EXPLORING VBA'S FIDUCIARY PROGRAM

HEARING

BEFORE THE

SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS

OF THE

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EXPLORING VBA'S FIDUCIARY PROGRAM

Thursday, June 11, 2015

HOUSE OF REPRESENTATIVES,
COMMITTEE ON VETERANS' AFFAIRS,
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 3:09 p.m., in Room 334, Cannon House Office Building, Hon. Ralph Abraham [chairman of the subcommittee] presiding.

Present: Representatives Abraham, Lamborn, Costello, Bost, Titus, and Brownley.

Also Present: Representative Johnson.

OPENING STATEMENT OF CHAIRMAN RALPH ABRAHAM

Mr. ABRAHAM. Good afternoon, everyone. Thank you for your patience.

This oversight hearing of the subcommittee on Disability Assistance and Memorial Affairs will now come to order. The purpose of this hearing is to explore VBA's fiduciary program, which is intended to protect veterans, who, due to their injury, disease, or other infirmity, are unable to manage their own financial affairs.

According to the VA, in 2014, this program covered more than 172,800 beneficiaries who received approximately $2.9 billion in VA benefit payments.

The fiduciary program is supposed to help protect our Nation's most vulnerable veterans, and it is absolutely essential that this subcommittee has the most up-to-date information about whether the changes to the program over the last few years have been effective.

Today's hearings will review the criteria VA uses to determine whether a veteran needs help managing his or her finances and how VA determines who should be appointed as fiduciary.

We will also look at VA's oversight of fiduciaries, including use of the field exam, which helps assess the veteran's general welfare, and evaluate how well the fiduciary is managing the veteran's finances.

Inevitably, this hearing will focus on oversight of the fiduciaries and how to protect veterans from fraud. But I want to acknowledge at the onset that the vast majority of fiduciaries are doing the right thing and serving the veterans to the best of their ability. In most cases, the fiduciary is a loving family member who is naturally committed to ensuring the veteran's health and welfare.

There are also many businesses that as a way to show their appreciation to our veterans develop significant resources to provide this service for veterans and their families.

However, serious concerns have been raised about the VBA's oversight of fiduciaries. On June 1st, 2015, the Office of Inspector General issued a report substantiating allegations that VBA has not conducted field examinations in a timely manner in 42 percent of cases in 2013. Let me repeat that. The VBA did not conduct 42 percent of field examinations in a timely manner.

VBA is supposed to conduct field examinations in order to assess the welfare of the beneficiary and evaluate the overall performance of the fiduciary.

According to the OIG, the delay in conducting field examination placed $360.7 million in benefit payments and $487.6 million in estate value at increased risk.

According to the VA figures, fiduciaries have misused almost $19.3 million of veterans benefits in a little more than 3 years, money that was intended to ensure the care and comfort of some of the Nation's most valuable heroes.

Although taxpayers re-issued $5.6 million to replace some of these lost benefits, the veterans involved may have lost as much as $14 million.

Another problem previously highlighted by the OIG in 2014 reports that 89 percent of the merit reviews, which are investigations into allegations of misuse of funds, were not completed by the EAFH within VBA's performance standard of 14 days after receipt of an allegation. This is unacceptable.

I look forward to hearing VA's plan to implement the OIG's recommendation as well as other initiatives to improve the oversight of fiduciaries. The welfare of veterans served by the fiduciary program should be one of VA's top priorities.

This hearing will also address whether there are any negative, unintended consequences for the veteran after the VA determines that a beneficiary is incompetent.

While the fiduciary program is essential to protect the welfare of veterans who are unable to manage their own financial affairs, it is also crucial that the VA ensure that our Nation's heroes are not deprived of the constitutional rights they have fought so hard to defend.

Before we begin, I have to say that I am extremely frustrated that the VA's eastern area hub manager is not here to answer questions, despite the fact that my staff specifically requested the individual's presence in light of the findings of the 2014 OIG report.

VA has not indicated that there were any scheduling conflicts that would have prevented the eastern area hub manager to appear, so I am forced to question whether this absence is because VA did not want this particular hub manager to answer questions related to the problems uncovered by the OIG.

This appears to be another example of VA's failure to follow through on Secretary McDonald's promise of improving VA's transparency and accountability. Our Nation's veterans deserve better than the status quo. Although I am pleased that Ms. Marcia Hempy, the Columbia Area Hub manager, is here to answer some

of these questions, I note that she is only here because I directed that subcommittee staff insist that a regional hub manager be present to answer questions about this vital problem in this program, and that Ms. Hempy is currently working from the VA central office here in Washington. Going forward, I hope VA will more fully cooperate with the subcommittee's requests and help us to conduct effective oversight so that we can work together to provide veterans with the service they deserve.

I am looking forward to hearing from our witnesses. With that, I would like unanimous consent that our colleague, Representative Johnson of Ohio, be allowed to participate in today's hearing. Representative Johnson has been working on fiduciary issues for a long time and recently introduced H.R. 2605, the Veterans Fiduciary Reform Act of 2015.

Hearing no objections, so ordered.

I now call on distinguished Ranking Member Ms. Titus for her opening statement.

OPENING STATEMENT OF RANKING MEMBER DINA TITUS

Ms. TITUS. Thank you, Mr. Chairman, and thank you for holding this hearing on the VBA's fiduciary program. It is very important that we look at this program, because it was designed to protect some of our most vulnerable veterans.

I would like to welcome Mr. Abe from the VA Office of Inspector General, and also Undersecretary McLenachen and thank them and their team for the diligent work that they are doing on this subject.

I am like you, though, I share some of your concerns. After reviewing today's testimony and the figures that have been shared with us by our witnesses, I fear that the fiduciary program may be much under-resourced and in need of critical changes. Part of the problem appears to be that the VA failed to anticipate the need for more field examiners and other employees when they submitted their 2015 budget request. Instead, much like with the appeals process, which we are also trying to address, they have allowed the problem to fester and grow before asking for additional resources.

A basic and important responsibility of the fiduciary program is to conduct field examinations. That is how qualified veterans gain access to the program and how the integrity of the work that the fiduciaries are doing is maintained. So if the VBA fails to complete timely examinations and to review and investigate misuse allegations, then the well-being of the beneficiaries is put at risk.

Yet, according to the IG, as you stated, 42 percent of field examinations are not being completed in a timely fashion. And even more concerning is the fact that the VA hasn't completed 89 percent of its misuse allegations in a timely manner, leaving some veterans in challenging, perhaps even dangerous, situations for about a half a year on average.

To this point, I was also surprised to learn that VA field examiners are expected to visit only one veteran a day. Surely, we can visit more than one veteran a day. And I would welcome your suggestions on what we can do to better utilize the resources that we have to be more efficient in the meantime.

I am also curious about how those in the hub offices, now that it is been reorganized, track and oversee those in the field, those field examiner positions, because they can be as far away as from St. Louis to Honolulu. If you look at the western regional hub, you can see that is pretty long distances, and I wonder what kind of leadership and scrutiny is occurring in those field offices to try to bring these numbers down.

So in short, I am afraid the program is drastically under-resourced and not scrutinized by leadership. So it is clearly time that we had a complete review of the fiduciary program's effectiveness. These are some of our most vulnerable veterans, and we have to do all we can to ensure their financial and physical well-being.

So, Mr. Chairman, I look forward to working with you in the bipartisan spirit of this committee to address some of these questions and improve the program. And I would yield back.

Mr. ABRAHAM. Thank you, Ms. Titus. I ask that all members waive their opening as per this committee's custom.

I would like to welcome our first panel. Thank you for coming today, and thank you, again, for your patience.

David McLenachen, the Director of Pension and Fiduciary Service and Acting Deputy Under Secretary for Disability Assistance of the Veterans Benefits Administration. He is accompanied by Mr. Michael Stephens, the Director of the Indianapolis office; and Ms. Marcia Hempy, the Manager of the Columbia Fiduciary Hub and Acting Deputy Director of Pension and Fiduciary Service.

Mr. Gary Abe, the Deputy Assistant Inspector General for Audits and Evaluations. He is accompanied by Mr. Aucoin, Assistant Inspector General for Investigations, and Mr. Timothy Crowe, the Director of the St. Petersburg's Office of Audits and Evaluations.

And after we conclude panel 1, we will seat a second panel consisting of Mr. Zachary Hearn, the Deputy Director for Claims, Veterans Affairs and Rehabilitation Division of the American Legion; Mr. Samuel J. Albritton, the Executive Vice President of Regions Bank, and Mr. Douglas Rosinski, a founding member and attorney with the Veterans Justice Group, LLC.

I want to remind the witnesses that your complete written statements will be entered into the hearing record, and because of the time constraints, the panel has agreed to waive their opening statement. We can go straight to questions. We have all your opening statements in our books, and I have actually read them.

STATEMENTS OF DAVID R. MCLENACHEN, ACTING DEPUTY UNDER SECRETARY FOR DISABILITY ASSISTANCE, DIRECTOR, PENSION AND FIDUCIARY SERVICE, VETERANS BENEFITS ADMINISTRATION, U.S. DEPARTMENT OF VETERANS AFFAIRS, ACCOMPANIED BY MR. MICHAEL R. STEPHENS, DIRECTOR, INDIANAPOLIS REGIONAL OFFICE, VETERANS BENEFITS ADMINISTRATION, U.S. DEPARTMENT OF VETERANS AFFAIRS, AND MARCIA HEMPY, ACTING DEPUTY DIRECTOR, PENSION AND FIDUCIARY SERVICE AND MANAGER, COLUMBIA FIDUCIARY HUB, VETERANS BENEFITS ADMINISTRATION U.S. DEPARTMENT OF VETERANS AFFAIRS; GARY ABE, DEPUTY ASSISTANT INSPECTOR GENERAL FOR AUDITS AND EVALUATIONS, OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF VETERANS AFFAIRS, ACCOMPANIED BY QUENTIN AUCOIN, ASSISTANT INSPECTOR GENERAL FOR INVESTIGATIONS, OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF VETERANS AFFAIRS, AND TIMOTHY CROWE DIRECTOR, ST. PETERSBURG OFFICE OF AUDITS AND EVALUATIONS OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF VETERANS AFFAIRS

Mr. ABRAHAM. So I will begin the questioning.

Mr. McLenachen, VA testified in 2012 that the misuse rate for beneficiary funds was less than one-tenth of 1 percent at the time. And I have a few follow-up questions. Is that rate still accurate?

Mr. MCLENACHEN. That is still correct.

Mr. ABRAHAM. Okay. And how did the VBA calculate that figure?

Mr. MCLENACHEN. It is based on the number of beneficiaries and the number of misuse cases.

Mr. ABRAHAM. Okay. All right. Can you be a little more specific on that, sir, please?

Mr. MCLENACHEN. Sure. The process that we go through is we can have misuse allegation, and within 14 days, we look at that allegation to see whether it merits further investigation.

If it is determined that it does, we will investigate that misuse allegation, and the investigation has to be completed within a period of time, the entire process.

Mr. ABRAHAM. You think those calculations are good calculations? You think there is any misalignment of the numbers?

Mr. MCLENACHEN. In the prehearing information that we provided, you will see that those numbers grow from over the last few years. The reason for that is, after we did the hub consolidation in March 2012, it allowed us to get better control of this work. And so we have been involved in a cleanup—essentially, a cleanup effort over the last few years. And that is why when you look at that data, you will see over the last 3 years, those numbers have grown. And we have done a better job of detecting misuse.

Mr. ABRAHAM. So VBA still stands by those figures at this point so to speak?

Mr. MCLENACHEN. Yes. And those numbers are based on when we make a determination that there has been misuse in a case, that number is based on the number of beneficiaries in the program.

Mr. ABRAHAM. Now, is VBA's suggestion that it can effectively measure all misuse of the beneficiary funds that has taken place,

and is that rate of misuse almost negligible? Is that what you are saying?

Mr. MCLENACHEN. It is a very low number. And if you are asking is there misuse out there that we are not detecting, I hope there is not. But for me to guarantee that, I cannot guarantee that. The important role of the fiduciary program is to detect misuse. And as you saw in the inspector general's testimony, there is a number of criminal cases that they have prosecuted, and the majority of those have been detected by our program and referred to the inspector general's office. So it is a very important role for the fiduciary program.

And if you look at the data that we have provided prior to the hearing, you will see that the allegation numbers have gone up. We are doing a much better job now of getting allegations of misuse and acting upon them. We did a couple of different things. We centralized allegations of misuse in our phone centers, so our phone centers are tracking that information as it comes in, referring it to the fiduciary hubs.

Mr. ABRAHAM. Mr. Abe, would you agree with those figures? Do you think they are accurate?

Mr. ABE. Well, I would like to turn that over to Mr. Crowe, because he has actually reviewed that statistic, and he can explain how we view it.

Mr. CROWE. It does represent the dollar amount of misuse that VBA has determined that occurred, I presume, divided by the total States they are managing. Would that be correct?

Given the magnitude of the number of beneficiaries out there and the kind of money you are talking about, we would tend to think that there is misuse going on out there that has not been detected.

Mr. ABRAHAM. Mr. McLenachen, as of 2013, the VBA procedure required the VBA to initiate debt collection procedures for all fiduciaries who misused funds. What specific controls have you implemented to ensure debt collection procedures are conducted effectively?

Mr. MCLENACHEN. That is one of the significant changes that we made in the program recently in the misuse area.

Prior to that we were, admittedly, not doing a good job of establishing debts when the fiduciaries misused benefits. We initiated new procedures. We did training in the area of debt—establishing debts. In 2014, we deployed a new IT system, which has built into it the entire misuse protocol for managing the misuse work. The protocol is what we go through to make a misuse determination.

Mr. ABRAHAM. Before I run out of time, what are those procedures, per se? Could you give me a couple of examples?

Mr. MCLENACHEN. Well, we have a pretty significant and detailed procedure that our finance activities, local offices and the fiduciary hubs are supposed to follow. If I have time, sir, I could maybe ask Ms. Hempy, she could probably give you a better idea of what she does in her hub under those new procedures.

Mr. ABRAHAM. Well, I am out of time. But if you will just give me a copy of those procedures later, I would appreciate that.

Mr. MCLENACHEN. I would be happy to.

Mr. ABRAHAM. Ms. Titus.

Ms. TITUS. Thank you, Mr. Chairman.

Mr. Secretary, do you have some figures that are broken down within the regions that you can tell me how this process is working in Nevada?

Mr. MCLENACHEN. I do. We, nationally—and I am going to distinguish the national number for you, and I am specifically referring to our initial appointments, initial appointment field exams, which is a very point in the process, because that is when we start payment of benefits to a fiduciary.

Nationally, we have driven that number down, thanks to the hard work in our hubs, down to about an average of 33 days for those initial appointment field examinations.

However, in Nevada, the State of Nevada, we are at about 68 days. So we have a lot of work to do in Nevada to get it down to the point—the standard for those is 45 days. So we are above standard in the State of Nevada. You might ask why that is. There are only three field examiners in Nevada right now. We lost one recently. However, to address that concern, the hub has already adjusted to get some assistance, for southern Nevada from Utah. One of the good points of the consolidation is that we are able to move our resources across State lines, which we were not able to do before.

In addition to that, they are hiring another field examiner. So they will be up to 5 field examiners with one in Reno, two in Vegas, and then an additional person that they are hiring, and a person in Utah. So hopefully that will help address that situation.

I just want to point out, one of the resource management hard issues in the fiduciary program is it depends on the nature of the area where we are doing the field examinations. In a rural area, can be a challenging resource area, compare an urban—densely-populated urban issue, less travel, beneficiaries are closer together, it is a different resource issue. So Nevada, we have a lot of rural areas to cover.

Ms. TITUS. Do you have any patterns for the people who need these services; older, younger, men, women? Anything that stands out?

Mr. MCLENACHEN. We are actually putting that data together right now, and we would be happy to provide it to the committee after the hearing once we get that completed. That is not data that we routinely track in the program, but we are working on pulling that data and putting the report together.

Ms. TITUS. I think that would be interesting. I appreciate that.

And I would just ask you, Ms. Hempy, if you could address the comment I made earlier about how you oversee your field examiners when you are located in Salt Lake City they are in Hawaii or Nevada, wherever. I realize your district isn't that large, but the one in the west is.

Do you have proper oversight? Do you go out and visit in the field occasionally yourself? Do you follow up on their cases? How do you do that?

Ms. HEMPY. Thank you for that question. Currently, we touch base with our field examiners daily to make sure that their needs are met and we know their schedule. We have weekly meetings with the entire group to discuss policy and procedures and any

changes in the program that we need to implement, or any problems that they may be having out in the field that we could address as a leadership team.

We also have an open communication line that they can call the leadership or email the leadership at any time if they need assistance. We do make periodic visits out into the field and do supervisory visits and ride-alongs with each of our field examiners to ensure that they are properly doing their job and holding them accountable for those things. And I personally do go out and do spot checks of those types of supervisory visits and ride-alongs.

Ms. TITUS. So do you think that seeing only one or maybe slightly over one a day is an efficient use of time? Is there something we can do to increase those numbers? Is it a function of geography? Would you address that issue?

Ms. HEMPY. Yes, ma'am. Currently, we are working with a standard, and we hold our employees accountable for that standard. What we do is we encourage our employees to work above that standard, and many of them do. And we address those that are not working to that standard.

Ms. TITUS. How do you address them?

Ms. HEMPY. We would evaluate their performance, and we put them on a performance improvement plan, and try to make them successful, address what needs they have, whether it be training or more oversight. And if they are not successful in that plan, then we take action to either remove that employee or find a more suitable job for them.

Ms. TITUS. I would ask the Secretary, do you think you have the resources you need to put in place the recommendations made by the inspector general? President's fiscal year 2016 budget we requested 85 additional FTE. I think that is critical to us making progress on the IG's recommendations. We are taking them very seriously.

Ms. TITUS. Thank you. Mr. Chairman.

Mr. ABRAHAM. Mr. Lamborn.

Mr. LAMBORN. Thank you, Mr. Chairman. Thank you for having this hearing.

Mr. McLenachen.

Mr. MCLENACHEN. Yes, sir.

Mr. LAMBORN. Okay. If—as you told the chairman, one-tenth of 1 percent of cases have problems. That is one out of a thousand. Do you stand by that number?

Mr. MCLENACHEN. Based on the data that I have available to me, yes.

