

**Department of
Veterans Affairs**

Memorandum

Date: October 31, 2012
From: General Counsel (021)
Subj: Implementation of Public Law 112-154—VAIQ 7277672
To: Director, Loan Guaranty Service (26)

VAOPGCPREC 2-2012

Questions Presented:

With regard to the implementation of Public Law 112-154--

- a. Are new regulations necessary before implementing section 202?
- b. When are sections 204 and 205 effective?
- c. Are surviving spouses under section 206 exempt from paying the statutory loan fee usually required under 38 U.S.C. 3729? Are such spouses eligible for double entitlement?
- d. Is section 701 consistent with current regulations and policies? What regulations, if any, are necessary before implementing the provision?

Held:

- a. Regulations are not necessary before implementing section 202, as a new regulation would merely be a restatement of the statute. VA may provide the assistance, effective as of October 1, 2012. VA is still required, nevertheless, to promulgate a new final regulation, not subject to notice and comment, to address the statutory change.
- b. In accordance with the plain meaning of the statute, the Department should implement section 204 on August 6, 2013, which is one year from the date of enactment of Public Law 112-154, and should have already implemented section 205, as it became effective August 6, 2012.
- c. Surviving spouses under section 206 are, to the same extent as surviving spouses under 38 U.S.C. § 3701(b)(2), exempt from paying the statutory loan fee. Also, section 206 surviving spouses are eligible for double entitlement.
- d. Section 701 is not inconsistent with current regulations and policies and, for the most part, can be implemented before a final rule is published. To the extent VA is required to implement a new policy decision not expressly prescribed in the statute or addressed in current regulations, VA should publish a proposed rule and allow the public to comment on VA's plans for implementation.

Discussion:

Section 202

1. Section 202 amended 38 U.S.C. § 2101(a) by authorizing Specially Adapted Housing (SAH) assistance for certain veterans injured on or after September 11, 2001. Specifically, SAH assistance under section 202 is available to certain veterans who

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received a permanent service-connected disability that was incurred on or after September 11, 2001, and that is due to the loss or loss of use of one lower extremity, severely affecting the functions of balance or propulsion. The provision was effective as of October 1, 2012, and will expire on September 30, 2013.

2. You asked whether Loan Guaranty Service can implement section 202(a) of Public Law 112-154 without regulations. We hold that it can, as a regulatory amendment would merely restate the statutory provisions. VA will still need to amend 38 C.F.R. § 3.809 to make it consistent with the statute, but the amendment to the regulation is not necessary to implement section 202(a). VA will amend section 3.809 in a final rule, without undergoing public notice and comment that would reflect the statutory amendment or, at most, reflect VA's interpretation of the statutory amendment. See 5 U.S.C. § 553(b). The regulatory amendment will be effective as of the date of publication in the final rule but will be applicable to any application for the assistance pending with VA on October 1, 2012, or filed on or after October 1, 2012.

Sections 204 and 205

3. Section 204 amended 38 U.S.C. § 2102 so that the SAH assistance known as Temporary Residence Adaptation (TRA) grants will not be deducted from the aggregate amount of assistance available under chapter 21. Section 205 amended 38 U.S.C. § 2102A by increasing the amount of TRA assistance available and extending the authority for TRA grants through December 31, 2022. It also authorized the Secretary to index the TRA amounts to the same cost of construction index used for other SAH grants. Your letter questions whether the effective dates of the provisions "would contradict [the law's] own purpose by imposing incongruous implementation dates that provide a disincentive for use of TRA grants during most of FY2013."

4. Congress does not have to specify when a law becomes effective. Absent a provision setting another effective date, a bill takes effect at 12:01a.m. on the day it is signed by the President. U.S. v. Casson, 434 F.2d 415, 418-419 (D.C. Cir. 1970). Generally, statutes are to be applied only prospectively. See Sutherland, *Statutory Construction*, 41.04. The prospective nature of laws is significant because it means Congress must usually include instructions if a law is to be applied retroactively.

5. In this instance, Congress prescribed effective dates. Section 204(b) states that it is to be effective one year from the date of enactment, meaning August 6, 2013. Section 205 states that it is effective as of the date of enactment, August 6, 2012. The prescription is neither ambiguous nor retroactive.

