**No. 2014-_____**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FEDERAL CIRCUIT**

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**AMERICAN MILITARY PARTNER ASSOCIATION,**

*Petitioner,*

v.

**ROBERT A. MCDONALD, SECRETARY OF VETERANS AFFAIRS,**

*Respondent.*

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# PETITION FOR REVIEW

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AUGUST 18, 2014

The American Military Partner Association ("AMPA"), through its counsel Lambda Legal Defense and Education Fund, Inc. and Morrison & Foerster LLP, hereby petitions this Court pursuant to 38 U.S.C. § 502 and Federal Circuit Rule 47.12 to review the summary of legal opinions issued by the U.S. Department of Veterans Affairs ("VA"), the legal opinions referenced in that summary, and the VA instructions identified below. The challenged action mandates denial of spousal benefits to veterans and their same-sex spouses and survivors on the ground that their marriages are not accorded legal recognition by the states where they resided at the time of marriage and when the right to benefits accrued, notwithstanding that these states' denial of legal recognition to such marriages is unconstitutional. Having weathered the federal government's past, longstanding discrimination against them, lesbian and gay veterans and their families find themselves once again deprived of equal rights and earned benefits by the government they served and the nation for which they sacrificed.

## ACTION ON WHICH JUDICIAL REVIEW IS SOUGHT

On June 26, 2013, the Supreme Court in *United States v. Windsor*, 133 S. Ct. 2675 (2013), struck down as unconstitutional Section 3 of the federal Defense of Marriage Act ("DOMA") (codified as amended at 1 U.S.C. § 7), which denied federal legal recognition and spousal benefits to same-sex married spouses. That same day, the President of the United States directed each federal agency, in

conjunction with the Department of Justice, to review the agency's programs, laws, regulations, and policies that implicate marital status and to establish policies to extend marital benefits to same-sex couples to the fullest extent permitted by law. *See* Memorandum from Eric Holder, Jr., U.S. Att'y Gen., to the President, *Implementation of* United States v. Windsor, at 1-3 (June 20, 2014) ("Holder Memorandum"), *available at* http://www.justice.gov/iso/opa/resources/972014620103930904785.pdf. Following nearly a year of analysis, the VA responded to this directive with a *Summary of Precedent Opinions of the General Counsel*, published in the Federal Register at 79 Fed. Reg. 35,414-15, on June 20, 2014, with a June 17, 2014 effective date (the "Summary"), *available at* https://www.federalregister.gov/articles/2014/06/20/2014-14476/summary-of-precedent-opinions-of-the-general-counsel.

AMPA seeks judicial review of action by the VA set forth in the Summary, which provides "legal interpretations issued by the Office of the General Counsel involving Veterans' benefits under laws administered by VA." *Id.* at 35,414. These legal interpretations "are considered precedential by VA and will be followed by VA officials and employees in future claim matters involving the same legal issues." *Id.* The Summary in turn references the full text of two General Counsel's legal opinions dated June 17, 2014. *See* Memorandum, *Effective Dates of Awards Based on Same-Sex Marriage*, VAOPGCPREC 3-2014

(June 17, 2014); Memorandum, *Reliance on State Law to Determine Validity of Same-Sex Marriage*, VAOPGCPREC 4-2014 (June 17, 2014) (collectively, the "Legal Opinions").[1]

The Summary and Legal Opinions require, in relevant part, that the VA apply 38 U.S.C. § 103(c) to deny recognition and spousal veterans benefits to married same-sex spouses who, at the time of marriage and when the right to benefits accrued, resided in a state that refused to recognize their marriage. *See, e.g.*, Summary, *supra*, at 35,415 (requiring VA to "look to state law to determine the validity of a marriage," and explaining that to be recognized for purposes of spousal veterans benefits, marriage must have been valid under law of state of residence either at time of inception of marriage or when right to benefit accrued).

The VA has issued instructions and procedures to staff and information to the public confirming that, under these precedential materials, the VA will deny claims for spousal benefits to those who "have never lived in a state that recognized same-sex marriage, but . . . traveled to a recognition state to marry." U.S. Dep't of Veterans Affairs, Office of Pub. & Intergovernmental Affairs, *Important Information on Marriage*, http://www.va.gov/opa/marriage/; *see also*

[1] The Summary and Legal Opinions are attached as Exhibit 1.

VBA Letter 20-14-08, *Administration of Same-Sex Spousal Benefits* (June 20, 2014), http://dvs.ohio.gov/Portals/0/library/odvs/saa/news/DOMAVBALetter 062014.pdf.[2] The Summary and Legal Opinions, as well as the instructions and procedural and informational materials based upon them, constitute actions to which 5 U.S.C. § 552(a)(1) refers and thus are subject to judicial review in this Court pursuant to 38 U.S.C. § 502. *See, e.g.*, *Splane v. West*, 216 F.3d 1058, 1062 (Fed. Cir. 2000).[3]

Petitioner challenges the Summary, Legal Opinions, and instructions and procedures directing that the VA disrespect the spousal status of veterans and their same-sex spouses and survivors who (a) entered into marriages valid where entered, but (b) resided at the time of marriage and when their right to benefits accrued in states with laws denying recognition to marriages of same-sex couples,

[2] Instructional and informational materials which the Petitioner has been able to access are attached as Exhibit 2.

[3] The Summary and Legal Opinions constitute a "'statement of general . . . applicability and future effect designed to implement . . . or prescribe . . . law or policy,'" subject to § 502 review as action to which 5 U.S.C. § 551(a)(1)(d) refers. *LeFevre v. Sec'y, Dep't of Veterans Affairs*, 66 F.3d 1191, 1196 (Fed. Cir. 1995). Thus, for example, Memorandum VAOPGCPREC 4-2014 is directed to the Under Secretaries for Health, Benefits, and Memorial Affairs, and, as set forth in the Summary, answers the question: "How will the [VA] administer spousal benefits in accordance with 38 U.S.C. § 103(c) in light of variances in state law on the issue of same-sex marriage?" Summary, *supra*, at 35,415.

and (c) would otherwise be eligible for VA spousal veterans benefits and have applied (or would apply) for such benefits.[4]

## SUMMARY OF ARGUMENT

*Windsor* held that DOMA's denial of federal recognition to married same-sex spouses "undermine[d] both the public and private significance of state-sanctioned same-sex marriages" by telling "those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition." 133 S. Ct. at 2694. The Court's opinion specifically singled out to highlight among DOMA's unconstitutional effects the deprivation of "veterans' benefits" to same-sex spouses, including denying these veterans and their spouses the dignity and final respect of the right to "buri[al] together in veterans' cemeteries." *Id.* These and other deprivations of federal benefits, the Supreme Court concluded, violate the Fifth Amendment's guarantees of due process and equal protection. *Id.* at 2693.

In the year following *Windsor*, an unbroken chain of federal courts around the nation, including the Fourth and Tenth Circuits, have likewise declared

[4] In some other respects, not challenged here, the Summary, Legal Opinions, and instructions appropriately endeavor to ensure access to VA benefits for same-sex couples who are not otherwise barred by the VA's interpretation and implementation of the place of residence standard.

unconstitutional state laws denying same-sex couples the right to marry and legal recognition of their existing marriages validly entered in other jurisdictions.[5]

[5] *See Bostic v. Schaefer*, Nos. 14-1167, 14-1169, 14-1173, 2014 U.S. App. LEXIS 14298 (4th Cir. July 28, 2014), *aff'g Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014), *petition for cert. filed*, No. 14-153 (Aug. 8, 2014); *Bishop v. Smith*, Nos. 14-5003, 14-5006, 2014 U.S. App. LEXIS 13733 (10th Cir. July 18, 2014), *aff'g Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014), *petition for cert. filed*, No. 14-136 (Aug. 6, 2014); *Kitchen v. Herbert*, No. 13-4178, 2014 U.S. App. LEXIS 11935 (10th Cir. June 25, 2014), *aff'g Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013), *petition for cert. filed*, No. 14-124 (Aug. 5, 2014); *Burns v. Hickenlooper*, No. 14-cv-01817-RM-KLM, 2014 U.S. Dist. LEXIS 100894 (D. Colo. July 23, 2014) (preliminary injunction), *appeal docketed*, No. 14-1283 (10th Cir. July 24, 2014); *Love v. Beshear*, No. 3:13-cv-750-H, 2014 U.S. Dist. LEXIS 89119 (W.D. Ky. July 1, 2014), *appeal docketed*, No. 14-5291 (6th Cir. argued Aug. 6, 2014); *Baskin v. Bogan*, No. 1:14-cv-00355-RLY-TAB, 2014 U.S. Dist. LEXIS 86114 (S.D. Ind. June 25, 2014), *appeal docketed*, Nos. 14-2386, 14-2387, 14-2388 (7th Cir. June 26, 2014); *Wolf v. Walker*, No. 1:14-cv-64-bbc, 2014 U.S. Dist. LEXIS 77125 (W.D. Wis. June 6, 2014), *appeal docketed*, No. 14-2526 (7th Cir. July 11, 2014); *Whitewood v. Wolf*, No. 1:13-cv-1861, 2014 U.S. Dist. LEXIS 68771 (M.D. Pa. May 20, 2014); *Geiger v. Kitzhaber*, Nos. 6:13-cv-01834-MC, 6:13-cv-02256-MC, 2014 U.S. Dist. LEXIS 68171 (D. Or. May 19, 2014), *appeal docketed*, No. 14-35427 (9th Cir. May 16, 2014); *Latta v. Otter*, No. 1:13-cv-00482-CWD, 2014 U.S. Dist. LEXIS 66417 (D. Idaho May 13, 2014), *appeal docketed*, Nos. 14-35420, 14-35421 (9th Cir. May 15, 2014); *Henry v. Himes*, No. 1:14-cv-129, 2014 U.S. Dist. LEXIS 51211 (S.D. Ohio Apr. 14, 2014), *appeal docketed*, No. 14-3464 (6th Cir. argued Aug. 6, 2014); *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014), *appeal docketed*, No. 14-1341 (6th Cir. argued Aug. 6, 2014); *Tanco v. Haslam*, No. 3:13-cv-01159, 2014 U.S. Dist. LEXIS 33463 (M.D. Tenn. Mar 14, 2014) (preliminary injunction), *appeal docketed*, No. 14-5297 (6th Cir. argued Aug. 6, 2014); *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014) (preliminary injunction), *appeal docketed*, No. 14-50196 (5th Cir. Mar. 1, 2014); *Lee v. Orr*, 13-cv-8719, 2014 U.S. Dist. LEXIS 21620 (N.D. Ill. Feb. 21, 2014); *Bourke v. Beshear*, 3:13-cv-750-H, 2014 U.S. Dist. LEXIS 17457 (W.D. Ky. Feb 12, 2014), *appeal docketed*, No. 14-5291 (6th Cir. argued Aug. 6, 2014); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013), *appeal docketed*, 14-3057 (6th Cir. argued Aug. 6, 2014).

Moreover, in *Cooper-Harris v. United States*, 965 F. Supp. 2d 1139 (C.D. Cal. 2013), a federal district court declared unconstitutional 38 U.S.C. § 101(3) and (31), which define "spouse" and "surviving spouse" to refer only to "a person of the opposite sex," thereby denying same-sex spouses access to veterans benefits. The VA has itself acknowledged *Cooper-Harris*'s holding that "the exclusion of legally married same-sex couples from veterans benefits is not rationally related to any military interest or other identified governmental purpose." VAOPGCPREC 3-2014, *supra*, at 3 (included in Exhibit 1 hereto). In recognition of the fact that discrimination against same-sex spouses in administration of veterans benefits is constitutionally unjustifiable, the VA voluntarily ceased enforcement of those provisions of § 101(3) and (31).[6]

In short, abundant federal authority establishes that excluding married same-sex spouses from spousal veterans benefits and denying legal recognition to their marital statuses violates guarantees of due process and equal protection.

Yet in June 2014, the VA determined, through the challenged Summary, Legal Opinions, and instructional materials, now being implemented agency-wide,

[6] On September 4, 2013, the Attorney General notified Congress that the President had directed the Executive Branch to cease enforcement of the provisions of § 101(3) and (31) excluding same-sex couples from access to VA benefits. Letter from Eric Holder, Jr., U.S. Att'y Gen., to John Boehner, Speaker, U.S. House of Reps. (Sept. 4, 2013), *available at* http://www.justice.gov/iso/opa/resources/557201394151530910116.pdf.

to deny legal recognition and spousal benefits to veterans and same-sex spouses who resided when they married or their benefits rights accrued in states that discriminate against their marriages. The VA is taking this step purportedly in accordance with 38 U.S.C. § 103(c), which provides:

> In determining whether or not a person is or was the spouse of a veteran, their marriage shall be proven as valid for the purposes of all laws administered by the Secretary according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued.

As a result, lesbian and gay veterans and their spouses and survivors who suffer state discrimination against their marriages will be denied or disadvantaged in obtaining spousal veterans benefits such as disability compensation, death pension benefits, home loan guarantees, and rights to burial together in national cemeteries. *See, e.g.*, 38 U.S.C. §§ 1115, 1135, 1311, 1541, 2402, 3710, 5121, 5121A. Thus, for example, under the challenged action, the VA will deny spousal benefits to AMPA member veterans and same-sex spouses who married in Maryland but at the time of their marriage and application for spousal benefits resided in Virginia—even though Virginia's marriage ban has been held unconstitutional by the Fourth Circuit. *See Bostic*, 2014 U.S. App. LEXIS 14298.

By looking to the law of the place of residence, rather than the law of the place where the marriage was celebrated, as many other federal agencies do to establish marital status, *see* Holder Memorandum, *supra*, the VA imports into

federal law unconstitutional state definitions of marital status. The Supreme Court struck down DOMA because it unconstitutionally "writes inequality into the . . . United States Code" by denying recognition to the valid marriages of same-sex couples. *Windsor*, 133 S. Ct. at 2694. The VA's rote importation via § 103(c) of state marriage laws, no matter how discriminatory and constitutionally infirm, to determine marital status for federal purposes "writes inequality" right back into the United States Code, in derogation of *Windsor*.

