### Section C. Adverse Action Proposal Period

#### Overview

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| In This Section  | This section contains the following topics: |

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| Topic  | Topic Name |
| 1  | General Information on the Adverse Action Proposal Period |
| 2  | Responding to the Beneficiary  |
| 3  | Hearings Requested in Response to a Proposed Adverse Action |
| 4  | Sending Final Decision Notice |

#### 1. General Information on the Adverse Action Proposal Period

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| Introduction | This topic contains general information on the adverse action proposal period, including* definition of adverse action proposal period
* basic rule for 65-day limit
* calculating the adverse action proposal period, and
* extending the adverse action proposal period.
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| Change Date | March 1, 2016 |

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| a. Definition:Adverse Action Proposal Period | The ***adverse action proposal period*** is the control period between the date the notice of proposed adverse action is mailed to the beneficiary and the date that the final decision notice is sent. The minimum period for the proposed adverse action is 60 days. ***Important***: Legally, the beneficiary has 60 days to respond. However, adverse action should not be taken until at least the 65th day to allow time for evidence to reach the development or authorization activity.  |

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| b. Basic Rule: 65-Day Limit | Take no adverse action until at least the ***65th day*** following the date of the notice of proposed adverse action, unlessthe beneficiary* specifically asks that the award be reduced or suspended to minimize any possible overpayment, or
* submits documentary evidence confirming earlier oral information, which is sufficient to justify the proposed adverse action.
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| c. Calculating the Adverse Action Proposal Period | The first day of the adverse action proposal period is the date that the notice of proposed adverse action is mailed to the beneficiary. The date of the letter is the date of the mailing for purposes of computing the time limits for the adverse action proposal period. Use the table below to compute the adverse action proposal period. |

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| If the adverse action proposal period time limit expires on a ... | Then ... |
| workday | * exclude the first day of the adverse action proposal period, and
* include the last day.
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| * Saturday
* Sunday, or
* holiday
 | include the next workday following the weekend or holiday. |

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| ***Reference***:For more information on computing the time limit, see[38 CFR 3.110](http://www.ecfr.gov/cgi-bin/text-idx?SID=1d475a06174c2964db5df67a7e6469c0&node=se38.1.3_1110&rgn=div8). |

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| d. Extending the Adverse Action Proposal Period | The adverse action proposal period may be extended for* the development of evidence
* a hearing, if the hearing is requested within 30 days following the release of a notice of proposed adverse action, or
* a hearing for a proposal of incompetency, if requested at any time *before* the Department of Veterans Affairs (VA) makes a final decision on the beneficiary’s competency.

In addition, the base period may be extended to allow time for an administrative action or a rating decision.***References***: For more information on* due process requirements for incompetency determinations, see M21-1, Part III, Subpart v, 9.B.3, and
* required action when a response is received to a proposed adverse action, see M21-1, Part I, 2.C.2.
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#### 2. Responding to the Beneficiary

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| Introduction | This topic contains information on responding to the beneficiary, including* receipt of insufficient evidence or no response within 60 days
* responding to invalid notice of disagreements (NODs)
* evidence received in 60 days requiring further development
* requests by the beneficiary for VA to obtain evidence
* evidence received supporting the proposed adverse action
* evidence received that is favorable to the claimant
* evidence received in 60 days that was not reviewed prior to the final action, and
* request for implementation of adverse action.
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| Change Date | January 18, 2016 |

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| a. Receipt of Insufficient Evidence or No Response Within 60 Days | Follow the steps in the table below if the beneficiary either fails to respond within the 60-day period, or if he/she submits insufficient evidence to justify a change in the proposed action. |

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| Step | Action |
| 1 | Is a rating decision needed because the proposed adverse action was initiated with a rating decision?* If *yes*, route the claims folder to the rating activity at the end of the due process period. The rating activity will make a decision and then route the folder to the authorization activity for processing.
* If *no,* route the claims folder to authorization. The authorization activity will reduce, suspend, or terminate benefits using the appropriate effective date provisions.

