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Title 38, Parts 0, 1, 2, 12, 14-16,
18-20, 25-26, 38-45, 48-49, 74-75

General

Veterans Benefits Administration

Supplement No. 98

Covering period of *Federal Register* issues
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GENERAL INSTRUCTIONS

Custom Federal Regulations Service™

Supplemental Materials for *Book A*

Code of Federal Regulations

Title 38, Parts 0, 1, 2, 12, 14-16, 18-20, 25-26, 38-45, 48-49, 74-75

General

Veterans Benefits Administration

Supplement No. 98

3 March 2011

Covering the period of Federal Register issues
through March 3, 2011

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**Book A, Supplement No. 98
March 3, 2011**

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1.INDEX-1 to 1.INDEX-8	1.INDEX-1 to 1.INDEX-8	Part 1 Index
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1.480-1 to 1.485a- <u>2</u>	1.480-1 to 1.485a- <u>1</u>	§1.484
1.994-1 to <u>1.995-1</u>	1.994-1 to <u>1-1000.2</u>	§1.1000

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HIGHLIGHTS

Book A, Supplement No. 98 March 3, 2011

Supplement Highlights references: Where substantive changes are made in the text of regulations, the paragraphs of *Highlights* sections are cited at the end of the relevant section of text. Thus, if you are reading §3.263, you will see a note at the end of that section which reads: “Supplement *Highlights* references—6(2).” This means that paragraph 2 of the *Highlights* section in Supplement No. 6 contains information about the changes made in §3.263. By keeping and filing the *Highlights* sections, you will have a reference source explaining all substantive changes in the text of the regulations.

Supplement frequency: This Book A (*General*) was originally supplemented twice a year, in April and October. Beginning 1 August 1995, supplements will be issued *every month* during which a final rule addition or modification is made to the parts of Title 38 covered by this book. Supplements will be numbered consecutively as issued.

Modifications in this supplement include the following:

1. On 8 February 2011, the VA published a final rule, effective that same date, to amend regulations to reflect changes made by section 504 of the Caregivers and Veterans Omnibus Health Services Act of 2010 . Changes:

- In §1.460, added definitions of *decision-making capacity*, *practitioner*, and *surrogate*; and
- Added §1.484.

2. On 23 February 2011, the VA published an interim final rule, effective 1 May 2011, to implement statutory restrictions on the garnishment of Federal benefit payments.

- Added §1.1000



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services. Each contractor shall be required to enter into a written agreement subjecting such contractor to the provisions of §§1.460 through 1.499 of this part; 38 U.S.C. 5701 and 7332; and 5 U.S.C. 552a and 38 CFR 1.576(g).

Deceased. The term “deceased” means death established by either neurological criteria (brain death) or cardiopulmonary criteria (cardiac death). Brain death is the irreversible cessation of all brain function. Cardiac death is the irreversible cessation of circulatory and respiratory function. In both cases, “irreversible” means that function will not resume spontaneously and will not be restarted artificially.

Decision-making capacity. The term “decision-making capacity” has the same meaning set forth in 38 CFR 17.32(a).

Diagnosis. The term “diagnosis” means any reference to an individual’s alcohol or drug abuse or to a condition which is identified as having been caused by that abuse or any reference to sickle cell anemia or infection with the human immunodeficiency virus which is made for the purpose of treatment or referral for treatment. A diagnosis prepared for the purpose of treatment or referral for treatment but which is not so used is covered by §§1.460 through 1.499 of this part. These regulations do not apply to a diagnosis of drug overdose or alcohol intoxication which clearly shows that the individual involved is not an alcohol or drug abuser (e.g., involuntary ingestion of alcohol or drugs or reaction to a prescribed dosage of one or more drugs).

Disclose or disclosure. The term “disclose” or “disclosure” means a communication of patient identifying information, the affirmative verification of another person’s communication of patient identifying information, or the communication of any information from the record of a patient who has been identified.

Drug abuse. The term “drug abuse” means the use of a psychoactive substance for other than medicinal purposes which impairs the physical, mental, emotional, or social well-being of the user.

Eye bank and tissue bank. The term “eye bank and tissue bank” means an “establishment” as defined in 21 CFR 1271.3, pursuant to section 361 of the Public Health Service Act (42 U.S.C. 264) that has a valid, current registration with the Federal Food and Drug Administration (FDA) as required under 21 CFR part 1271.

Individual. The term “individual” means a veteran, as defined in 38 U.S.C. 101(2), or a dependent of a veteran, as defined in 38 U.S.C. 101(3) and (4)(A).