The VA is required to act first and foremost within the bounds of the Constitution and to construe its governing statutes so as to avoid unconstitutional results. *See Kaplan v. Conyers*, 733 F.3d 1148, 1156 n.8 (Fed. Cir. 2013) ("[W]here the agency's interpretation raises serious constitutional doubts, courts are required to inquire whether there exists another permissible interpretation."). When confronted with a statute whose rote enforcement will deny federal benefits and yield a palpably unconstitutional result, federal agencies and courts have determined that the appropriate course is to extend the benefits to avoid the unconstitutional consequence. Already the VA has taken this approach in declining to apply 38 U.S.C. § 101(3) and (31) so as to deprive same-sex spouses the very veterans benefits at issue here. *See supra* p. 7 note 6.

Historic precedents involving 42 U.S.C. § 402(d)(3), a Social Security Act provision which, similar to 38 U.S.C. § 103(c), looked to state law definitions—

there, of intestate succession to determine eligibility for federal dependent benefits for so-called "illegitimate" children—also demonstrate this principle. Against a similar backdrop of evolving case law questioning the constitutionality of state statutes discriminating against non-marital children, the Social Security Administration ("SSA") "'re-examined' the role of state paternity and intestacy laws in the federal benefits scheme, and . . . interpret[ed] the Social Security Act as 'requir[ing] a determination, at least in some circumstances, of whether the state intestacy statute is constitutional.'" *Lawrence v. Chater*, 516 U.S. 163, 165 (1996); *see also Mathews v. Lucas*, 427 U.S. 495, 515 n.18 (1976) (noting in dicta that, if "discrimination against children in appellees' class in state intestacy laws is constitutionally prohibited, . . . appellees would be made eligible for benefits under" the Social Security Act); *Daniels v. Sullivan*, 979 F.2d 1516 (11th Cir. 1992) (holding unconstitutional SSA's incorporation of constitutionally-suspect state intestate inheritance scheme for purposes of determining social security benefits eligibility, and extending benefits to non-marital child). The VA inappropriately relies on discriminatory state laws to deny spousal benefits to same-sex spouses, thereby perpetuating the federal discrimination condemned in *Windsor*.

The VA's incorporation of state definitions of marital status that discriminate against same-sex couples to determine eligibility for federal spousal

benefits is arbitrary, capricious, and contrary to law. It violates the Fifth Amendment, including by impinging on the fundamental right to marry and by denying equal protection on the basis of sexual orientation and sex.

## AMPA'S STANDING AND ADVERSE AFFECTS SUFFERED

AMPA is the nation's leading non-profit organization supporting the partners and spouses of lesbian, gay, bisexual, and transgender ("LGBT") troops and veterans. The organization began in 2009 as a "Campaign for Military Partners" by Servicemembers United, an organization focused on repealing the 1993 statute commonly referred to as "Don't Ask, Don't Tell" ("DADT"). When DADT was repealed in 2011, Servicemembers United wound down its affairs and AMPA was formed. The partners of active duty service members founded AMPA to connect the families of LGBT service members and veterans, support them through the challenges of military-related and post-military life, and advocate on their behalf. AMPA provides assistance and education to veterans and their spouses in accessing the benefits earned through military service. It also advocates for policy changes to improve the lives of LGBT service members, veterans, and their families. Today, AMPA has more than 28,000 members and supporters.

AMPA's members include veterans and their same-sex spouses and survivors who entered into marriages recognized as valid in the state of celebration while they resided in states that disrespect their marriages, and continued or

continue to live in such states at the time their right to VA spousal benefits accrued or will accrue. AMPA members have applied or would apply for spousal veterans benefits, and would be entitled to receive them but for the challenged action by the VA.

AMPA is adversely impacted by and has organizational standing to challenge the VA's action because it has been forced to divert its resources to advocacy, education, and support for veterans and their families who are or will be denied spousal benefits as a result of the Summary, Legal Opinions, and instructions and procedures. AMPA's members, who stand to lose critical veterans benefits for their families and are thus directly adversely impacted by the challenged VA policy, would have standing in their own right to bring this action, and AMPA therefore also has associational standing on behalf of its members. The challenged VA action perpetuates a "second-class" status for the married veterans and spouses AMPA represents, *Windsor*, 133 S. Ct. at 2693, depriving them of important financial benefits as well as dignity and equality under the law. *See, e.g.*, *Warth v. Seldin*, 422 U.S. 490, 511 (1975) (association's standing may be based on injury to itself or to its members); *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 689 (Fed. Cir. 2000) (same).

## CONCLUSION

AMPA respectfully requests that the Court grant its Petition and order that the VA deem eligible for spousal veterans benefits same-sex spouses who have entered into lawful marriages valid in the place of celebration.

Dated: August 18, 2014

Respectfully submitted,

/s/ M. Andrew Woodmansee


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*Counsel for Petitioner American Military Partner Association*

## CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing Petition for Review was served via first class mail on August 18, 2014, on the following:

Secretary Robert A. McDonald
Office of the Secretary
U.S. Department of Veterans Affairs
810 Vermont Avenue NW
Washington DC 20420

Acting General Counsel Tammy Kennedy
Office of General Counsel
U.S. Department of Veterans Affairs
810 Vermont Avenue NW
Washington DC 20420

Dated: August 18, 2014

/s/ M. Andrew Woodmansee
M. Andrew Woodmansee

# EXHIBIT 1

Regulatory Activities Division, Office of the Comptroller of the Currency, 400 7th Street SW., Suite 3E–218, Mail Stop 9W–11, Washington, DC 20219.

**SUPPLEMENTARY INFORMATION:** Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from OMB for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) to include agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, the OCC is publishing notice of the proposed collection of information set forth in this document.

The OCC is proposing to extend approval of the following information collection:

*Title:* Fair Housing Home Loan Data System Regulation.

*OMB Control No.:* 1557–0159.

*Description:* The Fair Housing Act (42 U.S.C. 3605) prohibits discrimination in the financing of housing on the basis of race, color, religion, sex, or national origin. The Equal Credit Opportunity Act (15 U.S.C. 1691 *et seq.*) prohibits discrimination in any aspect of a credit transaction on the basis of race, color, religion, national origin, sex, marital status, age, receipt of income from public assistance, or exercise of any right under the Consumer Credit Protection Act (15 U.S.C. 1601 *et seq.*). The OCC is responsible for ensuring that national banks and Federal savings associations comply with those laws. The OCC needs this information to fulfill its statutory responsibilities.

The information collection requirements are as follows:

- 12 CFR 27.3(a) requires national banks that are required to collect data on home loans under 12 CFR part 203 [1] to present the data on Form FR HMDA–LAR,[2] or in automated format in accordance with the HMDA–LAR instructions, and to include one additional item (the reason for denial) on the HMDA–LAR. Section 27.3(a) also lists exceptions to the HMDA–LAR recordkeeping requirements. Federal savings associations generate this information pursuant to the CFPB's Regulation C, 12 CFR part 1003.
- 12 CFR 27.3(b) lists the information banks should seek to obtain from an applicant as part of a home loan application, and also sets forth information that a bank must disclose in collecting certain information from an applicant.
- 12 CFR 27.3(c) sets forth additional information required to be kept in the loan file.
- 12 CFR 27.4 states that the OCC may require a national bank to maintain a Fair Housing Inquiry/Application Log found in Appendix III to part 27 if there is reason to believe that the bank is engaging in discriminatory practices or if analysis of the data compiled by the bank under the Home Mortgage Disclosure Act (12 U.S.C. 2801 *et seq.*) and 12 CFR part 203 indicates a pattern of significant variation in the number of home loans between census tracts with similar incomes and home ownership levels differentiated only by race or national origin.
- 12 CFR 27.5 requires a national bank to maintain the information required by § 27.3 for 25 months after the bank notifies the applicant of action taken on an application, or after withdrawal of an application.
- 12 CFR 27.7 requires a national bank to submit the information required by §§ 27.3 and 27.4 to the OCC upon its request, prior to a scheduled examination using the Monthly Home Loan Activity Format form in Appendix I to part 27 and the Home Loan Data Form in Appendix IV to part 27.

*Type of Review:* Regular.

*Affected Public:* Businesses or other for-profit.

*Estimated Number of Respondents:* 1,927.

*Estimated Total Annual Burden:* 31,704 hours.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the OCC, including whether the information has practical utility;

(b) The accuracy of the OCC's estimate of the burden of the information collection;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: June 16, 2014.

**Stuart Feldstein,**

*Director, Legislative and Regulatory Activities Division.*

[FR Doc. 2014–14397 Filed 6–19–14; 8:45 am]

**BILLING CODE 4810–33–P**

[1] This regulation has been transferred to the Consumer Financial Protection Bureau (CFPB) (12 CFR part 1003).

[2] Loan Application Register, *http://www.ffiec.gov/hmda/pdf/hmdalar2011.pdf.*

## DEPARTMENT OF VETERANS AFFAIRS

### Summary of Precedent Opinions of the General Counsel

**AGENCY:** Department of Veterans Affairs

**ACTION:** Notice.

**SUMMARY:** The Department of Veterans Affairs (VA) is publishing a summary of legal interpretations issued by the Office of the General Counsel involving Veterans' benefits under laws administered by VA. These interpretations are considered precedential by VA and will be followed by VA officials and employees in future claim matters involving the same legal issues. The summary is published to provide the public, and, in particular, Veterans' benefits claimants and their representatives, with notice of VA's interpretations regarding the legal matters at issue.

**FOR FURTHER INFORMATION CONTACT:** Susan P. Sokoll, Law Librarian, Department of Veterans Affairs, 810 Vermont Avenue NW. (026H), Washington, DC 20420, (202) 461–7623.

**SUPPLEMENTARY INFORMATION:** A VA regulation at 38 CFR 2.6(e)(8) delegates to the General Counsel the power to designate an opinion as precedential and 38 CFR 14.507(b) specifies that precedential opinions involving Veterans' benefits are binding on VA officials and employees in subsequent matters involving the legal issue decided in the precedent opinion. The interpretation of the General Counsel on legal matters, contained in such opinions, is conclusive as to all VA officials and employees, not only in the matter at issue, but also in future adjudications and appeals involving the same legal issues, in the absence of a change in controlling statute or regulation or a superseding written legal opinion of the General Counsel.

VA publishes summaries of such opinions in order to provide the public with notice of those interpretations of

the General Counsel that must be followed in future benefit matters and to assist Veterans' benefits claimants and their representatives in the prosecution of benefit claims. The full text of such opinions, with personal identifiers deleted, may be obtained by contacting the VA official named above or by accessing the opinions on the Internet at *http://www.va.gov/ogc/precedentopinions.asp.*

**VAOPGCPREC 3–2014**

*Questions Presented*

On September 4, 2013, the Attorney General announced that the President directed the Executive Branch to cease enforcement of the definitions of ''spouse'' and ''surviving spouse'' in title 38, United States Code, to the extent that they limit recognition of marital status to couples of the opposite sex. Given the President's instruction, how should VA determine effective dates for benefits based on same-sex marriage?

*Held*

1. The President's directive to cease enforcement of the definitions of ''spouse'' and ''surviving spouse'' in title 38, United States Code, to the extent that those definitions preclude recognition of same-sex marriages, should be given retroactive effect as it relates to claims still open on direct review as of September 4, 2013. If VA awards benefits in such a case, the effective date of the award should be determined under 38 U.S.C. § 5110 as if the statutes barring recognition of same-sex marriage were not in effect when the claim was filed.

2. For new claims or reopened claims received after September 4, 2013, VA should apply 38 U.S.C. § 5110(g) to assign an effective date if to do so would be to the claimant's benefit. However, if a new claim establishes entitlement to an effective date earlier than September 4, 2013, by operation of 38 U.S.C. § 5110(d)–(f), (h), (j)–(l), or (n), then section 5110(g) should not be applied to limit the availability of that earlier effective date.

*Effective Date:* June 17, 2014.

Will A. Gunn,
*General Counsel, Department of Veterans Affairs.*

**VAOPGCPREC 4–2014**

*Question Presented*

How will the Department of Veterans Affairs (VA) administer spousal benefits in accordance with 38 U.S.C. § 103(c) in light of variances in state law on the issue of same-sex marriage?

*Held*

1. The plain language of section 103(c) requires that a person be married to a Veteran to be considered the ''spouse'' of the Veteran and requires VA to look to state law to determine the validity of a marriage. A domestic partnership or civil union that is not recognized as a ''marriage'' under state law cannot be considered a valid marriage for VA purposes.

2. Section 103(c) provides two alternative bases for determining the validity of a marriage. Section 103(c) provides that VA shall look to ''the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued'' (emphasis added). Under this standard, if a marriage is valid in one of the places of residence identified in the statute, it will be valid for VA purposes, even if it was not recognized as valid under the laws of any other place in which the parties resided.

3. Under section 103(c), ''at the time of the marriage'' means when the parties entered into the marriage. If the parties' marriage is valid under the law of the place where they resided at the time of the inception of their marriage, it is valid for VA purposes.

4. We construe the term ''when the right to benefits accrued'' in section 103(c) to refer to: (1) The point in time at which the claimant filed a claim that is ultimately found to be meritorious in establishing entitlement to a benefit or increased benefit for which a marriage to a Veteran is a prerequisite; or (2) if entitlement cannot be established as existing at the time the claim is submitted, then at such later date as of which all requirements of entitlement are met. Once VA has determined a marriage valid under section 103(c), such determination shall be recognized in subsequent adjudicatory decisions involving the same or other VA benefits unless there is a change in marital status through death or judicial action.

