—NET WORTH (NW) EFFECTIVE-DATE PROVISIONS DERIVATIONS

| Proposed § 3.274     | Derived from         | Situation   | Effective date   | Change from current rule   |
|----------------------|----------------------|---|--|--|
| 3.274(g) .....       | 3.660(d) .....       | NW has decreased after VA denial, reduction, or discontinuance.   | Entitlement from date of NW increase if information received timely. | No date change. Addition of certified statement requirement.   |
| 3.274(h) .....       | 3.660(a)(2) .....    | NW has increased and reduction or discontinuance necessary.   | End-of-the-year that NW increases.                                   | No date change. Addition of certified statement requirement when NW decreases before the effective date. |
| 3.274(i)(1) .....    | New Cross-Reference. |   |  |  |
| 3.274(i)(2)(1) ..... | 3.660(d) .....       | Dependent child’s NW has decreased and adding the child results in a rate decrease for the veteran or surviving spouse. | End-of-the-year that NW decreases.                                   | No date change.  |

TABLE 1—NET WORTH (NW) EFFECTIVE-DATE PROVISIONS DERIVATIONS—Continued

| Proposed § 3.274     | Derived from   | Situation   | Effective date  | Change from current rule                           |
|----------------------|----------------|---|---|--|
| 3.274(i)(2)(2) ..... | 3.660(c) ..... | Dependent child's NW has increased and removing the child results in a rate increase for the veteran or surviving spouse. | Date of receipt of claim for increased rate based on child's NW increase. | No date change. Claim required for increased rate. |

We would remove from § 3.660(d), which pertains to net worth effective dates, the reference to § 3.274, but the reference to § 3.263 would remain intact. With the exception of removing or redesignating certain paragraphs as explained below in the discussion regarding conforming amendments, we propose no changes to § 3.263, which applies to net worth decisions for section 306 pension and to parental dependency for veterans disability compensation purposes under 38 U.S.C. 1115.

Finally, we would update the authority citation at the end of § 3.274 to include the effective-date statutes, 38 U.S.C. 5110 and 5112, along with the net worth statutes, 38 U.S.C. 1522 and 1543.

Section 3.275—How VA Determines the Asset Amount for Pension Net Worth Determinations

Although sections 1522 and 1541 require VA to deny or discontinue pension or increased pension when a veteran's, surviving spouse's, or child's net worth is excessive, nothing in these statutes prescribes how VA should calculate net worth. VA implemented the statutory net worth provisions in current 38 CFR 3.275 by establishing net worth evaluation criteria. We propose to amend § 3.275 consistent with proposed § 3.274.

As noted in the above discussion of proposed § 3.274, we propose to establish the maximum CSRA as the net worth limit for pension entitlement. Net worth over that limit would not meet the reasonableness standard prescribed by Congress in sections 1522 and 1543. VA would determine the amount of the asset component of a claimant's net worth using objective criteria and compare the net worth to a published limit in order to determine whether a claimant's net worth permits an award or increased award of pension. This objective standard would promote fair and consistent decision-making and would allow VA to process claims more efficiently for individuals who immediately need supplemental income. Accordingly, the criteria in current § 3.275(d) for subjectively evaluating net worth would not be

applicable under the proposed rule. Proposed § 3.275 would define the term "assets" instead of "net worth" or "corpus of estate." As we described above in the information pertaining to § 3.274(b), net worth would consist of both an asset component and an annual income component to account for the statutory provision that VA must consider annual income in its net worth determinations. Because we are proposing a bright line net worth limit, net worth would be the sum of assets and income, and the term "assets" would be used in many locations where "net worth" is currently used because net worth does not currently have an income component *per se*. Proposed § 3.275 would also provide exclusions from assets as described in greater detail below. We would not include the net worth evaluation criteria from current paragraph (d) because net worth would no longer be evaluated using those criteria; rather, there would be a bright line net worth limit.

Under current § 3.275(e), VA excludes from the net worth (*i.e.*, assets) of a child reasonable amounts for actual or prospective educational or vocational expenses until the child attains age 23. There is no statutory requirement for this exclusion and we believe that the monetary amount of the net worth limit we proposed in § 3.275(a) is sufficient to account for vocational or educational expenses until age 23. Public high school education in the United States is free. The United States Department of Education College Affordability and Transparency Center reports average net prices of college attendance for 2011–2012. Average net price is for full-time beginning undergraduate students who received grant or scholarship aid from federal, state or local governments, or the institution. The following college prices are reported per semester for 4-year colleges: Public (*e.g.*, State): \$11,582; Private not-for-profit: \$20,247; and Private for profit: \$21,742. Therefore, we believe that the maximum CSRA of \$117,240 (2014) is also an appropriate limit for children, and proposed § 3.275 does not include the language of § 3.275(e).

Proposed § 3.275(a)(1) would define "assets" and restate most of current

§ 3.275(a), (b), and (c), although we would use the term "assets." Proposed paragraph (a)(1) would also use the term "fair market value" rather than the term "market value" that current paragraph (a)(1) uses. We would include a cross-reference to proposed § 3.276(a)(4), which would define "fair market value." In proposed paragraph (a)(2), we propose to define "claimant" in order to simplify §§ 3.275 and 3.276. Proposed paragraph (a)(2)(i) would provide that, with one exception, "claimant" would mean a pension beneficiary, a dependent spouse, or a dependent or potential dependent child as described in proposed § 3.274(d), as well as a veteran, surviving spouse, or surviving child pension applicant for the purposes of §§ 3.275 and 3.276. The exception, at proposed (a)(2)(ii), would define claimant as "a pension beneficiary or applicant who is a veteran, a surviving spouse, or a surviving child." This definition would apply to paragraph (b)(1), which would regulate the manner in which VA treats the exclusion of a residence. This exception is necessary to make clear that VA does not exclude more than one residence per family unit. These definitions would simplify §§ 3.275 and 3.276 because the proposed net worth and asset transfer provisions would apply to each of these individuals and one term would describe all affected individuals.

Proposed paragraph (a)(3) would define "residential lot area" to state and clarify VA's policy with respect to lot size. Current § 3.275(b) provides that VA does not include a claimant's "dwelling . . . including a reasonable lot area" in determining the amount of the claimant's net worth. Proposed § 3.275(a)(3) would define "residential lot area" as the lot on which a residence sits that is similar in size to other residential lots in the vicinity of the residence, but not to exceed 2 acres (87,120 square feet), unless the additional acreage is not marketable. The additional property might not be marketable if, for example, the property is only slightly more than 2 acres, the additional property is not accessible, or there are zoning limitations that prevent selling the additional property.



The United States Census Bureau reports that in 2010, the average lot size for new single-family homes sold was 17,590 square feet. In metropolitan areas, it was 16,585 square feet and outside metropolitan areas, it was 27,363 square feet. We propose to establish a 2-acre residential lot area limit to avoid disadvantaging veterans and survivors who may have purchased a residence with an above-average lot size long before they developed a need for the support provided by the pension program. This limit would support our policy choice, under which we exclude a claimant's primary residence from assets, while at the same time placing a reasonable limit on excluded property for purposes of preserving the pension program for Veterans and survivors who have an actual need.

Proposed paragraph (b) would prescribe exclusions from assets. In proposed paragraph (b)(1), we would incorporate other matters of longstanding VA policy with respect to a claimant's residence, as explained and justified below. Under current § 3.275(b), VA excludes a claimant's "dwelling" from net worth. We propose to refer to a claimant's "primary residence" rather than to a "dwelling" to clarify that VA excludes only the value of the single residence, along with the residential lot area, where the claimant has established a permanent place of residence, not the value of other properties where the claimant may occasionally reside. The proposed rule clarifies that a claimant can have only one primary residence at any given time. The term "primary residence" is well understood because a primary residence is considered a legal residence for the purposes of income tax and acquiring a mortgage. We also propose to state that, if the residence is sold, VA would not include the proceeds from the property sale as an asset to the extent the claimant uses the proceeds to purchase another residence within the same calendar year. This provision would be consistent with the effective-date rule in 38 U.S.C. 5112(b)(4)(B), which provides that a reduction or discontinuance of pension based upon a change in net worth is effective the last day of the calendar year in which the change occurred. However, to the extent the sale price exceeds the purchase price of the latter residence, the excess amount would be included as an asset.

Consistent with proposed § 3.275(a)(1), proposed § 3.275(b)(1)(i) would state that VA will not subtract from a claimant's assets the amount of any mortgages or encumbrances on a claimant's primary residence. Because VA would not include a claimant's

primary residence as an asset and mortgages and encumbrances would be property-specific, VA would not subtract mortgages or encumbrances on the primary residence from other assets.

Current § 3.275(b) does not address whether VA excludes a claimant's residence if the claimant is receiving care in a nursing home or other residential facility or receiving care in the home of a family member. The legislative history of Public Law 95-588, which created the current pension program, indicates that Congress was aware that VA does not include a beneficiary's residence as part of net worth and did not intend to change that policy. *See* 123 Cong. Rec. S19754, (daily ed. Dec. 15, 1977) (statement of Sen. Cranston). However, the legislative history does not address the point at which VA should discontinue the primary residence exclusion. Accordingly, at proposed paragraph (b)(1)(ii), we propose to state that VA would exclude a claimant's primary residence as an asset regardless of whether the claimant is residing in a nursing home, medical foster home, or an assisted living or similar residential facility that provides custodial care, or resides with a family member for custodial care. The terms "nursing home," "medical foster home," "assisted living, adult day care, or similar facility," and "custodial care" would be defined in proposed § 3.278(b) with a cross reference in proposed § 3.275(b)(1)(ii) to that regulation. Because there is generally a possibility that an individual may return to his or her primary residence, and VA supports such a return, we propose to prescribe clearly that a claimant's primary residence is not an asset for VA pension purposes. Consistent with our current policy, we would also specify that any rental income from the primary residence would be countable annual income under § 3.271(d) for pension entitlement purposes (and thus would be part of net worth under proposed § 3.274). This is consistent with the general rule in 38 U.S.C. 1503(a) that "all payments of any kind or from any source . . . shall be included" in determining annual income except as specifically excluded.

Proposed paragraphs (b)(3) through (b)(6) would list four types of payments that are excluded from assets for VA's net worth calculations for pension. These four exclusions apply to current pension but do not apply to prior pension programs. Proposed paragraph (b)(3) would list payments under section 6 of the Radiation Exposure Compensation Act of 1990 and is taken from current § 3.275(h). Proposed

paragraph (b)(4) would list payments made under section 103(c) of the Ricky Ray Hemophilia Relief Fund Act of 1998, which are excluded under 42 U.S.C. 300c-22(note). Proposed paragraph (b)(5) would list payments made under the Energy Employees Occupational Illness Compensation Program, which are excluded under 42 U.S.C. 7385e(2). Proposed paragraph (b)(6) would list payments made to certain eligible Aleuts under 50 U.S.C. App. 1989c-5. These payments are excluded under 50 U.S.C. App. 1989c-5(d)(2).

Below in this NPRM, we propose a new § 3.279 that would list payments that are statutorily excluded in determining entitlement to all needs-based benefits that VA administers. The payments listed in paragraphs (f), (g), (i), and (j), of current § 3.275 would be listed in proposed § 3.279; therefore, they would not be included in proposed § 3.275(b). Proposed § 3.275(b)(7) cross-references proposed § 3.279 and excludes from net worth other applicable payments listed there. The payments described in current § 3.275(e) are already accounted for in setting the net worth limit (see discussion of the CSRA above). As explained and justified later in this NPRM, the exclusion described in paragraph (k) of current § 3.275 would not be included in these regulations.

#### Waived Income Provision Relocation and Revision

We propose to move the provision of current 38 CFR 3.276(a), which pertains to waived income, to a new paragraph (i) in 38 CFR 3.271. We believe that § 3.271 would be a more appropriate location for a provision that applies to income counting than would § 3.276. Proposed § 3.276 pertains to asset transfers and penalty periods with respect to net worth calculations. Section 1503(a) of title 38, United States Code, requires VA to consider as income "all payments of any kind or from any source (including salary, retirement or annuity payments, or similar income, which has been waived . . .)." This provision of section 1503(a) became effective July 1, 1960, when Public Law 86-211 established what we now term "section 306" pension. The previous pension program, which we now term "old-law" pension, was an "all-or-nothing" benefit in which a small increase in income could result in the total loss of VA pension. Therefore, beneficiaries often wished to waive receipt of other income so as not to lose pension entitlement, and VA regulations pertaining to old-law pension permit this. *See* 38 CFR 3.262(h). However,

Public Law 86–211 required VA to count waived income for pension purposes, thus preventing beneficiaries from “creat[ing] their own need so as to qualify for the benefit.” See S. Rep. No. 86–666, at 4 (1959), as reprinted in 1959 U.S.C.C.A.N. 2190, 2193. This provision was carried forward to the current pension program in section 1503(a), and VA implemented it in current 38 CFR 3.276(a), which we now propose to move to proposed 38 CFR 3.271(i). Proposed § 3.271(i) essentially restates current § 3.276(a) in that it also provides that VA would count waived income. We would also add a reference to proposed § 3.279, which would list statutory exclusions from income. Additionally, longstanding VA policy provides a qualified exception to the general rule regarding waiver, such that if an individual withdraws a Social Security claim after a finding of entitlement to Social Security benefits, so as to maintain eligibility for an unreduced Social Security benefit on attainment of a certain age, this withdrawal is not considered to be a waiver. In this situation, the individual’s withdrawal of the claim is more accurately and fairly characterized under section 1503(a) as a deferral of income rather than a waiver. Accordingly, we propose to clearly state this policy in proposed § 3.271(i).

