

**Title: Title 38 Appointment, Compensation, Performance Management, and Accountability System for Senior Executive Leaders in the Department of Veterans Affairs (VA)**

**Status:** New submission.

**Proposed Legislative Authority:** Establish a comprehensive employment system under Title 38 for VA's Senior Executive level leadership positions. Under this system, employees who occupy these positions – whether within the Veterans Health Administration (VHA), the Veterans Benefits Administration (VBA), the National Cemetery Administration (NCA), or any of VA's Staff Offices or other organizations - would be appointed, paid, and appraised in accordance with regulations promulgated by the VA Secretary and without regard to the provisions of Title 5. Moreover, the processes through which these employees may be disciplined for misconduct or poor performance, and may grieve or appeal such discipline, would be governed by new Title 38 authorities rather than Title 5 authorities or the current VA SES accountability provisions in 38 USC § 713.

Under the new system, the VA Secretary would determine the qualifications required for appointment to an executive leadership position within the Department and would appoint qualified leaders without the requirement of Office of Personnel Management (OPM) certification. Pay would be determined for each covered executive based on an analysis of relevant factors similar to those used to set pay for Veterans Health Administration (VHA) physicians and dentists under 38 U.S.C. § 7431. These factors would include the complexity of the position held; an analysis of the local labor market for similar positions in private and other Federal sector organizations; and the individual executive's experience and performance in the position and/or in other VA assignments; The aggregate pay limitation for this system would be the same as the VHA physicians and dentists pay system. The Secretary would appraise executives' performance, and approve any performance-based awards and/or pay increases, based on outcome-oriented and business-related factors such as customer satisfaction, employee feedback, and organization deliverables. The Secretary would retain authority to discipline executives for misconduct or poor performance, subject to pre- and post-decisional due process rules modeled on those currently applicable to VHA health care professionals under Title 38, Chapter 74, subchapter V. VA would enter into an interchange agreement with OPM to allow certified permanent career VA senior executives to transfer to career SES appointments in other Federal agencies on the same basis as permanent career Senior Executives appointed under Title 5 authorities.

**Current Law or Practice:** Currently, VA Senior Executives are appointed, assigned, paid, and appraised pursuant to Title 5 authorities (5 U.S.C. §§ 3131 et seq., 5 CFR Parts 214 and 317, and 5 CFR § 534, Subpart D) and are disciplined pursuant to Title 5 and Title 38 authorities (5 USC § 3592, 5 USC Chapters 43 and 75, and 38 USC § 713). This legislation would replace those authorities

**Justification:**

- I. VA needs business-oriented employment authorities to recruit and retain leaders who can transform VA's business practices to better serve Veterans.

Today, VA faces unprecedented demands for services and benefits. The service offerings themselves have multiplied over the years through expanded eligibility for existing benefits and new benefits programs. Both the number and types of benefits and services have expanded dramatically, and many Veterans have increasingly complex needs, expectations, and requirements of VA. As Veterans age, service-connected issues become more chronic and acute. Demands for mental health care and suicide prevention are rising dramatically. The standards for health care are changing, challenging our ability to meet expectations. Veterans' benefits claims and appeals have increased dramatically. Overall, this has increased the complexity of serving America's Veterans.

This challenging environment has required VA to re-examine its operating norms and institute new programs to meet these challenges. As a result, VA is in the midst of a radical transformation to improve its relationship with and service to Veterans and their families. The sustainability of this transformation is dependent upon the career VA leaders who provide executive level leadership for VA's health care and benefits facilities, memorial programs, and other facilities and programs. The VA Secretary needs greater flexibility than current authorities afford him in terms of recruiting, compensating, appraising and – where necessary – disciplining career leaders to ensure that VA can operate as a values-based high performance organization rather than a compliance-focused underperforming bureaucracy.

