## Section B. Notice of Proposed Adverse Action

#### Overview

|  |  |
| --- | --- |
| In This Section | This section contains the following topics on the notice of proposed adverse action: |

|  |  |
| --- | --- |
| Topic | Topic Name |
| 1  | General Information on the Notice of Proposed Adverse Action |
| 2  | Elements of the Notice of Proposed Adverse Action |
| 3  | Process for Proposing an Adverse Action |
| 4  | Where to Find Other Topics Specific to Due Process |

#### 1. General Information on the Notice of Proposed Adverse Action

|  |  |
| --- | --- |
| Introduction | This topic contains general information on the notice of proposed adverse action, including* benefit changes requiring a notice of proposed adverse action
* requirement of notice for a proposed adverse action
* proposed rating or administrative action
* exemptions for temporary and delimited ratings
* requests for apportionment requiring a notice of proposed adverse action, and
* proposed incompetency determinations.
 |

|  |  |
| --- | --- |
| Change Date | April 21, 2015 |

|  |  |
| --- | --- |
| a. Benefit Changes Requiring a Notice of Proposed Adverse Action | Except as otherwise provided in [38 CFR 3.103(b)(3)](http://www.ecfr.gov/cgi-bin/text-idx?SID=dd2b9db35ed6b58a0b8e2446e7bb27e6&node=se38.1.3_1103&rgn=div8), no award of compensation, pension or dependency and indemnity compensation (DIC) shall be terminated, reduced or otherwise adversely affected unless the beneficiary has been notified of the proposed adverse action and has been provided a period of 60 days in which to submit evidence for the purpose of showing the adverse action should not be taken.Generally, VA must send the beneficiary, fiduciary (if applicable), and his/her representative (if any) a notice of proposed adverse action prior to taking any unfavorable action affecting his/her benefits, including, but not limited to* reductions
* suspensions
* terminations
* severance of benefits
* apportionments, and
* competency determinations.

***Reference***: For a list of references specific to due process, see M21-1, Part I, 2.B.4. |

|  |  |
| --- | --- |
| b. Requirement of Notice for a Proposed Adverse Action | A notice of proposed adverse action is required when VA proposes an action based upon third party information that could adversely affect the payment of benefits. ***References***: For more information on* sending a notice of proposed adverse action, see
* M21-1, Part I, 2.B.3
* M21-1, Part I, 2.B.4, and
* the definition of third party information, see M21-1, Part I, 2.A.1.d.
 |

|  |  |
| --- | --- |
| c. Proposed Rating or Administrative Action  | A notice of proposed adverse action is required when benefits are being reduced or terminated based on a rating or administrative action. Examples of cases for which benefits may possibly be reduced based on a rating action or an administrative decision include* reduction in evaluation of a service-connected (SC) disability
* discontinuance of unemployability
* severance of service connection
* benefits erroneously awarded because of
* an administrative error, or
* error in judgment.

***Reference***:For a list of references specific to due process, see M21-1, Part I, 2.B.4. |

|  |  |
| --- | --- |
| d. Exemptions for Temporary and Delimited Ratings | Sometimes a Veteran is temporarily granted an increased payment for a disability following an event, such as a joint replacement or heart attack, for which the rating schedule provides a temporary evaluation for a specified period of time. In such a circumstance, ensure the award letter specifies the date or conditions under which the increased payment will be reduced.***Important***: A notice of proposed adverse action is ***not*** needed in this situation because the Veteran has already been fully informed of the date and reasons for the prospective adjustment. |

|  |  |
| --- | --- |
| e. Requests for Apportionment Requiring a Notice of Proposed Adverse Action | A notice of proposed adverse action is required when an apportionment of benefits is requested by or on behalf of a beneficiary’s dependent. ***References***: For more information on* adjusting apportioned awards, see M21-1, Part III, Subpart v, 3.B, and
* the list of references specific to due process, see M21-1, Part I, 2.B.4
 |

|  |  |
| --- | --- |
| **f. Proposed Incompetency Determinations** | When an incompetency determination is proposed, the beneficiary will be notified of the proposed action and of the right to a hearing as provided in [38 CFR 3.103](http://www.ecfr.gov/cgi-bin/text-idx?SID=adece13ebcfd51c6477a845a185ec6b3&node=se38.1.3_1103&rgn=div8). ***References***: For more information on* the list of references specific to due process, see M21-1, Part I, 2.B.4, and
* hearings during the adverse action proposal period, see M21-1, Part I, 2.C.3.
 |