#### Section 3.276—Asset Transfers and Penalty Periods

Sections 1522 and 1543 of 38 U.S.C. require VA to deny or discontinue pension when a claimant’s or beneficiary’s net worth, including consideration of annual income, is excessive. As stated in the above introductory information on net worth determinations and asset transfers, current § 3.276(b), which pertains to asset transfers, is not effective in proscribing transfers of significant assets for the purpose of creating pension entitlement, which is inconsistent with a needs-based benefit program. We therefore propose significant changes to VA’s asset transfer regulation consistent with our interpretation of Congress’ intent. Significantly, we propose to establish a 36-month look-back period for claimants who transfer assets in order to reduce net worth and create pension entitlement. We also propose to establish penalty periods related to such transfers.

Proposed § 3.276(a) would define “covered asset,” “covered asset amount,” “fair market value,” “transfer for less than fair market value,” “annuity,” “trust,” “uncompensated value,” “look-back period” and “penalty period.” These definitions

would make this necessarily complex regulation easier to understand. We would also provide a cross-reference to the definition of “claimant” in proposed § 3.275, which, as previously discussed, would mean claimants, beneficiaries, and dependent spouses, as well as dependent or potentially dependent children. We use the same terminology in this NPRM when describing proposed changes to § 3.276.

We would define “covered asset” to mean an asset that was part of net worth, was transferred for less than fair market value, and would have caused or partially caused net worth to exceed the limit had the claimant not transferred the asset. The “covered asset amount” would be the monetary amount by which net worth would have exceeded the limit on account of a covered asset if the uncompensated value of the covered asset had been included in the net worth calculation. We would include two examples of covered asset amounts. These definitions are important because the covered asset amount is the amount that VA proposes to use to calculate the penalty period as described below. A smaller covered asset amount results in a shorter penalty period. We propose to define “covered asset amount” in this manner because, in our view, it would be inequitable to calculate a penalty period using the entire transferred amount when net worth would have exceeded the limit by only a small amount if the claimant had not transferred any assets at all.

In proposed § 3.276(a)(4), we propose to define “fair market value” as the price at which an asset would change hands between a willing buyer and willing seller who are under no compulsion to buy or sell and who have reasonable knowledge of relevant facts. VA uses the best available information to determine fair market value, such as inspections, appraisals, public records, and the market value of similar property if applicable. Using the best available information to determine a fair value is a restatement of current and longstanding policy.

We then propose to define “transfer for less than fair market value” as selling, conveying, gifting, or exchanging an asset for an amount less than the fair market value of the asset. In addition, we would include as a transfer for less than fair market value any asset transfer to or purchase of any financial instrument or investment that reduces net worth and would not be in the claimant’s financial interest were it not for the claimant’s attempt to qualify for VA pension by transferring assets to or purchasing such instruments or investments. Two examples of such

instruments or investments are annuities and trusts. We would define “annuity” to mean “a financial instrument that provides income over a defined period of time for an initial payment of principal.” This definition is derived from the GAO report. We would define “trust” to mean a legal arrangement by which an individual (the grantor) transfers property to an individual or an entity (the trustee), who manages the property according to the terms of the trust, whether for the grantor’s own benefit or for the benefit of another individual. As previously stated, the GAO report identified numerous organizations that assist claimants with transferring assets to create pension entitlement. Therefore, we are including these asset transfers in the proposed definition of “transfer for less than fair market value.” We note that similar terms are used in 42 U.S.C. 1382b(c), which pertains to Social Security Administration’s SSI program. There are certain similarities between SSI and VA’s pension program in that both are based on need. In light of VA’s broad authority to implement appropriate net worth regulations and in the absence of specific statutory guidance, we have drawn some of the proposed language in this NPRM from 42 U.S.C. 1382b, which pertains to resources (*i.e.*, net worth) for SSI.

The “uncompensated value” of an asset would be defined as the difference between its fair market value and the amount of compensation an individual receives for the asset. (In this context, the word “compensation” has its more general meaning rather than the technical meaning given in 38 U.S.C. 101(13).) In the case of an asset transfer to, or purchase of, a financial instrument or investment such as a trust or an annuity, the uncompensated value would mean the amount of money or the monetary value of other assets so transferred.

Proposed § 3.276(a)(7) would define “look-back period” to mean the 36-month period before the date on which VA receives either an original pension claim or a new pension claim after a period of non-entitlement. As previously stated, VA proposes to establish a 3-year look-back period similar to that employed by the Social Security Administration in administering its SSI program. Although Medicaid uses a 5-year look-back period for most transfers of assets, as a policy matter, VA believes that a 3-year look-back period is sufficient to preserve the integrity of its pension program.

“Penalty period” would be defined as a period of non-entitlement due to transfer of a covered asset.

Proposed § 3.276(b) would establish VA's policy with regard to pension entitlement and covered assets and would put claimants on notice that VA may require evidence to determine whether a prohibited asset transfer has occurred. This is consistent with current § 3.277(a), which provides that VA always has the right to request proof of entitlement to pension. We would reference § 3.277(a) in § 3.276(b). *See also* 38 U.S.C. 1506(1).

Proposed § 3.276(c) would establish a presumption, rebuttable by clear and convincing evidence, that transferring an asset during the look-back period was for the purpose of reducing net worth to establish entitlement to pension. As a result, the asset would be considered a covered asset. The presumption could be rebutted if the claimant establishes that he or she transferred an asset as the result of fraud, misrepresentation, or unfair business practice related to the sale or marketing of financial products or services for purposes of establishing entitlement to VA pension. We propose that evidence substantiating the application of this exception may include a complaint contemporaneously filed with state, local, or Federal authorities reporting the incident. In such a case, VA would not consider the transferred asset to be a covered asset and would thus not calculate any penalty period, although this would mean that net worth would be excessive and the provisions of § 3.274 regarding reducing net worth would apply.

Proposed § 3.276(d) would set forth an exception that applies to assets transferred to a trust for the benefit of a veteran's child whom VA rates or has rated as being permanently incapable of self-support under the provision of 38 CFR 3.356. VA would not consider assets transferred to a trust established on behalf of such a child to be covered assets as long as there is no circumstance under which distributions from the trust can be used to benefit the veteran, veteran's spouse, or surviving spouse.

VA considered providing for an exception consistent with the "undue hardship" determination prescribed in the aforementioned SSI statute, 42 U.S.C. 1382b(c)(1)(C)(iv). However, the statutory resource limit in the SSI program is \$3,000 for an individual with a spouse and \$2,000 for an individual with no spouse. *See* 42 U.S.C. 1382(a)(3). Because these limits are significantly lower than the net worth limit that VA proposes to use, we do not believe that a hardship provision is warranted.

In proposed § 3.276(e), VA would establish a penalty period for covered assets transferred during the look-back period and the criteria for calculating such a penalty period. In providing the calculations for the length of the penalty period, we have again drawn on 42 U.S.C. 1382b(c), pertaining to SSI. Subsection (c)(1)(A)(iv) of 42 U.S.C. 1382b establishes a formula for calculating penalty periods for purposes of SSI. VA's formula would be similar. VA's formula would determine a penalty period in months by dividing the covered asset amount by the applicable maximum annual pension rate under 38 U.S.C. 1521(d), 1541(d), or 1542 as of the date of the pension claim, rounded down to the nearest whole number. For veterans and surviving spouses, we would use the maximum annual pension rate at the aid and attendance level. (Surviving children are not entitled to aid and attendance.) We note that the higher the divisor, the shorter the penalty period. Although not all veterans and surviving spouses to whom the regulation would apply would qualify for pension at the aid and attendance level, we believe that most claimants who transfer covered assets would qualify at this level. Further, and again following the example of the SSI statute, we note that the divisor for calculating penalty periods for SSI is the maximum monthly SSI benefit payable. We would use the applicable maximum annual pension rate in effect as of the date of the pension claim and the rule would include the VA Web site at which the rates may be found.

We propose to set a maximum penalty period of 10 years. We considered setting the maximum penalty period at 36 months, which would be consistent with the SSI statute; however, after further consideration, we determined that it would be inequitable for an individual who transfers, for example, \$1,000,000 to have a penalty period of the same length as an individual who transfers \$25,000.

Under proposed § 3.276(e)(2), the penalty period would begin on the date that would have been the payment date of an original or new pension award if the claimant had not transferred a covered asset and the claimant's net worth had been within the limit. Under proposed § 3.276(e)(3), the claimant, if otherwise qualified, would then be entitled to pension benefits effective the last day of the last month of the penalty period, with a payment date as of the first day of the following month in accordance with 38 CFR 3.31.

We would provide an example of penalty period calculations at proposed § 3.276(e)(4).

Proposed § 3.276(e)(5) states that, with two exceptions, VA would not recalculate a penalty period under this section. VA would recalculate the penalty period if the original calculation is shown to be erroneous or if all of the covered assets were returned to the claimant before the date of claim or within 30 days after the date of claim. If, not later than 90 days after VA's decision notice pertaining to the penalty period, VA receives evidence showing that all covered assets have been returned to the claimant, VA would not assess a penalty period. Although VA would not assess a penalty period in such a situation, the claimant's net worth would be excessive, but would be available for the claimant to use for his or her needs consistent with Congressional intent. Once correctly calculated, the penalty period would be fixed, and return of covered assets after the 30-day period provided would not shorten the penalty period. Numerous penalty period recalculations would detract from the primary mission of paying pension benefits to those in need. Claimants always have the right to appeal any VA decision. *See* 38 CFR 20.201.

#### Section 3.277—Eligibility Reporting Requirements

VA has discretionary authority, under 38 U.S.C. 1506, to require pension beneficiaries to complete annual Eligibility Verification Reports (EVR) to verify the amount of their income, net worth, and the status of their dependents. VA has implemented this authority at 38 CFR 3.277(c)(2), which currently provides that VA "shall" require an EVR in particular situations. We now propose to remove the word "shall" and replace it with the word "may," which reflects the statute and gives VA discretionary authority to require EVRs.

#### Section 3.278—Deductible Medical Expenses

Section 1503(a)(8) authorizes VA, in determining annual income in the current pension program, to exclude from annual income amounts paid by a veteran, veteran's spouse, or surviving spouse, or by or on behalf of a veteran's child, for unreimbursed medical expenses to the extent they exceed 5 percent of the applicable maximum annual pension rate. In the parents' DIC program, section 1315(f)(3) authorizes VA to exclude from a claimant's annual income "unusual medical expenses." *See* 38 CFR 3.262(l) (defining unusual medical expenses and implementing the exclusion for parents' DIC and section 306 pension).

There is currently no regulation that adequately defines “medical expense” for VA purposes. Current 38 CFR 3.262(l) and 3.272(g) are clear that a deductible medical expense must be unreimbursed and must be made on behalf of certain individuals, *e.g.*, the veteran, veteran’s spouse, veteran’s surviving spouse, or other qualifying relatives. Except for the provision in 38 CFR 3.362(l) that unreimbursed health, accident, sickness, and hospitalization insurance premiums are included in medical expenses for purposes of section 306 pension and parents’ DIC, VA regulations do not define what constitutes an unreimbursed medical expense for VA’s needs-based benefit programs. In particular, no regulation reflects current VA policy pertaining to deductions available for institutional forms of care and in-home attendants.

We therefore propose to add new § 3.278 to improve clarity and consistency in determining what constitutes a medical expense that is deductible from a claimant’s or beneficiary’s income. We would use the term “deductible” because even though the statutes and the implementing regulations cited above speak in terms of medical expense “exclusions,” VA treats deductions and exclusions differently. A deduction is an amount subtracted from income, whereas an exclusion is an amount not counted in the first instance. For our purposes, this technical difference is not important.

Proposed § 3.278 would implement sections 1315(f)(3) and 1503(a)(8) by describing and defining the medical expenses that VA may deduct for purposes of three of VA’s needs-based benefit programs. In proposed paragraph (a), we would define the scope of proposed § 3.278. Proposed paragraph (b) defines various terms. Proposed § 3.278(b)(1) would define “health care provider.” We propose to require that an individual be licensed by a state or country to provide health care in the state or country in which the individual provides the health care. We intend that individual states be responsible for such licensing. However, we recognize that some claimants, beneficiaries, and family members do not reside in any state and, therefore, we would require that the provider be licensed by a state “or country.” We also propose to list examples of licensed health care providers. In paragraph (b)(1)(ii), we would include within the definition of “health care provider” a nursing assistant or home health aide who is supervised by a licensed health care provider.

Paragraphs (b)(2) and (b)(3) of proposed § 3.278 would define

“activities of daily living” (ADL) and “instrumental activities of daily living” (IADL). These terms are well-known and understood in the health care industry and are used in other Federal regulations, including VA regulations. For the purposes of determining deductible medical expenses for VA’s needs-based benefits, ADLs would mean basic self-care activities and would consist of “bathing or showering, dressing, eating, toileting, and transferring.” We would also define “transferring” to mean an individual’s moving himself or herself, such as getting in and out of bed. These activities are essentially those described in current § 3.352, and the inability to perform these activities is considered at least partly determinative of an individual’s need for the regular aid and attendance of another individual for VA purposes. Proposed § 3.278(b)(3) would define IADLs for VA medical expense deduction determinations as independent living activities, such as shopping, food preparation, housekeeping, laundering, managing finances, handling medications, using the telephone, and transportation for non-medical purposes. Proposed paragraph (e)(4) would provide that VA does not consider expenses for assistance with IADLs to be medical expenses except in certain circumstances because such personal care expenses are not intrinsically medical. Other Government agencies, such as the Internal Revenue Service and Social Security Administration, also do not consider such expenses to be medical expenses for their purposes except in limited circumstances. One item that is often included as an IADL is transportation. Our definition of IADL would include “transportation for non-medical purposes” because it is longstanding VA policy to consider transportation for medical purposes to be a deductible medical expense, and we would continue that policy.

