DEPARTMENT OF VETERANS AFFAIRS
ASSISTANT SECRETARY FOR PUBLIC AND INTERGOVERNMENTAL AFFAIRS
WASHINGTON DC 20420

F 2X 273-5717

Memorandum To: Kitty Higgins and Rahm Emanuel

From: Kathy Jurado Kathy Jurado

Subject: VA talking points on nicotine dependence including:

1) VA Under Secretary for Health opinion as to whether nicotine dependence may be considered a disease for compensatory purposes,
2) VA General Counsel opinion on eligibility for compensation based on nicotine dependence, and
3) Administration's proposed legislation.

Date: June 20, 1997

1) May 5, 1997 Opinion of VA Under Secretary for Health

May nicotine dependence be considered a disease for VA compensation purposes?

VA Under Secretary for Health determined that nicotine dependence may be considered a disease for compensation purposes. However, there are no scientific bases to determine how long it takes to become nicotine dependent. (See Attachments 1 & 2)

So can't tell whether they became dep. in service

What are some of the problems in identifying veterans who qualify? How will the VA identify

2) May 13, 1997 Opinion of VA General Counsel

Can VA pay compensation for disabilities or deaths attributable to veterans' use of tabacco products?

Veterans and their survivors are entitled to compensation for "service connected" disabilities or deaths, i.e. those due to injuries or diseases incurred or aggravated during military service. In a 1993 opinion, the former General Counsel determined that compensation is payable for disabilities or deaths attributable to veterans' use of tabacco products during service.

VA historically has also considered service connected on a "secondary" basis disabilities proximately due to service-connected diseases. In 1997, VA program officials asked the General Counsel for a formal opinion as to whether nicotine dependence acquired in service, leading to postservice smoking which ultimately causes physical illness (such as lung cancer or cardiovascular disease), can be the predicate for service connecting the smoking-related illness. In other words, is compensation payable for the results of even postservice smoking if it is due to nicotine dependence acquired in service?

The resulting May 13, 1997 opinion stated that the initial inquiry must be whether nicotine dependence is a disease. Citing a May 5, 1997, memorandum from the Under Secretary for Health to the effect that nicotine dependence may be considered a disease for VA-compensation purposes, the General Counsel stated that the remaining issues which must be decided in judging these claims are 1) whether the nicotine dependence was acquired in service, and 2) whether the nicotine dependence was the "proximate" cause of the claimed illness -- both acknowledged to be very difficult questions of fact.

Regarding the proximate-cause issue, the opinion stated the causal connection would be broken if, for example, there had been sustained full remission of the nicotine dependence following service and subsequent resumption of tabacco use, or exposure to a toxic substance which constituted a supervening cause of the claimed disability or death. (See Attachment 3)

OK

3) Administration's proposed legislation

Under current law, VA adjudicators in resolving a claim would have the burden of determining whether a veteran acquired a nicotine dependence during service and whether that nicotine dependence, which arose during service, is the proximate cause of disability -- both acknowledged to be very difficult questions of fact. However, the Administration has submitted legislation to Congress that would make it unnecessary to ascertain any link between inservice tobacco use and postservice diseases.

ok

The Administration proposes to amend Title 38 to prohibit service-connection of disabilities or deaths based solely on their being attributable, in whole or in part, to veterans' use of tobacco products during service. This proposal would not preclude establishing service-connection based on a finding that a disease or injury became manifest or was aggravated during active service, or became manifest to the requisite degree of disability during an applicable statutory presumptive period. Under current law, a veteran could be service-connected for diseases and conditions that could be caused by tobacco use and manifest themselves during service or an applicable presumptive period, regardless of whether the veteran used tobacco.

what?

The proposed legislation defines the limits of the government's responsibility as not encompassing a veteran's risks from smoking. This proposal would apply to the adjudication of new claims for monthly compensation filed after enactment and would not affect pending claims. The proposal is not an argument against the health consequences of smoking or the addictive nature of tobacco, which are well-recognized, but is a statement that reinforces the traditional role of the benefits system. The system was designed to aid veterans disabled while serving their country, who to varying degrees put themselves at risk, while carrying out their responsibilities as soldiers. (See Attachment 4)

what?

health care?
health care / financial?

Attachment 1

Department of Veterans Affairs

Memorandum

Date: APR 8 1997

From: General Counsel (022)

Subj: Request for Opinion -- Nicotine Dependence

To: Under Secretary for Health (10)

1. As you know, under 38 U.S.C. §§ 1110, 1131, and 1310, compensation is payable for disability "resulting from personal injury suffered or disease contracted in line of duty . . . in the active military, naval, or air service" and for death from a service-connected disability. Disability which is proximately due to or the result of a service-connected disease or injury is considered service connected under 38 C.F.R. § 3.310(a). A 1993 precedent opinion, VAOPGCPREC 2-93 (O.G.C. Prec. 2-93), held that direct service connection of disability or death may be established if the evidence establishes that injury or disease resulted from tobacco use in line of duty in the active military, naval, or air service. The opinion also noted that, if nicotine dependence is considered a disease or injury for compensation purposes, such dependence began in service, and resulting tobacco use led to disability subsequent to service, service connection could be established for that disability pursuant to 38 C.F.R. § 3.310(a).

2. The Veterans Benefits Administration (VBA) recently requested an opinion from this office regarding the circumstances under which service connection may be established for tobacco-related disability or death on the basis that such disability or death is secondary to nicotine dependence which arose from a veteran's tobacco use during service. In VAOPGCPREC 2-93, the General Counsel stated that nicotine dependence, which was classified by the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Third Edition Revised, as a psychoactive substance-use disorder, clearly would fall outside the scope of the term "injury." The same conclusion would follow under the Fourth Edition of the Diagnostic and Statistical Manual, which classifies nicotine dependence as a "substance use

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disorder." Resolution of the question posed by VBA, therefore, necessarily depends upon whether nicotine dependence may be considered a disease for compensation purposes.

3. In VAOPGCPREC 82-90 (O.G.C. Prec. 82-90), a precedent opinion discussing the definition of the term "disease" as used in 38 U.S.C. §§ 1110 and 1131, the General Counsel cited *Dorland's Illustrated Medical Dictionary* 385 (26th ed. 1974) as defining the term "disease" as "any deviation from or interruption of the normal structure or function of any part, organ, or system of the body that is manifested by a characteristic set of symptoms and signs and whose etiology, pathology, and prognosis may be known or unknown." The most recent edition of *Dorland's Illustrated Medical Dictionary* 478 (28th ed. 1994) provides virtually the same definition of "disease." The General Counsel also pointed out that, in *Durham v. United States*, 214 F.2d 862, 875 (D.C. Cir. 1954), the United States Court of Appeals for the District of Columbia Circuit indicated that the term "disease" refers to a condition which is capable of improvement or deterioration. *See also* VAOPGCPREC 67-90 (O.G.C. Prec. 67-90) (stating that a disease is usually capable of improvement or deterioration). As stated in VAOPGCPREC 2-93, a determination of whether nicotine dependence may be considered a disease for compensation purposes requires application of accepted medical principles relating to that condition. We therefore request your opinion as to whether, under the above criteria, and in light of the latest available information on nicotine dependence, including newly reported material concerning its etiology, pathology, and prognosis, nicotine dependence may be considered a disease for compensation purposes.

4. We request your prompt attention to this matter so that we may advise VBA, which is awaiting guidance prior to adjudicating numerous claims which have been set aside pending resolution of issues relating to tobacco-related disabilities.

Mary Lou Keener

Department of Veterans Affairs

Memorandum

Date: MAY 5 1997

From: Under Secretary for Health (10)

Subj: Request for Opinion – Nicotine Dependence

To: General Counsel (022)

1. In response to your request of April 9, 1997, regarding VHA's opinion as to whether nicotine dependence may be considered a disease for compensatory purposes, please be advised that the Diagnostic and Statistical Manual of Mental Disorders (4th edition) classifies nicotine dependence as a substance use disorder. Thus, I suppose that nicotine dependence may be considered a disease, as illustrated in your reference to VAOPGCPREC 67-90 (which states that a disease is usually capable of improvement or deterioration).

2. An individual who becomes dependent on nicotine can go into remission by eliminating the use of products/substances containing nicotine, such as tobacco products. Sometimes this is facilitated by or requires medical treatment.

3. I must point out that, however, another important issue in this regard is the time at which a person becomes dependent on nicotine, or for that matter, any substance. At present, there are no physiologic criteria, medical data, or other scientific bases to determine how long it takes to become dependent on nicotine. Dependence may occur after smoking the first few packs of cigarettes, or after the first month of smoking, or many months after starting to smoke.

4. For those persons whose nicotine dependence requires medical treatment, please be advised that there exists a variety of treatment regimens, including use of tapering doses of nicotine delivered by a skin patch or gum. When one quits smoking, with or without the assistance of medical treatment, I suppose you could consider the nicotine dependence to be in remission, although it is not customarily thought of in this way. However, since everyone is susceptible to the addictive potential of nicotine, as far as we know, it cannot be scientifically stated, at this time, whether the reoccurrence of nicotine dependence that would occur with resumption of tobacco use is a relapse of the original condition or a *de novo* reoccurrence of the condition.

5. Finally, please be advised that the use of "proximate" as related to disability or death caused by conditions associated with nicotine dependence, and as commonly defined, is not supported by medical evidence. For example, it cannot be medically determined that an individual who smoked and died from artherosclerosis or congestive heart failure (CHF) due to chronic obstructive pulmonary disease would not have died from CHF if

he/she did not smoke. Other risk factors such as diet, exercise, cholesterol levels, etc., also substantially influence the development of heart disease and the relative etiologic contribution of such factors cannot be scientifically apportioned.

6. If I may be of further assistance to you in this matter, please do not hesitate to contact my office.

Kenneth W. Kizer, M.D., M.P.H.

Attachment 3

Department of Veterans Affairs

Memorandum

Date May 13, 1997

VAOPGCPREC 19-97

From General Counsel (022)

Subj Secondary Service Connection Based on Nicotine Dependence

To Director, Compensation and Pension Service (21)

QUESTION PRESENTED:

Under what circumstances may service connection be established for tobacco-related disability or death on the basis that such disability or death is secondary to nicotine dependence which arose from a veteran's tobacco use during service?

COMMENTS:

1. Section 3.310(a) of title 38, Code of Federal Regulations, provides, in pertinent part, that, "[d]isability which is proximately due to or the result of a service-connected disease or injury shall be service connected." The disabling condition stemming from the service-connected disease or injury is referred to in the regulation as a "secondary condition." Where a claimant can establish that a disease or injury resulting in disability or death was a direct result of tobacco use during service, *e.g.*, damage done to a veteran's lungs by in-service smoking gave rise to lung cancer, service connection may be established without reference to section 3.310(a). However, where the evidence indicates a likelihood that a veteran's disabling illness had its origin in tobacco use subsequent to service, and the veteran developed a nicotine dependence during service which led to continued tobacco use after service, the issue then becomes whether the illness may be considered secondary to the service-incurred nicotine dependence and resulting disability or death may be service connected on that basis pursuant to section 3.310(a).