5. The phrase ''place where the parties resided'' is interpreted to mean the place where the parties regularly lived or had their home, as distinguished from a place in which they were present on a temporary basis. The provision includes parties who lived in a place continuously for a reasonable period of time and those who relocated to a place with the intent to live there either permanently or for a reasonable period of time. A party's temporary absence from the place they ordinarily lived would not defeat the finding that they resided in that place. If the parties resided in different jurisdictions at their time of marriage, VA may consider the marriage valid for VA purposes if it is valid under the law of either jurisdiction. In addition to U.S. states, the term ''place'' may include U.S. territories and possessions, the District of Columbia, foreign nations, and other areas governed by a recognized system of laws pertaining to marriage, such as tribal laws.

6. The plain language of section 103(c) applies only to determine the validity of a marriage to a Veteran. It thus applies for purposes of establishing eligibility or ineligibility for benefits or services provided on the basis of the marriage of a ''veteran'' (including, in some instances, active-duty service members and others defined to be ''veterans'' under certain statutory provisions). In other instances, however, when VA provides benefits or services based on the marital status of an individual who is not considered a Veteran, section 103(c) generally would not apply in determining the validity of a marriage to such an individual.

*Effective Date:* June 17, 2014.

Will A. Gunn,
*General Counsel, Department of Veterans Affairs.*

**Signing Authority:** On June 17, 2014, Will A. Gunn, General Counsel, approved this document and authorized the undersigned to sign and submit this notice to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

**Robert C. McFetridge,**

*Director, Office of Regulations Policy and Management, Office of the General Counsel, Department of Veterans Affairs.*

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**Department of Veterans Affairs**

# Memorandum

Date: June 17, 2014

**VAOPGCPREC 3-2014**

From: General Counsel (022)

Subj: Effective Dates of Awards Based on Same-Sex Marriage

To: Under Secretary for Benefits (20)

## QUESTION PRESENTED:

On September 4, 2013, the Attorney General announced that the President directed the Executive Branch to cease enforcement of the definitions of "spouse" and "surviving spouse" in title 38, United States Code, to the extent that they limit recognition of marital status to couples of the opposite sex. Given the President's instruction, how should VA determine effective dates for benefits based on same-sex marriage?

## HELD:

1. The President's directive to cease enforcement of the definitions of "spouse" and "surviving spouse" in title 38, United States Code, to the extent that those definitions preclude recognition of same-sex marriages, should be given retroactive effect as it relates to claims still open on direct review as of September 4, 2013. If VA awards benefits in such a case, the effective date of the award should be determined under 38 U.S.C. § 5110 as if the statutes barring recognition of same-sex marriage were not in effect when the claim was filed.

2. For new claims or reopened claims received after September 4, 2013, VA should apply 38 U.S.C. § 5110(g) to assign an effective date if to do so would be to the claimant's benefit. However, if a new claim establishes entitlement to an effective date earlier than September 4, 2013, by operation of 38 U.S.C. § 5110(d)-(f), (h), (j)-(l), or (n), then section 5110(g) should not be applied to limit the availability of that earlier effective date.

## DISCUSSION:

1. On June 26, 2013, in *United States v. Windsor*, No. 12-307, 133 S. Ct. 2675 (June 26, 2013), the Supreme Court held that Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7 (DOMA), violates Fifth Amendment principles by discriminating against same-sex couples who are married under State law. As a result of this decision, most Federal agencies began administering governmental benefits based on spousal status to married same-sex couples. However, VA faced a unique situation in that certain provisions in title 38, United States Code, define "spouse" and "surviving spouse" to refer only to a person of the opposite sex. Section 101(3) and (31) of title 38 defines the terms "spouse" or "surviving spouse" as "a person of the opposite sex." The plain

language of these definitions prevented VA from recognizing a same-sex marriage. On September 4, 2013, the Attorney General notified Congress that the President had directed the Executive Branch to cease enforcement of the provisions of section 101(3) and 101(31) that limit VA benefits to opposite-sex couples.

2. The President's direction to the Executive Branch to cease enforcement of sections 101(3) and (31) permits VA to grant claims for benefits for otherwise eligible same-sex spouses and surviving spouses of veterans, provided, if applicable, that their marriages meet the requirements of 38 U.S.C. § 103(c). We note that, although the Attorney General's letter refers broadly to a direction to "cease enforcement of" sections 101(3) and (31), the letter in its entirety makes clear that the President has directed VA to cease enforcing only the language of those provisions requiring that a spouse or surviving spouse be of the opposite sex. VA will continue to apply the portions of these provisions that do not bar recognition of same-sex marriages.[1] Guidance on how VA will interpret 38 U.S.C. § 103(c) is forthcoming. Section 103(c) provides, "In determining whether or not a person is or was the spouse of a veteran, their marriage shall be proven as valid for the purposes of all laws administered by the Secretary according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued."

3. Section 5110 of title 38, United States Code, establishes criteria for assigning the effective date of an award of VA benefits. Under 38 U.S.C. § 5110(a), the effective date of an award of benefits is generally the later of the date VA received the claim that resulted in the award of those benefits or the date entitlement arose as a factual matter. In some circumstances, section 5110 permits an effective date corresponding to the date entitlement arose even though that date is earlier than the date VA received the claim. *See, e.g.,* 38 U.S.C. § 5110(d) (certain death benefits may be effective from the first day of the month in which death occurred, if a claim is received within one year after such date). Section 5110(g) establishes special effective date rules applicable when benefits are awarded pursuant to a liberalizing change in law resulting from "any Act or administrative issue." *See* 38 C.F.R. § 3.114(a). In such cases, the effective date of benefits is to be fixed "in accordance with the facts found but shall not be earlier than the effective date of the Act or administrative issue." 38 U.S.C. § 5110(g). Further, benefits may not be made "retroactive for more than one year from the date of application therefor." *Id.* Section 5110(g) thus establishes two distinct exceptions to the operation of the other effective-date rules in section 5110. The first, which is restrictive

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[1] Sections 101(3) and (31) contain other definitional criteria that do not discriminate against same-sex married couples. For example, section 101(3) provides that a "surviving spouse" must have been "the spouse of the veteran at the time of the veteran's death," among other requirements, and section 101(31) requires that a "spouse" be a "wife or husband." VA will continue to apply these non-discriminatory definitional criteria in determining whether a person is a "spouse" or "surviving spouse."

in nature, is that, where an award is predicated upon a liberalizing "Act or administrative issue," the award cannot be earlier than the effective date of the Act or administrative issue, even if the claim was filed earlier than that date. The second exception, which is liberalizing in nature, is that a claimant who submits a claim for benefits based on the liberalizing Act or administrative issue may receive an effective date up to one year prior to the date of the claim. This provides a grace period for persons who were previously ineligible for benefits to learn of the liberalizing change and to submit claims based on that change. *See* S. Rep. No. 2042, 87th Cong., 2d Sess. 6 (1962), *reprinted in* 1962 U.S.C.C.A.N. 3260, 3264-65 (stating that, because "[c]laimants who have no knowledge of the benefits . . . may be penalized by not filing promptly . . . [a] retroactive period of payment of not more than 1 year would be provided"). We now examine how the provisions of section 5110 apply to the present circumstance, in which VA's ability to provide benefits based on same-sex marriage arises from the Supreme Court's decision in *Windsor* and the Attorney General's letter announcing that the Executive Branch would cease enforcement of 38 U.S.C. § 101(3) and (31).

4. The Attorney General's September 4, 2013, notification to Congress explained that Section 3 of DOMA was substantively identical to the definitions in 38 U.S.C. § 101(3) and (31). The Attorney General also found that "[t]he decision of the Supreme Court in *Windsor* reinforces the Executive's conclusion that the Title 38 provisions are unconstitutional." While the President's directive, explained in the Attorney General's letter, is not a judicial decision, it was largely based on the Supreme Court's decision in *Windsor* and applied constitutional principles to conclude that enforcing the discriminatory provisions of sections 101(3) and (31) would violate the guarantee of equal protection. Further, a Federal district court has held these provisions to be unconstitutional. *See Cooper-Harris, et al. v. United States*, No. 2-12-00887-CBM (C.D. Cal. Aug. 29, 2013) (concluding that the exclusion of legally married same-sex couples from veterans benefits is not rationally related to any military interest or other identified governmental purpose). We therefore believe it is appropriate under the circumstances to treat claims for same-sex marital benefits pending on direct review as of September 4, 2013, in the same manner as if the judiciary had definitively invalidated the title 38 provisions. Under this interpretation, the President's direction to cease enforcement of sections 101(3) and (31) should be considered to have the same effect on claims as if the judiciary had definitively held the language in sections 101(3) and (31) to be unconstitutional.

5. We have previously addressed the effect of judicial decisions invalidating statutes or regulations. *See* VAOPGCPREC 9-94; VAOPGCPREC 10-94. We have held that decisions of the Veterans Court invalidating VA regulations or statutory interpretations do not have retroactive effect in relation to prior "final" adjudications of claims. VAOPGCPREC 9-94. Specifically, we have explained that, under 38 C.F.R. § 3.105, correction of "clear and unmistakable error" in prior decisions does not apply where "'there is a change in law or Department of Veterans Affairs issue, or a change in interpretation of law or a Department of Veterans Affairs issue.'" VAOPGCPREC 9-94

at ¶ 6 (quoting 38 C.F.R. § 3.105). This is consistent with Supreme Court precedent indicating that, even when a statute is found unconstitutional, prior final decisions applying that statute are not subject to retroactive correction. *See Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374-75 (1940); *Jordan v. Nicholson*, 401 F.3d 1296, 1299 (Fed. Cir. 2005) ("even in the extreme instance of unconstitutional application of a statute, the Supreme Court does not supply a retroactive remedy for final judgments"). However, we have also held that judicial decisions should be given retroactive effect with regard to claims still open on direct review. VAOPGCPREC 9-94. We based this conclusion in part on the Supreme Court's holding in *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993), that "[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." Thus, we believe that the President's determination should be given full retroactive effect as to claims for benefits based on same-sex marriage that were pending on direct review as of September 4, 2013. To accord that determination full retroactive effect, benefits awarded pursuant to such pending claims may be effective on the date they would ordinarily be effective under 38 U.S.C. § 5110 as if the provisions of DOMA and 38 U.S.C. § 101(3) and (31) precluding recognition of same-sex marriages had not been in effect.

6. For purposes of claims received after the Attorney General's September 4, 2013, notification to Congress, we believe it is appropriate to characterize that notification as a liberalizing administrative issue for purposes of assigning effective dates, if such a characterization would benefit the claimant. Under 38 U.S.C. § 5110(g) and 38 C.F.R. § 3.114(a), such claims could receive an effective date up to one year prior to receipt of the claim, but in no event earlier than September 4, 2013. In VAOPGCPREC 10-94, we held that "if an award may be predicated upon an administrative issue . . . prompted by a judicial precedent, 38 U.S.C. § 5110(g) should be applied in assigning the effective date if to do so would be to the claimant's benefit." The President's directive, as described in the Attorney General's letter, establishes the Executive Branch's position on an issue of law and has the effect of authorizing previously proscribed payments, and we believe it may be considered a liberalizing "administrative issue" within the meaning of section 5110(g). Further, treating the Attorney General's notification as a liberalizing administrative issue based on judicial precedent is consistent with the Attorney General's statement that the Supreme Court's reasoning in *Windsor* constituted one of the "unique circumstances" justifying the President's directive.

7. Application of section 5110(g) to the change in law effected by the President's directive will allow veterans who file claims within one year of the Attorney General's notification to receive an effective date as early as September 4, 2013. *See* 38 C.F.R. § 3.114(a)(1).[2] Claims received more than one year after the Attorney General's notification could still be entitled to an effective date up to one year prior to VA's receipt of the claim. *See* 38 C.F.R. § 3.114(a)(3). This relief would also be available to claimants who previously received a final decision denying benefits on the basis of a same-sex marriage and who re-apply for benefits after September 4, 2013. *See Routen v. West*, 142 F.3d 1434, 1438 (Fed. Cir. 1998) ("[U]nder appropriate circumstances an intervening change in the applicable law may entitle a veteran to receive consideration of a claim, even though the claim is based on essentially the same facts as those in a previously adjudicated claim."). This is consistent with the purpose of section 5110(g) to permit retroactive payment where persons previously ineligible for benefits may not immediately learn of and submit claims for benefits now permitted under a liberalizing Act or administrative issue.

8. We have previously advised that, where an award can be viewed as based on a liberalizing issue resulting from a judicial decision, VA will apply section 5110(g) only "if to do so would be to the claimant's benefit." VAOPGCPREC 10-94. Consistent with this principle, benefits awarded on new claims for dependency and indemnity compensation by the same-sex spouse of a veteran or servicemember, if filed within one year of the date of death, should be effective as of the first day of the month in which the death occurred, even if the death occurred prior to September 4, 2013. This result is based on the plain language of section 5110(d) and the premise that the provisions of section 101(3) and (31), which VA has ceased enforcing, should not be applied to limit the application of section 5110(d). Similarly, new claims for benefits based on recognition of a same-sex marriage or a child of a same-sex spouse may receive effective dates earlier than September 4, 2013, by establishing entitlement pursuant to 38 U.S.C. §§ 5110 (e), (f), (h), (j), (k), (l), or (n).

Will A. Gunn

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[2] Although 38 C.F.R. § 3.114 uses the term "VA issue" rather than "administrative issue", the statutory term appears broad enough to encompass issuances from other Executive Branch entities that serve to bind VA, such as pronouncements by the President and, in some instances, the Attorney General. Further, the rules governing retroactivity in section 3.114, which are based on section 5110(g), would be equally applicable in the case of an issuance by the President or the Attorney General.

**Department of Veterans Affairs**

# Memorandum

Date: June 17, 2014

**VAOPGCPREC 4-2014**

From: General Counsel (022)

Subj: Reliance on State Law to Determine Validity of Same-Sex Marriage

To: Under Secretary for Health (10); Under Secretary for Benefits (20); Under Secretary for Memorial Affairs (40)

**QUESTION PRESENTED:**

How will the Department of Veterans Affairs (VA) administer spousal benefits in accordance with 38 U.S.C. § 103(c) in light of variances in state law on the issue of same-sex marriage?