Infection with the human immunodeficiency virus (HIV). The term “infection with the human immunodeficiency virus (HIV)” means the presence of laboratory evidence for human immunodeficiency virus infection. For the purposes of §§1.460 through 1.499 of this part, the term includes the testing of an individual for the presence of the virus or antibodies to the virus and information related to such testing (including tests with negative results).

Informant. The term “informant” means an individual who is a patient or employee or who becomes a patient or employee at the request of a law enforcement agency or official and who at the request of a law enforcement agency or official observes one or more patients or employees for the purpose of reporting the information obtained to the law enforcement agency or official.

Near death. The term “near death” means that in the clinical judgment of the patient’s health care provider based on defined clinical triggers, the patient’s death is imminent.

Organ Procurement Organization. The term “Organ Procurement Organization” (OPO) means an organization that performs or coordinates the procurement, preservation, and transportation of organs and maintains a system of locating prospective recipients for available organs.

Patient. The term “patient” means any individual or subject who has applied for or been given a diagnosis or treatment for drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus, or sickle cell anemia and includes any individual who, after arrest on a criminal charge, is interviewed and/or tested in connection with drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus, or sickle cell anemia in order to determine that individual’s eligibility to participate in a treatment or rehabilitation program. The term patient includes an individual who has been diagnosed or treated for alcoholism, drug abuse, HIV infection, or sickle cell anemia for purposes of participation in a VA program or activity relating to those four conditions, including a program or activity consisting of treatment, rehabilitation, education, training, evaluation, or research. The term “patient” for the purpose of infection with the human immunodeficiency virus or sickle cell anemia, includes one tested for the disease.

Patient identifying information. The term “patient identifying information” means the name, address, social security number, fingerprints, photograph, or similar information by which the identity of a patient can be determined with reasonable accuracy and speed either directly or by reference to other publicly available information. The term does not include a number assigned to a patient by a treatment program, if that number does not consist of, or contain numbers (such as social security, or driver’s license number) which could be used to identify a patient with reasonable accuracy and speed from sources external to the treatment program.

Person. The term “person” means an individual, partnership, corporation, Federal, State or local government agency, or any other legal entity.

Practitioner. The term “practitioner” has the same meaning set forth in 38 CFR 17.32(a).

Procurement organization. The term “procurement organization” means an organ procurement organization, eye bank, and/or tissue bank as defined in this section.

Records. The term “records” means any information received, obtained or maintained, whether recorded or not, by an employee or contractor of VA, for the purpose of seeking or performing VA program or activity functions relating to drug abuse, alcoholism, tests for or infection with the human immunodeficiency virus, or sickle cell anemia regarding an identifiable

patient. A program or activity function relating to drug abuse, alcoholism, infection with the human immunodeficiency virus, or sickle cell anemia includes evaluation, treatment, education, training, rehabilitation, research, or referral for one of these conditions. Sections 1.460 through 1.499 of this part apply to a primary or other diagnosis, or other information which identifies, or could reasonably be expected to identify, a patient as having a drug or alcohol abuse condition, infection with the human immunodeficiency virus, or sickle cell anemia (e.g., alcoholic psychosis, drug dependence), but only if such diagnosis or information is received, obtained or maintained for the purpose of seeking or performing one of the above program or activity functions. Sections 1.460 through 1.499 of this part do not apply if such diagnosis or other information is not received, obtained or maintained for the purpose of seeking or performing a function or activity relating to drug abuse, alcoholism, infection with the human immunodeficiency virus, or sickle cell anemia for the patient in question. Whenever such diagnosis or other information, not originally received or obtained for the purpose of obtaining or providing one of the above program or activity functions, is subsequently used in connection with such program or activity functions, those original entries become a “record” and §§1.460 through 1.499 of this part thereafter apply to those entries. Segregability: these regulations do not apply to records or information contained therein, the disclosure of which (the circumstances surrounding the disclosure having been considered) could not reasonably be expected to disclose the fact that a patient has been connected with a VA program or activity function relating to drug abuse, alcoholism, infection with the human immunodeficiency virus, or sickle cell anemia.

(1) The following are examples of instances whereby records or information related to alcoholism or drug abuse are covered by the provisions of §§1.460 through 1.499 of this part:

(i) A patient with alcoholic delirium tremens is admitted for detoxification. The patient is offered treatment in a VA alcohol rehabilitation program which he declines.

(ii) A patient who is diagnosed as a drug abuser applies for and is provided VA drug rehabilitation treatment.