The need for more flexible VA executive employment authorities is compounded by an alarming number of vacant leadership positions, a retirement tsunami on the very near horizon, and an increasingly difficult executive recruitment market. As of January 28, 2016 –

- Nearly 30% of VA's Senior Executive Service allocations are currently unfilled
- Nearly 70% of VA's current career executives are either eligible to retire immediately or will become eligible this year
- VHA lost 22.3% of its Medical Center Directors and 22.9% of its Network Directors to retirement or resignation just in the past Fiscal Year
- VHA Medical Center Directors' annual salaries are capped at just 46% of what the average private sector hospital director earns
- In Fiscal Year 2015, VA had to re-announce 37 VA executive recruitment actions because the announcements attracted no qualified candidates the first time around

II. VA must compete with private sector employers for top leadership talent.

Many VA programs compete directly with the private sector for the same executive labor pool. Gifted leaders interested in executive level positions within VA's health care, claims processing, memorial affairs, information technology, finance, human resources, legal, and other programs are often courted by private sector employers who can offer far more generous compensation packages. Traditional Title 5 authorities cap Federal sector executive pay dramatically below what the private sector offers for comparable positions.

This pay disparity is particularly stark in the health care arena. The Healthcare Compensation Survey conducted by the Hay Group for 2013 reflects individuals holding the position of Chief Executive Officer (CEO) in private sector health care systems received on average \$731,800 annual cash compensation. CEOs of a single facility within an overall system received an average of \$393,100. In that same year, SES pay rates capped annual compensation for senior executives at \$181,500. While cost-of-living increases have since increased the maximum rate of SES pay to \$185,100, that increase does little to address the obvious pay disparity.

Under this proposal, VHA executive compensation would continue to lag behind that of CEOs in private sector healthcare systems, but would be higher than the current cap to acknowledge and recognize the clinical and healthcare expertise and experience that these healthcare executives provide to our Nation's Veterans. The same cap would apply to VA executives in VBA, NCA, and the staff offices and organizations, though VA expects non-VHA executives' pay will not generally require the same quantum of adjustment as pay for Medical Center Directors and VISN Directors.

Inadequate compensation is not the only reason executives decline employment opportunities with VA. Cumbersome administrative requirements – including but not limited to the requirement for OPM certification of new senior executives – result in extraordinarily long lag times for VA executive recruitments. Many gifted executives who may be interested in VA positions are lured away by competing employers who can bring them onboard immediately.

III. VA needs to appraise and reward executives' performance based on organization outcomes, as businesses do

In addition to recruiting and retaining top-notch executive talent, VA must revamp its systems for assessing and rewarding performance to ensure executive-level leaders' performance ratings accurately reflect the performance of the enterprise. This requires both that we set meaningfully outcome-oriented performance goals and that we discipline ourselves in assigning ratings so that only the most outstanding and transformational leaders receive the highest marks.

VA proposes to establish by regulation an executive performance management system that ensures meaningful differentiation between satisfactory and extraordinary leadership, and that rationally links executives' performance awards to demonstrably improved care and services for Veterans.

IV. The current VA executive accountability authorities do not support transformation

The vast majority of VA's over 300,000 employees work tirelessly and effectively for the benefit of Veterans and other stakeholders. Similarly, the vast majority of VA's 400+ career executives provide exceptional leadership for the VA facilities and programs for which they are responsible. The Secretary is committed to celebrating VA employees' exemplary efforts on behalf of Veterans and to ensuring that those contributions are not obscured by inaccurate media reports or irresponsible rhetoric.

That said, on the rare occasion that a VA executive engages in misconduct or severely underperforms, the Secretary is committed to holding culpable individuals accountable. True accountability is challenged when the available authorities require unduly lengthy pre- or post-decisional procedures, or when third party appellate processes rely too heavily on unsuitable precedent. Recent experience suggests that the executive accountability authorities currently available to the Secretary are an ill fit for a Department undergoing transformation, and that extending the Title 38 disciplinary and appellate procedures to VA's career executives would strike a better balance between executives' due process rights and the Secretary's need to effectively manage his executive workforce.

a. The current VA executive accountability authorities do not work.

Section 707 of the Veterans' Access, Choice and Accountability Act of 2014 (Choice Act), Public Law 113-146, authorizes the VA Secretary to remove an executive from Federal employment, or from the Senior Executive Service to a General Schedule position, when the Secretary determines the executive's performance or misconduct warrants such action. That authority, now codified at 38 U.S.C. § 713, further provides for expedited appeal of such actions to a Merit Systems Protection Board (MSPB) Administrative Judge. The Choice Act authority, by its terms, is in addition to the Secretary's pre-existing authorities under 5 U.S.C. §§ 3592 and 7511-7512, which authorize adverse action for cause but entail lengthier pre-decisional due process and post-decisional MSPB appeals than actions under the Choice Act.

