



July 10, 2023

James Ruhlman, Deputy Director
Program Management
Education Service
Veterans Benefits Administration
Via email

Dear Mr. Ruhlman,

In response to concerns we raised about the standard operating procedures for the risk-based surveys as required by 38 U.S.C. §3673, Director Garcia wrote to inform us that VBA had developed a new SOP and he forwarded a copy of the *Standard Operating Procedure, Notice of Government Action (38 USC §3673(e), June 1, 2023 (hereinafter "SOP")*. Director Garcia suggested that we contact you directly if we had any questions or comments about the new SOP.

We are so grateful for VBA's responsiveness to our concerns and the creation of an SOP to address the requirements of section 3673. Overall, it looks very good and closely aligns with the statute. It should provide very helpful and much-needed guidance to the SAAs. However, there are a few instances where the new SOP does not align with the underlying statute and consequently extends the time for completing the risk-based surveys (RBS) beyond the period allowed in the statute. We request that you correct these few instances so that the SOP correctly implements the law.

Specifically, per 38 U.S.C. §3673(e)(1)(B) and (C), an SAA is required to complete the RBS no later than 60 days after the date it receives notice "or otherwise becomes aware of an action or event described in paragraph (3)."¹ SAAs also must immediately notify

¹ 38 U.S.C. §3673(e)(3) describes the actions or events as follows:

- (3) *An action or event under this paragraph is any of the following:*
 - (A) *The receipt by an educational institution of payments under the heightened cash monitoring level 2 payment method...*
 - (B) *Punitive action taken by the Attorney General, the Federal Trade Commission, or any other Federal Department or agency for misconduct or misleading marketing practices...*
 - (C) *Punitive action taken by a State against an educational institution.*

VA when they receive notice or otherwise become aware of one of the actions or events listed in paragraph 3, and, likewise, under subsection (e)(1)(A), VA is supposed to notify the relevant SAA if it receives notice or otherwise becomes aware of one of the actions or events.

We request that you review the following issues and make the corrections suggested:

1. The SOP currently does not include that ‘becoming aware’ of one of the actions or events described in 38 U.S.C. §3673(e)(3) triggers the VA and SAAs’ obligations.

The SOP prompts the VA and SAAs to take action if they receive a notice or “become[] aware of **a notice** of certain action(s) taken against” a school.² The statute, however, does not mention becoming aware of a *notice*. The statute provides that notification must be given and risk-based surveys conducted when VA/SAA receives notice **or otherwise becomes aware of the actions or events** listed in 3673(e)(3). In other words, the SOP suggests that SAAs should not take action (and that the 60 day clock does not begin) when they become aware of an event, but – instead – only when they become aware that they have been notified by VA or aware of notice to the school from another agency. In short, by instructing SAAs that they should act only after becoming aware of a *notice*, the SOP inadvertently raises the threshold for when an RBS is triggered. For instance, an SAA could discover a state’s punitive action against a school through a news media report, but – by following the wording of the SOP – delay notifying the VA or conducting the RBS because it did not actually become informed about a *notice* that was provided. The statute, however, starts the clock from the date the SAA receives notice or becomes aware of an action or event, not the date the SAA becomes aware of a notification about the event.

We recommend correcting the SOP to state that an RBS must be completed not later than 60 days after the date the SAA receives notice *or becomes aware of* the action or event, and not after the date the SAA notifies VA. To avoid any confusion and to ensure

(D) The loss, or risk of loss, by an educational institution of an accreditation from an accrediting agency or association, including notice of probation, suspension, an order to show cause...

(E) The placement of an educational institution on provisional certification status by the Secretary of Education.

² In the Background section on page 3, the SOP states: “section 1014 amended chapter 36 of title 38 USC 3673(e) to establish communication between the Secretary and State Approving Agencies **when either receives or becomes aware of a notice of certain action(s)** taken against an ETI [Education and Training Institution]. Additional requirements outlined by this legislation includes oversight activities in the form of a risk-based survey *when such notice is received.*” Immediately following is a list of the “Types of *notices.*” (emphasis added).

that SAAs conduct the risk-based surveys on the schedule that Congress carefully established (which is when the SAA becomes aware of one of the triggering events), the relevant SOP sections should be revised to incorporate the specific language from the statute: “or otherwise becomes aware of an action or event” described in 38 U.S.C. §3673(e)(3).

2. The SOP starts the 60 days to complete an RBS on the date when SAAs notify VA, which can give the SAA two weeks longer than the 60 days provided in the statute to complete the RBS.

Another issue impacting the timeliness of the risk-based surveys is that the SOP allows the SAAs to wait **10 business days** before notifying the VA.³ The SOP directs SAAs to provide to VA the notice or information received “as soon as feasible but no later than 10 business days after becoming aware of such action.”⁴ Thereafter, “[w]ithin 60 days of receiving notice from VA or when a SAA provides notice to VA of such an event, SAAs are to complete a risk-based survey.”⁵ That effectively extends the period for completing the risk-based surveys by two weeks beyond the 60 days allowed by statute.

Time is of the essence for completing a risk-based survey when one of the actions or events listed in the statute occurs. Those actions and events indicate serious compliance and financial risk, and often occur just before a school closes suddenly. In these circumstances, it is necessary for the SAA to complete the RBS as soon as possible to protect student veterans and their GI Bill benefits.

3. The VA should clarify that the Oversight and Accountability staff will complete their review within the 30 days to ensure that VA will notify the SAAs within 30 days of receiving notice or becoming aware of one of the actions or events in 38 U.S.C. §3673(e)(3).

Under 38 U.S.C. §3673(e)(1)(A), if VA receives notice or otherwise becomes aware of an action or event in subsection (e)(3), it must notify the relevant SAA not later than 30 days after the date on which it received the notice or became aware of the action or event. Unless the SAA has otherwise learned of the action or event, this notice by VA to the SAA triggers the SAA’s obligation to complete the RBS. The SOP’s provision covering this requirement explains that the VA will give notice to the SAAs within 30

³ The statute requires the SAAs to “**immediately** notify” the Secretary when they receive notice or otherwise become aware of one of the triggering actions or events. 38 U.S.C. 3673(e)(1)(B) The ten business days allowed in the SOP does not seem to meet the statutory requirement of **immediate** notification to the VA.

⁴ Notification Actions Required, SOP, p. 3.

⁵ Compliance Required Actions, SOP, p. 3.

days "after VA becomes aware of such event **and the** Oversight and Accountability (O/A) staff within Education Service has reviewed the action that gave rise to such notice" (emphasis added).

Perhaps it is understood within VA that the O/A staff must complete their review within that 30 days so that VA can notify the relevant SAA in accordance with the statutory timeframe. However, as written, the SOP suggests that the 30 days for VA to notify the SAA starts to run after the O/A staff complete their review. If O/A staff review can take longer than the 30 days from when VA received notice or became aware of the action or event, then the SOP appears to be extending the notification to the SAAs beyond the 30 days allowed by statute. We recommend clarifying in the SOP and with VA staff that the notification to the relevant SAA must happen no later than 30 days after the date that the Secretary received notice or otherwise became aware of an action or event listed in 38 U.S.C. §3673(e)(3) – as the statute specifies.

Thank you for considering these comments on the SOP. We would be happy to discuss these further if you would like. Also, if it would be helpful, we would be happy to send a mark-up of the SOP showing our comments on the document itself.

Respectfully,

Della M. Justice

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Vice President for Legal Affairs