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BEFORE THE
HOUSE COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS**

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Chairman Luttrell, Ranking Member Pappas and distinguished members of the Subcommittee, thank you for the opportunity to appear before you today to discuss the Department of Veterans Affairs (VA) fiduciary program and the vital role we serve for our Veterans and beneficiaries. Accompanying me today is Kevin Friel, Deputy Director, Pension and Fiduciary (P&F) Service. I want to express my appreciation for your continued support of the Nation's Veterans, their families and survivors. VA takes the protection of our most vulnerable beneficiaries very seriously, and we are grateful for the opportunity to share with the Committee the significant updates VA has made to the fiduciary program.

Fiduciary Program Purpose and Structure

Since as early as 1924, the mission of VA's fiduciary program is to protect Veterans and other VA beneficiaries who are unable to manage their own financial VA benefits because of injury, disease, infirmities of advanced age or who are dependents under the age of majority. VA protects these vulnerable beneficiaries by appointing and overseeing fiduciaries who manage their VA benefits. VA provides oversight over fiduciaries to ensure that VA monetary benefits are being used to meet the care and needs of those beneficiaries adjudged incompetent to manage their VA-derived benefits. VA does not take the action to appoint a fiduciary lightly and strives to preserve dignity by serving these beneficiaries with a high degree of sensitivity in the least intrusive way possible.

The statutory authority for the fiduciary program is 38 U.S.C. Ch. 55 and 61. VA has established Federal regulations for this program under 38 C.F.R. Part 13, Fiduciary Activities. In 2018, P&F Service revised its regulations to refine VA policies and procedures, ensuring consistency with current law. It also clarified the rights of beneficiaries in the fiduciary program and the roles that VA and fiduciaries play in ensuring that VA monetary benefits are managed in the best interest of impacted beneficiaries.

In March 2012, VA consolidated all fiduciary activities to six regional fiduciary hubs, comprised of over 1,200 Field Examiners, Legal Instrument Examiners, Fiduciary Service Representatives and other management and support staff. As of August 2023, these hubs collectively provide oversight of approximately 104,000 beneficiaries and

83,000 fiduciaries. The Office of Field Operations monitors the operations of the six fiduciary hubs while P&F Service provides policies, procedures, and additional oversight of the fiduciary program.

VA Modernization Efforts

VA has undergone significant modernization and improvement in its approach to fiduciary activities. In November 2020, VA implemented a comprehensive plan aimed at reducing unnecessary intrusiveness in the lives of VA beneficiaries and their families, while also improving oversight of fiduciaries. This initiative also allowed VA to re-focus efforts on expeditiously conducting interviews and investigations that are paramount to enrolling and monitoring beneficiaries and their associated fiduciaries in the program. VA focused on the completion of initial appointments and investigations, as well as follow-up face-to-face examinations for situations where an issue or concern in the beneficiary-fiduciary relationship was identified.

These programmatic improvements have also positively impacted the time it takes VA to appoint a fiduciary to serve Veterans and other beneficiaries, thereby ensuring faster access to benefits. Since implementing the procedural modernization efforts which began in February 2020, VA reduced the average days pending for an initial appointment field examination from 37 days to 26 days, as of August 31, 2023. Additionally, VA has further enhanced oversight of fiduciaries by increasing the completion of financial reviews for beneficiary funds by 49% from 45,204 in fiscal year (FY) 2020 to 67,223 in FY 2022.

In November 2020, VA also modernized information technology systems for fiduciary program activities by migrating from a legacy system to VA's central benefits claims processing system, the Veterans Benefits Management System. This allowed for the use of VA's modern claims processing application to deliver fiduciary services efficiently and effectively.

Accountings are paramount to the oversight of certain fiduciaries. In August 2020, VA delivered the Fiduciary Accounting Submission Tool (FAST). Prior to implementing FAST, fiduciaries were required to submit accountings and financial documents to VA through the mail. The FAST system provides an alternative to mail by allowing for the electronic submission of accountings reports which streamlines the current process for accounting submission and reviews. Fiduciaries may use FAST to submit new and existing accountings, fund usage reviews and provide accounting revisions in a centralized repository. VA continues to work to enhance the FAST system to streamline workload processing of accountings and fund usage reviews.

VA has also leveraged technology to accommodate the fiduciary program throughout the global pandemic. The pandemic curtailed in-person visits with Veterans and other beneficiaries. VA quickly researched viable options and leveraged the Veterans Health Administration's (VHA) video teleconferencing tools to conduct field examinations with beneficiaries. In March 2022, the fiduciary program released its own

video conferencing tool, P&F Service Video Conferencing. This allowed VA employees to see the beneficiary and their living situation when circumstances prevented an in-person visit, enabling VA to continue its oversight responsibilities.

Referrals to the Fiduciary Program

VA beneficiaries may be referred to the fiduciary program in multiple ways. A referral to the fiduciary program may result from a proposal of incompetency from a VA regional office based on medical evidence of record or receipt of a court determination finding that a beneficiary is unable to manage their financial affairs. VA's regulation (in 38 C.F.R. § 3.353(a)) defines a mentally incompetent person as "one who because of injury or disease lacks the mental capacity to contract or to manage [their] own affairs, including disbursement of funds without limitation." Additionally, beneficiaries under the age of majority are required to be referred to the fiduciary program. VA refers to individuals who have not yet reached the age of majority as minor children. The age of majority is determined by the laws of each individual state or U.S. territory.

