

A REPORT TO CONGRESS CONCERNING
FEDERAL FORMER SPOUSE PROTECTION LAWS



A REPORT TO THE
COMMITTEE ON ARMED SERVICES
OF THE UNITED STATES SENATE
AND THE
COMMITTEE ON ARMED SERVICES
OF THE HOUSE OF REPRESENTATIVES

Prepared by the Department of Defense

EXECUTIVE SUMMARY

This report presents the results of a review of former spouse protection laws applicable to members and former members of the uniformed services¹ and their former spouses. The review was undertaken in response to the requirement in Section 643 of the National Defense Authorization Act for Fiscal Year 1998 (NDAA 1998) that the Secretary of Defense report to Congress primarily on the Uniformed Services Former Spouses' Protection Act (USFSPA). Report results are based on analysis of legal, procedural, and experiential data and materials related to the USFSPA carried out by the Department of Defense (DoD). In addition, independent subject matter experts provided DoD with further assistance in data collection, analysis, summarization, and report preparation.

Background

The issue of the division of military retired pay in divorce settlements was decided by the Supreme Court in its 1981 *McCarty v. McCarty* decision.² In that decision, the Court held that Federal law prohibited State courts from dividing military retired pay under State community property laws in divorce proceedings. The Court recognized the Federal interest in protecting the military retirement system, but also recognized the social and economic consequences of its decision on former spouses. It therefore invited the Congress to provide a measure of protection to former spouses of retired service members. In response, the Congress enacted the USFSPA in September 1982.

The USFSPA provided authority for State courts to treat retired pay as marital property subject to division. It also, for the first time, afforded former spouses the right to have direct payments of retired pay made to them by the Federal Government based on State court judgments subject to certain restrictions. It also afforded some former spouses other rights, including entitlements to survivor benefits, medical care, and military commissary and exchange privileges.

Congress has amended the USFSPA several times. These amendments have, for example, authorized courts to direct members to provide Survivor Benefit Plan (SBP) coverage to former spouses, changed the method by which "disposable retired pay" is calculated, and extended protections to spouses and former spouses whose rights to retired pay were terminated as a result of domestic violence and abuse.

Throughout the history of the USFSPA, there have been opposing views expressed about the law's fairness. To address these views and assess the current state and operation of the USFSPA, the Congress required the Secretary of Defense to conduct a review and report the results to the Congress.

¹ As used in this report, "uniformed services" refers to the Army, Navy, Air Force, Marine Corps, Coast Guard, National Oceanic and Atmospheric Administration (NOAA) and the U.S. Public Health Service.

² 435 U.S. 210 (1981).

The report must include findings, conclusions, and recommendations for improving the USFSPA. This report is submitted in compliance with that requirement.

Report Methodology

To assess the current state of the USFSPA, we gathered data from a variety of stakeholders on USFSPA issues. Stakeholders included current and former service members and the organizations that represent them, current and former spouses and the organizations that represent them, the uniformed services, governmental agencies, the American Bar Association (ABA), and State Bar Associations (State Bars).

We analyzed stakeholder data with a view towards identifying which provisions of the USFSPA and related laws are operating properly and do not need amendment, and which provisions are not operating properly and need amendment.

Key USFSPA Issues

In the course of our review, we identified a wide range of USFSPA-related issues. However, the stakeholders most frequently cited the following six issues:

- Treatment of Veterans Affairs (VA) disability compensation
- Termination of payments upon remarriage of former spouse
- Grant of benefits to 20/20/15 spouses as well as 20/20/20 spouses³
- Calculation of benefits based on time of divorce rather than time of retirement
- The "10-year Rule" for direct payment of retired pay allocations⁴
- Survivor Benefit Plan (SBP) issues:
 - Termination of SBP benefits if former spouse remarries before age 55
 - Award of SBP benefits among more than one spouse
 - Direct payment of SBP premiums by former spouses
 - 1-year "deemed election" rule⁵

Conclusions and Recommendations

³ A 20/20/15 spouse is a wife or husband who was married for at least 20 years to a member who served at least twenty years—at least fifteen years of the marriage must occur during the period of the member's military service. A 20/20/20 spouse is a wife or husband who was married for at least 20 years to a member who served at least twenty years—at least twenty years of the marriage must occur during the period of the member's military service. As a general rule, under current law, only 20/20/20 spouses continue to receive military benefits after they divorce.

⁴ The 10-year rule requires that the marriage and military service overlap for at least 10 years in order for the Federal Government to pay allocations of retired pay directly to a former spouse. The Federal Government cannot make direct payment to a former spouse unless this rule is satisfied.

⁵ Under the 1-year "deemed election" rule, a former spouse may make a "deemed election" of SBP coverage if the member fails or refuses to follow a court order which required the member to elect SBP coverage and designate the former spouse as beneficiary. Under the current law, to be effective, the former spouse must make the election within 1 year of the date the court order is issued.

Based on the results of our data collection and analyses, we present the following conclusions and recommendations with respect to the six key issues identified above. The body of the report contains our conclusions and recommendations for the other USFSPA-related issues we identified.

1. Treatment of VA Disability Compensation. The USFSPA excludes from disposable retired pay amounts waived to receive VA disability compensation. When a former spouse is receiving a certain percentage of the member's disposable retired pay each month, the waiver of military retired pay reduces the amount that the former spouse will receive each month.

Conclusion. Congress has, on several occasions, chosen to give VA disability compensation a higher priority than payments to former spouses. This is consistent with the treatment historically provided by Congress to VA disability compensation. It has treated it as compensation owed to the member for injuries/wounds incurred in the service of the United States. As such, the Congress has always exempted it from the claims of creditors (it has allowed claims for spousal and child support). The treatment of VA disability compensation is not within the purview of DoD. Such matters are exclusively within the purview of the Department of Veterans Affairs and the Congress. If Congress chooses to revisit the issue of the treatment of disability compensation, in relation to retired pay, it would be appropriate to ensure that the concerns of both members and former spouses are taken into account.

2. Termination of Payments Upon Remarriage of Former Spouse. The USFSPA does not require that distributions of retired pay to a former spouse stop if the former spouse remarries.

Conclusion. Domestic relations law is a subject principally reserved to the States. For this and other reasons discussed in this report, Federal law should not require that payments stop upon the former spouse's remarriage. Further, military retirement is similar enough to other types of retirement programs that it does not merit being treated differently than virtually all other retirement benefits. As a consequence, State courts, not Federal law, should determine the effect of remarriage.

3. Grant of Benefits to 20/20/15 Spouses as Well as 20/20/20 Spouses. Currently, 20/20/15 spouses are eligible for only limited benefits under the USFSPA.

Conclusion. The 20/20/20 eligibility rule is too restrictive. However, the principle of the 20/20/20 requirement should be retained because members must serve at least 20 years to earn benefits, and it would be inappropriate to extend benefits to former spouses who satisfy lesser criteria. A former spouse who has at least a 15-year marriage/service overlap should be eligible to qualify for these benefits by having time married after the member's retirement count toward satisfaction of the 20-year marriage/service overlap. Having every month of marriage after the member's retirement count as one month marriage/service overlap may be appropriate.

Recommendation. This measure would affect revenue. Although we have concluded that it may be appropriate for a former spouse who has at least a 15-year marriage/service overlap to be eligible to qualify for medical care, commissary, and exchange benefits by having time married after the

member's retirement count toward satisfaction of the 20-year marriage/service overlap requirement, further study is necessary to determine the cost of enacting such a program. Once DoD determines these costs, DoD will be able to make a recommendation and submit draft legislation if appropriate.

4. Calculation of Benefits Based on Time of Divorce Rather Than Time of Retirement. In cases where the member is not retired at the time of divorce, courts often award a percentage of the member's retired pay to the former spouse as of the date the member actually retires. In essence, the court treats post-divorce promotions and longevity pay increases earned by the member as marital assets.

Conclusion. This treatment of military retired pay is inconsistent with the treatment of other marital assets in divorce proceedings—only those assets that exist at the time of divorce or separation are subject to division. Assets that are earned after a divorce are the sole property of the party who earned them.

Recommendation. Congress should amend the USFSPA to base all awards of military retired pay on the member's rank and time served at the time of divorce. This provision should be exclusively prospective. The pay increases attributable to promotions and additional time served should be the member's separate property. However, as a matter of equity, the former spouse should benefit from increases in the pay table approved by Congress. For example, as the pay for an O-4 (e.g., Major/Lieutenant Commander) with 14 years of service is increased due to increases in the pay table, so too is the dollar amount of the allocation to the former spouse. The objective in this regard should be to provide the former spouse, on a present value basis, with approximately the same amount of retired pay that he or she would have received had the payments begun immediately on divorce.

5. The "10-year Rule" for Direct Payment of Retired Pay Allocations. Former spouses are eligible for direct payment, through the Defense Finance and Accounting Service (DFAS), of their allocable share of retired pay *only* if the member and former spouse were married for 10 or more years during which the member completed 10 or more years of creditable service.

Conclusion. Overwhelming justification exists for abolishing this requirement. First, no other examined public or private retirement system or plan contains such a restriction. Second, repeal should prevent the courts, practitioners, and parties to divorce proceedings from mistakenly interpreting this rule as a prerequisite to allocation of retired pay. Third, repealing this requirement would allow DFAS to issue separate Federal income tax reporting documents to the parties for their respective shares of the allocations.

Recommendation. DoD recommends that Congress repeal the 10-year marriage requirement for direct allocations of retired pay to former spouses.

6. SBP Issues. Termination of SBP Benefits if Remarried Before Age 55, Award of SBP Benefits to More Than One Spouse, Direct Payment of SBP Premiums by Former Spouses, and the 1-year "Deemed Election" Rule.

Current SBP law provides as follows: (1) a current or former spouse who remarries before reaching age 55 automatically loses entitlement to SBP coverage based on the former marriage; (2) a member can designate only one SBP beneficiary; and (3) former members have SBP premiums for current or former spouses deducted from disposable retired pay. In addition, if a member who is required to make an SBP election fails or refuses to do so, the member is "deemed" to have made the election if Defense Finance and Accounting Service (DFAS) receives both a written request from the former spouse and a copy of the court order within 1 year of the date of the decree of divorce or filing.

Conclusion. Since SBP coverage also stops if the current (surviving) spouse of a retired member remarries before age 55, no compelling reason exists for treating a former spouse more favorably than a current spouse.

The limit on SBP beneficiaries inappropriately deprives the surviving current spouse of an interest in the SBP and overcompensates the surviving former spouse. As a result, SBP annuity payments should be divisible or assignable among multiple beneficiaries. Additionally, they should be presumptively divisible in pro rata shares corresponding to the division of the underlying retirement benefits. If the USFSPA is amended to permit designation of multiple beneficiaries, the costs to the Government must be considered.⁶ Actuarially sound assumptions and tables must be developed to determine the appropriate premium cost for additional beneficiary coverage.

The rules regarding payment of SBP premiums have led to inequities by requiring that some members and former members pay premiums on annuities for the benefit of former spouses.

The "1-year rule" has created hardships for some spouses seeking to be recognized as court-ordered SBP beneficiaries.

The Government should not incur any additional cost, other than administrative expenses, as a result of implementing these recommendations. Former members and their former spouses should pay any additional insurance costs.

Recommendations. DoD recommends amending the provisions of the laws which relate to SBP as follows—

- Permit the designation of multiple SBP beneficiaries. (Provided actuarially sound assumptions and tables are developed to determine the appropriate premium cost for additional beneficiary coverage.)

⁶ The DFAS Retired Pay Directorate estimates system allocations would take at least 2 years to accomplish and that the estimated cost of the changes would be \$3-4 million.

- Establish a presumption (unless otherwise agreed by the parties or ordered by a court) that multiple beneficiary designations and related allocations of SBP benefits must be proportionate to the allocation of retired pay.
- Permit the courts (or the parties) to establish and designate responsibility for payment of premiums related to SBP coverage (at present, the law requires them to be deducted from disposable retired pay), and require SBP premiums to be withheld from the respective party's share of retired pay in accordance with such designation.
- Permit any spouse or former spouse to waive any or all of his or her proportionate coverage under SBP.
- Repeal the 1-year deemed election period requirement.

All of the above topics are discussed in greater detail in the body of the report. Further, additional details are included in the Appendices. Refer to page 7 for the Table of Contents and page 8 for the list of Appendices.

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LIST OF ABBREVIATIONS AND ACRONYMS

ABA	American Bar Association
AFSA	Air Force Sergeant's Association
ARA	American Retirees Association
C-4	Jurisdictional rules under 1408 C-4
CHCBP	Continued Health Care Benefit Program
CIA	Central Intelligence Agency
CIARA	Central Intelligence Agency Retirement Act
COBRA	Consolidated Omnibus Budget Reconciliation Act of 1985
COLA	Cost of Living Allowance
CSRS	Civil Service Retirement System
DAV	Disabled American Veterans
DFAS	Defense Finance and Accounting Service
DIC	VA Dependents Indemnity Compensation
DOD	Department of Defense
ERISA	The Employee Retirement Income Security Act of 1974, as amended
EX-POSE	Ex-Partners Of Servicemen/women for Equality
FERS	Federal Employee's Retirement System
FRA	Fleet Reserve Association
FS	Foreign Service
FSPS	Foreign Service Pension System
FSRDS	Foreign Service Retirement and Disability System
HMO	Health Maintenance Organization
HR SIC	Coast Guard Human Resources Services and Information Center
IRA	Individual Retirement Account
IRS	Internal Revenue Service
JAG	Judge Advocate General
MWR	Morale, Welfare, and Recreation
NCOA	Non Commissioned Officers Association of United States of America
NDAA	National Defense Authorization Act
NMFA	National Military Family Association
NMVA	National Military and Veterans Alliance
NOAA	National Oceanic and Atmospheric Administration
OPM	Office of Personnel Management
ORDS	Organization Retirement and Disability System
QDRO	Qualified Domestic Relations Order
QJSA	Qualified Joint and 50% Survivor Annuity
SBP	Survivor Benefit Plan
SSB	Special Separation Benefit
SSCRA	Soldiers' and Sailor's Civil Relief Act
State Bars	State Bar Associations
TREA	The Retired Enlisted Association

TROA	The Retired Officers Association
TSP	Federal Employees' Thrift Savings Plan
UCMJ	Uniform Code of Military Justice
U.S.C.	United States Code
USFSPA	Uniformed Services Former Spouses' Protection Act
VA / DVA	Department of Veterans Affairs
VSI	Variable Separation Incentive
WISE	Women In Search of Equity for Military in Divorce

INTRODUCTION

Purpose of the Report

This report presents the results of a review of former spouse protection laws applicable to members and former members of the uniformed services and their former spouses. The review was undertaken in response to a requirement in Section 643 of the National Defense Authorization Act for Fiscal Year 1998 (NDAA 1998), which required the Secretary of Defense to report to Congress primarily on the Uniformed Services Former Spouses' Protection Act (USFSPA).⁷ (See Appendix A) The USFSPA was enacted in 1982. Its primary purpose was to allow State courts to consider the retired pay of service members as property that could be divided during divorce proceedings.

In response to Congress' request for information related to the USFSPA, this report addresses a wide range of related issues including—

- The protections, benefits, and treatment afforded under Federal former spouse protection laws to current and former members of the uniformed services.
- The protections, benefits, and treatment afforded under Federal former spouse protection laws to current and former Federal Government employees and their former spouses.
- The experiences of current and former military personnel and their former spouses with respect to administration of former spouse protection laws.
- The experiences of the uniformed services in administering the USFSPA, including the adequacy and effectiveness of legal assistance that the DoD provides to members, former members, and their spouses.
- Legal authorities applicable to the enforcement of laws and protections of the interests of members and former members of the uniformed services and their former spouses in retired or retainer pay.
- Authorities that provide other benefits for members or former members and their former spouses.
- State laws and the decisions of the state courts interpreting the USFSPA.

⁷ Public Law 97-252, Title X, §§ 1001–1006, 96 Stat. 718, 730–738 (1982); 10 U.S.C. §1408.

Organization of this Report

Excluding appendices, this report is divided into the following seven sections—

Title	Description
Introduction	Indicates the purpose of the report and how the data used in preparing it were collected and analyzed.
Background	Provides a general description of the major provisions of the USFSPA and its related benefits.
USFSPA Today: Statistics and Issues	Presents statistics regarding annual numbers of cases of division of retired pay between service members and former spouses and provides a summary of key USFSPA issues.
Protections, Benefits, and Treatment Afforded Under Federal Law and Private Retirement Plans	Provides discussion of the protections, benefits, and treatment of retired pay under the uniformed services, Federal civilian, and private sector retirement systems.
USFSPA Administration	Discusses how USFSPA is administered and identifies related issues and challenges.
Review of USFSPA Issues	Addresses issues related to USFSPA and the positions of various stakeholders, such as service member and former spouse organizations.
Conclusions and Recommendations	Presents DoD's conclusions and recommendations on USFSPA-related issues.

Formation and Composition of DoD Working Group

In response to Congress' request for a report on former spouse protection laws, the Assistant Secretary of Defense for Force Management Policy formed a working group responsible for conducting a review and writing the report. The DoD working group included representatives from the Office of the Secretary of Defense Directorate of Compensation, Office of Legal Policy, Armed Forces Tax Council, and the Defense Finance and Accounting Service (DFAS). A representative from the Office of General Counsel served as an *ex officio* member. Judge Advocate General's Corp officers of the Reserve Components⁸, who have substantial private sector experience in domestic relations and pension law, also collaborated in the review and the preparation of this report. In addition to the working group,

⁸ As used in this report, "Reserve Component" means the Army National Guard of the United States, the Army Reserve, the Naval Reserve, the Marine Corps Reserve, the Air National Guard of the United States, the Air Force Reserve, the Coast Guard Reserve, or the Reserve Corps of the Public Health Service. 37 U.S.C. §101(24); 10 U.S.C. §101(c).

independent subject matter experts provided additional data, analysis, summarization, and report preparation support.

Report Methodology

In preparing this report, DoD—

- Examined and analyzed the statutory, regulatory, and case law authorities related to former spouse protection laws.
- Collected data on experiences with former spouse protection laws from military services/agencies, Federal agencies (nonmilitary), service member and former member organizations, former spouse organizations, the Family Law Section of the American Bar Association (ABA), and State Bar Associations (State Bars).
- Collected data on the administration and application of former spouse protection laws.

We analyzed the materials listed above to determine which provisions of the USFSPA and related laws are operating properly and do not need amendment and which provisions are not operating properly and need amendment.

Materials Collected. DoD solicited information from a wide range of organizations and individuals. The following paragraphs describe the materials submitted by each group.

Submissions by the Armed Forces. Legal advisors from the Army, Navy, Air Force, Marine Corps, and Coast Guard responded to the request by the Assistant Secretary of Defense (Force Management Policy) for comments on their respective experiences in administering the USFSPA.

Information Provided by Other Uniformed Services. Officials of the National Oceanic and Atmospheric Administration (NOAA) provided information about their experiences in administering and applying USFSPA, as well as their views on key USFSPA issues. Similar information was requested from the Commissioned Corps of the U.S. Public Health Service. However, the Corps did not provide information in support of this effort.

Submissions by State Bars and the ABA. The Assistant Secretary of Defense for Force Management Policy requested specific information and comments from all State Bars and the Family Law Section of the ABA. The information provided in response enabled DoD to prepare the summary of the history of State laws and State courts decisions that interpret the USFSPA. These submissions also contained several recommendations for amending the USFSPA. Fourteen State Bars provided responses. (See Appendix B).⁹ The Family Law Section of the ABA made a detailed submission.

⁹ The Louisiana response is not included because it represented the views of one individual and was never formally endorsed by the Louisiana State Bar Association.

Testimony from the Committee on Veterans' Affairs Hearings. On September 24, 1997, Congressman Bob Stump (R-AZ) introduced the Uniformed Services Former Spouses' Equity Act of 1997.¹⁰ This proposal would have amended the USFSPA in the following particulars—

- Terminate payments of retired pay to a former spouse upon his or her remarriage.
- Base allocation of retired pay on a member's rank and service at the time of the divorce.
- Impose a statute of limitations on efforts to seek a division of retired pay.
- Impose limits on the allocation of disability retired pay to former spouses.

On August 5, 1998, the House Veterans' Affairs Committee held hearings on the garnishment of benefits paid to veterans for child support and other court-ordered family obligations. Much of the testimony related to the USFSPA and proposals contained in Congressman Stump's bill. Members of DoD's working group attended the hearings and obtained copies of the 17 submissions made to the Committee. These submissions were also helpful in preparing this report.

Interviews with Officials at OPM, the Foreign Service, and the CIA. Oral and/ or written presentations were provided by personnel from the Office of Personnel Management (OPM), the Foreign Service (FS), and the Central Intelligence Agency (CIA). These presentations addressed the structure and major provisions of the respective agency's retirement programs, particularly the division of retired pay and the provision of post-retirement benefits to spouses and former spouses of employees.

Civilian Private Practitioners. While not mandated by Congress, DoD also considered presentations on the division of retired pay and benefits accrued under private sector retirement plans by civilian private practitioners.

DFAS Submission. The Assistant Secretary of Defense for Force Management Policy requested specific information and comments from DFAS on its experiences in administering the USFSPA. DFAS provided DoD with statistical information on the number of court orders it processes and comments on a variety of issues, including specific challenges it faces in administering USFSPA and the need among legal practitioners for more information regarding the law.