Although managing finances is an IADL for purposes of this section, we propose to clarify that managing finances does not include services rendered by a VA-appointed fiduciary. We also provide, in proposed paragraph (e)(5), that a fee paid to a VA-appointed fiduciary is not a deductible medical expense. Beneficiaries pay fees to VA-appointed fiduciaries out of their monthly VA benefits. Accordingly, we have determined that it would be inappropriate to permit a deduction from income for financial management services, and thus increase the amount of pension paid, when VA benefits are used to pay for the services.

Proposed § 3.278(b)(4) would define “custodial care” as regular assistance with two or more ADLs or regular supervision because an individual with a mental disorder is unsafe if left alone due to the mental disorder. This definition is consistent with current VA policy.

Proposed § 3.278(b)(5) would define “qualified relative.” Under 38 U.S.C. 1503(a)(8) and 1315(f)(3), VA may deduct medical expenses paid by a veteran, a veteran’s dependent spouse, a surviving spouse, or a surviving child (pension and section 306 pension) or by a veteran’s parent (parents’ DIC). The implementing regulations, 38 CFR 3.262(l) and 3.272(g), limit whose medical expenses VA may deduct. In addition to the claimant’s or beneficiary’s medical expenses, the medical expenses of dependents and certain other family members are deductible. We would define “qualified relative” as a veteran’s dependent spouse, a veteran’s dependent or surviving child, and other relatives of the claimant who are members or constructive members of the claimant’s household whose medical expenses are deductible under §§ 3.262(l) or 3.272(g). A “constructive member” of a household is an individual who would be a member of the household if the individual were not in a nursing home, away at school, or a similar situation. Defining a “qualified relative” for the purposes of the medical expense deduction makes the regulation simpler. We would not include veterans or surviving spouses in the definition because veterans and surviving spouses are the only pension beneficiaries who can be rated or presumed to require the aid and attendance of another individual or to be housebound under 38 CFR 3.351. This distinction is significant as will be explained below in this NPRM. We would also not include claimants who are parents for parents’ DIC purposes because they too can be rated or presumed to require the aid and attendance of another individual.

Proposed § 3.278(b)(6), the definition of “nursing home,” would cross-reference current § 3.1(z)(1) or (2), which defines “nursing home” for all of 38 CFR part 3, with provision made that if the facility is not located in a state, then the facility must be licensed in the country in which it is located.

Consistent with current VA health care regulations, proposed paragraph (b)(7) would define “medical foster home” as a privately owned residence, recognized and approved by VA, that offers a non-institutional alternative to nursing home care for veterans who are unable to live alone safely due to

chronic or terminal illness. See 38 CFR 17.73.

Proposed paragraph (b)(8) would define “assisted living, adult day care, or similar facility.” We would use this rather lengthy term to avoid confusion that could result from the fact that not all facilities that meet our proposed definition use the same nomenclature. Some governmental institutions could also fall under our proposed definition. Our proposed definition for such a facility is that it must provide individuals with custodial care; however, the facility may contract with a third-party provider to provide such care. We would further provide that residential facilities must be staffed with custodial care providers 24 hours per day. To be included in our definition, a facility must be licensed if such facilities are required to be licensed in the state or country in which the facility is located.

Proposed paragraph (c) would prescribe VA’s general medical expense policy and list examples of expenses that VA considers medical expenses for its needs-based benefits. In general, medical expenses for VA purposes are payments for items or services that are medically necessary or that improve a disabled individual’s ability to function. This reflects longstanding VA policy with respect to medical expenses.

Proposed § 3.278(c) would specify that the term “medical expenses” includes, but is not limited to, payments specified in paragraphs (c)(1) through (c)(7). Paragraphs (c)(1) through (c)(7) list payments made to a health care provider; payments for medications, medical supplies, medical equipment, and medical food, vitamins, and supplements; payments for adaptive equipment; transportation expenses for medical purposes; health insurance premiums; smoking cessation products; and payments for institutional forms of care and in-home care as provided in paragraph (d). We propose to include in paragraph (c) detailed provisions relating to the broad categories of medical expenses. These clarifications provide further guidance regarding the medical expenses that may be deducted from income.

Under current policy, medical expenses include payments for care provided by a health care provider, but not for cosmetic procedures that only improve or enhance appearance, although these may be deductible if the purpose of such procedure is to improve a congenital or accidental deformity or is related to treatment for a diagnosed medical condition. Proposed §§ 3.278(c)(1) and (e)(2) would continue this policy.

We propose to prescribe in § 3.278(c)(4) that VA limits the deductible expense per mile for travel by private vehicle to the current Privately Owned Vehicle (POV) mileage reimbursement rate specified by the United States General Services Administration (GSA). The current amount can be obtained from [www.gsa.gov](http://www.gsa.gov), and we would also post the current amount on VA’s Web site at a location to be determined. We have inserted “location to be determined” in the proposed regulation text as a placeholder and would provide the Web site address in the final rule. We would also clarify that the difference between transportation expenses calculated under this criterion and the amount of other VA or non-VA transportation reimbursements are deductible medical expenses. This policy is similar to considering a co-payment to a health care provider as a deductible medical expense even though insurance pays the remainder. We would provide an example of this longstanding policy in the proposed rule.

In proposed § 3.278(c)(5), we would clarify that medical expenses include Medicare Parts B and D premiums as well as long-term care insurance premiums.

Proposed § 3.278(d) would prescribe VA’s medical expense policy for payments for institutional and in-home care services. In accordance with longstanding VA policy, proposed paragraph (d)(1) would provide that payments to hospitals, nursing homes, medical foster homes, and inpatient treatment centers, including the cost of meals and lodging charged by such facilities, are deductible medical expenses.

In paragraph (d)(2), we propose to clarify VA’s policy with respect to in-home attendants. We also propose a limit to the hourly in-home care rate that VA would deduct. We propose this limit to minimize instances of fraudulent or excessive in-home care charges. We also would require that payments, to qualify as medical expenses for VA, must be commensurate with the number of hours that the provider attends to the disabled individual. The proposed limit is reasonable and derived from a reputable industry source. The limit that we propose is the average hourly rate for home health aides, which is published annually by the MetLife Mature Market Institute in its “Market Survey of Long-Term Care Costs” (MetLife Survey). We considered using for this purpose the mean hourly wage for home health aides published by the United States Department of Labor (DoL) Bureau of

Labor Statistics. (See <http://www.bls.gov/oes/current/oes311011.htm>.) However, the 2012 MetLife Survey shows that the 2012 national average private-pay hourly rate for home health aides to be \$21.00 per hour, which was unchanged from 2011. The lowest average hourly rate was \$3.00 per hour and the highest was \$32.00 per hour. The May 2013 DoL mean hourly wage for home health wage was \$10.60 per hour. We have determined that using the higher hourly rate as a limit better supports our policy decision to ensure that wartime veterans and their families receive the highest level of care possible while simultaneously being mindful of the interests of taxpayers. We would use the most current applicable MetLife report and would publish the limit on a VA Web site at a location to be determined. We have inserted “location to be determined” in the proposed regulation text as a placeholder and would provide the Web site address in the final rule.

We would next state the general rule that an in-home attendant must be a health care provider for the expense to qualify as a medical expense and that only payments for assistance with ADLs or health care services are medical expenses. However, if a veteran or a surviving spouse (or parent for parents’ DIC) meets the criteria for regular aid and attendance or is housebound, the attendant does not need to be a health care provider. In addition, VA would consider payments for assistance with IADLs (as defined by VA) to be medical expenses, as long as the attendant’s primary responsibility is to provide the veteran, surviving spouse, or parent with health care services or custodial care. In accordance with current VA policy, this provision would also apply to a qualified relative if a physician or physician assistant states in writing that, due to physical or mental disability, the relative requires the health care services or custodial care that the in-home attendant provides.

Similarly, proposed paragraph (d)(3) would address facilities that are assisted living, adult day care, and similar facilities, and would provide the general rule that only payments for health care services and assistance with ADLs provided by a health care provider are medical expenses. However, if a veteran or surviving spouse (or parent for parents’ DIC) meets the criteria for regular aid and attendance or is housebound, the care does not need to be provided by a health care provider. In addition, if the primary reason for the veteran or surviving spouse to be in the facility is to receive health care services or custodial care that the facility

provides, then VA would deduct all fees paid to the facility, including meals and lodging. This provision would also apply to a qualified relative if a physician or physician assistant states in writing that, due to the relative's physical or mental disability, the relative requires the health care services or custodial care that the facility provides.

Proposed paragraph (e) would list examples of items and services that are not medical expenses for purposes of VA needs-based benefits. We would clarify that generally, payments for items or services that benefit or maintain general health, such as vacations and dance classes, are not medical expenses, nor are fees paid to a VA-appointed fiduciary, as explained above. Proposed paragraph (e)(2) would provide that cosmetic procedures are not medical expenses except in the instances described in proposed paragraph (c)(1). We would also clarify that except as specifically provided, medical expenses do not include assistance with IADLs (*i.e.*, shopping, food preparation, housekeeping, laundering, managing finances, handling medications, using the telephone, and transportation for non-medical purposes), nor do they include payments for meals and lodging, except in limited situations involving custodial care. Here, we would explicitly state that this category applies to facilities such as independent living facilities that do not provide individuals with health care services or custodial care.

VA's intent in promulgating these rules is to ensure that deductions from countable income reflect Congress' intent that amounts be deducted for "medical expenses" only, and not for other services such as meals and lodging or excessive administrative services not directly related to the provision of medical care. We would provide cross references to §§ 3.262(l) and 3.272(g); amend §§ 3.262(l) and 3.272(g) to cross reference the new medical expense regulation; and make corresponding amendments to § 3.261.

#### Section 3.279—Statutory Exclusions From Income or Assets (Net Worth or Corpus of the Estate)

As stated above in this NPRM in the information pertaining to § 3.275, we propose a new § 3.279 regarding statutory exclusions from income or assets, which would list 27 exclusions applicable to all VA-administered needs-based benefits. We note that we propose no change to net worth terminology for VA's older benefit programs in this rulemaking; therefore, we would continue to use the previous

terms in addition to the term "assets," which would apply to current-law pension. We would use the terms "Corpus of estate" in the applicable heading in paragraphs (b) through (e) along with "assets," in order to ensure consistency with current 38 CFR 3.261(c). We here use the term "assets" to describe the changes and additions.

Many of these exclusions are already contained in current VA regulations. We have determined that it would be useful for regulation users to have all of the statutory exclusions listed in one regulation. Exclusions that are not applicable to every VA-administered needs-based benefit would be contained only in the regulations pertaining to the benefit. This NPRM describes statutory exclusions that are either not currently contained in 38 CFR part 3 or are only partly contained in current part 3.

Proposed paragraph (a) would describe the scope of the section as described above.

Proposed § 3.279(b)(1) would exclude from income relocation payments made under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended. 42 U.S.C. 4601. Payments made under the Act are excluded from income by 42 U.S.C. 4636.

Proposed § 3.279(b)(4) would exclude from income and assets payments made to individuals because of their status under Public Law 103–286, as victims of Nazi persecution.

Proposed § 3.279(b)(7) would exclude from income and assets payments under the National Flood Insurance Act of 1968. *See* 42 U.S.C. 4031.

Proposed § 3.279(c)(1) would exclude from income and assets funds paid under the Indian Tribal Judgment Funds Use or Distribution Act, 25 U.S.C. 1401, while such funds are held in trust. The first \$2,000 per year of income received by individual Native Americans in satisfaction of a judgment of the United States Court of Federal Claims is excluded from income. The law originally pertained to judgments of the Indian Claims Commission as well as judgments of the United States Court of Federal Claims. However, the Government discontinued the Indian Claims Commission on September 30, 1978, so we would not refer to the Commission in proposed § 3.279(c)(1). We also propose to include a clarification which complies with a precedent opinion of VA's Office of the General Counsel, VAOPGCPREC 1–94, 59 FR 27307, May 26, 1994, which held that the \$2,000 exclusion for per-capita payments applies to the sum of all payments received in an annual reporting period.

Proposed § 3.279(c)(2) would exclude from income the first \$2,000 per year received by individual Indians that is derived from an individual Native American's interest in trust or restricted lands. It would also exclude from assets all interest of individual Native Americans in trust or restricted lands. *See* 42 U.S.C. 1408. Current regulations only address the income component.

Proposed § 3.279(c)(3) would address exclusions under the Per Capita Distributions Act, codified at 25 U.S.C. 117a–117c. Under section 117b(a), distributions of funds are subject to the provisions of 25 U.S.C. 1407. The exclusions under § 3.279(c)(3) would mirror the exclusions under § 3.279(c)(1).

Proposed § 3.279(c)(4) would exclude from income and assets income derived from certain submarginal land of the United States that is held in trust for certain Native American tribes in accordance with 25 U.S.C. 459e.

Proposed § 3.279(c)(5) would exclude from income and assets up to \$2,000 per year of per capita distributions under the Old Age Assistance Claims Settlement Act, 25 U.S.C. 2301.