Mr. LAMBORN. Okay. Now, there was a disturbing Houston news expose in June of 2012, which alleged that the VA had appointed gambling addicts, psychiatric cases, and convicted criminals as fiduciaries. Has that problem been cleaned up? Was that accurate to start with? And are any current fiduciaries in one of those categories?

Mr. MCLENACHEN. Based on what I know, that was not accurate. Let me explain.

In 2004, Congress amended the law to require us to do a specific investigation to qualify a fiduciary. We follow that law. It requires us to do a criminal background check, a credit check, and do a com-

plete investigation to determine whether appointing a specific individual is in the best interest of a particular beneficiary.

Regarding, for example, criminal convictions, we can still appoint somebody under that law if they have a criminal conviction, if we think it is in the best interest of that beneficiary to appoint that person. But as a general rule, that is not our policy. And we clarified those policies in the proposed rules that we published and that we hope to finalize soon.

It is not my belief that this is the case; however, this program has been around for a long time, and it is possible that there is a fiduciary out there that was appointed before Congress changed the law.

Mr. LAMBORN. Okay. Thank you.

Now, Mr.—is it Abe?

Mr. ABE. Abe.

Mr. LAMBORN. Aucoin.

Mr. AUCOIN. Yes, sir.

Mr. LAMBORN. And Mr. Crowe, do any of you have reason to doubt the one out of 1,000 number that the Deputy Secretary thought was the current situation of bad cases?

Mr. ABE. Well, I think the assumption is misleading in a sense that they are basing their that rate on the misuse that they have identified. So they are assuming that they have identified all the misuse, which is probably not the case. And so the number is higher and I think that they would agree.

Mr. LAMBORN. Then how can they do a better job of identifying those additional problems? Do any of the three of you have suggestions for the VA on how to do a better job of rooting those out?

Mr. McLenachen asked for additional FTE, but is that all there is to it, or are the processes in some way lacking?

Mr. AUCOIN. No, sir that is not all there is to it. When I looked at our statistics on our referreds of allegations of fraud, they either come from VBA or come from some outside source I looked at the data starting in fiscal year 2010 to present date, there is an over 91 percent increase in those allegations of fiduciary fraud that have come to us for investigation.

The referrals that we converted to full investigations during the same time frame have gone up 48 percent. The numbers are increasing. Whether it is a good scrubbing, as has been mentioned, or we are just getting more fraud brought to our attention, I can't say.

But what I can say is when we look at these things, there are certain weaknesses that seem to occur time and time again in the fraud cases. The accountings are being falsified a number of times. The funds that are supposed to be certified as being on deposit in the banks are not accurate. There are times where the certificates are presented to the bank, by the fiduciary the bank stamps it and say, yes, this is, in fact what is on deposit, but it is then given back to the fiduciary. The fiduciary takes it and then brings it in with their accounting. But while they have that form in their possession, they alter the form and add additional funds that they have stolen, and they add it to the form to pretend that the funds are still on deposit. And that showed up time and time and time again in our fraud cases.

Mr. LAMBORN. Then how can we do a better job of making sure that doesn't continue to happen?

Mr. AUCOIN. I think getting the field exams done in a timely fashion, spending more time on-site with the actual fiduciaries would do that. You have got to look at the documentation and make sure that it adds up.

The bank statements that are turned in to VA in today's time frame, a bank statement that looks official because it looks like it came from the bank, can be altered by the fiduciary and turned in as if it is the official bank statement.

We also found that with multiple fiduciaries—multiple beneficiaries under one fiduciary, if the money is taken out of one account and the accountings are turned in on an annual basis, which is when the fiduciary took that beneficiary on, you have multiple accounts, you can shift money from one account to another. So if I go to look at that one account and if everything looks fine, that is because the money was shifted from another account to hide fraud. We found that scheme more than once.

Mr. LAMBORN. Thank you all for the work that you are doing in trying to protect our veterans.

Mr. ABRAHAM. Mr. Costello.

Mr. COSTELLO. The hub model and whether it is been successful, and if it is not been entirely successful, what reforms need to be made in order to button up some of the management criticisms that were made in the June 1st, 2015, OIG report? Can you comment on that?

Mr. MCLENACHEN. Yes. I am glad to have the opportunity to address that, because I know there have been some concerns about our consolidation in the hub model. I will tell you it is very, very successful in our view because of the things that you are hearing about today, which is doing a better job of having control of the work that we have. We went from 56 offices that had a fiduciary activity to 6, not counting the Manila regional office, that now we have a complete and, I guess, transparent view of what the workload is in this program. And that is why you see those allegations going up, because we are doing a better job of tracking those and making sure that there is no misuse to the best of our ability. And I don't dispute that there might be some other misuse out there.

However, the hub model has really been a significant change for us and it has improved the program. And if I could, I would like to let—one of the best, probably, examples is in the Indianapolis hub. Mr. Stephens experienced that prehub and posthub, and he can tell you what impact it has had on the program in his area.

Mr. COSTELLO. Okay. Yes.

Mr. STEPHENS. Good afternoon. Thank you for the opportunity to respond.

I have worked as a director or in leadership in regional offices, both preconsolidation and postconsolidation of fiduciary operations. I can tell you that, my experience, when it was decentralized, is that it was very difficult to show the proper amount of oversight to that operation. It was a very small part of what 56 different regional offices do. Once we consolidated, we were able to—we are able to recognize and realize efficiencies, and also we have im-

proved consistency in operations through consistent training and consistent management through our region.

The amount of progress we have been able to make, I will give you an example. We have improved—or reduced, rather, the number and the amount of over 45-day-old initial exams, which is our standard for timeliness. Over 45-day initial appointments we have reduced by 98 percent since their peak. We have reduced the number of follow-up, old follow-up field exams, by 38 percent in Indianapolis. You would see similar results across the other hubs.

Mr. COSTELLO. So the OIG report 2013 relative to the timeliness standards, you are saying that in the past 2 years with the hub, you have seen marked improvement on the percentages related to timeliness?

Mr. STEPHENS. Absolutely. Like I said, 98 percent reduction in the number of old initial appointments.

Mr. COSTELLO. And, Mr. McLenachen—I apologize if I butchered that.

Mr. MCLENACHEN. Sure.

Mr. COSTELLO. The definition of success, or when I ask has it been successful, you had indicated that the ability to identify the absconding of funds, or the misuse of funds has gone up. So, in other words, you are able to identify more misappropriation for lack of a better term?

Mr. MCLENACHEN. We are doing a much better job of that now. And that is due to a number of factors. The consolidation is one piece, but we have a new IT system. We have done—we have misuse training that we deployed. And so, really, it is a matter of having control of the work, and doing a better job of identifying that type of conduct. There is a number of ways we do that. It is through accounting, and follow-up field examinations. We do onsite reviews of fiduciaries that handle multiple beneficiaries. I think my message is that the oversight is much better today than it was a few years ago.

Mr. COSTELLO. Another question. The proposed regulatory changes, can you share with me your observations. Are you welcoming them? What constructive comments do you have to make them better? It seems to me, most particularly, that the intent is to make sure that the fiduciary appointment process, as well as the training of fiduciaries, will weed out some of the bad actors before they have the ability to misappropriate.

Mr. MCLENACHEN. Yes. The regulations that we proposed address that aspect of the program to include bars to appointment. So we have a section that we proposed that would bar somebody from acting as a fiduciary for a variety of reasons, a long list of reasons.

The regulations are a critical component of the transformation of this program. And we have a number of things that we need to get in place before we go final, such as training, procedures manual, guidance to the field, our IT system, which we put out last year. We are about at the point where we have all that stuff together where we can go final with those regulations. And it will kind of be the end piece of transforming the program. That doesn't mean the work's done, though.

Mr. ABRAHAM. Thank you. Mr. Johnson.

Mr. JOHNSON. Well, thank you, Mr. Chairman. And thanks to the committee for allowing me to participate.

And thank the panel for being here today.

Mr. McLenachen, as you may recall, I chaired the Oversight Investigation Subcommittee in the 112th Congress, and we conducted an investigation and oversight hearing that revealed shocking behavior on the part of some of the VA's fiduciaries at that time and some gross misfeasance on the part of the VA in addressing the issues; things from egregious examples of appointing fiduciaries embezzling their veteran beneficiaries funds to examples of the VA arbitrarily removing a veteran's wife and replacing her with a paid fiduciary, unknown to the family without provocation.

It was clear then that the VBA's fiduciary program was in dire need of reform. And I have to tell you, you know, it sounds like there might be an echo in the room, because here we are 3 years later, and we are still talking about some of the same issues.

And that is concerning to me, Mr. Chairman, that after 3 years, that we are still dealing with some of the basics.

Mr. Stephens, I acknowledge you. You say there have been some improvement. And I am not going to say that there hasn't been some improvement in some areas, but these are very, very serious problems for our Nation's heroes that need to be taken care of.

So let me ask just a few very specific questions.

Mr. McLenachen, how quickly is a fiduciary, who has been found to have misused a beneficiary's funds, removed from their role as a fiduciary?

Mr. MCLENACHEN. Our policy is once a misuse determination has been made, they will be removed and they will not be appointed to any another——

Mr. JOHNSON. How quickly? The question was, how quickly is a fiduciary that has been found to have misused a beneficiary's funds removed? Is it the same day? Same week? A month later? What is it?

Mr. MCLENACHEN. Immediately upon an allegation of misuse that is substantiated, they are removed and a successor fiduciary is appointed.

Mr. JOHNSON. Okay. Great.

Can you tell me in the last 12 months how many fiduciaries have been removed?

Mr. MCLENACHEN. I do not have that data with me, but I can certainly provide that to you.

Mr. JOHNSON. Please. I would like to see that.

If a fiduciary is handling—let's say a fiduciary is identified to have misused funds and they are removed from that—their role as a fiduciary, if they are handling more than one beneficiary, is he or she removed from their role in all cases or just one?

Mr. MCLENACHEN. Our policy is that they would be removed from all cases.

Mr. JOHNSON. Great. I love that.

Are there any criminal pursuits, charges, against fiduciaries that do this kind of thing?

Mr. MCLENACHEN. I will defer to the inspector general for that, but what we do and our procedures are that when we make a mis-

use determination, we refer those matters to the IG for evaluation. So that is the next step in the process.

Mr. JOHNSON. Mr. Abe, one of you, are there criminal charges and pursuits of criminal investigations against these folks?

Mr. AUCOIN. Absolutely. If misuse referral is sent over to the Office of Inspector General, we will look at it, and we will investigate it.

Mr. JOHNSON. Okay.

Mr. AUCOIN. The VBA is certainly briefed on our findings, and in some cases, the fiduciaries may have a surety bond and we have assisted the Department to go after and get some of the funds back. Not every fiduciary has a surety bond, but especially in one of the examples that we listed, we worked hand in hand with regional counsel once the case was done to recoup the money, and get it back to the Department.

Mr. JOHNSON. That leads me to the next question, and you answered a little bit of it there. If they have a security bond, then you are able to get some of the money back?

Mr. AUCOIN. Yes, sir.

Mr. JOHNSON. But what, in a broader scope, Mr. McLenachen, is done for that veteran who has had his or her funds abused or misused, what is done to help them recover that?

Mr. MCLENACHEN. So there is a number of things, a number of tools. The biggest issue is that in 2004, Congress changed the law to allow us to re-issue benefits. So in the cases where we have been authorized to re-issue benefits, that is the first thing that we will do.

Mr. JOHNSON. And one final question, and then you can respond to all of it, if they will give us the time, how is the veteran taken care of during that time that the investigation is going on? Let's say there is a fiduciary that has been accused and you are doing the investigation, what happens in that interim time while that investigation——

Mr. MCLENACHEN. So we remove the fiduciary that misused—has been alleged to have misused the benefits—and appoint a successor fiduciary. The goal is to try to do that quickly enough that there is no interruption of benefits. So the monthly benefits will continue to flow. The fiduciary that has been removed has to transfer funds to the successor fiduciary, so it should be a seamless process for the beneficiary. That is the way the program is supposed to run.

Mr. JOHNSON. Okay. Well, I certainly sense a desire to fix these problems. I really do. It is the slow moving wheels of a massive bureaucracy that I know you are dealing with that makes it awfully frustrating for me as a veteran and someone who is concerned, as I know you are, about our Nation's heroes.

Mr. MCLENACHEN. I assure we have made a lot of changes since you and I last spoke in this setting.

Mr. JOHNSON. Well, this one was a much better conversation, I think. Thank you.

Mr. ABRAHAM. Thank you, Mr. Johnson.

Ms. Brownley.

Ms. BROWNLEY. Thank you, Mr. Chairman and Ranking Member. And I apologize to all of you for being late.

But Mr. McLenachen, I wanted to—in your testimony you talked a little bit about current law in the VA and their, sort of, inability to re-issue benefits to veterans in cases of fiduciary misuse when the fiduciary in question manages benefits for nine—I think nine or fewer veterans.

Mr. MCLENACHEN. Yes.

Ms. BROWNLEY. So veterans are out, if they have a family matter—member, excuse me, that has misused the funds, the veteran just loses his or her benefits, correct? That is current law?

Mr. MCLENACHEN. So that was another—Representative Johnson brought up the point of what can we do. And we have a legislative proposal that was in the President's budget to address this concern. There is essentially an inequity within the law for re-issuance of benefits. A fiduciary that is handling 10 or more beneficiaries, or that is a corporate entity, we can re-issue benefits automatically. If it is a beneficiary, though, that has a fiduciary that handles nine or less, the only way that we can recoup their benefits and make them whole is, one, if VA was neglect. If the VA was neglect, and I make that determination, we can re-issue benefits.

Otherwise, we are talking about collecting on a surety bond, restitution from a criminal case, our options are very limited. And I see no reason at all why we should treat two beneficiaries that are situated exactly the same way as far as their disability differently just because there is an arbitrary cutoff between nine and 10 individuals that are handled. So I would appreciate any support we could get for that particular legislative proposal.

Ms. BROWNLEY. Well, thank you for that. And I really do thank the administration for the proposal in the budget. And I have discussed with my staff and the staff here and plan to introduce legislation, as you suggested, that will ensure that every veteran who is the victim——

Mr. MCLENACHEN. Thank you.

Ms. BROWNLEY [continuing]. Would receive the benefits that they have earned and deserve. And certainly, would love the help and support from the committee and all the committee members to join me in that legislation.

It seems, though, it is your judgment, then, if the VA has—is negligent, then the veteran has recourse. But if the VA is not doing its appropriate oversight and making sure that the fiduciaries are fulfilling their duties and doing so appropriately, isn't that—wouldn't that fall into the category of the VA being negligent?

Mr. MCLENACHEN. Those decisions are centralized in my office, and I assure you that I use the most liberal possible negligent standards I can possibly use——

Ms. BROWNLEY. I am sure you do.

Mr. MCLENACHEN [continuing]. To make sure that we re-issue whatever benefits we can. That is the guidance in my office, and that is what we do.

Because in those cases, there may not be that many opportunities for recouping the benefits. And so, just so you all know, in our program, about 90 percent of the beneficiary fiduciary relationships are one-on-one relationships with a family member or a caregiver or friend that volunteers their services. Most of those people are

not covered by re-issuance of benefits, because we are not going to be negligent in every case, thankfully.

Ms. BROWNLEY. So in terms of the number of the cases that you review, can you give us a sense of how many are——

Mr. MCLENACHEN. We provided——

Ms. BROWNLEY [continuing]. Successful.

Mr. MCLENACHEN. We provided some information in some prehearing data. As far as negligence determinations, if you can refer to that in fiscal year 2013—and this is where we really started trying to clean up this work as I mentioned—having a million dollars we re-issued due to negligence. And, by the way, negligence—for example, by statute, if we do not act on a misuse allegation within 60 days, it is negligence. But also, the statute contains a general negligence provision, which we apply, like I say, very liberally to try to re-issue as much as we can.

Fiscal year 2014, we re-issued approximately $3 million in benefits, and so far this fiscal year, $1.4 million in benefits due to negligence.

Ms. BROWNLEY. Very good.

My time is done, but I look forward to working with you to come up with an appropriate solution.

And I yield back.

Mr. ABRAHAM. All right, ladies and gentlemen, thank you, again, for your testimony on behalf of the subcommittee. Thank you for your time. We certainly realize that time is a rare commodity in this part of the world, so thank you, again.

You are now excused. And we will pause for just a minute to seat the second panel.

[THE PREPARED STATEMENTS OF MR. MCLENACHEN AND MR. ABE APPEAR IN THE APPENDIX]

Mr. ABRAHAM. Thank you for coming again. We have got a vote coming up in just a bit, so in the interest of time, we are going to forgo the spoken testimony. We have the written testimony, and I have actually read it. So we are going to go straight to questions.

STATEMENTS OF ZACHARY HEARN, DEPUTY DIRECTOR FOR CLAIMS, VETERANS AFFAIRS AND REHABILITATION DIVISION, THE AMERICAN LEGION; SAM J. ALBRITTON, III, EXECUTIVE VICE PRESIDENT, REGIONS BANK; AND DOUGLAS J. ROSINSKI, ATTORNEY, VETERANS JUSTICE GROUP, LLC

Mr. ABRAHAM. Mr. Hearn, I am going to start with you, sir. In your written testimony you described a situation in which the VA denied a veteran's request that his wife serve as a fiduciary because VA says his spouse was unable to properly take care of the veteran. Instead, the VA appointed an unknown individual to serve as fiduciary at a cost of up to 4 percent of the veteran's benefit.

Do you think the VA handled that case appropriately?

Mr. HEARN. Thank you, Chairman.

That situation came out of—our experience has been that these issues have been centralized with certain fiduciary hubs. This dealt, in particular, with the Lincoln fiduciary hub.

In this situation, speaking with the service officer, it was kind of silly. The veteran's wife just paid the bills. My wife pays the bills. I mean, so it was just a question. The way it was asked was

that the—who handles the financial responsibilities of the household, and the veteran and the veteran's wife just answered honestly; well, she does.

So things were a little bit misconstrued there. In that situation, obviously, we don't believe that the VA handled that properly.

Mr. ABRAHAM. Okay. And I will stay with you for this next one. In your written testimony you also note that delays in appointing fiduciaries can create serious challenges for veterans and their families. Expound on that a little bit for me.

