

STATEMENT OF
JACK McCOY,
DIRECTOR, VA EDUCATION SERVICE,
BEFORE THE
SUBCOMMITTEE ON BENEFITS,
HOUSE COMMITTEE ON VETERANS' AFFAIRS
JUNE 16, 2004

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to appear today before this Subcommittee. I am pleased to testify today on H.R. 4032 and the draft bill, the "Veterans Self-Employment Act of 2004." Let me first discuss H.R. 4032, the "Veterans Fiduciary Act of 2004."

H.R. 4032

Background

During testimony before this Subcommittee in July of last year, we provided extensive background information about VA's Fiduciary Program, as well as statistics relating to quality reviews and to other steps VA is taking to oversee payments made to beneficiaries who are incapable of managing funds. The information we provided then remains accurate, and VA has not experienced any significant problems carrying out activities related to the Fiduciary Program since our July 2003 testimony.

Summary of VA's Position

Before getting into the specifics of the bill, I would first like to summarize VA's position. We agree that there is a value in strengthening the protections afforded to incompetent beneficiaries and for close oversight of fiduciaries. However, we see the current bill as imposing restrictions and requirements that are, in many instances, too broad for VA's unqualified support.

Key Provisions of H.R. 4032

Section 2(a) of H.R. 4032 would define, for purposes of chapters 55 and 61 of title 38, United States Code, the term "fiduciary" as: (1) a person who is a guardian, curator, conservator, committee, or person legally vested with the responsibility or care of a claimant (or a claimant's estate) or of a beneficiary (or a beneficiary's estate); or (2) any other person having been appointed in a representative capacity to receive money paid under any of the laws administered by the Secretary for the use and benefit of a minor, incompetent, or other beneficiary. Section 2(b) would make conforming changes to 38 U.S.C. §§ 5502 and 6101. This definition provides needed clarity, and we can support this provision. There would be no costs associated with this change.

Section 3 of H.R. 4032 would require the Secretary to base any certification of a person as a beneficiary's fiduciary on an investigation of that person's fitness to serve as that beneficiary's fiduciary, adequate evidence that certification of that person would be in the beneficiary's interest, and the furnishing of any bond that may be required. Proposed 38 U.S.C. § 5507 would also require the Secretary to conduct investigations in advance of certification as

a fiduciary, would require a face-to-face interview with the person to the extent practicable, and would require the Secretary to request information about whether the person has a criminal record that resulted in imprisonment for more than one year. If a person has such a criminal record, VA could certify the person as a fiduciary only if the Secretary specifically finds that the person has been rehabilitated and is the most appropriate person to act as fiduciary for the beneficiary. For certain proposed fiduciaries (the parent of a minor beneficiary, the spouse or parent of an incompetent beneficiary, or a court-appointed fiduciary), VA would be permitted to investigate the fiduciary's fitness on an expedited basis, which may include waiver of any specific requirement relating to investigations.

This provision would codify requirements already contained in VA's Adjudication Procedures Manual (M21-1MR, Part XI, Ch. 2, Section D.12) concerning initial appointment of fiduciaries and would add a requirement to investigate a person's fitness to serve as a fiduciary. Because VA has directives in place that generally parallel the requirements of this proposal, the provision is unnecessary. We also note that the requirement for investigation of potential fiduciaries carries a cost of about \$527,000 annually. We believe the current screening procedure is sound and see little benefit in routinely requiring investigations that could unnecessarily delay urgently needed appointments of fiduciaries. Accordingly, we do not support this provision.

Should the committee decide to proceed with this portion of the legislation, we suggest that an additional category be added to proposed 38 U.S.C.

§ 5507(c)(2) that would authorize VA to expedite investigation of fiduciaries if the amount of benefits the fiduciary will be handling is minimal.

Finally, in this regard, the proposed statutory language requiring heightened scrutiny of potential fiduciaries that have been convicted of an offense that resulted in imprisonment for more than one year is also unnecessary. VA believes that it would be unnecessarily burdensome to determine if such a potential fiduciary were rehabilitated, particularly since VA already has the authority to make payment to any fiduciary who we determine will serve the best interest of a beneficiary. Further, VA already strives to avoid appointing as fiduciaries individuals who have criminal records.