2. VAOPGCPREC 2-93 (O.G.C. Prec. 2-93) held that determination of whether nicotine dependence may be considered a disease for compensation purposes is essentially an adjudicative matter to be resolved by adjudicative personnel based on accepted medical principles. That opinion also noted in passing that, if nicotine dependence is considered a disease for compensation purposes, such dependence began in service, and resulting tobacco use led to disability, the issue would become whether secondary service connection could be estab-

lished for that disability pursuant to 38 C.F.R. § 3.310(a). The threshold question which must be answered with regard to claims for secondary service connection of tobacco-related disability or death is whether nicotine dependence may be considered a disease within the meaning of the veterans' benefit laws. *See* VAOPGCPREC 2-93, paras. 2-4. In a May 5, 1997, memorandum, the Under Secretary for Health, relying upon the criteria set forth in VAOPGCPREC 67-90 (O.G.C. Prec. 67-90), stated that nicotine dependence may be considered a disease for VA compensation purposes.

3. Assuming the conclusion of the Under Secretary for Health that nicotine dependence may be considered a disease for compensation purposes is adopted by adjudicators, secondary service connection may be established, under the terms of 38 C.F.R. § 3.310(a), only if a veteran's nicotine dependence, which arose in service, and resulting tobacco use may be considered the proximate cause of the disability or death which is the basis of the claim. We note initially that a determination of proximate cause is basically one of fact, for determination by adjudication personnel. VADIGOP, 3-17-71 (Vet). "Proximate cause" is defined by *Black's Law Dictionary* 1225 (6th ed. 1990) as "[t]hat which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces injury, and without which the result would not have occurred." This definition is very similar to the following definition of proximate cause adopted by the General Counsel of the Bureau of War Risk Insurance in a January 12, 1921, opinion, 13 Op. G.C. 141 (Bureau of War Risk Ins. 1921):

> An act which directly produced the injury * * *. That cause which naturally leads to and which might have been expected to produce the result. That from which the effect might be expected to follow without the concurrence of any unusual circumstances. That which immediately produces the effect as distinguished from a predisposing cause. (32 Cyc. 745).

See also VADIGOP 3-17-71 (Vet) (quoting same definition).

4. A subsequent event, which is referred to as an "intervening" cause, may interrupt the causal connection between an event or circumstance and subsequent incurrence of disability or death. *See, e.g., Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 1051-52 (5th Cir. 1983). An "intervening" cause which "'turns aside the[] course [of events],

prevents the natural and probable result of the original act or omission, and produces a different result that could not have been reasonably anticipated'" may be considered a supervening cause of injury which severs the causal connection between the original act and the injury. *Sheehan v. New York*, 354 N.E. 2d 832, 835-36 (N.Y. 1976) (quoting 1 Warren's N.Y. Negligence § 5.08). [1]

5. Again, assuming that adjudicators adopt the Under Secretary for Health's conclusion that nicotine dependence may be considered a disease, the two principal questions which must be answered by adjudicators in resolving a claim for benefits for tobacco-related disability or death secondary to nicotine dependence are: (1) whether the veteran acquired a dependence on nicotine during service; and (2) whether nicotine dependence which arose during service may be considered the proximate cause of disability or death occurring after service. With regard to the first question, determination of whether a veteran is dependent on nicotine is a medical issue. According to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (1994) (DSM-IV) at 243, the criteria for diagnosing substance dependence are generally to be applied in diagnosing nicotine dependence. Under those criteria, as applied to the specific circumstances surrounding nicotine use, nicotine dependence may be described as a maladaptive pattern of nicotine use leading to clinically significant impairment or distress, as manifested by three or more of the following criteria occurring at any time in the same 12-month period: (1) tolerance, as manifested by the absence of nausea, dizziness, and other characteristic symptoms despite use of substantial amounts of nicotine or a diminished effect observed with continued use of the same amount of

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[1] Relevant considerations in determining whether an "intervening" cause supercedes an earlier event as the proximate cause of an injury include: (1) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the original event; (2) the extraordinary, rather than normal, nature of the force's operation; (3) the fact that the intervening force is operating independently of any situation created by the original event or is or is not a normal result of such an event; (4) the fact that the operation of the intervening force is due to another's action or failure to act; (5) the fact that the intervening force is due to an act of another which is wrongful and subjects the actor to liability; and (6) the degree of culpability of a wrongful act of another which sets the intervening force in motion. Restatement (Second) of Torts § 442 (1965).

nicotine-containing products; (2) withdrawal, marked by appearance of four or more of the following signs within twenty-four hours of abrupt cessation of daily nicotine use or reduction in the amount of nicotine used: (a) dysphoric or depressed mood; (b) insomnia; (c) irritability, frustration, or anger; (d) anxiety; (e) difficulty concentrating; (f) restlessness; (g) decreased heart rate; or (h) increased appetite or weight gain; or by use of nicotine or a closely related substance to relieve or avoid withdrawal symptoms; (3) use of tobacco in larger amounts or over a longer period than was intended; (4) persistent desire or unsuccessful efforts to cut down or control nicotine use; (5) devotion of a great deal of time in activities necessary to obtain nicotine (*e.g.*, driving long distances) or use nicotine (*e.g.*, chain-smoking); (6) relinquishment or reduction of important social, occupational, or recreational activities because of nicotine use (*e.g.*, giving up an activity which occurs in smoking-restricted areas); and (7) continued use of nicotine despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by nicotine. *Id.* at 181, 243-45.

6. If it is determined that, as a result of nicotine dependence acquired in service, a veteran continued to use tobacco products following service, adjudicative personnel must determine whether the post-service usage of tobacco products was the proximate cause of the disability or death upon which the claim is predicated. As discussed above, a supervening cause of the disability or death would sever the causal connection to acquisition of the nicotine dependence in service. Post-service exposures to environmental or occupational toxins other than tobacco products may also be found, under the facts of particular cases, to constitute supervening causes of the disabilities or deaths so as to preclude findings of service connection.

7. Moreover, if a nicotine-dependent individual has achieved sustained full remission and then resumes use of tobacco products, the question arises whether such resumption constitutes a supervening cause which breaks the connection between the individual's prior tobacco use and disability or death resulting from resumed use of tobacco and results in de novo reoccurrence of the nicotine dependence. DSM-IV, at 180, indicates that sustained full remission is achieved when none of the criteria for nicotine dependence has been met for twelve months or longer. Where a veteran achieves sustained full remission of nicotine dependence following service and subsequently resumes tobacco use, and it can be determined that disability or death resulted from tobacco use, and a de novo dependence, which occurred after

Director, Compensation and Pension Service (21)

the resumption, the causal connection between nicotine dependence incurred during service and the claimed secondary condition should, in our view, be considered to have been severed.

HELD:

a. A determination as to whether service connection for disability or death attributable to tobacco use subsequent to military service should be established on the basis that such tobacco use resulted from nicotine dependence arising in service, and therefore is secondarily service connected pursuant to 38 C.F.R. § 3.310(a), depends upon whether nicotine dependence may be considered a disease for purposes of the laws governing veterans' benefits, whether the veteran acquired a dependence on nicotine in service, and whether that dependence may be considered the proximate cause of disability or death resulting from the use of tobacco products by the veteran. If each of these three questions is answered in the affirmative, service connection should be established on a secondary basis. These are questions that must be answered by adjudication personnel applying established medical principles to the facts of particular claims.

b. On the issue of proximate cause, if it is determined that, as a result of nicotine dependence acquired in service, a veteran continued to use tobacco products following service, adjudicative personnel must consider whether there is a supervening cause of the claimed disability or death which severs the causal connection to the service-acquired nicotine dependence. Such supervening causes may include sustained full remission of the service-related nicotine dependence and subsequent resumption of the use of tobacco products, creating a de novo dependence, or exposure to environmental or occupational agents.

Mary Lou Keener

THE SECRETARY OF VETERANS AFFAIRS

WASHINGTON

MAY 9 1997

The Honorable Newt Gingrich
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

Transmitted herewith is a draft bill, the "Veterans' Compensation Cost-of-Living Adjustment and Benefit Programs Improvement Act of 1997," to authorize a cost-of-living adjustment (COLA) for fiscal year (FY) 1998 in the rates of disability compensation and dependency and indemnity compensation (DIC), and to revise and improve certain veterans compensation, pension, and memorial affairs programs, and for other purposes. I request that this draft bill be referred to the appropriate committee for prompt consideration and enactment.

Section 101 of the draft bill would direct the Secretary of Veterans Affairs to increase administratively the rates of compensation for service-disabled veterans and of DIC for the survivors of veterans whose deaths are service related, effective December 1, 1997. The rate of increase would be the same as the COLA that will be provided under current law to veterans' pension and Social Security recipients, which is currently estimated to be 2.7 percent. We believe this proposed COLA is necessary and appropriate in order to protect the benefits of these most deserving recipients from the eroding effects of inflation. We estimate that enactment of this section, in conjunction with section 102 of this draft bill, would result in benefit costs of $330.7 million during FY 1998 and $1.94 billion over the five-year period beginning in FY 1998. The costs associated with the compensation COLA are considered to be part of the compensation baseline and not subject to the pay-as-you-go provisions of the Omnibus Budget Reconciliation Act of 1990.

Section 102 would require the Secretary of Veterans Affairs, in computing new rates of (or limitations affecting) disability compensation and DIC pursuant to the enactment of any legislation requiring the Secretary to increase such rates to provide a COLA for fiscal year 1998 and thereafter, to round down to the next lower whole dollar any rate that is not evenly divisible by one dollar. This proposal is consistent with the congressionally-mandated calculation methods applied to COLA's for fiscal years 1994, 1995, and 1996. We estimate this proposal would reduce FY 1998 benefit cost associated with the COLA proposed in section

The Honorable Newt Gingrich

101 of this draft bill by $17 million and reduce the five-year benefit cost for FY 1998 through FY 2002 by $287 million, as compared to the cost of that COLA and future COLAs based on rounding odd dollar amounts to the nearest whole dollar. The savings are subject to the pay-as-you-go provisions of the Omnibus Budget Reconciliation Act of 1990.

Section 103 would amend titles 26 and 38 of the United States Code to make permanent the authority of the Department of Veterans Affairs (VA) to access unearned income information from the Internal Revenue Service (IRS) and wage, self-employment, and retirement income information from the Social Security Administration (SSA) for purposes of income verification in determining eligibility for VA means-tested benefits such as pension and medical care for certain non-service-related illnesses or conditions.

Experience has shown that authority to match unearned income information from IRS and wage, self-employment, and retirement income information from SSA with VA data for purposes of income verification in determining eligibility for or the proper amount of VA means-tested benefits has been an effective savings measure and has had a significant program-abuse deterrent effect. We estimate that enactment of this proposal would result in savings in monetary benefits of $10 million in FY 1999 and $120 million during the four-year period beginning in FY 1999. These savings are subject to the pay-as-you-go provisions of the Ominibus Budget Reconciliation Act of 1990.

Section 104 would amend section 5503(f) of title 38, United States Code, to make permanent the $90 limitation on monthly VA pension payments that may be made to beneficiaries, without dependents, who are receiving Medicaid-covered nursing-home care. The current payment limitation, which is due to expire at the end of fiscal year 1998, works to the advantage of these nursing-home residents because it permits them to keep the $90 to apply toward personal expenses rather than have it "pass through" to the Medicaid program. This section would simply remove the existing September 30, 1998, expiration date for section 5503(f). We estimate this proposal would result in government-wide savings because a beneficiary's nursing-home care costs, previously paid for with VA pension benefits, would be paid for by the Medicaid program, which shares a portion of the costs with the States. Government-wide savings are estimated to be $206 million in FY 1999 and a total of $893 million during the four-year period beginning in FY 1999.