***Reference***: For more information on reductions and discontinuances, see [38 CFR 3.500–3.505](http://www.ecfr.gov/cgi-bin/text-idx?SID=a02ae0bb8bc0aa1d7225876b1f53e94e&mc=true&node=sg38.1.3_1461.sg15&rgn=div7). |
| 2 | Notify the beneficiary of the final decision. |

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| b. Responding to Invalid NODs | If the beneficiary expresses disagreement with a proposed adverse action, send a notice as described in M21-1, Part I, 5.B.1.c. |

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| c. Evidence Received in 60 Days Requiring Further Development | If a beneficiary submits evidence that requires further development* continue payments
* begin to develop and evaluate additional evidence
* advance the pending issue suspense date for the proposed adverse action period for development of the evidence, and
* hold all the material obtained until
* reasonable efforts to obtain additional evidence have been exhausted, or
* a final decision can be made.

***Note***: Lay statements, medical records, or other records that are material to the issue in which VA is proposing adverse action may be insufficient to justify a change in the proposed adverse action; however, this evidence may still provide sufficient information to warrant further development such as obtaining records or scheduling an examination. ***Exception***: If the results of the development clearly indicate continuing entitlement to current benefits or new entitlement to greater benefits, notify the beneficiary and take appropriate award action.***Reference***: For more information on obtaining evidence after a proposed adverse action, see M21-1, Part I, 2.C.2.d. |

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| d. Requests by the Beneficiary for VA to Obtain Evidence | Develop to request all relevant records identified by the beneficiary or representative during the 60-day response period. Do not take any action specified in the notice of proposed adverse action until VA has met its duty to assist.***Exception***: If the beneficiary submits a request for VA to obtain records that will ***not*** impact the decision, then request the evidence, but do not delay the action specified in the notice of proposed adverse action.***References***: For more information on* relevant records and reasonable efforts in obtaining records, see
* M21-1, Part I, 1.C, and
* [38 CFR 3.159(c)](http://www.ecfr.gov/cgi-bin/text-idx?SID=ba722fb8bb24998f9eac841269b1d257&mc=true&node=se38.1.3_1159&rgn=div8)
* requesting evidence from sources other than the claimant, see M21-1, Part III, Subpart iii, 1.C, and
* developing for service records, see M21-1, Part III, Subpart iii, 2.
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| e. Evidence Received Supporting the Proposed Adverse Action | If the beneficiary sends documentary evidence that supports the proposed adverse action* make the adjustment, and
* send the beneficiary a final decision notice of the implemented adverse action.
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| f. Evidence Received That Is Favorable to the Claimant  | Once a notice of proposed adverse action is sent, if new evidence establishes that the adverse action should notbe taken, then* take appropriate action to amend or reverse the proposed action, and
* send the beneficiary a final decision notice.

***Reference***: For more information on preparing a new rating decision following receipt of additional evidence, see M21-1, Part III, Subpart iv, 8.B.1.f. |

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| g. Evidence Received in 60 Days That Was Not Reviewed Prior to the Final Action | If you discover that evidence received on or before the 60th day was not reviewed before the adverse action was taken, promptly review the adverse action as described in the table below. |

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| If ... | Then ... |
| the additional evidence does not change the adverse decision | * confirm and continue the decision, and
* fully advise the beneficiary of this decision and his/her appellate and procedural rights.

***Note***:Under [38 CFR 20.304](http://www.ecfr.gov/cgi-bin/text-idx?SID=e1fab56f5a9a35c6fe119953e756d1c0&node=se38.2.20_1304&rgn=div8), this confirmed and continued decision, if made before the original decision became final, does not extend the claimant’s appeal period for that decision, and refer him/her to the appellate and procedural rights issued with the earlier decision. |
| the additional evidence changes the adverse decision | prepare a revised rating decision and/or decision notice in accordance with the instructions in M21-1, Part III, Subpart iv, 8.B.1.f. |
| further development is needed | * restore the beneficiary’s payments until development is completed and a final decision made
* send a letter explaining the basis for resumed payments, and
* include a warning that adverse action may be appropriate if the evidence does not support continued payments.
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| h. Requests for Implementation of Adverse Action | If the beneficiary submits a written statement or other evidence or contacts VA by telephone in response to a notice of proposed adverse action confirming the validity of the evidence already of recordandspecifically asking that the proposed adverse action be implemented * take adverse rating and/or award action, and
* send the final decision notice.

