

**Department of  
Veterans Affairs**

# Memorandum

VAOPGCPREC 2-2019

Date: June 25, 2019

From: Principal Deputy General Counsel (02)

Subj: Crediting Certain Veterans for Their Payment of Statutory Funding Fee  
(VIEWS 01255105)

To: Director, Loan Guaranty Service (26)

**QUESTIONS PRESENTED:**

1. Does the Department of Veterans Affairs (VA) have legal authority to issue a refund of a funding fee collected under 38 U.S.C. § 3729 when the requirements for waiver of the fee under section 3729(c) are met ?
2. If yes, to whom and under what circumstances?
3. Is a refund determination subject to the Veterans Appeals Improvement and Modernization Act of 2017 (AMA)?

**HELD:**

1. Yes. If VA determines that veterans impermissibly incurred funding fees due to overt error, systems limitations, or process limitations, VA should promptly credit such veterans for the fees they incurred. Additionally, VA must refund a funding fee if a later-in-time award of disability compensation is effective as of a date that is on or before the date the funding fee was collected.
2. We believe a claim for remittance of a funding fee that was improperly assessed or that may now be refunded due to an intervening retroactive award of service-connected benefits is similar to the types of claims that the U.S. Court of Appeals for Veterans Claims (Veterans Court) has found not to be claims for benefits. Since a claim for a refund is not a claim for benefits, VA should promulgate rules clarifying VA's policy and procedures for processing claims for refunds. VA should continue issuing refunds whenever VA determines on its own, or if a veteran provides documentation, that a refund is due.
3. The three-lane review scheme of the AMA applies to claims for "benefits"; VA is not required to make all three AMA review options available with respect to determinations not involving benefit claims. VA could choose to make supplemental claim and/or higher-level review processes, or similar processes, available for decisions concerning requests for refund of the funding fee.

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## **DISCUSSION:**

### **Background**

1. VA's Loan Guaranty Service (LGY) administers programs that, in relevant part, assist eligible veterans, Servicemembers, and surviving spouses (collectively, as applicable, "veterans") in obtaining housing loans guaranteed, insured, or made, under chapter 37, title 38, U.S. Code (hereinafter "chapter 37"). Such loans include VA-guaranteed loans, Native American Direct Loans, and "vendee loans." See 38 U.S.C. § 3703, §§ 3761 et seq., and § 3733.
2. In 1982, to reduce program costs, Congress imposed a loan fee for loans "guaranteed, made, or insured" under chapter 37. See Pub. L. 97-253, § 406(a)(1); H. Rep. No. 97-660, pgs. 27-28 (estimating annual savings of \$90-104 million). The loan fee is commonly called a funding fee. The funding fee statute is codified at 38 U.S.C. § 3729. Section 3729 provides that a funding fee "shall be collected from each person obtaining a housing loan guaranteed, insured, or made under" chapter 37, excluding cases where the fee is waived under section 3729(c). Subsection (c) sets forth the circumstances where the funding fee is waived and reads as follows:

“(c) Waiver of fee.—(1) A fee may not be collected under this section from a veteran who is receiving compensation (or who, but for the receipt of retirement pay or active service pay, would be entitled to receive compensation) or from a surviving spouse of any veteran (including a person who died in the active military, naval, or air service) who died from a service-connected disability.

(2)(A) A veteran described in subparagraph (B) shall be treated as receiving compensation for purposes of this subsection as of the date of the rating described in such subparagraph without regard to whether an effective date of the award of compensation is established as of that date.

(B) A veteran described in this subparagraph is a veteran who is rated eligible to receive compensation—

(i) as the result of a pre-discharge disability examination and rating; or

(ii) based on a pre-discharge review of existing medical evidence (including service medical and treatment records) that results in the issuance of a memorandum rating.”
3. In the years since Congress imposed the funding fee, LGY has encountered cases in which LGY deemed it reasonable and prudent to credit, in some way, certain veterans for funding fees collected in connection with loans guaranteed, made, or insured, under chapter 37. LGY has characterized such crediting as "refunding the funding fee." While other loan types can be implicated, the vast majority of cases involve VA-guaranteed loans. Generally, such cases fall into four broad categories: (i) cases where a veteran incurred a funding fee due to an overt error (error cases), (ii) cases where a systems limitation prevented stakeholders from accessing information about a veteran (systems limitation cases), (iii) cases where process limitations resulted in reliance on outdated information (process limitation cases), and (iv) cases where a veteran closed on a loan

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and later received an award of disability compensation with an effective date on or before the date the funding fee was collected, e.g. the date of loan closing (retroactive cases).