Submissions by Tax-Exempt Organizations. On December 23, 1998, DoD published a notice in the *Federal Register* soliciting information and comments from private, tax-exempt organizations. (See Appendix D). Responding organizations included those representing the interests of members and former members and those representing the interests of former spouses. These

¹⁰ H.R. 2537, 105th Congress, 1st Session (1997).

organizations are listed in Appendix E. Several organizations that have not been recognized by the Internal Revenue Service (IRS) as tax-exempt also provided detailed submissions which were helpful.

Web site, E-Mails, and Letters. On December 30, 1998, DoD launched a web site on its Personnel and Readiness Home Page and requested comments from individuals affected by the USFSPA. In addition to the comments collected on the official web site, DoD received e-mails and letters from individuals detailing their experiences with, and views of, various provisions of USFSPA. While these submissions were informative, the individuals who forwarded the submissions were not representative of the population affected by the USFSPA. Nonetheless, since there are far fewer former spouse organizations, when compared with the number of member/former member organizations, DoD used former spouse letters and e-mail messages to obtain additional perspectives on USFSPA-related issues.

BACKGROUND

General Description of USFSPA

Congress enacted the USFSPA in response to the Supreme Court's 1981 decision in *McCarty v. McCarty*.¹¹ In its decision, the Court held that Federal law prohibited a State court from dividing military retired pay under State community property laws in divorce settlements. Although the Court recognized the Federal interest in protecting the military retirement system, it also recognized the social and economic consequences of its decision for many former spouses. The Court invited Congress to afford more protection to former spouses of retired service members. In response to *McCarty v. McCarty*, Congress enacted the USFSPA in September 1982. A detailed discussion of the legislative history of the USFSPA is included in Appendix F.

One of the most important provisions of the USFSPA allows State courts to consider disposable retired pay in divorce proceedings either as property solely of the member or as property of the member and his or her spouse.¹² The USFSPA does not mandate an *automatic* division of retired pay, nor does it require the use of a specific *formula* for dividing retired pay. Rather, it grants State courts the *discretion* to consider retired pay, along with other marital assets, in making a property division. Because of differences in States' handling of property settlements, the USFSPA prohibits courts from dividing military retired pay unless it has jurisdiction over the member. A court is considered to have jurisdiction over the member if the member resides in the area under the court's jurisdiction (for reasons other than military assignment), has legal domicile in that area, or has consented to the jurisdiction of the court.

In addition to allowing a former spouse to receive a share of retired pay as a result of a property settlement, the USFSPA allows a former spouse to receive payments of alimony and child support obligations from retired pay. If the marriage coincided with at least 10 years of the member's "creditable military service,"¹³ the former spouse is eligible to receive payments resulting from a division of disposable retired pay as property directly from the services through DFAS.¹⁴ Otherwise, members must pay the allocation of retired pay directly to the former spouse. DFAS, however, may pay alimony and child support directly to a former spouse regardless of the duration of the marriage.¹⁵

The USFSPA's effective date was February 1, 1983. However, it allowed courts to treat retired pay as property beginning with pay periods after June 25, 1981, the date of the *McCarty* decision. In so doing, Congress intended to restore the law to its state before the Supreme Court's

¹¹ 435 U.S. 210 (1981).

¹² 10 U.S.C. §1408(c)(1).

¹³ As used in this report, "creditable military service" or "creditable service" means years of service creditable in determining eligibility for retired pay under Chapter 71 of Title 10 U.S.C. This calculation is made using the criteria set forth in 10 U.S.C. §1045.

¹⁴ 10 U.S.C. §1408(d)(2).

¹⁵ 10 U.S.C. §1408(d)(5).

decision. Former spouses divorced between the *McCarty* decision and the enactment of the USFSPA had the opportunity to return to court to have their decrees modified.¹⁶ Under the USFSPA, pre-*McCarty* divisions of retired pay remain valid. In 1990, the USFSPA was amended to prohibit modification of pre-*McCarty* court orders with respect to a division of retired pay unless the original decree either divided military retired pay or specifically reserved the right to do so.¹⁷

Summary of Related Benefits

Members, former members, and their spouses and former spouses may also be eligible for additional benefits through the Survivor Benefit Plan (SBP), medical care, commissary and exchange privileges, and Department of Veterans Affairs (VA) disability compensation.¹⁸ The USFSPA specifies the extent to which former spouses are eligible to receive these benefits.

Survivor Benefit Plan. In general, the USFSPA allows former spouses to receive survivor annuity benefits from the SBP. As originally enacted, the USFSPA required that the designation of a former spouse as beneficiary be voluntary. Consequently, State courts could not order such designations. The 1985 amendments to the USFSPA allow courts, in the divorce decree, to incorporate or approve, a voluntary written agreement that designates the spouse as SBP beneficiary.¹⁹ In 1987, Congress amended the SBP to permit State courts to order members to participate in the SBP and to designate a former spouse as a beneficiary incident to a divorce.²⁰ If a member fails to make a court-ordered election, the former spouse may make a “deemed election” of SBP by providing written notice to DFAS within one year of the date of the court order or filing.²¹ The SBP benefit is payable to only one beneficiary. It cannot be divided between a spouse and a former spouse or between a child and a former spouse.

Medical Care and Commissary and Exchange Benefits. The USFSPA also makes provisions for unremarried former spouses to receive medical benefits and commissary and exchange privileges. To be eligible, the former spouse must have been married to the member for at least 20 years during a period in which the member performed at least 20 years of military service. However, a former spouse who otherwise qualifies for medical benefits loses coverage if he or she becomes covered by an employer-sponsored health plan. Subsequent changes to the USFSPA allow former spouses who do not meet the 20/20/20 eligibility criterion to receive or participate in reduced or alternative medical benefit plans.

¹⁶ Senate Report 97-502, *reprinted in* 1982 U.S.C.C.A.N. vol. 3, 1599–1600.

¹⁷ Public Law 101-510, 1990 Defense Authorization Act.

¹⁸ Additional benefits, such as use of Morale, Welfare, and Recreation (MWR) facilities and related services (e.g., theater and golf courses), legal assistance, and other military facilities services may be available to former spouses. However, the working group received virtually no submissions or comments with respect to these benefits. Moreover, its review did not disclose any concern or issues with respect to these benefits. Therefore, for purposes of this report, the term “other benefits” is limited.

¹⁹ Department of Defense Authorization Act, 1985, 98-525, §642, 98 Stat. 2492, 2548 (1984); codified at 10 U.S.C. §1450(f)(4).

²⁰ Public Law 98-525, section 641; *see also* 10 U.S.C. §1448(f)(3).

²¹ 10 U.S.C. §1450(f)(3).

Disability Benefits. Both VA and DoD determine and administer disability benefits. In general, the purpose of disability retired pay is to authorize a continuing payment to members separated from active service because of a physical or mental disability. The award of disability benefits also recognizes the need to provide some measure of economic security for personnel whose duties exposed them to the hazards of wartime and career military service.

The USFSPA excludes both DoD disability retired pay and VA disability compensation from the definition of “net disposable retired pay.” Consequently, neither is subject to allocation to a former spouse. Disability compensation awarded by the VA is excludable from the former member's gross income for Federal income tax purposes,²² while disability retired pay received from DoD generally is not.²³

A retiree may receive disability compensation from the VA at the same time that he or she receives retired pay, including DoD disability retired pay. However, the member must file a “waiver” of a portion of his or her retired pay (including DoD disability retired pay) equal to the amount of disability compensation that he or she is entitled to receive from the VA. This results in a reduction in retired pay equal to the award of VA disability compensation.

²² 38 U.S.C. §5301.

²³ Internal Revenue Code section 104(a)(4) provides, in part, that gross income does not include "amounts received as a pension, annuity, or smaller allowance for personal injuries or sickness resulting from active service in the armed forces." Congress has, however, limited the applicability of this section. It "continues to apply to a member if—(A) on or before September 24, 1975, he was entitled to receive any amount described in subsection (a)(4), (B) on September 24, 1975, he was a member of any organization (or reserve component thereof) referred to in subsection (a)(4) or under a binding written commitment to become such a member, (C) he receives an amount described in subsection (a)(4) by reason of a combat-related injury, or (D) on application therefor, he would be entitled to receive disability compensation from the Veterans' Administration." If the member obtains a VA disability rating and waives military retired pay to receive VA disability pay, the amount the member receives from the VA would be tax free. *See* 38 U.S.C. §5301.

USFSPA TODAY: STATISTICS AND KEY ISSUES

Statistics Regarding Division of Military Retired Pay

The receipt, review, and implementation of court orders dividing retired pay constitute a significant proportion of the DFAS workload.²⁴ The Office of the Assistant General Counsel for Garnishment Operations in the Cleveland DFAS is the Office of Primary Responsibility for these matters. This office has 111 employees who process court orders for alimony, child support, commercial debt, and applications for payments under the USFSPA. Thirty-five percent of these employees' time is spent processing orders issued under the USFSPA. The Office of Retired Pay employs 15 individuals in the Garnishment and Former Spouse Payment Section. Over 80 percent of their time is spent adjudicating payment issues that arise in connection with orders issued under the USFSPA.

Total Retirees and Former Spouses Receiving Direct Payments. As of April 1, 1999, there were 1,985,557 former members receiving retired pay. Additionally, there were 54,044 former spouses receiving direct payment allocations of retired pay pursuant to orders issued under the USFSPA.

Small Benefit Payments to Former Spouses. Of the 54,044 former spouses receiving monthly direct payment allocations of retired pay as of April 1, 1999, 735 receive \$100 per month or less in net payments of retired pay.

DFAS Caseload. DFAS has processed over 18,000 court orders in each of the past three years (1996 through 1998). Specifically, the number of court orders affecting retired pay or requiring DFAS to make payments under the USFSPA in recent years were—

Calendar Year	Domestic Relations Orders Processed
1996	19,536
1997	21,523
1998	18,596
1999 (Jan–Aug)	13,516

In 1998, DFAS rejected, at initial submission, 43.4 percent of the domestic relations orders it processed.²⁵ This rejection rate was similar to other years. A significant proportion of the rejections are due to curable errors, such as failure to submit certified copies of court orders, DoD Form 2293, or other required documents. A lesser proportion are due to failure to satisfy the C-4 jurisdictional rules

²⁴ DFAS, a central processing unit in Cleveland, Ohio, is responsible for processing all domestic relations orders that require the payment of alimony or child support or that allocate retired pay to a former spouse.

²⁵ This represents 8,068 of the 18,596 orders processed.

(rules required by the USFSPA²⁶ and that are more restrictive than regular State jurisdictional rules) or the 10-years-of-marriage requirement for direct payment from DFAS. A small percentage is due to use of allocation formulas that do not satisfy the requirements of the USFSPA.

During calendar year 1998, DFAS received 11,600 written and 35,857 telephonic inquiries about domestic relations orders relating to the USFSPA. According to DFAS, this level of annual activity is typical.

Summary of Key USFSPA Issues

Since the USFSPA became law, members, former members, spouses, and former spouses commonly cite several of its provisions as problematic. As discussed below, efforts by organizations that purport to represent the respective interests of these individuals (member and former member organizations and former spouse organizations) have resulted in numerous proposals to amend the USFSPA. A few of the proposals have actually been enacted. DoD believes that the controversies associated with the USFSPA and with subsequent legislation gave rise to the 1998 NDAA requirements that DoD report to Congress on Federal former spouse protection laws.

In the section below, we identify and discuss those issues most frequently raised by the stakeholders. For a more detailed discussion of these issues, see the section of this report entitled, "Review of USFSPA Issues."

Treatment of VA Disability Compensation. To receive VA disability compensation, a former member must waive an equal portion of military retired pay. Such waivers reduce the members' disposable retired pay on a dollar-for-dollar basis.²⁷ This reduction, in turn, automatically reduces the former spouse's allocation of retired pay. Thus, a member, by waiving a portion of retired pay to receive VA disability compensation, can reduce his or her payment to a former spouse without the consent of either the former spouse or the court.

Termination of Payments Upon Remarriage of Former Spouse. The USFSPA does not require that payments of retired pay to a former spouse terminate upon his or her remarriage.

Grant of Benefits to 20/20/15 Spouses. Only former spouses who qualify under the 20/20/20 marriage rules receive commissary and exchange privileges and, with one exception, permanent medical care. Former spouses who satisfy the 20/20/15 requirement (20 years of marriage, 20 years of creditable military service, and a 15-year overlap in the marriage and service) receive only temporary medical benefits (former spouses divorced before April 1, 1985, who satisfy certain other requirements can receive medical care for an indefinite period). Upon remarriage, former spouses lose eligibility for all of these benefits.

²⁶ 10 U.S.C. §1408(c)(4).

²⁷ 10 U.S.C. §1408(a)(4).

Calculation of Benefits Based on Time of Divorce Rather Than Time of Retirement. In cases in which the member is still on active duty, or is a member of the Reserve Component who has completed 20 years of creditable service and has not reached age 60, the USFSPA does not require a court to calculate the allocation of retired pay to the former spouse based on the member's rank and years of creditable service at the time of divorce or as of some other date specified in State law, such as the date of separation. As a consequence, the courts often include a member's post-dissolution promotions and years of creditable service in calculating the former spouse's allocation of retired pay.

The "10-Year Rule" for Direct Payment of Retired Pay Allocations. Since its inception, the USFSPA has allowed DFAS to make direct payments of allocations of retired pay as property only when the marriage and the period of creditable service overlapped by at least 10 years. This rule requires thousands of former members and former spouses to make individual arrangements for payment and collection of allocations of retired pay.²⁸ No other Federal or private retirement plan includes a direct payment limitation.

SBP Issues. Several issues concerning SBP benefits have long been raised by all categories of interested parties. These issues include the termination of SBP benefits to a former spouse upon his or her remarriage before age 55, the inability of a member to designate more than one spouse or former spouse as an SBP beneficiary, the payment of SBP premiums, and the 1-year deadline for a former spouse to make a "deemed election" for SBP coverage.

²⁸ DoD is not authorized to, and does not, maintain records of the number of members and former members whose marriages were dissolved before the 10-year overlap requirement was satisfied.

PROTECTIONS, BENEFITS, AND TREATMENT AFFORDED UNDER FEDERAL LAW AND PRIVATE RETIREMENT PLANS

Overview of the Protections, Benefits, and Treatment Afforded Under Federal Law to Members, Former Members, and Their Former Spouses

During the months that followed the *McCarty* decision, several legislative initiatives to repeal the decision were introduced and one compromise measure was enacted. All civilian employees of the Federal Government were subject to some sort of pension sharing at this time. Only the retirement benefits of military members were not subject to division by State courts. The Federal philosophy that followed directly from this background was that State courts, subject to the laws established by their legislatures, were in the best position to resolve the many fact-dependent issues that arise in a divorce. Accordingly, Congress chose to grant to the State courts the authority, subject to Federal limits, to divide military retirement benefits, and it further chose to protect the affected service members by establishing procedural safeguards, that, at the time, were meaningful. These safeguards were intended to ensure that no Federal payments would be made to a former spouse in the absence of compliance with the protections provided to the service member.

The Senate bill that later became the USFSPA was S. 1814. It was introduced by Senator Roger Jepsen (R-IA), Chairman of the Subcommittee on Manpower and Personnel of the Senate Armed Services Committee, in September of 1981. Senator Jepsen introduced the bill with the intent of reversing the Supreme Court's decision in *McCarty*, and the bill's provisions were made retroactive to June 26, 1981, the date of that decision. That is, the Committee intended the legislation to restore the law to what it was before the *McCarty* decision, when State courts were permitted to apply State divorce law to retired pay.²⁹ The bill became law in September 1982.

Under the USFSPA, former spouses are not given an automatic right to receive an allocation of retired pay. Rather, retired pay can, *at the discretion of the State courts*, be treated either as the sole property of the member or as the property of the member and his or her spouse. The division of retired pay is determined by a court that has personal and subject matter jurisdiction over the parties based on the divorce law of the State in which the court is situated. However, the USFSPA places several limitations on the power of a State court to divide retired pay, including the following—

- The total amount of disposable retired pay allocable to a spouse or a former spouse (or to more than one spouse and former spouse) can not exceed 50 percent of such pay.
- No right is created that would allow a spouse or a former spouse to sell, assign, or transfer an interest in retired pay.
- The courts cannot direct a member to retire at a particular time to effectuate current payment of retired pay to a spouse or a former spouse.

²⁹ Senate Report 97-502, p. 5.

Only Disposable Retired Pay is Subject to Division. The USFSPA stipulates that only “disposable retired pay” is subject to division. It defines disposable retired pay as the member’s total monthly retired pay less the following items: (1) overpayments of retired pay, (2) forfeiture of retired pay ordered by a court-martial, (3) retired pay required to be waived by a former member in order to receive VA disability compensation, (4) disability pay from DoD, and (5) the cost of providing SBP coverage for a spouse or former spouse.³⁰ In the case of divorce decrees entered before February 3, 1991, Federal and State income tax withholdings are deducted from total retired pay in determining disposable retired pay.³¹ When crafting the law, Congress noted that the specific deductions including disability pay that are to be made from the monthly retired pay “generally parallel those existing deductions which may be made from the pay of Federal employees and military personnel before such pay is subject to garnishment for alimony or child support payments under section 459 of the Social Security Act (42 U.S.C. 659).”³²

Limitation on Allocation of Retired Pay. The amount payable under all court orders that can be allocated to a former spouse as marital property is limited by the USFSPA to 50 percent of a member’s “disposable retired pay.”³³

No Assignment of Retired Pay. The USFSPA prohibits a former spouse from selling, assigning, or transferring his or her court-ordered interest in retired pay.

State Court Jurisdiction. In general, domestic relations issues are subject to State law. However, as a Federal law, the USFSPA does preempt State law in the areas that are specified in the USFSPA.

Jurisdictional Requirements. The USFSPA imposes a jurisdictional requirement that must be met before a particular court can award a former spouse an allocation of retired pay. To satisfy this requirement, the spouse must establish that the member’s residence is within the territorial jurisdiction of the court (for reasons other than military service), that the member is domiciled within the territorial jurisdiction of the court, or that the member has consented to the jurisdiction of the court.³⁴

Requirements for Order to Qualify for Direct Payments. For a former spouse to qualify to receive direct payment from DFAS, the court order must meet certain criteria. First, the order must specifically provide for the payment of an amount expressed either as a dollar amount or as a

³⁰ 10 U.S.C. §1408(a)(4).

³¹ National Defense Authorization Act, Public Law 101-510, Title V, §555, 104 Stat. 1485, 1569-70 (1990). A former subparagraph, 10 U.S.C. §1408(b)(C), which identified amounts properly withheld for Federal, State or Local income taxes, was deleted in 1990. The effective date of the revision was February 3, 1991.

³² Senate Report 97-502, p. 14.

³³ 10 U.S.C. §1408(e)(1).

³⁴ 10 U.S.C. §1408(c)(4).

percentage of disposable retired pay—even if the member has not yet retired.³⁵ If the member is on active duty at the time of divorce, the award may be expressed as a formula or hypothetical award (award based on the member's rank and years of creditable service at the time of the divorce or separation). Cost-of-living allowance (COLA) increases are permitted only for percentage awards, not for dollar amount awards.³⁶

Second, two separate “jurisdictional” criteria must be satisfied. The parties must have been married for at least 10 years during which time the member must have performed at least 10 years of creditable service.³⁷ Additionally, the court must establish that certain jurisdictional criteria such as residence, domicile, or consent of the member have been satisfied.³⁸

Finally, the order must specify whether the allocation represents child support, alimony, or a division of property.³⁹ The maximum amount of retired pay that can be paid by DFAS directly to the former spouse is 50 percent of the member’s disposable retired pay.⁴⁰ This amount increases to 65 percent if current payments or arrearages for spousal/child support are due and owing to the former spouse.⁴¹

Marriage Requirements and Termination on Remarriage. The USFSPA does not contain a minimum marriage requirement. Therefore, courts may divide military retired pay regardless of the length of the marriage. This area, however, has been a source of considerable confusion. For example, the 10-year marriage requirement for direct payment of former spouse allocations by DFAS has been misinterpreted by some to mean that only marriages of 10 years or more qualify for division of retired pay.

Similarly, there is no effect on the division of retired pay if a former spouse remarries. However, some former spouses will lose other USFSPA-related benefits (such as coverage under the SBP) under certain conditions. These circumstances are discussed in the relevant sections below.

Enacted Amendments. Since the USFSPA was signed into law, several proposals have been made to amend certain provisions. However, only a few amendments survived to be enacted. This section describes those amendments.

1985 NDAA. Section 641 of the NDAA for Fiscal Year 1985 authorized courts to direct members to provide SBP coverage to their former spouses. Section 645 made former spouses who were divorced before the effective date of the USFSPA and who otherwise satisfied its requirements eligible for medical care. It also authorized medical care for former spouses who were married at least

³⁵ 10 U.S.C. §1408(a)(2)(C).

³⁶ *See, for example*, 2 C.F.R. 63.6(H).

³⁷ 10 U.S.C. §1408(d)(2).

³⁸ 10 U.S.C. §1408(c)(4).

³⁹ 10 U.S.C. §1408(d)(1).

⁴⁰ 10 U.S.C. §1408(e)(1).

⁴¹ 10 U.S.C. §1408(e)(5-6); 42 U.S.C. §659 (section 759 of the Social Security Act).

20 years to a member who served at least 20 years, provided that the marriage coincided with at least 15 years of the member's period of service. For divorces occurring before April 1, 1985 the duration of this eligibility was unlimited. For divorces occurring on or after April 1, 1985, the period of eligibility was limited to 2 years.