**HELD:**

1. The plain language of section 103(c) requires that a person be married to a Veteran to be considered the "spouse" of the Veteran and requires VA to look to state law to determine the validity of a marriage. A domestic partnership or civil union that is not recognized as a "marriage" under state law cannot be considered a valid marriage for VA purposes.

2. Section 103(c) provides two alternative bases for determining the validity of a marriage. Section 103(c) provides that VA shall look to "the law of the place where the parties resided at the time of the marriage *or* the law of the place where the parties resided when the right to benefits accrued" (emphasis added). Under this standard, if a marriage is valid in one of the places of residence identified in the statute, it will be valid for VA purposes, even if it was not recognized as valid under the laws of any other place in which the parties resided.

3. Under section 103(c), "at the time of the marriage" means when the parties entered into the marriage. If the parties' marriage is valid under the law of the place where they resided at the time of the inception of their marriage, it is valid for VA purposes.

4. We construe the term "when the right to benefits accrued" in section 103(c) to refer to: (1) the point in time at which the claimant filed a claim that is ultimately found to be meritorious in establishing entitlement to a benefit or increased benefit for which a marriage to a Veteran is a prerequisite; or (2) if entitlement cannot be established as existing at the time the claim is submitted, then at such later date as of which all requirements of entitlement are met. Once VA has determined a marriage valid under section 103(c), such determination shall be recognized in subsequent adjudicatory decisions involving the same or other VA benefits unless there is a change in marital status through death or judicial action.

Under Secretary for Health (10); Under Secretary for Benefits (20); Under Secretary for Memorial Affairs (40)

5. The phrase "place where the parties resided" is interpreted to mean the place where the parties regularly lived or had their home, as distinguished from a place in which they were present on a temporary basis. The provision includes parties who lived in a place continuously for a reasonable period of time and those who relocated to a place with the intent to live there either permanently or for a reasonable period of time. A party's temporary absence from the place they ordinarily lived would not defeat the finding that they resided in that place. If the parties resided in different jurisdictions at their time of marriage, VA may consider the marriage valid for VA purposes if it is valid under the law of either jurisdiction. In addition to U.S. states, the term "place" may include U.S. territories and possessions, the District of Columbia, foreign nations, and other areas governed by a recognized system of laws pertaining to marriage, such as tribal laws.[1]

6. The plain language of section 103(c) applies only to determine the validity of a marriage to a Veteran. It thus applies for purposes of establishing eligibility or ineligibility for benefits or services provided on the basis of the marriage of a "veteran" (including, in some instances, active-duty service members and others defined to be "veterans" under certain statutory provisions). In other instances, however, when VA provides benefits or services based on the marital status of an individual who is not considered a Veteran, section 103(c) generally would not apply in determining the validity of a marriage to such an individual.

**COMMENTS:**

**Background**

1. VA administers benefits and programs that depend on "spouse" and "surviving spouse" status. *See, e.g.,* 38 U.S.C. §§ 1115 (providing additional compensation to a disabled Veteran who has a spouse), 1311 (authorizing dependency and indemnity compensation to the surviving spouse of a Veteran). On June 26, 2013, the Supreme Court held, in *United States v. Windsor*, No. 12-307, 133 S. Ct. 2675 (2013), that section 3 of the Defense of Marriage Act, 1 U.S.C. § 7 (DOMA), violates Fifth Amendment principles by discriminating against legally married same-sex couples. On September 4, 2013, the Attorney General announced that the President had directed the Executive Branch to cease enforcement of similar provisions in 38 U.S.C. § 101(3) and 101(31), defining "surviving spouse" and "spouse," to the extent that they limit Veterans' benefits to opposite-sex couples. VA will administer spousal benefits to same-sex married couples, provided their marriages meet the requirements of 38 U.S.C. § 103(c). Section 103(c) provides, "[i]n determining whether or not a person is or

[1] For the purpose of brevity, the terms "state" and "state law" are used throughout this opinion to include all of the jurisdictions and systems of laws that would qualify as a "place" or the "law of the place."

was the spouse of a veteran, their marriage shall be proven as valid for the purposes of all laws administered by the Secretary according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued." 38 U.S.C. § 103(c); *see also* 38 C.F.R. § 3.1(j) (defining "marriage"). Questions have arisen as to how section 103(c) should be applied when determining the validity of a marriage in light of the variances in state law governing same-sex marriages. Although the question presented arises because of the removal of certain impediments to VA recognizing same-sex marriages for the purpose of Veterans' benefits, this opinion interprets 38 U.S.C. § 103(c) for purposes of both opposite-sex marriages and same-sex marriages of Veterans.

**Requirement of a Valid Marriage**

2. For Veterans' benefits purposes, spousal status is predicated on a valid marriage under state law.[2] *See* 38 U.S.C. § 103(c). In interpreting section 103(c), the starting point is the language of the statute itself. *Santa Fe Indus., Inc. v. Green,* 430 U.S. 462, 472 (1977). Under the plain-meaning rule, if the language of the statute is clear there is no need to look outside the statute to ascertain its meaning. *Sullivan v. Stroop*, 496 U.S. 478, 482 (1990) ("If the statute is clear and unambiguous that is the end of the matter, for the court must give effect to the unambiguously expressed intent of Congress.") (internal quotation marks and citations omitted). Some aspects of section 103(c) are clear. The plain language of section 103(c) makes clear that an individual must be married to a Veteran in order to be considered the "spouse" of the Veteran. The use of the term "marriage" in section 103(c) precludes the recognition of other legal unions, such as domestic partnerships or civil unions, unless such relationships are considered marriages under state law. *See Henderson v. Shinseki*, No. 10-3934, 2012 WL 1948875 (Vet. App. May 31, 2012) (unpublished) (a domestic partnership that, according to state law, entitles the parties to the same rights and responsibilities as spouses, but is not considered a marriage under state law, is not a marriage for VA purposes).

3. In addition, the plain language of section 103(c) requires VA, in most cases, to look to state law to determine the validity of a marriage. *Burden v. Shinseki*, 727 F.3d 1161, 1168 (Fed. Cir. 2013). This is consistent with the fact that there is no Federal law defining "marriage" and matters related to marriage have long been considered to be the domain of the states. *Id.* "By history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States." *Windsor*, 133 S. Ct. at 2689-90; *Trammel v. United States*, 445 U.S. 40, 63

[2] A limited exception provided in 38 U.S.C. § 103(a) permits VA, for the purpose of gratuitous death benefits, to recognize certain marriages that are not valid under state law. Guidance regarding the potential application of section 103(a) to claims involving same-sex marriage is forthcoming.

Under Secretary for Health (10); Under Secretary for Benefits (20); Under Secretary for Memorial Affairs (40)

(1980) ("[T]he law of marriage and domestic relations are concerns traditionally reserved to the states.").

**Choice of Law**

4. Section 103(c) provides that the validity of a marriage is determined "according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued" (emphasis added). Congress's use of the disjunctive "or" signifies that meeting either of the two listed conditions will satisfy the statute's requirements. *See, e.g., Zorich v. Long Beach Fire Dept. and Ambulance Serv.*, Inc. 118 F.3d 682, 684 (9th Cir. 1997); *United States v. O'Driscoll*, 761 F.2d 589, 597 (10th Cir. 1985); *see also* 1A Norman J. Singer, *Sutherland Statutory Construction* § 21.14 (7th ed. 2009) ("The literal meaning of these terms ["and" and "or"] should be followed unless it renders the statute inoperable or the meaning becomes questionable."). Thus, if a marriage is valid in at least one place of residence identified in the statute, it will be valid for VA purposes, even if it was not recognized as valid under the laws of any other place in which the parties resided. This is consistent with the way that VA has historically interpreted this provision. *See, e.g.*, VAOPGC 13-61 (10-31-61) (noting that "[i]f either of the jurisdictions described in [section 103(c)] would recognize a divorce decree rendered under the circumstances of the sort involved in the particular instance, the subsequent marriage may be recognized as valid").

5. A review of legislative history shows that, beginning in 1882, Congress provided that marriages shall be proven valid for the purposes of pension benefits[3] according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided at the time when the right to pension accrued. Act of Aug. 7, 1882, ch. 438, 22 Stat. 345 (1882). Similar provisions were included in subsequent statutes and made applicable for purposes of other benefits. *See, e.g.*, Act of Oct. 6, 1917, ch. 105, § 22(5), 40 Stat. 398, 401 (1917); *see also World War Veterans' Act, 1924*, ch. 320, § 20, 43 Stat. 607, 613 (providing that the marriage of a claimant should be shown by such testimony as the Director of the Veterans' Bureau might prescribe by regulations); Veterans' Bureau Regulation No. 75, sec. 34 (Sept. 4, 1924) (prescribing standards similar to current section 103(c) to implement the World War Veterans' Act, 1924). In 1937, Congress expanded the statutory list of the laws under which a marriage could be proven valid to include the law of the place where the marriage was celebrated. Act of Aug. 16, 1937, ch. 659, § 4(c), 50 Stat. 660, 661 (1937). However, within a year this option was removed. Act of May 13, ch. 214, §§ 3,

[3] At that time, the term "pension" referred to payment for disability or death due to injury or disease incurred in the line of duty in service, similar to the benefits now known as disability compensation and dependency and indemnity compensation. *See* Act of March 3, 1873, ch. 234, §§ 1, 8, 17 Stat. 566, 569.

4, 52 Stat. 352, 353 (1938); *see also United States v. Snyder*, 177 F.2d 44, 47 (D.C. Cir. 1949) (finding VA's regulation omitting the "place-of-ceremony" criterion consistent with Congress's intention in removing that criterion from the statute). It is unclear from the legislative history why consideration of the law of the place of celebration was added or subsequently eliminated. However, in 1951, the Ninth Circuit Court of Appeals, in *Barrons v. United States*, opined that the short-lived provision was "manifestly unsatisfactory" because it "would recognize as valid a marriage celebrated elsewhere which conflicted with the explicit policy of the state of residence (and perhaps of all other states), and which therefore might not be recognized [in the state of residence] for any purpose." 191 F.2d 92, 95 (9th Cir. 1951). Since the two-pronged test based exclusively on places of residence was restored in 1938, the law has consistently required marriages to be proven valid for the purposes of Veterans' benefits according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided at the time when the right to benefits accrued. *See* Pub. L. No. 85-857, § 103(c), 72 Stat. 1105, 1110 (1958); 38 U.S.C. § 103(c). The legislative history gives no indication that Congress intended anything other than that the use of the disjunctive "or" in referring to the two statutory criteria for marriage validity would have its plain meaning of referencing alternative means of establishing validity. Further, the circumstances of the 1937 and 1938 amendments confirm that validity of a marriage in the place of celebration alone is insufficient to establish the validity of the marriage for purposes of section 103(c).

**Defining the Time of the Marriage**

6. Section 103(c) provides that a marriage may be proven valid according to the law of the place where the parties resided "at the time of the marriage." Congress's use of the phrase "the time" suggests a focus on a single identifiable point in time. We interpret this provision to mean at the inception of the marriage, and to refer to the law that was in effect at that time. Evaluating the marriage at the time it was entered into is consistent with the way that VA and courts have interpreted the phrase "at the time of the marriage" in the past. *See, e.g., Barrons,* 191 F.2d 92, 94 (describing at the time of the marriage to mean "[a]t the time of the ceremony"); 15 P.D. 308, 311 (12-15-1904) (holding that a marriage is valid for pension purposes if valid according to the law of the place where the parties resided at the time it was contracted)[4]. Accordingly, if the parties' marriage is valid under the law of the place where they resided at the inception of their marriage, it is valid for VA purposes.

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[4] "P.D." refers to decisions of the Department of the Interior on Pensions and Bounty Land. The Department of the Interior had jurisdiction over claims for service pensions prior to the creation of the United States Veterans' Bureau, the predecessor of the Veterans Administration and the Department of Veterans Affairs. These decisions do not bear precedential value, but are cited to show how section 103(c) has been interpreted over time.

Under Secretary for Health (10); Under Secretary for Benefits (20); Under Secretary for Memorial Affairs (40)

**Defining When the Right to Benefits Accrued**

7. Section 103(c) also provides that a marriage will be recognized as valid for VA purposes if it is valid under the law of the place where the parties resided "when the right to benefits accrued." The language of the current statute is silent as to when exactly the right to benefits "accrues." In the context of Veterans' benefits, there are several factors that may affect when a right to benefits "accrues." First, many benefits payable by reason of a marriage depend in part upon facts relating to the Veteran's disability status. *See, e.g.*, 38 U.S.C. § 1115 (authorizing additional compensation to a married Veteran having a service-connected disability rated not less than 30-percent disabling); § 1521(a) and (c) (authorizing benefits to a married Veteran who is permanently and totally disabled due to non-service-connected disability). Accordingly, changes in a veteran's disability status may affect when the right to benefits "accrues." Second, in many instances, the act of entering into a marriage may be the very step that gives rise to potential eligibility for certain benefits. For example, if a Veteran had a service-connected disability rated 30-percent disabling prior to marrying, the Veteran's marriage would give rise to potential eligibility for a dependent's allowance under 38 U.S.C. § 1115. Similarly, because the spouse of a Veteran is eligible for burial in a national cemetery, marriage would give rise to potential eligibility for that benefit. 38 U.S.C. § 2402(a)(5). Of course, treating the date of marriage as the "date entitlement arose" in such instances would have the effect of collapsing the two-pronged standard of section 103(c) into a single "date of marriage" standard in a substantial number of cases. Third, pursuant to 38 U.S.C. § 5101(a)(1), "a specific claim . . . must be filed in order for benefits to be paid or furnished to any individual." In view of this requirement, it is reasonable to conclude that, although a claimant's circumstances may give rise to potential eligibility for certain benefits, the right to such benefits cannot accrue until a specific claim has been filed. *See Jones v. West*, 136 F.3d 1296, 1299 (Fed. Cir. 1998) (describing section 5101 as a statute of "general applicability" that "mandates that a claim must be filed in order for any type of benefit to accrue or be paid"). That view finds some support in 38 U.S.C. § 5110(a), which provides that, with limited exceptions, a claimant is entitled to payment of VA compensation, pension, or dependency and indemnity compensation only for periods on and after the date of application, even if the claimant met the factual eligibility criteria at an earlier date.