***Important***: Be extremely careful to ensure that the beneficiary is asking for final implementation of the adverse decision and not merely trying to minimize any overpayment during the 60-day period. If there is any uncertainty as to the beneficiary’s intentions, ask for clarification (use the telephone when appropriate). If clarification is not received, wait until the expiration of the adverse action proposal period before acting. ***Example***: The Veteran responds to a notice of proposed adverse action by sending a statement that says, “Yes, my wife Ann died on March 9, 2000, but I didn’t know I had to report it. Please tell me how much I have to pay back, and don’t pay me more than I should be getting.” Since the Veteran is specifically requesting the adverse action, adjust the award and send a final decision notice.***References***: For more information on * sending contemporaneous notice, see M21-1, Part I, 2.D.1
* sending final decision notice of adverse action, see M21-1, Part I, 2.C.4, and
* contemporaneous notice related to information received by telephone, see M21-1, Part I, 2.D.2.
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#### 3. Hearings Requested in Response to a Proposed Adverse Action

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| Introduction | This topic contains information about hearings requested in response to a proposed adverse action, including * determining the time limit for adverse action hearing requests
* premature final action taken when a hearing was timely requested
* processing an adverse action hearing request
* failure to appear for an adverse action hearing, and
* rescheduling adverse action hearings.
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| Change Date | March 1, 2016 |

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| a. Determining the Time Limit for Adverse Action Hearing Requests | As stated in 38 CFR 3.105(i)(1), payments continue at their current rate if a beneficiary requests a hearing within 30 days of the date the notice of proposed adverse action is sent. If the 30-day time limit expires on a Saturday, Sunday, or holiday, include the next succeeding workday in the computation.***Exception***: For hearings requested in connection with proposed incompetency, a hearing requested at any time prior to the final rating must be held before final rating action is taken.***References***: For more information on* extending the adverse action proposal period, see M21-1, Part I, 2.C.1.d, and
* proposed incompetency, see
* [38 CFR 3.353(e)](http://www.ecfr.gov/cgi-bin/text-idx?SID=2f52c4f3a81ec1192998f1e0d253208b&node=se38.1.3_1353&rgn=div8), and
* M21-1, Part III, Subpart iv, 8.A.3.a.
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| **b. Premature Final Action Taken When a Hearing was Timely Requested**  | If it is discovered that the beneficiary or his or her representative requested a hearing within the applicable time period and final action was prematurely taken, then* restore the beneficiary’s payments
* ensure the hearing is scheduled, and
* notify the beneficiary and his or her representative that
* the action was in error, and
* the proposed adverse action period will remain in effect until after the hearing is completed.

***References***: For more information on the * time limit for hearing requests, see M21-1, Part I, 2.C.3.a, and
* scheduling a hearing, see M21-1, Part I, 4.3.
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| c. Processing an Adverse Action Hearing Request | Follow the steps in the table below when VA receives a request for a hearing after a notice of proposed adverse action. |

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| **If the hearing is requested...** | **Then ...** |
| * within 30 days of the notice of proposed adverse action, or
* during the incompetency proposal period
 | * keep the controlling end product (EP) pending
* establish an EP 173
* schedule and hold the hearing, and
* make a final decision.

***Important***: If a hearing is requested within the applicable time limit as discussed in M21-1, Part I, 2.C.3.a, do not take final action on the proposed adverse action until * a regional office (RO) employee who has decision-making authority over the issue(s)
* holds the hearing
* receives the evidence developed as a result of it, and
* makes a final decision, or
* the beneficiary fails, without good cause, to appear for the hearing, and a final decision is then made.
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| more than 30 days after a notice of proposed adverse action | * establish an EP 173
* make a final decision under the controlling EP
* schedule and hold the hearing, and
* make a new decision under EP 173, if needed.