The Secretary understood the new Choice Act accountability authority to manifest Congress' intent that VA should move quickly and decisively to remove or demote those VA executives whose misconduct or poor performance undermine Veterans' trust in VA care and services. The Secretary also understood that he must exercise the new authority consistent with constitutionally-mandated due process principles. For these reasons, VA's policy implementing the new authority provides for five days' advance notice and an opportunity to respond to the charges and supporting evidence before a

final decision is made, rather than the thirty days' notice afforded by the traditional Title 5 rules. VA's implementing policy further provided that any decision to remove or demote an executive should be supported by substantial evidence, meaning sufficient evidence of misconduct or poor performance to provide a reasonable basis for the action. This is a lower standard of proof than the preponderant evidence standard MSPB uses when reviewing adverse actions under the general Title 5 rules.

Notwithstanding VA's implementing policy and Congress' clear intent, MSPB has retained the stricter "preponderant evidence" standard of proof when reviewing Choice Act accountability actions. More specifically, MSPB's implementing regulations require the Administrative Judge to defer to the Secretary's choice of penalty if preponderant evidence supports the charge(s) upon which the penalty was based, but permit the judge to reverse a removal or demotion action if, in the judge's view, the action was "unreasonable under the circumstances." 5 CFR § 1210.18.

The Secretary has used the Choice Act authority to propose removal or demotion of eleven VA executives. Five of those actions have resulted in MSPB Administrative Judges' review on the merits. Although preponderant evidence supported some or all of the charges in all five actions, the Administrative Judges in three cases reversed the penalty as "unreasonable under the circumstances." This lack of deference to the Secretary's exercise of a clear statutory prerogative has frustrated the Secretary's efforts to remove malfeasant or neglectful executives from VA's senior leadership corps.

- b. The Title 38 disciplinary and appellate procedures are a better fit for a Department undergoing transformation.

The Title 38 authorities governing VA health care professionals' disciplinary and appellate procedures have been on the books since shortly after World War II, when Congress recognized that the general civil service rules were a poor fit for a national health care system rapidly expanding to meet returning servicemembers' needs. The Title 38 rules provide sufficient pre- and post-decisional safeguards to ensure that VA personnel are not disciplined arbitrarily, but deference is afforded the Secretary in determining whether a particular employee's conduct or performance warrants removal or other adverse action. More than half a century of judicial review has proven that these authorities are fair, robust, and properly calibrated to balance the interests of employees and Veterans alike. The Department therefore proposes that the Choice Act accountability authority be repealed and replaced with authorities modeled on 38 U.S.C. §§ 7461 and 7463, which specify the pre-decisional due process to be afforded prior to decision on an adverse action and provide for a post-decisional grievance process after less severe actions. The Department further recommends that the new authority mirror 38 U.S.C. § 7462(f), which affords employees who have been the subject of a major adverse action a limited right to judicial review. These new accountability authorities, like the pay authorities described above, would apply to all VA executives, not just VHA executives. Our recommended legislative language provides that the Secretary's accountability actions will remain in effect during any grievance or subsequent judicial review.

**Affected Strategic Objectives:** Deliver world class service to Veterans and their families by applying sound business principles that result in effective management of people, communications, technology, and governance.

**Cost Benefit Analysis:**

Executive level compensation under this system would be determined for each covered individual based on factors reflecting the complexity of an executive’s assignment, pay data for similar positions in private and other public sector organizations, and the experience, accomplishments, and overall results-driven performance of the individual. Pay ranges would provide appropriate levels of distinction for higher levels of responsibility. Individual pay recommendations would be recommended and reviewed at different levels of the organization, including an Executive Resources Board to provide transparency and parity.