Funding Fee Determinations

4. Under VA's regulatory framework, lenders must determine the funding fee amount, if any, to be collected at loan closing. See generally 38 C.F.R. § 36.4313(e) (casting funding fee determinations and collections as responsibility of lender). Generally, lenders rely on a VA-generated certificate of eligibility (COE) as evidence that a veteran is eligible, although 38 U.S.C. § 3702(c) states that "[a]n honorable discharge shall be deemed a certificate of eligibility" to apply for a VA-guaranteed loan. Even though LGY makes a funding fee waiver notation on a VA-furnished COE, lenders are responsible for ensuring that they do not collect funding fees from veterans for whom the fee is waived. See VA Pamphlet 26-7 (Lender's Handbook), Ch. 8, pg. 17. If a fee is required, the lender must collect the fee at closing and electronically remit funds to VA via the VA Funding Fee Payment System. See 38 C.F.R. § 36.4313(e)(3)-(4) (requiring lender to transfer funding fee funds to VA within fifteen days of closing); Lender's Handbook, Ch. 8, pgs. 17-22.

5. Generally, in cases where evidence suggests that the funding fee might be waived, lenders are required to verify the waiver by obtaining one of the following items: (i) a completed VA Form 26-8937 "Verification of VA Benefits"<sup>1</sup>, signed by the veteran and VA, (ii) for veterans receiving retirement pay in lieu of VA compensation benefits, a copy of VA's disability rating and documentation of retirement income, or (iii) other evidence that a borrower is entitled as an unmarried surviving spouse. See Lender's Handbook, Ch. 8, pg. 18. Lenders are to consult with Regional Loan Center (RLC) staff if the applicability of the funding fee waiver is uncertain. Id. If a veteran asserts that a funding fee waiver applies but, despite the lender's compliance with the authorities discussed above, the lender cannot verify that a waiver applies before the loan closing, the lender must collect the funding fee at loan closing, remit it to VA, and notify VA of the veteran's assertion. Id. at Ch. 8, pg. 19.

**Question 1: Does VA have authority in error and limitation cases to refund a funding fee to a veteran?**

Authority to Issue Refunds in Overt Error, Systems Limitation, and Process Limitation Cases

6. When LGY determines that an overt error, systems limitation, or process limitation caused a veteran to impermissibly incur a funding fee, LGY should take action to credit

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the veteran back for the fee incurred. In the America's Community Bankers decision, the U.S. Court of Appeals for the D.C. Circuit considered whether the Federal Deposit Insurance Corporation (FDIC) exceeded its statutory authority in promulgating a rule designed to stem the harmful effects of the savings and loan crisis that began in the 1980s. See America's Community Bankers v. FDIC, 200 F.3d 822, 824 (D.C. Cir. 2000). The relevant statute directed the FDIC to impose assessments on certain financial institutions such that a reserve fund would reach a 1.25 percent "reserve-to-deposits capitalization ratio" for a certain quarter in 1996. Id. at 825. A banking trade group challenged the FDIC's rule, stating that it collected more than was necessary to reach the requisite ratio. Id. The court ultimately held that the rule did not exceed the FDIC's statutory authority and that the assessments the FDIC collected were in proper amounts. Id. at 836. However, the court acknowledged that, if the plaintiff were to prevail, any dollar amounts that the financial institutions paid to the FDIC, above what the statute permitted, would require the FDIC to immediately return the overpayments. Id. at 830. If the plaintiff "is correct in its statutory interpretation, then the FDIC improperly collected money from . . . members, and they are entitled under the statutory scheme to get their money back." 200 F.3d at 830 (emphasis added); see also Steele v. United States, 200 F.Supp.3d 217, 224 (D.D.C. 2016) (holding that Internal Revenue Service's sovereign immunity was waived as to claim asserting that agency unlawfully collected user fees, i.e. money that "rightfully belonged to [the plaintiffs] . . . in the first place.").

7. Consistent with the court's reasoning in the America's Community Bankers case, funding fees impermissibly collected by lenders and remitted to VA would be "improperly collected" monies. See supra para. 6. When VA becomes aware of such cases, VA should take action to refund any improperly collected fees a veteran paid.