Mr. HEARN. Okay. And we have a seasoned service officer, and he was explaining the situation where it was a World War II veteran that was in a nursing home. Alzheimer's requires a fiduciary. Thankfully, the veteran's nursing home recognized the situation, and they weren't going to kick the veteran out of the nursing home and lose that care. But there have been situations where there has been a significant concern.

Now, the problem with this is, that the veterans can't get involved—or the veteran's family can't get involved in commingling of funds, and at that point, the family members, do they inherit an additional responsibility that they are biting off more than they can chew? That, really, this should be falling upon—that deal with the retroactive payment. And so that is where that problem lies.

And, actually, that deals with—that situation dealt more with the Salt Lake City fiduciary hub.

Mr. ABRAHAM. All right, sir. What would you tell the VA do to improve those situations?

Mr. HEARN. One of the most common things we have heard, and I know Mr. Stephens is here from Indianapolis. And we heard glowing remarks of that fiduciary hub from service officers from that region of the country.

Other regions of the country, just like the regional officers, you have good ones and you have bad ones. One of the biggest concerns that the American Legion has had is that through the decentralization of programs, theoretically, it would work. Specialization of skills tends to increase efficiency. However, that hasn't proven to be the case in a lot of places such as Lincoln, such as Salt Lake City. And so what we would like to have is our service officers do not have access to those adjudicators, so those people out in the field, at the level that they had in the past, and we would like for them to return those responsibilities back to the local regional offices.

Mr. ABRAHAM. Mr. Albritton, in your written testimony you note that the VA does not currently have clearly defined standards to guide regional hub manager's decisions with respect to determining how many beneficiaries a single trust entity is able to serve. What factors do you think the VA should consider when determining how many beneficiaries a single trust entity should manage?

Mr. ALBRITTON. Well, thank you, Mr. Chairman. It is a pleasure to be here today.

First off, I just want to point out that Regions Bank has been in this business for 25 years serving veterans. We have never had any case of misuse. We enjoy this business serving our veterans, and it is a core policy of our organization.

Mr. ABRAHAM. We appreciate it.

Mr. ALBRITTON. We feel that there should be a designation made between professional third-party fiduciary that has standards with internal controls that has been in this business that has bonding to cover any instances of any misuse, and there should be a distinction in terms of appointing those types of fiduciaries versus fiduciaries that maybe provide services for smaller amount of beneficiaries.

I believe the OIG report pointed out there were several instances in which there were 2 to 50 beneficiaries under a provider, and unfortunately, in those type of situations, there were situations in which illness, someone went on vacation, bills weren't paid, and the process broke down. So there, we would suggest that there is some standards set to govern a professional-type fiduciary, and that type of orientation would be beneficial for the VA.

Mr. ABRAHAM. Okay. Thank you.

Ms. Titus.

Ms. TITUS. Thank you. I want to ask you, Mr. Hearn, what is your general impression of the hub reorganization system. Do you think there is enough oversight? Do you think that having a centralized office and a large area to cover is working out for this program?

Mr. HEARN. Thank you, Ranking Member.

This was something that I specifically addressed with service officers as they came back to me, because this is how important it is. These service officers, it is hard for us to advocate for policy unless we listen and listen intently.

And for the overwhelming majority of them, especially the ones living in the western part of the country, those living in the southwest part of the country, that are dealing with a handful of fiduciary hubs, they are saying it is not working, they are not noticing any sort of measurable uptick. And the quality of service as far as the relationship dealing with the adjudicators is down. And so while you may have picked up a day or two here or a day or two there, everybody that I have spoken to, especially in those parts of the country, are asking for it to be returned back to the regional office.

Ms. TITUS. Is there any difference in terms of the veterans that you serve that you have noticed in different ages, different circumstances of the impressions that they have of this program?

Mr. HEARN. Was that to me?

Ms. TITUS. Yes.

Mr. HEARN. Sorry. I can check on that for you and get back to you, for the record. That wasn't an issue that was brought up, but I will certainly ask that on your behalf.

Ms. TITUS. Thank you.

Mr. HEARN. You are welcome.

Ms. TITUS. Mr. Albritton, I just—I think we heard earlier that 90 percent of the veterans who need this service have a family member or close friend. That would leave 10 percent to either be assigned to a bank or a lawyer or some kind of official professional fiduciary.

I just wondered, how do you generate revenue from—this is part of your business? Is there a service charge? How much does that cut into the benefit that the veteran receives? What kind of serv-

ices do they get that a person doesn't get by having their wife take care of the books? Would you just kind of describe what you do?

Mr. ALBRITTON. Certainly. Thank you.

There is the 10 percent that is available for third-party professional beneficiary, and the standard fee is 4 percent that is paid to that third-party professional fiduciary.

In our instance, our unit is based in Kingsport, Tennessee. The employees that man this unit have, on average, 16 years of experience working with veterans. They have developed a personal relationship with the veterans that they serve. A lot of different examples of where they built homes for our veterans and bought furniture, arranged that furniture, set them up completely, or assisted them in escaping a situation where family members were using the funds intended for the veteran for their own sake.

So we assist hands-on and have personalized service with those veterans. But for that 4 percent, we are looking at—we are looking at—we have internal audits that we perform. We look at investment reviews. We have the monthly account administration reviews of the accounts, and then we have dedicated phone lines that the veterans can call into 24-hour response. And so any or—or all of those accounting and other procedures that would be necessary to show that there is huge amount of accountability that we are able to provide for that 4 percent.

In addition to that, we have investment officers, trust officers, real estate professionals, others that can probate accounts, if there is no one there to probate the estate. So for that 4 percent, there are a lot of services that are performed for the veteran, and they seem to be very appreciative of that.

Ms. TITUS. I would imagine. I know there are caps on a certain number that you can serve. And I think that is to keep it more personal and more closely supervised. Do you have any comment on those caps?

Mr. ALBRITTON. I do. I am not aware that there is any formalized cap. It is interesting, since 2012, we have been frozen out of any new accounts. In 2012, we had 530 accounts, veterans that we worked with. We are down now to 298. We were not told officially any sort of limitation that was in place. We were not pointed to any written policy that was in place, and yet we have been frozen out for 2 years. Our standard right now is one associate in our VA beneficiary hub per 100 veterans. And I think if you look at that and you compare it to the number of field officers that the VA has assigned, which I believe is one in 350, 375, there is a lot of personalized service. In fact, our team goes out and visits with the veterans, they visit with the field service officers.

So there is a lot of one-on-one interaction. But as far as I understand, there is no written policy for a limitation, although it has been quoted to us and we have been frozen out of any new accounts. And we would like to build this business and serve our veterans more.

Ms. TITUS. Thank you, Mr. Chairman.

Mr. ABRAHAM. Thank you, Ms. Titus. Mr. Costello.

Mr. COSTELLO. Thank you, Mr. Chairman. Mr. Rosinski, I have two questions for you. In your written testimony, you describe cases in which the VA inappropriately sought to appoint a fiduciary

for veterans who were able to manage their own affairs without VA's help. Can you elaborate on the standards you think the VA should adopt to ensure that the due process rights of veterans are protected and that the VA's decision to appoint a fiduciary is proper?

Mr. ROSINSKI. Yes, sir. First of all, I have seen actual cases that I have represented people where they have said something about their wife signing the checks or handling their finances, which were placed in the VA fiduciary program, one being a man who suffered from ALS, who really wanted to try explain, but was cut off that he could not write and that it caused him great pain to write his name, so he had his wife sign the checks. And it took us over a year to get him out of the program.

Other cases where lives have been completely overlooked. A 61-year marriage, the spouse was not even considered, and was given to a third-party, which was a bank, which was not as qualified as this gentleman's bank. And that case has been in Veterans court, has been in local court, has been in State court, has been in Federal court. But the issue is the standards, yes. The standards are the State standards for appointing a person of these capacities. I think we are all missing that the statute that Congress passed here is solely limited to the ability to handle their finances. It has nothing to do with the legal definition of incompetency. And what is happening more and more is that if you are adjudicated a high mental health rating, PTSD being the largest one, you are automatically considered incompetent unless you can prove otherwise. And that is coming from many parts of the country through the legal clinic people that I speak with. And it is at an increasing rate. And the second thing is because of those standards, the field examiners are wandering far outside the boundaries of that and demanding, again, my clients and sworn testimony, they are wandering outside of that into personal finances of the family's, using up their time, using up the field examiner's time on areas they should not be in.

Mr. COSTELLO. So to clarify, since we are talking about due process rights, it seems like you are getting into burden of proof here, and you are saying with PTSD, the burden of proof sort of automatically shifts for a VA beneficiary to have to prove they are competent and not——

Mr. ROSINSKI. Absolutely. All it takes to get into the fiduciary program, or be proposed into the program is a check box, yes or no, on a VA medical form, usually DBQ for a mental health condition. There are some that come through that are just checked "yes," no explanation. The proposal comes out. If it says "check," wife handles the funds, they are into the program and then the burden shifts to them to find someone who can convince the VA that they have had sufficient tests or mental health tests or whatever, which varies from office to office, how to get out.

Mr. COSTELLO. I want to get to my next question, but it appears to me that you are saying that we are painting with too broad of a brush.

Mr. ROSINSKI. Absolutely.

Mr. COSTELLO. So what kind of standards do you incorporate in order to sort of make that a little bit more precise?

Mr. ROSINSKI. If VA would define the standards, instead of just a check box by some VA health care manager, one, we could reduce the number that get into the proposal stage, that need field examinations, that get into the program and get the problems caused, even if it is 1 percent or 10 percent. The broad brush brings in a lot of people that don't need to be in the program, don't need to take up the resources of VA.

Mr. COSTELLO. You also indicated you think it is important for VA to conduct criminal background and credit checks when assigning new beneficiaries to known fiduciaries. Is that a good use of VA resources for fiduciaries that have already been approved by VA? And maybe even an added question, why do you think that we should be doing that?

Mr. ROSINSKI. I think it would be a wonderful requirement, because right now the law is the requirement that when a fiduciary is appointed, they are supposed to do a credit check and a criminal background check. Every single case of which I am aware, and I admit I only see very few, they have waived both of those for fiduciaries who already have one case. So the people, most of the people that are being caught have multiple cases. They have never gone back and done a credit check to see if the guy suddenly has bought a million dollar boat, or opened up any other bank accounts. To me, that is exactly what is required every time you give them another case.

Mr. COSTELLO. I can see it on the credit check, because obviously, if there has been a lot of consumer activity incommensurate to the type of salary that one might be drawing. But how about the criminal check?

Mr. ROSINSKI. That one would be my second choice. But also, as we found out, and I was asked information on those previous media reports, that is how they found those people. Some had criminal activity after they were appointed their first or second or third case. And I think it is very relevant that if they know they are going to do checks maybe every fifth one, I don't know, to go back and see if someone who has got in the gate has turned on their beneficiaries.

Mr. COSTELLO. I appreciate your work and your testimony here today.

Mr. ABRAHAM. Ms. Brownley.

Ms. BROWNLEY. Thank you, Mr. Chairman. Mr. Hearn, I just wanted to ask you if—I talked a little bit in the first panel about trying to put forward some legislation that would ensure veterans who are misguided by their fiduciary, that they would indeed—we figure out a way in which to make sure that they are in receipt of their benefits that they earned and deserved. I am sure you have a process by which you go through, but just wanted to get an idea from you if that is something that you feel like the American Legion could support?

Mr. HEARN. Yes, Congresswoman. Thank you. The American Legion would be happy to work with you and your office on this. This is a program, when I was preparing the testimony, it becomes increasingly clear—I mean, it smacks you in the face that these are some of the most vulnerable veterans in our Nation. And we need to ensure that we put these protections in place because we don't

want there to be a situation where it just spirals out of control. So we would be more than thrilled to work with you on trying to get something together.

Ms. BROWNLEY. Thank you for that. And, you know, I was also just sort of curious, I mean, clearly, we have aging population with our veterans. And with that aging population it is going to be more Alzheimer's, other kinds of things where this seems at least we are going to go through, I would imagine, a bubble where we are going to have the growth there. And certainly the numbers that were given by the OIG, if you just look at the fiscal year 2015 quarter one, it looks as though there is a trajectory here that is trend-lined as, you know, could take a real leap, because in other full years, they have already had at least almost the amount of requests in just the first quarter, of allegations, I should say, than—they have more than they did in all of fiscal year 2012.

So it seems as though that trajectory is definitely going in a direction where it is clear that we need to set up some better procedures to make sure that it doesn't happen, but if it does happen, that we treat our veterans and take care of our veterans appropriately. So thank you for that. And I would look forward to working with you. You know, from your vantage point, if there are some particular stories that you have or particular members who have struggled with this, if you could share any of that, I would certainly appreciate it.

Mr. HEARN. This is one of those programs where it is imperative to have a strong relationship with VA. That if a veteran is being injured by his or her fiduciary, it is kind of difficult for the veteran to oftentimes get in contact with the Veterans Service Officer. So we don't hear about it usually firsthand. We have heard anecdotal stories. But as far as—we are almost solely relying upon IG or VA to do the investigation. Unfortunately, a lot of times we don't hear about it until it is later, just because of the reporting structure and everything along those lines. The veterans don't really have necessarily the ability to pick up the phone and call, because if they have a fiduciary, they generally don't have access to the funds. That is the whole purpose of the program.

But getting back to the point of the age, back in 2010 the average male veteran was 64.9 years old. I think in 1967 was the biggest year of the draft during the Vietnam War. You can do the math and figure out where we are the baby boomers, the Vietnam War was no longer your father's war, it was your grandfather's war. And it is something that we definitely need to get hold of before it spirals out of control.

Ms. BROWNLEY. Thank you, sir, and I yield back.

Mr. ABRAHAM. Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman. Mr. Rosinski, in your experience, have background checks been waived, and have felons been able to serve or appointed to serve as fiduciaries? And if so, can you explain?

Mr. ROSINSKI. I am not aware of a felon in any of my clients' cases. I believe, though, that if you look at the people who are in jail, they have multiple dozens, a hundred in some cases, I believe, veterans under their charge, and they stole from most, if not all of them, over a period of years. And that is what has stimulated the

thought to me—and that they were waived. I know that some of those were waived. I don't know if every single one was. But everything when I have seen they have waived it because they are inside the door already, inside the program. They are trusted. So the harm is even worse when someone you trusted turns around not to have that trust. And here we are trying to verify that trust.

Mr. JOHNSON. What do you think about the periodic—what if the VA were to do periodic background checks, especially on situations like you just described where you have hundreds of veterans in a particular fiduciary pool? Maybe you think we should have a policy that requires periodically that they go through a background investigation just to make sure they are still clean?

Mr. ROSINSKI. Yes, sir, I do. And a credit check and a background check is push a button on a computer, as far as I know, and make a request. And the costs are very, very trivial. And certainly a lot easier to do that from a service that provides that type of information than have a field examiner run around a community to see if somebody knows something bad about a person.

Mr. JOHNSON. Right. Okay. For the entire panel, I know it is the VA's current policy to appoint fiduciaries by first considering the individual entity, whether it is a family member or whoever, that the beneficiary requests. In your experience, and I will give each of you a chance to answer, in your experience is this policy widely practiced?

Mr. ALBRITTON. If they are appointing an individual, is it widely practiced that they are appointing an individual first and foremost? Yes, I believe that policy is widely practiced. I think from our standpoint, when you do work down the process and get to where you need a third-party professional fiduciary, you need to be careful about who you appoint, because you could have the same misuse even with that fiduciary as you would possibly an individual misusing funds.

And that is one of the many reasons we believe that a consolidated fiduciary program like what we have seen with HUD in section 8 housing vouchers for a statewide contract, putting together a 2- to 3-year contract so that not only the agency knows that the entity will be there to provide those services, but also the entity that is providing those services has a clear roadmap to know how much they need to staff up, and are committed to that. And so there is that relationship.

But to directly answer your question, yes, I do believe they are, from my perspective, going through that process effectively.

Mr. ROSINSKI. Congressman, in my experience, and maybe it is because of the nature of my cases I have seen, that is not the case. And actually, I would submit also the first choice by statute is the veteran himself. Even if they have been found to, quote-unquote, "be incompetent," the first choice is still the veteran himself unless there is some reason that that would not be to his benefit. That is completely missed. And indeed, my mantra that I have here for the opening statement was, first, do no harm. Most of these veterans that have anybody in their life have successfully navigated—usually they are 70 or 80 or 90 now—a long time without any about VA benefits, or with minimal VA benefits, and they have managed their money and they are not in debt. And they are scraping along.

But VA completely overlooks that and goes down the list. And like I said, my experience has been has overlooked spouses or has specifically excluded spouses or sisters or brothers that have had 20, 30 years of dealing with this veteran through all stages.

And also we are going to see another bubble, because as I said before, it is the TBI people who are now getting sucked into this program. And there is a lot of that coming up where they are being found incompetent because they have some residuals of TBI. And in that case again, they are not looking at how those people have negotiated their finances while suffering from whatever condition they have, and have jumped right into fiduciaries much less qualified than the bank that we have described here. And that is compounding the problem.

Mr. JOHNSON. Right. Sir.

Mr. HEARN. Thank you, Congressman. From what we have seen, if you want to paint with a broad brush, VA is taking the necessary efforts to make sure that the family members are being given an opportunity. The times that we have noticed that fiduciaries have been appointed that fall outside of that realm, you have family members that may not qualify for one reason or the other. And so we understand that that is there as a protection for the veteran. And we want to make sure that that continues. The biggest problem that we have noticed is, there is confusion that goes on when that examination is occurring between, perhaps, an elderly couple that really aren't understanding where the examiner is going with the questions, as was given by the chairman's question about the veteran's wife paid the bills, so the veteran was financially irresponsible, I guess. So with a broad brush, yes, VA is meeting its requirements.

[THE PREPARED STATEMENTS OF MR. HEARN, MR. ALBRITTON, AND MR. ROSINSKI APPEAR IN THE APPENDIX]

Mr. JOHNSON. Okay. Mr. Chairman, I yield back.

Mr. ABRAHAM. Thank you, Mr. Johnson. Again, on behalf of this subcommittee, we thank you so much for being here. Thank you for your patience. The testimony here today has raised serious concerns about how VBA is managing the fiduciary program and serving our most vulnerable veterans. I look forward to working through these issues with the Department, my colleagues on the committee, and the stakeholders who took time to present those concerns today, and those who work to assist veterans who need help managing their financial affairs. Again, thanks to everyone for being here. And as initially noted, the complete written statements of today's witnesses will be entered into the hearing record. I ask unanimous consent that all members have 5 legislative days to revise and extend their remarks and include extraneous material. Hearing no objection, so ordered. I thank the members and the witnesses for their attendance and participation. This hearing is now adjourned.