8. In discussing statutes of limitations, the Supreme Court has explained that "[i]n common parlance a right accrues when it comes into existence." *United States v. Lindsay*, 346 U.S. 568, 569 (1954). The Supreme Court has further explained that "the 'standard rule' is that a claim accrues 'when the plaintiff has a complete and present cause of action.'" *Gabelli v. S.E.C.,* 133 S. Ct. 1216, 1220 (2013) (quoting *Wallace v. Kato,* 549 U.S. 384, 388 (2007)). But the Court has also considered whether, for purposes of a particular statute, the word "accrued" may have "taken on an established technical meaning which Congress must have had in mind," provided the legislative history shows "that such a meaning was suggested to Congress before the Act was

passed." *Lindsay*, 346 U.S. at 570. The Court has also emphasized that statutory terms must be understood in light of their context. *See United States v. Morton*, 467 U.S. 822, 828 (1984) ("We do not . . . construe statutory phrases in isolation; we read statutes as a whole."); *see also Mitchell v. Cohen*, 333 U.S. 411, 418 (1948) (defining the scope of the term "servicemen" as used in the Veterans' Preference Act of 1944, 58 Stat. 387, by "examination of the statutory scheme rather than by reliance on dictionary definitions").

9. In the context of determining the validity of a Veteran's marriage, legislative history suggests that "when the right to benefits accrued" is most logically construed to refer to the date when VA received the claim for the benefit rather than the date the factual predicate for the claim arose. Language similar to that of section 103(c) previously appeared in the context of Civil War pension statutes, which required that a marriage be proven valid "according to the law of the place where the parties resided at the time of the marriage or at the time when the right to pension accrued." Act of Aug. 7, 1882, ch. 438, 22 Stat. 345 (1882). At the time when that language was enacted, previously enacted statutes indicated that "when the right to pension accrued" referred to the time when pension became payable, *i.e.,* the effective date of the pension. *See* Act of March 3, 1873, ch. 234, § 16, 17 Stat. 566, 572 (stating that "the right of persons entitled to pensions shall be recognized as accruing at the date . . . stated for the commencement of such pension"). Initially, Congress in 1873 defined the time for commencement of pension as the date of the Veteran's death or discharge, provided a claim was filed within five years of that date, and provided that, "otherwise the pension shall commence from the date of filing the last evidence necessary to establish the same." *Id.* § 15. In 1879, however, Congress amended this provision to state that, for all pension claims filed after July 1, 1880, and relating to disability or death after March 4, 1861, "the pension shall commence from the date of filing the application." Act of Mar. 3, 1879, ch. 187, § 2, 20 Stat. 469, 470 (1879). Therefore, at the time Congress first prescribed the standard now in section 103(c) for determining the validity of a marriage, the reference to when the right to benefits accrued plainly referred to the time the application for benefits was filed.

10. This legislative history establishes a specific meaning for the phrase "when the right to pension accrued," sufficient to distinguish the use of the term "accrued" in this context from its use in statutes of limitation. Rather than referring to the time when the factual predicate for the claim arose, as in statutes of limitation, the 1882 precursor to section 103(c) used "when the right to pension accrued" to refer to when the benefit in question became payable. For claims received after July 1, 1880, this generally meant the date of filing the application. *See* Act of March 3, 1879, ch. 187, § 2, 20 Stat. at 470. The concept of the right to benefits "accruing" or "commencing" on the date when the claim is filed remains relevant to the current VA benefit scheme, as evidenced by current law requiring that a specific claim be filed for every Veterans' benefit and the general rule of assigning effective dates in connection with the date that the claim or application was filed. *See* 38 U.S.C. § 5101(a)(1) ("a specific claim . . . must be filed in

order for benefits to be paid or furnished to any individual"); 38 U.S.C. § 5110(a) ("Unless specifically provided otherwise . . . the effective date of an award . . . shall not be earlier than the date of receipt of application"). Consistent with how the phrase "when the right to pension accrued" was applied in 1882 and the general effective date rule under current law, we interpret the "when the right to benefits accrued" in current section 103(c) to refer to the time at which a meritorious claim is filed or when factual entitlement to the claimed benefit thereafter arises.

11. The phrase "when the right to benefits accrued" in the context of VA benefits serves a very different purpose from the general use of the term "accrue" in statutes of limitations. Statutes of limitations designate a specific point in time at which to commence the time period for the filing of a claim. Statutes of limitations "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Railroad Telegraphers v. Railway Express Agency, Inc.,* 321 U.S. 342, 348–349 (1944). The laws "inevitably reflect[] a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975). The same concerns do not apply when determining whether a marriage is valid for the purpose of Veterans' benefits. As the Supreme Court has stated, "[t]here is no statute of limitations" on the filing of claims for VA disability benefits. *Walters v. National Assoc. of Radiation Survivors*, 473 U.S. 305, 311 (1985). Thus, pinpointing the date when a claimant for VA benefits could have first filed a claim would generally serve no practical purpose. Moreover, if VA were to interpret "when the right to benefits accrued" in the same way that accrual is generally defined in statutes of limitations, practical difficulties would arise. Interpreting the phrase to mean when the claimant first meets the factual criteria for entitlement to benefits would, in many instances, effectively collapse the two-pronged test of section 103(c) into a single "date of marriage" test, since the marriage itself is often the last eligibility requirement met, as described in paragraph 7, above. Further, to the extent such an interpretation may turn, in some cases, upon when a Veteran's disability first reached a certain level of severity – such as permanent and total disability – it could require significant evidentiary development and factual findings that may be burdensome and difficult to make with precision. Additionally, it is possible that a claim may be filed several years after both the date of the marriage and the date the claimant first met the factual criteria for eligibility for the benefit. In providing alternative dates for determining the validity of a marriage, it is more likely that Congress intended to permit consideration of the claimant's present circumstances at the time entitlement to benefits is being determined, rather than requiring VA to look solely to two different past periods, both of which may be remote in time.

12. Consistent with the above-referenced legislative history, certain other aspects of section 103(c) weigh in favor of interpreting "when the right to benefits accrued" to mean the date when VA received the claim or such later point in time when all requirements

for entitlement are met. First, in providing two distinct times at which the validity of the marriage may be established, section 103(c) appears to be designed to operate in a liberal manner, and our interpretation should preserve and further this liberal purpose to the extent feasible. Second, the statute contemplates that there generally will be a specific, identifiable point in time at which the right to benefits "accrues." With these principles in mind, we conclude that the phrase "when the right to benefits accrued" is most reasonably construed to refer to the point in time at which the claimant files a claim that is ultimately found to be meritorious in establishing entitlement to a benefit or increased benefit for which marriage is a prerequisite or, if entitlement cannot be established at the time such claim is filed, the date thereafter on which the claimant satisfies the eligibility criteria for the benefit. This interpretation generally would lead to a specific and readily identifiable point in time, which would be consistent for all types of claims and would give due consideration to the claimant's present circumstances.[5] Further, this interpretation construes "when the right to benefits accrued" to encompass both the factual criteria for benefit eligibility and the claim-filing requirement necessary to authorize benefits. Basing a determination on the time a *meritorious* claim was filed also furthers the statute's beneficial purpose by ensuring that an adverse determination concerning the validity of a Veteran's marriage does not bar a later finding that the marriage is valid, if circumstances change to permit VA to recognize the marriage with respect to a later claim.

13. Construing "when the right to benefits accrued" to refer to the date of application comports with the historical context in which that term was established and reflects the general effective date provision in 38 U.S.C. § 5110(a). Under current law, however, the date of application may differ from the effective date ultimately assigned to the award of benefits. *See* 38 U.S.C. § 5110 and VAOGCPREC 1-13. We recognize that, under current law, a myriad of exceptions to the general effective date rule may provide claimants earlier effective dates than the date of filing. These exceptions did not exist when Congress originally employed the phrase "when the right to pension accrued" for purposes of determining marriage validity. In 1882, the law of Civil War pensions provided a single type of benefit, and the date when the right to benefits accrued was tied to a point in time that was readily identifiable as part of the claim process. The broader range of effective dates available under current law gives rise to the question whether the phrase "when the right to benefits accrued" should be interpreted to refer to the date of application in all cases or to refer to the date that VA ultimately finds to be the effective date of the particular benefit claimed, which would often, but not always, be

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[5] For the purpose of section 103(c), in instances where a party to the marriage is deceased, VA considers the party's last place of residence while alive to be the place where that party resided at the time of claim. This furthers the two-pronged standard set out in the statute by ensuring that, even in claims for survivor, death, and burial benefits, consideration is given to both parties' most recent place of residence in addition to their place of residence at the time of marriage.

the date of application. We have found no legislative history subsequent to 1882 providing guidance on that question. However, viewing section 103(c) in relation to the overall statutory scheme, we believe that provision is most logically read to refer to the date of application in all cases. That interpretation would preserve the central feature of the original statutory language in referring to a uniform date that generally can be readily identified at the time a claim is made. In contrast, construing the operation of current section 103(c) to vary in accordance with the more complex effective-date rules now in effect would lead to potentially complex, burdensome, and ultimately unnecessary adjudicative proceedings. Claims for VA disability benefits generally consist of multiple elements that are adjudicated sequentially. *See, e.g., D'Amico v. West*, 209 F.3d 1322, 1326 (Fed. Cir. 2000) ("A claim for veteran's disability benefits has five elements: (1) veteran status; (2) existence of a disability; (3) service connection of the disability; (4) degree of disability; and (5) effective date of the disability."). An individual's status as a Veteran or a spouse with potential eligibility for benefits based on such status is a preliminary issue in that sequential analysis. In contrast, an effective-date determination is the last element that is addressed in a benefit claim, as it necessarily follows from factual determinations pertaining to the disability at issue. *See Young v. Shinseki*, 25 Vet. App. 201, 204 (2012) ("assignment of an effective date . . . is a 'downstream issue' that does not become relevant until VA grants the benefit sought"). Construing "when the right to benefits accrued" to refer to the effective date ultimately assigned for the benefit would, oddly, require VA to fully adjudicate all factual elements of the claim in order to make the threshold determination of whether an individual is a spouse or surviving spouse for purposes of the claimed benefit. Accordingly, we believe it is more consistent with the statutory scheme and with the legislative history of section 103(c) to construe "when the right to benefits accrued" to refer to the date of application.

14. If entitlement to the benefit in question cannot be established as of the time the claim was filed, we believe it is reasonable to interpret "when the right to benefits accrued" to be such later point in time when all requirements of entitlement are met. This interpretation gives effect to Congress's use of the disjunctive "or" in section 103(c) by continuing to provide an alternative to "the time of the marriage." For example, a Veteran may file a claim for a benefit but have it properly denied due to lack of evidence showing a necessary element of the claim. However, if the Veteran later submits new evidence that shows that his or her circumstances changed so that the criteria for entitlement are satisfied while the claim or an appeal is still pending, the date the right accrued will be after the claim was received. The same result would apply if VA receives evidence of such changed circumstances during the appeal period following the initial denial of a claim. *See* 38 C.F.R. § 3.156(b). Accordingly, we believe this interpretation best reconciles the language and purpose of section 103(c) with the practical considerations of the current Veterans' benefits scheme.

15. Section 103(c) is unclear as to whether it requires a separate determination of validity for each benefit or increased benefit for which a claimant applies. The statute's

use of the general term "benefits," rather than a narrower term such as "the benefit sought," is compatible with the view that a marriage found valid for purposes of one VA benefit may be considered valid for the purpose of other benefits, even if the right to the latter benefits may have accrued at a different time.[6] The legislative history shows no basis to infer that Congress intended disparate results concerning the same marriage based on when a particular Veterans' benefit is sought. As noted above, when Congress in 1882 first provided for determining the validity of marriage based on the law of the place the parties resided "when the right to pension accrued," that standard applied to a single benefit, then known as "pension." Congress clearly did not, at that time, contemplate the need to reconsider the validity of a marriage once it had been established, and none of the subsequent enactments incorporating the language of the 1882 statute suggest any such purpose. Finding a person to be a spouse or surviving spouse for purposes of one benefit but not another would be anomalous, would likely lead to confusion and administrative difficulties, and would likely be contrary to congressional intent. The statutory benefits scheme logically favors continuing to recognize a marriage once VA has found it valid to establish that a person is a spouse or surviving spouse. Thus, we believe that it is reasonable to interpret the term "benefits" to mean not only the benefits sought in the claim or application under consideration, but also any Veterans' benefit that has been previously granted or awarded based on the marriage at issue. This means that once VA has determined a marriage valid under section 103(c) for a VA-benefit purpose, such determination should control for purposes of subsequent VA-benefit decisions unless there is a factual change in marital status, such as through death or judicial action. This interpretation is consistent with the fact that eligibility for various spousal benefits, such as dependents' educational assistance and CHAMPVA[7] medical benefits, are often predicated on eligibility determinations made on other VA claims, such as compensation dependency claims and dependency and indemnity compensation (DIC) claims. *See* 38 U.S.C. §§ 1781(a); 3501(a)(1). In view of the clear and purposeful interdependency of these VA benefit determinations, it would be incongruous for VA to not recognize a marriage in determining the eligibility for the subsequent benefit. This interpretation is also consistent with title 38 statutes providing that, when VA recognizes a marriage as an

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[6] For example, if a Veteran and a same-sex spouse lived in a recognition state at the time of their application for a VA home loan guaranty, but then moved to a non-recognition state when the Veteran applied for additional disability compensation for his or her spouse, VA may rely on its previous determination that the marriage was valid for the purpose of the home loan guaranty benefit to show that the marriage is valid for the subsequently filed dependency benefit. This does not mean, however, that if VA previously recognized a Veteran's marriage in error, or based on incorrect or inaccurate information, VA would be obligated to continue to recognize the marriage in a subsequent VA benefit determination.