Proposed § 3.279(c)(6) would exclude from income and assets any income or asset received under the Alaska Native Claims Settlement Act, 43 U.S.C. 1626. Current §§ 3.262(x) and 3.272(t) exclude the following payments from income consideration: cash (including cash dividends on stock received from a Native American Corporation) to the extent that it does not, in the aggregate, exceed \$2,000 per individual per year; stock (including stock issued or distributed by a Native American Corporation as a dividend or distribution on stock); a partnership interest; land or an interest in land (including land or an interest in land received from a Native American Corporation as a dividend or distribution on stock); and an interest in a settlement trust. The Alaska Native Claims Settlement Act, 43 U.S.C. 1626, provides that the income or asset received from Native Corporation shall not "be considered or taken into account as an asset or resource" for any Federal program. 43 U.S.C. 1626(c). Therefore, to extend the exclusion to assets, proposed § 3.279(c)(6) would exclude from assets the income and assets described above. We would also extend the exclusion to certain bonds that are statutorily excluded but are not specifically mentioned in current § 3.262(x) or 3.272(t).

Proposed § 3.279(c)(7) would exclude from income and assets payments received under the Maine Indian Claims Settlement Act of 1980, 25 U.S.C. 1721.

Proposed § 3.279(c)(8) would exclude payments received by Native Americans under the settlement in *Cobell v. Salazar*, Civil Action No. 96–1285 (TFH) (D.D.C.). Section 101(f)(2) of Public Law 111–291, December 8, 2010, provides that amounts from this settlement received by an individual Indian as a lump sum or a periodic payment are not to be treated as income or resources (*i.e.*, net worth for VA purposes) during the 1-year period beginning on the date of receipt. Accordingly, because VA counts lump-sum payments as income for a 1-year period, proposed § 3.279(c)(8) would exclude such payments from income and would exclude them from assets for 1 year.

Proposed § 3.279(d)(1) would exclude from income allowances, earnings, and payments to individuals participating in programs under the Workforce Investment Act of 1998, 29 U.S.C. 2931, which provides that allowances, earnings, and payments to individuals participating in programs under the Act shall not be considered as income for the purposes of determining eligibility for, and the amount of, income transfer and in-kind aid furnished under any Federal or Federally-assisted needs-based program. There would be no net worth exclusion.

Proposed § 3.279(d)(2) would exclude from income allowances, earnings, and payments to AmeriCorps participants pursuant to 42 U.S.C. 12637. There would be no asset exclusion.

Current §§ 3.262(q) and 3.272(k) list payments from various Federal volunteer programs that are excluded from income. Through a series of legislative changes, these programs are now administered by the Corporation for National and Community Service. *See* Public Law 103–82. Section 5044(f) of title 42, United States Code, provides that payments made under the act which created the Corporation for National and Community Service, with certain exceptions, do not reduce the level of or eliminate eligibility for assistance that volunteers may be receiving under other government programs. We propose to account for this change in the law by providing, in proposed § 3.279(d)(3), that payments received from any of the volunteer programs administered by the Corporation for National and Community Service would be excluded from income and assets unless the payments are equal to or greater than the minimum wage. We propose to provide that the minimum wage for this purpose is that under the Fair Labor Standards Act of 1938, 29 U.S.C. 201, or that under the law of the state where the

volunteers are serving, whichever is greater.

Proposed § 3.279(e)(1) would exclude from income and assets the value of the allotment provided to an eligible household under the Food Stamp Program. Proposed § 3.279(e)(2) would exclude from income and assets the value of free or reduced-price food under the Child Nutrition Act of 1966, 42 U.S.C. 1771.

Proposed § 3.279(e)(3) would exclude from income the value of any child care provided or arranged (or any amount received as payment for such care or reimbursement for costs incurred for such care) under the Child Care and Development Block Grant Act of 1990, 42 U.S.C. 9858.

Proposed § 3.279(e)(4) would exclude from income the value of services, but not wages, provided to a resident of an eligible housing project under a congregate services program under the Cranston-Gonzalez National Affordable Housing Act, 42 U.S.C. 8011.

Proposed § 3.279(e)(5) would exclude from income and assets the amount of any home energy assistance payments or allowances provided directly to, or indirectly for the benefit of, an eligible household under the Low-Income Home Energy Assistance Act of 1981, 42 U.S.C. 8621.

Proposed § 3.279(e)(6) would exclude from income payments, other than wages or salaries, received from programs funded under the Older Americans Act of 1965, 42 U.S.C. 3001. In accordance with 42 U.S.C. 3020a(b), such payments may not be treated as income for the purpose of any other program or provision of Federal or state law.

Proposed § 3.279(e)(7) would exclude from income and assets the amount of student financial assistance received under Title IV of the Higher Education Act of 1965, including Federal work-study programs, Bureau of Indian Affairs student assistance programs, or vocational training under the Carl D. Perkins Vocational and Technical Education Act of 1998, as amended, 20 U.S.C. chapter 44.

Proposed § 3.279(e)(8) would exclude from income annuities received under subchapter 1 of the Retired Serviceman’s Family Protection Plan, 10 U.S.C. 1441. We note that this exclusion is currently listed at § 3.261(a)(14) for prior law pension, but is not listed as an income exclusion from current pension at § 3.262. Inasmuch as 10 U.S.C. 1441 was amended after January 1, 1979, we believe this statutory exclusion meets the requirement for inclusion in § 3.279, *i.e.*, it applies to all needs-based benefits that VA administers.

As an aid to those who read this supplementary information, we are providing the following derivation table for proposed § 3.279. It lists only new income exclusions (*i.e.*, income exclusions not currently found in 38 CFR part 3) and exclusions derived from current § 3.272. It does not list exclusions derived from §§ 3.261 or 3.262. If an exclusion is derived from § 3.261 or 3.262 but not listed in current § 3.272, the derivation table below lists the proposed § 3.279 exclusion as “new.”

TABLE 2—PROPOSED § 3.279 DERIVATION

| Proposed § 3.279                 | Derived from current § 3.272 (or “New”) |
|----------------------------------|---|
| 3.279(b)(1) .....                | New.                                    |
| 3.279(b)(2) .....                | 3.272(v).                               |
| 3.279(b)(3) .....                | 3.272(p).                               |
| 3.279(b)(4) .....                | New.                                    |
| 3.279(b)(5) .....                | 3.272(o).                               |
| 3.279(b)(6) .....                | 3.272(u).                               |
| 3.279(b)(7) .....                | New.                                    |
| 3.279(c)(1) .....                | New.                                    |
| 3.279(c)(2) .....                | 3.272(r).                               |
| 3.279(c)(3) through (c)(5) ..... | New.                                    |
| 3.279(c)(6) .....                | 3.272(t).                               |
| 3.279(c)(7) through (d)(2) ..... | New.                                    |
| 3.279(d)(3) .....                | 3.272(k).                               |
| 3.279(e)(1) through (e)(8) ..... | New.                                    |
| 3.279(e)(9) .....                | 3.272(w).                               |

Conforming Amendments, Corrections, and Other Exclusions

Because the statutory exclusions pertaining to all VA-administered needs-based benefits would be listed in proposed § 3.279, for purposes of notice, we propose not to include such statutory exclusions in other regulations. We previously listed paragraphs we would not include in proposed § 3.275, which pertains to net worth for current pension. Section 3.263 pertains to net worth for section 306 pension and dependency of parents for VA service-connected compensation purposes. (Net worth is not a factor for parents’ DIC or old-law pension.) We would remove paragraphs (e), (f), (g), and (h) from § 3.263 because these paragraphs list net worth exclusions that would be listed at new § 3.279, in paragraphs (b)(5), (b)(3), (b)(6), (b)(2), and (e)(9), respectively.

We would amend § 3.270, which describes the applicability of certain regulations that pertain to needs-based benefits, to remove from paragraph (a) “Sections 3.250 to 3.270.” and add in its place “Sections 3.250 to 3.270 and sections 3.278 and 3.279.” Currently, §§ 3.250 to 3.270 apply only to (1) the

prior pension programs, (2) parents' DIC, and (3) parental dependency. Current §§ 3.271 to 3.277 apply only to current pension. Because proposed new § 3.278 would apply to all VA-administered needs-based benefits for which medical expenses may be deducted and proposed new § 3.279 would apply to all VA-administered needs-based benefits, it is necessary to amend § 3.270 to include the proposed new regulations.

For reasons described below in the information pertaining to conforming amendments and additions to § 3.272, we would remove paragraph (i) from § 3.263.

#### Conforming Amendments and Corrections to Sections 3.261 and 3.262

Sections 3.261 and 3.262 set forth income exclusions for section 306 pension, old-law pension, parental dependency for compensation under § 3.250, and parents' DIC. We would remove paragraphs (s), (u), (v), (x), (y), and (z) from current § 3.262 because these paragraphs list income exclusions that would be listed at new § 3.279, in paragraphs (b)(5), (b)(3), (c)(2), (c)(6), (b)(6), (b)(2), and (e)(9), respectively. We would redesignate paragraphs (t) and (w) of current § 3.262 as proposed paragraphs (s) and (t) of proposed § 3.262. We also propose a correction to current § 3.262(w), which we propose to redesignate as § 3.262(t). Current § 3.262(w) provides that income received under Section 6 of the Radiation Exposure Compensation Act, Public Law 101-426, is excluded for purposes of parents' DIC under the authority of 42 U.S.C. 2210 note. This is accurate; however, the exclusion also applies to parental dependency for compensation purposes. The note at 42 U.S.C. 2210 provides that "amounts paid to an individual under [Section 6 of the Radiation Exposure Compensation Act] . . . shall not be included as income or resources for purposes of determining eligibility to receive benefits described in section 3803(c)(2)(C) of title 31, United States Code or the amount of such benefits." 42 U.S.C. 2210 note. The list of benefits at section 3803(c)(2)(C) does not include section 306 pension or old-law pension but does include parental dependency for compensation purposes in addition to parents' DIC. Accordingly, the exclusion at proposed § 3.262(t) would apply to parental dependency for compensation purposes as well as to parents' DIC.

Additionally, we would add to proposed § 3.262 a new paragraph (u), which would refer to other payments

excluded from income in proposed § 3.279.

We would remove current entries (35) through (37) and (39) through (41) from current § 3.261(a). We propose a correction to current entry (38) of § 3.261(a), which we would redesignate as entry (35). This entry currently references § 3.262(w), which would be redesignated as § 3.262(t) as described above. Further, current entry (38) of § 3.261(a) is erroneous because it shows that income received under Section 6 of the Radiation Exposure Compensation Act is excluded for purposes of old-law pension and section 306 pension when this is not the case as explained above. Proposed entry (35) would provide the correct information.

Additionally, we would add to proposed § 3.261(a) a new entry (36), which would refer to other payments excluded from income in proposed new § 3.279.

For reasons described below in the information pertaining to conforming amendments and additions to § 3.272, we would remove paragraph (a)(41) from § 3.261 and paragraph (aa) from § 3.262; and paragraph (i) from § 3.263.

#### Conforming Amendments and Additions to Section 3.272

Section § 3.272 sets forth income exclusions for current pension. We propose to add to current § 3.272(g) a reference to proposed § 3.278 that would define medical expenses. We also propose to remove from current § 3.272, regarding exclusions from income, paragraphs (k), (o), (p), (r), (t), (u), (v), and (w), because these paragraphs contain statutory income exclusions that would be listed in proposed § 3.279. We also propose to redesignate current paragraphs (q), (s), and (x) as (o), (p), and (q), respectively. We would add new paragraphs (k), (r), and (s). We would also amend the authority citation in paragraph (q), as proposed to be redesignated, due to a law change. Section 604 of Public Law 111-275 amended 38 U.S.C. 1503 to add a new paragraph (a)(11), which we describe below, and redesignated former paragraph (a)(11) as (a)(12).

We propose to remove paragraph (w) because it describes a statutory income and asset exclusion of payments received under the Medicare transitional assistance program and any savings associated with the Medicare prescription drug discount card. This program was discontinued on December 31, 2005. See 42 U.S.C. 1395w-141(a)(ii)(C). The program was replaced with the Medicare coverage gap discount program under the authority of 42 U.S.C. 1395w-114a. The statutory

authority for the new program does not include language pertaining to eligibility to other Federal benefits; therefore, we propose to remove this exclusion.

We also propose to add a new income exclusion at § 3.272(k) that would clarify VA's policy pertaining to income from certain annuities. We would provide that VA would exclude payments from an annuity and count, on an annual basis, only the interest component of the payments if a claimant or beneficiary, or someone acting on his or her behalf, transfers an asset to the annuity principal and either (1) VA has already considered the fair market value of the transferred asset as an asset, or (2) the funds used to purchase the annuity were proceeds from the sale of the claimant's or beneficiary's primary residence that was previously excluded as an asset from VA's net worth calculation and such funds are not sufficient to cause net worth to exceed the limit under proposed § 3.274(a).

Generally, VA counts income from Individual Retirement Accounts and similar investments, even though such income represents a partial return on principal. In addition, a claimant or beneficiary may transfer assets from one form to another form, e.g., selling real estate at fair market value and placing the proceeds into a savings account or certificate of deposit. Such a transfer of assets has no impact on net worth for VA pension as long as VA has included the fair market value as an asset and net worth remains within the net worth limit. However, sometimes a claimant or beneficiary, or someone acting on his or her behalf, will sell an asset or his or her residence and purchase an annuity with the proceeds. We emphasize that these are situations in which the proceeds would not cause net worth to bar pension entitlement. If a claimant sells his or her primary residence that was previously excluded as an asset and uses the proceeds to purchase an annuity, VA views such a transfer in a similar manner as if the claimant had placed the proceeds from the sale in a bank account. If the proceeds were placed in a bank account, then the bank account itself would be an asset. However, incremental withdrawals from the bank account would not count as income. Accordingly, fairness would dictate that the same proceeds, if placed into an annuity principal rather than a bank account, should not result in countable income that reduces pension entitlement, although the annuity principal itself could adversely affect pension entitlement if the value of the



annuity principal caused net worth to exceed the net worth limit.