***Important***: If development is underway based on evidence submitted by the beneficiary, complete the development before making the final decision. |

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| ***References***: For more information on * EPs, including control for hearings requested with income verification match (IVM) and individual unemployability (IU) proposed adverse actions, see M21-4, Appendix B
* hearings, see
* [38 CFR 3.103(c)](http://www.ecfr.gov/cgi-bin/text-idx?SID=54e4ec99a5387fa53eae468f2c13b8f6&node=se38.1.3_1103&rgn=div8), and
* [38 CFR 3.105(i)(1)](http://www.ecfr.gov/cgi-bin/text-idx?SID=54e4ec99a5387fa53eae468f2c13b8f6&node=se38.1.3_1105&rgn=div8), and
* scheduling hearings, see M21-1, Part I, 4.3.
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| d. Failure to Appear for an Adverse Action Hearing | Due process requires only that a beneficiary be afforded a reasonable opportunity for a personal hearing.If the beneficiary fails to appear for a scheduled hearing without good cause, and the 60-day adverse action proposal period has expired* make a decision based on the evidence of record
* advise the beneficiary of the decision, and
* advise the beneficiary that if a new hearing is still desired
* he/she should contact VA to schedule a hearing, and
* the action just completed will be reconsidered in light of any evidence presented at that hearing.

***Reference***: For more information on rescheduling hearings, see * [38 CFR 3.105(i)](http://www.ecfr.gov/cgi-bin/text-idx?SID=54e4ec99a5387fa53eae468f2c13b8f6&node=se38.1.3_1105&rgn=div8), and
* M21-1, Part I, 2.C.3.e.
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| e. Rescheduling Adverse Action Hearings  | If the beneficiary failed to appear for a hearing due to good cause as discussed in [38 CFR 3.105(i)](http://www.ecfr.gov/cgi-bin/text-idx?SID=dbacdc3596cd36975d74d6fe19614017&mc=true&node=se38.1.3_1105&rgn=div8)* schedule a new hearing on a priority basis
* establish EP 173, and
* continue payments, if the request for hearing was received within the appropriate time limit.

***Note***: If the request to reschedule the hearing is received after action has already been taken on the controlling EP, establish EP 173 and take any needed award adjustment under that EP.***References***: For more information on* time limits for requesting a hearing, see M21-1, Part I, 2.C.3.a,
* good cause and failure to appear for a hearing, see M21-1, Part I, 4.1.q
* scheduling hearings, see M21-1, Part I, 4.3, and
* EPs for hearing requests, see M21-4, Appendix B.
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#### 4. Sending Final Decision Notice

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| Introduction | This topic contains information on sending a final decision notice, including* requirement for sending a final decision notice
* required elements of the final decision notice, and
* procedure for sending a final decision notice.
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| Change Date | July 5, 2015 |

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| a. Requirement for Sending a Final Decision Notice | The final decision notice must be sent to the last address of record for the * beneficiary, and
* beneficiary’s designated representative (if any).

***Reference***: For more information on determining where to send a notice, see M21-1, Part I, 2.B.3.b. |

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| b. Required Elements of the Final Decision Notice | Every final decision notice, like a contemporaneous notice, must include the following elements:* statement of decision (including new rate(s), if applicable)
* statement of applicable effective date(s)
* reasons for decision
* overpayment information, and
* appeal rights.

***Note***: There is no need to re-summarize in the final decision notice any evidence referenced in the advance notice.***References***: For more information on * when to provide a summary of evidence in a decision notice, see M21-1, Part III, Subpart v, 2.B.1.e, and
* notification requirements, see M21-1, Part III, Subpart v, 2.B.1.
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| c. Procedure for Sending a Final Decision Notice | Follow the steps in the table below to send the final decision notice. |

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| Step | Action |
| 1 | Compose the final decision notice with all of the required elements and language. ***References***: For more information on * the required elements of the final decision notice, see M21-1, Part I, 2.C.4.b, and
* decision notices, see M21-1, Part III, Subpart v, 2.B.
 |
| 2 | Determine * who will receive a notice, and
* the appropriate address to send the notice.

***References***: For more information on determining * who receives a notice, see M21-1, Part I, 2.A.1.c., and
* the appropriate address to send the notice, see M21-1, Part I, 2.B.3.b.
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| 3 | Send the final decision notice to the beneficiary and representative, if any. |
| 4 | Place a copy of the notice in the claims folder. |