1987 NDAA. Section 644 of the NDAA for Fiscal Year 1987⁴² changed the method by which “disposable retired pay” is calculated. The legislation limited the deduction of DoD disability pay to the percentage of the member's disability on the date on which the member was retired and removed the deduction for group term life insurance premiums from the calculation.⁴³ Section 643 also reduced, from 60 to 55, the age of the former spouse at which SBP payments would end in the event of remarriage.

1991 NDAA. Section 555 of the NDAA for Fiscal Year 1991⁴⁴ amended the USFSPA in the following two respects: (1) it explicitly prohibited the reopening of pre-*McCarty* cases for purposes of dividing retired pay unless the original decree either divided military retired pay or specifically reserved the right to do so, and it placed a 2-year statute of limitations (until November 1992) on payments to those who did reopen pre-*McCarty* cases and received an award; and (2) it amended the definition of “disposable retired pay” by eliminating the deduction for State and Federal income taxes. The House Armed Services Committee Report accompanying the 1991 NDAA stated, with respect to section 555—

The reopening of divorce cases finalized before the Supreme Court's decision in *McCarty v. McCarty* continues to be a significant problem . . . Although Congress has twice stated in report language that this result was not intended, the practice continues unabated. . .

The exclusion of tax withholdings of the service member from the computation of disposable retired pay have created unfairness, in part because of present interpretations of the Internal Revenue Code . . . Current law provisions that permit the deduction from gross retired pay of amounts waived in order to receive veterans' disability compensation . . . [will] not be changed.⁴⁵

1993 NDAA. Section 653(a)(2) of the NDAA for Fiscal Year 1993⁴⁶ extended the protections of the USFSPA to spouses and former spouses of members whose rights to retired pay were terminated as a result of domestic abuse. In passing this amendment, Congress intended “to remedy a concern that if a member of the Armed Forces is separated from the military because of a conviction of

⁴² Public Law 99-661, Div. A, title VI, §644(a), 100 Stat. 3816, 3885-3887 (1986).

⁴³ Public Law 99-661 now set forth in 10 U.S.C. §1408(a)(4)(C).

⁴⁴ Public Law 101-510, Div. A, title V, §555(a), 104 Stat. 1485, 1569-1570 (1990).

⁴⁵ House Report 101-665 (Committee on Armed Services), pp. 279-80, on H.R. 4739, 101st Congress, 2d Session (1990).

⁴⁶ Public Law 102-484, Div. A, title VI, §653, 106 Stat. 2315, 2426-2428 (1992).

dependent abuse, the member (and subsequently the family) immediately lose all military benefits.” The House Armed Services Committee stated that “this situation creates a serious disincentive to spouses and dependents to report abuse, and often results in repeated revictimization of the victim.”⁴⁷

Pending Legislation. On January 6, 1999, Congressmen Stump (R-AZ) and Norwood (R-GA) introduced the Uniformed Services Former Spouses Equity Act of 1999 (H.R. 72). The proposal, which is virtually identical to a bill (H.R. 2537) introduced by Congressman Stump in 1997, contains amendments to the USFSPA. In general, the proposed amendments include—

- Terminating payments to a former spouse upon remarriage.
- Requiring disposable retired pay to be computed based on the rank and years of service of the member at the time of the final divorce decree.
- Limiting the time allowed for seeking a division of retired pay.
- Limiting the apportionment of VA disability compensation when retired pay has been waived.

(See Appendix G for the text of H.R. 72).

Federal Income Tax Treatment of Payments Under the USFSPA. The Internal Revenue Code contains a variety of special rules that apply to benefits attributable to service with the armed forces. This section addresses only the Federal income tax rules applicable to the payment of such benefits.

Retired Pay. Although military retired pay is considered to be, in some contexts, current, but reduced compensation, for current, but reduced services, the Internal Revenue Code treats pay, including DoD disability pay (subject to 10 U.S.C. § 1403), as deferred compensation for past services and, as such, makes it subject to income (but not employment) tax.⁴⁸ In the case of retired pay allocated to a member and former spouse pursuant to a court order, each party is responsible for payment of all Federal, State, and local income taxes on their respective allocations. When DFAS makes direct payment of these allocations, it withholds Federal income tax from each party's payments in accordance with IRS tables and schedules based on marital status, number of dependents, and additional allowances for itemized deductions. It also reports the payments to the IRS on IRS Form 1099-R - which it issues to each party.

⁴⁷ House Report 103-200 (Committee on Armed Services), p. 284, 103d Congress, 1st Session (1994), accompanying H.R. 2401.

⁴⁸ See, for example, 4 U.S.C. §111. Before 1990, amounts withheld for Federal, State, or Local income taxes were deducted from total retired pay in determining disposable retired pay. In 1990, this provision was deleted from the USFSPA due to “unfairness, in part because of present interpretations of the Internal Revenue Code.” See National Defense Authorization Act for Fiscal Year 1990, 101-510, title V, §555, 104. Stat. 1485, 1569-70 (1990).

When DFAS cannot make direct payments to the former spouse because the minimum marriage requirement is not satisfied, the former member receives all of his or her retired pay from DFAS and has tax withheld on the full amount. DFAS reports the full amount of retired pay to the former member and the IRS on IRS Form 1099-R.⁴⁹

SBP Premiums. When a member or former member enrolls in SBP, his or her retired pay is reduced to pay for the SBP annuity. Thus, for Federal income tax purposes, gross income does not include the amount of the reduction in retired pay that results from participation in the SBP.⁵⁰

VA Disability Compensation. VA disability compensation is excludable from gross income for Federal income tax purposes.⁵¹

Medical and Dental Care Coverage.

In General. Former spouses of active duty and retired members who meet certain requirements are eligible for health care benefits under TRICARE Standard. TRICARE Standard is a health benefits program for all seven of the uniformed services. The first requirement that must be met for a former spouse to be eligible for this program is that the member or former member must have performed at least 20 years of creditable service at the time of divorce or annulment. In addition, the former spouse must: (1) not have remarried; (2) not be covered by an employer-sponsored health plan; (3) not be eligible for Part A of Medicare due to age, except under certain conditions; (4) not be the former spouse of a NATO (or "Partners for Peace" nation) member; and (5) meet the requirements of one (not all) of the following three situations:

Situation 1. The former spouse must have been married to the member or former member for at least 20 years and at least 20 of those married years must have been creditable in determining the member's eligibility for retired pay. If the date of the final decree of divorce or annulment was on or after February 1, 1983, the former spouse is eligible for TRICARE coverage which is received after that date. If the date of the final decree was before February 1, 1983, the former spouse is eligible for TRICARE coverage received on or after January 1, 1985.

Situation 2. The former spouse must have been married to the member or former member for at least 20 years, and at least 15 but less than 20 of those married years must have been creditable in determining the member's eligibility for retired pay. If the date of the final decree of divorce or annulment was before April 1, 1985, the former

⁴⁹ Only payments that qualify as "alimony" qualify for deduction as an adjustment to gross income. Allocations of retired pay that are not structured as "alimony" thus constitute nondeductible "personal" expenses. Internal Revenue Code sections 62, 71, and 215.

⁵⁰ See, for example, section 122 of the Internal Revenue Code.

⁵¹ 38 U.S.C. §5301.

spouse is eligible only for care received on or after January 1, 1985, or the date of the decree, whichever is later.

Situation 3. The former spouse must have been married to the member or former member for at least 20 years, and at least 15 but less than 20 of those married years must have been creditable in determining the member's eligibility for retired pay. If the date of the final decree of divorce or annulment is on or after September 29, 1988, the former spouse is eligible only for care received for 1 year from the date of the decree.

Upon completion of the period of eligibility for TRICARE, explained in Situation 3 above, a former spouse is eligible for the Continued Health Care Benefit Program (CHCBP). This program is similar to COBRA continuation coverage provided to former spouses under private sector plans. (See Appendix H).

Continued Health Care Benefit Program. CHCBP is intended to provide benefits similar to TRICARE Standard for a specific period of time (18 to 36 months) to former members and their family members, certain unremarried former military spouses, and emancipated children (living on their own) who enroll and pay quarterly premiums. The premiums are based on comparable Federal Employee Health Benefit Program rates paid by employees and the agencies they work for, plus an administrative fee of up to 10 percent.

Eligible individuals must enroll in CHCBP within 60 days after separation from active duty or the date on which they lose eligibility for military health care. A third-party contractor administers CHCBP, including enrollment and updates of the DEERS database. The contractor accepts applications for enrollment and payments for the first 3 months of coverage, and sends a letter of acceptance, which serves as proof of enrollment when a person seeks care.

Unmarried Children up to Age 21. Children (including stepchildren who are adopted by the sponsor) are covered by TRICARE even if the former spouse is remarried. But a stepchild who was not adopted by the member loses eligibility on the date the divorce becomes final. Stepchildren need not be adopted by the member to be covered by TRICARE while the member and the mother or father of the stepchildren remain married. A child aged 21 or older may be covered if he or she is severely disabled and the condition existed prior to the child's 21st birthday. A child may also be covered up to the 23rd birthday if he or she is a full-time student.

Certain Abused Spouses, Former Spouses, and Dependent Children. TRICARE benefits are provided to the families of former members who were eligible for retirement but had that eligibility taken away as a result of abuse of the spouse or child. This benefit is effective for medically necessary services and supplies provided under TRICARE Standard (CHAMPUS) on or after October 23, 1992. It is not limited to 1 year of eligibility, nor is it limited to illnesses and injuries resulting from the abuse.

Commissary and Exchange Privileges.

Commissary. The purpose of the commissary privilege is to make items of convenience and necessity, especially items related to subsistence, available for purchase by military personnel at convenient locations and reasonable prices.⁵² The types of merchandise and food items authorized for sale at a commissary are specifically limited by legislation.⁵³

Exchange. The purpose of a military exchange is to provide merchandise and necessary services at moderate prices to authorized patrons.⁵⁴ An additional purpose is to generate earnings to supplement appropriated funds for the support of DoD's Morale, Welfare, and Recreation (MWR) programs.⁵⁵ There is no specific statutory authority that governs the establishment and operation of military exchanges. Rather, they are established and operated under regulations promulgated by the military departments.⁵⁶

Value of Commissary and Exchange Benefits. The annual savings from using commissary and exchange stores as compared with use of commercial retail stores has been estimated to average between 20 and 25 percent.⁵⁷

General Eligibility Requirements. Several categories of individuals are entitled to use commissary facilities, including active and retired members and their surviving spouses (unlimited use), veterans with service-connected disabilities and their surviving spouses (unlimited use), and certain members of the Reserve Components and their spouses (currently, 24 visits per year).⁵⁸ All of these categories of individuals have unlimited use of exchanges.

Eligibility of Former Spouses. Certain unremarried former spouses are entitled to commissary and exchange privileges "to the same extent and on the same basis as the surviving spouse of a retired member of the uniformed services."⁵⁹ To be entitled to commissary privileges, the following requirements must be satisfied: the former spouse must not be remarried, must have been married to a member who completed at least 20 years of creditable service, must have been married to such member for at least 20 years, and must have a marriage/creditable service overlap of at least 20 years.⁶⁰

⁵² The legislative authority for commissaries is found throughout title 10 of the United States Code. *See, for example*, 10 U.S.C. §§ 2484 and 2685. *See also* 10 U.S.C. §§ 4621 (Army), 7601 (Navy and Coast Guard), 7602-7603 (Navy, Marine Corps, Army, and Air Force) and 9621 (Air Force).

⁵³ *See* 10 U.S.C. §2486.

⁵⁴ *See, for example*, 10 U.S.C. §1065.

⁵⁵ *See, for example*, 10 U.S.C. §1065(e).

⁵⁶ In 1949, a subcommittee of the House Armed Services Committee held hearings on DoD's MWR resale activities. From these hearings, the Armed Services Exchange Regulations were developed. These Regulations are promulgated as DoD Directive 1330.9. Hearings were held again in 1953, 1957, 1970, 1972 and 1979. At each hearing, it was concluded that the exchange system represented an important benefit for members and their families.

⁵⁷ Department of Defense Military Compensation Background Papers, 5th ed. (1996); p. 701 (commissaries), p. 704 (exchanges).

⁵⁸ *See, for example*, 10 U.S.C. §§ 1063, 1064 and 1065.

⁵⁹ *See* 10 U.S.C. §1062.

⁶⁰ 10 U.S.C. §1072(2)(F)(1).

Proposals have been made to reduce the required marriage overlap from 20 to 15 years. The reason is that many members, especially enlisted members, do not marry until after they enter the armed forces and retire promptly on completing 20 years of creditable service, thereby permanently preventing their former spouses from satisfying the 20-year marriage and creditable service overlap.⁶¹

Dependent Children. Children who reside in the household of a separated spouse continue to be eligible for commissary privileges until the divorce decree is made final. With two exceptions, once the decree becomes final, children who live with a former spouse are not entitled to commissary privileges because they are not considered to be part of the member's household even if the member provides or maintains their household.⁶² The exceptions are children who reside with a former spouse who meets the 20/20/20 marriage requirements⁶³ or children who are entitled to privileges under 10 U.S.C. 1072(2)(H) due to abuse by the member. Regardless of where they live, dependent children continue to be entitled to use the exchange and MWR facilities if they are dependent on the member for over 50 percent of their support.⁶⁴

Survivor Benefit Plan.

Background. Congress enacted the SBP program to ensure that surviving dependents of military personnel who die while eligible for retirement or after retirement will continue to have a reasonable level of income.⁶⁵ This program permits a member to elect to receive a reduced amount of monthly retired pay in exchange for a monthly annuity in a lesser amount for the lifetime of an eligible survivor. By electing an SBP annuity, a retired member ensures that a beneficiary will be provided with continued income at the level elected by the member, within statutory limits, after his or her death. SBP annuities are adjusted for COLAs in the same percentage amount, and at the same time, as COLA adjustments to retired pay.⁶⁶

Court-Ordered Designation of Former Spouse as SBP Beneficiary. As originally enacted, the USFSPA required that, to be effective, the designation of a former spouse as an SBP beneficiary must be voluntary and, as such, could not be ordered by a State court. However, the 1985 amendments to the USFSPA clarified the intent of Congress by specifying that a court order incorporating or approving a voluntary written agreement by the retiree to designate the spouse as an SBP beneficiary would be honored.⁶⁷ The 1987 NDAA⁶⁸ amended the SBP as a "matter of equity" and to bring it more into conformity with practices under civil service and private sector survivor benefit

⁶¹ H.R. Report 98-1080, pp. 299-300, 98th Congress (1985).

⁶² "Armed Services Commissary Regulation," DoD Reg. 1330.17-R, para. 2-201.17 (April 1987).

⁶³ Ibid.

⁶⁴ DoD Dir. 1330.9, "Military Exchanges, paras. 1-201.7b, 2-201 (15 DEC 86).

⁶⁵ 10 U.S.C. §§ 1447-1460(b).

⁶⁶ 10 U.S.C. §1451(g).

⁶⁷ Department of Defense Authorization Act, 1985, 98-525, §642, 98 Stat. 2492, 2548 (1984); codified at 10 U.S.C. §1450(f)(4).

⁶⁸ Public Law 99-661, §§ 641-646, 100 Stat. 3816, 3885-3887 (1986).

plans.⁶⁹ In that connection, Congress amended the SBP to permit State courts to order members to participate in the SBP and to designate a former spouse as a beneficiary incident to a divorce agreement or decree.⁷⁰ If the member fails to make an appropriate election, the former spouse may make a “deemed election” of SBP coverage. However, this deemed election must be made within 1 year of the date of the court order or filing involved.⁷¹ Such an election, or designation of beneficiary, may not be changed unless certain procedural requirements are satisfied.⁷²

The following nine paragraphs provide additional information on the SBP. This is a general discussion, not necessarily limited to issues related to former spouses, that provides a context for discussions about SBP that are relevant to this report.

Eligible Participants. Eligible participants in the SBP are active duty members entitled to retired pay and members of the Reserve Component, who are eligible to receive retired pay upon reaching age 60.⁷³ A member who is entitled to retired pay as a result of active duty service is *automatically* enrolled in the program at the *maximum* authorized level of coverage unless he or she specifically elects, before retirement, not to be covered or to be covered at less than the maximum level.⁷⁴ If the member is married, the spouse must consent to the election.⁷⁵ A member of the Reserve Component who is entitled to retired pay but has not reached age 60 must affirmatively elect coverage within 90 days after notification that he or she has completed the number of years of service required for eligibility for retired pay.⁷⁶ Additionally, the member must elect whether the annuity should become effective on his or her death or on the day they would have turned 60 had they lived.⁷⁷

Permissible Beneficiaries. Permissible SBP beneficiaries include an eligible surviving or former spouse, surviving dependent children (in equal shares, if the eligible surviving or former spouse is dead, dies, or otherwise becomes ineligible), and a natural person designated under “insurable interest” coverage.⁷⁸ A member who does not participate in the SBP because he or she does not have qualifying dependents at the time of retirement may elect SBP coverage if he or she marries or acquires a dependent child after retirement. The election must be made within 1 year of the marriage or the acquisition of the dependent child.⁷⁹ Additionally, a member who has no eligible dependents may elect,

⁶⁹ House Report 99-718 (Committee on Armed Services), p. 209, accompanying H.R. 4428, 99th Congress, 2d Session (1986).

⁷⁰ Public Law 98-525, section 641; *see, also*, 10 U.S.C. §1448(f)(3).

⁷¹ 10 U.S.C. §1450(f)(3).

⁷² 10 U.S.C. §§ 1450(f)(2) and 1450(f)(3).

⁷³ 10 U.S.C. §1448(a)(1).

⁷⁴ 10 U.S.C. §1448(a)(2)(A).

⁷⁵ *Ibid.*

⁷⁶ 10 U.S.C. §1448(a)(2)(B).

⁷⁷ 10 U.S.C. §1447(6)(B).

⁷⁸ 10 U.S.C. §1450(a).

⁷⁹ 10 U.S.C. §1448(a)(5)(A).

before retirement, to provide an annuity to any individual who has an insurable interest in his or her life.⁸⁰ However, an insurable interest benefit will be terminated if the member acquires a spouse or dependent child after retirement and elects an SBP annuity for them.⁸¹

Base Amount Against Which SBP Annuity Is Calculated. Absent a written agreement of the parties or court order to the contrary, a member is required to specify the amount of coverage provided by the SBP annuity. The maximum SBP annuity is 55 percent of the member's "base amount." If maximum coverage is elected, the full amount of the member's retired pay serves as the "base amount" on which the amount of the survivor annuity and the cost thereof are computed. In the case of a member who is eligible for retired pay for service with the Reserve Components and who dies before age 60, the "base amount" is computed as the base amount less the Reserve Add-on premium when multiplied by 55 percent or 35 percent. Coverage in any amount less than the maximum may be specified by the member, whereby the "base amount" is any sum between \$300 and the member's full monthly retired pay. Unless otherwise prohibited by court order or by agreement of the parties, the member may decline to participate in the SBP program with the written consent of his or her spouse.⁸²

Amount of SBP Annuity. As originally enacted, the SBP program was integrated with the Social Security system and therefore required a certain reduction in the level of SBP annuity payments in connection with Social Security eligibility. Under Section 711(a) of the Department of Defense Authorization Act, 1986,⁸³ this "Social Security offset" was eliminated and replaced by a two-tier system under which the survivor/annuitant would receive an SBP annuity equal to 55 percent of the member's base amount until the survivor reached age 62. Thereafter, the survivor's monthly annuity would be reduced to 35 percent in recognition of the survivor's entitlement to Social Security based on the member's military service.⁸⁴ If the survivor is under age 62 or is a dependent child when he or she becomes entitled to the SBP annuity, the monthly benefit is nonetheless an amount equal to 55 percent of the member's base amount. If the survivor (other than a dependent child or insurable person) is age 62 or older when he or she becomes entitled to the SBP annuity, the monthly amount is equal to 35 percent of the member's base amount.⁸⁵

⁸⁰ 10 U.S.C. §1448(b)(1).

⁸¹ 10 U.S.C. §1450(f).

⁸² See, 10 U.S.C. §1451.

⁸³ Public Law 99-145, Title VII, §711(a), 99 Stat. 666, 670 (1985).

⁸⁴ See Senate Report 99-118 (Committee of Conference), p. 442, and House Report 99-235 (Committee of Conference), p. 442, accompanying S. 1160, 99th Congress, 1st Session (1985).

⁸⁵ 10 U.S.C. §1451(a). In a savings provision, however, the 1985 amendments provided that current and future survivors of current retired or retirement-eligible members could elect to have their SBP benefits computed under the "old" Social Security offset system or under the new "55/35 two-tier system"—whichever provided a greater benefit. An exception to this rule is that the 55/35 reduction does not apply to any incapacitated dependent children of the retired member who are over age 62 and are incapable of supporting themselves because of physical or mental impairments that existed before the children attain age 18. See House Report 99-718 (Committee on Armed Services), p. 210, accompanying H.R. 4428, 99th Congress, 2d Session (1986).

