

**38 CFR Part 3****RIN 2900-AQ95****Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge**

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Request for information; notification of listening sessions.

**SUMMARY:** The Department of Veterans Affairs (VA) is requesting information to assist in the modification of the regulatory framework for discharges considered “dishonorable” for VA benefit eligibility purposes. On July 10, 2020, VA published a proposed rule for public notice and comment. The proposed rule would modify VA regulations governing VA character of discharge determinations based on “willful and persistent misconduct,” “moral turpitude,” and “homosexual acts involving aggravating circumstances or other factors affecting the performance of duty.” In addition, the proposed rule would create a “compelling circumstances” exception to certain regulatory bars to benefits in order to ensure fair character of discharge determinations in light of all pertinent factors.

Following publication, VA received numerous public comments. Due to the various and differing comments received, VA is seeking additional information to help inform VA’s development of updated character of discharge regulations. Additionally, VA is announcing a virtual listening session to further seek verbal feedback from a variety of entities as VA implements this regulation. Regardless of attendance at the virtual listening session, interested parties are invited to submit comments, including data and research.

**DATES:** Comments on this request for information must be received by VA on or before [Insert date 30 days after date of publication in the *FEDERAL REGISTER*]. VA will also hold the first public virtual listening session on October 5, 2021, and the second public

virtual listening session on October 6, 2021. Each meeting will start at 8:50 a.m. and conclude at or before 4:15 p.m. Eastern Daylight Time. Virtual check-in will begin at 8 a.m.

**ADDRESSES:** Comments must be submitted through [www.Regulations.gov](http://www.Regulations.gov) and will be available for public viewing, inspection, or copies.

The virtual listening sessions will be held virtually as WebEx events and will be open to the public to listen on a first come, first served basis. Information about the meeting and registration to speak or listen can be obtained by emailing:

[CODRegistration.VBACO@va.gov](mailto:CODRegistration.VBACO@va.gov). Virtual attendance will be limited to the maximum allowed by WebEx.

**FOR FURTHER INFORMATION CONTACT:** Robert Parks, Chief, Part 3 Forms and Regulations (211D), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420, 202-461-9540 (This is not a toll-free telephone number).

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

On July 10, 2020 (85 FR 41471), VA published a proposed rule in the Federal Register to amend 38 CFR 3.12 by updating and clarifying the regulatory bars to benefits. Specifically, VA proposed to modify the regulatory framework for discharges considered “dishonorable” for VA benefit eligibility purposes, such as discharges due to “willful and persistent misconduct,” “an offense involving moral turpitude,” and “homosexual acts involving aggravating circumstances or other factors affecting the performance of duty.” VA also proposed to extend a “compelling circumstances” exception to certain regulatory bars to benefits in order to ensure fair character of discharge determinations in light of all pertinent factors.

VA invited interested persons to submit written comments on or before September 8, 2020. VA received over 70 comments in response to the proposed rule.

Over 20 of those comments were from organizations and the rest were from individual members of the public. Those organizations included: (1) American Psychological Association, (2) Charlotte Center for Legal Advocacy, (3) Homeless Advocacy Project, (4) Homeless Persons Representation Project, Inc., (5) Inner City Law Center, (6) Legal Aid Foundation of Los Angeles, (7) Lewis B. Puller Veterans Benefits Clinic of William & Mary Law School, (8) Modern Military Association of America, (9) National Law School Veterans Clinic Consortium, (10) National Organization of Veterans' Advocates, Inc., (11) National Veterans Legal Services Program, (12) New York State Division of Veterans Services, (13) NY Legal Assistance Group, (14) Ohio Veterans Law Task Force, (15) Public Counsel Center for Veterans Advancement, (16) Swords to Plowshares, (17) The Jerome N. Frank Legal Services Organization, (18) The Minority Veterans of America (MVA), (19) The National Coalition for Homeless Veterans, (20) The National Veterans Council for Legal Redress, (21) University of Florida Levin College of Law Veterans and Servicemembers Legal Clinic, (22) Veterans Advocacy Project, (23) Veterans Clinic at the University of Missouri School of Law, (24) Veterans Healthcare Policy Institute, (25) Veterans Legal Services, and (26) Vietnam Veterans of America. Individual comments were also received from U.S. Senators Richard Blumenthal, Jon Tester, and Sherrod Brown.