[7] The Civilian Health and Medical Program of the Department of Veterans Affairs.

impediment to benefits (*e.g.*, when the remarriage of a surviving spouse would preclude the surviving spouse from receiving certain Veterans' benefits), the impediment can be removed only if there is a change in the marital relationship through annulment, divorce, or death. *See* 38 U.S.C. § 103(d), 5110(k) and (l). Moreover, VA outreach provisions, 38 U.S.C. §§ 6301 and 6303, further suggest that a VA determination that a person is a spouse or a surviving spouse for purposes of one benefit would require VA to provide the individual with information on his or her potential eligibility for other benefits as a spouse or surviving spouse. These provisions suggest that Congress intended to provide a person eligible for one benefit as a spouse or surviving spouse with the full range of benefits provided based on marital status.

16. However, if a marriage has been determined invalid for the purposes of a particular Veterans' benefit, and the underlying factual conditions are not the same at the time of a subsequent benefit claim, then VA should determine the marriage's validity based on the circumstances as they exist at that time. As stated above, we construe the phrase "when the right to benefits accrued" in 38 U.S.C. § 103(c) to refer to the time when a meritorious application was filed, such that an adverse determination on a prior claim does not bar a later finding that the marriage is valid. This is also consistent with the principle that finality does not bar consideration of an issue previously decided where there exists a new factual basis. *See* 38 U.S.C. §§ 5108, 7104(b); 38 C.F.R. § 3.104(a). Moreover, a claimant who was previously denied benefits based on the invalidity of his or her marriage, but then is later determined to have a valid marriage with regard to any Veterans' benefit administered by VA, could reopen his or her claim for the former benefits based on new and material evidence. *See* 38 C.F.R. § 3.156(a). Again, we note that the date used to determine the validity of the marriage for VA purposes may differ from the effective date assigned to the award of benefits.

**Determining Place of Residence**

17. In addition to defining the points in time that are relevant to determining a marriage's validity, section 103(c) also requires determining which state's law should be considered. This determination requires interpreting the phrase "the place where the parties resided." In using the broad term "place", rather than a more specific term such as "state," the statute reflects a clear intent to encompass not only U.S. states and the District of Columbia, but foreign jurisdictions as well. *See* VAOPGC 8-86 (4-16-86) (noting that historically VA has relied on state and foreign law in claims involving the validity of marriage). We note further that "place" generally may be interpreted to refer, in appropriate circumstances, to other areas governed by a recognized system of laws pertaining to marriage. For example, if, in a particular area, marriage is governed not by national or state law, but by tribal law, VA may consider such law consistent with the plain language of section 103(c). *See Montana v. United States*, 450 U.S. 544, 564 (1981) (explaining that Indian tribes retain the inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members); *see also, e.g.*, 15 P.D. 283 (11-30-1904) (applying the tribal

Under Secretary for Health (10); Under Secretary for Benefits (20); Under Secretary for Memorial Affairs (40)

laws of the Choctaw Nation to determine if the claimant was the widow of the Veteran).

18. The term "resided" as used in 38 U.S.C. § 103(c) and the implementing regulation is not defined by statute or regulation. The term "reside" is a somewhat variable concept that the Merriam-Webster Dictionary defines to mean either "to dwell permanently or continuously" or "to occupy a place as one's legal domicile."[8] *Reside Definition*, merriam-webster.com, http://www.merriam-webster.com/dictionary/reside (last visited Sept. 17, 2013); *see also Nielson v. Shinseki*, 607 F.3d 802, 805-06 (Fed. Cir. 2010) (explaining that, in interpreting a statute, terms may be deemed to have their ordinary dictionary meaning). Similarly, BLACK'S LAW DICTIONARY defines the noun "resident" to mean "[a] person who lives in a particular place" or "[a] person who has a home in a particular place," but notes that that person "is not necessarily either a citizen or a domiciliary." *Resident Definition*, BLACK'S LAW DICTIONARY (9th ed. 2009). Consistent with these definitions, courts often have defined the term "reside" in relation to the legal term "domicile." It is generally accepted that "domicile" has a more restrictive meaning than "reside," and a residence may be of a more temporary character than a "domicile." *See, e.g., Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989) (explaining that "'[d]omicile' is not necessarily synonymous with 'residence,'" and that "one can reside in one place but be domiciled in another"); *Eastman v. Univ. of Michigan*, 30 F.3d 670, 673 (6th Cir. 1994) (explaining that "domicile is an individual's permanent place of abode where he need not be physically present, and residence is where the individual is physically present much of the time" and that "[a]n individual consequently may have several residences, but only one domicile"); *Transatlantica Italiana v. Elting*, 74 F.2d 732, 733 (2d Cir. 1935) (explaining that "residence demands less intimate local ties than domicile" and that "domicile allows longer absences"). We see no reason to go beyond the ordinary meaning of "reside," and we view the term to mean where one regularly lives or has his or her home, as distinguished from a place in which the person is present on a temporary basis. *See United States v. Namey*, 364 F.3d 843, 845 (6th Cir. 2004) ("An ordinary person would understand that a person resides where the person regularly lives or has a home as opposed to where the person might visit or vacation"); *see also, e.g.*, 38 C.F.R. § 36.4401 (defining "reside" for the purpose of specially adapted housing benefits to mean "[t]o occupy (including seasonal occupancy) as one's residence"); *but see, e.g.*, 38 C.F.R. § 3.42 (defining "Residing in the U.S." for the purpose of compensating certain Filipino Veterans residing in the United States at full dollar amount to mean "that an individual's principal, actual dwelling place is in the U.S."). This definition would apply to parties who lived in a location continuously for a reasonable period of time as well as to those who relocated to a place with the intent to live there either permanently

[8] The Merriam-Webster Dictionary defines "domicile" to mean "a dwelling place: place of residence" or "a person's fixed, permanent, and principle home for legal purposes." *Domicile Definition*, merriam-webster.com, http://www.merriam-webster.com/dictionary/domicile (last visited Sept. 17, 2013).

or for a reasonable period of time. However, "reside" ordinarily would not include a visit to or a temporary stay in a location, and parties' temporary absences from the places they ordinarily live would not defeat the finding that they reside in that place. We believe that this definition makes sense when addressing possible marriages of military personnel because they often move more frequently than other individuals and are often stationed away from their permanent homes or domiciles. Nothing in the statute or the ordinary meaning of "reside" suggests a specific time period or other specific facts that are minimally necessary to establish residence. Accordingly, whether the parties reside or resided in a particular state must be determined on the facts of each case, in view of the above principles and the principle of resolving reasonable doubt in favor of Veterans.

19. In instances when the parties resided in different jurisdictions at their time of marriage, VA may consider the marriage valid for VA purposes if it is valid under the law of either jurisdiction. Although section 103(c) uses the singular term in referring to the "place" the parties resided at the time of the marriage, it is well established that, unless the context indicates otherwise, "words importing the singular include and apply to several persons, parties, or things." 1 U.S.C. § 1; *see Barrons*, 191 F.2d at 95-96 (analyzing the law of the two states where the parties resided at time of marriage). Section 103(c) speaks in terms of a marriage being "proven as valid" and provides alternative bases for doing so, suggesting an intent by Congress favoring recognition of the validity of marriages. This is consistent with the manner in which VA has previously applied section 103(c) and its predecessors in non-precedential opinions. If the marriage is valid for VA purposes in at least one of the places in which a party resided at the time of marriage, it will be valid for VA purposes, even if it was not recognized as valid under the laws of another place where the other party resided. *See, e.g.*, VAOPGC 40-58 (12-16-58) (recognizing validity of marriage under the law of Japan, where the ceremony was performed and one party resided, without regard to the law of Hawaii, where the Veteran resided); *see also* 45 Op. Sol. 898, 904 (8-31-39)[9] (stating "the validity of this marriage may be decided under the laws of the State of residence of either party" and noting the common-law presumption of its validity).

20. Further, we note that VA has interpreted section 103(c) to require not that the marriage could have been performed under the laws of the place(s) in which the parties resided at the relevant time, but only that the marriage, being valid in the place in which it was celebrated, was recognized as valid in the place where the parties resided during the relevant period under the theories of comity or full faith and credit. *See Barrons*, 191 F.2d 92 (interpreting a VA regulation nearly identical to current 38 U.S.C. § 103(c) in determining whether a proxy marriage conducted in Nevada would be recognized as valid under the laws of the states where the spouses resided, Texas and California,

[9] "Op. Sol." refers to opinions of the Solicitor of the Veterans Administration.

which did not permit proxy marriage); *see also* VAOPGC 6-70 (12-8-70) (holding that "[o]rdinarily, as a matter of comity, [the states in question] will recognize a marriage in a foreign jurisdiction if it is valid under the law of that jurisdiction"). Historically, in the United States, "[m]arriages not polygamous or incestuous, or otherwise declared void by statute, will, if valid by the law of the state where entered into, be recognized as valid in every other jurisdiction." *Loughran v. Loughran*, 292 U.S. 216, 223 (1934); *see also Barrons*, 191 F.2d at 95 ("A marriage is generally recognized as valid in any state if it was valid in the state where it was celebrated, at least unless it collides with some strong public policy of the state of residence."). VA must determine whether the marriage is valid under the law of the state of residence. However, where the parties married in a state other than the state in which they resided, that determination would involve the question of whether the marriage was valid in the state in which it was celebrated and, if so, whether the state of residence would recognize the marriage. *See* 15 P.D. 308, 311 (12-15-1904) ("As a general rule, of course, when parties reside in one State and temporarily go into another State to be married, the courts of the place of residence will follow the lex loci contractus in determining the validity of the marriage."). We recognize that this principle does not always hold true with respect to states' recognition of same-sex marriages performed in other jurisdictions. *See, e.g., In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 669 (Tex. App. 2010) (noting that "Texas has repudiated the place-of-celebration rule with respect to same-sex unions on public-policy grounds"). However, to the extent the state in which a claimant resides recognizes as valid a same-sex marriage performed in another state, the marriage would be considered to be valid under the law of the claimant's residence.

**Section 103(c) Applies to Veterans**

21. Section 103(c) provides standards for "determining whether or not a person is or was *the spouse of a veteran*." (Emphasis added). The plain language of section 103(c) limits its application to determining the validity of a Veteran's marriage as opposed to determining the validity of the marriage of other individuals. We recognize that there are benefits that VA provides to other individuals, such as servicemembers, based on their spousal status. The benefits that VA provides to servicemembers appear to fall primarily into two categories. In some instances, the statutes governing a particular benefit include servicemembers in the definition of "veteran" for that benefit. *See, e.g.*, 38 U.S.C. § 1301 (including "a person who died in active military, naval or air service" in the definition of Veteran for the purpose of DIC); 38 U.S.C. § 2402(a)(1) (including "a person who died in the active military, naval, or air service" in the definition of a Veteran for the purpose of burial and memorialization benefits). In those instances, section 103(c) applies in determining the validity of the marriage. In other instances, however, VA provides benefits or services based on the marital status of an individual who is not considered a Veteran. *See, e.g.*, 38 U.S.C. § 3501(a)(1)(C) (including the spouse of certain members of the Armed Forces in its definition of an "eligible person" for certain educational benefits); 38 U.S.C. § 1965 (defining the term "widow" for purposes of certain insurance programs to mean "a person who is the lawful spouse of the insured

member at the time of his death" and defining "member" to include "a person on active duty, active duty for training, or inactive duty training" as well as other individuals that do not have Veteran status). Section 103(c), by its plain language, would not be applicable in determining whether a marriage to such an individual is a valid marriage. Moreover, we are unaware of any other statutory provision that would be controlling in these instances. Thus, it would be prudent for the VA programs that are affected by the marital status of individuals who are not Veterans to consider whether regulations should be issued to govern determinations of the validity of marriages of those individuals.

22. We further note that there are instances in which VA takes into account the marriage of a third party in providing benefits to a Veteran. For example, VA provides dependency benefits to a Veteran for a child; however if the child marries, such benefits are discontinued. *See* 38 U.S.C. §§ 101(4)(A) (defining a child as "a person who is unmarried") and 1115(1)(B),(C) and (F) (providing additional disability compensation where the Veteran has a child). Because section 103(c) expressly states that it applies in "determining whether or not a person is or was the spouse of a veteran," it would not apply in determining the validity of the Veteran's child's marriage. However, VA regulations pertaining to disability compensation, pension, and dependency and indemnity compensation provide more broadly that, "[*m*]*arriage* means a marriage valid under the law of the place where the parties resided at the time of marriage, or the law of the place where the parties resided when the right to benefits accrued." 38 C.F.R. § 3.1(j). As this regulation is not limited to marriages of Veterans, it would apply on its face in determining the validity of the marriage of a child for purposes of those benefits. *See* 38 C.F.R. § 3.57(a)(1) and (2) (referring to the child of a Veteran as an unmarried person). Because section 103(c) does not require VA to apply its standard to the marriage of a child, VA could revise its regulations to prescribe a different standard for determining the validity of a child's marriage.

Tammy L. Kennedy
for Will A. Gunn

# EXHIBIT 2

# Office of Public and Intergovernmental Affairs

## Important Information on Marriage

The Department of Veterans Affairs (VA) offers a variety of benefits and services that depend on "spouse" and "surviving spouse" status. For the purpose of VA benefits, spousal status is predicated on a valid marriage under state law. Under the current Federal law, 38 U.S.C. § 103(c), VA may recognize a Veteran's marriage for VA purposes if:

- the marriage was legal in the place where the Veteran or the Veteran's spouse lived at the time of the marriage; or
- the marriage was legal in the place where the Veteran or the Veteran's spouse lived when he or she filed a VA claim or application (or a later date when the Veteran became eligible for benefits).

