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UPDATE ON VETERANS AFFAIRS
Changes to VA Pension Eligibility Regulations

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Felicia Pasculli, Esq. concentrates her practice in the areas of Elder Law & Special Needs Law, Trusts and Estates, and Veterans Law. She takes great pride in introducing the area of VA pension benefits to the Elder Law bar in 2001. She is certified as an elder law attorney (“CELA”) by the American Bar Assn. accredited National Elder Law Foundation and has been designated a “NY Metro Area Super Lawyer” for seven consecutive years, as well as a *Best Lawyer in America*. She is a founder of the Long Island Alzheimer’s Foundation and the Family Council at the Northport, New York VA Medical Center.

Felicia serves as a member of the Executive Committee of the Elder Law & Special Needs section of the New York State Bar Association and has served as Secretary of NYNAELA (National Academy of Elder Law Attorneys). She has lectured extensively for NAELA, the NY State Bar Assn., the NYS Women’s Bar Assn., National Organization of Veterans Advocates (NOVA), as well as many other professional groups. Her topics have included the intersection of public benefits, including Medicaid with veterans’ benefits, Trusts, Ethics, and Guardianships. She is accredited to train attorneys for the right to represent veterans before the VA.

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The Department of Veterans Affairs (VA) amended its regulations governing veterans' eligibility for VA pensions and other needs-based benefit programs effective October 18, 2018. The new regulations establish new requirements for evaluating net worth and asset transfers and more clearly identify what constitutes unreimbursed medical expenses. The VA's justification for these changes is to "ensure the integrity of VA's needs-based benefit program and the consistent adjudication of pension...claims."

REVIEW OF PENSION PROGRAM BASIC ELIGIBILITY RULES

1. Veterans or their surviving spouses must be at least 65 or officially disabled if younger;
2. Veteran must have served 90 days of consecutive active duty, one day of which must have been during a War-Time Period:
 - World War II – December 7, 1941 – December 31, 1946
 - Korean War – June 27, 1950 – January 31, 1955
 - Vietnam War – August 5, 1964 – May 7, 1975 (or February 28, 1961 – May 7, 1975 for veterans who served in Vietnam.
 - Gulf War – August 2, 1990 - undetermined
3. Veteran must have received a discharge other than dishonorable;
4. Disability Status – Veterans are eligible without a disability but a high benefit is available to those who are disabled.
 - Aid & Attendance – the veteran must require help with the activities of daily living at home, in nursing home or assisted living.
 - Housebound – the veteran needs to have a disability that prevents him or her from leaving their home.
 - Basic pension – No disability requirement
5. Spousal rules: a surviving spouse must have been living with the veteran at the time of the veteran's death and must be single at time of claim.

§ 3.274 Net worth and VA pension.

The VA chose a bright-line net worth limit equal to the maximum community spouse resource allowance (CSRA) for Medicaid purposes. Important distinction: Medicaid's CSRA relates to a community spouse's resources not the entire household members' assets as the VA does.

(a) *Net worth limit.* For purposes of entitlement to VA pension, the net worth limit effective December 1, 2018 is \$127,061.00. This limit will be increased by the same percentage as the Social Security increase whenever there is a cost-of-living increase in benefit amounts payable under section 215(i) of

title II of the Social Security Act (42 U.S.C. 415). VA will publish the current limit on its website at www.benefits.va.gov/pension/.

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

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

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

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

(4) *Example of net worth calculation.* For purposes of this example, presume the net worth limit is \$127,061. A claimant's assets total \$118,000 and annual income is \$10,000. Therefore, adding the claimant's annual income to assets produces net worth of \$128,000. This amount exceeds the net worth limit.

(c) *Assets of other individuals included as claimant's or beneficiary's assets—*

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

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

(3) *Claimant or beneficiary is a surviving child.*

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

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

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

(1) *Dependent child and potential dependent child.* For the purposes of this section, (i) "Dependent child" refers to a child for whom a veteran or a surviving spouse is entitled to an increased maximum annual pension rate; (ii) "Potential dependent child" refers to a child who is excluded from a veteran's or surviving spouse's pension award solely or partly because of this paragraph (d). References in this section to "dependent child" include a potential dependent child.