Authority to Issue Refunds in Retroactive Cases

8. Retroactive cases are those where a veteran closes on a VA-guaranteed loan, incurs a funding fee, and later receives a disability compensation award with an effective date that is on or before the date the funding fee was collected, e.g. the date of loan closing. The issue is whether VA has legal authority to credit veterans, in some way, for having incurred the fee, given that the temporal reach of the later-in-time disability compensation award includes the collection date. While such authority is not immediately evident from the plain language of section 3729(c), we believe the law requires VA to make refunds based on retroactive award dates.

9. Generally, administrative agencies are "creature[s] of statute, having only those powers expressly granted . . . by Congress or included by necessary implication from the Congressional grant." Soriano v. United States, 494 F.2d 681, 683 (9th Cir. 1974). An agency "literally has no power to act . . . unless and until Congress confers power



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upon it.” Louisiana Public Service Comm’n v. FCC, 476 U.S. 355, 374 (1986); see also Killip v. Office of Personnel Mgmt., 991 F.2d 1564, 1570 (Fed. Cir. 1993) (holding that agencies must “refrain from . . . temptation to stretch jurisdiction to decide questions . . . whose resolution properly lies with Congress”). The first step in determining the scope of power that a statute grants to an agency is to examine the statute’s plain text. See Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002), citing Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997) (inquiry ends if language “is unambiguous and statutory scheme is coherent and consistent”) (internal quotations omitted).

10. The statute, in relevant part, waives the funding fee for “a veteran who is receiving compensation (or who, but for the receipt of retirement pay or active service pay, would be entitled to receive compensation)”. See 38 U.S.C. § 3729(c) (emphasis added). The question is whether the language “is receiving compensation” unambiguously triggers a funding fee waiver solely for veterans who are actually receiving disability compensation payments at the time the fee is collected or if the language also authorizes waiver of the fee for veterans who, post-collection, receive a disability compensation award with an effective date that is on or before the date the funding fee was collected.

11. Section 3729(c) does not explicitly state the date upon which a veteran must be receiving compensation to trigger a funding fee waiver. 38 U.S.C. § 3729. However, the use of the present-tense phrase “is receiving compensation” indicates that the individual must have been receiving compensation on the date of the operative event to which the statute applies. See, e.g., In re Ran, 607 F.3d 1017, 1025 (5th Cir. 2010) (“Congress’s choice to use the present tense requires courts to view the . . . determination in the present, i.e., at the time the petition for recognition was filed”); accord Fawn Mining Corp. v. Hudson, 80 F.3d 519, 521-23 (D.C. Cir. 1996) (interpreting statute requiring individuals to have been “receiving . . . benefits” on a specified date). The operative event under section 3729 is the date the funding fee is to be assessed, i.e., the date of closing. Lenders must collect the funding fee, if applicable, at closing and remit the funds to VA. See supra para. 4. The provisions of section 3729(b)(2) indicate that the amount of the funding fee is determined based on the date of closing. Since the funding fee is a condition precedent to the guaranty, unless section 3729(c) applies, it follows that the date of funding fee collection is the salient event.

12. The retroactive effect accorded by statute to awards of VA disability compensation is relevant in determining whether an individual who receives a retroactive award of compensation subsequent to closing may be considered to have been “receiving compensation” on the date of closing. “It is a fundamental canon of statutory construction that words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (citations and internal quotation marks omitted). The phrase “who

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is receiving compensation,” as used in section 3729(c), must be interpreted in the context of related provisions in title 38, United States Code, governing entitlement to compensation. Section 5110(a)(1) of title 38, U.S.C., provides that, unless otherwise provided by statute, “the effective date of an award . . . of compensation . . . shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor.” It is well established that this provision allows, and generally requires, awards of compensation to take effect retroactively, from the date of the application for benefits, rather than the date of decision. See Ruel v. Wilkie, 918 F.3d 939, 941 (Fed. Cir. 2019); Young v. McDonald, 766 F.3d 1348, 1351 (Fed. Cir. 2014). Section 5111(a) of title 38, U.S.C., provides that actual payment of disability compensation may not commence prior to the first day of the month following the date the award became effective. However, section 5111(b)(1) states that, “during the period between the effective date of an award or increased award as provided under section 5110 of this title or other provision of law and the commencement of the period of payment based on such award as provided under subsection (a) of this section, an individual entitled to receive monetary benefits shall be deemed to be in receipt of such benefits for the purpose of all laws administered by the Secretary.” 38 U.S.C. § 5111(b)(1) (emphasis added). This language makes clear that individuals entitled to VA disability compensation are deemed to be “in receipt” of such compensation from the effective date of the award, for purposes of all laws administered by VA, even though that date precedes the date of the decision finding them to be entitled to such compensation.