An additional pay band would be added to the three pay bands currently applicable to VA Senior Executives under Title 5 authorities, with only the most complex executive leadership roles assigned to the highest pay band. The Department envisions that its 344 career senior executive positions would be distributed among the bands as follows

Pay Band	Salary Range	Number of Execs
3	\$150-170K	131
2	\$170-185K	106
1	\$185-205K	87
1A	\$205-235K	20

In calculating increased salary costs, we estimate that the amount per executive would vary for each individual based on the complexity of the position, the individual executive’s experience and performance, and other market factors. Executives whose assignments and qualifications do not merit enhanced compensation would not receive additional pay under this system. Pay adjustments would be considered upon any change in assignment. Pay changes would be commensurate with the new assignment and may result in an increase or decrease in pay, considering the applicable variables and criteria of each new assignment. In the event no changes in assignment occur, a pay review would be required every two years.

NOT AN OFFICIAL DEPARTMENT PROPOSAL –  
SHARED FOR DISCUSSION PURPOSES ONLY

In calculating the overall cost of this proposal, we must offset the increased salary costs by the cost savings associated with reduced executive turnover. We estimate that the enactment of this new system will reduce the predicted turnover rate for VA executives over the next three years from 20% to 10%. Over the next seven years, we anticipate a reduction in expected turnover from 15% to 10%.

The American Hospital Association estimates the cost of employee turnover at 35% of an employee’s salary. Clearly, turnover also causes many less quantifiable impacts in the work environment such as increasing existing staff workload, decreased morale, and higher burnout potential. The costs associated with senior executive turnover are typically higher due to the impact such vacancies have on the overall organization’s productivity.

The total estimated cost of this proposal, along with expected savings resulting from reduced turnover, is as follows:

CURRENT				PROPOSED							
Year	Number of SES	Average Salary	Benefits	Total Salary and Benefits	Average Salary Increase	Benefits Increase	New Average Salary	New Benefits	New Total Salary and Benefits	Turnover Savings	Total Cost of Proposal
2016	344	\$169.8	\$57.7	\$227.5	\$4.8	\$1.6	\$174.6	\$59.4	\$234.0	\$2,661.2	-\$448.6
2017	344	\$171.5	\$58.3	\$229.8	\$4.8	\$1.6	\$176.3	\$59.9	\$236.2	\$2,687.8	-\$475.2
2018	344	\$173.3	\$58.9	\$232.2	\$4.8	\$1.6	\$178.1	\$60.5	\$238.6	\$1,357.9	\$854.7
2019	344	\$175.1	\$59.5	\$234.6	\$4.8	\$1.6	\$179.9	\$61.2	\$241.0	\$1,372.0	\$840.6
2020	344	\$176.9	\$60.1	\$237.0	\$4.8	\$1.6	\$181.7	\$61.8	\$243.5	\$1,386.2	\$826.4
<b>5 Year Total</b>										<b>\$9,465.1</b>	<b>\$1,597.9</b>
2021	344	\$178.7	\$60.8	\$239.5	\$4.8	\$1.6	\$183.5	\$62.4	\$245.9	\$1,400.6	\$812.0
2022	344	\$180.6	\$61.4	\$242.0	\$4.8	\$1.6	\$185.4	\$63.0	\$248.4	\$1,415.2	\$797.4
2023	344	\$182.5	\$62.0	\$244.5	\$4.8	\$1.6	\$187.3	\$63.7	\$250.9	\$1,429.9	\$782.7
2024	344	\$184.4	\$62.7	\$247.1	\$4.8	\$1.6	\$189.2	\$64.3	\$253.5	\$1,444.8	\$767.9
2025	344	\$186.3	\$63.3	\$249.6	\$4.8	\$1.6	\$191.1	\$65.0	\$256.1	\$1,459.8	\$752.8
<b>Grand Total</b>										<b>\$16,615.4</b>	<b>\$5,510.7</b>

The estimated increase in salary costs over 10 years of \$1.65 million would be offset by a 10 year savings of \$.55 million from reduced turnover. The net 10 year investment of \$1.1 million would eliminate the loss of extremely valuable, knowledgeable and tenured senior executives.

Further, and equally important, this change would motivate highly experienced, seasoned executives to take on leadership roles in VA most demanding positions, driving VA’s transformation for the benefit of Veterans.

**Legislative Text:** We propose rescinding the current text of 38 U.S.C. § 713 and replacing it with the following:

**§ 713. Senior Executives.**

(a) In General.