This additional request for information, described in more detail below, will assist VA in gathering and taking into account diverse viewpoints on this issue. Responses to this request for information will be used to help inform VA's development of updated character of discharge regulations. This request for information has a written comment period of 30 days, during which VA invites individuals, groups, and entities to reply to the questions presented below. VA believes that 30 days is sufficient to provide comments, as the individuals, groups, and entities interested in this program likely have information and opinions readily available or can quickly compile and submit such

information. Commenters are encouraged to provide complete but concise responses to the questions outlined below.

VA will also be holding virtual public listening sessions on October 5, 2021, and October 6, 2021, to provide groups and entities an opportunity to share additional information. Oral comments, testimonies, and technical remarks are encouraged to be concise and directed toward specific Request for Information topics below. Please note that VA will evaluate all comments (oral and written) and, as appropriate, incorporate them into VA's next action.

### **Request for Information**

To update its character of discharge regulations, VA seeks information on the topics and issues listed below. Commenters do not need to address every question and should focus on those that relate to their expertise or perspectives. Commenters should clearly indicate which topics and issues are being addressed in their response.

#### **A. Compelling Circumstances**

1. VA proposed to consider, as a factor in a “compelling circumstances” analysis, the impact of mental impairment at the time of the prolonged absence without leave (AWOL) or misconduct, to include a diagnosis of (or evidence that could later be medically determined to demonstrate the existence of) certain enumerated mental disabilities. Some commenters felt that the list of disabilities was overinclusive; some felt that it was underinclusive. VA seeks comment on the following question: What conditions, symptoms, or circumstances if any, should VA consider when determining the impact of mental impairment at the time of the prolonged AWOL or misconduct?
2. VA proposed to consider, as a factor in a “compelling circumstances” analysis, “Sexual abuse/assault.” Should VA employ a different or additional term for this category, such as “Military Sexual Trauma (MST)”? Also, should VA include

language reminding adjudicators to look beyond service records to corroborate the account of an in-service personal assault, as provided in 38 CFR 3.304(f)(5)?

## **B. Willful and Persistent Misconduct**

VA noted in the proposed rulemaking that “willful misconduct” is already defined in 38 CFR 3.1(n) as “an act involving conscious wrongdoing or known prohibited action”—i.e., the act involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences.

VA then proposed to clarify what circumstances qualify as “willful and persistent misconduct” in proposed 38 CFR 3.12(d)(2)(ii), with reference to certain timelines for “minor misconduct” and “more serious misconduct”. VA seeks comments on the following questions:

1. Should VA proceed with a distinction between “minor misconduct” and “more serious misconduct” when evaluating whether misconduct is persistent? Should VA define what is considered “serious misconduct?” Should VA only consider an action to be “misconduct” if it actually caused harm to a person or property or should VA consider all misconduct, regardless of severity, in its determination? Should VA consider extenuating circumstances that may have led to or impacted the “misconduct” at issue?
2. Some commenters requested that VA clarify the number of incidents required to constitute willful and persistent misconduct. How many instances over what period of time should be considered persistent? Should the totality of the circumstances be considered in addition to the number of incidents when determining misconduct to be willful and persistent?

## **C. Moral Turpitude**

Some commenters expressed concern that the proposed rule’s definition of moral turpitude is too vague. VA seeks comments on the following questions:

1. VA regulation currently does not define moral turpitude, but states in 38 CFR 3.12(d)(3) that it includes “generally, conviction of a felony.” VA’s proposed rule would define moral turpitude as a “willful act that gravely violates accepted moral standards and would be expected to cause harm or loss to person or property.” Should VA revise this proposed definition, and if so, how?