In summary, we believe that VA's current process of appointing fiduciaries is working well and do not feel that the legislation would provide any significant improvements. Indeed, addition of proposed 38 U.S.C. § 5507 may unnecessarily complicate a process that, in most instances, achieves VA's goal of appointing well-qualified fiduciaries. If it is enacted, we estimate that 6 additional FTE at the GS 10/5 level would be required to carry out these functions in VBA's field offices. Additionally, 1 FTE at the GS 13/5 level would be required to support these functions in VA's Central Office. We estimate that the total annual cost of this provision would be \$447,000.

Section 4 of H.R. 4032 would add two new provisions to title 38 to enhance VA's ability to protect incompetent beneficiaries. The first, proposed 38 U.S.C. § 6106, would have five subsections. The first subsection would prohibit a fiduciary from collecting a fee from a beneficiary for any month for which VA or

a court of competent jurisdiction has determined that the fiduciary misused all or a part of the benefits provided to the fiduciary. We support enactment of this provision.

The second subsection, 38 U.S.C. § 6106(b), would make a fiduciary liable to the United States if the Secretary or a court of competent jurisdiction has determined that the fiduciary has misused benefits entrusted to him or her in a fiduciary capacity. This provision, which excludes Federal, State, or local government agency fiduciaries, would direct VA to treat misused funds that are not repaid by the fiduciary as erroneous benefits payments, which may be recovered as debts owed to the United States and subsequently repaid by VA to the beneficiary. We support enactment of this provision.

The third, fourth, and fifth subsections of proposed section 6106 would define “misuse of benefits by a fiduciary,” authorize certain VA regulations, and subject VA’s decision that a fiduciary has misused benefits to appeal to the Board of Veterans' Appeals and the Court of Appeals for Veterans Claims. Making these decisions appealable would be consistent with the fact that VA determinations concerning overpayments of benefits are currently appealable. Accordingly, we support these provisions provided that savings found in another VA program can offset any new costs. However, we have reservations about the recourse of appeal through the Board of Veterans’ Appeals (BVA). Our concerns involve both appropriateness of this venue and administrative efficiency. The BVA traditionally handles appeals relating to veterans’ (or dependents’ or survivors’) claims for benefits. If this appeal mechanism would prove to be

unduly burdensome to the claims-adjudication process in practice, we would recommend an alternative process. We currently cannot provide costs concerning these provisions, and will forward this information as soon as it becomes available.

Section 4 of H.R. 4032 would also add to title 38 a new section 6107. That provision would consist of three new subsections. The first subsection, 38 U.S.C. § 6107(a), would require VA to reissue benefits to the beneficiary or alternative fiduciary in any case in which the Secretary's negligent failure to investigate or monitor a fiduciary results in the misuse of benefits by the fiduciary. VA, through its Fiduciary Program staff, field examinations, review of fiduciary accountings, general monitoring, and quality control, strives to avoid all instances of misuse of VA funds by fiduciaries. Nevertheless, VA recognizes that in isolated incidents its fiduciary staff may fail to meet the high standards set for this program. We do not believe that a beneficiary should suffer financially because of VA's negligent failure to oversee a fiduciary. Accordingly, we support enactment of 38 U.S.C. § 6107(a) provided that savings found in another VA program can offset any new costs.

The second subsection, 38 U.S.C. § 6107(b), would require VA to reissue benefits in a case of benefit misuse by a fiduciary who is not an individual or is an individual who serves fifteen or more beneficiaries. VA supports enactment of this provision provided that savings found in another VA program can offset any new costs. We estimate that subsections (a) and (b) together would cost \$364,000 in the first year and approximately \$4 million over ten years.

The third subsection, 38 U.S.C. § 6107(c), would require VA to make a good-faith effort to recoup from the original fiduciary funds reissued to a beneficiary or alternative fiduciary under subsection (a) or (b). VA supports enactment of this provision provided that savings found in another VA program can offset any new costs. At this time, we do not know what the costs of the provision would be.

Section 5 of H.R. 4032 would add four new sections to title 38. The first of these, 38 U.S.C. § 5508, has three major requirements. The first would require the Secretary to provide for periodic onsite review of any fiduciary who is a person who serves fifteen or more individuals, is a certified community-based nonprofit social service agency, or is an agency that provides VA-related fiduciary services for 50 or more individuals. Section 5508(b) would define “certified community-based nonprofit social service agency” for these purposes. Proposed 38 U.S.C. § 5508(c) would require VA, within 120 days of the end of each even-numbered fiscal year, to report the results of the periodic onsite reviews conducted under 38 U.S.C. § 5508(a) and (b) during the previous two fiscal years, as well as any other fiduciary reviews conducted during that time.