Spousal Consent to SBP Annuity. For certain elections by a member under the SBP to be effective, written spousal consent is required.⁸⁶ A married member who is eligible to elect an SBP annuity must obtain the written consent of his or her spouse if (1) the member elects not to participate in the SBP, (2) the spouse's SBP annuity is specified by the member to be paid at a level below the maximum level, or (3) the SBP annuity is for a dependent child rather than the spouse.⁸⁷ A married member who elects to provide a Reserve Component SBP annuity at less than the maximum level or provides an SBP annuity for a dependent child rather than the spouse must also obtain written spousal consent to the election.⁸⁸ Additionally, if a married member who is eligible to provide an SBP annuity elects an annuity for a former spouse (or for a former spouse and dependent child), the member's current spouse must be notified of the election; however, the current spouse's consent is not required.⁸⁹

Cost of SBP Annuity. Under current law, the cost of the SBP premium is shared by the Government and retired members. The law that governs the method by which the SBP premiums are calculated has been the subject of two recent amendments.⁹⁰ The member's share of the cost of his or her survivor annuity increases at the same time and at the same rate as COLA adjustments to active duty military pay. The present monthly cost of an SBP annuity is 6.5 percent of the member's base amount. Members who retired before March 1, 1990, either use the new flat rate or 2.5 percent of the first \$300 and 10 percent of the remaining base amount, whichever is more advantageous to the member.⁹¹ The cost for children's coverage is determined actuarially. When a cost-of-living increase in retired pay becomes effective, the member's SBP premium increases proportionately with the increase in the related annuity.⁹² The cost of providing an SBP annuity to a spouse or a former spouse to whom payment of a portion of the member's retired pay is being made pursuant to a court order is deducted from retired pay in determining "disposable retired pay."⁹³

⁸⁶ 10 U.S.C. §1448(a)(3).

⁸⁷ 10 U.S.C. §1448(a)(3)(A).

⁸⁸ 10 U.S.C. §1448(a)(3)(B).

⁸⁹ 10 U.S.C. §1448(a)(3)(E).

⁹⁰ Title VII of the DoD Authorization Act, 1986, 99-145, §714, 99 Stat. 583, 672-673, amended the manner in which the cost of the SBP is shared by participants and the Government. The changes enacted by this amendment, however, applied only to persons who first participated in the SBP program on or after March 1, 1986. The basis for determining the cost of SBP was again amended by the Military Survivor Benefits Improvement Act of 1989, enacted as Title XIV of the National Defense Authorization Act for Fiscal Years 1990 and 1991, 101-189, sections 1401-1407, 103 Stat. 1352, 1577-1589 (1989). The basis for determining a member's share of the cost of the SBP annuity was changed from the old rule of 2.5 percent of the first \$300 of the base amount of the annuity plus 10 percent of the remainder of the base amount to a flat 6.5 percent of the base amount for all individuals who first became members of the uniformed services on or after March 1, 1990. See 10 U.S.C. section 1452(a)(1)(A). For individuals who first became members of the armed forces before March 1, 1990, the cost of the "premium" was either the new 6.5 percent rate or the old formula—whichever was more advantageous to the retiree. The stated purposes of this amendment were to "preserve the design balance between member contribution and government subsidy of the SBP benefits" and "to reduce the cost of SBP to participants, and hopefully to increase participation in the SBP program." See Senate Report 101-81 (Committee on Armed Services), p. 180, accompanying S. 1352, 101st Congress, 1st Session (1989).

⁹¹ 10 U.S.C. §1452.

⁹² 10 U.S.C. §1451(A) (adjustments to base amount); 10 U.S.C. §1451(g) (adjustment to annuity).

⁹³ 10 U.S.C. §1408(a)(3)(D).

Effect of Remarriage. Prior to the 1987 NDAA, a surviving spouse/SBP beneficiary who remarried before age 60 lost entitlement to the SBP annuity. In 1987, Congress lowered, from 60 to 55, the age at which the former spouse could remarry without losing his or her SBP annuity. The purpose of this amendment was to provide “military surviving spouses . . . the same considerations as civil service surviving spouses.”⁹⁴

Reinstatement of SBP Annuity. An SBP annuity paid to a surviving spouse or former spouse that terminated upon such spouse’s remarriage can be reinstated only under limited circumstances. For example, if the spouse remarries before age 55 and that remarriage terminates due to death, annulment, or divorce, payment of the SBP annuity can be resumed as of the first day of the month in which the remarriage terminated.⁹⁵ The 1987 NDAA also amended the SBP statutes to authorize the payment of an SBP annuity to a surviving dependent child of an active duty, retirement-eligible member who dies without a surviving spouse or if such surviving spouse later dies.⁹⁶

Supplemental SBP Annuity. A member may also elect an SBP “supplemental annuity” for a spouse or a former spouse that begins when the participant dies or when the spouse or former spouse reaches age 62, whichever is later. The purpose of this feature is to offset the effect of the two-tier annuity computation under the SBP.⁹⁷ Such an election can be voluntary or made as a result of a written agreement or court order.⁹⁸ Under this feature, when the member’s surviving spouse becomes eligible for Social Security benefits, the SBP annuity is not reduced. In adding this provision to the law, Congress intended to “fill a need by certain SBP participants for additional coverage beyond age 62, the age at which Social Security benefits normally become available.”⁹⁹

VA Disability Compensation. Under USFSPA, disability compensation received by members or former members from either the VA or DoD is excluded when determining disposable property in a divorce. As a result, disability compensation cannot be allocated to a former spouse through a court order.

Background. A former member may receive compensation from the VA for disabilities at the same time he or she receives retired or retainer pay, including DoD disability retired pay, based on service as a member of the armed forces. However, the member must waive a portion of retired pay (including disability from the DoD) equal to the amount of compensation to which he or she is entitled to

⁹⁴ House Report 99-718 (Committee on Armed Services), p. 211, accompanying H.R. 4428, 99th Congress, 2d Session (1986).

⁹⁵ 10 U.S.C. §1450(b). However, if the surviving spouse or the former spouse is entitled to two SBP annuities, he or she may not receive both annuities but must elect which one to receive.

⁹⁶ See, Public Law 99-661, §§ 641-46, 100 Stat. 3816 (1986); House Report 99-718 (Committee on Armed Services), accompanying H.R. 4428, 99th Congress, 2d Session (1986); 10 U.S.C. §1450.

⁹⁷ 10 U.S.C. §§ 1456-1458.

⁹⁸ 10 U.S.C. §1458. This “Supplemental Survivor Annuity Plan” was created in the Military Survivor Benefits Improvement Act of 1989, Title XIV of the National Defense Authorization Act for Fiscal Years 1990 and 1991, Public Law 101-189, §§ 1401-1407, 103 Stat. 1352, 1579-1586 (1989).

⁹⁹ Senate Report 101-81 (Committee on Armed Services), pp. 180-181, accompanying S. 1352, 101st Congress, 1st Session (1989).

receive from the VA. These provisions effectively bar the concurrent receipt of disability retired pay from the DoD and VA compensation for the same disability.¹⁰⁰ Disability retired pay from the DoD is generally taxable but VA disability is not.¹⁰¹ Therefore, eligible members benefit by waiving retired pay to receive disability compensation from the VA. In doing so, the member benefits not only from the non-taxable status of such pay, but also from the fact that the disability rating can be increased over time.

In determining disposable retired pay subject to division under the USFSPA,¹⁰² payments for (1) retired pay waived to receive VA disability compensation and (2) disability retired pay from the DoD are deducted from total retired pay. Most former members elect to receive VA disability compensation rather than disability retired pay from the DoD because of the tax-free status of the former.¹⁰³ When a divorce decree awards military retired pay as a percentage of disposable retired pay, a member can reduce the payment to the former spouse by waiving retired pay to receive VA disability compensation. When a VA disability rating is awarded after a member's retirement, it often is retroactive. This recharacterization of military retired pay as VA disability pay causes prior payments to the former spouse to constitute overpayments. DFAS must recoup these overpayments even if it causes the former spouse great hardship. Some courts will circumvent the prohibition against garnishing or dividing VA disability pay as property by ordering it paid as "alimony." Recharacterizing an award of retired pay as alimony, while enabling the former spouse to receive the amount awarded, is inconsistent with the general prohibition against garnishing or dividing VA disability pay.

Legislation Relating to the Treatment of VA Disability Compensation under USFSPA. Under the USFSPA, VA disability compensation remains untouchable. In 1982, the apparent authority for this (although it has never been cited in the Congressional records or in the United States Supreme Court cases) was 38 U.S.C. section 3101. This section was later amended and redesignated as 38 U.S.C. section 5301.¹⁰⁴ Apparently, the present authority (although it has never been specifically cited as such) for exempting VA disability compensation from the definition of "disposable retired pay" is 38 U.S.C. section 5301. Section 5301(a) reads, in relevant part, as follows:

Payments of benefits due or to become due under any law administered by the Secretary¹⁰⁵ shall not be assignable except to the extent authorized by law . . . shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy,

¹⁰⁰ See, generally, 38 U.S.C. §5304-5305.

¹⁰¹ See 38 U.S.C. §5301 (exempt from taxation) and 38 U.S.C. §5305 (waiver of retired pay). For a more in-depth explanation of taxation issues related to disability pay, especially applicable rules for excluding disability retired pay from income subject to taxation, see Section 104(b) of the Internal Revenue Code.

¹⁰² 10 U.S.C. §1408(a)(4).

¹⁰³ See 10 U.S.C. §§ 1408(a)(4)(B), 1408(a)(4)(C).

¹⁰⁴ See, Public Law 102-40, Title IV, section 402(b)(1), (d)(1), May 7, 1991, 105 Stat. 238, 239.

¹⁰⁵ In 1982, this was the Veteran's Administration as set forth in 38 U.S.C. §3101(a).

or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary . . . (emphasis supplied)

Although a statutory exemption exists for the enforcement and collection of child support and alimony, no exception exists for awards as property. Thus, VA disability compensation, received as a result of waiver of retired pay, remains statutorily exempt from all claims other than claims of the United States and is not divisible or assignable.¹⁰⁶ To make such payments divisible, assignable, or awardable as property, Congress would have to enact permissive legislation—which is allowable under section 5301—as was done for enforcement of child support and alimony obligations.

Proposed Legislation. On January 6, 1999, Congressmen Bilirakis (R-FL) and Norwood introduced three bills regarding VA disability compensation.¹⁰⁷ Each of the bills, if enacted, would increase the economic value of VA disability compensation. A discussion of these proposals—H.R. 303, H.R. 65, and H.R. 44—follows.

H.R. 303. Under this bill, receipt of VA disability compensation would not reduce the former member's retired pay if the retired pay was based on 20 or more years of creditable service. H.R. 303 would, however, not apply to DoD disability retired pay. Thus, in cases in which a member retires with at least 20 years of creditable service, his or her VA disability compensation and retired pay would be paid concurrently on an unreduced basis. Enactment of H.R. 303 would therefore enable a former spouse to maintain the level of his or her retired pay notwithstanding an award of VA disability compensation.

H.R. 65. This measure would permit retirees to receive retired pay and VA disability compensation without a full corresponding reduction in retired pay. In general, as a retiree's disability rating increased, the amount of the reduction in his or her retired pay would be proportionately decreased.

H.R. 44. This proposal would authorize the payment of special, additional disability compensation under Chapter 71 of Title 10 to retirees who have qualifying service-connected disability ratings of 70 percent or greater.¹⁰⁸

Overview of the Protections, Benefits, and Treatment Afforded Under Federal Law to Employees and Former Employees of the Government and Their Former Spouses

Table 1 permits the reader to compare and contrast the USFSPA with various Federal (non-military) retirement systems and with private employer-sponsored retirement plans that authorize a former spouse to receive an award of retirement benefits and the award of a survivor annuity. The table describes the Civil Service Retirement System, the Federal Employees Retirement System, the Railroad

¹⁰⁶ 38 U.S.C. §5301(a).

¹⁰⁷ H.R. 44, H.R. 65, and H.R. 303.

¹⁰⁸ This proposal became part of the Fiscal Year 2000 National Defense Authorization Act. P.L. 106-65, section 658.

Retirement Systems (Tier I and Tier II), the CIA Retirement Systems, the Foreign Service Retirement and Disability System, the Foreign Service Pension System, the Thrift Savings Plan and private sector plans. As do most graphic displays summarizing complicated legal systems, this presentation involves some oversimplification. Notwithstanding this limitation, the table is accurate concerning the major characteristics of these retirement systems.

For a detailed discussion of the systems compared in the chart, see Appendix H. This appendix also includes discussion, as appropriate, of the award of retirement and survivor benefits to a former spouse under private employer-sponsored retirement plans. These plans cover more than 84 million people.

Table 1
Retirement Benefits for Former Spouses

FORMER SPOUSE ELIGIBILITY FOR RETIRED PAY	Military Retirement (USFSPA)	Private	Civil Service¹⁰⁹	Foreign Service	CIA¹¹⁰	Railroad Retirement Tier 1	Railroad Retirement Tier 2
Automatic Allocation of Retired Pay	No	No	No	Yes ¹¹¹	Yes/50% ²	Yes/50% ¹¹²	No
Court-Awarded Allocations of Retired Pay	Yes	Yes	Yes	Yes	Yes	No	Yes
Maximum Allocation Awardable by Court	100% of disposable retired pay. DFAS may pay up to 50%.	100% of employee's gross benefit	100% of employee's net benefits ¹¹³	100% of employee's gross benefit	100% of employee's gross benefit	N/A	100% of employee's gross benefit
Minimum Age for Former Spouse to Collect	N/A	N/A	N/A	N/A	N/A	62 ¹¹⁴	N/A
Direct Payment	Yes/Limited ¹¹⁵	Yes	Yes	Yes	Yes	Yes	Yes
Maximum Benefit Payable Directly	50% of member's "disposable retired pay"	100% of employee's gross benefit	100% of employee's net benefit	100% of employee's net benefit ¹¹⁶	100% of employee's net benefit	50% of employee's age 65 benefit	100% of employee's net benefit
Earliest Former Spouse Can Collect Direct Payment on Divorce	Member is collecting	"Earliest retirement age," unless plan allows immediate distribution	Employee is collecting TSP—immediate collection	Employee is collecting TSP—immediate collection	Employee is collecting TSP—immediate collection	Employee is collecting	Employee is collecting
Remarriage Penalty	No	No	No ¹¹⁷	Yes/age 55 ¹¹⁸	Yes/age 60 ⁹	Yes	No ¹¹⁹
Reinstatement Allowed	N/A	N/A	N/A	No	No	Yes	Yes

⁹⁹ References to TSP are to the Federal Thrift Savings Plan. Otherwise, all references are to CSRS and FERS.

¹⁰ The CIA has four retirement programs (CSRS, ORDS, FERS, and FERS Special). Under these programs, there are three categories of "former spouse" (Qualified Former Spouse, Former Spouse, and Previous Spouse).

¹¹ Although spouse's entitlement is statutory, spousal benefits can be modified by court order or agreement of the parties.

¹² Statutory right to benefit; generally 50 percent, less any Social Security benefit the former spouse earned on his or her account.

¹³ When a married employee retires, a survivor annuity will be provided for the surviving spouse unless the employee and the spouse file a written election with the OPM to waive the survivor annuity.

¹⁴ The Railroad Retirement Act requires that the employee be retired before the former spouse can obtain benefits.

¹⁵ Only with 10 years of creditable service/marriage overlap.

¹⁶ However, under the statutory pro rata formula, a former spouse could never be awarded greater than 50 percent of the retirement benefits.

¹⁷ However, a State court can impose a requirement that benefits to the former spouse terminate on his or her remarriage.

¹⁸ Benefits continue irrespective of remarriage if ordered by a court.

¹⁹ The authorization to divide tier 2 benefits does not address remarriage. However, originally, these could be supplied by court order or agreement.

Automatic Distribution of “Small Benefits”	No	Yes—\$5,000 lump sum or less	No TSP—Yes \$5,000 lump sum or less	No TSP—Yes \$5,000 lump sum or less	No	No	No
FORMER SPOUSE ELIGIBILITY FOR SURVIVOR BENEFITS	Military Retirement (USFSPA)	Private	Civil Service¹²⁰	Foreign Service	CIA¹²¹	Railroad Retirement Tier 1	Railroad Retirement Tier 2
Automatic Benefits	No	No	No	Yes	Yes	Yes/100%	No
Court-Awarded Benefits	Yes	Yes	Yes	Yes	Yes	No	No
Maximum Benefit Awardable by the Court	55% of member’s unreduced benefit, lowered to 35% at age 62	Defined Contribution Plans: Up to 100% of employee’s account balance Defined Benefit Plans: Survivor annuity equal to at least 50% of employee’s reduced benefit ¹²²	50% of employee’s unreduced benefit ¹²³	55% of employee’s unreduced benefit under FSRDS; 50% of unreduced benefit under FSPS ¹²⁴	55% of employee’s unreduced benefit, unless a valid court order or property settlement provides to the contrary	N/A	N/A
Minimum Age for Former Spouse to Collect	None	None	None	None	None	Age 60	N/A
Remarriage Penalty	Yes/age 55	No	Yes/age 55	Yes/age 55	Varies depending on the retirement system	Yes/age 60	N/A
Reinstatement Allowed	Yes	N/A	No	Yes	Yes	Yes	N/A

²⁰ References to TSP are to the Federal Thrift Savings Plan. Otherwise, all references are to CSRS and FERS.

²¹ The CIA has four retirement programs (CSRS, ORDS, FERS, and FERS Special). Under these programs, there are three categories of “former spouse” (Qualified Former Spouse, Former Spouse, and Previous Spouse).

²² Assumes that the employee’s employer offered only the minimum survivor benefit required by the Retirement Equity Act. Some plans provide a higher survivor benefit of 75 percent or 100 percent of the participant’s benefit.

²³ Reduced by any allocation awarded to a previous former spouse.

²⁴ Under CSRS, a survivor annuity is permanently lost if the former spouse remarries before age 55. Under ORDS, entitlements to both retirement and survivor annuities are permanently lost if a former spouse remarries before age 55 and before payments begin. If a qualified former spouse remarries before age 55, but after payments begin, only the survivor annuity is terminated. This annuity can be reinstated if the subsequent marriage ends in death or divorce. This remarriage restriction can be modified by a court order. Under FERS, the survivor annuity stops for a former spouse who remarries before age 55. This remarriage penalty can be waived by court order. Under FERS/SP, the remarriage penalty can be waived by court order.

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Overview of the Protections, Benefits, and Treatment Afforded Under Private Retirement Plans

Although the division of retired pay under plans sponsored by private employers is governed by State law, all “assignments” of benefits under such plans must also comply with the applicable provisions of the Internal Revenue Code and the Employee Retirement Income Security Act (ERISA). Under these provisions, benefits accrued under a retirement plan can be allocated or “assigned” only if the order that creates or recognizes a spouse’s or other alternate payee former spouse’s interest in the employee’s benefits constitutes a “qualified domestic relations order” (QDRO). These statutes contain several requirements that must be satisfied for a domestic relations order, which awards a spouse or other alternate payee former spouse a share of an employee’s retirement benefits, to be a QDRO. In general, to be qualified, a domestic relations order must—

- Establish the existence of the former spouse’s right to receive all or a portion of the employee’s retirement benefit.
- Include several facts relating to identification of the parties, amount or percentage of the employee’s retirement benefit to be paid to the former spouse, the number of payments or the period over which the payments to the former spouse will be paid.
- Not require the plan to provide any type or form of benefit not otherwise provided thereunder.
- Not require the plan to pay benefits to the former spouse in excess of those payable to the employee if there were no order.¹²⁵

Except as discussed in the preceding paragraph, there are no limitations imposed by either the Internal Revenue Code or ERISA in determining the amount of a former spouse’s benefit under a private retirement plan. Awards are within the discretion of the parties or the court. Benefits to a former spouse may be paid in any form and at any time allowed by the plan under which the award is made. A former spouse can roll-over both lump sum payments and installment payments (which are made over a period of less than 10 years) into an Individual Retirement Account (IRA) on a tax-deferred basis. Unless the parties agree or the court orders otherwise, the remarriage of the former spouse will not affect his or her allocation.

Direct Payments. Under ERISA, the person responsible for administering the plan (typically the employer or a committee comprised of employees) must make (or direct the plan trustee to make) all distributions to former spouses. All such distributions must be made directly to the former spouse or, if the distribution is an “eligible rollover distribution,” to an IRA owned by the former spouse.¹²⁶ Amounts rolled over to an IRA are not taxable to the former spouse until distributed.

¹²⁵ See generally §414(p) of the Internal Revenue Code and the Income Tax Regulations promulgated thereunder.

¹²⁶ See §401(a)(31) of the Internal Revenue Code.

Survivor Benefits. Retirement plans sponsored by private employers are subject to rules similar to those applicable to the SBP. For example, the standard form of benefit required to be provided by all defined benefit pension plans and all defined contribution plans which are subject to the minimum funding requirements of Section 412 of the Internal Revenue Code (i.e., money purchase pension plans), is a “qualified joint and 50 percent survivor annuity (QJSA)”.¹²⁷ The QJSA is paid in the form of an annuity for the life of the participant with a survivor annuity paid to the surviving spouse or former spouse, if he or she survives the participant, equal to at least 50 percent of the participant’s annuity. The cost of the survivor annuity can be fully subsidized by the plan or paid through a reduction in the participant’s annuity. The amount of the reduction depends on the relative age and gender of the participant and spouse and on the mortality assumptions specified in the plan.