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

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

(4) *Dependent child annual income calculation.* VA will calculate a dependent child's annual income under § 3.271, and will include the annual income of the child as well as the annual income of the veteran or surviving spouse that would be included if VA were calculating a pension entitlement for the veteran or surviving spouse.

(e) *When VA calculates net worth.* VA calculates net worth only when:

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

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

NOTE TO PARAGRAPH (e).

If the evidence shows that net worth exceeds the net worth limit, VA may decide the pension claim before determining if the claimant meets other entitlement factors. VA will notify the claimant of the entitlement factors that have not been established. Caveat – Send in a complete application.

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

(1) *How assets decrease.* A veteran, surviving spouse, or child, or someone acting on their behalf, may decrease assets by spending them on any item or service for which fair market value is received unless the item or items purchased are themselves part of net worth. See § 3.276(a)(4) for the definition of "fair market value." The expenses must be those of the veteran, surviving spouse, or child, or a relative of the veteran, surviving spouse, or child. The relative must be a member or constructive member of the veteran's, surviving spouse's, or child's household.

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

(3) *Example 1.* For purposes of this example, presume the net worth limit is \$127,061 and the maximum annual pension rate (MAPR) is \$13,535. A claimant has assets of \$120,000 and annual income of \$24,000. Adding annual income to assets produces a net worth of \$144,000, which exceeds the net worth limit. However, the claimant is a patient in a nursing home and pays annual unreimbursed nursing home fees of \$29,000. Reasonably predictable unreimbursed medical expenses are deductible from annual income under § 3.272(g) to the extent that they exceed 5 percent of the applicable MAPR (here, \$28,324.25) from annual income, which decreases annual income to zero. The claimant's net worth is now \$120,000; therefore, net worth is within the limit to qualify for VA pension.

(4) *Example 2.* For purposes of this example, presume the net worth limit is 127,061 and the maximum annual pension rate (MAPR) is \$13,535. A claimant has assets of \$126,000 and annual income of \$11,500. Adding annual income to assets produces a net worth of \$137,500, which exceeds the net worth limit. The claimant pays reasonably predictable annual unreimbursed medical expenses of \$10,000. Unreimbursed medical expenses are deductible from annual income under § 3.272(g) to the extent that they exceed 5 percent of the applicable MAPR. VA subtracts the projected expenditures that exceed 5 percent of the applicable MAPR (here, \$9,323.25) from annual income, which decreases annual income to \$2,176.75. This decreases net worth to \$128,176.75, which is still over the limit. VA must deny the claim for excessive net worth.

(g) Effective dates of pension entitlement or increased entitlement after a denial, reduction, or discontinuance based on excessive net worth—

(1) *Scope of paragraph.* This paragraph (g) applies when VA has (i) Discontinued pension or denied pension entitlement for a veteran, surviving spouse, or surviving child based on the veteran's, surviving spouse's, or surviving child's excessive net worth; or (ii) Reduced pension or denied increased pension entitlement for a veteran or surviving spouse based on a dependent child's excessive net worth.

(2) *Effective date of entitlement or increased entitlement.* The effective date of entitlement or increased entitlement is the day net worth ceases to exceed the limit. For this effective date to apply, the claimant or beneficiary must submit a certified statement that net worth has decreased and VA must receive the certified statement before the pension claim has become finally adjudicated under § 3.160. This means that VA must receive the certified statement within 1 year after its decision notice to the claimant concerning the denial, reduction, or discontinuance unless the claimant appeals VA's decision. Otherwise, the effective date is the date VA receives a new pension claim. In accordance with § 3.277(a), VA may require the claimant or beneficiary to submit additional evidence as the individual circumstances may require.

(h) Reduction or discontinuance of beneficiary's pension entitlement based on excessive net worth—

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

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

(i) *Additional effective-date provisions for dependent children—(1) Establishing a dependent child on veteran's or surviving spouse's pension award results in increased pension entitlement.* When establishing a dependent child on a veteran's or surviving spouse's pension award results in increased pension entitlement for the veteran or surviving spouse, VA will apply the effective-date provisions in paragraphs (g) and (h) of this section. (2) *Establishing a dependent child on veteran's or surviving spouse's pension award results in decreased pension entitlement.* (i) When a dependent child's non-excessive net worth results in decreased pension entitlement for the veteran or surviving spouse, the effective date of the decreased pension entitlement rate (i.e., VA action to add the child to the award) is the end of the year that the child's net worth decreases.