1. Notwithstanding any law, the Secretary may appoint, employ, appraise, discipline, and terminate from Federal service, employees in career senior executive positions within the Department.
2. The Secretary and the Director of the Office of Personnel Management may enter into agreements that, among other things, permits employees appointed under subsection (a)(1) to transfer to career Senior Executive Service appointments in other federal agencies, without having to compete under competitive merit staffing procedures.
3. The Secretary shall prescribe regulations to implement this subsection.

(b) Performance Management.

The Secretary shall prescribe, by regulation, a performance management system for employees appointed under subsection (a)(1) that ensures performance ratings and any resulting awards meaningfully differentiate extraordinary from satisfactory contributions and substantively reflect organization deliverables.

(c) Pay for Senior Executives. Pay for individuals appointed under subsection (a)(1) shall consist of two elements: base pay and market pay.

(1) Base Pay.— The annual rates or ranges of rates of basic pay for individuals appointed under subsection (a)(1) shall be prescribed from time to time by Executive order as authorized by chapter 53 of title 5 or as otherwise authorized by law.

(2) Market Pay.— Individuals appointed under subsection (a)(1) are eligible for market pay, as follows:

(A) Market pay shall consist of pay intended to reflect the recruitment and retention needs of the Department for the assignment to be performed by the senior executive.

(B) The annual amount of the market pay payable to the senior executive shall be determined by the Secretary on a case-by-case basis.

(C) In determining the amount of market pay for individuals appointed under subsection (a)(1), the Secretary shall take into account—

(i) the experience of the senior executive in managing facilities or programs of the Department;

(ii) the complexity of the senior executives assignment, whether assigned or to be assigned;

(iii) the labor market for individuals in similar positions, which may cover any geographic area the Secretary considers appropriate;

(iv) the experience of the senior executive in performing the assignment, whether assigned or to be assigned; and

(v) such other considerations as the Secretary considers appropriate.

(D) The amount of market pay of a senior executive shall be evaluated by the Secretary not less often than once every 24 months. The amount of market pay may be adjusted as the result of an evaluation under this paragraph.

(3) Requirements and Limitations on Total Pay.—

(A) Not less often than once every two years, the Secretary shall prescribe for Department-wide applicability the minimum and maximum amounts of annual pay that may be paid under this section to senior executives. Amounts prescribed under this paragraph shall be published in the Federal Register, and shall not take effect until at least 60 days after the date of publication.

(B) The sum of the total amount of the annual rate of base pay and market pay may not be less than the minimum amount, nor more than the maximum amount, specified under subsection (c)(3).

(C) In no case may the total amount of compensation paid to a senior executive under this title in any year exceed the amount of annual compensation (excluding expenses) specified in section 102 of title 3.

(4) Treatment of Pay.— Pay under this subsection shall be considered pay for all purposes, including retirement benefits under chapters 83 and 84 of title 5 and other benefits.

(5) Ancillary Effects of Decreases in Market Pay.— A decrease in pay of a senior executive resulting from an adjustment in the amount of market pay of the senior executive under subsection (c)(2) shall not be treated as an adverse action and shall be final and conclusive and no other official or any

court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

(d) Adverse actions.

1. The Secretary (or an official designated by the Secretary) may reprimand, suspend, involuntarily reassign, demote, or remove an employee appointed under subsection (a)(1) if the Secretary (or designee) determines that the employee's misconduct or performance warrants such action.
2. A senior executive who is the subject of an adverse action under this section entitled to be represented by an attorney or other representative of the employee's choice and –
  - a. not less than ten days' advance written notice of the charges and evidence supporting the action and an opportunity to respond, in a manner prescribed by the Secretary, before a decision is made regarding the action; and
  - b. the right to grieve the action in accordance with a grievance process to be established by the Secretary.
3. A decision or grievance decision under subsection (d)(2)(B) shall be final and conclusive.
1. An employee adversely affected by a final decision under subsection (d)(3) may obtain judicial review of the decision.
  - a. In any case in which judicial review is sought under this subsection, the court shall review the record and may set aside any agency action found to be –
    - i. arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
    - ii. obtained without procedures required by law, rule, or regulation having been followed; or
    - iii. unsupported by substantial evidence.