13. Construing section 3729, as we must, in conjunction with the related provisions of sections 5110 and 5111, we conclude that a veteran who is awarded disability compensation in a decision rendered subsequent to a funding fee collection, e.g. loan closing, but whose award is assigned an effective date preceding the collection, generally must be deemed to have been “receiving compensation” at the time of the collection. We do take note of the differences between the language in sections 3729 and 5111 (“is receiving” versus “in receipt of”), but we see no reason to ascribe different meanings to those very similar terms. Congress appears to have used “receiving” and “in receipt of” for essentially the same purposes throughout title 38. See, e.g., 38 U.S.C. § 1311(a)(2) referring to veterans “in receipt of” compensation at the time of death), § 1318(b) (same), § 1511 (referring to Indian War veterans “receiving, or entitled to receive” pension), § 1717 (referring to home health services for veterans “receiving” compensation or pension). Accordingly, the subsequent award of disability compensation with an effective date on or prior to the date of closing provides a basis for finding that the veteran should receive a refund of the funding fee.

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**Question 2: To whom and under what circumstances may VA refund a funding fee?**

14. How, when, and to whom VA may pay a refund under certain scenarios depends on whether a request for refund of a funding fee is a claim for a VA “benefit.” This is because Congress has set forth in statute the procedural requirements applicable to benefits applications, processing, delivery, and appeals. For example, 38 U.S.C. § 5101(a) provides that “[a] specific claim in the form prescribed by the Secretary . . . must be filed in order for benefits to be paid or furnished to any individual.” Under 38 U.S.C. § 5103(a), VA must provide a “claimant” with “notice of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim.” The term “claimant” is defined for this purpose as “any individual applying for, or submitting a claim for, any benefit under the laws administered by the Secretary.” 38 U.S.C. § 5100. If the waiver is a home loan benefit, we must analyze the questions within the statutory scheme Congress has prescribed. If the waiver is not, we must resort to other legal constructs.

15. The U.S. Court of Appeals for Veterans Claims (Veterans Court) has found the loan guaranty benefit to be a property right. See, e.g., Wells v. Brown, 9 Vet. App. 293, 297 (Vet. App. 1996) (acknowledging that the appellant “had a property interest in his original VA loan guaranty entitlement,” and “a legitimate claim to entitlement to the benefit in question”). Further, the court has held that the term “claimant” “includes a person applying for or seeking benefits under part II or III of title 38” of the United States Code. See Livesay v. Principi, 15 Vet. App. 165, 179 (Vet. App. 2001). Because loan guaranty benefits are provided under chapter 37 of title 38, which is within part III of that title, a claim for loan guaranty benefits is a “claim for benefits” from VA. On the other hand, the Veterans Court has held that a claimant’s request for a waiver of indebtedness is not a claim for a benefit, even if the indebtedness itself arose from payment of VA benefits. See Lueras v. Principi, 18 Vet. App. 435, 438-39 (Vet. App. 2004). The court reasoned that “[t]he appellant is not seeking benefits in the first instance . . . but, rather, having received an overpayment of benefits creating an indebtedness, he is requesting a waiver of recovery of that indebtedness.” Id. at 439.

16. The Veterans Court also has held that individuals seeking the restoration of competency are not benefit claimants because they are requesting decisions on how a benefit will be distributed. See Sims v. Nicholson, 19 Vet. App. 453, 455 (Vet. App. 2006). They are not requesting the benefit, itself. Id. In Livesay, the court held that a claimant alleging clear and unmistakable error (CUE) in a prior final decision “is not pursuing a claim for benefits . . . but rather is collaterally attacking a final decision.” 15 Vet. App. at 178-79. The court acknowledged that a CUE claim “may result in reversal or revision of a final decision on a claim for benefits,” but concluded that “it is not by itself a claim for benefits.” Id. at 179. This indicates that not all decisions within a



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benefits program are decisions on claims for benefits *per se*. Further, we also know that other courts have found that certain elements of the home loan program are not benefits at all. See, e.g., Stanley v. Veterans Administration, 454 F.Supp. 9, 12 (E. D. Pa. 1978), citing United States v. Neustadt, 366 U.S. 696, 679 (1961) (appraisals of properties in government housing programs confer no benefit interest on borrowers, such appraisals are solely for the protection of the government).