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

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

(a) *Definitions pertaining to assets—(1) Assets.* The term *assets* means the fair market value of all property that an individual owns, including all real and personal property, unless excluded under paragraph (b) of this section, less the amount of mortgages or other encumbrances specific to the mortgaged or encumbered property. VA will consider the terms of the recorded deed or other evidence of title to be proof of ownership of a particular asset. *See also* § 3.276(a)(4), which defines "fair market value." (2) *Claimant.* (i) Except as provided in paragraph (a)(2)(ii) of this section, for the purposes of this section and § 3.276, *claimant* means a pension beneficiary, a dependent spouse, or a dependent or potential dependent child as described in § 3.274(d), as well as a veteran, surviving spouse, or surviving child pension applicant. (ii) For the purpose of paragraph (b)(1) of this section, *claimant* means a pension beneficiary or applicant who is a veteran, a surviving spouse, or a surviving child. (3) *Residential lot area.* For purposes of this section, *residential lot area* means the lot on which a residence sits that does not exceed 2 acres (87,120 square feet), unless the additional acreage is not marketable.

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

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

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

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

- (A) A nursing home or medical foster home;
- (B) A care facility other than a nursing home; or
- (C) The home of a family member for health care or custodial care.

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

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

Caveat: Assets include the following:

Principal of an IRA that is accessible without penalty plus distributions count as income.

§ 3.276 Asset transfers and penalty periods.

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

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

(2) *Covered asset* means an asset that—(i) was part of a claimant's net worth; (ii) was transferred for less than fair market value; and (iii) if not transferred, would have caused or partially caused the claimant's net worth to exceed the net worth limit under § 3.274(a).

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

(i) *Example 1.* For purposes of this example, presume the net worth limit under § 3.274(a) is \$127,061. A claimant's assets total \$115,000 and his annual income is zero. However, the claimant transferred \$30,000 by giving it to a friend. If the claimant had not transferred the \$30,000, his net worth would have been \$145,000, which exceeds the net worth limit. The claimant's covered asset amount is \$17,939, because this is the amount by which the claimant's net worth would have exceeded the limit due to the covered asset.

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

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

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

(ii) A voluntary asset transfer to, or purchase of, any financial instrument or investment that reduces net worth by transferring the asset to, or purchasing, the instrument or investment unless the claimant establishes that he or she has the ability to liquidate the entire balance of the asset for the claimant's own benefit. If the claimant establishes that the asset can be liquidated, the asset is included as net worth. Examples of such instruments or investments include—

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

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

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

(7) *Look-back period* means the 36-month period immediately preceding the date on which VA receives either an original pension claim or a new pension claim after a period of non-entitlement. This definition does not include any date before October 18, 2018.

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

(b) *General statement of policy pertaining to pension and covered assets*. VA pension is a needs-based benefit and is not intended to preserve the estates of individuals who have the means to support themselves. Accordingly, a claimant may not create pension entitlement by transferring covered assets. VA will review the terms and conditions of asset transfers made during the 36-month look-back period to determine whether the transfer constituted transfer of a covered asset. However, VA will disregard asset transfers made before October 18, 2018. In accordance with § 3.277(a), for any asset transfer, VA may require a claimant to provide evidence such as a Federal income tax return transcript, the terms of a gift, trust, or annuity, or the terms of a recorded deed or other evidence of title.

(c) *Exception for transfers as a result of fraud or unfair business practice*. An asset transferred as the result of fraud, misrepresentation, or unfair business practice related to the sale or marketing of financial products or services for purposes of establishing entitlement to VA pension will not be considered a covered asset. Evidence supporting this exception may include, but is not limited to, a complaint contemporaneously filed with State, local, or Federal authorities reporting the incident.