In proposed § 3.272(r), we would incorporate a new statutory income exclusion. Section 604 of the Veterans' Benefits Act of 2010, Public Law 111–275, amended 38 U.S.C. 1503(a) to provide a new income exclusion beginning in calendar year 2012. The statute now excludes from a veteran's countable income "payment of a monetary amount of up to \$5,000 to a veteran from a state or municipality that is paid as a veterans' benefit due to injury or disease." We propose to implement this change in law by excluding all such payments from the claimant's or beneficiary's income, not to exceed a total of \$5,000 in a 12-month annualization period (an annualization period is generally a calendar year). In proposed § 3.272(s), we would add a reference to other payments excluded from income listed in § 3.279.

As an aid to those who read this supplementary information, we are providing the following proposed distribution and derivation tables for current and proposed § 3.272.

TABLE 3—CURRENT § 3.272 DISTRIBUTION

| Current § 3.272            | Distributed to or no change in location |
|----------------------------|---|
| 3.272(a) through (j) ..... | No change.                              |
| 3.272(k) .....             | 3.279(d)(3).                            |
| 3.272(l) through (n) ..... | No change.                              |
| 3.272(o) .....             | 3.279(b)(5).                            |
| 3.272(p) .....             | 3.279(b)(3).                            |
| 3.272(q) .....             | 3.272(o).                               |
| 3.272(r) .....             | 3.279(c)(2).                            |
| 3.272(s) .....             | 3.272(p).                               |
| 3.272(t) .....             | 3.279(c)(6).                            |
| 3.272(u) .....             | 3.279(b)(6).                            |
| 3.272(v) .....             | 3.279(b)(2).                            |
| 3.272(w) .....             | Removed.                                |
| 3.272(x) .....             | 3.272(q).                               |

TABLE 4—PROPOSED § 3.272 DERIVATION

| Proposed § 3.272              | Derived from, no change, or "new" |
|-------------------------------|-----------------------------------|
| 3.272(a) through (f) .....    | No change.                        |
| 3.272(g), last sentence ..... | New.                              |
| 3.272(h) through (j) .....    | No change.                        |
| 3.272(k) .....                | New.                              |
| 3.272(l) through (n) .....    | No change.                        |
| 3.272(o) .....                | 3.272(q).                         |
| 3.272(p) .....                | 3.272(s).                         |
| 3.272(q) .....                | 3.272(x).                         |
| 3.272(r) .....                | New.                              |
| 3.272(s) .....                | New.                              |

*Statutory Change to Medicaid Nursing Home Provision*

We propose to amend current 38 CFR 3.551(i) to reference the authorizing statute, 38 U.S.C. 5503(d)(7) rather than to specify the statutory sunset date. Section 203 of Public Law 112–260, enacted January 10, 2013, amended 38 U.S.C. 5503(d)(7) to extend to November 30, 2016, the sunset date for reductions of pension to \$90 for certain beneficiaries receiving Medicaid-approved care in a nursing home. Previously, the Veterans Benefits Act of 2010, Public Law 111–275, had extended this sunset date to May 31, 2015, and Public Law 112–56 had extended it to September 30, 2016. To avoid multiple future regulatory changes, proposed paragraph (i) would provide the sunset date as the date given in 38 U.S.C. 5503(d)(7).

We would also add "surviving child" where appropriate to state that the Medicare reduction pertains to a surviving child claiming or receiving pension in his or her own right. This change would make the rule consistent with the statutory amendments made by section 606 of the Veterans Benefits Act of 2010. We would make clarifying changes to the title and content of current § 3.551(i) to reflect the above noted changes. Finally, we would amend 38 CFR 3.503 to add paragraph (c), which would be an effective-date provision pertaining to Medicaid-covered nursing home care for surviving children. Proposed paragraph (c) would mirror §§ 3.501(i)(6) and 3.502(f), which apply to veterans and surviving spouses, respectively. We would amend the authority citation to include 38 U.S.C. 5503(d).

*Paperwork Reduction Act*

This proposed rule includes a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) that requires approval by the Office of Management and Budget (OMB). Accordingly, under 44 U.S.C. 3507(d), VA has submitted an information collection request to OMB for review. OMB assigns a control number for each collection of information it approves. VA may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Proposed 38 CFR 3.276 and 3.278 contain a collection of information under the Paperwork Reduction Act of 1995. If OMB does not approve the collection of information as requested, VA will immediately remove the provisions containing a collection of

information or take such other action as is directed by OMB.

Comments on the collections of information contained in this proposed rule should be submitted to the Office of Management and Budget, Attention: Desk Officer for the Department of Veterans Affairs, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies sent by mail or hand delivery to the Director, Office of Regulation Policy and Management (02REG), Department of Veterans Affairs, 810 Vermont Ave. NW., Room 1068, Washington, DC 20420; fax to (202) 273–9026 (this is not a toll-free number); or email comments through [www.Regulations.gov](http://www.Regulations.gov). Comments should indicate that they are submitted in response to "RIN 2900–AO73."

VA considers comments by the public on proposed collections of information in—

- Evaluating whether the proposed collections of information are necessary for the proper performance of the functions of VA, including whether the information will have practical utility;
- Evaluating the accuracy of VA's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of the collections of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

The collections of information contained in 38 CFR 3.276 and 3.278 are described immediately following this paragraph, under their respective titles.

*Title: Asset Transfers and Penalty Periods.*

*Summary of collection of information:* Under proposed 38 CFR 3.276, claimants would be required to report to VA whether they have transferred assets within the 3 years prior to claiming pension or anytime thereafter and if so, information about those assets. This would also require amendments to the following existing application forms:

- VA Form 21–526, Veterans Application for Compensation and/or Pension, OMB Control Number 2900–0001.
- VA Form 21P–527, Income, Net Worth, and Employment Statement, OMB Control Number 2900–0002.
- VA Forms 21P–534, Application for Dependency and Indemnity

Compensation, Death Pension and Accrued Benefits by a Surviving Spouse or Child (Including Death Compensation if Applicable), and 21P-534EZ, Application for DIC, Death Pension, and/or Accrued Benefits, OMB Control Number 2900-0004.

• VA Forms 21P-527EZ, Application for Pension, OMB Control No. 2900-0002.

*Description of the need for information and proposed use of information:* The information is needed to ensure that only qualified claimants receive VA needs-based benefits.

*Description of likely respondents:* Claimants for VA pension or survivor benefits.

*Estimated frequency of responses:* Once per claim.

*Estimated number of respondents per year and respondent burden:*

| VA form No.     | OMB control No. | Estimated number of pension and survivor benefit respondents per year | Estimated respondent burden | Estimated total annual reporting and recordkeeping burden (hours) |
|-----------------|-----------------|---|-----------------------------|---|
| 21-526 .....    | 2900-0001       | 25,000  | 1 hour .....                | 25,000  |
| 21P-527 .....   | 2900-0002       | 25,000  | 1 hour .....                | 25,000  |
| 21P-534 .....   | 2900-0004       | 25,000  | 1 hour, 15 minutes .....    | 31,250  |
| 21P-534EZ ..... | 2900-0004       | 75,000  | 50 minutes .....            | 62,500  |
| 21-527EZ .....  | 2900-0002       | 75,000  | 50 minutes .....            | 62,500  |

*Title:* Deductible Medical Expenses.

*Summary of collection of information:* Under proposed 38 CFR 3.278, claimants would be required to submit information pertaining to their medical expenses. Certain claimants would also be required to submit evidence that they need custodial care or assistance with activities of daily living. This would also require amendments to the following existing forms:

- The application forms described above in the information pertaining to asset transfers and penalty periods.
- VA Form 21P-8416, OMB Control Number 2900-0161.

*Description of the need for information and proposed use of information:* The information is needed to ensure that only qualified claimants receive VA needs-based benefits.

*Description of likely respondents:* Claimants for VA pension benefits.

*Estimated number of respondents per year:* 60,000 pension claimants.

*Estimated frequency of responses:* Annual.

*Estimated respondent burden:* 30,000 hours (30 minutes per form × 60,000 respondents annually).

Regulatory Flexibility Act

The Secretary certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. This proposed rule would directly affect only individuals and would not directly affect small entities. Therefore, pursuant to 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a “significant regulatory action” requiring review by the OMB, unless OMB waives such review, as “any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.”

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined, and it has been determined to be a significant regulatory

action under Executive Order 12866 because it will have an annual effect on the economy of \$100 million or more, and it is likely to result in a rule that may raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order. VA’s impact analysis can be found as a supporting document at <http://www.regulations.gov>, usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA’s Web site at <http://www1.va.gov/orpm/>, by following the link for “VA Regulations Published.”

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this proposed rule are 64.104, Pension for Non-Service-Connected Disability for Veterans, and 64.105, Pension to Veterans Surviving Spouses, and Children.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and

submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Robert A. McDonald, Secretary, Department of Veterans Affairs, approved this document on August 6, 2014, for publication.

**List of Subjects in 38 CFR Part 3**

Administrative practice and procedure, Claims, Disability benefits, Pensions, Veterans.

Dated: January 7, 2015.  
**William F. Russo,**  
*Acting Director, Office of Regulation Policy & Management, Office of the General Counsel, U.S. Department of Veterans Affairs.*

For reasons set out in the preamble, VA proposes to amend 38 CFR part 3 as follows:

**PART 3—ADJUDICATION**

**Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation**

■ 1. The authority citation for part 3, subpart A continues to read as follows:

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

- 2. Amend the table in § 3.261(a) as follows:
  - a. Remove entries (35) through (37) and (39) through (42).
  - b. Redesignate entry (38) as entry (35).
  - c. Revise newly designated entry (35).
  - d. Add entry (36).

The revision and addition read as follows:

**§ 3.261 Character of income; exclusions and estates.**

- \* \* \* \* \*
- (a) *Income.*

| Income   | Dependency (parents) | Dependency and indemnity compensation (parents) | Pension; old-law (veterans, surviving spouses and children) | Pension; section 306 (veterans, surviving spouses and children) | See—        |
|--|----------------------|---|---|---|-------------|
| *  | *                    | *   | *   | *   | *           |
| (35) Income received under Section 6 of the Radiation Exposure Compensation Act (Pub. L. 101-426). | Excluded .....       | Excluded .....                                  | Included .....  | Included .....  | § 3.262(t). |
| (36) Other payments excluded from income listed in § 3.279.  | Excluded .....       | Excluded .....                                  | Excluded .....  | Excluded .....  | § 3.262(u). |

- \* \* \* \* \*
- 3. Amend § 3.262 as follows:
  - a. Add a sentence to the end of paragraph (l) introductory text.
  - b. Remove paragraphs (s), (u), (v), (x), (y), (z), and (aa).
  - c. Redesignate paragraphs (t) and (w) as paragraphs (s) and (t), respectively.
  - d. Revise newly designated paragraph (t).
  - e. Add a new paragraph (u).

The additions and revision read as follows:

**§ 3.262 Evaluation of income.**

\* \* \* \* \*

(l) \* \* \* For the definition of what constitutes a medical expense, see

**§ 3.278 Deductible medical expenses.**

\* \* \* \* \*

(t) *Radiation Exposure Compensation Act.* For the purposes of parents' dependency and indemnity compensation and dependency of parents under § 3.250, there shall be excluded from income computation payments under Section 6 of the Radiation Exposure Compensation Act of 1990.

(u) *Other payments.* Other payments excluded from income listed in § 3.279.

**§ 3.263 [Amended]**

■ 4. Amend § 3.263 by removing paragraphs (e), (f), (g), (h), and (i).

**§ 3.270 [Amended]**

■ 5. Amend § 3.270 as follows:

- a. Revise the heading in paragraph (a) by removing “*Sections 3.250 to 3.270*” and adding in its place “*Sections 3.250 through 3.270 and sections 3.278 through 3.279*”.
- b. Revise the note to paragraph (a) by removing “§§ 3.250 to 3.270” and adding in its place “§§ 3.250 through 3.270 and §§ 3.278 through 3.279”.
- c. Revise the heading in paragraph (b) by removing “*Sections 3.271 to 3.300*” and adding in its place “*Sections 3.271 through 3.300*”.
- 6. Amend § 3.271 by adding paragraph (i) to read as follows:

**§ 3.271 Computation of income.**

\* \* \* \* \*

(i) *Waiver of receipt of income.* Potential income that is not excludable under §§ 3.272 or 3.279 but is waived by an individual is included as countable income of the individual. However, if an individual withdraws a claim for Social Security benefits, after a finding of entitlement to those benefits, in order to maintain eligibility for unreduced Social Security benefits upon reaching a particular age, VA will not regard this potential income as having been waived and will therefore not count it.  
 (Authority: 38 U.S.C. 1503(a))

- 7. Amend § 3.272 as follows:
  - a. Add a sentence to the end of paragraph (g) introductory text.
  - b. Remove paragraphs (k), (o), (p), (r), (t), (u), (v), and (w).

- c. Redesignate paragraphs (q), (s), and (x) as paragraphs (o), (p), and (q), respectively.
  - d. Add new paragraphs (k), (r), and (s).
  - e. Revise the authority citation in newly designated paragraph (q).
- The additions and revision read as follows:

**§ 3.272 Exclusions from income.**

\* \* \* \* \*

(g) *Medical expenses.* \* \* \* For the definition of what constitutes a medical expense, see § 3.278, Deductible medical expenses.