6. It is our understanding that Congress envisioned a multi-phase improvement, with the first phase being section 205's increase to the amount of the TRA assistance available. Although one could argue that a veteran might be better off by postponing a

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TRA grant for a year so that the grant would not count against the maximum SAH assistance available, that is not the relevant comparison. What is relevant is how the law changed, not how it will continue to change in the future. With enactment of Public Law 112-154, TRA amounts immediately increased from \$14,000 to \$28,000, and from \$2,000 to \$5,000, meaning a veteran can immediately receive at least 50 percent more TRA assistance than before. The increase will be especially helpful to those who cannot wait a year. This does not seem contradictory to Congress' purpose when enacting the law.

7. The second phase, which Congress postponed, will further expand the assistance provided under this law. Congress presumably delayed the effective date to limit fiscal year expenditures. Due to costs associated with the expansion, it is possible section 204 may not have been feasible to implement immediately. Regardless, Congress has instructed that the provision will not become effective for one year from the date of enactment, which is fully within the scope of the legislative function. See U.S. Const. art. I, §§ 1, 8. "To attempt to decide whether some date other than the one[s] set out in the statute is the date actually 'intended' by Congress is to set sail on an aimless journey." United States v. Locke, 471 U.S. 84, 93 (1985).

8. That Congress expressly included effective dates for both provisions amplifies the argument that Congress had a deliberate plan in drafting the statute the way it did. The Department does not have the authority to substitute its own judgment for that of Congress as expressed in statute. As such, the Department should implement section 204 on August 6, 2013, which is one year from the date of enactment of Public Law 112-154, and the Department should have already implemented section 205, as it became effective August 6, 2012, the date of enactment.

Section 206

9. Section 206 expanded home loan guaranty entitlement to include surviving spouses of certain totally-disabled veterans. Subsection (c) directed VA to collect statutory loan fees (38 U.S.C. § 3729) from the newly-covered surviving spouses in the same manner in which the Secretary collects fees from persons described in paragraph (2) of section 3701(b).

10. A person described in section 3701(b)(2) is a surviving spouse of any veteran who died from a service-connected disability, but only if such surviving spouse is not eligible for benefits under chapter 37 on the basis of the spouse's own active duty service or service in the Selected Reserve. Pursuant to 38 U.S.C. § 3729(c)(1), a loan fee may not be collected from any surviving spouse of a veteran who died from a service-connected disability. Taking these provisions together, the Department may not collect a loan fee from a person described in section 3701(b)(2).

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11. It is our opinion that Congress intended the same outcome for surviving spouses covered under section 206. Subsection (c) specifically requires the Secretary to collect a funding fee in the “same manner” as those under section 3701(b)(2). We “must presume that a legislature says in a statute what it means and means in a statute what it says there.” Conn. Nat’l Bank v. Germain, 112 S.Ct. 1146, 1149 (1992).

12. We know that Congress was aware of the issue, as individuals in VA communicated with Congressional staff in advance of enactment, advising that VA would interpret the language as leading to an exemption from the loan fee. Even if VA had not discussed the issue with Congressional staff, we must also, if possible, avoid “any construction which implies that the legislature was ignorant of the meaning of the language it employed.” Montclair v. Rainsdell, 107 U.S. 147, 152 (1883). It seems that Congress included section 206(c) for the specific purpose of making sure that, with regard to the loan fee, newly-covered surviving spouses would have no more responsibility than other types of surviving spouses already eligible for guaranteed loans. To charge a fee otherwise would require the Department to render subsection (c) as “mere surplusage.” Potter v. United States, 155 U.S. 438, 446 (1894).

13. You also asked whether a newly-covered surviving spouse under section 206 could be eligible for double entitlement: once as a surviving spouse and again under his/her own earned entitlement. Unlike 38 U.S.C. § 3701(b)(2), section 206 is silent on how the surviving spouse’s own active duty service or service in the Selected Reserve affects entitlement as a surviving spouse. The legislative history also does not offer insight into Congressional intent.

14. A canon of statutory interpretation is that, “where Congress includes particular language in one section of a statute but omits it in another..., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” Keene Corp. v. United States, 508 U.S. 200, 208 (1993) (quoting Russello v. United States, 464 U.S. 16, 23, (1983)). Furthermore, “negative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted.” Lindh v. Murphy, 521 U.S. 320, 330 (1997).

15. Congress was clearly familiar with the intricacies of section 3701(b)(2). As already mentioned, it even made sure that the loan fee would be collected the same for newly-covered surviving spouses as for those eligible under section 3701(b)(2). Yet Congress chose not to include language that would limit entitlement in the same way as section 3701(b)(2). This would seem to indicate that, regardless of the apparent incongruity with subsection (b)(2), the outcome was intended.