[Whereupon, at 4:27 p.m., the subcommittee was adjourned.]

APPENDIX

STATEMENT OF DAVID R. McLENACHEN

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to discuss the Department of Veterans Affairs (VA) fiduciary program. I am accompanied by Mr. Michael Stephens, Director, Indianapolis Regional Office, who oversees the activities of VA's Eastern Area Fiduciary Hub.

In the fiduciary program, VA appoints and oversees fiduciaries for Veterans and other beneficiaries who, because of injury, disease, or the infirmities of advanced age, are unable to manage their VA benefits. In 2014, VA protected more than 172,800 Veterans and their survivors, who were in receipt of VA benefits, which is a 41 percent increase in the number of beneficiaries overseen from 2011. Approximately 138,900 fiduciaries provided services to these beneficiaries who received annual VA benefit payments of almost $2.9 billion. The number of beneficiaries in the program will continue to grow as VA decides more benefit claims and the beneficiary population ages.

VA is working hard to implement fiduciary program improvements to enhance service delivery and protection of beneficiaries. These efforts include implementing operational efficiencies, clarifying and strengthening policies and procedures, modernizing information technology systems, and providing training to fiduciary program staff and fiduciaries. VA appreciates the Committee's oversight and interest in improving the fiduciary program, and welcomes the opportunity to highlight recent program enhancements, as set out in detail below.

Organizational Changes

VA has consistently noted the need for heightened awareness regarding the Department's most vulnerable beneficiaries, who rely on the services of VA-appointed fiduciaries to properly manage their VA benefits. Recognizing the need for program reforms and additional oversight, VA reorganized to create its Pension and Fiduciary (P&F) Service in 2011. P&F Service focuses on the unique needs of these beneficiaries, more than 50 percent of whom are also in VA's needs-based pension program, and on strengthening oversight of VA-appointed fiduciaries. This reorganization has allowed VA to increase the staff responsible for fiduciary program policies and procedures, quality, training, and site visits.

In March 2012, VA consolidated the management of its fiduciary activities at six fiduciary hubs nationwide. VA moved all fiduciary workload from individual VA Regional Offices (ROs) to the hubs to improve controls and consistency in processing the work. These hubs are located at the Salt Lake City, Lincoln, Milwaukee, Indianapolis, Louisville, and Columbia VA ROs. Under this hub concept, fiduciary hub managers deploy their field examination resources according to the location of beneficiaries within the hub and without regard to state borders or VA regional office jurisdiction, while centralizing all other fiduciary functions at the hub site.

In August 2014, VA established claims processing teams in each of the fiduciary hubs to improve the internal procedures for delivering benefits to individuals who require the assistance of a fiduciary. These teams produce beneficiaries' final ratings of incompetency, initiate monthly benefit payments to fiduciaries on behalf of beneficiaries, and release beneficiaries' retroactive benefits to their fiduciaries. The new process eliminates the hand offs between VA's Pension Management Centers and Veterans Service Centers and the fiduciary hubs and ensures more timely release of benefits to fiduciaries.

Strengthening Oversight Through Policy and Procedures

In January 2014, VA published proposed fiduciary regulations that would prescribe new rules for all aspects of the fiduciary program's administration. This is the first major update of fiduciary regulations since 1975. VA rewrote the proposed regulations in easier to understand language and proposed policy changes that would modernize VA's oversight of beneficiaries and fiduciaries. The proposed regulations would also incorporate statutory changes and court decisions that have had an impact on the program over the past decade. Among other things, the new regulations would prescribe beneficiary rights and fiduciary responsibilities, and define VA's oversight role in ensuring that fiduciaries properly manage VA benefits for the beneficiaries they serve. We anticipate publishing the final regulations in 2015.

Effective in October 2014, VA changed its policies and procedures to allow the fiduciary hubs to expand the use of streamlined oversight for certain less vulnerable beneficiaries. In some cases, the beneficiary's well-being is assessed by other means, including by the beneficiary's spouse, through programs approved by the Veterans Health Administration, or by the licensed health care facility where the beneficiary resides. For example, a beneficiary in a Medicaid-eligible nursing home is in a pro-

tected environment monitored by a government agency and does not require duplicative oversight by VA. This new policy provides more frequent oversight through other means such as telephone calls or correspondence in order to provide less intrusive oversight of these beneficiaries, when appropriate. It also allows VA to shift resources to improving its oversight of its most severely disabled beneficiaries.

Strengthening Oversight Through Technology

In May 2014, VA deployed a new information technology system for the fiduciary program, called the Beneficiary Fiduciary Field System (BFFS). Use of the previous antiquated system was discontinued and all useful data was migrated to BFFS. VA designed the system to improve workload management, to deploy streamlined processing tools, and to enhance beneficiary and fiduciary oversight. In addition, BFFS provides real time reporting capabilities; robust and meaningful data capture to identify trends and conduct analysis; custom workflows designed to automatically and effectively assign fiduciary work; and audit tracking to improve user monitoring and data integrity. BFFS also provides improved oversight of fiduciaries and affords more effective safeguards against misuse of benefits through improved fiduciary misuse reporting and monitoring.

In January 2015, VA deployed its electronic Knowledge Management (KM) system to all fiduciary program staff. KM replaced the fiduciary intranet site and is the official source for all fiduciary guidance, including the Fiduciary Program Manual, regulations, statutes, and other program guidance. This innovative tool, which an individual employee can tailor to his or her personal needs and can collect employee feedback for Pension and Fiduciary Service's consideration, is the single source of all fiduciary reference material in an easily searchable format.

In 2012, VA established phone units in the hubs to respond to direct inquiries from beneficiaries and fiduciaries and ensure consistent service delivery. The fiduciary hubs have a toll-free number dedicated to answering fiduciary program inquiries. VA is in the process of modernizing the current telephone system to improve call routing and reporting capabilities and allow for the recording of telephone calls for quality monitoring.

Strengthening Oversight Through People

VA has improved its internal training programs and delivery of fiduciary-related information to external stakeholders. First, VA designed a National Training Curriculum to promote standardized practices for its field fiduciary program personnel. Since 2013, VA has provided an 80-hour training course to 217 fiduciary field examiners who had less than 12-months of experience. In 2014, VA deployed an online self-study training course for more experienced field examiners and will train over 160 journey-level field examiners using this course in 2015. In addition, VA developed a web-based misuse training course designed for the specific roles of fiduciary field personnel. The misuse training is mandatory for all fiduciary staff and provides the knowledge and tools necessary to properly address misuse allegations, conduct investigations, and finalize misuse determinations. In addition to these centralized training efforts, onsite training is provided to field fiduciary program personnel on hub-specific topics, such as misuse procedures, BFFS tools and reports, and error trends discovered during quality reviews or site visits.

Second, the Veterans Benefits Administration (VBA) has developed a standardized computer-based training module for fiduciaries that VA hosts on its internet site. VA also published A Guide for VA Fiduciaries, which is a reference booklet for fiduciaries that helps them understand their responsibilities and perform their duties. The guide book is available in hard copy and electronically on the VA fiduciary program internet site at *http://www.benefits.va.gov/fiduciary/index.asp*. As an additional tool for fiduciaries, VA is developing an on-line accounting assistant to aid fiduciaries in completing their accounting forms. All of these products aim to educate fiduciaries on beneficiary rights, fiduciary responsibilities, management of funds, and accounting and audit procedures.

Currently, VBA is conducting a Work Measurement Study (WMS) of all fiduciary work tasks. This study is under contract and should be completed in June 2015. The fiduciary program has experienced tremendous growth and significant revisions to policies and procedures, and the WMS is capturing work performance in this new fiduciary program environment. With the information provided through the WMS, VA will be able to more accurately define and quantify the time involved in completing fiduciary program work and will be able to refine fiduciary program resource requirements.

Fiduciary Appointment and Oversight

Under current policy, VA appoints fiduciaries by first considering the individual or entity that the beneficiary requests. If the beneficiary does not state a preference,

VA considers the beneficiary's family members, friends, and other acquaintances who are willing to serve without charging a fee. Absent such an appointment, VA will appoint an individual or entity that will provide fiduciary services for a fee. VA's policy is to select the least restrictive and most effective method of payment for a beneficiary. Currently, about 80 percent of the beneficiaries in the program have a one-to-one relationship with their fiduciary and approximately 90 percent of fiduciaries perform their duties without cost to the beneficiary.

As required by 38 United States Code (U.S.C.) § 5507, VA conducts an investigation prior to appointing a person as a fiduciary for a beneficiary. As part of that investigation, VA has a face-to-face meeting with the proposed fiduciary and obtains a copy of a credit report regarding the proposed fiduciary. VA also checks the proposed fiduciary's criminal history, determines whether appointment of the proposed fiduciary would be in the interest of the beneficiary, and requires the proposed fiduciary to obtain a surety bond if necessary. Fiduciaries must enter into an agreement with VA regarding their responsibilities, such as meeting the beneficiary's needs, maintaining a separate financial institution account for the beneficiary, accounting for funds under management, and protecting any reserved funds. VA ensures that an individual or entity that serves as a fiduciary meets each of these qualification requirements.

It is VA's obligation to oversee the fiduciaries it appoints to manage VA benefits for beneficiaries. VA conducts this oversight through visits with the beneficiary and fiduciary, by auditing the fiduciary's annual accounting and supporting financial documentation, by conducting on-site reviews, by verifying surety bonds, and by investigating misuse allegations.

VA confirms that the fiduciary is fulfilling his or her obligation to determine and meet the needs of the beneficiary through periodic, follow up field examinations. During the follow up field examination, VA interviews the beneficiary and fiduciary, and either recommends continuing the appointment or replacing the fiduciary. VA may perform these follow up field examinations through face-to-face contact, or a telephone call or letter. VA schedules the first follow up field examination one year after the initial appointment field examination and then schedules subsequent follow up on one- to three-year intervals based on the beneficiary's situation. In addition, VA conducts an unscheduled field exam when it identifies a problem in the beneficiary-fiduciary relationship, receives a public report of concern, or the fiduciary fails to respond or inappropriately responds to a VA telephone or correspondence inquiry.

Under 38 U.S.C. § 5509(a), Congress authorized VA to require fiduciaries to file reports or accountings regarding the management of funds by the fiduciary. Currently, VA requires annual accountings when: the fiduciary is also the beneficiary's court-appointed guardian; VA has authorized a fee; or, the funds under management by the fiduciary for the beneficiary exceed $10,000. VA requires fiduciaries to provide detailed financial documents, including bank records, with their annual accountings. Collection of this additional information allows VA to verify reported expenditures and identify potential misuse of funds for further investigation. This requirement also serves as a misuse deterrent for fiduciaries. To ensure transparency for beneficiaries, VA changed its accounting procedures to include instructing fiduciaries to provide a copy of any VA-approved accounting to the beneficiary. VA audits approximately 35,000 accountings each year.

Congress also authorized VA to conduct on-site reviews of fiduciaries who handle 20 or more beneficiaries. In these cases, VA visits the fiduciary's place of business and inspects the fiduciary's activities on behalf of VA beneficiaries. There are currently 264 fiduciaries that meet the statutory requirements for on-site reviews. VA schedules these reviews once every three years; however, VA may conduct an unscheduled on-site review as part of a misuse investigation, in response to a complaint, or upon failure of the fiduciary to submit a timely accounting or appropriately respond to VA contact.

Management and Oversight of Fiduciary Hub Managers

Each fiduciary hub manager reports to and has his or her performance evaluated by the Director of the VA Regional Office where the hub is located. Fiduciary hub managers are responsible for meeting fiduciary program performance measures, to include the timely completion of initial appointment field examinations, follow up field examinations, fiduciary accountings, and the misuse protocol, to include investigating misuse allegations and making misuse determinations. In addition, VA conducts recurring quality reviews of fiduciary field work to measure the accuracy of the work and identify error trends. VA analyzes these trends to identify training gaps, clarify policies and procedures, and modify the information technology requirements for the fiduciary program.

In December 2014, VA revised its site survey protocol to ensure that Pension and Fiduciary Service's site visit teams conduct comprehensive inspections of fiduciary hub compliance with program policies and procedures. During a site visit, the assigned team reviews the hub's organizational structure, workload management plans, and performance data to determine whether the hub is appropriately using its resources. Prior to the visit and while on-site, the site visit team reviews processing operations and station controls for data integrity, quality and training. During this fiscal year, VA has conducted site visits at two fiduciary hubs.

Fiduciary Misuse of VA Funds

VA has implemented several procedures to enhance its prevention and identification of misuse of beneficiary funds. First, as noted above, VA requires fiduciaries to submit detailed financial documents, including bank records, with their annual accountings. This policy allows VA to detect inappropriate movement of funds for the purpose of concealing misuse. VA also centralized allegations of misuse within its National Call Centers, developed mandatory misuse training for all fiduciary personnel, and modified its new information technology system to add internal controls for the misuse work process and reporting of misuse data and protocol timeliness. VA is also developing procedures for expanding the quality assurance program for fiduciary work to include the tasks associated with investigating fiduciary misuse of beneficiary funds.

After fiduciary hub consolidation in 2012, VA began an effort to identify and complete all pending misuse matters, including final misuse determinations, debt establishment, and benefit reissuance. Although misuse of benefits is rare in the fiduciary program, approximately one-tenth of one percent of beneficiaries are the victims of fiduciary misuse. VA recognizes that fiduciary misuse of benefits can cause financial hardship for beneficiaries.

VA is aggressively pursuing recoupment of VA benefits in all cases of misuse, particularly in cases where VA is not authorized to reissue benefits. In November 2013, VA implemented formal procedures for creating a debt against a fiduciary who misused VA benefits, for initiating debt collection activities, and for referring debts to the U.S. Department of the Treasury for offset against other Federal payments, including Federal tax return refunds. If a bond was in place when a fiduciary misused a beneficiary's benefits, the fiduciary hub manager will attempt to recoup benefits from the surety company.

Under 38 U.S.C. § 6107, VA must reissue benefits to victims of fiduciary misuse when the fiduciary is not an individual, or when the fiduciary is an individual who manages benefits for 10 or more beneficiaries. In all other cases of fiduciary misuse, VA's authority to reissue benefits is limited to cases in which VA was negligent in its appointment or oversight of the fiduciary. This law leaves many beneficiaries unprotected because VA-appointed fiduciaries are generally family members, friends, or care providers who have a one-to-one relationship with the beneficiary they serve. It is also arbitrary because VA must treat two beneficiaries, who have the same disability and the same inability to manage their financial affairs differently depending upon the fiduciary that it appoints.

Under current law, if one beneficiary has an individual fiduciary who manages benefits for nine other beneficiaries, that beneficiary has the added protection of VA's reissuance of benefits upon a VA finding of fiduciary misuse. If the other beneficiary has a fiduciary who manages benefits for eight other beneficiaries, that beneficiary has the added protection of reissuance of benefits only if VA determines that it was negligent. Absent negligence in these cases, the Government's ability to make the beneficiary whole is limited to court-ordered restitution in a criminal or civil action or recovery under a surety bond that the fiduciary purchased. To address this problem, VA submitted a legislative proposal during the 2016 budget process that would authorize VA to automatically reissue misused benefits in all cases of fiduciary misuse.

CHALLENGES

Despite VA's successful implementation of many program enhancements over the past few years, challenges remain. As noted previously, the VA's fiduciary program is experiencing extraordinary growth. The program's current staffing levels are inadequate to further strengthen oversight of beneficiaries, resulting in an increasing workload of initial appointment and follow up field examinations. In 2014, fiduciary program personnel conducted almost 85,000 field examinations, however, almost 42,000 field examinations remained pending at the end of the fiscal year. From 2011 to 2014, the field employee allocation increased 22 percent (703 to 855 employees); however, staffing has not kept pace with program growth. VA completed 19 percent more field examinations in 2014 than in 2012, but the number of field examinations received increased by 32 percent during the same period. Even though fiduciary

hubs are completing more work through increased staffing and improved efficiency, the inventory of pending field examinations continues to grow.

VA implemented a fiduciary program workload management plan at four fiduciary hubs to improve the timeliness of initial appointment field examinations. The national average days pending for an initial appointment field examination decreased to 33 days in April 2015, down from 142 days in October 2012. VA's emphasis on average days pending prioritizes the oldest pending initial appointment field examination. As a result, VA improved the number of initial appointments pending less than 45 days from 34 percent in September 2012, to 83 percent in April 2015. While VA successfully reduced the length of time a beneficiary must wait for the appointment of a fiduciary, the average days pending for follow up field examinations increased to 244 days in April 2015, up from 199 days in October 2012. If VBA's FY 2016 budget request isn't provided, beneficiary protection will be compromised by increased intervals between visits.

VA is grateful for funding in 2015 to hire 50 fiduciary employees and has requested funding in the 2016 budget process to hire another 85 fiduciary employees.

Conclusion

In conclusion, I want to affirm VA's commitment to serve and protect our most vulnerable population of Veterans and other beneficiaries. VA has significantly improved the fiduciary program to ensure that these beneficiaries receive the benefits and services they have earned. The interest in our program expressed by this Committee reflects the importance of this effort. I assure you that VA is committed to taking all steps necessary to ensure we fulfill our obligation to protect the beneficiaries in this program.

Mr. Chairman, this concludes my prepared remarks. I would be happy to address any questions or comments regarding my testimony today.

STATEMENT OF GARY K. ABE

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to discuss the work of the Office of Inspector General (OIG) related to the Department of Veterans Affairs (VA) Fiduciary Program and how the Veterans Benefits Administration (VBA) can better protect veterans, who, because of injury, disease, or the infirmities of age, are in need of assistance managing their financial affairs. I am accompanied today by Mr. Quentin Aucoin, Assistant Inspector General for Investigations, and Mr. Timothy Crowe, Director, OIG Bay Pines Audit Operations Division.

Background

VBA can determine a veteran or other beneficiary is unable to manage his or her financial affairs based on receipt of medical documentation or if a court of competent jurisdiction has already made this determination. VA will then appoint a fiduciary, either an individual or entity, and with the authority contained in Section 5502(a)(1) of Title 38, United States Code, Payments to and Supervision of Fiduciaries, will disburse VA benefits on behalf of the beneficiary for the use and benefit of the beneficiary.