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

(1) VA rates or has rated the child incapable of self-support under § 3.356; (Under VA regs, this is a child who before age 18 became permanently incapable of self-support) and,

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

(e) *Penalty periods and calculations.* When a claimant transfers a covered asset during the look-back period, VA will assess a penalty period not to exceed 5 years. VA will calculate the length of the penalty period by dividing the total covered asset amount by the monthly penalty rate described in paragraph (e)(1) of this section and rounding the quotient down to the nearest whole number. The result is the number of months for which the VA will not pay pension.

(1) *Monthly penalty rate.* The monthly penalty rate is the maximum annual pension rate (MAPR) under 38 U.S.C. 1521(d)(2) for a veteran in need of aid and attendance with one dependent that is in effect as of the date of the pension claim, divided by 12, and rounded down to the nearest whole dollar. The monthly penalty rate is located on VA's website at www.benefits.va.gov/pension. **THE 2019 PENALTY RATE IS \$2230**

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

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

(4) *Example of penalty period calculation.* VA receives a pension claim in November 2018. The claimant's net worth is equal to the net worth limit. However, the claimant transferred covered assets totaling \$10,000 on September 20, 2018, and October 23, 2018. Therefore, the total covered asset amount is \$10,000, and the penalty period begins on November 1, 2018. Assume the MAPR for a veteran in need of aid and attendance with one dependent in effect in November 2018 is \$24,000. The monthly penalty rate is \$2,000. The penalty period is $\$10,000/\$2,000$ per month = 5 months. The fifth month of the penalty period is February 2019. The claimant may be entitled to pension effective February 28, 2019, with a payment date of March 1, 2019, if other entitlement requirements are met.

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

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

(ii) VA receives evidence showing that some or all covered assets were returned to the claimant before the date of claim or within 60 days after the date of VA's notice to the claimant of VA's decision concerning the penalty period. If covered assets are returned to the claimant, VA will recalculate or eliminate the penalty period. For this exception to apply, VA must receive the evidence not later than 90 days after the date of VA's notice to the claimant of VA's decision concerning the penalty period. Once covered assets are returned, a claimant may reduce net worth at the time of transfer under the provisions of § 3.274(f).

§ 3.278 Deductible medical expenses.

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

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

(1) *Health care provider* means: (i) an individual licensed by a State or country to provide health care in the State or country in which the individual provides the health care. The term includes, but is not limited to, a physician, physician assistant, psychologist, chiropractor, registered nurse, licensed vocational nurse, licensed practical nurse, and physical or occupational therapist; or (ii) a nursing assistant or home health aide who is supervised by a licensed health care provider as defined in paragraph (b)(1)(i) of this section.

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

(3) *Instrumental activities of daily living (IADLs)* mean independent living activities, such as shopping, food preparation, housekeeping, laundering, managing finances, handling medications, using the telephone, and transportation for non-medical purposes.

(4) *Custodial care* means regular: (i) assistance with two or more ADLs; or (ii) supervision because an individual with a physical, mental, developmental, or cognitive disorder requires care or assistance on a regular basis to protect the individual from hazards or dangers incident to his or her daily environment.

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

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

(7) *Care facility other than a nursing home* means a facility in which a disabled individual receives health care or custodial care under the provisions of paragraph (d) of this section. A facility must be licensed if facilities of that type are required to be licensed in the State or country in which the facility is located. A facility that is residential must be staffed 24 hours per day with care providers. The providers do not have to be licensed health care providers.

(8) *Needs A&A or is housebound* refers to a disabled individual who meets the criteria in § 3.351 for needing regular aid and attendance (A&A) or being housebound and is a: (i) Veteran; (ii) Surviving spouse; (iii) Parent (for parents' DIC purposes); or (iv) Spouse of a living veteran with a service-connected disability rated at least 30 percent disabling, who is receiving pension.

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

(1) *Care by a health care provider.* Payments to a health care provider for services performed within the scope of the provider's professional capacity are medical expenses. Cosmetic procedures that a health care provider performs to improve a congenital or accidental deformity or related to treatment for a diagnosed medical condition are medical expenses.

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

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

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

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

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

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

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

(d) *Institutional forms of care and in-home care.* This paragraph (d) applies with respect to claims for a medical expense deduction for institutional forms of care or in-home care received on or after October 18, 2018 that VA has not previously granted.