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16. While we can argue that double entitlement seems incongruous with section 3701(b)(2), such a result is not unprecedented. For example, certain spouses of individuals missing in action can also be eligible for loan guaranties under section 3701(b)(3). In an opinion from 1974, we held that “the acquisition of a VA-guaranteed loan by the [spouse] of a [servicemember] missing in action under the provisions of section [3701(b)(3)] is not a bar to the use of any subsequent entitlement for another guaranteed loan to which s/he may become eligible in the status of surviving spouse of such former [servicemember].” See VAOPGC 6-74. In other words, the spouse can receive the benefit based on section 3701(b)(3) and, if the spouse’s status changes to that of surviving spouse, also under section 3701(b)(2). Although the opinion did not address whether the spouse would be eligible for additional benefits due to his or her own entitlement as a veteran, the logical conclusion is that the spouse would be. Admittedly, it may mean that one family could obtain four benefits under chapter 37: (1) husband obtains loan while wife is missing in action; (2) wife obtains loan upon her return; (3) wife dies of service-connected condition and widower obtains a loan as surviving spouse; and (4) widower obtains loan as a veteran. Nevertheless, omission of any limitation similar to that in section 3701(b)(2) would seem to indicate that Congress intended the result, and that newly-covered surviving spouses should not be limited to only one of the various entitlements available. It is difficult to speculate why Congress might have intended such an outcome, but again, the Department is not free to substitute its own judgment for that of Congress.

Section 701

19. Subsection (a)(1) of section 701 would add a new section 2109 to chapter 21, United States Code, which would authorize the Secretary to provide additional SAH assistance to veterans whose homes have been destroyed or damaged by natural or other disasters. As you have pointed out, the provision is ambiguous in several respects. It does not use the same terminology as the remainder of chapter 21 nor does it fully explain how the Secretary is to administer it. We are aware that the Department communicated the ambiguities to Congress on numerous occasions, but Congress did not choose to address the Department’s concerns.

20. Congress has entrusted the Secretary to administer the laws providing benefits and other services to veterans and to the dependents and beneficiaries of veterans. See 38 U.S.C. §§ 301, 303. When Congress does not speak directly to the precise questions at issue, the Secretary must attempt to discern Congress’ purpose behind enacting a law. See Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984). The Secretary has authority pursuant to 38 U.S.C. § 501 to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department. Once the Secretary does so, any judicial review is limited to whether the implementation is a permissible construction of the statute. Id. “Considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer...” Id.

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21. Although the legislative history provides little insight as to the scope of the benefit provided under new section 2109, the primary purpose seems clear enough: to return a veteran to the same circumstances as if a disaster never happened. In implementing the statute, that intent should be the guiding principle, along with our past guidance that the SAH grant is to be of the highest beneficial character and, within reasonable bounds, construed liberally in favor of the veteran. See, e.g., VAOPGCPREC 1-2008, VAOPGCPREC 13-95, and VA Op. Sol. 510-50.

22. There is no legal reason to assume that Congress intended the section to result in an upheaval of existing regulations and policies, nor is there any reason to believe that Congress meant to exclude anyone who had already received assistance under chapter 21. The law refers to provisions that affect those individuals who have received 2101(a) grants, 2101(b) grants, and TRA grants. As such, it seems that all of those individuals would be eligible for assistance under new section 2109. Subsection (a) mentions homes that have been damaged or destroyed in a natural or other disaster, and subsection (c)(1) mentions repairing or replacing the damaged home. This seems to mean that acquisition can include the purchase, construction, or repair of a home. These provisions are consistent with current rules and policies.

23. The only provision that seems to fall outside the scope of the usual grant administration is how to calculate the usages and aggregate amounts of assistance available. Subsections (b)(2) and (3) state that the assistance under new section 2109 is "available to a veteran to the same extent as if the veteran had not previously received assistance under [chapter 21], and not be deducted from the maximum uses or from the maximum amount of assistance available under [chapter 21]." Loan Guaranty Service's interpretation does not seem inconsistent with the statutory text or Congressional intent. We agree that a permissible construction could include (i) "disregard[ing] assistance provided under [this section] when determining whether or not a veteran has reached the three-time use limitation or aggregate amount of assistance available;" and (ii) allowing "a veteran who had already used three grants and/or the full aggregate grant maximum amount" to be eligible for assistance under this section."

24. VA should promulgate regulations in accordance with the Administrative Procedure Act. With regard to provisions that are merely restatements of the statute and are consistent with current rules, VA may publish a final rule without the need for a proposed rulemaking. To the extent VA is required to implement a new policy decision not expressly prescribed in the statute, VA should publish a proposed rule and allow the public the opportunity to comment.



Will A. Gunn