Fiduciaries appointed by VBA may be the spouse of a veteran; the chief officer of an institution in which a veteran is receiving care; a legal custodian who is the person or entity caring for the beneficiary and his or her estate; or another responsible person. Payments may also be made to a state court-appointed fiduciary, to a fiduciary whose duties and authority are established by Federal statute, or by means of supervised direct payment to an adult beneficiary. In all cases, VBA maintains oversight responsibility to ensure that the VA-derived income and estates of incompetent beneficiaries are used solely for the care, support, welfare, and needs of those beneficiaries. The Fiduciary Program reported overseeing more than 147,000 beneficiaries who received approximately $2.6 billion in VA benefit payments in fiscal year (FY) 2013, which represents the most recent program data reported by VBA. In response to a recent OIG report, VBA stated that the program supervised almost 173,000 beneficiaries in FY 2014.

Since our 2010 report, Audit of the Fiduciary Program's Effectiveness in Addressing Potential Misuse of Beneficiary Funds (March 31, 2010), VBA has made significant changes to the structure of the Fiduciary Program. In April 2011, VBA established the Pension and Fiduciary Service, in part, to strengthen oversight of VA-appointed fiduciaries. In March 2012, VBA completed consolidation of Fiduciary Program operations from 56 VA Regional Offices (VAROs) to 6 Fiduciary Hubs and the Fiduciary Activity at the VARO in Manila, Philippines. VA's FY 2014 Budget Submission stated the consolidation was intended to improve operational efficiencies. The Hubs are located in Indianapolis, Indiana; Louisville, Kentucky; Lincoln, Nebraska; Columbia, South Carolina; Salt Lake City, Utah; and Milwaukee, Wisconsin.

OIG Oversight of the Fiduciary Program

The OIG has an aggressive and comprehensive program in place to provide oversight of VBA's Fiduciary Program through a combination of audits, recurring inspections of VARO operations, review of allegations received by the OIG Hotline, and criminal investigations. OIG audit and evaluation reports, Hotline reviews, and inspection reports conducted by our Benefits Inspection Division since FY 2009 have consistently identified the vulnerability of VA-derived beneficiary estates to fraud, as well as opportunities for VBA to provide more consistent and effective oversight of the Fiduciary Program.

Investigative Work

The OIG Office of Investigations through its criminal investigation activities, aggressively combats fiduciary fraud by pursing prosecution and court-ordered restitution against those individuals diverting funds intended for VA beneficiaries and highlights Fiduciary Program vulnerabilities that are exploited by unscrupulous individuals at the expense of VA beneficiaries. From April 1, 2010, to March 31, 2015, the OIG conducted 216 investigations involving fiduciary fraud and arrested 94 fiduciaries and/or associates. For example:

- In Houston, Texas, an attorney and his wife, who served as his legal assistant, were sentenced to 46 months' incarceration, 3 years' supervised release, and ordered to pay restitution of $2,352,107 to VA and $282,112 to the Internal Revenue Service. The OIG investigation revealed that the attorney, who served as a court-appointed guardian and Federal fiduciary for 54 veterans, and his wife conspired to steal $2,352,107 from veterans' fiduciary bank accounts and failed to report the stolen income on their Federal tax returns. Prior to becoming a guardian for veteran clients, the attorney was employed by the VA's Regional Counsel in Houston, Texas. His duties were consistent with duties now performed by VBA Field Examiners. After a reorganization of VA legal services, he was assigned to the Fiduciary Section of VARO Houston. He retired from his position and opened a private law practice.
- In Memphis, Tennessee, a former VBA Field Examiner and a former court-appointed fiduciary were sentenced to 3 and 2 years in prison, respectively. They were also ordered to pay $889,626.87 in restitution to VA. An OIG and FBI investigation revealed that from 1999 until October 2008, both individuals conspired to alter annual accountings to conceal the theft of $889,626.87 from 13 veterans. The investigation also revealed that the former Field Examiner

suggested to the fiduciary that they take money from the guardianship accounts.

- In Tuskegee, Alabama, an administrative assistant for an attorney appointed as a fiduciary for several VA beneficiaries was sentenced to imprisonment for 33 months followed by 60 months of supervised probation. She was ordered to make restitution in the amount of $681,965. The OIG investigation revealed that the administrative assistant devised a scheme to embezzle $681,965 from 25 beneficiary accounts.
- In Lexington, Kentucky, an attorney serving as a VA fiduciary for a VA beneficiary was sentenced to 41 months' imprisonment, 36 months' supervised release, ordered to pay $460,679 in restitution to VA, as well as $176,246 restitution to the Social Security Administration. The investigation revealed that the fiduciary embezzled VA and Social Security benefits from a veteran. Following the conviction in this case, in April 2013, the OIG issued a management implication notice to the former VBA Deputy Undersecretary for Field Operations, detailing Fiduciary Program weaknesses exploited by this defendant.
- In Newfields, New Hampshire, the daughter of an incompetent veteran serving as the fiduciary was sentenced to 366 days' incarceration, followed by 24 months' supervised release. Prior to sentencing the defendant paid full restitution to VA in the amount of $251,534. The OIG investigation revealed that the daughter admitted to taking her father's VA benefits and falsifying the annual accountings and supporting bank records to conceal her illegal activities from VA.
- In Pearl, Mississippi, a former local prosecutor was sentenced to 120 months of incarceration followed by 60 months of supervised probation. The sentence also included a restitution order of $198,669. The OIG investigation revealed that while serving as the appointed fiduciary for five veterans, the fiduciary embezzled funds from accounts under his care as legal custodian.
- In Mansfield, Massachusetts, an attorney who was the VA-appointed fiduciary for his disabled veteran brother-in-law was sentenced to 6 months' home confinement, 5 years of supervised probation, and ordered to pay restitution to VA in the amount of $137,493. The OIG investigation revealed that the fiduciary embezzled the VA funds from his disabled brother-in-law while serving as a VA-appointed fiduciary.
- In Manchester, New Hampshire, the daughter who was the VA-appointed fiduciary of a disabled veteran was sentenced to 18 months' imprisonment and 24 months' supervised probation. She was also ordered to pay restitution of $221,905 to VA and $22,768 to the Social Security Administration. The investigation revealed that the fiduciary depleted her father's savings and continued diverting VA benefit payments for her own personal use.
- In Greenville, Mississippi, a former VA-appointed fiduciary was sentenced to 5 years' supervised probation and ordered to pay VA restitution of $30,240 after pleading guilty to embezzlement. An OIG investigation revealed that the fiduciary failed to notify VA that a widow beneficiary had died. The fiduciary subsequently received and negotiated VA benefit checks issued after the beneficiary's death and used the funds for personal expenses.

Audit Work

The OIG last testified about the Fiduciary Program in April 2010 shortly after releasing our audit report, Audit of the Fiduciary Program's Effectiveness in Addressing Potential Misuse of Beneficiary Funds. In that report, we concluded the Fiduciary Program was inconsistent in taking timely actions to ensure VA-derived funds and estates of beneficiaries determined to be unable to manage their financial affairs were used solely for the care, support, welfare, and needs of those beneficiaries or adequately protected from diversion or misuse. Specifically, the Fiduciary Program was not consistently:

- Taking effective action to obtain the fiduciary's written accounting of his/her management of a beneficiary's income and estate which had become seriously delinquent
- Verifying questionable beneficiary expenditures reported by fiduciaries
- Replacing fiduciaries when appropriate
- Reviewing and investigating allegations of misuse of beneficiary funds by fiduciaries

We concluded that this occurred because the Fiduciary Program lacked the elements of an effective management infrastructure to guide the program. Specifically, we determined that the program's case management system had severe functional and data limitations that negatively affected management's ability to support program operations. The program also lacked a staffing and workload model to guide

resource allocation decisions and other elements necessary to effectively monitor the program. In response to our report, the then Acting Under Secretary for Benefits indicated that VBA would undertake a series of measures in response to our report's findings.

VBA took steps to address our concerns to improve Fiduciary Program operations. For example, in 2014, VBA replaced the program's inadequate case management system, implemented policy requiring receipts for some unbudgeted and budgeted expenses meeting specified thresholds, now includes misuse allegations processing data in the Fiduciary Program section of VBA's Annual Benefits Report, developed a program staffing model for the Fiduciary Hubs, and launched a web-based portal providing resources to assist fiduciaries. However, work the OIG conducted recently concerning some of the Fiduciary Program's most important functions indicates that VBA still faces challenges in meeting its mission of protecting some of VA's most vulnerable constituencies.

Review of Alleged Mismanagement at VBA's Eastern Area Fiduciary Hub

In May 2013, the OIG Hotline received allegations of mismanagement at the Eastern Area Fiduciary Hub (EAFH) located in Indianapolis, Indiana. This Hub is responsible for all beneficiaries in VBA's Eastern Area, which spans 14 states and encompasses fiduciary activities of 16 VA Regional Offices. We substantiated the three allegations in our report, Review of Alleged Mismanagement at VBA's Eastern Area Fiduciary Hub (May 28, 2014), which concerned processing allegations of misuse of beneficiary funds, processing in-coming correspondence, and completing field examinations timely.

Hub staff did not timely complete various steps required by VBA policy after receipt of allegations of misuse of beneficiary funds. We analyzed 214 merit reviews and 23 investigations to determine compliance with VBA timeliness standards and policies. Additionally, in those cases where VBA determined that misuse of beneficiary funds had occurred, we followed up with EAFH and Pension and Fiduciary Service to determine whether misused funds had been repaid by the fiduciary and reissued to the beneficiary. We found the following:

- The Hub did not timely review and investigate misuse of beneficiary fund allegations. Of the 214 merit reviews of allegations of fiduciary misuse of funds initiated by the Hub, 190 (89 percent) were not completed within 14 days of receipt, as required by program policy. It took Hub staff an average of 162 days to review the 190 allegations for merit, which includes 87 reviews that were not completed as of July 2013, the time we completed onsite field work at the Hub. We also found the Hub EAFH had not processed and completed 17 of 23 fiduciary misuse of funds investigations (74 percent) within 45 days of the completed merit review, as required. The average time to complete the 17 investigations was 174 days, which included 5 investigations that were not completed as of July 2013.
- We also determined the Hub made 12 determinations concluding fiduciaries misused approximately $944,000 of beneficiary funds. However, required actions in response to identifying misuse of funds, such as replacing the fiduciary or requesting repayment from former fiduciaries, were not completed or completed timely by EAFH. For example, it took the Hub an average of 98 days from the date the misuse allegation was received to replace 5 of the 12 fiduciaries, ranging from 72–175 days. For the remaining seven determinations, three fiduciaries were replaced timely, three beneficiaries passed away prior to the Hub receiving the allegation, and one was an allegation against a previously replaced fiduciary.
- Internal reviews by Pension and Fiduciary Service staff to determine if VBA was negligent in its oversight of the fiduciaries in instances where misuse of funds occurred were not consistently conducted as required.

We also substantiated the allegation that the Hub had a large backlog of pending field examinations by identifying more than 11,000 (69 percent) of 16,000 pending field examinations that exceeded VBA timeliness standards. Field examinations, which consist of in-person visits by program staff, are a critical tool for VBA to assess the competency and welfare of beneficiaries who are unable to manage their financial affairs. Initial Appointment (IA) field examinations assess the competency and welfare of the beneficiary and, if needed, the appointment of a fiduciary to receive VA benefits. Subsequent to an IA field examination, program staff conduct Fiduciary-Beneficiary

Fiduciary-Beneficiary field examinations to periodically reassess the welfare of the beneficiary and the continued suitability of the fiduciary. As a result of a large backlog of field examinations not being completed timely by VBA, the general health and well-being of beneficiaries are placed at increased and unnecessary risk.

We also identified more than 3,200 pieces of mail that had yet to be processed and exceeded EAFH's timeliness standards, some of which were time-critical. VBA policy requires Fiduciary Program staff to review all correspondence in conjunction with the fiduciary folder and provide a response, if necessary, generally within 10 workdays of receipt. The Hub had a local goal of processing incoming mail within 5 days of receipt. Delays in processing the 3,200 pieces of mail ranged from 11 to 486 workdays, with an average delay of 30 workdays. Mail not processed timely included allegations of misuse of beneficiary funds, competency restoration requests, and retroactive payment requests. By not effectively managing incoming mail, those receiving VA benefits may be affected.

In response to our report, VBA stated that the conditions we identified concerning processing allegations of misuse, field examination backlogs, and unprocessed incoming correspondence occurred primarily due to an increased workload and insufficient staff when consolidation of VA regional office Fiduciary Program operations into the EAFH were completed.

Audit of the Fiduciary Program's Management of Field Examinations

Following the results of our work at the Indianapolis Fiduciary Hub, we conducted work nationwide concerning the Fiduciary Program's field examination function. We issued our final report, Audit of the Fiduciary Program's Management of Field Examinations on June 1, 2015. Our work was conducted at four of the remaining five Fiduciary Hubs: Columbia, South Carolina; Salt Lake City, Utah; Louisville, Kentucky; and Lincoln, Nebraska.

We concluded that VBA faces a large and growing backlog of field examinations. Specifically, we determined VBA did not meet timeliness standards for about 45,500 (42 percent) of approximately 109,000 pending and completed field examinations during calendar year (CY) 2013, of which 18,100 (40 percent) were still pending and not completed as of December 31, 2014. We followed-up by examining reported program performance for the first 9 months of CY 2014 and determined that field examinations not completed and already exceeding timeliness standards increased approximately 15 percent from about 19,000 in January 2014 to approximately 21,900 in September 2014.

This occurred because Field Examiner staffing did not keep pace with the growth in the beneficiary population, VBA did not staff the Hubs according to their staffing plan developed in conjunction with Fiduciary Program consolidation to the six Hubs, and did not use all relevant performance measures for the field examination function. The 2011 VBA staffing plan set a target of 1 Field Examiner for every 325 beneficiaries. However, our analysis of VBA staffing reports for the period of January 2013 through December 2013 showed the Fiduciary Program had an average of 1 Field Examiner for every 363 beneficiaries. The situation did not improve during the first 9 months of 2014. As of September 30, 2014, VBA employed 1 Field Examiner for every 386 beneficiaries supervised under the Fiduciary Program. While Field Examiner staffing has generally increased, the Fiduciary Program did not meet its staffing goal for Field Examiners in part due to the substantial growth in the beneficiary population. Specifically, although the beneficiary population increased by 10 percent from January 2013 through December 2013, the number of field examiners increased only 2 percent during this same period.

As a result, untimely field examinations placed approximately $360.7 million in benefit payments and $487.6 million in estate values at increased risk. In addition, we determined that VBA did not schedule required field examinations for a projected 1,800 beneficiaries in CY 2013. Lapses in field examination scheduling occurred because of inadequate management oversight to ensure required field examinations were scheduled. As a result, we project the Fiduciary Program did not schedule field examinations for about 1,800 beneficiaries, placing beneficiaries' well-being and approximately $36.1 million in benefit payments at increased risk in CY 2013.

We recommended the Under Secretary for Benefits implement a plan to meet timeliness standards, expand program performance measures, improve controls to identify unscheduled field examinations and enhance case management system functionality. The Under Secretary concurred with our recommendations and provided acceptable plans to complete all corrective actions.

Audit of the Fiduciary Program's Processing of Misuse Allegations

We recently provided VBA with a draft report on the extent to which VBA protects the VA-derived income and estates of beneficiaries who are unable to manage their financial affairs when misuse of beneficiary funds is alleged. This work was a direct result of our work at the Hub located at Indianapolis, Indiana, and our follow-up work in the management of field examinations.

Section 6106(b) of Title 38, United States Code, Misuse of Benefits by Fiduciaries, defines misuse as any case where a fiduciary receives payment under the laws administered by the VA Secretary, for the use and benefit of a beneficiary and uses any part of the payment for other than for the use and benefit of a beneficiary or the beneficiary's dependents. VBA is made aware of allegations or indications of misuse of funds by fiduciaries through multiple sources, such as the beneficiaries themselves, third parties, or VBA employees while performing duties. Once misuse is alleged or indicators of misuse exist, program policy requires staff take specific actions to review, investigate, and determine misuse within specified timeliness standards.

If VBA does not timely complete misuse actions, beneficiary funds are at increased risk of misuse. We projected VBA did not timely complete required misuse actions to ensure the protection of 758 beneficiaries' Vader estates valued at about $45.2 million. VBA also did not restore approximately $2.1 million of misused funds to beneficiaries. Additionally, unless VBA improves the timeliness of actions in response to allegations and indications of misuse, we project VBA may not adequately

protect annual benefit payments to beneficiaries valued at approximately $16 million, or $80 million during Cyst 2014 through 2018.

Conclusion

Despite some of the significant changes to structure, oversight and operation of the Fiduciary Program since our 2010 audit, significant challenges remain. The OIG's most recent work demonstrates that conditions that put beneficiaries and their VA-derived estates at unnecessary risk persist. Past and recent cases have uncovered unscrupulous fiduciaries who have misappropriated tens of thousands to even millions of dollars from the accounts of unsuspecting VA beneficiaries under the supervision of the Fiduciary Program. This type of theft can only be stopped by aggressive and consistent oversight by the Fiduciary Program.

As the veteran population ages, more VA beneficiaries will likely require the appointment of a fiduciary to assist them in managing the monetary benefits provided by VA. In order to meet these challenges, VBA needs to revisit its staffing model and resource allocation decisions for the Fiduciary Program, as well as the programs' work processes and tools. Without more effective controls, including more consistently and timely completion of some of the Program's most important functions, unacceptable risks to the general well-being and VA benefits of some of VA's most vulnerable beneficiaries will remain.

Mr. Chairman, this concludes my statement and we would be happy to answer any questions that you or Members of the Committee may have.

STATEMENT OF ZACHARY HEARN

Chairman Abraham, Ranking Member Titus, and distinguished members of the subcommittee, on behalf of National Commander, Michael Helm, and the more than 2 million members of The American Legion, we thank you for the opportunity to testify regarding The American Legion's positions on the Department of Veterans Affairs Fiduciary programs.