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

(2) *In-home care.* Payments for assistance with ADLs and IADLs by an in-home attendant are medical expenses as long as the attendant provides the disabled individual with health care or custodial care. Payments must be commensurate with the number of hours that the provider attends to the disabled person. The attendant must be a health care provider unless—(i) the disabled individual needs A&A or is housebound; or (ii) a physician, physician assistant, certified nurse practitioner, or clinical nurse specialist states in writing that, due to a physical, mental, developmental, or cognitive disorder, the individual requires the health care or custodial care that the in-home attendant provides.

(3) *Care facilities other than nursing homes.* (i) Care in a facility may be provided by the facility, contracted by the facility, obtained from a third-party provider, or provided by family or friends; (ii) Payments for health care provided by a health care provider are medical expenses; (iii) The provider does not need to be a health provider, and payments for assistance with ADLs and IADLs are medical expenses, if the disabled individual is receiving health care or custodial care in the facility and (A) the disabled individual needs A&A or is housebound, or (B) a physician, physician assistant, certified nurse practitioner, or clinical nurse specialist states in writing that, due to a physical, mental, developmental, or cognitive disorder, the individual needs to be in a protected environment; (iv) Payments for meals and lodging (and other facility expenses not directly related to health care or custodial care) are medical expenses if (A) the facility provides or contracts for health care or custodial care for the disabled individual, or (B) a physician, physician assistant, certified nurse practitioner, or clinical nurse specialist states in writing that the individual must reside in the facility (or a similar facility) to separately contract with a third-party provider to receive health care or custodial care or to receive (paid or unpaid) health care or custodial care from family or friends.

(e) *Non-medical expenses for VA purposes.* Payments for items and services listed in paragraphs (e)(1) through (4) of this section are not medical expenses for VA needs-based benefit purposes. The list is not all-inclusive.

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

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

(3) *Meals and lodging.* Except as provided in paragraph (d) of this section, payments for meals and lodging are not medical expenses.

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

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

This section sets forth payments that Federal statutes exclude from income for the purpose of determining entitlement to any VA-administered benefit that is based on financial need. Some of the exclusions also apply to assets (pension), also known as net worth or the corpus of the estate (section 306 pension and parents as dependents for compensation). VA will exclude from income or assets any amount designated by statute as not countable as income or resources, regardless of whether or not it is listed in this section.

NET WORTH AND TRANSFER RULES

Net Worth

- Net worth limit is equal to the maximum CSRA amount (currently \$127,061)
 - Increases per the Social Security benefit increase percentage each year
- Home is still not counted as part of net worth
- “Reasonable lot area” defined as not more than two acres unless the additional acreage is not marketable

Net Worth

- Includes all income and assets
- Assets: FMV of all property owned by the claimant and any dependents, less mortgages or other encumbrances
 - Exclusions: Home plus two acres, personal effects (rules specifically mention family transportation vehicles)

Lookback and Penalty Period

- 36 month lookback period
 - Triggered by the receipt of an original claim or a new claim following a period of non-entitlement
- Will not apply to transfers made prior to 10-18-18
- Only "covered assets" that are transferred will be penalized
 - An asset that was part of the claimant's net worth and if not transferred would have caused net worth to be over the limit

Example of Covered Assets (From the Rules)

- Claimant has \$115,900 and annual income of \$0 at the time of the VA application
- Gave a friend \$30,000 prior to applying for VA pension
 - If \$30,000 hadn't been transferred before application, net worth would have been \$145,900 and would have been excessive.
 - Covered asset amount is \$17,939 (\$145,900-\$127,061) and will incur a penalty

Lookback and Penalty Period

- Penalty period based on the MAPR for aid and attendance for a married Veteran
- Starts the month after the transfer is made
 - MAPR is divided by 12 to come up with the monthly amount
 - MAPR with one dependent used for a married veteran (\$2,169)
- Penalty period is rounded down

Example of Net Worth and Penalty Period

- Veteran owns one bank account with \$200,000.
- Annual income is \$24,000
- UMEs total \$34,000 (Therefore zero out income, difference not credited toward reducing assets.)
- Total net worth: \$200,000
 - Veteran transferred \$80,000 on Nov. 1, 2018
 - Filed for VA pension on Dec. 1, 2018
 - Net worth=\$120,000 (This is \$7,061 less than the net worth limit. Difference is deducted from the transferred amount = \$72,939
 - Penalty period - \$72,939 divided by \$2230= 32.70 rounded down to 32