(iii) While undergoing treatment for an unrelated medical condition, a patient discusses with the physician his use and abuse of alcohol. The physician offers VA alcohol rehabilitation treatment which is declined by the patient.

(2) The following are examples of instances whereby records or information related to alcoholism or drug abuse are not covered by the provisions of §§1.460 through 1.499 of this part:

(i) A patient with alcoholic delirium tremens is admitted for detoxification, treated and released with no counseling or treatment for the underlying condition of alcoholism.

(ii) While undergoing treatment for an unrelated medical condition, a patient informs the physician of a history of drug abuse fifteen years earlier with no ingestion of drugs since. The history and diagnosis of drug abuse is documented in the hospital summary and

no treatment is sought by the patient or offered or provided by VA during the current period of treatment.

(iii) While undergoing treatment for injuries sustained in an accident, a patient's medical record is documented to support the judgment of the physician to prescribe certain alternate medications in order to avoid possible drug interactions in view of the patient's enrollment and treatment in a non-VA methadone maintenance program. The patient states that continued treatment and follow-up will be obtained from private physicians and VA treatment for the drug abuse is not sought by the patient nor provided or offered by the staff.

(iv) A patient is admitted to the emergency room suffering from a possible drug overdose. The patient is treated and released; a history and diagnosis of drug abuse may be documented in the hospital summary. The patient is not offered treatment for the underlying conditions of drug abuse, nor is treatment sought by the patient for that condition.

Surrogate. The term "surrogate" has the same meaning set forth in 38 CFR 17.32(a).

Third party payer. The term "third party payer" means a person who pays, or agrees to pay, for diagnosis or treatment furnished to a patient on the basis of a contractual relationship with the patient or a member of his or her family or on the basis of the patient's eligibility for Federal, State, or local governmental benefits.

Treatment. The term "treatment" means the management and care of a patient for drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus, or sickle cell anemia, or a condition which is identified as having been caused by one or more of these conditions, in order to reduce or eliminate the adverse effects upon the patient. The term includes testing for the human immunodeficiency virus or sickle cell anemia.

Undercover agent. The term "undercover agent" means an officer of any Federal, State, or local law enforcement agency who becomes a patient or employee for the purpose of investigating a suspected violation of law or who pursues that purpose after becoming a patient or becoming employed for other purposes. (Authority: 38 U.S.C. 7334)

VHA health care facility. The term "VHA health care facility" means a VA medical center, VA emergency room, VA nursing home or other facility as defined in 38 U.S.C. 1701(3).

(Authority: 38 U.S.C. 7332, 7334)

[60 FR 63929, Dec. 13, 1995, as amended at 72 FR 48241, Aug. 23, 2007; 73 FR 65260, Nov. 3, 2008; 76 FR 6696, Feb. 8, 2011]

Supplement *Highlights* references: 78(1), 86(1), 98(1).

§1.480-1.483 [Reserved]

Disclosures Without Patient Consent**§1.484 Disclosure of medical information to the surrogate of a patient who lacks decision-making capacity.**

A VA medical practitioner may disclose the content of any record of the identity, diagnosis, prognosis, or treatment of a patient that is maintained in connection with the performance of any VA program or activity relating to drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus, or sickle cell anemia to a surrogate of the patient who is the subject of such record if:

- (a) The patient lacks decision-making capacity; and
- (b) The practitioner deems the content of the given record necessary for the surrogate to make an informed decision regarding the patient's treatment. (Authority: 38 U.S.C. 7331, 7332)

[76 FR 6696, Feb. 8, 2011]

Supplement *Highlights* references: 98(1).

§1.485 Medical emergencies.

(a) *General rule.* Under the procedures required by paragraph (c) of this section, patient identifying information from records covered by §§1.460 through 1.499 of this part may be disclosed to medical personnel who have a need for information about a patient for the purpose of treating a condition which poses an immediate threat to the health of any individual and which requires immediate medical intervention.

(b) *Special rule.* Patient identifying information may be disclosed to medical personnel of the Food and Drug Administration (FDA) who assert a reason to believe that the health of any individual may be threatened by an error in the manufacture, labeling, or sale of a product under FDA jurisdiction, and that the information will be used for the exclusive purpose of notifying patients or their physicians of potential dangers.