Under current law, direct service connection of a disability or death may be established if the evidence establishes that

injury or disease resulted from tobacco use in line of duty in the active military, naval, or air service, notwithstanding that the disability or death did not occur until after service and expiration of any applicable presumptive period. Section 105 would amend title 38, United States Code, by adding a new section that would have the effect of prohibiting service connection of a death or disability on the basis that it resulted from injury or disease attributable, in whole or in part, to the use of tobacco products by the veteran during the veteran's service. This amendment is consistent with the 1990 budget reconciliation act, in which Congress prohibited compensation for disabilities which are the result of veterans' abuse of alcohol and drugs. This was fiscally responsible action which enhanced the integrity of our compensation program, and our proposal regarding tobacco use is offered in that same spirit. In addition, claims based upon tobacco-related disorders present medical and legal issues which could impede ongoing efforts to speed claim processing by placing significant additional demands on the adjudicative system. This provision would not preclude establishment of service connection for disability or death from a disease or injury which became manifest or was aggravated during active service or became manifest to the requisite degree of disability during any applicable presumptive period specified in section 1112 or 1116 of title 38, United States Code. This amendment would apply to claims filed after the date of its enactment.

This provision would result in some level of benefit cost avoidance and avoid potential delays in claim processing resulting from increased workload.

Section 106 would authorize the Veterans Benefits Administration (VBA) to reimburse, from the general operating expenses account, the Veterans Health Administration (VHA) for the cost of medical examinations conducted with respect to veterans' claims for compensation or pension. Currently, such examinations are paid for out of VA's medical-care fund.

In order to assure that funding for compensation and pension medical examinations is available throughout FY 1998, appropriate language would need to be included in both the "Medical care" and "General operating expenses" appropriations. It is contemplated that VBA will enter into a memorandum of understanding with VHA to provide that, should funds budgeted under general operating expenses for the purpose of "purchasing" compensation and pension medical examinations prove insufficient, alternate funding under "Medical care" would be available to permit VHA to continue to provide these examinations. Medical care funds would be used for this purpose only in the event of a shortfall in general operat-

ing expenses. There are no costs or savings associated with this proposal.

Section 201(a) would amend section 2408(b) of title 38, United States Code, to make state cemetery grants more attractive to States. Section 2408 authorizes the Secretary of Veterans Affairs to make grants to States to assist them in establishing, expanding, or improving State veterans' cemeteries. Currently, the amount of a State cemetery grant is limited to 50 percent of the total of the value of the land to be acquired or dedicated for a cemetery and the cost of improvements to be made on the land. The remaining amount must be contributed by the State receiving the grant. Pursuant to the amendments proposed in this section, the amount of a State cemetery grant could not exceed, in the case of the establishment of a new cemetery, the total of the cost of improvements to be made on land to be converted into a cemetery and the initial cost of equipment necessary to operate the cemetery. In the case of the expansion or improvement of an existing cemetery, the amount of the grant could not exceed the total of the cost of improvements to be made on any land to be added to the cemetery combined with the cost of improvements to be made to the existing cemetery. If the amount of a grant should, for any reason, be less than the amount of those costs, the State receiving the grant would be required to contribute the remaining amount, in addition to providing any land necessary for the cemetery project.

Also, under current law, if at the time of a grant the State receiving the grant dedicates for the cemetery land which it already owns, the value of the land may constitute up to 50 percent of the State's contribution. Once that land value is so used, it may not constitute part of the State's contribution for any subsequent grant under section 2408. Under the amendments proposed in section 201(a) of this draft bill, a State would be responsible for providing any land required for a cemetery project, since the grant amount would no longer be based partly on the value of land to be acquired or dedicated for a cemetery.

We believe that excluding the value of land to be acquired for a cemetery from the basis of a grant would encourage states to be active partners in the cemetery grants program. In our experience, no State has acquired land for a cemetery in connection with a grant under section 2408. In every case, the State has dedicated land that was donated or transferred for that purpose, or land that it already owned. Further, any reduction of the basis from which a grant is calculated may be offset by an increase from 50 percent to up to 100 percent in the proportion of the amount of a project's cost that could be assumed by the Federal Government. Moreover, since, under the proposal, a grant may

cover the entire cost of improvements (and initial cost of equipment in certain cases), a State may not have to contribute cash toward the initial cost of a project.

Another feature that would make grants more attractive to States is the inclusion in the basis of a grant of the initial cost of equipment necessary to operate the cemetery. Providing funds to acquire the equipment necessary to operate a cemetery will, we believe, be a critical financial incentive to encourage States to establish new cemeteries. Such equipment is as essential to the establishment of an operational cemetery as are the land and the improvements made on it. However, because our proposed amendment includes only the *initial* cost of equipment for the *establishment* of a cemetery, the State would retain the responsibility for long-term maintenance and operation of the cemetery, including costs associated with the acquisition of replacement equipment. Each Federal grant would assist in the establishment and activation of new veterans' cemeteries, or in the expansion or improvement of existing cemeteries, but the States would bear the costs of continuing operation and long-term maintenance.

Section 201(b) of the draft bill would authorize "no-year" appropriations for the State cemetery grants program. Under current 38 U.S.C. § 2408(d), funds appropriated for State cemetery grants remain available only until the end of the second fiscal year following the fiscal year for which they are appropriated. However, in Public Law No. 104-204, 110 Stat. 2874 (1996), Congress appropriated funds for State cemetery grants, "to remain available until expended." Section 201(b) would amend section 2408(d) to reflect this no-year-funding policy.

The Office of Management and Budget advises that there is no objection to the submission of this draft bill to the Congress, and that its enactment would be in accord with the Administration's program.

Sincerely yours,

Jesse Brown

Enclosures
JB/fjb

105th Congress
1st Session

A BILL

To amend title 38, United States Code, to authorize a cost-of-living adjustment in the rates of disability compensation for veterans with service-connected disabilities and dependency and indemnity compensation for survivors of such veterans and to revise and improve certain veterans compensation, pension, and memorial affairs programs; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; REFERENCES TO TITLE 38, UNITED STATES CODE.

(a) SHORT TITLE.--This Act may be cited as the "Veterans' Compensation Cost-of-Living Adjustment and Benefit Programs Improvement Act of 1997".

(b) REFERENCES.--Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision,

the reference shall be considered to be made to a section or other provision of title 38, United States Code.

TITLE I-COMPENSATION AND PENSIONS

SEC. 101. INCREASE IN COMPENSATION RATES AND LIMITATIONS.

(a) IN GENERAL.-(1) The Secretary of Veterans Affairs shall, as provided in paragraph (2), increase, effective December 1, 1997, the rates of and limitations on Department of Veterans Affairs disability compensation and dependency and indemnity compensation.

(2) The Secretary shall increase each of the rates and limitations in sections 1114, 1115(1), 1162, 1311, 1313, and 1314 of title 38, United States Code, that were increased by the amendments made by the Veterans' Compensation Cost-of-Living Adjustment Act of 1996 (Public Law 104-263; 110 Stat. 3212). This increase shall be made in such rates and limitations as in effect on November 30, 1997, and shall be by the same percentage that benefit amounts payable under title II of the Social Security Act (42 U.S.C. 401 et seq.) are increased effective December 1, 1997, as a result of a determination under section 215(i) of such Act (42 U.S.C. 415(i)).

(b) SPECIAL RULE.-The Secretary may adjust administratively, consistent with the increases made under subsection (a)(2), the rates of disability compensation payable to persons within the purview of section 10 of Public Law 85-857 (72 Stat. 1263) who

SEC. 104. EXTENSION OF LIMITATION ON PENSION FOR CERTAIN RECIPIENTS OF MEDICAID-COVERED NURSING HOME CARE.

Section 5503(f) is amended by striking out paragraph (7).

SEC. 105. PROHIBITION REGARDING PAYMENT OF COMPENSATION FOR DISABILITY OR DEATH DUE TO TOBACCO USE.

(a) SERVICE CONNECTION.—Chapter 11 is amended by adding at the end of subchapter I the following new section:

"§ 1103. Special provisions relating to claims based upon effects of tobacco products.

"(a) Notwithstanding any other provision of law, a veteran's disability or death shall not be considered to have resulted from personal injury suffered or disease contracted in line of duty in the active military, naval, or air service for purposes of this title on the basis that it resulted from injury or disease attributable in whole or in part to the use of tobacco products by the veteran during the veteran's service.

"(b) Nothing in subsection (a) shall be construed as precluding the establishment of service connection for disability or death from a disease or injury which became manifest or was aggravated in active military, naval or air service or became manifest to the requisite degree of disability during any applicable presumptive period specified in section 1112 or 1116 of this title.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 11 is amended by adding the following new item after the item relating to section 1102:

"1103. Special provisions relating to claims based upon effects of tobacco products.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to claims filed after the date of enactment of this Act.

SEC. 106. REIMBURSEMENT OF COSTS ASSOCIATED WITH COMPENSATION AND PENSION MEDICAL EXAMINATIONS.

(a) AUTHORIZATION.-Chapter 77 of title 38, United States Code, is amended by adding at the end of subchapter I the following new section:

"**7705. Reimbursement for compensation and pension medical examinations.**

"(a) REIMBURSEMENT.-The Under Secretary for Benefits is authorized to reimburse the Veterans Health Administration for costs associated with the conduct of medical examinations requested by the Veterans Benefits Administration in connection with claims for benefits under this title.

"(b) SOURCE OF FUNDS.-Reimbursements under this section shall be made from amounts available to the Secretary of Veterans Affairs for payment of general operating expenses.".

(b) CLERICAL AMENDMENT.-The table of sections at the beginning of chapter 77 is amended by adding the following new item after the item relating to section 7703:

"7705. Reimbursement for compensation and pension medical examinations.".

TITLE II - MEMORIAL AFFAIRS

SECTION 201. STATE CEMETERY GRANTS PROGRAM.

(a)(1) AMOUNT OF GRANT RELATIVE TO PROJECT COST.-Section 2408(b) is amended by striking out paragraphs (1) and (2) and inserting in lieu thereof the following:

"(1) The amount of any grant under this section may not exceed—

"(A) in the case of the establishment of a new cemetery, the total of—

"(i) the cost of improvements to be made on the land to be converted into a cemetery, and

"(ii) the initial cost of equipment necessary to operate the cemetery; or

"(B) in the case of the expansion or improvement of an existing cemetery, the total of—

"(i) the cost of improvements to be made on any land to be added to the cemetery, and

"(ii) the cost of any improvements to be made

to the existing cemetery.

"(2) If the amount of a grant under this section is less than the amount of costs referred to in paragraph (1), the State receiving the grant shall contribute the amount by which the costs exceed the grant, in addition to any land acquired or dedicated by the State for the cemetery.".

2) EFFECTIVE DATE.-The amendment made by this subsection shall become effective 60 days after the date of enactment of this Act.

b) AUTHORIZATION OF NO-YEAR APPROPRIATIONS.-Section 2408(d) is amended by striking out "the end of the second fiscal year following the fiscal year for which they are appropriated" and inserting in lieu thereof "expended".