An unfortunate aspect of military service is that some service members and veterans develop mental health illnesses, and in some cases physical injuries that can diminish their capacity to manage financial affairs on a day to day basis. Whether a veteran suffers from posttraumatic stress disorder (PTSD) or develops depression secondarily to a previously service connected conditions, the nature of these disorders can impact multiple areas of their, and their family's daily life.

With severe conditions such as TBI or PTSD, veterans can struggle, either temporarily or over a long term, to perform certain tasks associated with their personal finances, and sometimes suffer diminished mental health capacity as well. Due to this diminished capacity, veterans may be deemed incompetent in accordance with the Code Federal Regulations (C.F.R.), which defines mental incompetency as one who because of injury or disease lacks the mental capacity to contract or to manage their own affairs to include disbursement of funds without limitation.[1] If a veteran is deemed incompetent to handle his/her financial affairs, the Department of Veterans Affairs (VA) appoints a fiduciary. A fiduciary is an individual or entity that has been appointed to receive funds on behalf of a beneficiary for the use and benefit of the beneficiary and their dependents. The appointed fiduciary is allowed to charge a fee up to four percent of the VA benefits that are paid to the beneficiary. If the beneficiary is married the spouse may receive payments on behalf of the veteran. A selection of a fiduciary involves an analysis of current credit reports, disclosure of criminal background, and consideration of the opinion of character witnesses.[2]

VA's fiduciary program is designed to benefit the veteran and their family. The American Legion recognizes that veterans who are suffering from mentally debilitating injuries may need the assistance of fiduciaries to manage their VA benefits as well as their personal finances. Unfortunately, the program can lead to appointed fiduciaries who may take advantage of veterans and their benefits.

In recent years, allegations of fraud within the fiduciary program have been reported. After conducting an investigation in June 2012, the Hearst News Service discovered the program had "gambling addicts, psychiatric cases, and convicted criminals who were among the thieves who have been handed control of disabled veterans' finances".[3] Reports of these allegations do little to breed confidence in a program designed to protect some of our nation's most vulnerable veterans.

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[1] CFR Title 38, Chapter 1, Part 3, Subpart A, Section 3.353.

[2] The American Legion Testimony: "VA Fiduciary Program": February 9, 2012.

[3] *http://www.usmedicine.com/agencies/department-of-veterans-affairs/senator-pushes-for-expedited-reform-of-controversial-va-fiduciary-program/.*

Beginning in May 2014, VA switched from the Fiduciary-Beneficiary System (FBS) to the new Beneficiary and Fiduciary Field System (BFFS) which is a new computer-based processing system that enables fiduciary employees to work more effectively and efficiently. The new system maintains larger quantities of data, tracks fiduciary information, retains information on previous fiduciaries and is a substantially more robust and powerful tracking system.

Recommendations for Improvement:

A chief concern of The American Legion is the location of the fiduciary branches. These locations are often separate from the VA regional office (VARO). For instance, the fiduciary location for the Muskogee, Oklahoma VARO is located in Lincoln, Nebraska. For the Denver VARO, its fiduciary hub is in Salt Lake City, Utah. Similar to other VA administrative processes, there is a backlog in adjudicating competency. This backlog proves frustrating to veterans as they complete their portion of the process, submit the medical evidence to rebut the incompetency claims, and then it languishes awaiting adjudication.

The centralization of these processes is not unique to the fiduciary program, and The American Legion has expressed concerns about the impact of centralization of Veterans Benefits Administration VBA) programs dating back to 2003 with opposition to the consolidation of pension operations into Regional Pension Maintenance Centers.[4] While VBA has continued to justify the centralized locations as a way to reduce the backlog of benefits processes, backlogs in adjudication continue even at the central locations, and communication between service officer advocates and VBA employees that could resolve common sense problems and expedite service is severely hampered. The centralization of programs has not provided the benefit intended, and therefore The American Legion believes more programs should be brought back into VAROs where direct communication can help facilitate an environment where obstacles are more rapidly overcome.

The American Legion has over 2,500 accredited representatives located throughout the country who represented more than 716,000 veterans in 2014 alone, and continues to advise and advocate for veterans across the United States. While providing advocacy to veterans, The American Legion is able to gather feedback regarding the implementation and effectiveness of VA programs.

According to our research:

- The program has had problems that have needed to be addressed from its onset, our Service Offers reported an experience where a veteran was labeled incompetent because he indicated that he does not pay his bills; however, after further review, it was determined that in the division of household responsibilities, the veteran's spouse held that responsibility.
- Another incident included a veteran who indicated that he wanted his wife to serve as his fiduciary, and VA denied the request stating that she was unable to properly take care of the veteran. To find a veteran incompetent, VA needs a medical examination to support the finding; in the case of this veteran's wife, no medical examination was afforded, and a VA field examiner awarded the fiduciary to an individual unknown to the veteran or his wife which cost the veteran up to four percent of his benefits annually.
- Once an individual is determined to be incompetent a letter is sent to the vet proposing incompetency. This letter allows 60 days for due process which delays the awarding of the back pay amounts due the veteran. Unfortunately, because of the immediate financial needs of these vulnerable veterans, some representatives are waiving the due process to get the fiduciary appointment moving but these letters of waiver are frequently ignored, and the 60 day window remains. This delays approving the appointed representative and consequently, the back pay.
- In a number of cases, this money is needed to pay owed amounts to nursing homes and private caregivers. Delaying this decision to award the back pay is placing undue hardship on facilities and families and, if continued, will lead to situations where nursing facilities or care facilities do not want to take on veteran patients if they require fiduciaries because of the VA filing delays. There often can be a delay of up to six months to get awarded amounts.
- In a conversation with the Salt Lake City fiduciary hub last week, one representative heard that the assigning of the fiduciary is almost four months in duration. If we add four months to the claim adjudication, which can take four to six months at a minimum, we are now looking at least 10 months to get needed money to families. Nursing homes are attempting to have families pay

[4] Resolution No. 120: Discontinue Department of Veterans Affairs Regional Pension Maintenance Centers – AUG 2003.

for the care of their loved ones up front and this can cause a co-mingling of funds and can leave the family responsible for any owed money. The American Legion does not recommend that a family pay anything for the care up front, as this can become a potential legal issue for the family.

• The service officers of The American Legion have also seen a number of claims that are not being expedited as they should be, based on the age of the veteran. When a veteran is above a certain age or has qualifying severe medical conditions, or is suffering unique and imminent financial hardships, the veteran is eligible to have their claim processed under an expedited procedure. However, American Legion service officers routinely remind VA that the client is entitled to this expedited treatment because it doesn't happen automatically. With VA's advanced digital and electronic capabilities and the electronic claims process almost fully implemented, the age factor should be identified by an automated process, but in addition, there should be better procedures built into the process to identify these factors and help the veteran.

Many of these concerns could be overcome with more direct contact between advocates such as service officers and the VBA employees who process the claims, the centralization process inhibits this communication and leads to a disjointed process that ultimately does not serve the veterans or their families.

Beyond the implementation of the program throughout the nation, The American Legion has concerns regarding how being determined incompetent affects the veteran. According to VA's definition, veterans are defined as incompetent "due to injury, disease, or due to age, are unable to manage their financial affairs".[5] Unfortunately, being deemed incompetent to manage financial affairs can have further consequences, as veterans deemed unable to manage finances are required to relinquish their weapons and are prohibited from purchasing weapons.[6] Utilizing this logic, any American that files bankruptcy due to financial mismanagement should be subjected to the same recourse from the federal government. The fact that veterans are the only group in the United States subject to this scrutiny and can have their constitutional rights infringed without a more detailed and considered due process, is unfair and unjust.

The American Legion is a strong supporter of the Second Amendment; by resolution adopted at our National Convention in August 2014, we urge "our nation's lawmakers to recognize, as part of their oaths of office, that the Second Amendment guarantees law-abiding citizens the right to keep and bear the arms of their choice, as do the millions of American veterans who have fought, and continue to fight, to preserve those rights, hereby advise the Congress of the United States and the Executive Department to cease and desist any and all efforts to restrict these rights by any legislation or order."[7]

If veterans are made to fear that by asking for needed help they may see their rights taken away, it may prevent those who need help from seeking it, and place the veteran in a bad position. Reform of this policy that automatically places veterans requiring a fiduciary on a list to remove their Second Amendment rights is critical to ensuring veterans who have need of the fiduciary program need not fear seeking the help they require to properly manage their financial and family affairs.

Conclusion

The American Legion recognizes the importance of a successful fiduciary program. With an aging veteran population and veterans returning after serving years in combat where the signature wounds of TBI and PTSD can impact cognitive functioning, it is necessary to have a robust and effective fiduciary program. The American Legion believes, based on our research gathered from the experiences of thousands of service officers in the field, that the system can be improved by returning the fiduciary programs to direct contact in the VAROs, and by reforming the automatic reporting mechanism that can needlessly strip veterans of their constitutional right to bear arms for seeking help with financial matters.

As always, The American Legion thanks this subcommittee for the opportunity to explain the position of the over 2 million veteran members of our organization. For additional information regarding this testimony, please contact Mr. Warren J. Goldstein at The American Legion's Legislative Division at (202) 861–2700 or *wgoldstein@legion.org*.

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[5] *http://www.benefits.va.gov/fiduciary/*.

[6] *http://www.benefits.va.gov/fiduciary/beneficiary.asp*.

[7] Resolution No. 92: Second Amendment-AUG 2014.

Testimony of

Sam Albritton

Executive Vice President

Regions Bank

On Behalf of

Regions Bank

Before the

United States House of Representatives

Committee on Veterans' Affairs Subcommittee on Disability Assistance and Memorial Affairs

Hearing on

"Exploring VBA's Fiduciary Program"

June 11, 2015

Introduction

Chairman Abraham, Ranking Member Titus and the Members of the House Veterans' Affairs Subcommittee on Disability Assistance and Memorial Affairs, my name is Sam Albritton and I am an executive vice president at Regions Bank and I am ultimately responsible for managing our Veterans Affairs fiduciary unit, which is located in Kingsport, Tennessee. I appreciate the opportunity to speak to the Committee about our efforts at Regions Bank to serve veterans and our 25-year record in managing VA guardianship accounts as a fiduciary. Senior management at Regions has made a commitment to our military, including the targeted hiring of veterans and special financial assistance for active and former service members. As a part of this ongoing commitment, the bank wants to grow our VA fiduciary business. Despite this directive from our senior leadership and our decades-long track record in managing VA fiduciary accounts, we have been unable to expand this business because we have been blocked since 2012 from further fiduciary appointments by the Washington headquarters and the Hub offices of the Department of Veterans Affairs. In this time, the Regions fiduciary unit has received clean audits from both the VA and the Social Security Administration about our management of beneficiary accounts. The bank's fiduciary unit now serves 298 beneficiaries, down from 530 in 2012 when we were informed—without any clear policy explanation and despite a clean VA audit—that we would not be allowed to serve additional beneficiaries because at the time we had more than 500 clients. And despite our willingness, expertise and significant corporate resources we have been unable to serve additional clients, even as our number of beneficiaries has fallen far below 500—the initial reason for blocking additional appointments. All the while, we understand that the VA has significant waiting lists in assigning third party professionally managed beneficiary accounts.

Veterans' Affairs Fiduciary Program Review

More than a year ago the VA sought comment on proposed rule changes to its fiduciary programs, which we responded to. The proposed VA policy changes are part of the agency's efforts to modernize its fiduciary programs, create national standards for fiduciaries and shift from general policy statements to regulations that govern the program. These rules have yet to be finalized. And while veterans without family able to assist them wait to be assigned guardians, capable fiduciaries, like Regions Bank, are not allowed to serve them.

The proposed rule about VA fiduciary accounts includes numerous revisions to current policy to clarify definitions and procedures and change the culture of the program in order to "best serve the interests of the beneficiary." These include rules about the appointment process, how benefits should be managed, reporting and accounting procedures, and guidelines for periodic, on-site reviews and audits, among others. The proposal further recognizes that it is not always possible

to meet the VA's stated goal that most fiduciaries are "volunteer family members or friends." While Regions is supportive of these general goals, we also are concerned that the proposal's intent to give Hub managers the ability to limit the number of beneficiaries a fiduciary serves may run counter to several of those goals intended to strengthen and standardize the program. We believe the proposal should differentiate between the potential number of beneficiaries that a sophisticated and professional corporate trust department can serve versus potential limits placed on other smaller providers like law firms. We believe that in these circumstances a professional corporate trust organization is best able to match the requirements under the new rules and thus serve the best interest of the beneficiaries. As a result, these professional trust organizations should face different—and clearly defined—standards about the number of accounts that they serve.

Regions Bank

Regions, a $120 billion bank headquartered in Birmingham, Alabama, is a community-focused full-service bank that operates in sixteen southern and Midwestern states and offers a full range of consumer and business lending products and services in our more than 1,600 branches and offices. Through our more than 23,000 associates, we serve 450,000 commercial clients and more than 4 million households. [See Appendix for Regions Bank map of operations.] Regions has a simple yet effective model that focuses on relationship banking through high quality customer service coupled with industry expertise. In one area of expertise, the Trust Department operates one of the largest corporate fiduciary departments with over $74 billion in trust assets and more than 1,000 employees. Another example of focused expertise is our VA fiduciary unit. Our existing experienced team of fiduciary officers, familiar with VA guidelines and procedures and dedicated to serving veterans, currently handle 298 guardianship accounts in sixteen states. As noted earlier, this number has declined because VA Hub offices have not awarded us new accounts in nearly three years without any specific reason. All the while, veterans are waiting for these services. And Regions stands ready to provide these services at the highest standards of care.

Table 1. Timeline of VA Contacts

May 2012	Received copy of e-mail sent to Field Examiners stating Regions could no longer be considered as payee
June 2012	VA on-site audit completed
November 2012	Inquiry to VA Hub about serving veterans
January 2013	Inquiry to VA Hub about serving veterans
July 2013	South Carolina VA Hub meeting
June 2014	Social Security on-site audit
August 2014	Conference call with VA about fiduciary program
September 2014	Received VA audit results
September 2014	Inquiry to VA Hub about serving veterans
April 2015	Inquiry to VA Hub about serving veterans

Regions' own practices and corporate controls highlight our ability to serve as a fiduciary in a manner consistent with the VA's goals in its proposed rule. Regions, as noted, has 25 years of experience managing VA fiduciary accounts. As a trust company, we are subject to the fiduciary standard of care (the highest in the financial services industry) and we have perpetual existence as a corporate fiduciary (and we are in our second generation of employees working with VA fiduciary relationships), removing the concerns about factors that could impact the service of individual fiduciaries, such as illness or retirement. There are many examples of our business practices—from the appointment process, to the way we manage fiduciary accounts, to our internal accountability and reporting requirements—where the strengths of a corporate trust department match the intent of the new rules. We have outlined several examples below. [See Appendix for more detailed review of our unit's procedures.]

- Appointment Process
  - Standardized appointment process, allowing VA officials to meet with a Regions fiduciary unit employee to complete the required paperwork and accept a veteran as a beneficiary
  - Introductory letter and phone call to veteran, within one day of acceptance of account, providing contact names and numbers
  - Dedicated phone line for VA officials

- Fiduciary Management Process
  - Dedicated toll-free number and email for veterans; all inquiries tracked and responded to within 24 hours
  - Segregated individual account for each veteran
  - On-line trust accounting system for automated bill payment and tracking
  - Ability to ACH to personal savings accounts for simpler transfer of allowances
  - Daily investment of excess funds, according to VA guidelines, in insured deposits or Treasury funds
  - Monthly statements listing all account transactions, with the ability to generate special statements as needed
  - Regions is able to serve as administrator of estates when no next-of-kin is located or available

- Accountability and Reporting
  - Support from internal compliance professionals
  - Internal monthly investment and administrative review process
  - Oversight from trust monitoring systems, regular internal audits and process reviews by banking regulators
  - Ability to generate prompt and efficient accountings when needed

- Blanket bond insurance coverage

- Personal Service and Scalability
  - Client visits at VA hospitals, including in Memphis, Nashville and Murfreesboro, and at VA-contracted residential care homes and personal residences
  - The ability to scale the business to serve veterans across at least three VA Hub offices (Columbus, Louisville and Indianapolis) and bank management's commitment to hire more associates to meet client needs

Features of an Improved Fiduciary Program

In its efforts to modernize its fiduciary programs, including the management of VA fiduciary accounts, the VA has proposed establishing a framework for "periodic" on-site reviews and an evaluation process to measure the effectiveness of fiduciaries. It is a positive step to formalize an informal process; moreover, we believe the review process should be strengthened so it can be used as part of the decision-making rubric that Hub managers will use when deciding if beneficiary account limits are necessary for specific fiduciaries. Regions believes that Hub managers must use appropriate and clearly identifiable criteria when making a determination about a limit and must recognize the disparate capabilities that are offered by individual, small firm or corporate trust fiduciaries.

This includes establishing specific, clearly defined criteria for the selection of professional fiduciaries. This evaluation should include standards based on:

- Previous experience in the VA fiduciary business and demonstrated commitment to that business (A proven track record is a good indicator of future success)
- A rigorous fiduciary oversight process, including monitoring by a group independent of the day-to-day employees
- Sufficient insurance against fraud and misuse of funds
- A documented service process so that veterans are served in an efficient and dignified manner, including prompt (and documented) responses to requests from both veterans and VA officials working on behalf of those veterans
- The maintenance of a network of other professionals to assist with specialized services, such as investment of funds, real estate matters and issues of probate

Conclusion

There is a demonstrated need to improve the VA fiduciary programs. At Regions, we are ready to be a partner in this process and the bank's fiduciary unit is capable of serving more veterans. In fact, we believe that we have the infrastructure and resources to serve as a consolidated fiduciary program for one or more of the VA Hub offices in our bank's footprint—meaning we can handle all of the beneficiaries where no family or qualified volunteer can serve in the fiduciary role. We believe that the current fee structure is fair and that by creating a consolidated fiduciary program the VA can operate more efficiently. Yet we—and possibly others—have been subjected to an arbitrary cap without adequate explanation that has limited our ability to serve veterans in need. As the Committee explores how the VA can improve its program, we want to ensure that the VA Hub managers or agency officials in Washington don't have excessive and unchecked discretion in making these decisions. This goes against the VA's stated goals of clarifying definitions and modernizing the overall fiduciary program. One possible solution would be to use the review and evaluation process as part of that decision making. For instance, the review could be followed by a timely and formal evaluation—including a rating that indicates a fiduciary's effectiveness—that would be part of any discussion about account limits. No arbitrary account number cap should be used. The ability to continue to help beneficiaries should be based on useful evaluations that measure past performance and the fact that a fiduciary has the infrastructure to safely and successfully serve veterans in the future.