(c) *Procedures.* Immediately following disclosure, any VA employee making an oral disclosure under authority of this section shall make an accounting of the disclosure in accordance with the Privacy Act (5 U.S.C. 552a(c) and 38 CFR 1.576(c)) and document the disclosure in the patient's records setting forth in writing:

- (1) The name and address of the medical personnel to whom disclosure was made and their affiliation with any health care facility;
 - (2) The name of the individual making the disclosure;
 - (3) The date and time of the disclosure;
 - (4) The nature of the emergency (or error, if the report was to FDA);
 - (5) The information disclosed; and
 - (6) The authority for making the disclosure (§1.485 of this part).
- (Authority: 38 U.S.C. 7332(b)(2)(A))

§1.485a Eye, organ and tissue donation.

A VHA health care facility may disclose the individually-identified medical record information of an individual covered by §§1.460 through 1.499 of this part to an authorized representative of a procurement organization for the purpose of facilitating determination of whether the individual is a suitable potential organ, eye, or tissue donor if:

- (a) The individual is currently an inpatient in a VHA health care facility;
- (b) The individual is, in the clinical judgment of the individual's primary health care provider, near death or deceased;
- (c) The VHA health care facility has a signed agreement with the procurement organization in accordance with the applicable requirements of the United States Department of Health and Human Services (HHS); and
- (d) The VHA health care facility has confirmed with HHS that it has certified or recertified the organ procurement organization as provided in the applicable HHS regulations. VA medical centers must verify annually in January of each calendar year with the Food and Drug Administration (FDA) that an eye bank or tissue bank has complied with the FDA registration requirements of 21 CFR part 1271 and that the registration status is active before permitting an eye bank or tissue bank to receive protected health information. (Authority: 38 U.S.C. 5701(k), 7332(b)(2)(E))

[72 FR 48242, Aug. 23, 2007, as amended at 73 FR 65260, Nov. 3, 2008]

Supplement *Highlights* references: 78(1), 86(1).

§1.994 Refunds.

VA will refund promptly to the appropriate individual amounts offset under these regulations when:

(a) A debt is waived or otherwise found not owed the United States (unless expressly prohibited by statute or regulation); or

(b) VA is directed by an administrative or judicial order to refund amounts deducted from the employee's current pay. (Authority: 5 U.S.C. 5514)

§1.995 Requesting recovery through centralized administrative offset.

(a) Under 31 U.S.C. 3716, VA and other creditor agencies must notify Treasury of all debts over 180 days delinquent so that recovery of such debts may be made by centralized administrative offset. This includes those debts that VA and other agencies seek from the pay account of an employee of another Federal agency via salary offset. Treasury and other disbursing officials will match payments, including Federal salary payments, against these debts. Where a match occurs, and all the requirements for offset have been met, the payment will be offset to satisfy the debt in whole or part.

(b) Prior to submitting a debt to Treasury for the purpose of collection by offset, including salary offset, VA shall provide written certification to Treasury that:

(1) The debt is past due and legally enforceable in the amount submitted to Treasury and that VA will ensure that any subsequent collections are credited to the debt and that Treasury shall be notified of such;

(2) Except in the case of a judgment debt or as otherwise allowed by law, the debt is referred to Treasury for offset within 10 years after VA's right of action accrues;

(3) VA has complied with the provisions of 31 U.S.C. 3716 and 38 CFR 1.912 and 1.912a including, but not limited to, those provisions requiring that VA provide the debtor with applicable notices and opportunities for a review of the debt; and

(4) VA has complied with the provisions of 5 U.S.C. 5514 (salary offset) and 38 CFR 1.980 through 1.994 including, but not limited to, those provisions requiring that VA provide the debtor with applicable notices and opportunities for a hearing.

(c) Specific procedures for notifying Treasury of debts for purposes of collection by centralized administrative offset are contained in the 31 CFR 285.7. VA and other creditor agencies may notify Treasury of debts that have been delinquent for 180 days or less, including debts that VA and other creditor agencies seek to recover from the pay of an employee via salary offset. (Authority: 31 U.S.C. 3716; 38 U.S.C. 501).

[69 FR 62203, Oct. 25, 2004]

Next Section is §1.1000

**Procedures for Financial Institutions Regarding Garnishment of
Benefit Payments After Disbursement**

§1.1000 Garnishment of payments after disbursement

(a) Payments of benefits due under any law administered by the Secretary that are protected by 38 U.S.C. 5301(a) and made by direct deposit to a financial institution are subject to 31 CFR part 212, Garnishment of Accounts Containing Federal Benefit Payments.

(b) This section may be amended only by a rulemaking issued jointly by the Department of the Treasury and the agencies defined as a “benefit agency” in 31 CFR 212.3.

[76 FR 9961, Feb. 23, 2011]

Supplement *Highlights* Reference: 98(2).

End of Part 1

[Reserved]