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ıahue, senior vice president of

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ondhand s e still in dispute.
Do ue onded, "That's the same

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proposed billion nationwide settle-
ment would eliminate such suits.

talks, the settlement intended to
of by state
governments and individual smokers

business practice" for orations to
deduct the of settling lawsuits.
"That's part of the " she said.

Opinion Eases Way for Veterans' Smoking-Related Illness Claims

ıo tobacco while on active
ıd subsequently became ill from
›-related diseases.

ner VA secretary Jesse Brown,
ft office this month, disagreed
e opinion, issued just days before
l of the Bush administration, and
essed for legislation that would
n it. Brown contended that
ıg was a voluntary action and, as
he government should not be
r injuries to smokers.

officials have acknowledged that the issue has far-reaching financial implications.

Meanwhile, officials in the VA's Compensation and Pension Office asked for guidance on how to begin processing an estimated 4,500 pending cases veterans and their survivors have filed.

The opinion by Keener attempts to address some of their questions. Keener accepted the concept that the government could be liable for smoking-related illnesses and made it easier for older veterans to file claims by classifying nicotine dependence as a secondary service-connected" condition. Under her decision, veterans or their families will have to show that the service member acquired the nicotine dependence while on active duty and that their illness caused a disability or death.

Ken McKinnon, a VA spokesman, cautioned that the department still believes the government should not pay compensation for smoking and is pressing for legislation that would block any new smoking claims. The VA will pay for any smoking-related condition, such as lung cancer or coronary illnesses, that occurs while a veteran is on active duty or shortly after, he said.

Philip Wilkerson, deputy director of operations for the American Legion, said the new opinion contains "the same kind of stringent criteria that apply to any other claim. They are simple, yet complex, [and] not particularly user friendly."

Smoking was widely accepted in the military during World War II, and as recently as the Vietnam era, troops in combat zones were given free cigarettes. Up to 50 percent of the military smoked 15 years ago, according to some surveys.

The VA has never estimated the financial impact of having to pay benefits for smoking-related ailments, but the department has estimated it could have 2.5 million claims filed over the next 10 years. The costs of those benefits would be "many millions" of dollars, according to one official.

Danny Devine, a spokesman for the House Veterans' Affairs Committee, said the panel hopes to hold hearings later this year.

The Department of Veterans Affairs, Office of Public Affairs
Press Guidance on Compensation for Tobacco-Related Disabilities

The Tuesday, July 15 issue of the *Federal Register* includes an opinion of the VA General Counsel that VA may compensate a veteran or his eligible survivors for the veteran's illness or death resulting from tobacco use begun during service. VA is sending guidance to Regional Offices and to veterans' organizations later this week to implement this policy.

Early this year, VA sent legislation to the Hill that would eliminate VA's responsibility for compensating tobacco-related illnesses.

Q's & A's:

Q. Whom will VA compensate for smoking-related illnesses under the new guidance?

A. Under the new guidance, the VA will compensate veterans who became ill during service; OR who first became nicotine-dependent during service, and as a result of that dependence, later developed a disabling illness or died.

Q. For what type of benefits (compensation, medical) are qualifying veterans eligible?

A. Qualifying veterans are eligible for monthly payments of compensation based upon the level of their disability and medical care for their service-connected injury or disease. Their survivors are eligible for benefits as well.

Q. How will VA's proposed legislation affect veterans?

A. VA interprets current law to allow veterans who began smoking during military service to qualify for compensation if they later develop a smoking-related illness. The VA's legislative proposal would end benefit eligibility for smoking-related illnesses that arise after service.

Q. What is the justification for VA's proposed legislation, given that nicotine is addictive and that the government distributed free cigarettes to service members?

A. VA's legislative proposal is based on the position that VA benefits were designed to assist those veterans who become ill or injured in executing military duties for their country. Compensating veterans for the results of their smoking simply exceeds the Government's responsibility to them. Service members have been as able as their civilian counterparts to weigh the potential health risks of using tobacco products.

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Press Guidance on Compensation for Tobacco-Related Disabilities

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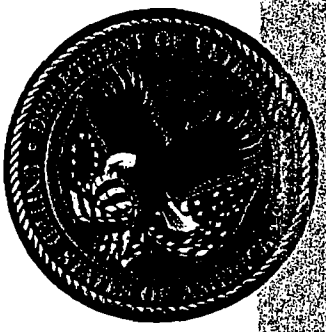

Department of Veterans Affairs

Office of the Assistant Secretary for Public & Intergovernmental Affairs

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To: April Melody, White House Communications — Phone: 456-6710
Hima Vatti, Domestic Policy Council — FAX: 456-7431

From: Kathy Jurado

Date: July 15, 1997

Pages: 7

Contents:

We have made a change in language regarding the cost estimate. It now reads "VA estimates a 10-year caseload of over 2.5 million claims from veterans and survivors and is currently developing a cost estimate for these claims."

DEPARTMENT OF VETERANS AFFAIRS

Summary of Precedent Opinions of the General Counsel

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

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

FOR FURTHER INFORMATION CONTACT: Jane L. Lehman, Chief Law Librarian, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273-6558.

SUPPLEMENTARY INFORMATION: VA regulations at 38 CFR 2.6(e)(9) and 14.507 authorize the Department's General Counsel to issue written legal opinions having precedential effect in adjudications and appeals involving veterans' benefits under laws administered by VA. The General Counsel's interpretations on legal matters, contained in such opinions are conclusive as to all VA officials and employees not only in the matter at issue but also in future adjudications and appeals, in the absence of a change in controlling statute or regulation or a superseding written legal opinion of the General Counsel.

VA publishes summaries of such opinions in order to provide the public with notice of those interpretations of the General Counsel that must be followed in future benefit matters and to assist veterans benefit claimants and their representatives in the prosecution of benefit claims. The full text of such opinions, with personal identifiers deleted, may be obtained by contacting the VA official named above.

VAOPGCPREC 19-97

Question Presented

Under what circumstances may service connection be established for tobacco-related disability or death on the basis that such disability or death is secondary to nicotine dependence which arose from a veteran's tobacco use during service?

Held

a. A determination as to whether service connection for disability or death attributable to tobacco use subsequent to military service should be established on the basis that such tobacco use resulted from nicotine dependence arising in service, and therefore is secondarily service connected pursuant to 38 CFR § 3.310(a), depends upon whether nicotine dependence may be considered a disease for purposes of the laws governing veterans' benefits, whether the veteran acquired a dependence on nicotine in service, and whether that dependence may be considered the proximate cause of disability or death resulting from the use of tobacco products by the veteran. If each of these three questions is answered in the affirmative, service connection should be established on a secondary basis. These are questions that must be answered by adjudication personnel applying established medical principles to the facts of particular claims.

b. On the issue of proximate cause, if it is determined that, as a result of nicotine dependence acquired in service, a veteran continued to use tobacco products following service, adjudicative personnel must consider whether there is a supervening cause of the claimed disability or death which severs the causal connection to the service-acquired nicotine dependence. Such supervening causes may include sustained full remission of the service-related nicotine dependence and subsequent resumption of the use of tobacco products, creating a de novo dependence, or exposure to environmental or occupational agents.

Effective Date: May 13, 1997.

The Department of Veterans Affairs, Office of Public Affairs Press Guidance on Compensation for Tobacco-Related Disabilities

The Tuesday, July 15 issue of the *Federal Register* includes an opinion of the VA General Counsel that VA may compensate a veteran or his or her eligible survivors for the veteran's illness or death resulting from tobacco use arising after discharge that is secondary to nicotine dependence incurred during service. The Office of Public Affairs is prepared to facilitate anticipated media interviews. Facility public affairs officers should forward media inquiries to regional Offices of Public Affairs.

The opinion was issued following a request by VA's Compensation and Pension Service for guidance on how to proceed adjudicating disability claims related to in-service tobacco use. In consultation with the Under Secretary for Health, General Counsel determined that veterans or their survivors may be compensated for disability or death due to tobacco use following discharge from service if that tobacco use resulted from nicotine dependence arising in service. In a 1993 opinion, the General Counsel held that death or disability due to an injury or disease resulting from tobacco use while on active duty is compensable, even if the disease or injury does not become evident until after service discharge.

VA has proposed legislation that would prohibit service-connection for an injury or disease resulting from tobacco use while on active duty which became manifest after service and beyond any presumptive period. This proposal would apply to new compensation claims, would not affect pending claims and would not preclude establishing compensation if the injury or disease became manifest or was aggravated during active service, or during an applicable statutory presumptive period.

VA believes veterans' compensation benefits were designed to assist those veterans who become ill or are injured in service to their country and that the government is not responsible for the adverse results of tobacco use.

VBA is sending guidance to Regional Offices for adjudicators of tobacco-related claims. Currently 4,500 claims are pending. VA estimates a 10-year caseload of over 2.5 million claims from veterans and survivors and is currently developing a cost estimate for these claims.

Q's & A's:

Q. Under what circumstances would VA compensate veterans for smoking-related illnesses now?

A. VA would compensate for disabilities or deaths from illnesses related to tobacco use under the following circumstances:
• The injury or disease appeared during service or during an applicable post-service presumptive period; or

-more-

• The injury or disease first appeared after military service and it can be established that the injury or disease resulted from in-service tobacco use; or
• The injury or disease first appeared after service AND it can be shown that: the veteran first became nicotine-dependent during service; as a result of that dependence, the veteran continued to use tobacco products after service; and the use of tobacco products after service proximately caused the veteran's disability or death.

Q. For what type of benefits (compensation, medical) are qualifying veterans eligible?

A. Qualifying veterans are eligible for monthly payments of compensation based upon the level of their disability and medical care for their service-connected injury or disease. Their survivors are eligible for monthly payments of dependency and indemnity compensation if the veteran's death is due to a service-connected disease or injury.

Q. How will VA adjudicators grant service-connection for tobacco use?

The 1997 GC opinion states that, in claims involving disability or death allegedly resulting from nicotine dependence acquired in service, adjudicators must answer the following questions:

1. Did the veteran become dependent on nicotine while in service?
2. Did the veteran continue to use tobacco products following service as a result of nicotine dependence acquired during service?
3. Did the use of tobacco products following service proximately cause the veteran's disability or death or did a supervening cause sever the causal connection to the nicotine dependence during service? Examples of a supervening cause are exposure to environmental or occupational agents or restarting tobacco use after not using such products after sustained full remission of nicotine dependence.

Q. Will VA propose a change in this policy?

A. Legislation proposed by VA in May 1997 would rule out service connection for a tobacco related disability or death arising after service which is due to nicotine dependence acquired during service. The legislation would apply to claims filed after the date on which the legislation is enacted.

-more-

Q. Under the proposed legislation would VA benefits be payable for any tobacco-related injury or disease?

A. The proposed legislation would not preclude service connection for:
• an injury or disease which became manifest in service;
• a disease which became manifest within a specified post-service period mandated by statute or regulation.

Q. Wouldn't this change in compensation policy be inconsistent with the characterization of nicotine dependence as a disease, or unfair in view of the government's distribution of free cigarettes to servicemembers?