Appendix

I. Regions' VA Fiduciary Program Procedures

- Account Opening
  - Once the necessary documents regarding the new account and the first benefit check have been received by Regions, the new account will be opened
  - A welcome phone call is made to the veteran on the day the account is opened to introduce Regions, establish communication, and go over the budget that was approved. Additionally, we will attempt to obtain any other vital information needed (i.e. date of birth, address, contact numbers, etc)
  - Following the creation of the account, a personalized new account letter is sent to the veteran. This letter advises the veteran of the general operation of their account, reiterates the budget established by the Department of Veteran Affairs, provides our contact information (mailing address, e-mail, toll-free number, facsimile number), and will request any other information necessary regarding recurring bill payments and transactions needed from the veteran
  - Regions also sends a follow-up letter to the veteran 30 days after the account has been opened. This letter will go over any documentation still needed from the veteran, and to reiterate any other relevant information regarding the veteran's account
- Disbursement Processing
  - In general, Regions will consider the following guidelines for distribution requests to the veteran:
    - Recurring account expenses should not exceed the normal cash inflows. If the account has an accumulated balance and expenses exceed the total income, Regions should carefully manage the outflows in order to maintain the long-term viability of the account. If necessary expenses routinely exceed cash inflows, Regions will seek guidance from the appropriate VA expert (LIE or Field Examiner)
    - Regions will establish recurring disbursements to the veteran such as:
      (1) Personal allowances
      (2) Clothing expenses
      (3) Vacation expenses
      (4) Holiday expenses
      (5) Utilities
      (6) Room and board/rent
      (7) Telephone/cable
      (8) Mortgage payments
      (9) Automobile payments
      (10) Other bills as instructed per VA

(11) Insurance/property tax payments

(12) Medical bills

- Regions will evaluate each out of the ordinary request (or item not listed on the budget received from the Department of Veteran Affairs) on its merits, availability of funds, and the history of the veteran

➢ Annual Accountings

o In cases where Regions serves as fiduciary only, VA form 21-4706b will be submitted along with a chronological statement of the account covering the accounting period

o Documents for the relative jurisdiction, including an accounting summary page and annual statement, will be submitted when Regions serves as court appointed financial guardian. The Department of Veteran Affairs will receive a stamped filed copy from the respective court

➢ Death of a Veteran

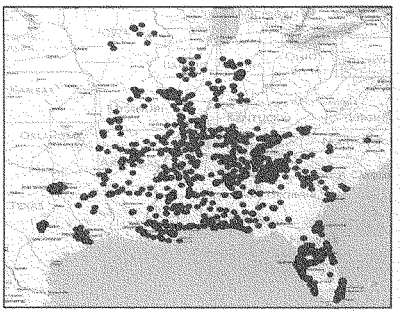
o Upon notification of the death of a veteran, Regions will immediately notify the Department of Veteran Affairs

o Regions will work directly with the funeral home (as chosen by family or by Regions if no family is identified) to negotiate arrangements. Agreed upon expenses are distributed directly to the funeral home

o Regions will then identify a personal representative for the veteran's estate (Regions is capable of serving as administrator if no family exists or if unable to do so)

o Regions must receive the necessary documents from said executor/administrator of the veteran's estate, along with approvals of the final accounting from the appropriate parties before releasing the balance to the estate

II. Footprint and Branch Network



Branches:
1,633
ATMs:
1,966
Associates:
23,601

STATEMENT OF DOUGLAS J. ROSINSKI, ESQ.
TO THE U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS
JUNE 11, 2015, HEARING EXPLORING VBA'S FIDUCIARY PROGRAM

EXECUTIVE SUMMARY

VJG strongly advocates fundamental overhaul of the VA fiduciary program. Despite some misgivings, VJG supports the "culture" changes embodied in the revised rules proposed over a year ago. 79 Fed. Reg. 430 (Jan. 3, 2014). Unfortunately, the final rules have yet to be issued.

As identified over three years ago in testimony to the Subcommittee On Oversight & Investigations, Congress did not intend the VA fiduciary program to operate the way it does today. Yet, VA continues to place veterans' *earned and awarded* benefits at risk from disregard of fundamental rights available to all Americans – except veterans.

To restore the program to its intended purpose and function, VJG suggests that Congress make *explicit* that:

- VA fiduciary program regulations *do not* pre-empt state laws and VA fiduciaries must comply with state laws unless in direct conflict with a statutory requirement.
- VA must recognize existing fiduciary appointments valid under laws of the veteran beneficiary's state of residence.
- VA must adopt a "priority" of fiduciary appointments recognizing the primacy of familial relationships over paid third-party "strangers."
- VA authority extends only to VA benefits paid to the veteran and does not extend to the veteran's other income or property, or any property of any family member.

Reasonably implemented in program regulations, these statutory clarifications would go a long way in changing the manner in which VA approaches its responsibilities in this program.

What is needed most, however, is VA recognition that veterans needing assistance with their finances have the same rights as every other citizen and that VA or any other federal agency cannot simply ignore those rights for bureaucratic expediency or any other administrative convenience.

Mr. Chairman, Ranking Member, and Distinguished Members of the Subcommittee:

Thank you for the opportunity to again present the views of one who represents veterans and their families who have had their lives upended by the so-called VA "fiduciary" program. On behalf of the Veterans Justice Group, LLC (VJG), I am pleased to testify on this important, if often overlooked, VA program. I have had the rewarding, if frustrating, experience of representing a number of those that have fallen into the unforgiving quagmire that is the VA fiduciary program and have drawn on that experience in this testimony.

VJG has long called for overhaul of the fiduciary program. Proposed revised regulations were published for comment over a year ago. 79 Fed. Reg. 430 (Jan. 3, 2014). Despite some misgivings, VJG generally supports the program changes embodied in those proposed rules. As we stated in our formal comments, too often the current program rules allow VA-appointed "fiduciaries" – who have little, if any, related skills or training – to collect large fees for little work while disregarding beneficiary needs. The mindset of maximizing "savings," while beneficiaries go without adequate housing, clothing, or needed medicines, must stop and the proposed rules go a long way towards that goal.

VJG also strongly supports the program "culture change" promised by VA management. It is critical, however, that the culture change not be limited to the appointed fiduciaries alone. A change in the culture of VA fiduciary program personnel, especially field examiners, is as important as, if not more important than, individual fiduciary program changes. Indeed, it is our experience that fiduciaries have historically responded *only* to their supervising field examiners, regardless of other requirements.

Unfortunately, as with so many other VA programs, little has come of the promises. Critically, VA has yet to publish the final rule which recognizes that a "fiduciary" empowered by the federal government should be *more* – not less – accountable for the proper treatment of his or her beneficiary. Given the admitted urgent need for reform, and only a few dozen comments to address, this delay is puzzling. The June 1, 2015, VA Office of Inspector General (OIG) *Audit of Fiduciary Program's Management of Field Examinations* finding that VA management has significantly *reduced* resources since the promises to improve the program is similarly puzzling.

OIG, however, failed to identify the greatest risk to veterans entrapped in an unresponsive VA fiduciary program: *the permanent loss of all awarded benefits because of VA failure to timely appoint a fiduciary*. VA contends, and the Courts have agreed, that existing statutes prohibit money awarded, but not actually paid by VA before a veteran's death, from being paid to the veteran's estate. *The money in such cases is permanently retained by VA.* Thus, even if a veteran receives an award, VA can (and does) *indefinitely* delay payment until a fiduciary is appointed. Thus, VA's reduction in field examiners – and the lack of any time limit on the appointment of a fiduciary – creates not only a risk of, but a *perverse incentive for*, delay in field examinations and fiduciary appointments.

In general, our objections with the current and proposed fiduciary program rules are with unexplained or unnecessary restrictions on the rights of beneficiaries. We see no reason or legal requirement that beneficiaries under this program should have any fewer rights or protections than any other citizen just because they are veterans. Indeed, the expectation should be that a veteran beneficiary is protected from improper or unnecessary infringement on his or her basic right to control their own property – including by VA. This, however, is not the case, as VA overreaching in creating "incompetent" veterans continues unabated.

One gauge of VA's overreach in sweeping veterans into its fiduciary program is the sheer number of veterans VA reports to the National Instant Criminal Background Check System (NICS). As of April 2013, VA had reported over *143,000* benefit recipients to NICS, effectively prohibiting them from purchasing a firearm, which accounted for *99%* of all federal agency NICS reports based on mental health. Senate Report 113-86 (Sep. 4, 2013). "That is true despite the fact that other federal agencies, such as the Social Security Administration, appoint representatives to manage benefit payments for their beneficiaries in a manner similar to VA's process." *Id.*

While the processes may be similar, it is VJG's experience that VA all too often bases its "incompetency" determinations on the flimsiest of reasons. The most outrageous of these is that a statement by a veteran to any VA medical provider that "my spouse handles the finances" or "my spouse signs the checks" can – and often does – result in a VA decision that the veteran is "unable to manage his finances," loss of control over his financial accounts, and loss of a right to purchase a firearm.

As one example, a VJG attorney represented a veteran suffering from ALS who was proposed for incompetency after he told a VA physician that his wife "signed all the checks." It was quickly established that the veteran meant

that it was difficult and painful for him to sign his name because of his physical condition and so his wife did that for him. The VA examiner did not ask for clarification of the veteran's statement and the first the veteran heard of his "incompetency" was when he received the proposal to appoint a fiduciary. The veteran's mental state was subsequently confirmed as undiminished in any way. Without experienced counsel, however, he would have been yet another statistic. We are aware of numerous other similarly questionable "incompetency" determinations.

Based on our years of experience struggling to protect clients from the excesses of the VA fiduciary program, VJG suggests that Congress make *explicit* that:

- VA fiduciary program regulations *do not* pre-empt state trust, estate, or fiduciary laws and VA fiduciaries must comply with state laws unless in direct conflict with a statutory requirement.
- VA must recognize Power of Attorney (Attorney-in-Fact), guardian, and fiduciary appointments that are recognized as valid under laws of the veteran beneficiary's state of residence.
- VA must adopt a "priority" of fiduciary appointments recognizing the primacy of familial relationships over paid third party "strangers."
- VA can only remove or replace a person serving as a guardian or fiduciary under state law at the time of a VA proposal of a veteran's "incompetency" upon obtaining a state court order finding "cause" to remove the person.
- VA authority extends only to VA benefits paid to the veteran and does not extend the veteran's other income or property, or any property of any family member.

To be clear, VJG believes that each of the above requirements are already found in existing statutes. VA, however, has chosen to adopt interpretations and implement policies which now require that "Congress make explicit" its intended program requirements.

In any event, the VA fiduciary program as envisioned in the proposed rules still suffers from unnecessary limitations on beneficiary rights and regulatory gaps and ambiguities that threaten continued program dysfunction. VJG discusses several of these issues below, as it did in its formal comments on the proposed revised fiduciary rules.

Respect For State Law

VJG does not agree with VA's foundation position that Congress intended to pre-empt state law when it narrowly authorized the Secretary to appoint a third party to handle the finances of a veteran when he or she cannot reasonably do so themselves. To the contrary, VJG submits that Congress intended VA to fully utilize the extensive and well-developed state law in this area to aid in the appointment, regulation, and oversight of its fiduciaries. Indeed, it has been VJG's experience that the vast majority of VA fiduciary program problems it encountered were violations of the state law of residence, such as failures to provide information to the beneficiary, violations of the duties of candor and loyalty, and failure to act in the best interest of the beneficiary. None of these are requirements of the VA fiduciary program.

In any event, VJG submits that there is no reasonable basis for the Secretary's interpretation of 38 U.S.C. section 5502(a)(1) finding that "Congress intended to preempt State law" in authorizing a VA fiduciary program. 79 Fed. Reg. at 430. Indeed, the single cited basis for this position is facially unrelated to the issue. *Id.* In any event, this issue was resolved by the U. S. Supreme Court *over 75 years ago.* Indeed, *Hines v. Stein*, 298 U.S. 94 (1936), explicitly rejected the Secretary's supremacy theory.

> During many years, *Congress* has *recognized* the propriety, if not the *necessity*, of entrusting the custody and management of funds belonging to incompetent pensioners to *fiduciaries appointed by state courts*, without seeking to limit judicial power in respect of them. To the contrary, it has directed that whenever any guardian, curator, or conservator fails properly to execute his trust, etc., the [Secretary] may appear in the court which has appointed and make proper presentation of such matters. *Authority of the state courts over guardians for incompetents is thus definitely recognized.*
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> . . .
>
> *Nothing* brought to our attention would justify the view that *Congress intended* to *deprive state courts* of their usual authority over fiduciaries, or to *sanction the promulgation of rules* to that end by executive officers or bureaus.

Hines, 298 U.S. at 98 (emphasis added) (internal citations and quotations omitted). Since ***1936*** then, the Secretary has been obligated to respect state fiduciary authority – but he does not yet do so.

Whether or not VA has the authority to ignore relevant state laws, there is every practical reason for it not to do so. Rather than a robust "scheme," Congress provided only the barest outlines of the duties and responsibilities of a VA-appointed "fiduciary." *See generally* 38 U.S.C. § 5502(a). Indeed, the relevant statutes specify only duties and responsibilities of the fiduciary *to the agency*. *See, e.g.*, 38 U.S.C. §§ 5502(b) ("render an account *to the Secretary*"); 5509 (fiduciary to receive payments at regional office when failing to provide accountings). Congress notably omitted any guidance on the "duties of the trust" or how "to administer the estate according to law." Indeed, there are no directions at all regarding a fiduciary's duties *to the beneficiary* – a seemingly key area for a "scheme" intended to protect beneficiaries from abuse by appointed fiduciaries.

This is a particularly significant omission by Congress, as a citizen's "trust" and "estate" are state creations, and the associated "duties" and "law" are also creatures of state law. If anything, the general language of the statutory provisions *require* reliance on state laws regarding fiduciary conduct, duties, and responsibilities to properly implement Congress's direction that an appointed fiduciary act for the "benefit of the beneficiary." 38 U.S.C. § 5502(a)(1); *see also id.* §§ 5502(b) ("Secretary may appear . . . in the court which appointed such fiduciary"); 5502(d), (e) (escheatment determined by state law). Thus, existing law makes reasonably clear that Congress intended that VA actually incorporate, or at least abide by, state law whenever possible.

Whatever Congress's intent, in addition to providing extensive and detailed fiduciary rules and thus obviating the need for VA to recreate them, recognizing state law also would allow VA to rely on state courts (and state agencies) for much, if not most, of the appointment and oversight activities that are now overwhelming VA's limited resources. Recognizing state court appointments would allow VA to: (1) eliminate the need for initial field examinations because state entities will vet the fiduciary and determine whether the appointment is in the best interests of the beneficiary; (2) reduce the effort expended in obtaining and reviewing fiduciary-supplied information by accepting reports submitted to state agencies or courts; (3) provide an established forum for submitting and resolving complaints against fiduciaries; and (4) provide an independent arbiter for establishing fair and reasonable beneficiary budgets. All of these elements would greatly reduce the burden on (ever fewer) field examiners.

It is thus unclear why VA continues to adamantly assert pre-emption over the very system that would (a) provide the consistent, well-understood standards and enforcement mechanism that the fiduciary program sorely needs and (b) reduce the workload on program field examiners.

VA should establish clear evidentiary standards for "incompetency."

The fundamental decision which triggers fiduciary program requirements is a final "rating" that a claimant is "unable to handle" his or her finances. 38 U.S.C. § 5502(a). Yet, there are no evidentiary standards for this initial decision. VJG submits that such standards are required in the program rules to ensure that claimants are not arbitrarily and capriciously deprived of several fundamental rights.

As discussed earlier, VJG has participated in several fiduciary cases where a veteran has been adjudicated as unable to handle his finances based on seemingly arbitrary bases. In each case, the "finding" was made by a single individual. Further, the veteran was not informed of any concern with his ability to handle his finances until a proposal to rate him as such was received in the mail.

The fundamental right to control one's own property should not turn on such flimsy, even if well intended, conclusions of a single individual. Nor should claimants be thrust into fighting to retain those rights without notice of the applicable standards. Fiduciary program regulations, therefore, should establish the specific evidentiary standards for this important determination.

VA should establish a maximum period to appoint a fiduciary.

VJG is aware of VA action to appoint a fiduciary up to *9 years* after the rating decision finding the claimant unable to manage his finances. Further, such long-delayed appointments are made without any reconsideration of the medical evidence or other basis of the original decision and without regard to "appropriate" financial management by the claimant in the years since the decision. Such long delayed fiduciary appointments are disruptive, intrusive, and, in many cases, replace well-functioning caregiving structures with adversarial relationships resulting in financial harm to the beneficiary.

VA regulations do not provide any time limit on the effectiveness of a proposed fiduciary appointment or require consideration of a beneficiary's successful financial performance in the intervening period. VA should, therefore, establish reasonable time limits for the effectiveness of

"incompetency" decisions and the weight of the underlying medical evidence. At the very minimum, VA should establish requirements to review the need for a fiduciary appointment after a certain period, to include consideration of the claimant's performance in financial matters since the original decision.

VA should be required to articulate a specific reason for disrupting existing well-functioning relationships.

VA is limited by statute to only exercise its authority to appoint a fiduciary "[w]here it appears to the Secretary that the interest of the beneficiary would be served thereby." 38 U.S.C. § 5502(a)(1). VJG experience is that VA has historically been unable to articulate a specific bases for the need of a VA-appointed fiduciary when an attorney-in-fact already existed and performed properly under state law. This is especially true in cases where VA field examiners decide to appoint a stranger in lieu of a long-married spouse or other family member who has provided long-term care without any problems noted.

To ensure that VA acts to appoint a fiduciary only in the circumstances authorized by Congress, VA should be required to articulate in the proposed and final rating decisions an *explicit* statement of the reasons and bases for the determination that appointment of another fiduciary (as distinct from the status quo) is in "the interest of the beneficiary" as required by 38 U.S.C. section 5502(a)(1). In other words, VA should be required to state why changing the beneficiary's current arrangement will result in a *better* situation for the beneficiary *before* invoking its authority to do so. While there are reasons to change existing arrangements (e.g., documented financial mismanagement, physical abuse, etc.), in our experience dedicated family members and long-term care givers have been ousted in favor of strangers without any discernable reasons or bases.