The requirement to conduct the onsite reviews described in this provision appears to duplicate a requirement in the recently enacted Social Security Protection Act of 2004 (Public Law 108-203). Section 102 of Public Law 108-203 contains extensive requirements pertaining to oversight of entities that serve as representative payees for Social Security Administration (SSA) beneficiaries, including an annual report on the results of reviews conducted during that year.

Because SSA has 6.7 million beneficiaries in their representative payee program, compared to VA's 100,000 beneficiaries, we believe it would be preferable for VA to use SSA's reports on such representative payees. In cases where the payee is not on the SSA list of payees, VA would either ask SSA to add that payee to its list or VA would conduct an on-site review of that payee.

We believe the requirements in proposed 38 U.S.C. § 5508(a) and (b) are too broad to serve VA purposes and that alternative means are available to accomplish the intended purpose. The reporting requirements in proposed section 5508(c) are also nearly identical to those in section 102 of Public Law 108-203. See Pub. L. No. 108-203, § 102(b), 118 Stat. 493, 498 (2004). We also believe that the resources devoted to producing such a report would be better used elsewhere.

Accordingly, we cannot support enactment of proposed 38 U.S.C. § 5508. We estimate that 6 additional FTE at the GS 10/5 level, and 1 FTE at the GS 13/5 level would be required to carry out the functions associated with enactment of 38 U.S.C. § 5508. We estimate that the total annual cost of this FTE would be approximately \$447,000. Additionally, we estimate that there will be a cost of \$350,000 in the first year associated with updating several VA computer systems in order to generate the data necessary for the biennial report to Congress.

Section 5 would also add a new section entitled "Authority to redirect delivery of benefit payments when a fiduciary fails to provide required accounting." This provision, which would be codified at 38 U.S.C. § 5509, would

include the authority both to require reports and accountings from fiduciaries and to direct a fiduciary who fails to file a required report or accounting to personally appear at the local regional office to receive benefit payments. VA's current procedures already require certain fiduciaries to submit regular accountings and authorizes the replacement of a fiduciary that fails to provide a required accounting. The new provision has a purpose very similar to that of the current 38 U.S.C. § 5502(b), which states in pertinent part:

The Secretary, in the Secretary's discretion, may suspend payments to any such guardian, curator, conservator, or other person who shall neglect or refuse, after reasonable notice, to render an account to the Secretary from time to time showing the application of such payments for the benefit of such incompetent or minor beneficiary, or who shall neglect or refuse to administer the estate according to law.

Although proposed 38 U.S.C. § 5509 essentially restates authority already provided by 38 U.S.C. § 5502(b), we have no objection to including it in the current legislation provided that savings found in another VA program can offset any new costs. Indeed, the addition of this provision may provide a means by which VA can emphasize to fiduciaries the need to submit timely reports and accountings. Accordingly, we have no objection to this provision. We are currently evaluating whether this provision will result in any additional costs; our preliminary conclusion is that there will be no costs.

Section 5 of H.R. 4032 would also add two new sections to chapter 61 of title 38. The first would be 38 U.S.C. § 6108, "Civil monetary penalties," authorizing a civil penalty of not more than \$5,000 for each conversion by a fiduciary appointed under 38 U.S.C. § 5502 of a VA benefit payment to a use that

the fiduciary knows or should know is for a use other than for the intended beneficiary. Section 6108(b) would subject a fiduciary who improperly converts a VA benefit payment to an assessment, in lieu of damages sustained by the United States, of not more than twice the amount of any payments converted. Under section 6108(c), any amounts collected as civil penalties or assessments would be credited to applicable appropriations to recoup VA's costs in pursuing civil collection actions against fiduciaries. Although we have no objection to these provisions, provided that any costs associated with them could be offset from savings found in another VA program, VA does not have a process in place for pursuing civil penalties against persons who misuse VA benefit payments. Costs associated with pursuing civil collection actions against fiduciaries would be borne primarily by VA's Office of General Counsel, through its various regional counsels. Such costs would depend directly on the number of civil penalty cases pursued by those offices. At this point, it is impossible to estimate such costs.

The final new provision that H.R. 4032 would add is a new 38 U.S.C. § 6109, "Authority for judicial orders of restitution." Section 6109(a) would authorize a Federal court, as part of the sentencing of a defendant convicted of an offense involving the misuse of VA benefits, to order the defendant to make restitution to VA. Section 6109(b) would make various provisions of title 18, United States Code, applicable to such restitution orders, and section 6109(c) would require a court that does not order full restitution to state its reasons on the record.