A. No. VA's legislative proposal is based on the position that compensating veterans for the results of their tobacco use, notwithstanding nicotine's addictive properties, simply exceeds the Government's responsibility to them. Veterans' compensation benefits were designed to assist those veterans who become ill or are injured in service to their country. The government's responsibility does not encompass a veteran's risks from tobacco use. VA will process these claims based on the guidance from its General Counsel, but believes legislation should be passed precluding the payment of compensation for disability or death due to tobacco use.

ADDITIONAL QUESTIONS AND ANSWERS PREPARED AT THE REQUEST OF THE WHITE HOUSE DOMESTIC POLICY COUNCIL

Q. Under what circumstances would the VA compensate veterans for smoking-related illnesses now?

A. VA would compensate for disabilities or deaths from smoking-related illnesses under the following circumstances:

- The illness actually appeared during service (in which case its smoking causation would not even be in issue);
- The illness first appeared after military service, but can be attributed to smoking in service; or
- The illness first appeared postservice, but it can be shown the veteran first became nicotine dependent in service, that dependence resulted in postservice smoking, and the postservice smoking caused the illness.

Q. What type of compensation do qualifying veterans receive (e.g. health care, financial)?

A. Veterans receive monthly cash payments ("disability compensation") in amounts based on their levels of disability, and are eligible for free VA health care for these illnesses. Their surviving spouses are eligible for monthly cash payments ("dependency and indemnity compensation") for deaths due to these illnesses.

Q. Now that the VA has found that nicotine is addictive (that nicotine addiction is a disease), will the VA change its policies?

A. Prior to the May 13, 1997 opinion of VA's General Counsel, VA had no established policy regarding compensation for results of postservice smoking based on nicotine dependence beginning in service. The potential for benefit eligibility on that basis has now been established.

Q. How would VA's proposed legislation change this policy?

A. VA has proposed legislation to preclude benefit eligibility that, under current law, could be established for diseases arising post service only on the basis of the diseases' relation to smoking in service. VA's legislation:

- would not preclude awarding benefits for smoking-related illnesses that become manifest in service;
- would not preclude benefits for illnesses which are presumed under law to be service related if they appear within prescribed periods following separation from service (these include, e.g., for all veterans, cancers or certain heart diseases becoming manifest within one year following service; for Vietnam veterans, certain cancers including lung cancer arising anytime after service because of their possible connection to herbicide exposure); and
- would apply only to claims filed after the legislation's enactment.

Q. Wouldn't this change in compensation policy be inconsistent with the characterization of nicotine dependence as a disease?

A. No. VA's legislative proposal is based on the position that compensating veterans for the results of their smoking, notwithstanding nicotine's addictive properties, simply exceeds the Government's responsibility to them.

Q. Isn't this proposal particularly unfair in view of the Government's distribution of free cigarettes to service members?

A. While it is true the military services have facilitated servicemembers' smoking habits, smoking has never been required -- many veterans have never smoked -- and members are as able as their civilian counterparts to weigh the potential health risks of using tobacco products.

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ACTIVITY REPORT ***
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Department of Veterans Affairs
Washington, DC 20420

Office of Public Affairs
Office of the Deputy Assistant Secretary

Fax Cover Sheet

DATE: 7/14/97

TO:
APRIL MELODY, White House Communications
HIMA VATTI, Domestic Policy Council

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FROM:
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Number of pages including cover sheet: 6

Message

The Department of Veterans Affairs, Office of Public Affairs
Press Guidance on Compensation for Tobacco-Related Disabilities

The Tuesday, July 15 issue of the *Federal Register* is expected to include an opinion of the VA General Counsel that VA may compensate a veteran or his eligible survivors for the veteran's illness or death resulting from tobacco use ~~arising after discharge that is secondary to nicotine dependence incurred~~ initiated during service. The Office of Public Affairs is prepared to facilitate anticipated media interviews. Facility public affairs officers should forward media inquiries to regional Offices of Public Affairs.

The opinion was issued following a request by VA's Compensation and Pension Service for guidance on how to proceed adjudicating disability claims related to in-service tobacco use. In consultation with the Under Secretary for Health, General Counsel determined that veterans or their survivors may be compensated for disability or death due to tobacco use following discharge from service if that tobacco use resulted from nicotine dependence arising in service. In a 1993 opinion, the General Counsel held that death or disability due to an injury or disease resulting from tobacco use while on active duty is compensable even if the disease or injury does not become evident until after service discharge.

VA has proposed legislation that would prohibit service-connection for an injury or disease resulting from tobacco use while on active duty which became manifest after service ~~and beyond any presumptive period~~. This proposal would apply to new compensation claims, would not affect pending claims and would not preclude establishing compensation if the injury or disease became manifest or was aggravated during active service, or ~~during an applicable statutory presumptive period~~.

VA believes veterans' compensation benefits were designed to assist those veterans who become ill or are injured in service to their country and that the government is not responsible for the adverse results of tobacco use.

VBA is sending guidance to Regional Offices for adjudicators of tobacco-related claims. Currently 4,500 claims are pending. VA estimates a 10-year caseload of over 2.5 million claims from veterans and survivors with a potential cost in the tens of billions of dollars.

Q's & A's:

Q. Under what circumstances ~~would~~ VA compensate veterans for smoking-related illnesses ~~now~~?

A. VA would compensate for disabilities or deaths from illnesses related to tobacco use under the following circumstances:
• The injury or disease appeared during service or ~~during an applicable post-service presumptive period~~; or

• The injury or disease first appeared after military service and it can be established that the injury or disease resulted from in-service tobacco use; or
• The injury or disease first appeared after service AND it can be shown that: the veteran first became nicotine-dependent during service; as a result of that dependence, the veteran continued to use tobacco products after service; and the use of tobacco products after service proximately caused the veteran's disability or death.

Q. For what type of benefits (compensation, medical) are qualifying veterans eligible?

A. Qualifying veterans are eligible for monthly payments of compensation based upon the level of their disability and medical care for their service-connected injury or disease. Their survivors are eligible for monthly payments of dependency and indemnity compensation if the veteran's death is due to a service-connected disease or injury. also for benefits

Q. How will VA adjudicators grant service-connection for tobacco use?

The 1997 GC opinion states that, in claims involving disability or death allegedly resulting from nicotine dependence acquired in service, adjudicators must answer the following questions:

1. Did the veteran become dependent on nicotine while in service?
2. Did the veteran continue to use tobacco products following service as a result of nicotine dependence acquired during service?
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Q. Will VA propose a change in this policy?

A. Legislation proposed by VA in May 1997 would rule out service connection for a tobacco-related disability or death arising after service which is due to nicotine dependence acquired during service. The legislation would apply to claims filed after the date on which the legislation is enacted.

Q. Under the proposed legislation would VA benefits be payable for any tobacco-related injury or disease?

A. The proposed legislation would not preclude service connection for:
- an injury or disease which became manifest in service;
- a disease which became manifest within a specified post-service period mandated by statute or regulation.

Q. Wouldn't this change in compensation policy be inconsistent with the characterization of nicotine dependence as a disease, or unfair in view of the government's distribution of free cigarettes to servicemembers?

A. No. VA's legislative proposal is based on the position that compensating veterans for the results of their tobacco use, notwithstanding nicotine's addictive properties, simply exceeds the Government's responsibility to them. Veterans' compensation benefits were designed to assist those veterans who become ill or are injured in service to their country. The government's responsibility does not encompass a veteran's risks from tobacco use. VA will process these claims based on the guidance from its General Counsel, but believes legislation should be passed precluding the payment of compensation for disability or death due to tobacco use.

7/15/97; 80f

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Q. Now that the VA has found that nicotine is addictive (that nicotine addiction is a disease), will the VA change its policies?

A. Prior to the May 13, 1997 opinion of VA's General Counsel, VA had no established policy regarding compensation for results of postservice smoking based on nicotine dependence beginning in service. The potential for benefit eligibility on that basis has now been established.

Q. How would VA's proposed legislation change this policy?

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Washington, DC 20420

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VA has proposed legislation that would prohibit service-connection for an injury or disease resulting from tobacco use while on active duty which became manifest after service ~~and beyond any presumptive period~~ w/in one year. This proposal would apply to new compensation claims, would not affect pending claims and would not preclude establishing compensation if the injury or disease became manifest or was aggravated during active service, or ~~during an applicable statutory presumptive period~~ within one year of leaving the Service.

VA believes veterans' compensation benefits were designed to assist those veterans who become ill or are injured in service to their country and that the government is not responsible for the adverse results of tobacco use.

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2. Did the veteran continue to use tobacco products following service as a result of nicotine dependence acquired during service?
3. Did the use of tobacco products following service proximately cause the veteran's disability or death or did a supervening cause sever the causal connection to the nicotine dependence during service? Examples of a supervening cause are exposure to environmental or occupational agents or restarting tobacco use after not using such products after sustained full remission of nicotine dependence.

Q. Will VA propose a change in this policy?

A. Legislation proposed by VA in May 1997 would rule out service connection for a tobacco-related disability or death arising after service which is due to nicotine dependence acquired during service. The legislation would apply to claims filed after the date on which the legislation is enacted.

Q. Under the proposed legislation would VA benefits be payable for any tobacco-related injury or disease? \ maybe mention illnesses that could've have had a concurrent cause like Agent Orange.

A. The proposed legislation would not preclude service connection for:
- an injury or disease which became manifest in service;
- a disease which became manifest within a specified post-service period mandated by statute or regulation.

Q. Wouldn't this change in compensation policy be inconsistent with the characterization of nicotine dependence as a disease, or unfair in view of the government's distribution of free cigarettes to servicemembers?

A. No. VA's legislative proposal is based on the position that compensating veterans for the results of their tobacco use, notwithstanding nicotine's addictive ~~properties~~, simply exceeds the Government's responsibility to them. ~~Veterans' compensation benefits were designed to assist those veterans who become ill or are injured in service to their country~~. The government's responsibility does not encompass a veteran's risks from tobacco use. VA will process these claims based on the guidance from its General Counsel, but believes legislation should be passed precluding the payment of compensation for disability or death due to tobacco use.

7/15/97; 80f

ADDITIONAL QUESTIONS AND ANSWERS PREPARED AT THE REQUEST OF THE WHITE HOUSE DOMESTIC POLICY COUNCIL

Q. Under what circumstances would the VA compensate veterans for smoking-related illnesses now?

A. VA would compensate for disabilities or deaths from smoking-related illnesses under the following circumstances:

- The illness actually appeared during service (in which case its smoking causation would not even be in issue);
- The illness first appeared after military service, but can be attributed to smoking in service; or
- The illness first appeared postservice, but it can be shown the veteran first became nicotine dependent in service, that dependence resulted in postservice smoking, and the postservice smoking caused the illness.

Q. What type of compensation do qualifying veterans receive (e.g. health care, financial)?

A. Veterans receive monthly cash payments ("disability compensation") in amounts based on their levels of disability, and are eligible for free VA health care for these illnesses. Their surviving spouses are eligible for monthly cash payments ("dependency and indemnity compensation") for deaths due to these illnesses.

Q. Now that the VA has found that nicotine is addictive (that nicotine addiction is a disease), will the VA change its policies?

A. Prior to the May 13, 1997 opinion of VA's General Counsel, VA had no established policy regarding compensation for results of postservice smoking based on nicotine dependence beginning in service. The potential for benefit eligibility on that basis has now been established.