#### 2. Elements of the Notice of Proposed Adverse Action

|  |  |
| --- | --- |
| Introduction | This topic contains information on the elements of a notice, including * required elements for notice of proposed adverse action, and
* description of elements in notice of proposed adverse action.
 |

|  |  |
| --- | --- |
| Change Date | October 13, 2004 |

|  |  |
| --- | --- |
| a. Required Elements for Notice of Proposed Adverse Action | Every notice of proposed adverse action mustinclude the following elements:* a statement of the proposed decision, including new rates of payment
* the proposed effective date of the decision
* information on the possible creation of an overpayment
* detailed reasons for the proposed decision, and
* the right to
* present evidence
* request a personal hearing, and
* have representation.
 |

|  |  |
| --- | --- |
| b. Description of Elements in Notice of Proposed Adverse Action | The table below describes each of the elements in a notice of proposed adverse action. |

|  |  |
| --- | --- |
| Element | Description |
| Statement of proposed decision | * fully and clearly states the proposed decision to
* reduce
* suspend, or
* terminate benefits, and
* provides new rate information for each rate change.
 |
| Statement of proposed effective date | * states the proposed effective date, and
* informs the beneficiary that
* he/she has 60 days to respond to the proposed decision, and
* the payment of benefits will continue through the 60-day period.

***Note***: The requirement that payments be continued through the 60-day period does not alter the effective date of the proposed reduction or termination.***Reference***: For more information on effective dates for reduced benefits, see [38 CFR 3.500 to 3.505](http://www.ecfr.gov/cgi-bin/text-idx?SID=89a210b6f8738c4fa13db242491be8df&mc=true&node=sg38.1.3_1461.sg15&rgn=div7). |
| Statement advising beneficiary of potential overpayment | * advises the beneficiary that if the proposed adverse action is implemented, he/she must repay any overpayment resulting from the continuation of payments during the proposed adverse action period, and
* informs the beneficiary that he/she may minimize any potential overpayment by requesting that the award be adjusted immediately.
 |
| Basis for proposed decision | States* the facts and reasons for the proposed action ([38 CFR 3.103](http://www.ecfr.gov/cgi-bin/text-idx?SID=89a210b6f8738c4fa13db242491be8df&mc=true&node=se38.1.3_1103&rgn=div8))
* the evidence under consideration, and
* the proposed rates and any calculations used to arrive at the proposed rates.
 |
| Rights of beneficiary  | Informs the beneficiary of the right to* present evidence
* request a personal hearing, and
* have representation.
 |

|  |
| --- |
| ***Reference***: For a list of M21-1 references specific to due process, see M21-1, Part I, 2.B.4. |

#### 3. Process for Proposing an Adverse Action

|  |  |
| --- | --- |
| Introduction | This topic contains information on the process of the proposed adverse action, including * process for notices of proposed adverse action,
* determining where to send the notice of proposed adverse action, and
* special procedures for hospitalized Veterans.
 |

|  |  |
| --- | --- |
| Change Date | January 20, 2016 |

|  |  |
| --- | --- |
| a. Process for Notices of Proposed Adverse Action  | The table below describes the process for notices of proposed adverse action. |