Net Worth and Penalty Period

- Penalty would start on Dec. 1, 2018 and run for 32 months (rounded down from 32.70)

Lookback and Penalty Period

- Only amount of assets transferred that exceed the net worth limit are subject to penalty (“covered assets”)
 - Includes transfers to a trust or annuity (with exceptions that would cause them to be counted as an asset)
 - Five year cap on the penalty period

Exceptions to the Transfer Penalty

- The result of fraud or unfair business practice
- Transfer to a trust established for a child incapable of self-support prior to 18
 - No circumstances that the Veteran, Veteran's spouse or surviving spouse can benefit
- Transfer was from assets that were not over the \$123,600 limit

Curing a Gift

- Curing Gifts
 - May be a partial or total cure
 - Cure must be made before the claim was filed or within 60 days of the notice of penalty
 - Evidence of the return/cure must be received not later than 90 days after the notice of decision

Advising Clients

- As long as transfers were made by 10-17-18, they will not be penalized, regardless of the date of application
- Net worth rules at the time of application will apply

Advising Clients

- Adding owners to accounts won't decrease the value of the asset if done after 10-18. If done before then, will be evaluated under current rules.
- Take a proactive planning approach with those who aren't quite ready
 - get some assets into a properly drafted irrevocable trust now so no waiting for 36 months when they are ready

Medical Expense Deductions

Why are Medical Expenses Important?

- Just like under old pension law, medical expenses are an offset of income (IVAP) to extent they exceed 5% of Maximum Base Pension Rate (based on household size)
- There are substantial changes to what was a qualifying medical expense (deduction for IVAP)

Where to find new rules

- Deductible Medical expenses are part of 38 CFR 3.278
 - (b) defines terms
 - (c) medical expenses
 - Care, Medications, Supplements, Adaptive Equipment, Transportation expenses, Insurance premiums
 - (d) details in-home care and facility expenses
 - (e) exclusions from deductible expenses

ADL vs IADL

Expansion of ADLs to include IADL

IADL – Instrumental activity of daily living
Activities related to Independent living,
including, preparing meals, managing
money, shopping, performing light or
heavy housework, etc.

VA ADDED THESE IADLS

- Ambulating to traditional list of bathing, dressing, eating, toileting and transferring
- Medication Administration- licensed caregiver unless satisfied conditions of 3.278(d)

Licensure of Care Givers

- Important exception to licensure requirement for custodial care
 - Either assistance with 2 or more ADLS (like before)
 - Certification by health professional that due to a physical, mental, or cognitive disorder the individual requires [the custodial care]-
3.278(d)(2) and (3)(iv)(4)

Facility Based Care

- No change for skilled nursing care (still valid expense)
- Other facilities get a specific section in 3.278(d)(3). This represents expansion.
- Family members are OK to provide care (no pay requirement)
 - Licensed caregiver required unless claimant is housebound or needs A&A and is receiving medical care or custodial care (See (d)(3)(iv))

Previously Approved Applicants

- Comments are clear that intent was not to cause any previously approved claimant to see a reduction in benefits
- Trap is if the care provider changes, then subject to re-evaluation
 - Importance of certification letter

Summary

- Definition of medical expenses has been expanded
- Medical professional letters are very important
- Need for licensed professionals is reduced
- No cap on payments

Inclusion of Annuities and
Trusts in Definition of
“Transfer for Less Than Fair
Market Value”

Under new VA pension regs

DEFINITION OF ANNUITIES UNDER NEW REGS

ANNUITIES ARE SPECIFICALLY IDENTIFIED AS AN INSTRUMENT THE VA CONSIDERS AS A TRANSFER FOR LESS THAN FAIR MARKET VALUE UNDER CERTAIN CIRCUMSTANCES

§3.276 (a)(5)(ii)(A) ANNUITY MEANS A FINANCIAL INSTRUMENT THAT PROVIDES INCOME OVER A DEFINED PERIOD OF TIME FOR AN INITIAL PAYMENT OF PRINCIPAL.