#### **D. Benefit Eligibility**

VA seeks comments on the following questions regarding former service members and the bars to VA benefits:

1. Some commenters recommended that VA only apply statutory bars to benefits (those enumerated in 38 U.S.C. 5303(a)); others expressed concerns about how such an approach would affect military order and discipline. How (if at all) would removing the regulatory bars affect military order and discipline?
2. Some commenters suggested that granting benefits to those with less than honorable discharges denigrates others’ honorable service. How (if at all) would extending VA benefits eligibility denigrate others’ honorable service?
3. VA is committed to ensuring that its character of discharge regulations reflect the principles of fairness, inclusion, and justice that our Service members and our Nation deserves. What specific changes can be made to the proposed rule for fairly adjudicating the benefits eligibility of historically disadvantaged and vulnerable populations?

#### **Listening Session Registration**

Information about the meeting, how to listen and/or register to speak can be obtained by emailing: [CODRegistration.VBACO@va.gov](mailto:CODRegistration.VBACO@va.gov).

*Individual registration:* VA encourages individual registrations for those wishing to speak who are not affiliated with or representing a group, association, or organization.

*Group registration:* Identification of the name of the group, association, or organization should be indicated in your registration request. Due to virtual platform meeting limitations of WebEx, and the statutory mandate that VA consult with certain entities, VA may select certain entities to speak or may limit the size of a group's registration to allow receipt of testimonies, and/or technical remarks from a broad, diverse group of stakeholders. Oral comments, testimonies, and/or technical remarks may be limited from a group, association, or organization with more than two individuals representing the same group, association, or organization. Efforts will be made to accommodate all attendees who wish to participate. The length of time allotted for participants to provide oral comments, testimonies, and/or technical remarks during the meeting will be no more than ten minutes, and is subject to the total number of participants speaking, to ensure time is allotted to selected registered speakers. Breaks between speakers will be ten minutes. There will be no opportunity for audio-visual presentations during the meeting.

*Audio (For listening purposes only):* Virtual attendance will be limited to the maximum allowed by WebEx on a first come, first served basis. Advanced registration is not required. Audio attendees will not be allowed to offer oral comments, testimonies, and/or technical remarks as the phone line will be muted.

*Note:* Should it be necessary to cancel the meeting due to technical issues or other emergencies, VA will take available measures to notify registered participants. VA will conduct the public meeting informally, and technical rules of evidence will not apply. VA will arrange for a written transcript of the meeting and keep the official record open until the closure of the Request For Information comment period to

allow submission of supplemental information. The transcript will be posted in the docket of the rule as part of the official record when the rule is published.

Each listening session will focus on the Request for Information topics described in this notice and will be scheduled according to the following Agendas:

**Listening Session 1:**

*Virtual Public Listening Sessions 1 (October 5, 2021)*

*Agenda*

08:00-08:50 Arrival/Check-In

09:00-12:00 Morning Public Meeting Session

12:00-13:00 Break

13:00-16:10 Afternoon Public Meeting Session

16:15 Adjourn

**Listening Session 2:**

*Virtual Public Listening Sessions 2 (October 6, 2021)*

*Agenda*

08:00-08:50 Arrival/Check-In

08:50-12:00 Morning Public Meeting Session

12:00-13:00 Break

13:00-16:10 Afternoon Public Meeting Session

16:15 Adjourn

## **Paperwork Reduction Act**

This request for information constitutes a general solicitation of public comments as stated in the implementing regulations of the Paperwork Reduction Act of 1995 at 5 CFR 1320.3(h)(4). Therefore, this request for information does not impose information collection requirements (*i.e.*, reporting, recordkeeping, or third-party disclosure requirements). Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*).

### Signing Authority

Denis McDonough, Secretary of Veterans Affairs, approved this document on July 7, 2021, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Luvenia Potts

Regulation Development Coordinator

Office of Regulation Policy & Management

Office of General Counsel

Department of Veterans Affairs

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