17. We believe that a claim for remittance of a funding fee that was improperly assessed or that may now be refunded due to an intervening retroactive award of disability compensation is similar to the types of claims that the Veterans Court has found not to be claims for benefits. As with the situations in Livesay, Lueras, and Sims, the claimant would not be seeking a loan guaranty benefit but would instead be seeking correction of an error or modification in how benefits were assessed and distributed. These corrections and modifications are ancillary to the matter of entitlement to the loan guaranty benefit and are not benefits in and of themselves. Additionally, during the nearly forty-year history of the funding fee, VA has never treated the waiver provision as a benefit. Despite notice, Congress has never questioned VA's approach. See United States v. Rutherford, 442 U.S. 544, 554, note 10 (1979) ("[o]nce an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned" (citations and internal quotation marks omitted)).

Form of Refund & Additional Variables

18. LGY faces heightened risk of a legal challenge if LGY issues a refund of a funding fee to anyone other than the veteran who paid it. Under the Administrative Procedure Act (APA), agencies must undertake notice-and-comment rulemakings when prescribing a policy that affects individual rights and obligations. See 5 U.S.C. §§ 551-559. In the America's Community Bankers case, the D.C. Circuit held that the FDIC did not overstep its statutory authority in assessing certain fees, via rulemaking, that capitalized a reserve fund meant to stem the savings and loan crisis. See supra paras. 6-7. While the court ultimately ruled against the plaintiff, the court acknowledged that the plaintiff had standing under the APA to allege (i) that the FDIC impermissibly collected certain assessments, and (ii) that a refund of overpayments was due. See America's Community Bankers, 200 F.3d at 830. In that case, the FDIC did not even attempt to argue that the assessment rule at issue did not affect an individual right or obligation. Id. In fact, despite the overt statutory command for the agency to impose fees on the regulated institutions, the FDIC still followed the rulemaking process set forth by the APA. Id. It seems that the FDIC conceded, and the court recognized, that action directing the flow of money, where a person might reasonably assert some claim



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to that money (even if unsuccessful), unequivocally affects an individual right. Id. Here, LGY is considering whether it is most prudent to credit certain veterans for funding fees or, when a guaranteed loan remains outstanding, to transfer funds to the veteran's lender, with such funds to be applied to the loan balance. While statutory authority for such a policy decision may exist, prior to prescribing a policy that affects money to which a veteran might lay claim, i.e. a substantive rule, it would be advisable for LGY to undertake notice-and-comment rulemaking. That rulemaking might also address whether VA should issue a refund to a veteran's estate in the event the Veteran dies before the refund is issued.

19. Another question is whether VA's payment of a guaranty claim to a loan holder can affect LGY's authority to credit a veteran for a funding fee the veteran incurred, such as where the underlying loan has been foreclosed and VA has paid a claim to the holder. As mentioned above, agencies are creatures of statute and cannot take action unless it is authorized by statute. See supra para. 9. Generally, in cases where the Secretary makes a guaranty payment to a holder, the Secretary is "subrogated to the rights of the holder . . . to the extent of the amount paid on the guaranty." See 38 U.S.C. § 3732(a)(1). However, in 1989, Congress constrained the Secretary's right to recover LGY-related debts from certain veterans. See Pub. L. 101-237, § 304; 38 U.S.C. § 3703(e). Under the current section 3703(e), most veterans "shall have no liability to the Secretary . . . for any loss resulting from any default . . . except in cases of fraud, misrepresentation, or bad faith." 38 U.S.C. § 3703(e). Consequently, in most cases, whether VA paid a guaranty claim to a holder should not affect the extent to which LGY credits a veteran for funding fees incurred.

Budget Authority

20. Generally, the applicable statutory scheme provides VA with budgetary resources to fund funding fee refund payments in the relevant cases discussed above. VA's ability to spend money, including funding fee credit payments, is contingent on advance authorization from Congress. See U.S. Const. art. I § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"); 31 U.S.C. § 1341(a)(1)(B) (prohibiting a government "obligation for the payment of money before an appropriation is made unless authorized by law."). In 1990, Congress enacted the Federal Credit Reform Act (FCRA), in part, to "measure more accurately the cost of federal credit programs . . . [and] . . . place the cost of credit programs on a budgetary basis equivalent to other federal spending." 2 U.S.C. § 661(1)-(4). The FCRA allows Congress to gauge the true cost of credit obligations, inclusive of obligations that do not necessarily require a disbursement of monies from the public coffers at the time the commitment is made. For example, prior to Congress's enactment of the FCRA, a VA-guaranteed loan that was made in 1980 and defaulted in 1985, obliging VA to make a guaranty payment to the holder, would not count as a

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government expenditure until 1985. Under the FCRA, at the moment VA guarantees a loan, VA's commitment must be recorded as a financial obligation in an amount equal to the net present value of the commitment, i.e. the loan subsidy cost.