|  |  |  |
| --- | --- | --- |
| Stage | Description | Reference |
| 1 | VA sends beneficiary a notice of proposed adverse action. | M21-1, Part I, 2.B.2 |
| 2 | VA establishes the proposed adverse action period specifying the amount of time the beneficiary has to respond before any proposed adverse action is executed.  | M21-1, Part I, 2.C.1 |
| 3 | VA responds to the evidence and arguments submitted by the beneficiary, if any, during the proposed adverse action period. | M21-1, Part I, 2.C.2  |
| 4 | VA responds to hearing requests, if applicable. | * M21-1, Part I, 2.C.3, and
* M21-1, Part I, 4.
 |
| 5 | VA sends final decision notice, advising the beneficiary of* the decision (including new rates)
* the effective date(s)
* the detailed reasons for the decision
* overpayment information, and
* appeal rights.
 | M21-1, Part I, 2.C.4 |

|  |  |
| --- | --- |
| b. Determining Where to Send the Notice of Proposed Adverse Action | Use the table below to determine where to send the notice of proposed adverse action. |

|  |  |
| --- | --- |
| If … | Then … |
| a valid current address exists  | send the notice to the current address of record. |
| mail is returned as undeliverable | follow guidance provided in M21-1, Part III, Subpart iii, 1.B.9, Issues Regarding a Claimant’s Address. |

|  |
| --- |
| ***Reference***: For more information on sending the notice to the Agent Cashier for a homeless beneficiary, see [38 CFR 1.710(d)](http://www.ecfr.gov/cgi-bin/text-idx?SID=ac21215bec0193cde41f81afe40dfb45&node=se38.1.1_1710&rgn=div8). |

|  |  |
| --- | --- |
| c. Special Procedures for Hospitalized Veterans | Hospital adjustments are completed when a Veteran is in receipt of aid and attendance (A&A) allowance and is hospitalized. The additional compensation or increased pension for A&A shall be discontinued.Follow the steps in the table below to send a notice of proposed adverse action to a hospitalized Veteran to ensure that he/she receives proper notification before the reduction or termination of benefits.***Note***: If the Veteran has a fiduciary, send the notice of proposed adverse action to the fiduciary only. A separate notice to the hospitalized Veteran is ***not*** required. |

|  |  |
| --- | --- |
| Step | Action |
| 1 | Prepare two notices of proposed adverse action and address * one to the Veteran’s address of record, and
* another to the Veteran at the hospital or nursing home.
 |
| 2 | The following statement should be included: *I was admitted to the* **[type hospital’s name]** *on* **[type** **admission date]**. *Please take immediate action to reduce my payments to the proper rate authorized by law.*Place it either* at the bottom of the notice of proposed adverse action, or
* on an attached *VA Form 21-4138*, *Statement in Support of Claim*.
 |
| 3 | Request the Veteran to sign and return the notice or form. ***Exception***:When a Veteran fails to return the form, no reduction in benefits can be made until the proposed adverse action period expires. |

|  |
| --- |
| ***Reference***: For more information on hospital adjustments, see* [38 CFR 3.551](http://www.ecfr.gov/cgi-bin/text-idx?SID=592b1779ab34430f0959a76518d17aea&mc=true&node=se38.1.3_1551&rgn=div8)
* [38 CFR 3.552](http://www.ecfr.gov/cgi-bin/text-idx?SID=592b1779ab34430f0959a76518d17aea&mc=true&node=se38.1.3_1552&rgn=div8), and
* [38 CFR 3.556](http://www.ecfr.gov/cgi-bin/text-idx?SID=592b1779ab34430f0959a76518d17aea&mc=true&node=se38.1.3_1556&rgn=div8).
 |

#### 4. Where to Find Other Topics Specific to Due Process

|  |  |
| --- | --- |
| Change Date | April 21, 2015 |

|  |  |
| --- | --- |
| a. References for Topics Specific to Due Process | The table below lists the location of other topics specific to due process. |

