

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

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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.<sup>1</sup> 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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<sup>1</sup> 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."

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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

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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.

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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).<sup>2</sup> 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).



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<sup>2</sup> 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.