(k) *Income from certain annuity payments.* VA will exclude annuity payments and count, on an annual basis, only the interest components of payments if a claimant or beneficiary (or someone acting on his or her behalf) transfers an asset to an annuity principal and either of the following statements is true:

- (1) VA has already considered the fair market value of the transferred asset as the claimant's or beneficiary's asset for VA purposes.
- (2) The funds used to purchase the annuity were proceeds from the sale of the claimant's or beneficiary's primary residence that was previously excluded as an asset under § 3.275(b)(1), and such funds are not sufficient to cause net worth to exceed the net worth limit under § 3.274(a).

\* \* \* \* \*

(q) \* \* \*

(Authority: 38 U.S.C. 1503(a)(12))

(r) *Veterans' benefits from states and municipalities.* VA will exclude from income payments from a state or municipality to a veteran of a monetary benefit that is paid as a veterans' benefit due to injury or disease. VA will exclude up to \$5,000 of such benefit in any annualization period.

(Authority: 38 U.S.C. 1503(a)(11))

(s) *Other payments.* Other payments excluded from income listed in § 3.279.

■ 8. Revise § 3.274 to read as follows:

**§ 3.274 Net worth and VA pension.**

(a) *Net worth limit.* For purposes of entitlement to VA pension, the net worth limit effective [insert effective date of the final rule after publication in the **Federal Register**] is [insert the dollar amount of the maximum community spouse resource allowance for Medicaid purposes on the effective date of the final rule]. This limit will be increased by the same percentage as the Social Security increase whenever there is a cost-of-living increase in benefit amounts payable under section 215(i) of title II of the Social Security Act (42 U.S.C. 415(i)). VA will publish the current limit on its Web site at [location to be determined].

(b) *When a claimant's or beneficiary's net worth exceeds the limit.* Except as provided in paragraph (h)(2) of this section, VA will deny or discontinue pension if a claimant's or beneficiary's net worth exceeds the net worth limit in paragraph (a) of this section.

(1) *Net worth* means the sum of a claimant's or beneficiary's assets and annual income.

(2) *Asset calculation.* VA will calculate a claimant's or beneficiary's assets under this section and § 3.275.

(3) *Annual income calculation.* VA will calculate a claimant's or beneficiary's annual income under § 3.271, and will include the annual income of dependents as required by law. See §§ 3.23(d)(4), 3.23(d)(5), and 3.24 for more information on annual income included when VA calculates a claimant's or beneficiary's pension entitlement rate. In calculating annual income for this purpose, VA will subtract all applicable deductible expenses, to include appropriate prospective medical expenses under § 3.272(g).

(4) *Example of net worth calculation.* A surviving spouse has claimed pension. The applicable maximum annual pension rate is \$8,485 and the net worth limit is \$117,240. The surviving spouse's annual income is

\$7,000 and her assets total \$116,000. Therefore, adding the spouse's annual income to her assets produces net worth of \$123,000. This amount exceeds the net worth limit.

(c) *Assets of other individuals included as claimant's or beneficiary's assets.* (1) *Claimant or beneficiary is a veteran.* A veteran's assets include the assets of the veteran as well as the assets of his or her spouse, if the veteran has a spouse.

(2) *Claimant or beneficiary is a surviving spouse.* A surviving spouse's assets include only the assets of the surviving spouse.

(3) *Claimant or beneficiary is a surviving child.* (i) If a surviving child has no custodian or is in the custody of an institution, the child's assets include only the assets of the child.

(ii) If a surviving child has a custodian other than an institution, the child's assets include the assets of the child as well as the assets of the custodian. If the child is in the joint custody of his or her natural or adoptive parent and a stepparent, the child's assets also include the assets of the stepparent. See § 3.57(d) for more information on child custody for pension purposes.

(d) *How a child's net worth affects a veteran's or surviving spouse's pension entitlement.* VA will not consider a child to be a veteran's or surviving spouse's dependent child for pension purposes if the child's net worth exceeds the net worth limit in paragraph (a) of this section.

(1) *Dependent child and potential dependent child.* For the purposes of this section—

(i) "Dependent child" refers to a child for whom a veteran or a surviving spouse is entitled to an increased maximum annual pension rate.

(ii) "Potential dependent child" refers to a child who is excluded from a veteran's or surviving spouse's pension award solely or partly because of this paragraph (d). References in this section to "dependent child" include a potential dependent child.

(2) *Dependent child net worth.* A dependent child's net worth is the sum of his or her annual income and the value of his or her assets.

(3) *Dependent child asset calculation.* VA will calculate the value of a dependent child's assets under this section and § 3.275. A dependent child's assets include the child's assets only.

(4) *Dependent child annual income calculation.* VA will calculate a dependent child's annual income under § 3.271, and will include the annual income of the child as well as the annual income of the veteran or

surviving spouse that would be included if VA were calculating a pension entitlement rate for the veteran or surviving spouse.

(e) *When VA calculates net worth.* Except as provided in paragraph (e)(3) of this section, VA calculates net worth only when:

- (i) VA has received—
  - (i) an original pension claim;
  - (ii) a new pension claim after a period of non-entitlement;
  - (iii) a request to establish a new dependent; or
  - (iv) information that a veteran's, surviving spouse's, or child's net worth has increased or decreased; and

(2) The claimant or beneficiary meets the other factors necessary for pension entitlement as provided in § 3.3(a)(3) and (b)(4).

(3) *When VA may calculate net worth.* If the evidence shows that net worth exceeds the net worth limit, VA may decide the pension claim before determining if the claimant meets other entitlement factors. VA will notify the claimant of the entitlement factors that have not been established.

(f) *How net worth decreases.* Net worth may decrease in three ways: assets can decrease, annual income can decrease, or both assets and annual income can decrease.

(1) *How assets decrease.* A veteran, surviving spouse, or child, or someone acting on their behalf, may decrease assets by spending them on the types of expenses provided in paragraph (f)(1)(i) and (ii) of this section. The expenses must be those of the veteran, surviving spouse, or child, or a relative of the veteran, surviving spouse, or child. The relative must be a member or constructive member of the veteran's, surviving spouse's, or child's household.

(i) Basic living expenses such as food, clothing, shelter, or health care; or

(ii) Education or vocational rehabilitation.

(2) *How annual income decreases.* See §§ 3.271 through 3.273.

(3) *How VA treats payment amounts that can decrease either annual income or assets.* When expenses can be considered as either deductible expenses for purposes of calculating annual income under § 3.272 or basic living expenses for purposes of decreasing assets under paragraph (f)(1) of this section, VA will first apply the amounts paid to decrease annual income, using remaining amounts paid to decrease assets if necessary. VA will not deduct the same expenses from both annual income and assets.

(4) *Example 1.* The net worth limit is \$114,000 and the maximum annual

pension rate (MAPR) is \$12,000. A claimant has assets of \$113,000 and annual income of \$8,000. Adding annual income to assets produces a net worth of \$121,000, which exceeds the net worth limit. The claimant pays unreimbursed medical expenses of \$9,000. Unreimbursed medical expenses are deductible from annual income under § 3.272(g) to the extent that they exceed 5 percent of the applicable MAPR. They may also be deducted from assets under paragraph (h)(1) of this section because they are basic living expenses. VA applies the expenditures to annual income first, which decreases annual income to zero. The claimant's net worth is now \$113,000; therefore, it is not necessary to apply the expenses to assets.

(5) *Example 2.* The net worth limit is \$114,000 and the MAPR is \$12,000. A claimant has assets of \$113,000 and annual income of \$9,500. Adding annual income to assets produces a net worth of \$122,500, which exceeds the net worth limit. The claimant pays unreimbursed medical expenses of \$9,000. Unreimbursed medical expenses are deductible from annual income under § 3.272(g) to the extent that they exceed 5 percent of the applicable MAPR. In this case, medical expenses that exceed \$600 are deductible from income. Medical expenses may also be deducted from assets under paragraph (f)(1) of this section. VA applies the expenditures to annual income first, which decreases annual income to \$1,100. This decreases net worth to \$114,100, which is still over the limit. VA will then deduct the remaining \$600 in medical expenses from assets, bringing net worth to \$113,500.

(g) *Effective dates of pension entitlement or increased entitlement after a denial, reduction, or discontinuance based on excessive net worth.* (1) *Scope of paragraph.* This paragraph (g) applies when VA has:

(i) Discontinued pension or denied pension entitlement for a veteran, surviving spouse, or surviving child based on the veteran's, surviving spouse's, or surviving child's excessive net worth; or

(ii) Reduced pension or denied increased pension entitlement for a veteran or surviving spouse based on a dependent child's excessive net worth.

(2) *Effective date of entitlement or increased entitlement.* The effective date of entitlement or increased entitlement is the day net worth ceases to exceed the limit. For this effective date to apply, the claimant or beneficiary must submit a certified statement that net worth has decreased and VA must receive the certified statement before the pension

claim has become finally adjudicated under § 3.160. This means that VA must receive the certified statement within 1 year after its decision notice to the claimant concerning the denial, reduction, or discontinuance unless the claimant appeals VA's decision. Otherwise, the effective date is the date VA receives a new pension claim. In accordance with § 3.277(a), VA may require the claimant or beneficiary to submit additional evidence as the individual circumstances may require.

(h) *Reduction or discontinuance of beneficiary's pension entitlement based on excessive net worth.* (1) *Effective date of reduction or discontinuance.* When an increase in a beneficiary's or dependent child's net worth results in a pension reduction or discontinuance because net worth exceeds the limit, the effective date of reduction or discontinuance is the last day of the calendar year in which net worth exceeds the limit.

(2) *Net worth decreases before the effective date.* If net worth decreases to the limit or below the limit before the effective date provided in paragraph (h)(1) of this section, VA will not reduce or discontinue the pension award on the basis of excessive net worth.

(i) *Additional effective-date provisions for dependent children.* (1) *Establishing a dependent child on veteran's or surviving spouse's pension award results in increased pension entitlement.* When establishing a dependent child on a veteran's or surviving spouse's pension award results in increased pension entitlement for the veteran or surviving spouse, VA will apply the effective-date provisions in paragraphs (g) and (h) of this section.

(2) *Establishing a dependent child on veteran's or surviving spouse's pension award results in decreased pension entitlement.* (i) When a dependent child's non-excessive net worth results in decreased pension entitlement for the veteran or surviving spouse, the effective date of the decreased pension entitlement rate (*i.e.*, VA action to add the child to the award) is the end of the year that the child's net worth decreases.

(ii) When a dependent child's excessive net worth results in increased pension entitlement for the veteran or surviving spouse, the effective date of the increased pension entitlement rate (*i.e.*, VA action to remove the child from the award) is the date that VA receives a claim for an increased rate based on the child's net worth increase.

(Authority: 38 U.S.C. 1522, 1543, 5110, 5112)

### § 3.275 How VA determines the asset amount for pension net worth determinations.

(a) *Definitions pertaining to assets.* (1) The term *assets* means the fair market value of all property that an individual owns, including all real and personal property, unless excluded under paragraph (b) of this section, less the amount of mortgages or other encumbrances specific to the mortgaged or encumbered property. VA will consider the terms of the recorded deed or other evidence of title to be proof of ownership of a particular asset. *See also* § 3.276(a)(4), which defines "fair market value."

(2) *Claimant.* (i) Except as provided in paragraph (a)(2)(ii) of this section, for the purposes of this section and § 3.276, *claimant* means a pension beneficiary, a dependent spouse, or a dependent or potential dependent child as described in § 3.274(d), as well as a veteran, surviving spouse, or surviving child pension applicant.

(ii) For the purpose of paragraph (b)(1) of this section, *claimant* means a pension beneficiary or applicant who is a veteran, a surviving spouse, or a surviving child.

(3) *Residential lot area.* For purposes of this section, *residential lot area* means the lot on which a residence sits that is similar in size to other residential lots in the vicinity of the residence, but not to exceed 2 acres (87,120 square feet), unless the additional acreage is not marketable.

(b) *Exclusions from assets.* Assets do not include the following:

(1) *The value of a claimant's primary residence (single-family unit),* including the residential lot area, in which the claimant has an ownership interest. VA recognizes one primary residence per claimant. If the residence is sold, any proceeds from the sale is an asset except to the extent the proceeds are used to purchase another residence within the same calendar year as the year in which the sale occurred.

(i) *Personal mortgage not deductible.* VA will not subtract from a claimant's assets the amount of any mortgages or encumbrances on a claimant's primary residence.

(ii) *Claimant not residing in primary residence.* Although rental income counts as annual income as provided in § 3.271(d), VA will not include a claimant's primary residence as an asset even if the claimant resides in any of the following as defined in § 3.278(b):

(A) A nursing home or medical foster home;

(B) An assisted living or similar residential facility that provides custodial care; or

■ 9. Revise § 3.275 to read as follows:

(C) The home of a family member for custodial care.

(2) *Value of personal effects suitable to and consistent with a reasonable mode of life*, such as appliances and family transportation vehicles.

(3) *Radiation Exposure Compensation Act payments*. Payments made under section 6 of the Radiation Exposure Compensation Act of 1990.

(Authority: 42 U.S.C. 2210 (note))

(4) *Ricky Ray Hemophilia Relief Fund payments*. Payments made under section 103(c) and excluded under section 103(h)(2) of the Ricky Ray Hemophilia Relief Fund Act of 1998.

(Authority: 42 U.S.C. 300c-22 (note))

(5) *Energy Employees Occupational Illness Compensation Program payments*. Payments made under the Energy Employees Occupational Illness Compensation Program.

(Authority: 42 U.S.C. 7385e(2))

(6) *Payments to Aleuts*. Payments made to certain Aleuts under 50 U.S.C. App. 1989c-5.