VA is providing information about when it can recognize a marriage on its application form instructions and through public outreach. VA generally accepts a claimant's or applicant's statement that he or she is married as sufficient evidence to establish a Veteran's marriage for the purpose of VA benefits.

VA is dedicated to serving all eligible Servicemembers, Veterans and their families and providing them the benefits they have earned.

### How To Determine If VA Will Recognize a Marriage?

| SCENARIO | *IF* | *THEN*, FOR PURPOSES OF VA, VETERAN AND SPOUSE ARE… |
|---|---|---|
| 1 | The Veteran and/or spouse live in a state that recognizes their marriage at the time of the claim… or The surviving spouse lives in a state that recognizes their marriage at the time of the claim… | Married |
| 2 | The Veteran is deceased, and the Veteran's last state of residence during his/her lifetime recognizes the marriage at the time of the claim… | Married |
| 3 | The Veteran and/or spouse lived in a state that recognized their marriage when they were married… | Married |
| 4 | The Veteran and spouse lived in a state that did not recognize their marriage when they were married (having traveled to a recognition state to get married), live in a state that does not recognize their marriage at the time of the claim, but then the Veteran and/or spouse move to a state that does recognize their marriage while the claim is pending…<br><br>or<br><br>The Veteran is deceased. The Veteran and surviving spouse lived in a state that did not recognize their marriage when they were married (having traveled to a recognition state to get married). At the time of the claim, the state of the deceased Veteran's last residence and the state where the surviving spouse lived when the claim was filed do not recognize their marriage. However, while the claim is pending, the surviving spouse moves to | Note: VA generally interprets "when the right to benefits accrued" (per 38 U.S.C. § 103(c)) to mean "at the time of the claim." However, the right to benefits can also accrue at a later time after the claim is submitted, when all the requirements for entitlement are met. |

| SCENARIO | *IF* | *THEN*, FOR PURPOSES OF VA, VETERAN AND SPOUSE ARE… |
|---|---|---|
| | a state that does recognize their marriage… | |
| 5 | The Veteran and spouse lived in a state that did not recognize their marriage when they were married (having traveled to a recognition state to get married) and continue to live in a state that does not recognize their marriage at the time of the claim… or<br><br>The Veteran is deceased. The Veteran and surviving spouse lived in a state that did not recognize their marriage when they were married (having traveled to a recognition state to get married). Also, at the time of the claim, the state of the deceased Veteran's last residence and the state where the surviving spouse currently lives do not recognize their marriage… | Not married for purposes of VA benefits |

### ***** Programs to which section 103(c) is NOT applicable because spousal eligibility is not based on marriage to a "Veteran"*

- Servicemembers' Group Life Insurance (SGLI)
- Family Servicemembers' Group Life Insurance (FSGLI), including the process of converting a spouse's FSGLI coverage to an individual policy spouse of a
- Veterans' Group Life Insurance (VGLI)
- Post 9/11 GI Bill Benefits (VA's recognizes all DoD-approved transfers to dependents)
- Survivors' and Dependents' Educational Assistance if the relationship is based on marriage to a Servicemember.
- Burial or memorialization benefits if the relationship is based on marriage to certain reservists, certain members of the reserve officer training corps, certain wartime allies of the U.S., and certain individuals entitled (or who would have been entitled but for their age) to retirement pay. (**For more information, see** www.cem.va.gov/cem/burial_benefits/eligible.asp#natlguard)

For these programs, the law requires VA to recognize marriages based on the law of the place where the marriage occurred, which is the same standard as used by the Department of Defense (DoD). If you have additional questions, please contact one of our Call Centers at **1-800-827-1000**.

### List of States That Have Recognized Same-Sex Marriage:

| STATE NAME | DATE SAME-SEX MARRIAGES WERE PERMITTED IN THE STATE (use this column if the place where the marriage occurred is the same as the place of residence) | DATE SAME-SEX MARRIAGES FROM ANY OTHER STATE WERE RECOGNIZED (use this column if the place where the marriage occurred is different from the place of residence) |
|---|---|---|
| California | June 17, 2008 – November 4, 2008 June 26, 2013 – present | June 17, 2008 – November 4, 2008 June 26, 2013 – present |
| Connecticut [1,2] | November 12, 2008 | November 12, 2008 |
| Delaware [2] | January 1, 2012 | July 1, 2013 |
| District of Columbia | March 9, 2010 | July 7, 2009 |
| Hawaii | December 2, 2013 | December 2, 2013 |
| Illinois | December 16, 2013 | December 16, 2013 |
| Iowa | April 20, 2009 | April 30, 2009 |
| Maine | December 29, 2012 | December 29, 2012 |
| Maryland | January 1, 2013 | February 23, 2010 |
| Massachusetts | May 17, 2004 | May 17, 2004 |
| Michigan | March 21, 2014 to March 22, 2014 | March 21, 2014 to March 22, 2014 |

| STATE NAME | DATE SAME-SEX MARRIAGES WERE PERMITTED IN THE STATE (use this column if the place where the marriage occurred is the same as the place of residence) | DATE SAME-SEX MARRIAGES FROM ANY OTHER STATE WERE RECOGNIZED (use this column if the place where the marriage occurred is different from the place of residence) |
|---|---|---|
| Minnesota | August 1, 2013 | August 1, 2013 |
| New Hampshire [2] | January 1, 2010 | January 1, 2010 |
| New Jersey | October 21, 2013 | October 21, 2013 |
| New Mexico | August 21, 2013 | January 4, 2011 |
| New York | July 24, 2011 | February 1, 2008 |
| Oregon | May 19, 2014 | October 16, 2013 |
| Pennsylvania | May 20, 2014 | May 20, 2014 |
| Rhode Island | August 1, 2013 | May 14, 2012 |
| Utah | December 20, 2013 to January 7, 2014 | December 20, 2013 to January 7, 2014 |
| Vermont | September 1, 2009 | September 1, 2009 |
| Washington | December 6, 2012 | December 6, 2012 |

1. Both Connecticut (effective October 1, 2010) and Rhode Island (effective August 1, 2013) recognize out-of-state domestic partnerships and civil unions as "marriages".
2. Several States have passed laws converting civil unions or domestic partnerships that were previously performed within the state to "marriages". On October 1, 2010, Connecticut (CT) converted existing in-state civil unions to marriages with an effective date of October 1, 2010 (CT civil unions permitted as of October 1, 2005). On January 1, 2011, New Hampshire (NH) converted existing in-state civil unions to marriages with an effective date of January 1, 2011 (NH civil unions permitted as of January 1, 2008)." On June 30, 2014, Washington (WA) will convert existing in-state domestic partnerships, in which either of the partners is not over the age of 62, to marriages effective on the date that the domestic partnership was performed (WA domestic partnerships permitted as of July 23, 2007). On July 1, 2014, Delaware (DE) will convert existing in-state civil unions to marriages, effective the date the civil union was performed (DE civil unions permitted as of January 1, 2012).
3. From June 1, 2014 to May 31, 2015, couples who have an Illinois (IL) civil union will have the option of having their IL civil union converted to a marriage, effective the date the civil union was performed (IL civil unions permitted as of June 1, 2011).

**Important:** VA is in the process of updating all forms that request marital status information in order to provide information on its marriage-validity determination criteria.

If you have additional questions about how these recent changes regarding same-sex marriage may affect your claim for benefits, please refer to our frequently asked questions below.

## Frequently Asked Questions

Collapse all | Expand all

- **Q:** Who is considered a spouse for purposes of VA benefits?
- **Q:** What supporting evidence do I have to submit with my claim or application to add my spouse as a dependent?
- **Q:** What does a claimant's or applicant's "assertion" entail?
- **Q:** Will VA pay retroactive compensation and pension benefits for claims involving same-sex spouses? What will be the effective date?
- **Q:** Does VA apply different requirements when evaluating my same-sex marriage? Will VA apply different requirements to a same-sex marriage?
- **Q:** I filed my claim or application the day after the Attorney General's announcement in September and still haven't received a decision? Why?
- **Q:** Can I transfer my Post 9/11 GI Bill benefits to my same-sex spouse, even if my marriage is not recognized for the purpose of other VA benefits and services?
- **Q:** What if I currently live in a state that recognizes same-sex marriage?
- **Q:**: What if I resided in a state that recognized same-sex marriage at the time I was married?
- **Q:** What if I have never lived in a state that recognized same-sex marriage, but I traveled to a recognition state to marry?
- **Q:**Does VA recognize common law marriages?
- **Q:** How long do I have to live in a state for VA to consider the state my residence?

- **Q:** Can I have more than one place of residence?
- **Q:** What if my spouse and I lived in different places when we were married?
- **Q:** What if my home state changed its laws to recognize same-sex marriage after I traveled to be married somewhere else?
- **Q:** What if I move to a state that recognizes same-sex marriage while my claim or application is pending?
- **Q:** What if I move to a state that recognizes same-sex marriage after my claim or application was denied?
- **Q:** What if I got married outside of the United States?
- **Q:** What if I resided outside of the United States at the time of my marriage or when I filed my claim?
- **Q:** The Department of Defense recognized my marriage-will VA?
- **Q:** What if VA has recognized my marriage for a different benefit?
- **Q:** What if I move to a state that recognizes same-sex marriage after my Veteran spouse dies?
- **Q:** I am a Veteran enrolled in VA health care. Will this change in the law affect my eligibility?
- **Q:** I am considering applying for VA health care or previously applied for VA health care and was denied based on income. Will this change in the law affect my eligibility?
- **Q:** If my marriage is recognized for the purposes of VA benefits, what benefits may I be eligible for?
- **Q:** What benefits may my spouse be eligible for?
- **Q:** Will VA recognize my domestic partnership or civil union for purposes of VA benefits?
- **Q:**What States Recognize Same-Sex Marriage?
- **Q:**Can VA confirm that the surviving same-sex spouse of a deceased Veteran, who is already interred in a VA national cemetery, will be eligible for interment with the Veteran?

return to top




U.S. Department of Veterans Affairs | 810 Vermont Avenue, NW Washington DC 20420
LAST UPDATED JUNE 20, 2014.

**DEPARTMENT OF VETERANS AFFAIRS**
**Veterans Benefits Administration**
**Washington, D.C. 20420**

June 20, 2014

VBA Letter 20-14-08

Director (00/21)
All VBA Regional Offices and Centers

SUBJ: Administration of Same-Sex Spousal Benefits

## Purpose

As of the date of this notification, the Veterans Benefits Administration (VBA) is processing same-sex spousal benefit claims. This letter provides instructions and procedures for processing these types of claims.

## Background

The Defense of Marriage Act (DOMA), enacted September 21, 1996, is a federal law that contains two operative sections: Section 2, which allows states to refuse to recognize same-sex marriages performed under the laws of other states; and Section 3, which defined "marriage" and "spouse" for purposes of federal law to preclude recognition of marriages of same-sex couples. On June 26, 2013, the Supreme Court held, in *United States v. Windsor*, that section 3 of DOMA violates the Fifth Amendment by discriminating against same-sex couples who are lawfully married under state law.

VBA administers benefits and programs that depend on the definition of the terms "spouse" and "surviving spouse." For purposes of VA benefits, 38 U.S.C. § 101(3) and § 101(31) define "surviving spouse" and "spouse" as persons "of the opposite sex." These definitions (codified separately from DOMA) were not specifically addressed in the Supreme Court's decision. On September 4, 2013, the United States Attorney General announced that the President had directed the Executive Branch to cease enforcement of 38 U.S.C. §§ 101(3) and 101(31), to the extent they preclude provision of Veterans' benefits to same-sex married couples. Accordingly, VA will no longer enforce the above-mentioned statutory provisions or VBA's implementing regulation (38 C.F.R. § 3.50), to the extent that they preclude provision of Veterans' benefits to same-sex married couples. This announcement allows VA to administer spousal and survivors' benefits to same-sex married couples, provided their marriages meet the requirements of 38 U.S.C. § 103(c). That provision states, "[i]n determining whether or not a person is or was the spouse of a Veteran, their marriage shall be proven as valid for the purposes of all laws administered by the Secretary according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued."

# Determining Whether VA Will Recognize A Marriage: Dependency Claims (Compensation and Pension), Survivors Pension, Dependency and Indemnity Compensation (DIC), and Accrued Benefits

**NOTE: The following procedures apply to adjudication of both compensation and pension claims. Education, insurance, loan guaranty, and vocational rehabilitation & employment will sometimes follow these same procedures for determining marital status, but in certain situations will follow benefit-specific guidance, which is provided later in this letter.**

**Important:** Any claims related to same-sex marriage currently held at regional offices or centers must be processed expeditiously according to the guidance set forth in this notification.

## Procedures

### General

Under 38 U.S.C. § 5124(a), VA may accept the written statement of a claimant's marriage to another individual as proof of the existence of the relationship. This statute is implemented under 38 C.F.R. § 3.204(a). To establish marriage under section 3.204(a), VBA requires only a statement by the claimant that includes the date and place of marriage and the name and social security number of the person the claimant has identified as his or her spouse.

Under 38 U.S.C. § 103(c), which is currently administered under 38 C.F.R. § 3.1(j), VBA will recognize a Veteran's marriage for the purposes of paying benefits if the marriage was recognized under the law of the place where at least one of the parties resided when they were married, or at the time when the claimant became eligible for benefits. To apply the section 103(c) standard, VBA will inform claimants of the standard through updated form instructions and provide claimants a link to a public website that contains information specific to marriage issues, and then, consistent with 38 U.S.C. § 5124(a) and 38 C.F.R. § 3.204(a), VBA will generally accept a claimant's statement that he or she is married. This same procedure applies no matter if the claimant is asserting that he/she is in an opposite-sex marriage or a same-sex marriage.