IMMEDIATE ANNUITIES

- TWO KINDS OF IMMEDIATE ANNUITIES:
- **COMMUTABLE** - THEY CAN BE CASHED IN LESS A PENALTY
THIS KIND OF ANNUITY (ASSET) IS ONE WHERE THE CLAIMANT “ESTABLISHES THAT HE OR SHE HAS THE ABILITY TO LIQUIDATE THE ENTIRE BALANCE OF THE ASSET FOR THE CLAIMANT’S OWN BENEFIT. IF THE CLAIMANT ESTABLISHES THAT THE ASSET CAN BE LIQUIDATED, THE ASSET IS INCLUDED AS NET WORTH”
A COMMUTABLE IMMEDIATE ANNUITY IS NOT A DIVESTMENT BUT TREATED AS A DEFERRED ANNUITY. NO CONSIDERATION OF WITHDRAWAL PENALTY.

NON-TRANSFERABLE OR NON-COMMUTABLE ANNUITIES

NON-TRANSFERABLE IMMEDIATE ANNUITY

THE VOLUNTARY PURCHASE OF SUCH AN ANNUITY WITHIN THE 3-YEAR LOOK-BACK PERIOD IS SUBJECT TO A TRANSFER PENALTY. THIS APPLIES TO ANNUITIES PURCHASED AFTER OCTOBER 18, 2018.

THIS ALSO APPLIES TO A DEFERRED ANNUITY WHICH IS ANNUITIZED AFTER THE OCTOBER 18TH DATE. BUT ONLY WHEN THE AMOUNT DIVESTED INTO THE ANNUITY WAS IN EXCESS OF THE \$127,061 ASSET LIMIT

- PENALTY WOULD ALSO APPLY IF SPOUSE PURCHASES AN IMMEDIATE ANNUITY

EXCEPTION FOR ANNUITY PURCHASES AS A RESULT
OF FRAUD OR UNFAIR BUSINESS PRACTICES

- § 3.276(c) AN ASSET TRANSFERRED AS THE RESULT OF FRAUD, MISREPRESENTATION, OR UNFAIR BUSINESS PRACTICE RELATED TO THE SALE OR MARKETING OF FINANCIAL PRODUCTS OR SERVICES FOR PURPOSES OF ESTABLISHING ENTITLEMENT TO THE VA PENSION WILL NOT BE CONSIDERED A COVERED ASSET.
- EVIDENCE SUPPORTING THIS EXCEPTION MAY INCLUDE, BUT IS NOT LIMITED TO, A COMPLAINT CONTEMPORANEOUSLY FILED WITH STATE, LOCAL, OR FEDERAL AUTHORITIES REPORTING THE INCIDENT.

TO RECAP

DEPENDS ON IF YOU BOUGHT IT IN THE THREE YEAR LOOK-BACK PERIOD, IF IT CAN BE LIQUIDATED, AND IF ITS VALUE KEEPS THE NET WORTH UNDER THE \$127,061

IF AN ANNUITY CANNOT BE LIQUIDATED AND IT WAS PURCHASED BEFORE THE LOOK-BACK PERIOD, THEN THE ANNUITY IS NOT CONSIDERED AN ASSET; HOWEVER DISTRIBUTIONS COUNT AS INCOME AND THE TIMING OF THE PURCHASE COULD WARRANT A PENALTY PERIOD.

ANNUITIES COULD PRESENT A DOUBLE WHAMMY – NOT ONLY DOES THE VALUE COUNT BUT ALSO THE DISTRIBUTION OF THE INCOME

TRUSTS

- §3.276 (a)(5)(ii)(B) Trust means a legal instrument by which an individual (the grantor) transfers property to an individual or an entity (the trustee), who manages the property according to the terms of the trust, whether for the grantor's own benefit or for the benefit of another individual.

Three Types of Trusts, Revocable, Irrevocable, and Supplemental Needs Trusts

- ESTABLISHING A TRUST DOES NOT ALWAYS RESULT IN A PENALTY PERIOD.
- TRANSFERS TO ANNUITIES OR TRUSTS OVER WHICH A CLAIMANT RETAINS CONTROL AND THE ABILITY TO LIQUIDATE ARE TRANSFERS FOR FAIR MARKET VALUE AND NOT SUBJECT TO A PENALTY PERIOD.
- THEY CAN BE LIQUIDATED SO THEY ARE CONSIDERED AN ASSET.

