

**Department of
Veterans Affairs**

Memorandum

Date: October 12, 2010
From: General Counsel (022)
Subj: Presidential Memorandum – Do Not Pay List (VAIQ 7014861)
To: Acting Assistant Secretary for Management (004)

VAOPGCPREC 6-2010

QUESTIONS PRESENTED:

- a. How does the June 18, 2010, Presidential Memorandum on Enhancing Payment Accuracy Through a "Do Not Pay List" affect Department of Veterans Affairs (VA) benefit payments?
- b. Does the Presidential Memorandum override in any way the procedural protections that are provided for in VA law and regulations, particularly the notice to claimants and beneficiaries and the opportunity for them to be heard that is afforded in connection with adjudicative actions denying their claims or reducing or discontinuing their current awards?
- c. Does the Computer Matching and Privacy Protection Act of 1988 apply to the database matching requirements of the Presidential memorandum?

HELD:

- a. The June 18, 2010, Presidential Memorandum on Enhancing Payment Accuracy Through a "Do Not Pay List" requires Federal agencies, including the Department of Veterans Affairs (VA), to review pre-payment and pre-award procedures and ensure that a thorough review of available databases with relevant information on eligibility occurs before the release of Federal funds. The Presidential Memorandum relates only to the procedures VA must follow before making benefit payments or awards, not the statutory or regulatory criteria for determining eligibility for, or entitlement to, any benefit.
- b. VA would treat the information obtained from the database review pursuant to the Presidential Memorandum in the same manner as information obtained from other sources. For a claimant denied an award or payment as a result of information disclosed in a database review, VA must summarize the information obtained through the database review in its decision notification and any statement of the case. In the case of information obtained from the database review that would result in the reduction or discontinuance of, or otherwise adversely affect, a current award of compensation, pension, or dependency and indemnity compensation, with certain exceptions, VA must, before issuing a decision, advise the beneficiary of the information received, the proposed effect

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that the information would have on the beneficiary's VA benefits, and the beneficiary's opportunity to submit evidence or have a hearing. Among the exceptions is that VA will send written notice to the beneficiary at the same time it takes an adverse action if the evidence reasonably indicates that a beneficiary is deceased.

c. The Computer Matching and Privacy Protection Act of 1988 applies to the database matching requirements of the Presidential Memorandum to the extent the databases that make up the Do Not Pay List are used to verify eligibility for, or entitlement to, VA benefits by virtue of a computerized comparison of two automated systems of records.

DISCUSSION:

Effect on VA Benefit Payments

1. On June 18, 2010, the President issued his Memorandum on Enhancing Payment Accuracy Through a "Do Not Pay List" (the Memorandum) to prevent the payment of Federal funds to ineligible recipients. 75 Fed. Reg. 35,953 (June 23, 2010). The Memorandum contemplates the creation of a "Do Not Pay List," comprising many databases containing information on recipients' eligibility to receive Federal benefit payments or Federal awards, such as grants and contracts. The Memorandum requires agencies, before making payments or awards, to check relevant databases to identify ineligible recipients and prevent improper payments from being made. In the short term, the Memorandum directs each Federal agency "to review current pre-payment and pre-award procedures and ensure that a thorough review of available databases with relevant information on eligibility occurs before the release of any Federal funds, to the extent permitted by law" and to submit to the Office of Management and Budget a plan that includes information on the agency's current pre-payment and pre-award procedures and a list of databases the agency checks pursuant to those procedures.

2. The Memorandum may affect the procedures VA must follow before making a benefit payment or award, but it does not affect the criteria for establishing eligibility for, or entitlement to, VA benefits or existing law applicable to making benefit payments. The Memorandum acknowledges this. 75 Fed. Reg. at 35,953 ("This memorandum requires agencies to review these databases with the recognition that there may be circumstances when the law nevertheless requires a payment or award to be made to a recipient listed in them."). Essentially, the Memorandum requires VA to check the Do Not Pay List for any information that the proposed payee may in fact not be eligible for, or entitled to, a payment or award. If the database review discloses such information, VA

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would consider that information in determining eligibility for, or entitlement to, the payment or award, pursuant to all applicable provisions of law.

3. Regarding the nature of the information obtained, the Do Not Pay List will comprise many databases containing information on recipients' eligibility to receive Federal benefit payments or Federal awards, such as grants and contracts. Given the diversity of the databases, it is likely that some of the information obtained will not affect a person's eligibility for, or entitlement to, payment or award of VA benefits, even if that information would affect that person's eligibility for, or entitlement to, other Federal funds. For example, the Memorandum identifies two databases that appear to pertain to debts—the Department of the Treasury's Debt Check Database and the Department of Housing and Urban Development's Credit Alert System or Credit Alert Interactive Voice Response System—as databases that must be checked. However, pursuant to 38 U.S.C. § 5301(a), except as to claims of the United States arising from laws administered by the Secretary of Veterans Affairs, payments of veterans benefits are generally exempt from the claim of creditors. The Memorandum is intended only to prevent improper payments and awards from being made. Payments and awards of VA benefits must be made unless valid legal authority establishes ineligibility for, or lack of entitlement to, benefits.