Q. How would VA's proposed legislation change this policy?

A. VA has proposed legislation to preclude benefit eligibility that, under current law, could be established for diseases arising postservice only on the basis of the diseases' relation to smoking in service. VA's legislation:

- would not preclude awarding benefits for smoking-related illnesses that become manifest in service;
- would not preclude benefits for illnesses which are presumed in law to be service related if they appear within prescribed periods following separation from service (these include, e.g., for all veterans, cancers or certain heart diseases becoming manifest within one year following service; for Vietnam veterans, certain cancers including lung cancer arising anytime after service because of their possible connection to herbicide exposure); and
- would apply only to claims filed after the legislation's enactment.

Q. Wouldn't this change in compensation policy be inconsistent with the characterization of nicotine dependence as a disease?

A. No. VA's legislative proposal is based on the position that compensating veterans for the results of their smoking, notwithstanding nicotine's addictive properties, simply exceeds the Government's responsibility to them.

Q. Isn't this proposal particularly unfair in view of the Government's distribution of free cigarettes to service members?

A. While it is true the military services have facilitated servicemembers' smoking habits, smoking has never been required -- many veterans have never smoked -- and members are as able as their civilian counterparts to weigh the potential health risks of using tobacco products.

Memorandum To: Joe Lockhart, White House Communications
CC: Barry Toiv, White House Communications

From: Kathy Jurado, VA Public Affairs Kathy Jurado

Subject: Nicotine Dependency

Date: July 8, 1997

Barry Toiv asked me to follow up with you prior to the release of a VA General Counsel memorandum on VA compensation of military veterans with tobacco related illnesses.

We have been informed that the *Federal Register* will publish an opinion of the VA General Counsel that VA may compensate a veteran with a tobacco related illness if determination is made that the nicotine dependence was acquired in service and the nicotine dependence is the proximate cause of the claimed illness.

The Administration has proposed legislation to amend Title 38 to prohibit service-connection of disabilities or deaths based solely on their being attributable, in whole or in part, to veterans' use of tobacco products during service. This proposal would apply to new compensation claims and not affect pending claims and would not preclude establishing service-connection based on a finding that a disease or injury became manifest or was aggravated during active service, or during an applicable statutory presumptive period.

The media has described the Administration's position on this issue as incompatible with it's overall position on smoking. We disagree, arguing that it is the position of the Administration that the Veterans Benefits System was designed to assist those veterans who were injured in service to their country and that the government's responsibility does not encompass a veteran's risks from smoking.

We expect the VA General Counsel opinion will be published in the *Federal Register* the week of July 14. In anticipation of that publication we plan to distribute the opinion, this week, to media outlets that have requested it in advance. These outlets are the *Washington Post, Wall Street Journal, ABC Nightly News* and the *Jacksonville Times Union (FL)*, Washington Times

I have attached for your review talking points and questions and answers prepared at the request of White House Cabinet Affairs, the Domestic Policy Council and Mr. Emanuel.

If I can answer any questions for you, do not hesitate to page me at 800-SKY-PAGE, PIN #3476819. I will be in San Diego for the remainder of the week, but Jim Holley, Deputy Assistant Secretary, VA Public Affairs, will be available at 202-273-5710.

Q. Under what circumstances would the VA compensate veterans for smoking-related illnesses now?

A. VA would compensate for disabilities or deaths from smoking-related illnesses under the following circumstances:

- The illness actually appeared during service (in which case its smoking causation would not even be in issue);
- The illness first appeared after military service, but can be attributed to smoking in service; or
- The illness first appeared postservice, but it can be shown the veteran first became nicotine dependent in service, that dependence resulted in postservice smoking, and the postservice smoking caused the illness.

Q. What type of compensation do qualifying veterans receive (e.g. health care, financial)?

A. Veterans receive monthly cash payments ("disability compensation") in amounts based on their levels of disability, and are eligible for free VA health care for these illnesses. Their surviving spouses are eligible for monthly cash payments ("dependency and indemnity compensation") for deaths due to these illnesses.

Q. Now that the VA has found that nicotine is addictive (that nicotine addiction is a disease), will the VA change its policies?

A. Prior to the May 13, 1997 opinion of VA's General Counsel, VA had no established policy regarding compensation for results of postservice smoking based on nicotine dependence beginning in service. The potential for benefit eligibility on that basis has now been established.

Q. How would VA's proposed legislation change this policy?

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- would not preclude awarding benefits for smoking-related illnesses that become manifest in service;
- would not preclude benefits for illnesses which are presumed in law to be service related if they appear within prescribed periods following separation from service (these include, e.g., for all veterans, cancers or certain heart diseases becoming manifest within one year following service; for Vietnam veterans, certain cancers including lung cancer arising anytime after service because of their possible connection to herbicide exposure); and
- would apply only to claims filed after the legislation's enactment.

Q. Wouldn't this change in compensation policy be inconsistent with the characterization of nicotine dependence as a disease?

A. No. VA's legislative proposal is based on the position that compensating veterans for the results of their smoking, notwithstanding nicotine's addictive properties, simply exceeds the Government's responsibility to them.

Q. Isn't this proposal particularly unfair in view of the Government's distribution of free cigarettes to service members?

A. While it is true the miltary services have facilitated servicemembers' smoking habits, smoking has never been required -- many veterans have never smoked -- and members are as able as their civilian counterparts to weigh the potential health risks of using tobacco products.

DEPARTMENT OF VETERANS AFFAIRS
ASSISTANT SECRETARY FOR PUBLIC AND INTERGOVERNMENTAL AFFAIRS
WASHINGTON DC 20420

Memorandum To: Kitty Higgins and Rahm Emanuel

From: Kathy Jurado Kathy Jurado

Subject: VA talking points on nicotine dependence including:

1) VA Under Secretary for Health opinion as to whether nicotine dependence may be considered a disease for compensatory purposes,
2) VA General Counsel opinion on eligibility for compensation based on nicotine dependence, and
3) Administration's proposed legislation.

Date: June 20, 1997

1) May 5, 1997 Opinion of VA Under Secretary for Health
May nicotine dependence be considered a disease for VA compensation purposes?

VA Under Secretary for Health determined that nicotine dependence may be considered a disease for compensation purposes, however, there are no scientific bases to determine how long it takes to become nicotine dependent. (See Attachments 1 & 2)

2) May 13, 1997 Opinion of VA General Counsel
Can VA pay compensation for disabilities or deaths attributable to veterans' use of tabacco products?

Veterans and their survivors are entitled to compensation for "service connected" disabilities or deaths, i.e. those due to injuries or diseases incurred or aggravated during military service. In a 1993 opinion, the former General Counsel determined that compensation is payable for disabilities or deaths attributable to veterans' use of tabacco products during service.

VA historically has also considered service connected on a "secondary" basis disabilities proximately due to service-connected diseases. In 1997, VA program officials asked the General Counsel for a formal opinion as to whether nicotine dependence acquired in service, leading to postservice smoking which ultimately causes physical illness (such as lung cancer or cardiovascular disease), can be the predicate for service connecting the smoking-related illness. In other words, is compensation payable for the results of even postservice smoking if it is due to nicotine dependence acquired in service?

The resulting May 13, 1997 opinion stated that the initial inquiry must be whether nicotine dependence is a disease. Citing a May 5, 1997, memorandum from the Under Secretary for Health to the effect that nicotine dependence may be considered a disease for VA-compensation purposes, the General Counsel stated that the remaining issues which must be decided in judging these claims are 1) whether the nicotine dependence was acquired in service, and 2) whether the nicotine dependence was the "proximate" cause of the claimed illness -- both acknowledged to be very difficult questions of fact.

Regarding the proximate-cause issue, the opinion stated the causal connection would be broken if, for example, there had been sustained full remission of the nicotine dependence following service and subsequent resumption of tabacco use, or exposure to a toxic substance which constituted a supervening cause of the claimed disability or death. (See Attachment 3)

3) Administration's proposed legislation

Under current law, VA adjudicators in resolving a claim would have the burden of determining whether a veteran acquired a nicotine dependence during service and whether that nicotine dependence, which arose during service, is the proximate cause of disability -- both acknowledged to be very difficult questions of fact. However, the Administration has submitted legislation to Congress that would make it unnecessary to ascertain any link between inservice tobacco use and postservice diseases.

The Administration proposes to amend Title 38 to prohibit service-connection of disabilities or deaths based solely on their being attributable, in whole or in part, to veterans' use of tobacco products during service. This proposal would not preclude establishing service-connection based on a finding that a disease or injury became manifest or was aggravated during active service, or became manifest to the requisite degree of disability during an applicable statutory presumptive period. Under current law, a veteran could be service-connected for diseases and conditions that could be caused by tobacco use and manifest themselves during service or an applicable presumptive period, regardless of whether the veteran used tobacco.

The proposed legislation defines the limits of the government's responsibility as not encompassing a veteran's risks from smoking. This proposal would apply to the adjudication of new claims for monthly compensation filed after enactment and would not affect pending claims. The proposal is not an argument against the health consequences of smoking or the addictive nature of tobacco, which are well-recognized, but is a statement that reinforces the traditional role of the benefits system. The system was designed to aid veterans disabled while serving their country, who to varying degrees put themselves at risk, while carrying out their responsibilities as soldiers. (See Attachment 4)

Attachment 1

Department of Veterans Affairs

Memorandum

Date: APR 9 1997

From: General Counsel (022)

Subj: Request for Opinion -- Nicotine Dependence

To: Under Secretary for Health (10)

1. As you know, under 38 U.S.C. §§ 1110, 1131, and 1310, compensation is payable for disability "resulting from personal injury suffered or disease contracted in line of duty . . . in the active military, naval, or air service" and for death from a service-connected disability. Disability which is proximately due to or the result of a service-connected disease or injury is considered service connected under 38 C.F.R. § 3.310(a). A 1993 precedent opinion, VAOPGCPREC 2-93 (O.G.C. Prec. 2-93), held that direct service connection of disability or death may be established if the evidence establishes that injury or disease resulted from tobacco use in line of duty in the active military, naval, or air service. The opinion also noted that, if nicotine dependence is considered a disease or injury for compensation purposes, such dependence began in service, and resulting tobacco use led to disability subsequent to service, service connection could be established for that disability pursuant to 38 C.F.R. § 3.310(a).

2. The Veterans Benefits Administration (VBA) recently requested an opinion from this office regarding the circumstances under which service connection may be established for tobacco-related disability or death on the basis that such disability or death is secondary to nicotine dependence which arose from a veteran's tobacco use during service. In VAOPGCPREC 2-93, the General Counsel stated that nicotine dependence, which was classified by the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Third Edition-Revised, as a psychoactive substance-use disorder, clearly would fall outside the scope of the term "injury." The same conclusion would follow under the Fourth Edition of the Diagnostic and Statistical Manual, which classifies nicotine dependence as a "substance use

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disorder." Resolution of the question posed by VBA, therefore, necessarily depends upon whether nicotine dependence may be considered a disease for compensation purposes.