The only time when VA will not accept a claimant's statement that he/she is married as being sufficient evidence to establish the claimant's marriage is when the claimant's statement on its face raises a question of validity, the claimant's statement conflicts with other evidence in the record, or there is a reasonable indication of fraud or misrepresentation. In these instances, VBA shall require more information, per 38 C.F.R. § 3.204(a)(2). The fact that a claimant is in a same-sex marriage, without additional information showing where the clamant and the spouse resided at the time of marriage and where they resided when the claim was filed, does not raise a question as to the marriage validity,

conflict with the claimant's statement that he/she is married, or present a reasonable indication that there is evidence of fraud or misrepresentation.

***Important***: For claims involving a biological child of the Veteran, the Veteran's written statement is sufficient to establish the relationship to the child, per 38 C.F.R. § 3.204(a). For claims involving an adopted child, the parent/child relationship should be recognized per 38 C.F.R. § 3.210(c). For claims involving a stepchild of a same-sex marriage, the parent/child relationship should be recognized per section 3.210(d). In instances when the relationship between the Veteran and child is neither biological nor adoptive, but there is indication that the relationship may be something more than a stepchild relationship, then refer the claim to regional counsel for a determination as to whether the child may be considered a legitimate child for the purpose of VA benefits under 38 C.F.R. § 3.210(a). For example, if a child was born during a same-sex marriage, but the child's biological relationship is only to the non-Veteran parent, it is possible that, even without a biological or adoptive relationship, the child may be considered to be the child of the Veteran under state law. Although we anticipate that further legal guidance on this issue will be forthcoming, such issues should be referred to regional counsel until further notice.

## Survivors Claims

When determining whether VA will recognize a same-sex marriage in survivors claims, claims processors should accept the statement of the claimant that he/she was married. As previously stated, VA will inform claimants through a form instruction of the section 103(c) standard and provide a link to a public website that contains information specific to same-sex marriages. Under the section 103(c) standard, VA marriage recognition can be established by the law of the place where at least one of the parties resided when the claimant files a valid claim, *or* the law of the place where at least one of the parties resided at the time of the marriage. When a party to the marriage is deceased, VA considers the party's last place of residence while alive to be the place where that party resided at the time of claim.

***Note***: For survivors claims, VA may accept a written statement asserting the marital relationship, but should determine if the same-sex marriage satisfies the requirements of 38 C.F.R. §§ 3.50(b)(1)&(2) and 3.54 (marriage dates). When calculating years of marriage pursuant to section 3.54, use the date the marriage was performed, not the date the marriage could first be recognized for the purpose of VA benefits.

***Important***: In some cases, VA cannot recognize a marriage in a survivor's claim under section 103(c), but the case may raise the question of whether the marriage may be considered a "deemed valid" marriage under 38 U.S.C. § 103(a). Claims identified, as possibly implicating section 103(a), will be processed with the assistance of regional counsel. Refer all such claims based on a same-sex marriage to regional counsel until further notice. The limited exception provided in section 103(a) and implementing regulation 38 C.F.R. § 3.52 permits VA, for the purpose of gratuitous death benefits, to recognize certain marriages as *deemed valid marriages* that are not recognized under state law. In order for this provision to be applied, the surviving spouse claiming benefits must have been, among other requirements, without knowledge of the legal impediment to the marriage when entering into the

marriage, which must have occurred one year or more before the Veteran's death or for any period of time if a child was born of the marriage.

## Effective Date

Although the Supreme Court did not directly address the constitutionality of the Title 38 provisions in its decision invalidating section 3 of DOMA, the Attorney General's September 4, 2013, announcement of the President's direction to cease enforcement of sections 101(3) and 101(31) of Title 38 may be characterized as a liberalizing change in law, if such a characterization would benefit the claimant. Therefore, the effective date should be assigned as follows:

1. If the claim was pending or open on direct review as of September 4, 2013, the effective date should be assigned under 38 U.S.C. § 5110 and 38 C.F.R. § 3.400, as if the laws barring VA's recognition of same-sex marriage had never been in effect.
2. If the claim was received after September 4, 2013, VA should apply 38 U.S.C. § 5110(g) and 38 C.F.R. § 3.114, to assign an effective date as early as September 4, 2013, if to do so would be to the claimant's benefit. If the claimant is entitled to an effective date earlier than September 4, 2013, based on some other provisions of 38 U.S.C. § 5110 and 38 C.F.R. § 3.400, then assign the effective date in accordance with those other provisions. For example if VA receives a claim for DIC or survivors' pension within one year of the date the death occurred, then the effective date of the award may be the first day of the month in which the death occurred, pursuant to 38 U.S.C. § 5110(d) and 38 C.F.R. § 3.400(c)(2), regardless of whether that date is prior to September 4, 2013. However, if death occurred more than one year prior to receipt of the claim, and section 5110(d) and section 3.400(c)(2) are therefore inapplicable, then VA may nonetheless assign an effective date as early as September 4, 2013, pursuant to 38 U.S.C. § 5110(g) and 38 C.F.R. § 3.114.

## Same-Sex Relationships and Common-Law Marriage

If the Veteran indicates that his or her same-sex marriage is a common-law marriage, claims processors must determine whether the same-sex relationship qualifies as a common-law marriage. See M21-1MR III.iii.5.C. Claims processors may seek guidance from regional counsel as needed.

## Insurance

For Servicemembers' Group Life Insurance (SGLI) and Family SGLI (FSGLI), where Veteran status is not a condition of participation, section 103(c) is inapplicable, and VA recognizes marriages for these programs based on the law of the place where the marriage occurred, which is the same standard as used by the Department of Defense (DoD). Section 103(c) also does not apply to the process of converting a spouse's FSGLI coverage to an individual policy, because that right of conversion depends upon status as a Servicemember's spouse, not as the spouse of a "Veteran." Similarly, when establishing a

marriage for purposes of Veterans' Group Life Insurance (VGLI), section 103(c) is inapplicable, because VGLI proceeds are paid based on a relationship to a "former member" rather than a "Veteran."

For spousal determinations with respect to National Service Life Insurance (NSLI) or U.S. Government Life Insurance (USGLI), applicable regulations employ the place-of-residence analysis under section 103(c) to establish whether VA will recognize a marriage. Claims processors should follow the procedures set forth in this letter with regard to dependency claims for compensation and pension for determinations of marital status for NSLI and USGLI.

## Loan Guaranty

Loan Guaranty will rely on assertions of spousal relationship when determining eligibility for home loan benefits and when determining whether credit underwriting standards are satisfied. Guidance for lenders participating in the VA Home Loan Guaranty program will be published separately. See http://www.benefits.va.gov/HOMELOANS/resources_circulars.asp for more information. This same procedure applies no matter if the applicant is asserting that he/she is in an opposite-sex marriage or a same-sex marriage.

## Education

### Transfer of Post-9/11 GI Bill Benefits

Section 103(c) does not apply to transfers of Post 9/11 GI Bill Benefits, per 38 U.S.C. § 3319, because an individual's eligibility to transfer this education benefit is based on the individual being a member of the uniformed services with a specific amount of qualifying service. For the purpose of this benefit VA's recognizes all DoD-approved Section 3319 transfers to dependents.

### Survivors' and Dependents' Educational Assistance (DEA/Chapter 35)

DEA/Chapter 35 claims eligibility may be established based on a relationship to either a Servicemember or a Veteran. For a dependent of a Servicemember, DEA eligibility may be established if either of the following exists:

1. A permanent and total disability, incurred or aggravated in the line of duty in the active military, naval, or air service, for which the Servicemember is hospitalized or receiving outpatient medical care, services, or treatment and is likely to be discharged or released from such service for such disability; OR
2. A Servicemember dies in the line-of-duty.

Section 103(c) is inapplicable when evaluating a Servicemember's dependents. DoD uses a different standard from VA in determining validity of marriage. For the purpose of determining whether VA will recognize a marriage to a Servicemember for this benefit, VA will recognize marriages that DoD recognizes. If eligibility is based on a relationship to a Veteran AND the relationship determination

depends upon marital status (e.g. spouse/surviving spouse, child with no biological or adoptive relationship to the Veteran, or step-child), claims processors should accept the statement of the claimant that he or she is married for purposes of establishing eligibility of the child.

# Vocational Rehabilitation and Employment

## Procedures

Vocational Rehabilitation and Employment (VR&E) will follow compensation and pension processes for determining dependency status. As such, VR&E staff members should follow the procedures as outlined above for compensation and pension when making a determination of dependency status based on marriage.

## Updates to Forms, Manuals, and Electronic Systems

VBA is updating all forms that request information regarding marital status to include a short explanation of the 38 U.S.C. § 103(c) criteria. The updated form language is as follows:

> If you are certifying that you are married for the purpose of VA benefits, your marriage must be recognized by the place where you and/or your spouse resided at the time of marriage, or where you and/or your spouse resided when you filed your claim (or a later date when you became eligible for benefits) (38 U.S.C. § 103(c)). Additional guidance on when VA recognizes marriages is available at http://www.va.gov/opa/marriage/.

The updated forms will include a link to a VA public-facing website http://www.va.gov/opa/marriage/ that provides an updated list of all states that recognize same-sex marriage, as well as more thorough guidance on how VA determines recognition of marriage.

VBA is in the process of updating its letters to include language regarding processing of claims based on marriage. Until these letters are updated, when denying a claim on the basis that the applicable marriage failed to meet the criteria of 38 U.S.C. § 103(c), claims processors should add text to the decision notification letter regarding the specific reason for denial. See Appendix A for the approved mandatory language.

Claims processors must also insert the updated “Recognition of Marriage” paragraph into the “What the Evidence Must Show” (WTEMS) enclosure for DIC, Accrued, Death Pension, and/or All Death Benefits into all 5103 Notices for those benefits until this language is updated in MAP-D. If the 5103 Notice contains multiple applicable WTEMS, claims processors should only insert the new paragraph once, at the beginning of the WTEMS text. See Appendix B for this new language (the additional text is highlighted) and a sample WTEMS.

Director (00)

VBA will make the necessary revisions to procedural manuals that require clarification of the policy discussed in this VBA Letter and notify the field when these updates are complete.

## Questions

For questions, please contact the following:

**Compensation:** Procedures and Program Development Staff at VAVBAWAS/CO/212A.

**Pension:** VAVBAWAS/CO/PMC.

**Insurance:** VAVBAPHI/IC/29/29A.

**Loan Guaranty:** Loan Guaranty Service at LGYLEGAL.VBAVACO@va.gov.

**Education:** If you have any questions, please direct them to the Education Policy & Regulations Team at VABVAWAS/CO/225C.

**VR&E:** Questions concerning the policy and procedures in this VBA letter may be directed to your area VR&E field liaison at the email address listed below, or by telephone at (202) 461-9600.

| Area | Primary | Alternate | E-mail |
|---|---|---|---|
| Eastern | Teri Nguyen | Veronica Brown | VAVBAWAS/CO/VRE/EA |
| Southern | Veronica Brown | Teri Nguyen | VAVBAWAS/CO/VRE/SA |
| Central | Marisa Liuzzi | Melinda Sargent | VAVBAWAS/CO/VRE/CA |
| Western | Melinda Sargent | Marisa Liuzzi | VAVBAWAS/CO/VRE/WA |

/s/

Allison A. Hickey
Under Secretary for Benefits

Appendices: Notification Letter Text and updated DIC WTEMS

# Appendix A

**Notification Letter Text**

VA cannot recognize your marriage for the purpose of the benefit sought. Based on the information of record, your marriage is not recognized according to either the law of the place where you and/or your spouse resided at the time of the marriage *or* the law of the place where you and/or your spouse resided when you filed your claim (or a later date when you became eligible for benefits), per 38 U.S.C. § 103(c). In order for VA to recognize any marriage, whether same-sex or opposite-sex, the marriage must meet one of the above requirements.

# Appendix B

**What the Evidence Must Show DIC Benefits**

**Recognition of Marriage**

If eligibility is based on a marital relationship, your marriage must be recognized by the law of the place where you and/or your spouse resided at the time of marriage, *or* at the time of the claim (or a later date when you became eligible for benefits), per 38 U.S.C. § 103(c). Because your Veteran spouse is deceased, VA will consider the place where the Veteran last resided while alive to be where the Veteran resided when you filed your claim. With respect to your residence, VA will consider where you actually resided when you filed your claim. In order for VA to recognize any marriage, whether same-sex or opposite-sex, the marriage must meet the requirements of 38 U.S.C. § 103(c).

Additional guidance on determining whether VA can recognize your same-sex marriage is available at http://www.va.gov/opa/marriage/.

**To support a claim for Dependency and Indemnity Compensation (DIC) benefits based on a service-connected disability established during the Veteran's lifetime, the evidence must show:**

•The Veteran died while on active military service; **OR**

•The Veteran had a service-connected disability(ies) that was either the principal or contributory cause of the Veteran's death; **OR**

•The Veteran died from a nonservice-connected injury or disease **AND** was receiving, or entitled to receive, VA compensation for a service-connected disability rated totally disabling

⇒For at least 10 years immediately before death; **OR**

⇒For at least 5 years after the Veteran's release from active duty preceding death; **OR**

⇒For at least 1 year before death, if the Veteran was a former prisoner of war who died after September 30, 1999.

**To support a claim for DIC benefits based on a disability that was not service-connected or for which the Veteran did not file a claim during his or her lifetime, the evidence must show:**
•An injury or disease that was incurred or aggravated during active military service, or an event in service that caused an injury or disease; **AND**

•A physical or mental disability that was either the principal or contributory cause of death. This may be shown by medical evidence or by lay evidence of persistent and recurrent symptoms of disability that were visible or observable; **AND**

•A relationship between the disability associated with the cause of death and an injury, disease, or event in military service. Medical records or medical opinions are generally required to establish this relationship.