To elect not to receive the QJSA form of benefit and elect an optional (if available) form of benefit provided by the plan, the spouse must consent, in writing, to the election. Such consent must acknowledge the effect thereof and be notarized or witnessed by a plan representative.¹²⁸

Private employer retirement plans not subject to the QJSA rules can only satisfy the requirements of the Internal Revenue Code if they provide that the participant’s benefit (i.e., his or her account balance under a defined contribution plan) can be paid only to his or her spouse or former spouse upon the participant’s death. However, in general, these plans also provide that the participant’s accrued benefit can be paid to someone other than the participant’s surviving spouse or former spouse. This election is permitted only if the spouse or former spouse consents in writing, before a notary public or plan representative, to a designation of a non-spouse beneficiary.¹²⁹ For additional information on private retirement plans, refer to Appendix H.

¹²⁷ Sections 411(a)(11) and 417 of the Internal Revenue Code.

¹²⁸ Section 417(a)(2) of the Internal Revenue Code; Section 417(a)(2) of the Internal Revenue Code allows a participant to elect out of the QJSA without spousal consent if the participant demonstrates to the satisfaction of the plan administrator that the spouse cannot be located or has abandoned the participant.

¹²⁹ Section 401(a)(11)(B)(iii) of the Internal Revenue Code.

USFSPA ADMINISTRATION

Section 643 of the National Defense Authorization Act for Fiscal Year 1998, among other requirements, states that this report must describe experiences associated with the administration of USFSPA provisions. In addition to describing experiences within the uniformed services, this report must describe the experiences that DFAS and OPM have had in administering USFSPA provisions.¹³⁰

Administration of the USFSPA by DoD

The armed forces provide accurate, readily available information on the USFSPA in the form of handouts and fact sheets, which are distributed through legal assistance offices and various other outlets. The armed forces, with the exception of the Marine Corps, generally rely on their judge advocates and civilian attorneys to render advice and assistance with regard to the USFSPA. The Marine Corps has designated its Separation and Retirement Branch as its point of contact for information related to the USFSPA.

Legal assistance is commonly provided to all eligible parties on matters related to legal separation and divorce. Such assistance includes counseling, negotiation, document preparation, assistance in preparation of *pro se* pleadings, and, in limited cases, representation in court. Providing these services requires the armed forces to devote substantial resources to ensure their attorneys are well trained in matters related to the USFSPA. For example, each service, as part of its training of new judge advocates, devotes a portion of instruction to the USFSPA. The Army Judge Advocate General's (JAG) School, the Naval Justice School, and the Air Force Judge Advocate General's School provide instruction to their service judge advocates. Most attorneys who are assigned to legal assistance duties on a full-time basis also attend the 1-week Legal Assistance Course at the Army JAG School in Charlottesville, Virginia. This course devotes at least 1 hour of instruction by DFAS attorneys on procedural aspects of the USFSPA. Each year, a similar course is offered to military and civilian attorneys stationed in Europe.

In addition to course work, the armed forces assist their attorneys in providing assistance on matters related to the USFSPA through scholarly publications such as *The Army Lawyer* and *The Reporter* (published by the Army and Air Force JAG Schools, respectively). Further, all of the armed forces rely extensively on judge advocates who are members of the Reserve Components to provide legal assistance related to divorce and separation matters because many of them are family law practitioners engaged in private practice. Service JAGs do, however, frequently call on and refer clients to DFAS for questions about USFSPA. In view of this, it appears that service JAGs might benefit from additional USFSPA training.

DoD consolidated responsibility for administering payments to former spouses, pursuant to the USFSPA, with DFAS. This agency conducts the legal review of court orders to ensure compliance

¹³⁰ DoD was unable to obtain information on the administration of the USFSPA by the Commissioned Corps of the U.S. Public Health Service.

with the USFSPA and processes orders that conform to the statutory requirements for payment. Direct payment is made to a former spouse if the parties satisfy the 10/10 marriage requirement and satisfy the jurisdictional requirement of 10 U.S.C. §1408(c)(4). Direct payment is limited to 50 percent of disposable retired pay. DFAS attorneys and paralegals provide comprehensive information and assistance to members and former spouses and their attorneys. This information is provided through letters and telephone calls. General information is provided through the DFAS web site (<http://www.dfas.mil>).

Criticisms of DFAS and Suggestions for Improvement

In the course of this review, a variety of criticisms were directed at DFAS (an agent for DoD) by stakeholders. Stakeholders suggested a number of changes:

Processing Time. Perhaps the most common criticism is that DFAS takes too long to process orders and initiate direct payments to former spouses. The USFSPA requires DoD to process an order and begin payment within 90 days from the date it receives the order. According to DFAS, payments to former spouses normally begin by the end of the second month following its receipt of the order. This processing period normally consists of the following three elements—

- The allowed 21 days for DFAS to determine whether the order is legally sufficient.
- The 30-day period DFAS is required by the USFSPA to hold its determination in abeyance for the member to demonstrate that the order is not valid or has been modified.
- If the 30-day period expires after the cut-off date for the mid-month payroll, the additional time that elapses until the next payroll period cut-off date.

As a matter of practice, DFAS typically reviews and processes USFSPA applications within 10-12 days of receipt. Within that time, DFAS sends the letter of acceptance or rejection to the former spouse. If it accepts the application, DFAS notifies the member at the same time it writes to the former spouse.

The USFSPA does not authorize DoD to withhold the former spouse's share of retired pay pending completion of its review or to make retroactive payments to take into account the time it takes to process the order. As a result, in many cases, by the time the payments begin, an arrearage has accrued that cannot be paid by DFAS. In turn, this often results in additional litigation. Not surprisingly, several State Bars suggested that Congress enact legislation to permit DFAS to make retroactive payments to a former spouse when arrearages result from the time expended in processing the order. In the alternative, the ABA recommended that DFAS withhold the former spouse's share pending its final approval of the order. Upon approval of the order and request for direct payment, DFAS would pay the withheld funds to the former spouse. If the order is ultimately rejected by DFAS,

the agency would pay the withheld funds to the retiree.¹³¹ This procedure is virtually identical to those required by the Internal Revenue Code and ERISA for private retirement plans. DFAS opposes this recommendation. The notice period affords the member time to notify DFAS if the order has been amended, superseded, or set-aside. The court-order itself, if binding, requires the member to make payments during the notification period.

Preapproval of Court Orders. The ABA and several State Bars recommended that DFAS conduct preliminary reviews of proposed court orders for administrative sufficiency—in the same manner as administrators of private retirement plans.¹³² The rationale for this recommendation is that proposed orders would be known to be sufficient prior to submission to the court. If they were found to be insufficient, errors or omissions could be corrected before the order is executed and filed. DFAS expressed concerns with this proposal on the basis that it would place DFAS in an inappropriate role that is properly played by advocates for the parties in the divorce proceedings.

USFSPA Handbook. To date, DFAS has not published a USFSPA handbook. The ABA and State Bars overwhelmingly support the publication, by DFAS, of a handbook that contains an explanation of the USFSPA, standard forms, and model language for court orders.¹³³ DFAS also acknowledges that additional USFSPA information should be published, including model forms and orders for use by practitioners.

Acknowledgment of SBP Deemed Elections. DFAS does not currently acknowledge the receipt of deemed elections. The ABA suggested that DFAS confirm receipt of SBP deemed election requests and affirmatively indicate whether the election will be honored by the agency.¹³⁴ DFAS agrees with this suggestion.

Concern Regarding the Difficulty of Implementing Court Orders with DFAS. ABA and State Bar submissions expressed difficulty in communicating and working with DFAS.

Other problems and proposed solutions that stakeholders have identified with the administration of the USFSPA by DFAS include—

- The number of customer service personnel and telephone lines should be increased.
- A standard form has not been published for use in preparing orders.
- Retirees and former spouses have not been educated on key tax issues.
- Legal professionals do not have access to key legal information.

¹³¹ ABA response to a DoD information request.

¹³² ABA and selected State Bar responses to a DoD information request.

¹³³ ABA and selected State Bar responses to a DoD information request.

¹³⁴ ABA response to a DoD information request.

DFAS acknowledges that many of the problems cited by stakeholders can be attributed to the need for changes to the law, which would provide more guidance to practitioners and the courts and enable DFAS to review and implement court orders more efficiently. In fact, it has significantly improved its service since this study began. New technology allows it to consistently answer 85-90 percent of incoming calls.

DFAS also believes that many attorneys and some courts do not understand the provisions of the USFSPA that relate to the drafting of court orders. As evidence, DFAS noted the high rate of rejections of court orders and the nature of many of the written and telephonic inquiries it receives from practitioners. DFAS believes that it is not its role to educate retirees or former spouses concerning USFSPA tax issues. It believes the attorneys who represent the parties should bear this responsibility.

DFAS also believes that legal professionals do have access to key legal information. It has established a web site that includes forms, information papers, and frequently asked questions and answers. It believes that many problems regarding USFSPA arise when private practitioners attempt to treat military retired pay division in the same manner they would those of a private company's pension plan.

Administration of the USFSPA by the U.S. Coast Guard

The Coast Guard describes its role in administering USFSPA provisions as "generally procedural," with management being the responsibility of the Topeka, Kansas based Coast Guard Human Resources Services and Information Center.¹³⁵ Governing directives are similar or identical to those used within DoD.

The Coast Guard, like the Army, Navy, Air Force, and Marine Corps, has a legal assistance program that provides clients with consultation, advice, and assistance on matters related to the USFSPA. In addition, all civilian Coast Guard legal assistance officers attend appropriate courses at the Army JAG School and Naval Justice School. Further, the Coast Guard also relies on Reserve Component attorneys for their private practice expertise.

The Coast Guard indicated that it has not experienced any major problems in the processing and division of retired pay for former spouses.

Administration of the USFSPA by NOAA

NOAA reports that it has few USFSPA-related cases. In fact, as of October 18, 1999, NOAA had 273 officers on its retired list. Eleven of these officers, or 4 percent of the retired population, are making payments to former spouses via the USFSPA. Requests for payments are made to NOAA's Commissioned Personnel Center. These requests are forwarded to the Department of Commerce Office of General Counsel/Employment Labor Law Division to determine legal sufficiency.¹³⁶ If there is a determination of legal sufficiency, the Commissioned Personnel Center forwards the case to the U.S. Coast Guard, which provides payroll support to NOAA.¹³⁷

NOAA officials state that, with the exception of one current case, there have not been any problems with the administration of the USFSPA.

Administration of the USFSPA by OPM

OPM began administering USFSPA provisions on January 1, 1997, after an amendment to the law was added to preclude divorced former military members from avoiding court-ordered apportionments to former spouses. According to OPM Retirement Policy Division officials, prior to the amendment, a divorced military retiree who waived his/her military pay to have military service credited in the Civil Service Retirement System (CSRS) or the Federal Employee Retirement System (FERS) could avoid having a court-ordered apportionment withheld from his/her annuity because the court order addressed only the military retired pay.

¹³⁵ U.S. Coast Guard submission in response to a DoD information request.

¹³⁶ NOAA is an organization of the Department of Commerce.

¹³⁷ Information obtained during a meeting with NOAA officials.

The volume of OPM USFSPA-related cases is low. According to OPM Retirement Policy Division officials, the agency has handled only approximately 50 USFSPA-related cases since 1997 because the military retired pay of divorced former service members is allocated prior to the time they become Federal civilian employees.

REVIEW OF USFSPA ISSUES

Members and former members, current and former spouses, the organizations that purport to represent their respective interests, the ABA, and State Bars have advocated a variety of positions on the laws and regulations that govern the division of retired pay and other benefits. (See Appendix I for additional information pertaining to stakeholder positions.) As can be expected, positions held by members and former members are generally contrary to those held by former spouses—and vice versa.

Based on the analyses of the data collected for this review, the working group and independent subject matter experts determined that there are six key issues related to the administration and application of the USFSPA. The six issues are—

- Treatment of VA disability compensation
- Termination of payments upon remarriage of former spouse
- Grant of benefits to 20/20/15 spouses as well as 20/20/20 spouses
- Calculation of benefits based on time of divorce rather than time of retirement
- The "10-year Rule" for direct payment of retired pay allocations
- SBP issues—
 - Termination of SBP benefits if remarried before age 55
 - Award of SBP benefits to more than one spouse
 - Direct payment of SBP premiums by former spouses
 - 1-year "deemed election" rule

In addition, there are a number of other important USFSPA issues. These issues include—

- Statute of limitation for the division of retired pay
- Voluntary Separation Incentive (VSI)/Special Separation Benefit (SSB) "early out" programs
- "Forced" retirement
- Limitations on division of retired pay
- Elimination of jurisdictional rule
- Retroactive awards of VA disability determinations
- Differing definitions of disposable retired pay for pre- and post-1991 decrees
- Specific formulas for division of retirement benefits
- COLAs for dollar-specific awards
- Lack of information regarding the USFSPA for judges and attorneys
- Removal of bar on opening pre-*McCarty* cases and reopening of final orders.

A discussion of these issues follows. The discussion of the six key issues includes a description of positions held by stakeholders (i.e., former spouse organizations,¹³⁸ member and former member

¹³⁸ Attempts were made to get positions from the National Organization for Women (NOW)—an organization that provided

organizations, the ABA and State Bars,¹³⁹ and governmental organizations¹⁴⁰) and specific organizations (e.g., American Retirees Association, Ex-Partners Of Servicemen/Women for Equality). The discussion of "other issues" is generally presented by type of stakeholder. Stakeholder matrices, presenting positions on the six key issues, are included in Appendix I.

Treatment of VA Disability Compensation

From the standpoint of the organizations that represent current and former military members, the treatment of VA disability compensation in the context of divorce is the most important USFSPA-related issue. The USFSPA excludes from "retired pay" amounts waived in favor of VA disability compensation. These waivers reduce the former spouse's marital share or percentage of the member's retired pay. For example, if a member receives a disability rating of 10 percent, the payment from retired pay to the former spouse is reduced by the dollar amount associated with the 10 percent rating.

Positions of Organizations Representing Former Spouses. Former spouse organizations generally believe that members can easily obtain VA disability ratings and that they regularly abuse this provision, thereby preventing former spouses from receiving their fair share of retired pay. For example, the Ex-Partners of Servicemen/Women for Equality (EX-POSE) position is that an investigation should be initiated to determine how the VA defines service-connected disabilities, and that disability pay should be awarded without reducing retired pay.¹⁴¹ The Committee for Justice and Equality for the Military Wife views the treatment of VA disability compensation as a "tax" on ex-spouses.¹⁴² Further, former spouse organizations seek to amend the USFSPA to enable courts to make VA disability compensation marital property that is subject to division.

Positions of Organizations Representing Members and Former Members. Member and former member organizations believe that dividing disability compensation would defeat the purpose for awarding the payments. Because disability compensation is intended to benefit the member alone, payments for a disability should be considered the member's separate property. They seek an explicit prohibition against any division of VA disability compensation.

Additionally, member and former member organizations note that many State courts award permanent alimony to the former spouse to circumvent the non-divisibility rule applicable to disability pay. For example, some State courts award permanent alimony in an amount equal to the amount of

USFSPA testimony before the House Military Personnel and Compensation Subcommittee on April 4, 1990—and the Congressional Caucus for Women's Issues. Neither chose to provide comments.

¹³⁹ State Bar associations that responded to the DoD information request included Arizona, Connecticut, Florida, Hawaii, Maryland, Michigan, Mississippi, Nebraska, Nevada, North Carolina, South Carolina, Utah, Vermont, and Virginia. The Louisiana response is not included because it represented the views of one individual and was never formally endorsed by the Louisiana State Bar Association.

¹⁴⁰ DoD was unable to obtain comments from the Commissioned Corps of the U.S. Public Health Service.

¹⁴¹ EX-POSE prepared statement for the August 5, 1998, House Veterans' Affairs Committee oversight hearing on the garnishment of benefits paid to veterans for child support and other court-ordered family obligations.

¹⁴² Committee for Justice and Equality for the Military Wife prepared statement (and accompanying articles) for the August 5, 1998, House Veterans' Affairs Committee oversight hearing.

retired pay that would otherwise be payable if the member had not received disability compensation. Some organizations have expressed concern that State courts use other methods to circumvent the prohibition against dividing disability compensation. As a consequence, some member and former member organizations want an amendment to the USFSPA that would nullify any court-ordered award of alimony that is determined to be “a payment in lieu of a payment of retired pay as marital property.”¹⁴³ Member and former member organizations would like Congress to retain the status of VA disability compensation as non-divisible and non-assignable under 38 U.S.C §5301.

Numerous member and former member organizations have stated that disability pay should not be subject to division during a divorce and that the USFSPA's protection of disability pay is ineffective.¹⁴⁴ These organizations include, but are not limited to the following—

- Air Force Sergeant's Association
- American Retirees Association
- Disabled American Veterans
- Fleet Reserve Association
- Korean War Veterans Association
- Military Order of Purple Heart
- National Association for Uniformed Services
- National Military and Veterans Alliance
- Naval Reserve Association
- Navy Enlisted Reserve Association
- Non Commissioned Officers Association of United States of America
- The American Legion
- The Retired Enlisted Association
- The Retired Officers Association
- Veterans of Foreign Wars.

Women In Search of Equity for Military in Divorce (WISE), an organization that describes itself as "...a nonprofit all volunteer association advocating equity for military members in divorce," states that VA disability compensation should be the "...sole property of the military member."¹⁴⁵

Positions of Bar Associations. The ABA and most of the State Bars responding to a DoD information request have expressed concerns about the current law governing VA disability compensation. For example, the ABA urges Congress to amend the Federal law governing the application of VA disability compensation to prohibit members from waiving any portion of disposable retired pay that has been awarded to a former spouse as separate property.

Positions of Governmental Organizations. Many governmental organizations have not

¹⁴³The Retired Officers Association (TROA) response to the *Federal Register* request.

¹⁴⁴ Although not a member or former member organization, the National Military Family Association (NMFA) also supports not dividing disability pay during a divorce (per response to the *Federal Register* request).

¹⁴⁵ WISE prepared statement for the August 5, 1998, House Veterans' Affairs Committee oversight hearing.

addressed the treatment of VA disability compensation or any other USFSPA-related issue. However, NOAA has expressed views on the topic. According to NOAA, the USFSPA provisions governing disability compensation should not be changed because other laws allow disability compensation to be divided via garnishment.¹⁴⁶

As discussed above, Rep. Stump has introduced House bill H.R. 72—the Uniformed Services Former Spouses Equity Act of 1999. Section 5 states that disability pay should not be treated as disposable retired pay. (See Appendix G).

Termination of Payments Upon Remarriage of Former Spouse

There is no requirement that distributions of retired pay to a former spouse terminate if the former spouse remarries.

Positions of Organizations Representing Former Spouses. Former spouse organizations oppose attempts to terminate payments upon remarriage. According to EX-POSE,

Frequent moves, difficult living conditions and long separations are often a part of military life. The unemployment rate for military spouses is three times that of civilian spouses. Meaningful employment is more difficult because of frequent moves and often the military retirement benefit is the only asset accrued during a marriage. Knowing that this retirement benefit will one day be available makes the hardships easier to endure.¹⁴⁷

A similar view is shared by the Committee for Justice and Equality for the Military Wife. According to this organization, terminating payment upon remarriage would "...mandate that a federal law override state domestic-relations laws in order to discriminate against...military wives."¹⁴⁸

Positions of Bar Associations. The position of the ABA and State Bars that addressed this issue is that payments to former spouses should not terminate upon remarriage.¹⁴⁹ In support, they advance rationales such as the following—

- The proposed amendment would “eliminate the status of military retired benefits as property, which would pre-empt the law of every State in the union and impair State laws regarding property division.”¹⁵⁰

¹⁴⁶ Information obtained during a meeting with NOAA officials.

¹⁴⁷ EX-POSE response to the *Federal Register* request.

¹⁴⁸ Committee for Justice and Equality for the Military Wife prepared statement (and accompanying articles) for the August 5, 1998, House Veterans' Affairs Committee oversight hearing.

¹⁴⁹ ABA response to a DoD information request, pp. 7-9.

¹⁵⁰ Ibid.

- In all 50 states, property allocated pursuant to a divorce decree remains the property of the former spouse to whom the allocation is made.
- The proposal serves no Federal interest inasmuch as it would make the treatment of retired pay vastly different from the treatment of virtually all other types of retirement payments.
- The ABA has adopted resolutions to the effect that all deferred compensation attributable to Federal employment should be subject to a permanent allocation.
- Members, former members, and the organizations that represent them have argued for equal treatment with other categories of retirement benefits in court cases, including the taxation of retired pay on the basis that military retired pay constitutes deferred compensation like other categories of retirement benefits.¹⁵¹
- No compelling reason justifies treating military retired pay differently from allocations of retired pay under substantially all other retirement systems.¹⁵²
- Former spouses negotiated their property settlements in good faith based on the assumption that the allocation of retired pay would not stop if he or she remarried. If payments are stopped because of remarriage, the asset distribution negotiated would no longer be equitable.
- No other category of property allocated to a former spouse is forfeited on remarriage.
- Former spouses endured military life in much the same way as the member and thus should not lose this right when remarrying. In most cases, because of the rigors of military life, the former spouse has been unable to progress in his or her career or profession and thus faces post-dissolution life with less opportunity to prosper economically.
- Even alimony does not automatically terminate in all States solely due to the former spouse's remarriage.
- Former spouses who do not satisfy the 20/20/20 requirements for commissary and exchange privileges can receive only an allocation of retired pay.
- If the proposal were enacted, Congress would send a negative message regarding its view of the value of the marital contributions of former, current, and future spouses of military members.