(Authority: 50 U.S.C. App. 1989c-5(d)(2))

(7) *Other payments*. Other payments excluded from net worth listed in § 3.279, which lists statutory exclusions from income and net worth for all VA needs-based benefits.

(Authority: 38 U.S.C. 1522, 1543)

■ 10. Revise § 3.276 to read as follows:

**§ 3.276 Asset transfers and penalty periods.**

(a) *Asset transfer definitions*. For purposes of this section—

(1) *Claimant* has the same meaning as defined in § 3.275(a)(2)(i).

(2) *Covered asset* means an asset that—

(i) Was part of a claimant's net worth,

(ii) Was transferred for less than fair market value, and

(iii) If not transferred, would have caused or partially caused the claimant's net worth to exceed the net worth limit under § 3.274(a).

(3) *Covered asset amount* means the monetary amount by which a claimant's net worth would have exceeded the limit due to the covered asset alone if the uncompensated value of the covered asset had been included in net worth.

(i) *Example 1*. The net worth limit under § 3.274(a) is \$115,920. A claimant's assets total \$113,000 and his annual income is zero. However, the claimant transferred \$30,000 by giving it to a friend. If the claimant had not transferred the \$30,000, his net worth would have been \$143,000, which exceeds the net worth limit. The

claimant's covered asset amount is \$27,080, because this is the amount by which the claimant's net worth would have exceeded the limit due to the covered asset.

(ii) *Example 2*. The net worth limit under § 3.274(a) is \$115,920. A claimant's annual income is zero and her total assets are \$117,000, which exceeds the net worth limit. In addition, the claimant transferred \$30,000 by giving \$20,000 to her married son and giving \$10,000 to a friend. The claimant's covered asset amount is \$30,000 because this is the amount by which the claimant's net worth would have exceeded the limit due to the covered assets alone.

(4) *Fair market value* means the price at which an asset would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts. VA will use the best available information to determine fair market value, such as inspections, appraisals, public records, and the market value of similar property if applicable.

(5) *Transfer for less than fair market value* means—

(i) Selling, conveying, gifting, or exchanging an asset for an amount less than the fair market value of the asset, or

(ii) An asset transfer to, or purchase of, any financial instrument or investment that reduces net worth and would not be in the claimant's financial interest but for the claimant's attempt to qualify for VA pension by transferring the asset to, or purchasing, the instrument or investment. Examples of such instruments or investments include—

(A) *Annuities*. *Annuity* means a financial instrument that provides income over a defined period of time for an initial payment of principal.

(B) *Trusts*. *Trust* means a legal arrangement by which an individual (the grantor) transfers property to an individual or an entity (the trustee), who manages the property according to the terms of the trust, whether for the grantor's own benefit or for the benefit of another individual.

(6) *Uncompensated value* means the difference between the fair market value of an asset and the amount of compensation an individual receives for it. In the case of a trust, annuity, or other financial instrument or investment described in paragraph (a)(5)(ii) of this section, *uncompensated value* means the amount of money or the monetary value of any other type of asset transferred to such a trust, annuity, or

other financial instrument or investment.

(7) *Look-back period* means the 36-month period immediately preceding the date on which VA receives either an original pension claim or a new pension claim after a period of non-entitlement.

(8) *Penalty period* means a period of non-entitlement, calculated under paragraph (e) of this section, due to transfer of a covered asset.

(b) *General statement of policy pertaining to pension and covered assets*. VA pension is a needs-based benefit and is not intended to preserve the estates of individuals who have the means to support themselves. Accordingly, a claimant may not create pension entitlement by transferring covered assets. VA will review the terms and conditions of asset transfers made during the 36-month look-back period to determine whether the transfer constituted transfer of a covered asset. In accordance with § 3.277(b), for any asset transfer, VA may require a claimant to provide evidence such as a Federal income tax return transcript, the terms of a gift, trust, or annuity, or the terms of a recorded deed or other evidence of title.

(c) *Presumption and exception pertaining to covered assets*. In the absence of clear and convincing evidence showing otherwise, VA presumes that an asset transfer made during the look-back period was for the purpose of decreasing net worth to establish pension entitlement and will consider such an asset to be a covered asset. However, VA will not consider such an asset to be a covered asset if the claimant establishes through clear and convincing evidence that he or she transferred the asset as the result of fraud, misrepresentation, or unfair business practice related to the sale or marketing of financial products or services for purposes of establishing entitlement to VA pension. Evidence substantiating the application of this exception may include a complaint contemporaneously filed with state, local, or Federal authorities reporting the incident.

(d) *Exception for transfers to certain trusts*. VA will not consider as a covered asset an asset that a veteran, a veteran's spouse, or a veteran's surviving spouse transfers to a trust established on behalf of a child of the veteran if:

(1) VA rates or has rated the child incapable of self-support under § 3.356; and

(2) There is no circumstance under which distributions from the trust can be used to benefit the veteran, the veteran's spouse, or the veteran's surviving spouse.

(e) *Penalty periods and calculations.* When a claimant transfers a covered asset during the look-back period, VA will assess a penalty period not to exceed 10 years. VA will calculate the length of the penalty period by dividing the total covered asset amount by the monthly penalty rate described in paragraph (e)(1) of this section and rounding the quotient down to the nearest whole number. The result is the number of months for which VA will not pay pension.

(1) *Monthly penalty rate.* The monthly penalty rate is the applicable maximum annual pension rate (MAPR) under 38 U.S.C. 1521(d), 1542(d), or 1543 described in this paragraph (e)(1) that is in effect as of the date of the pension claim, divided by 12, and rounded down to the nearest whole dollar. The MAPRs are located on VA's Web site at <http://www.benefits.va.gov/pension/>.

(i) If the claimant is a veteran or a surviving spouse, the annual rate is the MAPR at the aid and attendance level for a veteran or a surviving spouse with the applicable number of dependents.

(ii) If the claimant is a child, the annual rate is the child alone MAPR.

(2) *Beginning date of penalty period.* When a claimant transfers a covered asset or assets during the look-back period, the penalty period begins on the first day of the month that follows the date of the transfer. If there was more than one transfer, the penalty period will begin on the first day of the month that follows the date of the last transfer.

(3) *Entitlement upon ending of penalty period.* VA will consider that the claimant, if otherwise qualified, is entitled to benefits effective the last day of the last month of the penalty period, with a payment date as of the first day of the following month in accordance with § 3.31.

(4) *Example of penalty period calculation:* VA receives a pension claim in November 2014. The claimant's net worth is equal to the net worth limit. However, the claimant transferred covered assets totaling \$10,000 on August 20, 2014, and September 23, 2014. Therefore, the total covered asset amount is \$10,000, and the penalty period begins on October 1, 2014. The claimant is a surviving spouse with no dependents, so the applicable MAPR is \$13,563, and the monthly penalty rate is \$1,130. The penalty period is \$10,000/\$1,130 per month = 8 months. The eighth month of the penalty period is May 2015. The surviving spouse may be entitled to pension effective May 31, 2015, with a payment date of June 1, 2015, if other entitlement requirements are met.

(5) *Penalty period recalculations.* VA will not recalculate a penalty period under this section unless—

(i) The original calculation is shown to be erroneous; or

(ii) VA receives evidence showing that all covered assets were returned to the claimant before the date of claim or within 30 days after the date of claim. If all covered assets were returned to the claimant, VA will not assess a penalty period. For this exception to apply, VA must receive the evidence not later than 60 days after the date of VA's notice to the claimant of VA's decision concerning the penalty period. Once covered assets are returned, a claimant may reduce net worth under the provisions of § 3.274(f).

(Authority: 38 U.S.C. 1522, 1543, 1506(1))

(The Office of Management and Budget has approved the information collection requirement in this section under control numbers 2900-0001, 2900-0002, 2900-0004, and 2900-0002.)

### § 3.277 [Amended]

- 11. Amend § 3.277(c)(2) by removing “shall” and adding in its place “may”.
- 12. Add § 3.278 to read as follows:

### § 3.278 Deductible medical expenses.

(a) *Scope.* This section identifies medical expenses that VA may deduct from countable income for purposes of three of its needs-based programs: Pension, section 306 pension, and parents' dependency and indemnity compensation (DIC). Payments for such medical expenses must be unreimbursed to be deductible from income.

(b) *Definitions.* For the purposes of this section—

(1) *Health care provider* means:

(i) An individual licensed by a state or country to provide health care in the state or country in which the individual provides the health care. The term includes, but is not limited to, a physician, physician assistant, psychologist, chiropractor, registered nurse, licensed vocational nurse, licensed practical nurse, and physical or occupational therapist; and

(ii) A nursing assistant or home health aide who is supervised by a licensed health care provider as defined in paragraph (b)(1)(i) of this section.

(2) *Activities of daily living (ADL)* mean basic self-care activities and consist of bathing or showering, dressing, eating, toileting, and transferring. *Transferring* means an individual's moving himself or herself from one position to another, such as getting in and out of bed.

(3) *Instrumental activities of daily living (IADL)* mean independent living

activities, such as shopping, food preparation, housekeeping, laundering, managing finances, handling medications, using the telephone, and transportation for non-medical purposes. Managing finances does not include services rendered by a VA-appointed fiduciary.

(4) *Custodial care* means regular:

(i) Assistance with two or more ADLs, or

(ii) Supervision because an individual with a mental disorder is unsafe if left alone due to the mental disorder.

(5) *Qualified relative* means a veteran's dependent spouse, a veteran's dependent or surviving child, and other relatives of the claimant who are members or constructive members of the claimant's household whose medical expenses are deductible under §§ 3.262(l) or 3.272(g). A “constructive member” of a household is an individual who would be a member of the household if the individual were not in a nursing home, away at school, or a similar situation. Qualified relatives do not include claimants who are veterans, surviving spouses, or parents.

(6) *Nursing home* means a facility defined in § 3.1(z)(1) or (2). If the facility is not located in a state, the facility must be licensed in the country in which it is located.

(7) *Medical foster home* means a privately owned residence, recognized and approved by VA under 38 CFR 17.73(d), that offers a non-institutional alternative to nursing home care for veterans who are unable to live alone safely due to chronic or terminal illness.

(8) *Assisted living, adult day care, or similar facility* means a facility that provides individuals with custodial care. The facility may contract with a third-party provider for this purpose. A facility that is residential must be staffed 24 hours per day with custodial care providers. To be included in this definition, a facility must be licensed if such facilities are required to be licensed in the state or country in which the facility is located.

(c) *Medical expenses for VA purposes.* Generally, medical expenses for VA needs-based benefit purposes are payments for items or services that are medically necessary or that improve a disabled individual's functioning. Medical expenses may include, but are not limited to, the payments specified in paragraphs (c)(1) through (7) of this section.

(1) *Care by a health care provider.* Payments to a health care provider for services performed within the scope of the provider's professional capacity are medical expenses. Cosmetic procedures that a health care provider performs to

improve a congenital or accidental deformity or related to treatment for a diagnosed medical condition are medical expenses.

(2) *Medications, medical supplies, medical equipment, and medical food, vitamins, and supplements.* Payments for prescription and non-prescription medication procured lawfully under Federal law, as well as payments for medical supplies or medical equipment are medical expenses. Medically necessary food, vitamins, and supplements as prescribed or directed by a health care provider authorized to write prescriptions are medical expenses.

(3) *Adaptive equipment.* Payments for adaptive devices or service animals, including veterinary care, used to assist a person with an ongoing disability are medical expenses. Medical expenses do not include non-prescription food, boarding, grooming, or other routine expenses of owning an animal.

(4) *Transportation expenses.* Payments for transportation for medical purposes, such as the cost of transportation to and from a health care provider's office by taxi, bus, or other form of public transportation are medical expenses. The cost of transportation for medical purposes by privately owned vehicle (POV), including mileage, parking, and tolls, is a medical expense. For transportation in a POV, VA limits the deductible mileage rate to the current POV mileage reimbursement rate specified by the United States General Services Administration (GSA). The current amount can be obtained from [www.gsa.gov](http://www.gsa.gov) or on VA's Web site at [location to be determined]. Amounts by which transportation expenses set forth in this paragraph (c)(4) exceed the amounts of other VA or non-VA reimbursements for the expense are medical expenses.

(i) *Example.* In February 2013, a veteran drives 60 miles round trip to a VA medical center and back. The veteran is reimbursed \$24.90 from the Veterans Health Administration. The POV mileage reimbursement rate specified by GSA is \$0.565 per mile, so the transportation expense is \$0.565/mile \* 60 miles = \$33.90. For VA needs-based benefits purposes, the unreimbursed amount, here, the difference between \$33.90 and \$24.90 is a medical expense.

(ii) [Reserved]

(5) *Health insurance premiums.* Payments for health, medical, hospitalization, and long-term care insurance premiums are medical expenses. Premiums for Medicare Parts

B and D and for long-term care insurance are medical expenses.

(6) *Smoking cessation products.* Payments for items and services specifically related to smoking cessation are medical expenses.

(7) *Institutional forms of care and in-home care.* As provided in paragraph (d) of this section.

(d) *Institutional forms of care and in-home care.* (1) *Hospitals, nursing homes, medical foster homes, and inpatient treatment centers.* Payments to hospitals, nursing homes, medical foster homes, and inpatient treatment centers (including inpatient treatment centers for drug or alcohol addiction), including the cost of meals and lodging charged by such facilities are medical expenses.

(2) *In-home care.* Payments for services provided by an in-home attendant are medical expenses. Payments must be commensurate with the number of hours that the provider attends to the disabled person, and the attendant's hourly rate may not exceed the average hourly rate for home health aides published annually by the MetLife Mature Market Institute in its Market Survey of Long-Term Care Costs. VA will publish the in-home care hourly rate limit on its Web site at [location to be determined].