3. In VAOPGCPREC 82-90 (O.G.C. Prec. 82-90), a precedent opinion discussing the definition of the term "disease" as used in 38 U.S.C. §§ 1110 and 1131, the General Counsel cited *Dorland's Illustrated Medical Dictionary* 385 (26th ed. 1974) as defining the term "disease" as "any deviation from or interruption of the normal structure or function of any part, organ, or system of the body that is manifested by a characteristic set of symptoms and signs and whose etiology, pathology, and prognosis may be known or unknown." The most recent edition of *Dorland's Illustrated Medical Dictionary* 478 (28th ed. 1994) provides virtually the same definition of "disease." The General Counsel also pointed out that, in *Durham v. United States*, 214 F.2d 862, 875 (D.C. Cir. 1954), the United States Court of Appeals for the District of Columbia Circuit indicated that the term "disease" refers to a condition which is capable of improvement or deterioration. *See also* VAOPGCPREC 67-90 (O.G.C. Prec. 67-90) (stating that a disease is usually capable of improvement or deterioration). As stated in VAOPGCPREC 2-93, a determination of whether nicotine dependence may be considered a disease for compensation purposes requires application of accepted medical principles relating to that condition. We therefore request your opinion as to whether, under the above criteria, and in light of the latest available information on nicotine dependence, including newly reported material concerning its etiology, pathology, and prognosis, nicotine dependence may be considered a disease for compensation purposes.

4. We request your prompt attention to this matter so that we may advise VBA, which is awaiting guidance prior to adjudicating numerous claims which have been set aside pending resolution of issues relating to tobacco-related disabilities.

Mary Lou Keener

Department of Veterans Affairs

Memorandum

Date: MAY 5 1997

From: Under Secretary for Health (10)

Subj: Request for Opinion – Nicotine Dependence

To: General Counsel (022)

1. In response to your request of April 9, 1997, regarding VHA's opinion as to whether nicotine dependence may be considered a disease for compensatory purposes, please be advised that the Diagnostic and Statistical Manual of Mental Disorders (4th edition) classifies nicotine dependence as a substance use disorder. Thus, I suppose that nicotine dependence may be considered a disease, as illustrated in your reference to VAOPGCPREC 67-90 (which states that a disease is usually capable of improvement or deterioration).

2. An individual who becomes dependent on nicotine can go into remission by eliminating the use of products/substances containing nicotine, such as tobacco products. Sometimes this is facilitated by or requires medical treatment.

3. I must point out that, however, another important issue in this regard is the time at which a person becomes dependent on nicotine, or for that matter, any substance. At present, there are no physiologic criteria, medical data, or other scientific bases to determine how long it takes to become dependent on nicotine. Dependence may occur after smoking the first few packs of cigarettes, or after the first month of smoking, or many months after starting to smoke.

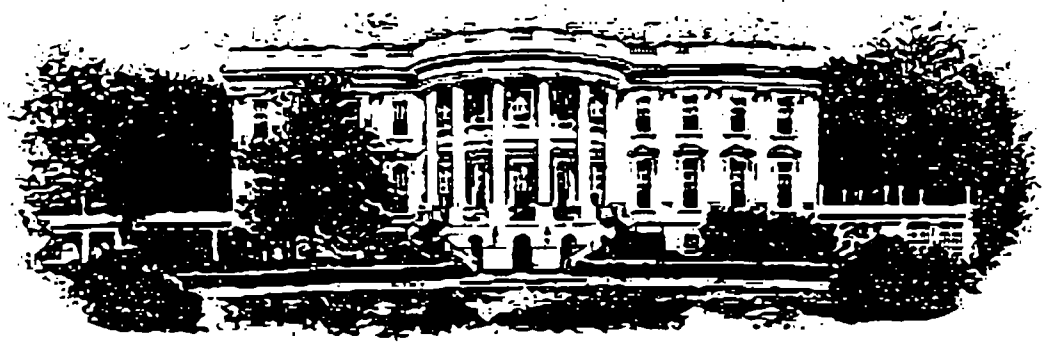
4. For those persons whose nicotine dependence requires medical treatment, please be advised that there exists a variety of treatment regimens, including use of tapering doses of nicotine delivered by a skin patch or gum. When one quits smoking, with or without the assistance of medical treatment, I suppose you could consider the nicotine dependence to be in remission, although it is not customarily thought of in this way. However, since everyone is susceptible to the addictive potential of nicotine, as far as we know, it cannot be scientifically stated, at this time, whether the reoccurrence of nicotine dependence that would occur with resumption of tobacco use is a relapse of the original condition or a *de novo* reoccurrence of the condition.

5. Finally, please be advised that the use of "proximate" as related to disability or death caused by conditions associated with nicotine dependence, and as commonly defined, is not supported by medical evidence. For example, it cannot be medically determined that an individual who smoked and died from artherosclerosis or congestive heart failure (CHF) due to chronic obstructive pulmonary disease would not have died from CHF if

he/she did not smoke. Other risk factors such as diet, exercise, cholesterol levels, etc., also substantially influence the development of heart disease and the relative etiologic contribution of such factors cannot be scientifically apportioned.

6. If I may be of further assistance to you in this matter, please do not hesitate to contact my office.

Kenneth W. Kizer, M.D., M.P.H.



THE WHITE HOUSE
OFFICE OF CABINET AFFAIRS

Room 160 OEOB
Washington, D.C. 20500
Telephone: (202) 456-2572
Faxsimile: (202) 456-6704

FAX COVER SHEET

DATE: 5/20

TO: Elizabeth

PHONE: _____

FAX: 67431

FROM: Anne

NO. OF PAGES: _____
(Including Cover Sheet)

PRIORITY: Y N

MESSAGE:

THE SECRETARY OF VETERANS AFFAIRS
WASHINGTON

MAY 9 1997

The Honorable Newt Gingrich
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

Transmitted herewith is a draft bill, the "Veterans' Compensation Cost-of-Living Adjustment and Benefit Programs Improvement Act of 1997," to authorize a cost-of-living adjustment (COLA) for fiscal year (FY) 1998 in the rates of disability compensation and dependency and indemnity compensation (DIC), and to revise and improve certain veterans compensation, pension, and memorial affairs programs, and for other purposes. I request that this draft bill be referred to the appropriate committee for prompt consideration and enactment.

Section 101 of the draft bill would direct the Secretary of Veterans Affairs to increase administratively the rates of compensation for service-disabled veterans and of DIC for the survivors of veterans whose deaths are service related, effective December 1, 1997. The rate of increase would be the same as the COLA that will be provided under current law to veterans' pension and Social Security recipients, which is currently estimated to be 2.7 percent. We believe this proposed COLA is necessary and appropriate in order to protect the benefits of these most deserving recipients from the eroding effects of inflation. We estimate that enactment of this section, in conjunction with section 102 of this draft bill, would result in benefit costs of $330.7 million during FY 1998 and $1.94 billion over the five-year period beginning in FY 1998. The costs associated with the compensation COLA are considered to be part of the compensation baseline and not subject to the pay-as-you-go provisions of the Omnibus Budget Reconciliation Act of 1990.

Section 102 would require the Secretary of Veterans Affairs, in computing new rates of (or limitations affecting) disability compensation and DIC pursuant to the enactment of any legislation requiring the Secretary to increase such rates to provide a COLA for fiscal year 1998 and thereafter, to round down to the next lower whole dollar any rate that is not evenly divisible by one dollar. This proposal is consistent with the congressionally-mandated calculation methods applied to COLA's for fiscal years 1994, 1995, and 1996. We estimate this proposal would reduce FY 1998 benefit cost associated with the COLA proposed in section

ing expenses. There are no costs or savings associated with this proposal.

Section 201(a) would amend section 2408(b) of title 38, United States Code, to make state cemetery grants more attractive to States. Section 2408 authorizes the Secretary of Veterans Affairs to make grants to States to assist them in establishing, expanding, or improving State veterans' cemeteries. Currently, the amount of a State cemetery grant is limited to 50 percent of the total of the value of the land to be acquired or dedicated for a cemetery and the cost of improvements to be made on the land. The remaining amount must be contributed by the State receiving the grant. Pursuant to the amendments proposed in this section, the amount of a State cemetery grant could not exceed, in the case of the establishment of a new cemetery, the total of the cost of improvements to be made on land to be converted into a cemetery and the initial cost of equipment necessary to operate the cemetery. In the case of the expansion or improvement of an existing cemetery, the amount of the grant could not exceed the total of the cost of improvements to be made on any land to be added to the cemetery combined with the cost of improvements to be made to the existing cemetery. If the amount of a grant should, for any reason, be less than the amount of those costs, the State receiving the grant would be required to contribute the remaining amount, in addition to providing any land necessary for the cemetery project.

Also, under current law, if at the time of a grant the State receiving the grant dedicates for the cemetery land which it already owns, the value of the land may constitute up to 50 percent of the State's contribution. Once that land value is so used, it may not constitute part of the State's contribution for any subsequent grant under section 2408. Under the amendments proposed in section 201(a) of this draft bill, a State would be responsible for providing any land required for a cemetery project, since the grant amount would no longer be based partly on the value of land to be acquired or dedicated for a cemetery.

We believe that excluding the value of land to be acquired for a cemetery from the basis of a grant would encourage states to be active partners in the cemetery grants program. In our experience, no State has acquired land for a cemetery in connection with a grant under section 2408. In every case, the State has dedicated land that was donated or transferred for that purpose, or land that it already owned. Further, any reduction of the basis from which a grant is calculated may be offset by an increase from 50 percent to up to 100 percent in the proportion of the amount of a project's cost that could be assumed by the Federal Government. Moreover, since, under the proposal, a grant may

2.

letter to gingrich

The Honorable Newt Gingrich

101 of this draft bill by $17 million and reduce the five-year benefit cost for FY 1998 through FY 2002 by $287 million, as compared to the cost of that COLA and future COLAs based on rounding odd dollar amounts to the nearest whole dollar. The savings are subject to the pay-as-you-go provisions of the Omnibus Budget Reconciliation Act of 1990.

Section 103 would amend titles 26 and 38 of the United States Code to make permanent the authority of the Department of Veterans Affairs (VA) to access unearned income information from the Internal Revenue Service (IRS) and wage, self-employment, and retirement income information from the Social Security Administration (SSA) for purposes of income verification in determining eligibility for VA means-tested benefits such as pension and medical care for certain non-service-related illnesses or conditions.

Experience has shown that authority to match unearned income information from IRS and wage, self-employment, and retirement income information from SSA with VA data for purposes of income verification in determining eligibility for or the proper amount of VA means-tested benefits has been an effective savings measure and has had a significant program-abuse deterrent effect. We estimate that enactment of this proposal would result in savings in monetary benefits of $10 million in FY 1999 and $120 million during the four-year period beginning in FY 1999. These savings are subject to the pay-as-you-go provisions of the Omnibus Budget Reconciliation Act of 1990.

Section 104 would amend section 5503(f) of title 38, United States Code, to make permanent the $90 limitation on monthly VA pension payments that may be made to beneficiaries, without dependents, who are receiving Medicaid-covered nursing-home care. The current payment limitation, which is due to expire at the end of fiscal year 1998, works to the advantage of these nursing-home residents because it permits them to keep the $90 to apply toward personal expenses rather than have it "pass through" to the Medicaid program. This section would simply remove the existing September 30, 1998, expiration date for section 5503(f). We estimate this proposal would result in government-wide savings because a beneficiary's nursing-home care costs, previously paid for with VA pension benefits, would be paid for by the Medicaid program, which shares a portion of the costs with the States. Government-wide savings are estimated to be $206 million in FY 1999 and a total of $893 million during the four-year period beginning in FY 1999.