21. The FCRA mandates that federal agencies track and account for such obligations in credit accounts. See Office of Management and Budget (OMB) Circular No. A-11 § 185, pg. 3 (2015). In 1998, Congress established LGY's current credit account, the Veterans Housing Benefit Program Fund (VHBPF). See 38 U.S.C. § 3722. The VHBPF is available to the Secretary "without fiscal year limitation, for all housing loan operations under this chapter, other than administrative expenses, consistent with the [FCRA]." 38 U.S.C. § 3722(b). The VHBPF contains two sub-accounts: the program account and the financing account. OMB Circular No. A-11 § 185, pg. 27. The program account can receive appropriations for the costs of loan guaranty commitments and LGY's administrative costs. Id. Normally, when LGY makes a loan guaranty commitment, the program account disburses funds into the financing account equal to the subsidy cost of the VA-guaranteed loan. Id. The financing account receives such funds and holds them as a reserve to pay potential guaranty claims. Id. The financing account also receives other amounts, including funding fees paid by veterans under section 3729. See 38 U.S.C. § 3722(d); OMB Circular No. A-11 § 185, pg. 7 (2015). The FCRA provides indefinite authority for loan guaranty financing accounts to borrow funds from Treasury when balances in the account are insufficient to meet the account's obligations. OMB Circular No. A-11 § 185, pg. 49 (2015). Despite this indefinite borrowing authority, in most cases, OMB must apportion funds to the financing account before LGY can access them. Id. at pg. 40; 31 U.S.C. § 1512(a).

22. Where lenders have collected funding fees from veterans in error, limitation, and retroactive cases, and remitted such funds to the Secretary, under the FCRA and section 3722(d), LGY has deposited such funds into the VHBPF's financing account. The financing account is generally available to the Secretary, without fiscal year limitation, to disburse monies consistent with the FCRA. Regardless of the nature of a veteran's interest in a funding fee refund, where LGY determines a refund is due, such funds should be paid from the financing account, i.e. the account into which the funds were initially deposited. See OMB Circular No. A-11 § 185, pg. 7 (2015) (stating that financing accounts must record "all cash flows resulting from post-1991 . . . loan guaranties."). In cases where funds in the financing account are not sufficient to meet the account's obligations, the financing account can borrow from the Treasury to cover such costs. See id. at pg. 49. In such instances, LGY may need to request an apportionment or reapportionment from OMB to access the funds. Id. at pg. 40.

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**Question 3: Is a refunding decision appealable under the AMA?**

23. The right of appeal to the Board of Veterans' Appeals (the Board) under 38 U.S.C. § 7104 applies to all VA decisions on matters affecting the provision of benefits, regardless of whether the decision is a decision on a "claim for benefits." See 38 U.S.C. §§ 511(a); 7104(a). However, the other review lanes made available under the AMA, i.e. supplemental claims under 38 U.S.C. § 5108 and higher-level reviews under 38 U.S.C. § 5104B, need not be made available for matters that are not claims for "benefits." Section 5104C(a), as added by the AMA, provides that, following a decision by the Secretary, a "claimant" may pursue either appeal to the Board, a supplemental claim, or higher-level review. 38 U.S.C. § 5104C(a). As noted above, the term "claimant" is defined in 38 U.S.C. § 5100 to refer to "an individual applying for, or submitting a claim for, any benefit under the laws administered by the Secretary." See supra para. 14; see also 38 U.S.C. § 5104B(a)(1) ("[a] claimant may request [higher-level] . . . review"). The three-lane review scheme of the AMA applies to claims for "benefits," but VA is not required to make all three AMA review options available with respect to determinations not involving benefit claims. VA could, of course, choose to make supplemental claim and/or higher-level review processes, or similar processes, available for decisions concerning requests for refund of the funding fee.



Richard J. Hipolit