New criminal background and credit checks should be required for each re-appointment of a fiduciary.

The VA fiduciary program has long suffered from VA-appointed fiduciary misdeeds, yet VA routinely waives the criminal background and credit checks when assigning new beneficiaries to "known" fiduciaries. While nothing can prevent a determined miscreant from intentionally mismanaging a beneficiary's funds, VJG believes that routinely performing credit and criminal checks is one of the best means to identify such misdeeds. In particular, *requiring* a review of a fiduciary's credit report upon each appointment is a cost-effective means to identify suspicious financial activity

by those individuals. A single review before any veteran's money is placed with the fiduciary cannot identify later theft of that money. Indeed, knowledge that no further checks will be made may encourage such theft.

In addition, VJG supports routine (e.g., annual or bi-annual) review of each fiduciary's *and* each beneficiary's credit report for suspicious activity as a means of identifying suspicious financial activity in either individual's accounts (loss of beneficiary funds *or* increase in fiduciary's funds). Thefts of beneficiary funds could be identified earlier with routine checks. Further, knowing that such routine checks will be made may deter potential theft or misuse.

Face-to-face beneficiary interviews should be limited to situations requiring information that cannot be obtained by other means.

VJG supports face-to-face interviews with potential fiduciaries. VA, however, also requires (actually, demanded under threat of withheld benefits) "face-to-face" interviews with *beneficiaries*, even when those interviews cannot possibly obtain useful information because the beneficiary is demented, comatose, or otherwise unaware. Other than verifying the physical condition of the beneficiary's physical condition, such interviews rarely result in any information that is not already in the record or which could be obtained from caregivers, medical providers, or other third parties.

Yet, the purported reason for such beneficiary interviews has been to establish the financial needs of the beneficiary and set the budget for the fiduciary to implement. Yet, seeking financial information from an individual who has been found "unable to handle their finances" because they *are unaware of their financial needs* defies common sense and can only produce inherently unreliable information. Indeed, VJG has documented cases of an "interview" with (1) a *sleeping* beneficiary and (2) a *mentally-challenged* beneficiary cited as the basis for establishing the beneficiary's budget. VA even demanded to interview a long-term demented 90-year-old veteran despite written statement from his physicians that questioning by a stranger would be detrimental to the veteran's health and his family and physicians could provide all the information requested by VA. It was only after seeking a court order to protect the veteran did VA relent and accept the existing information in lieu of an "interview."

VA, therefore, should be required to explicitly establish the requirements for face-to-face beneficiary "interviews" (as distinguished from examinations by medical professionals) which are generally not to be performed unless

there is a clear need, there is no risk of adverse health impacts, and a reasonable expectation that the beneficiary is the only or at least the best source of the information being sought.

The practical issue of long appeal durations must be addressed.

38 U.S.C. section 5507(d) limits temporary fiduciary appointments to not exceed 120 days. The statute also states that a temporary fiduciary is to "protect the assets of the beneficiary *while* a determination of incompetency is being made *or appealed*." 38 U.S.C. § 5507(d) (emphasis added). VJG experience is that an appeal of a fiduciary program decision, as with any other appeal of a VA benefits decision, takes from many *months* to many *years* to resolve. Indeed, *VJG is unaware of any fiduciary appointment appeal that has yet been decided by the Veterans Court in the four years since the Freeman case allowed such appeals.*

There is, therefore, a conflict between the statutory time restriction on temporary fiduciary appointments and the practical duration of an appeal in the normal course. Neither existing or proposed VA regulations address this conflict or identify how VA intends to comply with both the statutory direction to "protect the assets of the beneficiary" during an appeal and the limit of temporary fiduciary appointments to 120 days. VJG submits that because Congress explicitly established a 120 day limit for temporary fiduciaries, VA is required to establish an adjudicatory process that resolves incompetency issues and appeals of fiduciary program decisions *within 120 days*. Without such a requirement, a beneficiary would be left without any protection of his assets during the bulk of the appeal.

VJG recognizes that the imposition of a strict time limit for resolution of fiduciary appeals differs from the general canon that VA "has no time limits" for its adjudication processes. Fiduciary matters, however, are unique in the VA system, in that they involve government management of already awarded benefits (i.e., the *beneficiary's* money). Thus, fiduciary appeals are properly given priority over other appeals. Indeed, timely resolution of appointment issues is critical to protecting a beneficiary's assets, which is Congress's stated purpose for the program. *See* 38 U.S.C. section 5507(d); *see also* 79 Fed. Reg. at 449 ("We intend that appeals in fiduciary matters would be processed expeditiously").

Thus, a specific fiduciary appellate process required to resolve fiduciary appeals, is required.

Excluding family and caregivers from appointment as temporary fiduciaries is contrary to the need to expeditiously appoint qualified individuals.

In a related issue, VJG disagrees with VA's proposed limitation of temporary fiduciaries to "individuals and entities that already meet the qualification criteria for appointment and are performing satisfactorily as a fiduciary for at least one other VA beneficiary." This definition necessarily excludes family members, including spouses, and other long-term caregivers from serving as a temporary fiduciary because they will be very unlikely to have served as a fiduciary in any other case. VJG submits that there is no legitimate basis for such a blanket exclusion or deviation from the proposed order of preference of fiduciary appointment.

It has been VJG's experience that family members and long-term caregivers are the *most familiar* with a beneficiary's needs and can most quickly assume the role of temporary fiduciary in most cases. This is especially true where that individual has already managed the beneficiary's finances either formally or informally without complaint or noted deficiency. In such cases, VA can quickly establish a satisfactory track record and, if appropriate, waive formal investigation. To be clear, VJG recognizes that there will be cases where family members or long-term caregivers will not be an appropriate choice for temporary fiduciary. VA, however, should be required to provide a detailed basis for a deviation from the usual order of preference for permanent fiduciary appointments when making temporary fiduciary appointments.

Adequate field examiner qualifications must be specified

Neither existing or proposed regulations contain or point to the qualifications and training requirements applicable to field examiners. Indeed, it has been VJG's experience that regardless of the number of field examiners, they are and will continue to be required to make complex determinations, such as the adequacy of living conditions, "budget" approvals, and fiduciary performance evaluations, for which they have little, if any, formal training. Further, as in the case of the field examiner's "interview" of an admittedly sleeping beneficiary, the standards of adequate performance can vary widely.

Fiduciaries should provide funds as requested unless there is an articulable reason not to do so.

In VJG's view, an important change in the new fiduciary program "culture" is a complete reversal of the existing approach to responding to beneficiary requests for funds. In our experience, legitimate requests for funds often do not receive a response, are paid (if at all) only after repeated requests and after excessive delay. Indeed, as a practical matter, there appears to be a wide-spread presumption that any request for funds is inherently suspect and is to be paid only if the fiduciary cannot avoid doing so. Field examiners do little to correct this belief.

Consistent with the proposed culture change, therefore, VJG suggests that VA explicitly require that requests from beneficiaries (or their authorized representatives) for funds are presumptively reasonable and should be paid unless the fiduciary can articulate a specific reason for not doing so. Further, payments should be made within a set time limit, for example within 10 days of receipt of the request. Such a presumption will not prevent the fiduciary from requesting a reasonable explanation of the need for the funds, requiring evidence of proper expenditure of the requested funds, or denying requests that are improper or not in the best interest of the beneficiary.

VA should explicitly pre-empt higher state fees

Oddly, VA does not assert pre-emption authority in the one situation where state law actually conflicts with fiduciary program statutory requirements. VJG is informed that fees of up 5 percent of a beneficiary's monthly benefits have been allowed by VA in Florida because state law allows that high of a fiduciary fee. Such payments, however, clearly violate Congress's expressed authorization of a "4-percent ceiling" for fiduciary fees. *See* 79 Fed. Reg. at 440 (citing 38 U.S.C. § 5502(a)(2)). It is unclear why or upon what basis VA allows this higher fee to be charged VA beneficiaries. Indeed, it is ironic that VA's position is that program regulations pre-empt state law, 79 Fed. Reg. at 430, and has repeatedly invoked federal supremacy over state laws in defense of its policies, *see, e.g., Solze v. Shinseki*, CAVC 12-1512, but has failed pre-empt conflicting state law in the one situation that directly results in higher costs to veterans.

As it is clearly in interest of a beneficiary to not pay a higher fee than allowed by federal law, VA has duty to prevent such unauthorized fees. VA, therefore, should be required to explicitly prohibit payment of fees higher than 4% to anyone acting as a veteran's fiduciary.

VA authority over non-VA funds and other beneficiary property

Neither current or proposed rules identify the proper scope of VA's control of non-VA funds in financial accounts not containing VA funds and other beneficiary assets. It has been our experience that VA field examiners demand detailed information, including account numbers and other access information, regarding *all* financial accounts, and other assets of a beneficiary *and* family members. Further, the budgets subsequently set by the field examiners routinely require expenditure of *all* non-VA funds before VA benefits can be used. Failure to provide the requested information or to expend non-VA funds in the directed manner has resulted in suspension of all VA benefit payments and even threats to cut off other federal funds (i.e., military retirement). VJG, however, is unaware of the legal authority for these demands.

Thus, Congress should explicitly define the scope of VA's authority to (1) inquire of a beneficiary's non-VA assets; (2) require disclosure of financial or other asset information by any family member (whether or not a potential fiduciary); and (3) require information regarding, or asserting control over the expenditure of, non-VA funds.

In sum, despite the promises of VA management, the disregard of fundamental fiduciary principles described in my February 2012 testimony continues to plague and impoverish the most vulnerable veterans, their families, and their caregivers. Indeed, as recent reviews have shown, so-called "federal fiduciaries" have less supervision today than in 2012. Thus, despite professed concern and promised changes, VA's fiduciary program continues to operate largely unchanged and unsupervised

Thank you again for this opportunity to speak on behalf of our country's most vulnerable veterans and their families. I look forward to your questions and, hopefully, substantive changes in this failed program.

Curriculum Vitae

Douglas J. Rosinski is a veteran of the United States Navy where he was a qualified submariner and nuclear engineering officer.

Mr. Rosinski earned a B.S., *with distinction*, in Physics & Astronomy from the University of Rochester in 1981 and a J.D., *cum laude*, from the University of South Carolina School of Law in 1997. He is admitted to practice law in the District of Columbia, Georgia, and South Carolina, numerous federal district and appellate courts, the United States Court of Appeals for Veterans Claims, and the United States Supreme Court. Mr. Rosinski is also accredited to represent veterans before the Department of Veterans Affairs.

Since 1997, Mr. Rosinski has concentrated his practice in administrative law and regulatory compliance. In 2000, he began litigating cases on behalf of veterans and their families before the Department of Veterans Affairs regional offices, the Board of Veterans' Appeals, the United States Court of Appeals for Veterans Claims, federal district court, the United States Court of Appeals for the Federal Circuit Court, and the United States Supreme Court. In 2006, Mr. Rosinski was co-lead counsel in a class action on behalf of veterans that obtained the largest reported settlement in a case for Privacy Act violations.

Mr. Rosinski currently practices veterans law with his own firm in Columbia, South Carolina, and can be contacted at djr@djrosinski.com.

Disclosure Statement

Mr. Rosinski is appearing before the Subcommittee as a private citizen and has not received any federal grant or contract relevant to the subject matter of his testimony. The Veterans Justice Group, LLC, is comprised of advocates for fair treatment of veterans and their families seeking VA benefits earned through the veteran's service. VJG current and former members have challenged the propriety of VA "federal fiduciary" appointments, actions, and inactions within the VA system, before the Court of Appeals for Veterans Claims, and state and federal courts.

House Committee on Veterans' Affairs
Subcommittee on Disability Assistance and Memorial Affairs
Hearing on Veterans Benefits Administration's (VBA) Fiduciary Program
Pre-hearing Deliverables

Deliverable 1: For the first quarter of Fiscal Year (FY) 2015, and for each of the past three FYs (FY 2012, FY 2013, and FY 2014), please provide:

- **a.** The total number of allegations of misuse of beneficiary funds the VBA Fiduciary Program received and/or investigated
- **b.** The total number of misuse determinations made by VBA Fiduciary Program
- **c.** For each such misuse determination, describe the actions VBA took in response to identifying misuse of funds, such as replacing the fiduciary and/or requesting repayment
- **d.** The total amount of beneficiary funds VBA determined were misused; and
- **e.** The total amount of benefits VBA reissued to beneficiaries.

Response: After fiduciary hub consolidation in 2012, VA began an effort to identify and complete all pending misuse matters, including final misuse determinations, debt establishment, and benefit reissuance. Although misuse of benefits is rare in the fiduciary program, approximately one-tenth of one percent of beneficiaries are the victims of fiduciary misuse. VA recognizes that fiduciary misuse of benefits can cause financial hardship for beneficiaries.

VA emphasized the identification and reporting of misuse allegations to fiduciary field personnel, resulting in an increase in documented allegations. VA centralizes these allegations of misuse within its National Call Centers. Corresponding to the increase in allegations, VA is conducting more misuse investigations and determinations. Each allegation is reviewed to determine if further investigation is warranted. For cases where further investigation is necessary, a VA field examiner may collect evidence

through: an interview with the fiduciary, review of the fiduciary's financial records, and contact with the beneficiary. VA continues the investigation until there is a preponderance of evidence to support a conclusion. For cases requiring investigation, VA prepares a formal misuse determination. VA provides the fiduciary with a copy of the formal decision, and the fiduciary then has 30 days to submit new and material evidence regarding the misuse case.

VA is aggressively pursuing recoupment of VA benefits in all cases of misuse – this is particularly important in cases where VA is not authorized to reissue benefits. In November 2013, VA implemented formal procedures for creating a debt against a fiduciary who misused VA benefits, initiating debt collection activities, and referring debts to the U.S. Department of the Treasury for offset against other Federal payments, including Federal tax returns. Through formal guidance and field staff training, VA significantly increased the number and amount of debt established as the result of fiduciary misuse.

Under 38 United States Code (U.S.C.) § 6107, VA must reissue benefits to victims of fiduciary misuse when the fiduciary is not an individual, or when the fiduciary is an individual who manages benefits for 10 or more beneficiaries. In all other cases of fiduciary misuse, VA's authority to reissue benefits is limited to cases in which VA was negligent in its appointment or oversight of the fiduciary. Absent negligence in these cases, the Government's ability to make the beneficiary whole is limited to court-ordered restitution in a criminal or civil action or recovery under a surety bond that the fiduciary purchased.

VA designed its new information technology (IT) system, the Beneficiary Fiduciary Field System (BFFS), to add misuse controls and reporting of misuse data and protocol timeliness. VA's previous antiquated IT system only maintained limited misuse case data and did not monitor or track the misuse protocol. In addition, VA continues to build additional internal controls in BFFS to ensure the integrity of debt collection and benefit

reissuance data. For example, in June 2015, VA will release a BFFS enhancement containing rules-based criteria and real time misuse reporting capability.

To ensure the quality and timeliness of misuse work, VA developed mandatory misuse training for all fiduciary field personnel, included misuse protocol timeliness as a performance measure, and is developing procedures for expanding the quality assurance program for fiduciary work to include the tasks associated with investigating fiduciary misuse.

The following chart reflects the progress VA has made in documenting misuse allegations and taking corrective action when misuse is found, to include appointing a successor fiduciary and initiating debt collection procedures.

VBA Fiduciary Program - Misuse Data				
	FY 2012	FY 2013	FY 2014	FY 2015 Q1
Number of Misuse Allegations	481	922	1,314	698
Number of Determinations Finding Misuse	90	125	144	61
Number of Successor Initial Appointments	61	115	124	57
Amount of VA Benefits Misused	$4,253,225	$5,410,738	$6,308,894	$3,335,687
Number of Debts Established	0	2	171	157
Amount of Debt Established	$0	$58,470	$5,944,598	$5,071,201
Amount of Benefits Automatically Reissued	$523,013	$0	$83,589	$31,768
Amount of Benefits Reissued Due to Negligence	$0	$504,044	$2,995,518	$1,471,221
Total Amount of VA Benefits Reissued	$523,013	$504,044	$3,079,107	$1,502,989

Note: Misuse actions often span more than a single fiscal year. The data in this chart reflects only the specific actions within the misuse protocol completed during that fiscal year.

Deliverable 2: Please also provide a copy of VA's written guidance provided to Regional Hub Managers with respect to determining how many beneficiaries a single trust entity is able to effectively and efficiently manage.

Response: When appointing a fiduciary for a beneficiary, VA performs the best interest determination required by 38 U.S.C. § 5507(a)(2). As a result of this requirement, more than 80 percent of the beneficiaries in VA's fiduciary program have a one-to-one

relationship with their fiduciary. VA seeks out and appoints fiduciaries based on the person or entity that can serve in the least-restrictive, most effective manner, which seldom results in the appointment of a paid, professional fiduciary. In selecting fiduciaries, VA gives preference to family members, who normally serve without a commission. In some cases, however, VA determines that someone other than a family member is best suited to serve as a fiduciary.

While VA does not prescribe a specific limit on the number of beneficiaries a single fiduciary may serve or have formal written guidance on this topic, the hub manager will consider whether the fiduciary has the capacity to manage additional appointments without degrading the service that the fiduciary provides to any other beneficiary. In addition to services potentially degraded due to exceeding a fiduciary's capacity, service to other beneficiaries could be degraded if a fiduciary with a large number of beneficiaries suddenly decides that it wants to get out of the business of providing fiduciary services. Such a decision could disrupt VA's delivery of benefits to affected beneficiaries if VA is unable to timely appoint a large number of successor fiduciaries.

VA recognizes that larger companies may have a greater capacity to serve a large number of beneficiaries. However, the decision to appoint a fiduciary is also based upon the potential adverse impact to the program if a large corporate fiduciary suddenly decides to change its business model. Any limitation on appointment of a specific fiduciary for multiple beneficiaries is based upon the total number of beneficiaries the fiduciary serves, the fiduciary's demonstrated capacity to provide quality service, and whether additional appointments would degrade the services provided by the fiduciary. VA's new BFFS provides each fiduciary hub with national data on fiduciary appointments, to include the total number of beneficiaries that each fiduciary serves.

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