¹⁵¹ In *Barker v. Kansas*, 503 U.S. 594 (1992), the United States Supreme Court determined, with the support of members and member organizations, that retired pay constitutes “deferred compensation” and thus cannot be taxed any differently by the States than other categories of retired pay, including retired pay received by former Government employees. Thus, the Supreme Court held that members’ retired pay should be treated the same for income tax purposes as Federal and State retired pay. The USFSPA makes it absolutely clear that States may treat “disposable retired pay” as “property” subject to division in connection with divorce.

¹⁵² Note that, under the Organization Retirement and Disability System (ORDS), FERS Special and FS, a survivor benefit may be terminated upon the remarriage of a former spouse.

- This issue is best dealt with by the State courts. The USFSPA allows State courts to award or not award military retired pay consistent with that State's law. State courts should have the same discretion with regard to the effect of remarriage.

Positions of Organizations Representing Members and Former Members. Member and former member organizations take the position that the USFSPA should be amended to require termination of an allocation of retired pay if the former spouse remarries. In so doing, they point to the provisions of the Central Intelligence Agency Retirement Act (CIARA), Foreign Service Retirement and Disability System (FSRDS), and the Foreign Service Pension System (FSPS), which provide for the termination of benefits upon remarriage. In addition, the Fleet Reserve Association notes that VA Dependents Indemnity Compensation (DIC) terminates benefits upon remarriage.¹⁵³ In support of this position, member and former member organizations argue that military service involves many of the same challenges, hardships, and sacrifices as service with the CIA and FS and that, as a result, the USFSPA should parallel the remarriage provisions contained in the cited systems. These same stakeholders make the following arguments for termination of an allocation of retired pay upon remarriage—

- The allocation of retired pay to a former spouse is actually intended as support and, thus, remarriage of the former spouse should be viewed as abrogating both the former spouse's financial need and the former member's support obligation.
- The rule that remarriage before a certain age disallows the former spouse's right to certain Federal benefits should also apply to allocations of retired pay.
- Treatment of retired pay as property merely enables former spouses to receive an award of alimony in the few states that did not otherwise authorize such awards.
- The anecdotal evidence indicates there are occasional instances of multiple military marriages and divorces by a former spouse in which the former spouse receives an allocation of retired pay from each member.
- The sacrifices made by members in performing military service outweigh those of their former spouses.

¹⁵³ Fleet Reserve Association response to a DoD information request.

Positions of Governmental Organizations. According to NOAA, in most circumstances, it is difficult to "rationalize" continued payments after the remarriage of a former spouse. However, in cases where a former spouse supported a member/former member during the duration of his or her career, continued payments after remarriage may be appropriate.¹⁵⁴

Grant of Benefits to 20/20/15 Spouses As Well As 20/20/20 Spouses

Currently, 20/20/15 spouses are eligible for only limited benefits (other than allocations of retired pay) under the USFSPA. One year of transitional medical care in civilian and military facilities—but not commissary or exchange privileges—is available to an unremarried former spouse of a member or former member if the following three requirements are satisfied—

- The former spouse was married to the member for at least 20 years.
- The member performed at least 20 years of creditable service in determining eligibility for retired pay.
- The marriage overlapped at least 15 years of the 20 years of creditable service.¹⁵⁵

The former spouse has the option to participate in a group insurance plan for one additional year. If the divorce occurred before April 1, 1985, the duration of eligibility for medical care is unlimited.¹⁵⁶ In addition, under the DoD Directive applicable to commissaries, a dependent child who resides with the former spouse is generally ineligible to use the commissary. Provided the child is dependent on the member for more than 50 percent of his or her support, the child remains eligible to use military exchanges regardless of place of residence.

According to the Defense Manpower Data Center, as of September 1999, there were approximately 31,000 unremarried 20/20/20 former spouses of members of the uniformed services (including NOAA and the Commissioned Corps of the U.S. Public Health Service). The data also indicate that there are approximately 2,200 unremarried 20/20/15 former spouses who were divorced from members of the uniformed services after the 1985 changes in medical care provisions. Further, there are approximately 3,200 unremarried 20/20/15 former spouses who were divorced before the 1985 changes in medical care provisions.¹⁵⁷

Positions of Organizations Representing Former Spouses. Former spouse organizations suggest that a change is needed for former spouses who do not meet the 20/20/20 criteria. For example, EX-

¹⁵⁴ Information obtained during a meeting with NOAA officials.

¹⁵⁵ 10 U.S.C. § 1072(2)(G).

¹⁵⁶ 10 U.S.C. § 1086a.

¹⁵⁷ Defense Manpower Data Center information (as of September 1999).

POSE states that 20/20/15 spouses should be eligible for exchange and commissary privileges.¹⁵⁸ Although the Committee for Justice and Equality for the Military Wife has not specifically addressed the issue of granting medical, commissary, and exchange benefits to 20/20/15 spouses, it has taken the position that former spouses should receive a "...prorated share of the commonly earned pension after 10 years of service."¹⁵⁹

Positions of Organizations Representing Members and Former Members. With the exception of the Fleet Reserve Association, which does not support granting 20/20/20 type benefits to 20/20/15 spouses, all the other member organizations that addressed this issue in the August 5, 1998, House hearing and via DoD's *Federal Register* request support the consideration of extending benefits to 20/20/15 spouses.¹⁶⁰ The WISE position is that former spouses of 15-20 year marriages should be entitled to commissary and exchange benefits, but not medical benefits.¹⁶¹

Positions of Bar Associations. The ABA and the State Bars that addressed this issue believe that 20/20/15 spouses should be granted the same benefits that 20/20/20 spouses enjoy.¹⁶² The ABA states that, "At least where all service was performed during the marriage, extend the same medical, exchange and commissary benefits to former spouses of members that would be enjoyed by members, and the current spouses of members, who have taken...'early outs'" (i.e., more than 15 years of service, but less than 20 years of service).

Positions of Governmental Organizations. The NOAA position is that 20/20/15 spouses should not be entitled to the same benefits as 20/20/20 spouses. In other words, the current USFSPA provisions should not be changed.¹⁶³

Calculation of Benefits Based on Time of Divorce Rather Than Time of Retirement

According to the ABA, with respect to divorces involving military members, "The near-universal consensus of the State courts is to establish the spousal share of pension assets under the 'time rule,' through which each spouse receives half of the percentage created by taking the number of months of marriage during service as a numerator, and the total number of months served as a denominator." Under this model, benefits are calculated at the time of retirement rather than at the time of divorce. This issue is contentious in that former spouses want to maintain the status quo, while members and former members believe that calculating awards of retired pay to former spouses based on rank and years of service at the time of divorce would be more equitable.

¹⁵⁸ EX-POSE response to the *Federal Register* request.

¹⁵⁹ Committee for Justice and Equality for the Military Wife prepared statement (and accompanying articles) for the August 5, 1998, House Veterans' Affairs Committee oversight hearing.

¹⁶⁰ Sources include the Fleet Reserve Association response to information request, member organization prepared statements for the August 5, 1998, House Veterans' Affairs Committee oversight hearing, and member organization responses to the *Federal Register* request.

¹⁶¹ WISE response to the *Federal Register* request.

¹⁶² ABA and State Bar responses to DoD information requests.

¹⁶³ Information obtained during a meeting with NOAA officials.

Positions of Former Spouses and Organizations Representing Former Spouses. Some former spouses wrote letters or sent e-mails stating that they favor the method presently used by a majority of the State courts—which takes into account post-divorce increases in rank and years of service of the member. Reasons cited include "equity" and "fairness" in that the member would not have attained his or her final rank and years of service but for the contributions made by the former spouse during the marriage. Another reason is that, when rank and years of creditable service are used, the denominator of the marital fraction is the member's total years of creditable service rather than just his or her years of creditable service at the date of divorce, thus reducing the share of the former spouse. Former spouses also asserted that, since they must wait until the member retires before they will receive any payments, they should be compensated for this delay as a matter of fairness.

However, this view is not shared by all former spouse organizations. For example, the EX-POSE position is that it should be left to the discretion of State courts to decide when benefits should be calculated.¹⁶⁴

Positions of Organizations Representing Members and Former Members. Member and former member organizations urge almost unanimously that, as marital property, retired pay should be allocated based on the member's rank and years of military service at the time of divorce. Arguments in support of this position include the following—

- Granting the former spouse a percentage of retired pay based on the member's rank and years of service at the time of retirement rather than at divorce "impermissibly invades" the member's separate property.
- Dividing retired pay based on rank and longevity at the time of retirement provides former spouses a "windfall" in that they benefit from a portion of the member's military career to which they did not contribute.
- Principles of equitable community and property law require termination of a spouse's interest in marital property at the time the marriage is terminated.

According to WISE, "It is difficult to comprehend why a former spouse should be entitled to anything earned by the member after the date of divorce, when these increases should no longer be considered marital property."¹⁶⁵

Positions of Bar Associations. According to private practitioners, a majority of State courts do award post-divorce increases in rank and years of service when making awards of military retired pay as marital property. In many cases, the former spouse is awarded a fractional share of the member's retired pay. The numerator of the fraction is the number of months of marriage during the member's

¹⁶⁴ EX-POSE response to the *Federal Register* request.

¹⁶⁵ WISE response to the *Federal Register* request.

military service and the denominator is the total number of months served by the member. When this formula is used, post-divorce increases in rank and longevity are taken into account. The ABA supports this method of division of retired pay. Furthermore, the ABA notes the proposal advanced by members should be rejected "...for several legal and public policy reasons."¹⁶⁶ Most responding State Bar Associations support the ABA position.

Positions of Governmental Organizations. Representatives of the Coast Guard legal community and NOAA stated that the calculation of benefits should be based on a member's status at the time of divorce. This position is consistent with provisions in H.R. 72.

The "10-year Rule" for Direct Payment of Retired Pay Allocations

Under current law, former spouses are eligible for direct payment, through DFAS, of their allocable share of retired pay *only* if the member and former spouse were married for 10 or more years during which the member completed 10 or more years of creditable service. In all other cases, the member is responsible for paying the former spouse directly for his or her share of retired pay. Not surprisingly, this provision of the USFSPA often causes serious problems for both former members and former spouses.

Positions of Former Spouses and Organizations Representing Former Spouses. Some former spouses, who have expressed positions via letters and e-mail messages, state that the restrictions on direct payment contained in the USFSPA caused them to not receive their allocated share of retired pay. In these cases, former spouses resorted to expensive, time-consuming court proceedings to compel payment. This approach is even more difficult when the litigants reside in different jurisdictions and is virtually impossible in cases where the former member or former spouse resides in a foreign country. EX-POSE, on the other hand, "...agrees with the current eligibility definition of the USFSPA..."¹⁶⁷

Positions of Organizations Representing Members and Former Members. In prepared statements submitted at the August 8, 1998, House Veterans' Affairs Committee hearing, responses to the DoD *Federal Register* request, and follow-on requests for additional information, member organizations such as ARA, FRA, NMVA, NCOA, TREA, and TROA expressed support for the current 10-year minimum requirement of marriage concurrent with military service to qualify for direct payments by DFAS.

Positions of Bar Associations. According to the ABA, the 10-year rule is sometimes mistakenly interpreted by practitioners to constitute a bar to any allocation of retired pay to a former spouse. In turn, this mistaken interpretation results in incorrect legal advice to former spouses that results in no allocation of retired pay being requested. The ABA recommended abolishing this requirement for direct

¹⁶⁶ ABA response to a DoD information request, pp. 10-11.

¹⁶⁷ EX-POSE response to the *Federal Register* request.

payment.¹⁶⁸ Furthermore, for similar reasons, most of the State Bars that provided a position on this topic were overwhelmingly in favor of deleting this requirement.

Federal Income Tax Compliance Concerns. In cases where the 10-year minimum marriage requirement is not satisfied, because the former member receives the full amount of his or her retired pay, all of the pay is subject to income tax withholding. Moreover, DFAS reports all payments as income to the former member on IRS Form 1099-R. The former member must therefore report the yearly gross amount of retired pay as income on his or her Federal income tax return. No provision of the Internal Revenue Code entitles the former member to deduct any portion of the retired pay paid to the former spouse.¹⁶⁹ As a result, all parties would benefit from the repeal of the 10-year minimum marriage requirement by receiving separate Federal income tax reporting documents.

Based on discussions with private practitioners, DoD learned that some former members and their former spouses agree that the former member will deduct, as "alimony," the gross amount of retired pay allocated and paid by the retired member, rather than by DFAS, to the former spouse. This requires the former member to identify the former spouse by name and Social Security number on the former member's Federal income tax return. In turn, the former spouse declares the payments received as "alimony" and reports them as income. This approach subjects the former member and, potentially, the former spouse, to significant tax penalties, because the payments do not qualify as deductible alimony under the Internal Revenue Code.

SBP Issues

All categories of individuals and organizations raised several issues related to the SBP provisions of the USFSPA.

Termination of SBP Benefits If Remarried Before Age 55. Under current law, a former spouse who remarries before attaining age 55 loses entitlement to SBP coverage based on the former marriage.

Positions of Organizations Representing Members and Former Members. Member and former member organizations, such as the Air Force Sergeant's Association and the Fleet Reserve Association, generally urge retention of the requirement that SBP payments terminate on remarriage of the former spouse. They note that provisions of the Civil Service Retirement System (CSRS)/FERS, FS, Tier I Railroad Retirement, and certain elements of the CIA retirement systems require termination of survivor benefits upon remarriage.

Positions of Bar Associations. The ABA recommends the elimination of the "termination upon

¹⁶⁸ ABA response to a DoD information request, p. 5.

¹⁶⁹ Only payments that qualify as "alimony" qualify for deduction—as an adjustment to gross income. Allocations of retired pay are not structured as "alimony" and thus constitute nondeductible "personal" expenses. Internal Revenue Code sections 62, 71, and 215, respectively.

remarriage provision" generally on the basis that the SBP is marital property which, when awarded at divorce, should remain in place.¹⁷⁰

Allocation of SBP Benefits Among More Than One Spouse / Direct Payment of SBP Premiums by Former Spouses. Under current law, a member can designate only one SBP beneficiary. Additionally, a former spouse can be awarded less than 50 percent of the member's net disposable retired pay but at the member's death, receive "full" SBP benefits. A former member who has been divorced and remarried cannot elect any level of SBP coverage for the current spouse if SBP is in effect for the former spouse.

According to the ABA, "[c]urrently, the SBP premium is taken 'off the top' of disposable retired pay in all cases, with the net effect that both parties effectively 'pay' for a portion of the SBP benefit, in accordance with the parties' respective shares of the retirement benefits."¹⁷¹

Positions of Organizations Representing Former Spouses. Former spouse organizations have similar views on the divisibility issue. For example, EX-POSE, states that SBP should be the sole property of the former spouse, if she or he was the recipient at the time of divorce. However, SBP benefits could transfer to the new spouse if the former spouse dies.¹⁷² The EX-POSE position is similar to the one held by the Committee for Justice and Equality for the Military Wife. According to this organization, a "mandatory assignment of the survivor's annuity" should be made to former spouses.¹⁷³

Positions of Organizations Representing Members and Former Members. Member and former member organizations have varying positions on the SBP divisibility issue. Organizations such as the ARA, NMVA, NCOA, and TREA believe that SBP provisions "...deprive the military member of the means to protect a subsequent spouse/family."¹⁷⁴ FRA, on the other hand, has no objection to divisibility to more than one spouse "...if voluntarily made by the member or if the former spouse(s) pays premiums, or is awarded SBP coverage in lieu of direct or partial payments awarded by the court."¹⁷⁵ WISE believes that Congress should address and ensure that subsequent spouses receive the same protections afforded the first spouse.¹⁷⁶

Positions of Bar Associations. The ABA and most responding State Bars generally favor prorated coverage for multiple beneficiaries or, in the alternative, separate SBP coverage for multiple spouses.¹⁷⁷ The ABA and many State Bars also support direct premium payment by former spouses.

¹⁷⁰ ABA response to a DoD information request, p. 14.

¹⁷¹ ABA response to DoD information request, p. 15.

¹⁷² EX-POSE response to the *Federal Register* request.

¹⁷³ Committee for Justice and Equality for the Military Wife prepared statement (and accompanying articles) for the August 5, 1998, House Veterans' Affairs Committee oversight hearing.

¹⁷⁴ ARA, NMVA, NCOA, and TREA responses to the *Federal Register* request.

¹⁷⁵ FRA response to a DoD information request.

¹⁷⁶ WISE prepared statement for the August 5, 1998, House Veterans' Affairs Committee oversight hearing and response to the *Federal Register* request.

¹⁷⁷ ABA response to a DoD information request, p. 15.

Positions of Governmental Organizations. NOAA officials state that SBP benefits should not be allocated to more than one spouse. The spouse receiving the benefits should be the current spouse—rather than a former spouse. In addition, NOAA officials state that, as long as it does not result in members paying the costs, the organization does not object to former spouses paying SBP premiums.¹⁷⁸

1-year “Deemed Election” Rule. If a member who is required to make an SBP election fails or refuses to do so, the member is “deemed” to have made the election if DFAS receives both a written request from the former spouse and a copy of the court order.¹⁷⁹ The former spouse (beneficiary) must make this deemed election request within 1-year of the date of the court order or filing of an agreement.¹⁸⁰ This 1-year limit is jurisdictional. If the deemed election is not filed in a timely manner, the beneficiary loses all SBP benefits.

Positions of Bar Associations. The ABA and several responding State Bars¹⁸¹ recommend deletion of the 1-year deemed election requirement. First, it is viewed as a potential basis for a malpractice suit because some attorneys are not aware of the 1-year limitation. Second, many practitioners, as well as unrepresented parties to a dissolution, have remarked that it takes longer than one year to determine the applicable rules and file the deemed election.

Positions of Governmental Organizations. According to NOAA officials, because former spouses may retain attorneys to provide legal advice, it is unnecessary to change the 1-year provision.¹⁸²

The DoD Joint SBP board has recognized that the 1-year period for deemed elections is an area for possible further legislation. The board also sees, as an area for possible future legislation, limiting the time period available for a former spouse to pursue modification to a divorce decree. At present, this can occur many years after the date of the original decree--which can result in coverage being shifted from a current spouse to a former spouse - even after a member's death. (See Comptroller General opinion B-247508. September 2, 1992 and B-2407508.2, June 14, 1993.) Board representatives are looking for some finality to the period in which a former spouse may pursue SBP through court-ordered modification .

¹⁷⁸ Information obtained during a meeting with NOAA officials.

¹⁷⁹ 10 U.S.C. §1450(f)(3)(A).

¹⁸⁰ 10 U.S.C. §1450(f)(3)(C).

¹⁸¹ Notably, the Arizona, Florida, Michigan, North Carolina, and Virginia State Bars.

¹⁸² Information obtained during a meeting with NOAA officials.

Other USFSPA-related Issues

DoD has identified additional issues which, although less frequently cited by stakeholders, clearly should be addressed. These issues and, where available, stakeholder positions are presented below.

Statute of Limitation for the Division of Retired Pay

The USFSPA does not impose a statute of limitation on the division of retired pay. Member and former member organizations generally believe the USFSPA should be amended to impose a statute of limitation (most support a 2-year period of limitations), after which a former spouse cannot seek division of military retired pay. Former spouses argue against any statute of limitation.

The VSI/SSB "Early Out" Programs

The VSI program provides a variable-length annuity to members separating from active duty and affiliating with the Reserve Components.¹⁸³ Another program, known as Special Separation Benefit (SSB), provides enhanced separation pay benefits for members agreeing to terminate all connections with the armed forces.¹⁸⁴ In 1993, Congress enacted a third voluntary separation incentive program that authorized early retirement benefits for members with at least 15 but fewer than 20 years of creditable, active-duty, service.¹⁸⁵ All three voluntary separation programs have been extended by subsequent legislation.

Several State courts have awarded former spouses an interest in these voluntary separation programs based on the member's years of creditable service and years of marriage during such service. However, the USFSPA contains no provision which addresses the divisibility of such payments. Moreover, there is no mechanism for the enforcement of or direct payment to the former spouse of allocations made under the VSI/SSB programs. DFAS honors orders that divide the retired pay of members who retire early. As a practical matter, even if the law is amended to allow DFAS to make direct payment of VSI/SSB, since SSB is paid in the form of a single lump sum, DFAS will be able to make payment only if it has notice of the award prior to issuing the payment.

Another concern applicable to these programs is that the voluntary, early separation of the member makes it impossible for the former spouse to achieve the 20/20/20 status required to be eligible for health care benefits and commissary and exchange privileges.

¹⁸³ 10 U.S.C. §1175; Public Law 102-190, Div. A, Title VI, section 662, 105 Stat. 1396-98 (1991).

¹⁸⁴ 10 U.S.C. §§1174a, 1175; Public Law 102-190, Div. A, Title VI, section 661, 105 Stat. 1394-95 (1991).

¹⁸⁵ National Defense Authorization Act for Fiscal Year 1993, Public Law 102-484, 190, Title X, section 1061(a)(7), 105 Stat. 1290, 1472-73 (1991); National Defense Authorization Act for Fiscal Year 1994, §4403, 106 Stat. 2315, 2702-04 (1992).

Former spouse organizations, the ABA, and some State Bars that provided submissions recommend the USFSPA be amended to recognize payments made under these voluntary separation programs as marital property subject to division and provide for the direct payment thereof to former spouses. The ABA also recommends that "at least where all service was performed during the marriage, the same medical, exchange and commissary benefits should be provided to former spouses of members that would be enjoyed by members who have taken VSI or SSB, and their current spouses..."¹⁸⁶

"Forced" Retirement

Nothing in the USFSPA allows a State court to order a member to apply for retirement or to retire at a particular time in order to initiate payments to a former spouse. In fact, the USFSPA contains an express prohibition against such action by State courts.¹⁸⁷ Congress and DoD believe that such actions would be contrary to the best interests of the United States and that control of service members must remain with the Federal Government.¹⁸⁸ Nevertheless, State courts have, in some instances, required a member who chooses to remain in military service to make payments directly to the former spouse in an amount equal to what the former spouse would receive if the member retired when first eligible.