Effect on VA Procedural Protections

4. In determining eligibility for, or entitlement to, a payment or award, VA would treat information obtained from the database review in the same manner as information obtained from other sources. For example, when VA decides a claim, VA must notify the claimant of its decision. 38 U.S.C. § 5104; 38 C.F.R. § 3.103(b)(1) and (f). In the case of a benefit denial, the notice must include a summary of the evidence considered. 38 U.S.C. § 5104(b)(2); 38 C.F.R. § 3.103(f); *see* 38 U.S.C. § 7105(d)(1)(A) (requiring a statement of the case to include a summary of the pertinent evidence in the case); 38 C.F.R. § 19.29(a) (same). Therefore, for a claimant denied an award or payment as a result of information disclosed in a database review pursuant to the Memorandum, VA must summarize the information obtained through the database review in its decision notification and any statement of the case.

5. In the case of information obtained from the database review that would result in the reduction or discontinuance of, or otherwise adversely affect, a current award of compensation, pension, or dependency and indemnity compensation, VA would likewise treat the information in the same manner as information obtained from other sources. Pursuant to 38 C.F.R. § 3.103(b)(2) and (c), with certain exceptions enumerated in paragraph (b)(3), VA must provide to the beneficiary notice of the proposed adverse action and an opportunity to submit evidence or have a hearing. Therefore, if information disclosed in a database

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review pursuant to the Memorandum would adversely affect an award, VA must, before issuing a decision, advise the beneficiary of the information received and the proposed effect that the information would have on the beneficiary's VA benefits.

6. Most of the exceptions to the requirement of advance notice pertain to instances in which the affected beneficiary provides or fails to provide the information affecting benefits entitlement. See 38 C.F.R. § 3.103(b)(3)(i)-(ii), (iv)-(v). However, under 38 C.F.R. § 3.103(b)(3)(iii), VA will send written notice to the beneficiary at the same time it takes an adverse action if the evidence reasonably indicates that a beneficiary is deceased.¹

7. The Memorandum requires agencies to check, at minimum, the specified databases before "payment and award." Generally, VA pays running awards of compensation, dependency and indemnity compensation, and pension on a monthly basis. The Memorandum does not specify the frequency for checking the databases with regard to running awards. The frequency of database matches in current VA database matching programs varies depending on the nature of the program.² We interpret the Memorandum to require a database check before any new award of benefits is made and before any increased award is made.

8. The Memorandum contemplates that the Director of the Office of Management and Budget will issue guidance as to how agencies should meet the requirements of the Memorandum. That additional guidance may specify the frequency for checking the databases. If VA is limited in the frequency with which it could successfully check the databases and continue to make timely, monthly payments to eligible veterans, VA should so advise the Director of the Office of Management Budget.

¹ Additionally, under 38 C.F.R. § 3.103(b)(3)(vi), VA will send written notice to the beneficiary at the same time it takes an adverse action based upon a garnishment order issued under 42 U.S.C. § 659(a). Only VA compensation that is received in lieu of military retired pay may be garnished under such an order. See 58 Fed. Reg. 38,104, 38,105 (July 15, 1993).

² For example, once per year, the Social Security Administration (SSA) sends information to VA on the SSA benefit rates for recipients of VA pension benefits or parents' dependency and indemnity compensation. In contrast, VA master records are matched monthly with death records maintained by SSA.

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Applicability of the Computer Matching and Privacy Protection Act of 1988

9. The Privacy Act, as amended by the Computer Matching and Privacy Protection Act of 1988 (the Act), defines a "matching program" to include a computerized comparison of:

two or more automated systems of records or a system of records with non-Federal records for the purpose of—

(I) establishing or verifying the eligibility of, or continuing compliance with statutory and regulatory requirements by, applicants for, recipients or beneficiaries of, participants in, or providers of services with respect to, cash or in-kind assistance or payments under Federal benefit programs, or

(II) recouping payments or delinquent debts under such Federal benefit programs, . . .

5 U.S.C § 552a(a)(8)(A)(i)(I), (II). Several types of computer matches are specifically exempt from the statutory definition. For example, exempt matches include matches performed to produce aggregate statistical data without any personal identifiers; matches performed to support any research or statistical project, the specific data of which may not be used to make decisions concerning the rights, benefits, or privileges of specific individuals; and matches performed by a law enforcement agency to gather evidence against a person who is the subject of an investigation. See 5 U.S.C § 552a(a)(8)(B) (listing all matches exempt from the matching-program definition).

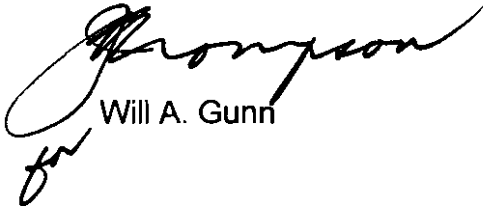
10. According to your staff, the five databases specified in the Memorandum as included in the Do Not Pay List are all automated systems. The purpose of the Do Not Pay List is for agencies to identify ineligible recipients and prevent certain improper payments from being made. To the extent the databases that make up the Do Not Pay List are used to verify eligibility for, or entitlement to, VA benefits by virtue of a computerized comparison of two automated systems of records, the Do Not Pay List would qualify as a matching program under the Act. See 5 U.S.C § 552a(a)(8)(A)(i)(I). Furthermore, because the databases will be used for the purpose of verifying eligibility or entitlement, none of the exemptions from the statutory definition of a "matching program" apply. See 5 U.S.C § 552a(a)(8)(B).

11. It is our understanding, however, that some of the databases included in the Do Not Pay List may not be relevant to a person's eligibility for, or entitlement to, VA benefits. VA would generally not enter into a computer matching agreement for any database not relevant to identifying ineligible recipients and preventing improper payments.

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12. In order to disclose identifying information to the various agencies with which matching activities will be performed, appropriate routine uses must be in place. In this regard, please consult with the Privacy Officers responsible for the Systems of Records from which disclosures will be made.



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