(i) Except as provided in paragraphs (d)(2)(ii) and (iii) of this section, the attendant must be a health care provider, and only payments for assistance with ADLs or health care services are medical expenses.

(ii) If a veteran or surviving spouse (or parent, for parents' DIC purposes) meets the criteria in § 3.351 for needing regular aid and attendance or being housebound, then—

(A) The attendant does not need to be a health care provider, and

(B) Payments for assistance with IADLs are medical expenses only if the primary responsibility of the attendant is to provide health care services or custodial care. Otherwise, only payments for assistance with health care or custodial care are medical expenses.

(iii) Paragraph (d)(2)(ii) of this section also applies to a qualified relative if a physician or physician assistant states in writing that, due to physical or mental disability, the qualified relative requires the health care services or custodial care that the in-home attendant provides.

(3) *Assisted living, adult day care, and similar facilities.* Certain payments to assisted living, adult day care, and similar facilities are medical expenses. Except as provided in paragraphs (d)(3)(i) and (ii) of this section, only payments for health care services or assistance with ADLs provided by a

health care provider are medical expenses.

(i) If a veteran or surviving spouse (or parent for parents' DIC purposes) meets the criteria in § 3.351 for needing regular aid and attendance or being housebound, then—

(A) The care does not need to be provided by a health care provider, and

(B) Medical expenses include all payments to the facility, to include meals and lodging, if the primary reason for the veteran or surviving spouse to be in the facility is to receive health care services or custodial care that the facility provides. Otherwise, only payments for assistance with health care or custodial care are medical expenses.

(ii) Paragraph (d)(3)(i) of this section also applies to a qualified relative if a physician or physician assistant states in writing that, due to mental or physical disability, the qualified relative requires the health care services or custodial care that the facility provides.

(e) *Non-medical expenses for VA purposes.* Payments for items and services listed in paragraphs (e)(1) through (5) of this section are not medical expenses for VA needs-based benefit purposes. The list is not all-inclusive.

(1) *Maintenance of general health.* Payments for items or services that benefit or maintain general health, such as vacations and dance classes, are not medical expenses.

(2) *Cosmetic procedures.* Except as provided in paragraph (c)(1) of this section, cosmetic procedures are not medical expenses.

(3) *Meals and lodging.* Except as provided in paragraph (d) of this section, payments for meals and lodging are not medical expenses. This category includes payments to facilities such as independent living facilities that do not provide health care services or custodial care.

(4) *Assistance with IADLs.* Except as provided in paragraph (d) of this section, payments for assistance with IADLs are not medical expenses.

(5) *VA fiduciary fees.* Fees for VA-appointed fiduciary services are not medical expenses.

**CROSS REFERENCES:** For the rules governing how medical expenses are deducted, see § 3.272(g) (regarding pension) and § 3.262(l) (regarding section 306 pension and parents' DIC).

(Authority: 38 U.S.C. 501(a), 1315(f)(3), 1503(a)(8), 1506(1))

(The Office of Management and Budget has approved the information collection requirement in this section under control numbers 2900-0001, 2900-0002, 2900-0004, 2900-0161, and 2900-0002.)



■ 13. Add § 3.279 to read as follows:

**§ 3.279 Statutory exclusions from income or assets (net worth or corpus of the estate).**

(a) *Scope of section.* This section sets forth payments that Federal statutes

exclude from income for the purpose of determining entitlement to any VA-administered benefit that is based on financial need. Some of the exclusions also apply to assets (pension), aka, net worth or the corpus of the estate (section 306 pension and parents as dependents for compensation).

| Program or payment   | Income                 | Assets (corpus of the estate) | Authority                       |
|--|------------------------|-------------------------------|---------------------------------|
| <b>(b) COMPENSATION OR RESTITUTION PAYMENTS</b>  |                        |                               |                                 |
| (1) <i>Relocation payments.</i> Payments to individuals displaced as a direct result of programs or projects undertaken by a Federal agency or with Federal financial assistance under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended.   | Excluded .....         | Included .....                | 42 U.S.C. 4636.                 |
| (2) <i>Crime victim compensation.</i> Amounts received as compensation under the Victims of Crime Act of 1984 unless the total amount of assistance received from all federally funded programs is sufficient to fully compensate the claimant for losses suffered as a result of the crime.   | Excluded .....         | Excluded .....                | 42 U.S.C. 10602(c).             |
| (3) <i>Restitution to individuals of Japanese ancestry.</i> Payments made as restitution under Public Law 100–383 to an individual of Japanese ancestry who was interned, evacuated, or relocated during the period of December 7, 1941, through June 30, 1946, pursuant to any law, Executive Order, Presidential proclamation, directive, or other official action respecting these individuals.         | Excluded .....         | Excluded .....                | 50 U.S.C. App. 1989b–4(f).      |
| (4) <i>Victims of Nazi persecution.</i> Payments made to individuals because of their status as victims of Nazi persecution.   | Excluded .....         | Excluded .....                | 42 U.S.C. 1437a note.           |
| (5) <i>Agent Orange settlement payments.</i> Payments made from the Agent Orange Settlement Fund or any other fund established pursuant to the settlement in the In Re Agent Orange product liability litigation, M.D.L. No. 381 (E.D.N.Y.).   | Excluded .....         | Excluded .....                | Sec. 1, Public Law 101–201.     |
| (6) <i>Chapter 18 benefits.</i> Allowances paid under 38 U.S.C. chapter 18 to a veteran's child with a birth defect.   | Excluded .....         | Excluded .....                | 38 U.S.C. 1833(c).              |
| (7) <i>Flood mitigation activities.</i> Assistance provided under the National Flood Insurance Act of 1968, as amended.  | Excluded .....         | Excluded .....                | 42 U.S.C. 4031.                 |
| <b>(c) PAYMENTS TO NATIVE AMERICANS</b>  |                        |                               |                                 |
| (1) <i>Indian Tribal Judgment Fund distributions.</i> All Indian Tribal Judgment Fund distributions excluded from income and net worth while such funds are held in trust. First \$2,000 per year of income received by individual Indians under the Indian Tribal Judgment Funds Use or Distribution Act in satisfaction of a judgment of the United States Court of Federal Claims excluded from income. | Excluded .....         | Excluded .....                | 25 U.S.C. 1407.                 |
| (2) <i>Interests of individual Indians in trust or restricted lands.</i> Interests of individual Indians in trust or restricted lands excluded from net worth. First \$2,000 per year of income received by individual Indians that is derived from interests in trust or restricted lands excluded from income.   | Excluded .....         | Excluded .....                | 25 U.S.C. 1408.                 |
| (3) <i>Per Capita Distributions Act.</i> First \$2,000 per year of per capita distributions to members of a tribe from funds held in trust by the Secretary of the Interior for an Indian tribe. All funds excluded from income and net worth while funds are held in trust.   | Excluded .....         | Excluded .....                | 25 U.S.C. 117b, 25 U.S.C. 1407. |
| (4) <i>Submarginal land.</i> Income derived from certain submarginal land of the United States that is held in trust for certain Indian tribes.  | Excluded .....         | Excluded .....                | 25 U.S.C. 459e.                 |
| (5) <i>Old Age Assistance Claims Settlement Act.</i> Up to \$2,000 per year of per capita distributions under the Old Age Assistance Claims Settlement Act.  | Excluded .....         | Excluded .....                | 25 U.S.C. 2307.                 |
| (6) <i>Alaska Native Claims Settlement Act.</i> Any of the following, if received from a Native Corporation, under the Alaska Native Claims Settlement Act:  | Excluded .....         | Excluded .....                | 43 U.S.C. 1626(c).              |
| (i) Cash, including cash dividends on stocks and bonds, up to a maximum of \$2,000 per year;   |                        |                               |                                 |
| (ii) Stock, including stock issued as a dividend or distribution;  |                        |                               |                                 |
| (iii) Bonds that are subject to the protection under 43 U.S.C. 1606(h) until voluntarily and expressly sold or pledged by the shareholder after the date of distribution;  |                        |                               |                                 |
| (iv) A partnership interest;   |                        |                               |                                 |
| (v) Land or an interest in land, including land received as a dividend or distribution on stock;   |                        |                               |                                 |
| (vi) An interest in a settlement trust.  |                        |                               |                                 |
| (7) <i>Maine Indian Claims Settlement Act.</i> Payments received under the Maine Indian Claims Settlement Act of 1980.   | Excluded .....         | Excluded .....                | 25 U.S.C. 1728.                 |
| (8) <i>Cobell Settlement.</i> Payments received under <i>Cobell v. Salazar</i> , Civil Action No. 96–1285 (TFH) (D.D.C.).  | Excluded for one year. | Excluded for one year.        | Sec. 101, Public Law 111–291.   |
| <b>(d) WORK-RELATED PAYMENTS</b>   |                        |                               |                                 |
| (1) <i>Workforce investment.</i> Allowances, earnings, and payments to individuals participating in programs under the Workforce Investment Act of 1998 (29 U.S.C. chapter 30).  | Excluded .....         | Included .....                | 29 U.S.C. 2931(a)(2).           |
| (2) <i>AmeriCorps participants.</i> Allowances, earnings, and payments to AmeriCorps participants under the National and Community Service Act of 1990.  | Excluded .....         | Included .....                | 42 U.S.C. 12637(d).             |

| Program or payment  | Income         | Assets (corpus of the estate) | Authority                  |
|---|----------------|-------------------------------|----------------------------|
| (3) <i>Volunteer work</i> . Compensation or reimbursement to volunteers involved in programs administered by the Corporation for National and Community Service, unless the payments are equal to or greater than the minimum wage. The minimum wage is either that under the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.) or that under the law of the state where the volunteers are serving, whichever is greater. | Excluded ..... | Excluded .....                | 42 U.S.C. 5044(f).         |
| (e) MISCELLANEOUS PAYMENTS  |                |                               |                            |
| (1) <i>Food stamps</i> . Value of the allotment provided to an eligible household under the Food Stamp Program.   | Excluded ..... | Excluded .....                | 7 U.S.C. 2017(b).          |
| (2) <i>Food for children</i> . Value of free or reduced-price for food under the Child Nutrition Act of 1966.   | Excluded ..... | Excluded .....                | 42 U.S.C. 1780(b).         |
| (3) <i>Child care</i> . Value of any child care provided or arranged (or any amount received as payment for such care or reimbursement for costs incurred for such care) under the Child Care and Development Block Grant Act of 1990.  | Excluded ..... | Included .....                | 42 U.S.C. 9858q.           |
| (4) <i>Services for housing recipients</i> . Value of services, but not wages, provided to a resident of an eligible housing project under a congregate services program under the Cranston-Gonzalez National Affordable Housing Act.   | Excluded ..... | Included .....                | 42 U.S.C. 8011(j)(2).      |
| (5) <i>Home energy assistance</i> . The amount of any home energy assistance payments or allowances provided directly to, or indirectly for the benefit of, an eligible household under the Low-Income Home Energy Assistance Act of 1981.  | Excluded ..... | Excluded .....                | 42 U.S.C. 8624(f).         |
| (6) <i>Programs for older Americans</i> . Payments, other than wages or salaries, received from programs funded under the Older Americans Act of 1965, 42 U.S.C. 3001.  | Excluded ..... | Included .....                | 42 U.S.C. 3020a(b).        |
| (7) <i>Student financial aid</i> . Amounts of student financial assistance received under Title IV of the Higher Education Act of 1965, including Federal work-study programs, Bureau of Indian Affairs student assistance programs, or vocational training under the Carl D. Perkins Vocational and Technical Education Act of 1998.   | Excluded ..... | Excluded .....                | 20 U.S.C. 1087uu, 2414(a). |
| (8) <i>Retired Serviceman's Family Protection Plan annuities</i> . Annuities received under subchapter 1 of the Retired Serviceman's Family Protection Plan.  | Excluded ..... | Included .....                | 10 U.S.C. 1441.            |

(Authority: 38 U.S.C. 501(a))

■ 14. Amend § 3.503 by adding paragraph (c) to read as follows:

**§ 3.503 Children.**

\* \* \* \* \*

(c) *Medicaid-covered nursing home care (§ 3.551(i))*. (1) Last day of the calendar month in which Medicaid payments begin, last day of the month following 60 days after issuance of a prereduction notice required under § 3.103(b)(2), or the earliest date on which payment may be reduced without creating an overpayment, whichever date is later; or

(2) If the child or the child's custodian willfully conceals information necessary to make the reduction, the last day of

the month in which that willful concealment occurred.

(Authority: 38 U.S.C. 501, 1832, 5112(b), 5503(d))

■ 15. Amend § 3.551 by revising paragraph (i) to read as follows:

**§ 3.551 Reduction because of hospitalization.**

\* \* \* \* \*

(i) *Certain beneficiaries receiving Medicaid-covered nursing home care*. This paragraph (i) applies to a veteran without a spouse or child, to a surviving spouse without a child, and to a surviving child. Effective November 5, 1990, and terminating on the date provided in 38 U.S.C. 5503(d)(7), if such a beneficiary is receiving Medicaid-covered nursing home care, no pension

or survivors pension in excess of \$90 per month will be paid to or for the beneficiary for any period after the month in which the Medicaid payments begin. A beneficiary is not liable for any pension paid in excess of the \$90 per month by reason of the Secretary's inability or failure to reduce payments, unless that inability or failure is the result of willful concealment by the beneficiary of information necessary to make that reduction.

\* \* \* \* \*

**§ 3.660 [Amended]**

■ 16. Amend § 3.660(d) by removing “§§ 3.263 or 3.274” and adding in its place “§ 3.263”.

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