Limitations on Division of Retired Pay

The USFSPA contains a provision that addresses payment of child support and alimony, "subject to the limitations of this section," from a member's retired pay.¹⁸⁹ The USFSPA also states that "no more than 50 percent of the member's disposable retired pay may be used to satisfy all court orders which divide the member's pay as property."¹⁹⁰ The provision pertaining to child support and alimony was enacted to clarify the restriction in present law that total payments of retired pay pursuant to court orders and other legal processes (such as garnishment) not exceed 65 percent of disposable retired pay.¹⁹¹ In essence, this provision allows DFAS to make direct payment of up to 65 percent of the member's disposable retired pay (as opposed to 50 percent for property distributions) to a former

¹⁸⁶ ABA response to a DoD information request.

¹⁸⁷ See 10 U.S.C. §1408(c)(3).

¹⁸⁸ See, e.g., Hearings Before the Subcommittee on Manpower and Personnel of the Senate Committee on Armed Services, 97th Congress, 2d Session, pp. 132-33 (1982); Hearing before the Military Personnel and Compensation Subcommittee of the Committee on Armed Services, House of Representatives, 101st Congress, 2d Session, pp. 241, 242-43, 247-48; and, Senate Report 97-502 (Committee on Armed Services), p. 17, accompanying S. 1814, 97th Congress, 2d Session (1982).

¹⁸⁹ See, e.g., 10 U.S.C. §§ 1408(d), 1408(d)(5). The purpose of this provision was to clarify the authority of State courts to enforce certain court orders in connection with the payment of retired pay. See, also, House Conference Report 98-1080, p.301, accompanying H.R. 5167, 98th Congress, 2d Session (1984).

¹⁹⁰ See 10 U.S.C. §1408(e)(1).

¹⁹¹ See House Report (Committee on Armed Services) 101-665, pp. 280, 529, accompanying H.R. 4739, 101st Congress, 2d Session (1990).

spouse to satisfy current support obligations and arrearages.¹⁹² The ABA recommends amending this 65 percent limitation to include enforcement of property award arrearages.¹⁹³

Elimination of Jurisdictional Rule

Under current law, special jurisdictional requirements must be satisfied to obtain an enforceable order for division of retired pay as marital property.¹⁹⁴ These jurisdictional requirements are applicable to both current members and retirees. The legislative history indicates that Congress established these jurisdictional requirements because of a concern that spouses might engage in "forum shopping" for a court most favorable to their position.¹⁹⁵ All 50 states now divide military retired pay. The ABA notes that the jurisdictional rules of the USFSPA have created injustices in a significant number of cases as opposed to preventing injustice as initially contemplated.¹⁹⁶ The ABA maintains that all State courts have jurisdictional laws to prevent the injustices and abuses contemplated by Congress at the time of enactment of the USFSPA.

Retroactive Awards of VA Disability Determinations

VA disability determinations can be made retroactively. In many cases, when VA makes this determination, the former spouse has already received payments of disposable retired pay. In these cases, because of the "deductibility" of VA disability from disposable retired pay, DFAS must collect from the former spouses what were, at the time, proper payments, but which have become "overpayments." Several State Bar Associations recommended amending the USFSPA to provide that these retroactive recoupments not be made.

Differing Definitions of "Disposable Retired Pay" for Pre- and Post-1991 Decrees

Prior to 1991, Federal income tax was deducted from total retired pay to calculate "disposable retired pay" subject to division as marital property. For pre-1991 distributions of retired pay as marital property, the deduction of Federal income tax generally worked in favor of the member—even where the State court ordered an equal division of the retired pay—due to the effect of tax withholding. Indeed, in amending the USFSPA in 1990, Congress noted the purpose of the amendment was to rectify an "unfairness, in part because of interpretations of the Internal Revenue Code."¹⁹⁷ However, when Congress amended the method of deducting Federal income tax from retired pay, the change was not made retroactive. Rather, it was made applicable only to decrees entered after the date of the amendment.

¹⁹² 10 U.S.C. §1408(d)(5).

¹⁹³ ABA response to a DoD information request, p. 18.

¹⁹⁴ 10 U.S.C. §1408(c)(4).

¹⁹⁵ See Senate Report 97-502, *supra*, at pp. 8–9. See also Senate Report 97-330, *supra*, at p. 167.

¹⁹⁶ ABA response to a DoD information request, p. 7.

¹⁹⁷ See House Report (Committee on Armed Services) 101-665, pp. 279–280, on H.R. 4739, 101st Congress, 2d Session (1990).

Specific Formulas for Division of Retirement Benefits

The USFSPA presently requires that an award of retired pay as property be expressed in a dollar amount or as a percentage of disposable retired pay. However, in cases where the divorce is effective prior to the member's eligibility to receive retired pay, the exact dollar amount or percentage cannot be determined until the member retires. Some responding State Bars recommended using formulas in dividing retirement benefits.

COLAs for Dollar-Specific Awards

The applicable Federal Regulation, 32 C.F.R. 63.6(h), provides for COLAs only when the award is expressed as a percentage of disposable retired pay. No provision in the USFSPA specifically permits COLAs for dollar amount awards. Several submissions stated that the USFSPA should be amended to add COLAs to dollar allocations. For example, the ABA notes in its submission that "there is really no good reason for this policy," and that DFAS should be directed to apply COLAs to specific dollar awards.¹⁹⁸ If the USFSPA were amended to specifically allow COLAs for dollar amount awards, DFAS estimates that it would cost approximately \$1 million to modify the retired pay system to accommodate the change.

Lack of Information Regarding the Act for Judges and Attorneys

Representatives of service legal communities and State Bars uniformly stated that more information regarding the USFSPA and the method by which its provisions are applied should be made available to judges and attorneys because lack of knowledge and confusion about the USFSPA is commonplace. Therefore, as discussed above, DFAS rejects, as legally insufficient, an unacceptably high percentage of court orders.

Various stakeholders stated that DoD's published guidance on the USFSPA is inadequate. Additionally, representatives of service legal communities, the ABA, and State Bars identified a need for a guidebook containing forms or "model language" for court orders.

Removal of Bar on Opening Pre-*McCarty* Cases and Reopening of Final Orders

Letters and e-mail messages from former spouses who are barred from seeking allocations of retired pay because of the effective date provisions of the USFSPA recommended amendments that would provide them with a remedy. Specifically, they requested the USFSPA be amended to enable former spouses whose divorce decrees were entered prior to the day before the June 26, 1981, decision in *McCarty* to reopen their cases to seek an allocation of retired pay. Thus, these former spouses seek to make the USFSPA retroactive. In general, the basis for this position is that the contributions of the former spouses to their respective military marriages, which ended in divorce prior to *McCarty*, should be judged as being as valuable as the contributions of any other former military

¹⁹⁸ ABA response to a DoD information request, p.18.

spouse. Many former spouses who are barred from seeking an allocation of retired pay stated they were nearly destitute. They believe that the member's retired pay, a portion of which they state they are entitled to receive, constitutes their only opportunity to climb out of poverty. They also argue that if pre-USFSPA courts believed retired pay was not divisible, a former spouse should not be economically disadvantaged simply because the court did not divide the retired pay.

CONCLUSIONS AND RECOMMENDATIONS

Effectiveness of the USFSPA

When Congress passed the USFSPA, its principal goal was to “remove the effect of the Supreme Court decision in *McCarty v. McCarty*.”¹⁹⁹ It did this “by permitting Federal, State, and certain other courts, consistent with the appropriate laws, to once again consider military retired pay when fixing the property rights of the parties to a divorce, dissolution, annulment, or legal separation.”²⁰⁰ In so doing, it recognized that “the whole subject of the domestic relation laws of husband and wife belongs to the laws of the States and not to the laws of the United States.”²⁰¹

Congress intended the USFSPA to be a comprehensive approach to resolving the numerous legal and economic issues applicable to the division of military retired pay on divorce. While its principal goal was to give States the power to decide matters related to the division of military retired pay, it also recognized the unique nature of military retired pay and enacted safeguards aimed at protecting the rights and entitlements of service members.

The DoD's review confirmed that, in large measure, Congress' goals have been realized. However, as is the case with many laws designed to resolve complex issues and which, as a consequence, are themselves complex, several provisions of the USFSPA could be improved. When considered as a whole, these improvements should be, to the maximum extent possible, fair to all parties.

The objective of any legislative initiative with respect to the USFSPA should be to maintain fairness and reduce the costs and complexity of both the substantive and procedural aspects of allocating retired pay. Not all of the initiatives discussed below can be implemented without DoD incurring some cost. However, we believe that any additional costs will be substantially outweighed by the improvements in fairness and efficiency for retirees and former spouses.

Provisions of the USFSPA, Related Laws, and Regulations in Need of Change

Each of the provisions of the USFSPA, related laws, and regulations which DoD concluded could be improved is discussed below.

¹⁹⁹ Senate Report 97-502, p. 1.

²⁰⁰ Ibid.

²⁰¹ *McCarty v. McCarty*, 453 U.S. 210, 220 (1981). The Department of Defense agreed with this principle. See statement of Dr. Lawrence J. Korb, Assistant Secretary of Defense for Manpower, Reserve Affairs, and Logistics, Senate Report 97-502, p. 1. Among other things, Dr. Korb urged Congress to amend the bill to compute payments as if the member could retire at the time of divorce and to terminate payments upon the remarriage of the former spouse.

Grant of Benefits to 20/20/15 Spouses. Under current law, only former spouses who qualify under the 20/20/20 marriage rules receive commissary and exchange privileges and, with one exception, permanent health care. Former spouses who satisfy the 20/20/15 requirement receive only temporary medical benefits (former spouses divorced before April 1, 1985, who satisfy certain other requirements can receive health care for an indefinite period). On remarriage, the former spouse loses eligibility for all of these benefits. As of September 1999, there were approximately 2,200 unremarried 20/20/15 former spouses who were divorced from members of the uniformed services (including NOAA and the Commissioned Corps of the U.S. Public Health Service) after the 1985 changes in medical care provisions.²⁰²

The dependent children of a member or former member do not qualify for commissary privileges if they reside with the former spouse—even if they are dependent on the member or former member for their support.²⁰³ Regardless of where they live, dependent children continue to be entitled to use the exchange and MWR facilities if they are dependent on the member for more than 50 percent of their support.²⁰⁴

Conclusions. The 20/20/20 eligibility rule is too restrictive. However, the principle of the 20/20/20 requirement should be retained because members must serve at least 20 years to earn benefits, and it would be inappropriate to extend benefits to former spouses who satisfy lesser criteria. DoD concluded that it may be appropriate for a former spouse who has at least a 15-year marriage/service overlap to be eligible to qualify for these benefits by having time married after the member's retirement count toward satisfaction of the 20-year marriage/service overlap. Allowing constructive credit toward the marriage/service overlap requirement, rather than simply applying a 20/20/15 test for all benefits, would retain the principle that only those former spouses who satisfy the 20/20/20 test should be eligible for permanent benefits. This approach would allow DoD to recognize the contributions of spouses who were married for at least three-fourths of the member's career, but who fail to qualify for benefits under the current, restrictive rules. DoD concluded that it may be appropriate to have every month of marriage after the member's retirement count as one month marriage/service overlap.

Recommendations. This measure would affect revenue. Although we have concluded that it may be appropriate for a former spouse who has at least a 15-year marriage/service overlap to be eligible to qualify for medical care, commissary, and exchange benefits by having time married after the member's retirement count toward satisfaction of the 20-year marriage/service overlap requirement, further study is necessary to determine the cost of enacting such a program. Once we determine the extent of these costs, we will be able to make a recommendation and submit draft legislation if appropriate. If we recommend implementation of such a proposal, we would envision that regardless of the date of divorce, any former spouse who satisfies the new test should be eligible to receive these

²⁰² Defense Manpower Data Center information (as of September 1999).

²⁰³ "Armed Services Commissary Regulation," DoD Reg. 1330.17-R, para. 2-201.17 (April 87).

²⁰⁴ DoD Dir. 1330.9, "Military Exchanges," para. 1-201.7b, 2-201 (15 Dec 86).

benefits prospectively. The change should not, however, give rise to claims for prior medical care or other expenditures.

DoD recommends that children of members and former members who reside with the former spouse, and with respect to whom the member or former member is entitled to claim the dependency exemption under section 152 of the Internal Revenue Code, be eligible to use the commissary. Such eligibility would remain in effect until the earlier of the remarriage of the former spouse or the time at which, under current law, such children would lose their eligibility for the privileges if they resided in the former member's household. DoD is currently studying this issue in greater depth.

Calculation of Benefits Based on Time of Divorce Rather Than Time of Retirement. The USFSPA does not require courts to base an allocation of retired pay on the member's rank and years of creditable service at the time of divorce. Rather, by not specifically addressing this issue, the USFSPA by implication permits State courts to base the allocation on post-divorce promotions and years of service. A member's pay can increase in the following four ways after the divorce: (1) promotion, (2) longevity, (3) COLA increases, and (4) targeted increases aimed at aligning military pay with comparable civilian sector pay.

Conclusions. In private sector retirement plans, such as a 401(k) plan, the participant's vested account balance or accrued benefit can be valued and divided at the time of separation or divorce. The military retirement system, however, is unlike any private sector retirement plan. The member makes no contribution to the plan, the member has no vested interest in the plan until he or she becomes eligible to retire, and, even after becoming eligible to retire, the member can be divested of retired pay through punitive action based on the member's misconduct. Even after retiring, the member can be recalled to active duty, can forfeit retired pay because of misconduct, and face certain post-retirement employment restrictions.

These unique features make it difficult for courts to value military retired pay at the time of divorce or separation. As a result, State courts typically award a percentage of the member's retired pay as of the date the member retires. In essence, the State court treats the future promotions and longevity pay increases earned by the member after the divorce as a marital asset. This is inconsistent with the treatment of other marital assets—only those assets that exist at the time of divorce or separation are subject to division. Assets that accrue subsequently are the sole property of the party who earned them. Post-divorce promotions and longevity pay increases are to military retired pay (which is a defined benefit plan) what post-divorce accruals and contributions are to private, defined benefit and defined contribution plans.

Recommendation. Congress should amend the USFSPA to provide that all awards of military retired pay be based on the member's rank and years of service at the time of divorce. This provision should be exclusively prospective. For example, if a future divorce occurs when the member is an O-4 (i.e., Major/Lieutenant Commander) with 14 years of creditable service, the award of military retired pay must be based on that rank and time served. That the member retires as an O-6 (i.e., Colonel/Captain) with 24 years of service is irrelevant to the award of military retired pay as property.

The pay increase attributable to the promotions and additional time served should be viewed as the member's separate property. However, as a matter of equity, the former spouse should benefit from increases in the pay table applicable to the O-4 grade. Thus, as the pay for an O-4 with 14 years of service is increased due to increases in the pay table, so too is the value of the allocation to the former spouse. The objective in this regard should be to provide the former spouse, on a present value basis, with approximately the same amount of retired pay that he or she would have actually received had payments begun on divorce. DFAS should include a formula in its recommendations that could be used by parties who divorce while the member is still on active duty.

The "10-year Rule" for Direct Payment of Retired Pay Allocations. Under current law, a former spouse is eligible for direct payment, through DFAS, of his or her share of retired pay *only* if the parties were married for at least 10-years during which the member completed at least 10- years of creditable service. In practice, this so-called "10-year rule" restricts enforcement of court orders concerning marriages that overlapped military service by less than 10 years. In such cases, the member is responsible for paying the former spouse his or her share of retired pay and DFAS must withhold tax on the full amount of the member's military retired pay. In addition, the 10-year rule is occasionally misinterpreted by counsel and their clients to constitute a bar to any division of retired pay.

Conclusions. Overwhelming justification exists for abolishing this requirement. First, no other examined public or private retirement plan or system contains such a restriction. Second, repeal should prevent the courts, practitioners, and parties to divorce proceedings from mistakenly interpreting a rule applicable to direct payments as a prerequisite to allocation of retired pay. Third, repealing this requirement would allow DFAS to issue separate Federal income tax reporting documents to the parties for their respective shares of the allocations.

Recommendation. DoD recommends that Congress repeal the 10-year requirement.

SBP Issues. Under current law, several inequities arise with respect to SBP beneficiaries and survivor annuity issues. For example, a member can designate only one SBP beneficiary. In addition, there has been some degree of controversy associated with the payment of SBP premiums. Further, a former spouse has only 1-year after the divorce to notify DFAS that the member must designate him or her as an SBP beneficiary (called a deemed election). If the former spouse fails to do so, he or she will lose entitlement to SBP benefits. In addition, former spouses and former spouse organizations urge repeal of the current law requirement that SBP coverage terminate if the former spouse remarries before attaining age 55.

Conclusions. The limit on SBP beneficiaries leads to both the inappropriate deprivation of survivorship interests and overcompensation of former spouse survivors. As a result, SBP annuity payments should be divisible or assignable among multiple beneficiaries. Additionally, they should be presumptively divisible in pro rata shares corresponding to the shares of the underlying retirement benefits. The rules regarding payment of SBP premiums has led to inequities by requiring that some members and former members pay premiums on annuities for the benefit of former spouses. The "1-year rule" has created hardships for some former spouses seeking to be recognized as court-ordered

SBP beneficiaries. Lastly, no good reason exists for repealing the requirement that SBP payments stop if the former spouse remarries before attaining age 55.

Recommendations. DoD recommends amending the provisions of the law relating to SBP as follows—

- Permit the designation of multiple SBP beneficiaries. (Provided actuarially sound assumptions and tables are developed to determine the appropriate premium cost for additional beneficiary coverage.)
- Establish a presumption (unless otherwise agreed by the parties or ordered by a court) that multiple beneficiary designations and related allocations of SBP benefits must be proportionate to the allocation of retired pay.
- Permit the courts (or the parties) to establish and designate responsibility for payment of premiums related to SBP coverage (at present, applicable law requires them to be deducted from disposable retired pay).
- Require premium costs of SBP to be withheld from the responsible party's share of retired pay.
- Permit any spouse or former spouse to waive any or all of his or her proportionate coverage under SBP.
- Repeal the 1-year deemed election period requirement.

If the USFSPA is amended to permit designation of multiple beneficiaries, the costs to the government or agency must also be considered.²⁰⁵ Actuarially sound assumptions and tables must be developed to determine the appropriate premium cost for additional beneficiary coverage. There should be no additional cost to the government, other than administrative expenses, as a result of implementing the recommendations below. Members and former spouses should be completely responsible for paying any additional insurance costs.

VSI/SSB "Early Out" Programs. The overwhelming majority of courts interpret these payments as based on accrued military service and therefore divisible.

Conclusions. Although the vast majority of State courts are allocating early retirement or separation payments to former spouses, the USFSPA contains no provision that addresses the divisibility of these payments. Presumably, current law does not address this because these types of payments were created after the last significant amendments to the USFSPA.

²⁰⁵ The DFAS Retired Pay Directorate estimates system allocations would take at least 2 years to accomplish and that the estimated cost of the changes would be \$3-4 million.

Recommendation. DoD recommends that Congress amend the USFSPA to include a provision which specifically recognizes early retirement and separation payments as property subject to division and authorizes direct payment to the former spouse.

"Forced" Retirement. The laws applicable to other Government and private employer retirement plans do not authorize State courts to require an employee to retire at a date specified by the court to effectuate the current payment of a former spouse's allocation of retired pay. Benefit plans sponsored by private employers may allow former spouses to elect to receive their benefits immediately. These plans may also permit such benefits to be distributed in a single lump sum equal to the present value of the former spouse's interest which, in turn, can be rolled over to an IRA on a tax-deferred basis. Attempting such an early distribution approach with the military retirement system would be challenging because of the numerous contingencies that affect members' eventual disposable retired pay.

Conclusion. The USFSPA does not authorize State courts to issue orders that compel the member to retire to make retired pay available for a former spouse. To provide for our national defense, the armed forces must be allowed to control when a member is permitted to retire. If military retired pay is awarded solely as property, a court should not be able to compel the member to provide any payments to the former spouse before the member retires. Since the member is not entitled to receive retired pay prior to retirement, the former spouse should also be precluded from receiving it (when it reflects an award as property) prior to the member's actual retirement.

Recommendation. DoD recommends that the USFSPA be amended to explicitly prohibit a court from requiring a member to begin payments (as property) to a former spouse before actual retirement, as economically, this may compel the member to retire. There should be no exceptions to this requirement.

Limitations on Division of Retired Pay. The USFSPA provides that the maximum amount of disposable retired pay that can be paid by DFAS to a former spouse as *property* is 50 percent of such disposable retired pay. Additionally, the USFSPA provides that a maximum of 65 percent of a member's disposable retired pay may be paid by DFAS directly to a former spouse pursuant to all court orders under the USFSPA and section 459 of the Social Security Act (relating to child support and alimony (and arrearages) enforcement). This provision is in accord with existing law that applies to all Federal employees.

Conclusion. DoD accepts the observation of the State Bars and the ABA that this is a limitation on the amount payable by DFAS directly to a former spouse and is not a limitation on the amount awardable by a court or under an agreement of the parties.