Proposed 38 U.S.C. § 6109(d) would describe the framework for handling payments obtained as a result of a court-ordered restitution. Subsection (d)(1) would authorize use of amounts recovered under restitution orders to defray expenses incurred in the supervision and investigation of fiduciaries. Subsection (d)(2) would require that “amounts received in connection with misuse by a fiduciary of funds paid as benefits” be paid to the individual whose benefits were misused or, if VA has reissued the benefits, be treated as a recouped overpayment and deposited into the applicable revolving fund, trust fund, or appropriation. VA has no objection to this amendment and does not expect to incur any costs as a result of this provision.

Section 6 of H.R. 4032 would make the provisions of this act, with the exception of new 38 U.S.C. §§ 6106 and 6107, effective the first day of the seventh month beginning after the date of the enactment of this Act. Sections 6106 and 6107, which concern fiduciaries’ misuse and reissuance of benefits, would apply to determinations of fiduciary misuse of funds made by VA after the date of enactment. VA has no objection to this provision.

Section 7 of H.R. 4032 would require VA to prepare a report evaluating whether the existing procedures and reviews for the qualification of fiduciaries are sufficient to enable the Secretary to protect benefits paid to such individuals from being misused by fiduciaries and to submit the report no later than 270 days after enactment. This provision would direct the Secretary to include in the report any recommendations the Secretary considers appropriate. The purpose such a report would serve 270 days following enactment (and less than 90 days

following the proposed effective date) is uncertain to us, and we therefore oppose this requirement.

In closing my remarks on H.R. 4032, Mr. Chairman, I want to emphasize again that VA's fiduciary program has a long history of providing oversight for those veterans who cannot manage their VA benefits. We take this responsibility seriously. I look forward to working with you and your committee to strengthen the safeguards available to provide additional protection to these beneficiaries. Now I would like to address the Veterans Self-Employment Act of 2004.

Veterans Self-Employment Act of 2004

Mr. Chairman, this draft bill would permit individuals entitled to educational assistance benefits under chapters 30, 32, and 35 of title 38 and chapter 1606 of title 10, United States Code, to use those benefits for training associated with the purchase of a franchise enterprise. A lump-sum payment would be made to the eligible individual in an amount equal to the portion of the cost of a franchise enterprise used to train a new owner or one-third of the total amount of educational assistance the individual has remaining on the day VA approves the individual's application for educational assistance, whichever is less. The number of months of entitlement charged would be calculated by dividing the amount paid to the individual by that individual's full-time monthly rate. The Secretary would be required to prescribe regulations establishing standards and qualification for approval of training associated with the purchase of the franchise enterprise and for approving organizations or entities offering the training. The Secretary would have discretion to delegate responsibility for approving such

training and training organizations, for education benefits purposes, to the State approving agencies.

This draft bill would become effective on March 1, 2005.

Mr. Chairman, we certainly believe it is important to promote and actively facilitate participation by veterans in training opportunities that will result in suitable employment, including self-employment and small business ownership. However, as discussed below, we have concerns about the approach embodied in the draft bill.

The proportion of a franchise fee allocated to education and training is typically not broken out as a separate expense and, in the event that a franchise contract would assign a separate cost for education and training there would be no way to ensure the amount assigned would be appropriate, or related to the value of the training, or linked to the expense of providing the training.

Given that there is no way to ensure that any charge for education and training is not an arbitrary amount, enactment of the draft bill would transform veterans' education benefits into a program providing partial capitalization of the cost of starting a business venture, although that program would be arbitrarily limited to franchised businesses, to the exclusion of other business opportunities.

We do not believe that the record exists to support such a major and fundamental transformation in the purpose of veterans' education benefits. Nor does the record indicate that the proposed bill would address the concerns of the Congress when it chose to exclude business capitalization from readjustment

programs enacted subsequent to the World War II GI Bill, a program that did include such a provision and a program that we believe was subject to abuse.

In addition, the proposed draft bill is not included in the President's budget proposal and does not provide for an offset of the cost, estimated to be \$11.9 million over 10 years. For these reasons, we are unable to support enactment of the draft bill.

Mr. Chairman, this concludes my statement. I will be pleased to respond to any questions you or the members of the Subcommittee may have.