The VA is using a very bright line of \$127,061. They call it a CSRA, but it is not because they count household income and assets.

- THEREFORE, WHETHER YOUR MONEY IS IN A TRUST OR NOT, AS LONG AS ITS CORPUS, ALONG WITH THE CLAIMANT'S INCOME AFTER UMEs ARE DEDUCTED IS UNDER \$127,061, THE CLAIMANT IS ELIGIBLE.

WHAT IF THE CORPUS EXCEEDS THE NET WORTH STANDARD?

- REVOCABLE TRUST – CORPUS GETS SPENT DOWN BEFORE ACHIEVING ELIGIBILITY
- IRREVOCABLE TRUST – FUNDING DATE IS CRITICAL. IF FUNDED BEFORE OCTOBER 18, 2018 AND CLAIMANT HAS NO CONTROL OVER THE INCOME OR PRINCIPAL NOT COUNTED. BUT...
- THE VA HAS CHALLENGED IRREVOCABLE GRANTOR TRUSTS OVER THE LAST FEW YEARS

Citation Nr: 1529488 Board of Veterans' Appeals decision

- GRANTOR AND NON-GRANTOR TRUSTS IN VA PENSION PLANNING

The distinction of a grantor vs. non-grantor trust is significant.

1. THE VA COMPARES INCOME REPORT TO THE IRS AND SSA RECORDS WITH THEIR RECORDS. THIS IS REFERRED TO AS AN INCOME VERIFICATION MATCH. (IVM)
2. IF A VETERAN ESTABLISHES A TRUST WHICH IS TAXED AS A GRANTOR TRUST, THE INCOME WILL BE ASSUMED BY THE VA TO BE THE CLAIMANT'S INCOME AND MAY PRECLUDE PENSION BENEFITS.
3. SAFEST TO STRUCTURE TRUST AS A NON-GRANTOR TRUST
4. CAVEAT – PROBLEM WITH PERSONAL RESIDENCE AND RETENTION OF PROPERTY TAX EXEMPTIONS AND CAPITAL GAIN EXCLUSIONS.

WHAT ABOUT SALE OF HOME DURING CLAIMANT'S LIFETIME?

- THE EFFECT OF A SALE IS TO CONVERT A NON-COUNTABLE ASSET INTO CASH, WHICH IS CONSIDERED IN CALCULATING NET WORTH.
- TO PRESERVE EXCLUSION OF GAIN (Internal Revenue Code §121 exclusion), THE TRUST MUST BE A GRANTOR TRUST.
- IT IS MY OPINION THAT A CLAIMANT'S PERSONAL RESIDENCE SHOULD BE HELD IN A GRANTOR TRUST WITH NO PROVISION FOR ACCESS TO INCOME OR PRINCIPAL. HOWEVER, ONCE SOLD, THE PROCEEDS SHOULD BE DISTRIBUTED OUT OF THE TRUST TO THE TRUST BENEFICIARIES OR TO A NON-GRANTOR TRUST.

POSITIVE CHANGE – SNTs ALLOWED

- THE VA WILL NOT CONSIDER AS A COVERED ASSET AN ASSET THAT A VETERAN, A VETERAN'S SPOUSE, OR A VETERAN'S SURVIVING SPOUSE TRANSFER TO A TRUST ESTABLISHED ON BEHALF OF A CHILD OF THE VETERAN IF:

- 1. THE VA RATES OR HAS RATED THE CHILD INCAPABLE OF SELF-SUPPORT UNDER § 3.356

§ 3.356 (a) – A CHILD MUST BE SHOWN TO BE PERMANENTLY INCAPABLE OF SELF-SUPPORT BY REASON OF MENTAL OR PHYSICAL DEFECT AT THE DATE OF ATTAINING THE **AGE OF 18** YEARS.

- 2. THERE IS NO CIRCUMSTANCE UNDER WHICH DISTRIBUTIONS FROM THE TRUST CAN BE USED TO BENEFIT THE VETERAN, THE VETERAN'S SPOUSE, OR THE VETERAN'S SURVIVING SPOUSE.