Recommendations. DoD recommends that the USFSPA be amended to retain this limitation with an exception that would permit direct payment by DFAS in excess of 50 or 65% of disposable retired pay where both of the parties agree (and the court approves).

COLAs for Dollar-specific Awards. No provision of the USFSPA permits COLAs for dollar amount awards. This rule limits the flexibility of the parties and the courts in negotiating property settlement agreements and causes practitioners and the courts difficulty in their efforts to draft orders.

Conclusion. No compelling reason exists for the current statutory limitation on dollar-specific awards.

Recommendation. Congress should amend the USFSPA to authorize DFAS to apply COLAs to dollar-specific awards.

Automatic “Cash-out” of “Small Benefits” and Optional “Cash-out” of SBP and “Large Benefits”. Requiring direct payment of all allocations of retired pay will increase the DFAS workload by creating many new “small” monthly payments to former spouses. It is economically inefficient for DFAS to process small monthly payments. DFAS believes that the small benefits should be automatically cashed out, without any form of election, in a single, lump sum. This approach would simplify administration of the USFSPA for all parties, result in savings to DoD, and be more convenient to former spouses.

Retirement plans sponsored by private employers and the Federal Employees' Thrift Savings Plan (TSP) have the option of automatically distributing “small” benefits to participants and former spouses in a single lump sum.²⁰⁶ The portions of these distributions that are attributable to any form of contribution except after-tax employee contributions qualify for direct or indirect IRA rollover treatment.²⁰⁷ For purposes of determining “small benefits,” the Internal Revenue Code provides that the accrued benefit of a participant will be considered small if the present value thereof, as determined in accordance with section 417(3)(3) of the Code, is \$5,000 or less. The “cash-out” rules also apply to the distribution of benefits to former spouses under QDROs.

Conclusion. The DoD Military Retirement Fund Board of Actuaries should publish tables that allow the present value of a former spouse’s allocation of retired pay or SBP payment to be calculated, and DFAS should automatically distribute it if the present value is “small.” To make the calculation, several assumptions would have to be made, including life expectancy (i.e., mortality), interest rate, and COLA increases. Inasmuch as the former spouse’s allocation could be reduced by the member’s receipt of disability compensation, the likelihood of this occurrence would also need to be included in the assumptions.

DoD also concluded that, under certain circumstances, the cash-out approach should be extended, as an optional form of payment, to SBP payments as well as allocations of retired pay in excess of \$5,000. To do so, DoD would need authority to promulgate regulations which specify the circumstances under which a former spouse can elect to receive SBP payments and allocations of retired pay with a present value in excess of \$5,000 in a single lump sum.

²⁰⁶ See Sections 411(a)(11)(A) and 417(e)(3) of the Internal Revenue Code.

²⁰⁷ See Sections 402(c)(8)(B) and 402(f)(2)(A) of the Internal Revenue Code.

Recommendations. Congress should amend the USFSPA to include a “small benefit cash-out” provision that is similar to the rule contained in Section 411(a)(11)(A) of the Internal Revenue Code. The provision would include a grant of authority to DoD to determine which actuarial assumptions to use in calculating present value. The provision would apply to both allocations of retired pay and SBP payments and would be nonselective. This would enable DFAS to save the expense associated with making small monthly payments and allow former spouses to receive the present value of all of their benefits immediately. Likewise, the Internal Revenue Code should be amended to include these payments in the category of “eligible rollover distribution” so they can be rolled over, on a tax-deferred basis, to an IRA.

The USFSPA should also be amended to authorize DoD to promulgate regulations which specify the circumstances under which former spouses can elect to receive SBP payments and allocations of retired pay with a present value of more than \$5,000, calculated in the same manner as “small benefits,” in a single lump sum.

When a benefit is "cashed-out," the amount expended by DoD will be recouped from the member's retired pay through direct deductions until the full amount is recouped.

Simplification of Administration of the Act

Many organizations agree that more information regarding the USFSPA and how its provisions are applied should be made available to alleviate the lack of understanding and confusion surrounding the law. Practitioners have also expressed concern with the processing of orders by DFAS. On the other hand, DFAS representatives express concern with the quality of orders it receives inasmuch as it rejects a sizable proportion of orders it receives regarding the division of military retired pay. Many practitioners rely on the provisions of ERISA when drafting court orders; however, ERISA does not apply to a division of military retired pay. Likewise, private practitioners use Qualified Domestic Relations Orders (QDROs) to divide military retired pay. QDROs were specifically created to address the provisions of ERISA; as such they unnecessarily complicate USFSPA cases.

Four methods suggested for simplifying administration of the USFSPA include publication of (1) more information (such as a handbook) related to the USFSPA; (2) a standard form for a domestic relations order for the division of military retired pay; (3) implementation of a pre-approval procedure by DFAS for court orders; and (4) presumptive standard formulas for use by judges, practitioners, and parties in calculating allocations of retired pay.

DoD believes that the recommendations that follow our conclusions in this section would improve DFAS's ability to process allocations of retired pay.

Conclusions. The publication of a handbook and a fully integrated web site should significantly enhance understanding of the USFSPA. The handbook could be patterned on the handbook published by OPM.

Parties would benefit from the publication—and perhaps required use—of forms of court orders, which would automatically be, if properly completed, accepted by DFAS. DoD believes it will be best to coordinate the drafting of standardized forms with DFAS, the Coast Guard, the Public Health Service, and NOAA.

The USFSPA also needs amendment in other areas. Congress should amend the law to allow either members or former spouses to submit an application for direct payment of benefits. Former spouses occasionally refuse to submit the application. As a consequence, the member will have income tax withheld on the full amount of the member's retired pay and must then make the payments provided in the divorce decree to the former spouse. Allowing the member to submit the application will equalize the parties' position in this matter.

The statute requires that members be given notice of an application for payment of retired pay (notice must include a copy of the order). The regulation requires that a member be given 30 days to respond to the application. DoD recommends that Congress amend the statute to allow the member to waive the notice requirement. Members occasionally request that payments start immediately. Amending the statute will clarify the member's rights in this respect.

We believe Congress should amend the USFSPA to delete the requirement that a copy of the court order be sent to the member. DFAS will instead notify the member that, upon request, it will send the member a copy of the order. Title 42 of the U.S. Code contains a similar provision concerning copies of child support orders. Since that provision took effect, DFAS has processed approximately 10,000 orders but received only approximately 300 requests for copies of the court order. Changing the requirement will result in fewer administrative costs to the Government.

We also conclude that Congress should amend the USFSPA to allow for electronic transmission of court orders and applications. At present, DFAS is unable to accept electronic transmissions. It expects to have that capability within the next few years. Authorization to use digital signatures is also appropriate. With technological advances, service of applications through the DFAS web site will soon become possible. This will permit DFAS to improve customer service and speed processing of court orders.

Congress should not grant DFAS explicit authority to conduct a “pre-submission review” of proposed court orders. Even if the review was non-binding, it would still place DFAS in an inappropriate role that is properly played by advocates for the parties in the divorce proceedings. The publication of a handbook, combined with an integrated web site and standard forms should be adequate to enable practitioners to prepare orders that comply with the USFSPA.

Recommendations. DoD recommends that—

- DFAS prepare a handbook for judges and practitioners that includes the statute, regulation, standardized forms and other information of use in drafting court orders. A disk or CD-ROM

version of the forms, statute and regulation would also be of benefit. The handbook should be similar to the format used by OPM in its CSRS/FERS handbook.

- DFAS develop a fully integrated web site that addresses the many issues involved with the USFSPA and the division retired pay. The web site should include all information found in the handbook referred to above as well as contact information regarding the DFAS personnel responsible for processing applications. The web site can also include links to other government sites containing information needed in preparing court orders (military pay tables, actuary tables, etc.).
- DFAS acknowledge the receipt of “deemed” SBP elections.
- Congress grant DoD specific authority to develop standard forms of court orders for percentage and dollar amount allocations and to publish the forms in a regulation. The content of the forms would be coordinated with DFAS, the U.S. Coast Guard, NOAA and the Public Health Service. Outside organizations will have the opportunity to comment on the proposed forms when they are published in the *Federal Register*.
- Congress amend the USFSPA to provide that a former member may waive the 30-day notice period.
- Congress amend the USFSPA to provide that the former member may request direct payment from DFAS to the former spouse.
- Congress amend the USFSPA to provide for electronic transmission of court orders and USFSPA applications, use of digital signatures, and the use of other technological advances that may appear in the future.
- Congress amend the USFSPA to repeal the requirement that a copy of the court order accompany the notice of application.

USFSPA Dependent Victims of Abuse Provisions. The following conclusion and recommendation, concerning a modification to the Dependent Victims of Abuse provisions of the USFSPA codified at 10 U.S.C. § 1408(h), is offered based on DFAS's experience in administering this provision over the last several years.

For a former spouse to be eligible for benefits as a victim of abuse by a member losing the right to retired pay, the USFSPA requires that the member be eligible to retire at the time he or she loses eligibility to receive retired pay as a result of spouse or child abuse.²⁰⁸ USFSPA further provides that the

²⁰⁸ 10 U.S.C. § 1408(h)(2)(A).

date the convening authority approves a court-martial sentence may be used as the date on which the member's eligibility to receive retired pay terminates.²⁰⁹

Decisions regarding pretrial confinement and confinement between the trial and the convening authority's action are made independently of their effect on a former spouse's eligibility for benefits under the USFSPA.

Consequently, in a few cases, former abused spouses have lost the opportunity to receive an allocation of retired pay simply because the members were confined prior to convening authority action on their cases. Specifically, the members would have been eligible to retire on the date the convening authority approved their sentences; however, they lost their eligibility for retired pay because they were confined prior to and/or after the trial and such confinement was not creditable service.

Conclusion. It is consistent with the overall purpose of 10 U.S.C. §1408(h) to remove disincentives to reporting and subsequently cooperating with prosecution authorities in abuse cases. While a decision to confine a service member during these periods may serve to protect abused spouses and dependent children, in a few cases the confinement action may also have the effect of depriving them of benefits under this statute.

Recommendation. DoD recommends that the statute be amended to provide that a former spouse may be eligible to receive payments under USFSPA, if the member, but for confinement periods served prior to convening authority action, would have been eligible to retire at the time he or she loses retirement eligibility because of the abuse. We recommend the amendment be made effective retroactively to October 23, 1992, the date the Dependent Victims of Abuse provisions were enacted. This action would slightly expand former spouse eligibility.

Recoupment of Overpayments to Former Spouses Resulting from Retroactive VA Disability Determinations. The VA often makes disability determinations that are retroactive in effect. When a former member receives a retroactive disability determination, he or she must waive retired pay in order to receive VA disability compensation. Since the determination is retroactive, disposable retired pay must be recomputed from the effective date of the disability, and an adjustment made to the amount of the former spouse's previous payments. Because this waiver reduces the amount available to pay the former spouse from retired pay, retroactive recharacterization usually causes the former spouse to be deemed to have been overpaid.

DFAS credits the former member for the total amount of the overpayments to the former spouse. It then establishes a debt against the former spouse's future USFSPA payments to recover the debt. In the debt notice letter, the former spouse is informed that he or she may request a waiver of the debt under 10 U.S.C. §2774. DFAS may waive collection from the former spouse "when collection of the erroneous payment would be against equity and good conscience, and not in the best interest of the

²⁰⁹ See 10 U.S.C. § 1408(h)(10)(A).

United States.’²¹⁰

Conclusions. In these instances, the USFSPA payments initially made to a former spouses were correctly computed based on information available at the time. Thus, the payments, although subsequently determined to be erroneous, did not appear to be “erroneous” when made. In order not to penalize either the former member or the former spouse, the Government should not attempt to collect overpayments.

Recommendation. DoD recommends that Congress enact legislation that exempts from recoupment overpayments to former spouses that are due to retroactive VA disability determinations.

Elimination of Jurisdictional Rule. A portion of the USFSPA, codified at 10 U.S.C. § 1408(c)(4), includes procedural requirements that must be satisfied for a State court to exercise jurisdiction over the allocation of retired pay, irrespective of the court’s possible jurisdiction over other aspects of the divorce. This provision was added to the basic legislation to ensure due process for the member and to prevent “forum shopping” by the former spouse.

This section, which applies only to a division of military retired pay as property, creates a special jurisdictional provision that does not exist for similarly situated non-military couples in divorces.

At the time Congress enacted the USFSPA many states provided that retirement or pension benefits were not marital property. Such benefits were considered to be the separate property of the person earning them and were therefore not subject to division during a divorce. The reason for this provision of the USFSPA no longer exists. All States provide that retirement benefits are marital property that are subject to division. The concern now is not 'forum shopping;' instead, it is 'forum avoidance' by the military spouse. DFAS reports that this usually occurs in cases involving members who are retired at the time of the divorce.

Certain stakeholders have expressed the opinion that adequate jurisdictional protections are available to members through the Soldiers and Sailors Civil Relief Act (SSCRA). Existing State laws provide adequate protection for retirees and members of the Reserve Component. The stakeholders maintain that the jurisdictional requirements create difficulties for spouses and members alike, resulting in delays and litigation expenses.

DFAS is responsible for ensuring compliance with the SSCRA when processing involuntary allotments for commercial debt. These allotments are initiated against the pay of active duty military personnel. Section 520(a) of the SSCRA provides specific procedural protections for active duty military personnel. The same protections are available to active duty military personnel in divorce proceedings.

The USFSPA requires that the designated agent determine whether the member’s rights under

²¹⁰ DoD FMR Volume 7B, DoD 70000.14-R, paragraph 60209.

the SSCRA were observed.²¹¹ The SSCRA’s requirements at 50 U.S.C. App §520 will continue to protect active duty military members against default divorce judgments. If it is not apparent from the court order that the member’s SSCRA rights were observed in the divorce proceeding, DFAS will reject the former spouse’s application for payments under the USFSPA.

Conclusions. Since all States now provide for the division of military retired pay, the issue of “forum shopping” is no longer a significant concern. In addition, ambiguities in USFSPA jurisdiction requirement provisions have complicated the intent and interpretation of the law. The removal of the jurisdiction requirement will simplify administration of the USFSPA.

Recommendation. DoD recommends that Congress delete the special jurisdiction requirement of the USFSPA.

Provisions of Military Retirement System Which Are Adequate

Despite statements by individuals and organizations to the contrary, DoD believes several provisions of the USFSPA, including some of the provisions that have generated the most controversy, are reasonably effective and should not be changed.

Treatment of VA Disability Compensation. Under current law, a member must waive retired pay to receive VA disability compensation. Because VA disability compensation is tax free, a member has a substantial economic incentive to seek a disability rating after retiring from military service. Seeking such a rating is clearly a member’s right. Indeed, if the member seeks medical care from the VA for an injury or an illness, the best way for that member to establish that the conditions were service connected would be to seek a VA disability rating promptly after retiring from active service. Accordingly, it is lawful and appropriate for a retired member to seek a VA disability rating.

Under present law, the waiver of retired pay to receive VA disability compensation also reduces the amount of disposable retired pay available for division at divorce, and, in most cases, reduces the payment to the former spouse. In other words, for each dollar of VA disability compensation awarded, the member’s disposable retired pay is also reduced by one dollar. In cases where the member receives a 100 percent disability rating, all payments to the former spouse may cease. This result is due to the provisions of the VA Disability Compensation System—not the Uniformed Services Former Spouses’ Protection Act.

²¹¹ 10 U.S.C. §1408(b)(1)(D).

Anecdotal evidence from former spouses suggests that some members have aggressively used the VA disability compensation system to reduce the share of their retired pay that will be received by the former spouse. However, no study supports such a conclusion. Some opposed to the existing law also contend that it is relatively easy to obtain a VA disability rating and thereby reduce, or even eliminate, payments to the former spouse. Again, no study supports these contentions.

Conclusion. Congress has chosen to give VA disability compensation a higher priority than payments to former spouses. This is consistent with the treatment historically provided by Congress to VA disability compensation. It has treated it as compensation owed to the member for injuries/wounds incurred in the service of the United States. As such, the Congress has always exempted it from the claims of creditors (it has allowed claims for spousal and child support). The treatment of VA disability compensation is not within the purview of DoD. Such matters are exclusively within the purview of the Department of Veterans Affairs and the Congress. If Congress chooses to revisit the issue of the treatment of disability compensation, in relation to retired pay, it would be appropriate to ensure that the concerns of both members and former spouses are taken into account.

Termination of Payments Upon Remarriage of Former Spouse. In passing the USFSPA, Congress allowed State courts to divide retired pay as property. Although, under certain circumstances, payments to the former spouses of CIA and FS employees may terminate upon the former spouse's remarriage, payments under the other retirement systems do not.

Conclusions. Domestic relations law is a subject principally reserved to the States. For this and other reasons, it is inappropriate for Federal law to direct that payments stop upon the former spouse's remarriage. Military retirement is similar enough to other types of retirement that it does not merit being treated differently than virtually all other retirement benefits. As a consequence, State courts, not Federal law, should determine the effect of remarriage.

Termination of SBP Benefits If Remarried Before Age 55 / Automatically Awarding SBP to a Former Spouse. Some argue that SBP coverage for former spouses should continue, even if they remarry before age 55 and that SBP coverage should be automatically awarded to former spouses.

Conclusions. SBP coverage stops if the surviving spouse of a retired member remarries before age 55. DoD found no compelling reason for treating a former spouse differently than a surviving spouse. DoD also concluded that whether a former spouse should receive SBP coverage is properly a matter for the parties to negotiate as part of property settlements or for courts to award as part of divorce decrees.

Statute of Limitation for the Division of Retired Pay. The USFSPA does not impose a statute of limitation on the division of retired pay.

Conclusion. Congress determined that most issues relating to divisibility of military retired pay should be left to the discretion of State courts. An appropriate statute of limitations should be left to the discretion of State law.

Differing Definitions of Disposable Retired Pay for Pre- and Post-1991 Decrees. Prior to 1991, Federal income tax was deducted from total retired pay to calculate disposable retired pay subject to division as marital property. For pre-1991 distributions of retired pay as marital property, the deduction of Federal income tax generally was advantageous to the member—even where the State court ordered an equal division of the retired pay. When it amended the USFSPA in 1990, Congress noted the purpose of the amendment was to rectify an "unfairness, in part because of interpretations of the Internal Revenue Code."²¹² However, when Congress amended the method of deducting Federal income tax from retired pay, the change was not made retroactive; rather, it was made applicable only to decrees entered after the date of the amendment.

Conclusion. DoD found no compelling reason to amend the definition of disposable retired pay that is applicable to pre-1991 divorces.

Specific Formulas for Division of Retirement Benefits. Some stakeholders believe that the USFSPA should be simplified by creating a presumed method of calculating the allocation of retired pay. This presumptive method would be a model that State courts could follow, but would not be required to follow. This presumptive method could be similar to the "statutory share" that is provided in the Foreign Service Pension System, but would not be mandatory as is the case in the Foreign Service Pension.

While a presumed method would simplify the allocation process in the absence of State law, such an approach would be inconsistent with Congress' determination that State law should govern most aspects of the division of retired pay. A presumptive method would be a clear indication of a Federal attempt to override State law in this regard. Regardless of efforts to label such a presumption as "voluntary," this "simplification" would be an intrusion into what Congress concluded should be an exclusively State law matter.

Conclusion. Creating a presumed method to calculate the allocation of retired pay would undermine the clear choice to use State law that the Congress made when it enacted the USFSPA. In the absence of a demonstrated need to revisit this issue, and no such need is apparent, retaining existing law is the best choice.

Removal of Bar on Opening Pre-McCarty Cases and Reopening of Final Orders. When it passed the USFSPA, and again when it amended the statute in 1990, Congress made it clear that its provisions would not be effective retroactively.

Conclusion. Because Congress determined not to make the USFSPA retroactive when it enacted the law, it would be inappropriate to amend the USFSPA to allow former spouses to reopen divorce proceedings that have been closed for 18 or more years.

²¹² See House Report (Committee on Armed Services) 101-665, pp. 279–280, on H.R. 4739, 101st Congress, 2d Session (1990).

Treatment of Military Retired Pay as Compensation for Current, but Reduced Services. Some current and former members and member organizations often argue that because, in some contexts, retired pay is considered compensation for current, but reduced services (because former members are subject to recall to duty, prosecution under the UCMJ, and, under certain circumstances, restrictions on foreign travel), the classification of retired pay by the USFSPA as “property” subject to division and “income” under the Internal Revenue Code is inequitable inasmuch as the benefit cannot be transferred or sold.

Congress has considered this issue and determined that retired pay is subject to division as property.

Conclusion. DoD believes that, on balance, there is no compelling reason to recommend that Congress reconsider its determination regarding this matter. Further, State courts should retain the authority to treat retired pay as property that is subject to division upon divorce.

Requiring State Courts to Apply State Law Considering Subjective Factors in Allocating Retired Pay. Various stakeholders have recommended that the USFSPA be amended to require State courts to take into account subjective factors when making an allocation of retired pay. Factors recommended to be considered include the relative fault of the parties (including consideration of dependent abuse) and the financial circumstances of the former spouse.

Conclusion. State courts, not Federal law, should determine whether fault will be taken into account and, if so, the extent to which it will affect the allocation of retired pay.

Expansion of Eligibility for Space-Available Travel. Some former spouses, who were eligible for military benefits, have stated that they may not travel in space-available military aircraft because of the requirement that their spouse travel with them.

Conclusion. DoD concluded that no change should be made to military regulations to allow former spouses to fly on military aircraft free of charge.