Under current law, direct service connection of a disability or death may be established if the evidence establishes that

injury or disease resulted from tobacco use in line of duty in the active military, naval, or air service, notwithstanding that the disability or death did not occur until after service and expiration of any applicable presumptive period. Section 105 would amend title 38, United States Code, by adding a new section that would have the effect of prohibiting service connection of a death or disability on the basis that it resulted from injury or disease attributable, in whole or in part, to the use of tobacco products by the veteran during the veteran's service. This amendment is consistent with the 1990 budget reconciliation act, in which Congress prohibited compensation for disabilities which are the result of veterans' abuse of alcohol and drugs. This was fiscally responsible action which enhanced the integrity of our compensation program, and our proposal regarding tobacco use is offered in that same spirit. In addition, claims based upon tobacco-related disorders present medical and legal issues which could impede ongoing efforts to speed claim processing by placing significant additional demands on the adjudicative system. This provision would not preclude establishment of service connection for disability or death from a disease or injury which became manifest or was aggravated during active service or became manifest to the requisite degree of disability during any applicable presumptive period specified in section 1112 or 1116 of title 38, United States Code. This amendment would apply to claims filed after the date of its enactment.

This provision would result in some level of benefit cost avoidance and avoid potential delays in claim processing resulting from increased workload.

Section 106 would authorize the Veterans Benefits Administration (VBA) to reimburse, from the general operating expenses account, the Veterans Health Administration (VHA) for the cost of medical examinations conducted with respect to veterans' claims for compensation or pension. Currently, such examinations are paid for out of VA's medical-care fund.

In order to assure that funding for compensation and pension medical examinations is available throughout FY 1998, appropriate language would need to be included in both the "Medical care" and "General operating expenses" appropriations. It is contemplated that VBA will enter into a memorandum of understanding with VHA to provide that, should funds budgeted under general operating expenses for the purpose of "purchasing" compensation and pension medical examinations prove insufficient, alternate funding under "Medical care" would be available to permit VHA to continue to provide these examinations. Medical care funds would be used for this purpose only in the event of a shortfall in general operat-

cover the entire cost of improvements (and initial cost of equipment in certain cases), a State may not have to contribute cash toward the initial cost of a project.

Another feature that would make grants more attractive to States is the inclusion in the basis of a grant of the initial cost of equipment necessary to operate the cemetery. Providing funds to acquire the equipment necessary to operate a cemetery will, we believe, be a critical financial incentive to encourage States to establish new cemeteries. Such equipment is as essential to the establishment of an operational cemetery as are the land and the improvements made on it. However, because our proposed amendment includes only the *initial* cost of equipment for the *establishment* of a cemetery, the State would retain the responsibility for long-term maintenance and operation of the cemetery, including costs associated with the acquisition of replacement equipment. Each Federal grant would assist in the establishment and activation of new veterans' cemeteries, or in the expansion or improvement of existing cemeteries, but the States would bear the costs of continuing operation and long-term maintenance.

Section 201(b) of the draft bill would authorize "no-year" appropriations for the State cemetery grants program. Under current 38 U.S.C. § 2408(d), funds appropriated for State cemetery grants remain available only until the end of the second fiscal year following the fiscal year for which they are appropriated. However, in Public Law No. 104-204, 110 Stat. 2874 (1996), Congress appropriated funds for State cemetery grants, "to remain available until expended." Section 201(b) would amend section 2408(d) to reflect this no-year-funding policy.

The Office of Management and Budget advises that there is no objection to the submission of this draft bill to the Congress, and that its enactment would be in accord with the Administration's program.

Sincerely yours,

Jesse Brown

Jesse Brown

Enclosures
JB/fjb

I Put Veterans First

May I Help You?

U.S. DEPARTMENT OF VETERANS AFFAIRS

– Lears

OFFICE OF THE ASSISTANT SECRETARY FOR PUBLIC AND INTERGOVERNMENTAL AFFAIRS

FAX: (202) 273-5717
PHONE: (202) 273-5750

DATE: ____
TO: Elizabeth Arye
FAX #: 456-7431

FROM: Kathy Jurado

COMMENTS: Claims don't get affected by legislation.

TRANSMITTING COVER PAGE PLUS ____ PAGE(S)

VBA has developed guidance — now that we will get out to field — Vet service organizations pending

– 4500 claims pending
– old general counsel positions unclear —
– r
– [illegible] noted by general counsel to undersecretary for benefits

Q. Under what circumstances would the VA compensate veterans for smoking-related illnesses now?

A. VA would compensate for disabilities or deaths from smoking-related illnesses under the following circumstances:

- The illness actually appeared during service (in which case its smoking causation would not even be in issue);
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A. Veterans receive monthly cash payments ("disability compensation") in amounts based on their levels of disability, and are eligible for free VA health care for these illnesses. Their surviving spouses are eligible for monthly cash payments ("dependency and indemnity compensation") for deaths due to these illnesses.

Q. Now that the VA has found that nicotine is addictive (that nicotine addiction is a disease), will the VA change its policies?

A. Prior to the May 13, 1997 opinion of VA's General Counsel, VA had no established policy regarding compensation for results of postservice smoking based on nicotine dependence beginning in service. The potential for benefit eligibility on that basis has now been established.

Q. How would VA's proposed legislation change this policy?

A. VA has proposed legislation to preclude benefit eligibility that, under current law, could be established for diseases arising postservice only on the basis of the diseases' relation to smoking in service. VA's legislation:

- would not preclude awarding benefits for smoking-related illnesses that become manifest in service;
- would not preclude benefits for illnesses which are presumed in law to be service related if they appear within prescribed periods following separation from service (these include, e.g., for all veterans, cancers or certain heart diseases becoming manifest within one year following service; for Vietnam veterans, certain cancers including lung cancer arising anytime after service because of their possible connection to herbicide exposure); and
- would apply only to claims filed after the legislation's enactment.

Q. Wouldn't this change in compensation policy be inconsistent with the characterization of nicotine dependence as a disease?

A. No. VA's legislative proposal is based on the position that compensating veterans for the results of their smoking, notwithstanding nicotine's addictive properties, simply exceeds the Government's responsibility to them.

Q. Isn't this proposal particularly unfair in view of the Government's distribution of free cigarettes to service members?

A. While it is true the miltary services have facilitated servicemembers' smoking habits, smoking has never been required -- many veterans have never smoked -- and members are as able as their civilian counterparts to weigh the potential health risks of using tobacco products.

Q. How does the VA's proposed legislation affect benefits for smoking-related illnesses?

A. The VA's legislative proposal precludes benefit eligibility for smoking related illness that arise after service. Currently, veterans who began smoking during military service may qualify for compensation if they later develop a smoking-related illness.

Q. What is the justification for this policy, given that nicotine is addictive and that the government distributed free cigarettes to service members?

A. VA's legislative proposal is based on the position that compensating veterans for the results of their smoking simply exceeds the Government's responsibility to them. While it is true that military services facilitated service members' smoking habits, smoking has never been required -- many veterans have never smoked -- and members have been as able as their civilian counterparts to weigh the potential health risks of using tobacco products.

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Date: July 14, 1997

Pages: 9

Contents: Information on Nicotine Dependency.

Guidance - better to get one story up tomorrow

DEPARTMENT OF VETERANS AFFAIRS
ASSISTANT SECRETARY FOR PUBLIC AND INTERGOVERNMENTAL AFFAIRS
WASHINGTON DC 20420

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Memorandum To: Kitty Higgins and Rahm Emanuel

From: Kathy Jurado Kathy Jurado

Subject: VA talking points on nicotine dependence including:

1) VA Under Secretary for Health opinion as to whether nicotine dependence may be considered a disease for compensatory purposes,
2) VA General Counsel opinion on eligibility for compensation based on nicotine dependence, and
3) Administration's proposed legislation.

Date: June 20, 1997

1) May 5, 1997 Opinion of VA Under Secretary for Health

May nicotine dependence be considered a disease for VA compensation purposes?

VA Under Secretary for Health determined that nicotine dependence may be considered a disease for compensation purposes. However, there are no scientific bases to determine how long it takes to become nicotine dependent. (See Attachments 1 & 2)

so can't tell whether they became dep in service

2) May 13, 1997 Opinion of VA General Counsel

Can VA pay compensation for disabilities or deaths attributable to veterans' use of tabacco products?

Veterans and their survivors are entitled to compensation for "service connected" disabilities or deaths, i.e. those due to injuries or diseases incurred or aggravated during military service. In a 1993 opinion, the former General Counsel determined that compensation is payable for disabilities or deaths attributable to veterans' use of tabacco products during service.

VA historically has also considered service connected on a "secondary" basis disabilities proximately due to service-connected diseases. In 1997, VA program officials asked the General Counsel for a formal opinion as to whether nicotine dependence acquired in service, leading to postservice smoking which ultimately causes physical illness (such as lung cancer or cardiovascular disease), can be the predicate for service connecting the smoking-related illness. In other words, is compensation payable for the results of even postservice smoking if it is due to nicotine dependence acquired in service?

The resulting May 13, 1997 opinion stated that the initial inquiry must be whether nicotine dependence is a disease. Citing a May 5, 1997, memorandum from the Under Secretary for Health to the effect that nicotine dependence may be considered a disease for VA-compensation purposes, the General Counsel stated that the remaining issues which must be decided in judging these claims are 1) whether the nicotine dependence was acquired in service, and 2) whether the nicotine dependence was the "proximate" cause of the claimed illness -- both acknowledged to be very difficult questions of fact.

Regarding the proximate-cause issue, the opinion stated the causal connection would be broken if, for example, there had been sustained full remission of the nicotine dependence following service and subsequent resumption of tabacco use, or exposure to a toxic substance which constituted a supervening cause of the claimed disability or death. (See Attachment 3)

What are some of the problems in identifying veterans qualified? How will the VA identify?

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OK

3) Administration's proposed legislation

Under current law, VA adjudicators in resolving a claim would have the burden of determining whether a veteran acquired a nicotine dependence during service and whether that nicotine dependence, which arose during service, is the proximate cause of disability -- both acknowledged to be very difficult questions of fact. However, the Administration has submitted legislation to Congress that would make it unnecessary to ascertain any link between inservice tobacco use and postservice diseases.

ok

The Administration proposes to amend Title 38 to prohibit service-connection of disabilities or deaths based solely on their being attributable, in whole or in part, to veterans' use of tobacco products during service. This proposal would not preclude establishing service-connection based on a finding that a disease or injury became manifest or was aggravated during active service, or became manifest to the requisite degree of disability during an applicable statutory presumptive period. Under current law, a veteran could be service-connected for diseases and conditions that could be caused by tobacco use and manifest themselves during service or an applicable presumptive period, regardless of whether the veteran used tobacco.

what?

The proposed legislation defines the limits of the government's responsibility as not encompassing a veteran's risks from smoking. This proposal would apply to the adjudication of new claims for monthly compensation filed after enactment and would not affect pending claims. The proposal is not an argument against the health consequences of smoking or the addictive nature of tobacco, which are well-recognized, but is a statement that reinforces the traditional role of the benefits system. The system was designed to aid veterans disabled while serving their country, who to varying degrees put themselves at risk, while carrying out their responsibilities as soldiers. (See Attachment 4)

what?

health care?
health care / financial?