|  |
| --- |
| **Topics and related reference(s)** |
| **Active service pay*** adjusting benefits based on a veteran's receipt of active service pay, see M21-1, Part III, Subpart v, 4.C
* circumstances necessitating revision and reissuance of a notice of proposed adverse action, see M21-1, Part III, Subpart v, 4.C.4.g
* failure to return *VA Form 21-8951, Notice of Waiver of VA Compensation or Pension to Receive Military Pay and Allowances*, see M21-1 Part III, Subpart v, 4.C.3, and
* exception to a notice of proposed adverse action, see M21-1, Part I, 2.D.1.a.
 |
| **Excessive payment or administrative error*** adjusting awards based on the cause of the payment of excessive benefits, see M21-1, Part III, Subpart v, 1.I, and
* special instructions for handling cases involving administrative error, see M21-1, Part III, Subpart v, 1.I.3.
 |
| **Apportionments and garnishments*** garnishment of disability compensation in lieu of military retired pay to pay alimony or child support, see M21-1, Part III, Subpart v, 3.D, and
* adjusting apportioned awards, see M21-1, Part III, Subpart v, 3.B.
 |
| **Clear and unmistakable error (CUE) or severance of benefits*** CUE or severance of SC benefits, see M21-1, Part IV, Subpart ii, 3.A.2.
 |
| **Contemporaneous Notice*** situations warranting a contemporaneous notice in lieu of a notice of proposed adverse action, see M21-1, Part I, 2.D.1.a.
 |
| **Dependency*** awards and adjustments based upon school attendance, see M21-1, Part III, Subpart iii, 6.B
* failure to return *VA Form 21-8960, Certification of School Attendance or Termination,* see M21-1, Part III, Subpart iii, 6.B.6.f
* verification of marital status and the status of dependents, see M21-1, Part III, Subpart iii, 5.K, and
* failure to return a dependent questionnaire, see M21-1, Part III, Subpart iii, 5.K.4.
 |
| **Hospitalization*** due process and control procedures for hospitalization, see M21-1, Part III, Subpart v, 6.C.1.d
* reduction because of hospitalization, see [38 CFR 3.551](http://www.ecfr.gov/cgi-bin/text-idx?SID=dd2e560ac7c2a6e1649d421cc05e826e&node=se38.1.3_1551&rgn=div8), and
* hospital adjustment of allowance for A&A, see [38 CFR 3.552](http://www.ecfr.gov/cgi-bin/text-idx?SID=dd2e560ac7c2a6e1649d421cc05e826e&node=se38.1.3_1552&rgn=div8).
 |
| **Incarceration*** providing notification to an incarcerated surviving spouse, see M21-1, Part III, Subpart v, 8.C.2.b, and
* receiving and sending notification regarding incarceration, see M21-1, Part III, Subpart v.8.A.2.
 |
| **Incompetency*** due process requirements for incompetency determinations, see M21-1, Part III, Subpart v, 9.B.3, and
* due process not required when incompetency is determined by a court of law, see M21-1, Part III, Subpart iv, 8.A.5.a.
 |
| **Matching program reductions*** death match identifies veteran’s spouse, see M21-1, Part X, 5.2.h
* fugitive felon match, see M21-1, Part X.16.2.a
* income verification match (due process requirements), see M21-1, Part X, 9.c.13
* social security prison match, see M21-1, Part X, 15.2, and
* social security verification match, see M21-1, Part X, 2.5.n.
 |
| **Notification Action** * proposed reductions or discontinuances under [38 CFR 3.105(e)](http://www.ecfr.gov/cgi-bin/text-idx?SID=8d1dbeb20c3bd4fc80b93873d358040e&node=se38.1.3_1105&rgn=div8), see M21-1, Part IV, Subpart ii, 3.A.3.
 |
| **Pension*** handling decisions to reduce or discontinue pension, including awards involving special monthly pension (SMP), see M21-1, Part V, subpart iii, 4.1
* “not permanent and total (PT)” and “no longer entitled to special monthly pension (SMP)” Cases, see M21-1, Part V, Subpart iii, 4.1
* notice of hospitalization/nursing home status received after discharge from facility, see M21-1, Part III, Subpart v, 6.C, and
* review of A&A entitlement following discharge from nursing home, see M21-1, Part III, Subpart iv, 8.D.5.
 |
| **Proposed rating decisions*** general information on proposed rating decisions, see M21-1, Part III, Subpart iv, 8.B.
 |