When the evidence demonstrates that a proposal of incompetency is appropriate, VA provides written due process notice of the proposed decision to the beneficiary. This notice explains the evidence used to make the decision and their rights. The beneficiary is informed of their right to provide additional evidence, a hearing and the implications of a finding of incompetency by VA. Beneficiaries have the right to a minimum due process period of 60 days, unless they waive their due process rights. If VA does not receive a waiver of due process, VA will review all evidence of record and make a final determination on incompetency after the due process period has expired. VA cannot determine a beneficiary is incompetent unless there is clear, convincing medical evidence which leaves no doubt as to the person's incompetency. In the absence of clear and convincing evidence to the contrary, VA presumes that a person is competent.

It is important to note that judicial findings of a court with respect to the incompetency of a beneficiary are not binding on VA's rating activity. If VA accepts the court's finding of incompetency based on a review of the evidence, no additional notices are provided to the beneficiary and VA designates the beneficiary as incompetent. However, if a Veteran is declared incompetent by a court, VA develops for all necessary evidence to complete a rating determination.

Fiduciary Appointment

In each case where a beneficiary requires a fiduciary, VA strives to appoint an individual that can assist VA in meeting the care and needs of the beneficiary. VA appoints various individuals and entities as a fiduciary, such as a spouse or family member, a court-appointed fiduciary, another interested party or a professional fiduciary.

During the appointment of a fiduciary, VA will assess the well-being and needs of the beneficiary and their dependents by way of an in-person field examination. A VA

field examiner will conduct an in-person visit to assess the beneficiary's living situation and will review the beneficiary's personal situation. VA will consider the beneficiary's preference of a fiduciary and attempt to appoint the preferred individual, provided that the proposed fiduciary is qualified, willing to serve, and the appointment would serve the beneficiary's interest. As of August 31, 2023, two out of three (72,534) fiduciaries appointed are spouses or other family members.

If the beneficiary is unable to identify a preferred individual to serve as their fiduciary, VA will make every effort to appoint an individual or entity that is willing to serve without a fee. However, in certain circumstances, VA must appoint a professional fiduciary who receives a fee for their services. Fees for a professional fiduciary are limited by statute to 4% of the beneficiary's monthly VA payment.

When appointing any fiduciary, VA thoroughly examines the fiduciary's ability to meet their responsibilities as outlined in regulation and statute. VA investigates a proposed fiduciary's criminal background and credit history and assesses their suitability. To be considered suitable, the proposed fiduciary must not possess a bar to fiduciary service, such as a recent conviction of a felony offense. VA will not appoint a person to serve as a fiduciary if they have misused a beneficiary's VA benefits, refuse to comply with VA regulations and/or are unable to fulfill their fiduciary responsibilities.

During the fiduciary appointment process, VA instructs the fiduciary on their duties and responsibilities and provides information about the needs of the beneficiary and any dependents, as applicable. VA provides fiduciaries with the training resources available on VA's website. VA ensures the fiduciary understands their responsibility to know all monthly bills and monetary considerations to meet the care and needs of the beneficiary.

As part of the appointment process, VA considers whether the beneficiary has the capacity to manage their own benefits with limited VA oversight. If the beneficiary demonstrates the capability to manage their funds, VA will place the beneficiary on Supervised Direct Pay. When Supervised Direct Pay is utilized and the beneficiary demonstrates the sustained ability to manage their funds under this appointment, VA will act to make a determination that finds the beneficiary to be competent.

In FY 2023 through August 31, VA has completed 1,600 initial appointment field examinations in an average of 42 days.

Fiduciary Oversight

VA provides robust oversight for all fiduciaries in the fiduciary program. Through its modernization efforts, VA has refined and strengthened its oversight responsibilities for the fiduciary and beneficiary. Fiduciary oversight focuses on a fiduciary's management of a beneficiary's benefits. VA reviews each case's individual circumstances to determine the level of oversight needed. All fiduciaries are subject to regularly scheduled financial oversight which is achieved by submitting either an

accounting or a fund usage report unless the appointment involves either a chief officer of a non-VA facility where the cost of care for the beneficiary equals or exceeds the monthly VA benefit, or a chief officer of a Federal institution if the officer is receiving VA benefits in a fiduciary capacity.

Annual Accounting

VA requires an annual accounting when the VA funds under management exceed \$10,000, the fiduciary is authorized to collect a fee for their service or the beneficiary is paid VA disability compensation benefits for total disability. VA may also determine that an accounting is necessary to ensure that beneficiary funds are properly managed by the fiduciary.

The annual accounting describes, in detail, all activity in the fiduciary accounts, regardless of the source of funds, such as Social Security payments and interest earned on deposits. The fiduciary is required to submit the annual accounting report, along with financial documents and statements covering the entire accounting period. VA conducts a thorough audit of the accounting and pertinent financial documents, examining funds received and expenditures. If the audit shows any indication of misuse of funds, VA investigates and removes the fiduciary from their appointment if misuse is confirmed.

In FY 2023 through August 31, VA completed 31,841 accountings, completing them in an average of 71 days.

Biennial Fund Usage Report

If the beneficiary's individual circumstances do not meet the criteria for an annual accounting, VA conducts targeted oversight of the fiduciary's use and management of VA funds through biennial fund usage reports. A fund usage report consists of a review of 3 months of all financial statements for the beneficiary. The fund usage report must include any supporting documents regarding irregular purchases so that VA can confirm the beneficiary's funds are being spent in their best interest. As with the accounting audit, if the fund usage review shows evidence of misuse of the beneficiary funds, VA investigates and removes the fiduciary from their appointment if misuse is substantiated.

In FY 2023 through August 31, VA completed 15,805 fund usage reviews, completing them in an average of 70 days.

Follow-Up Contact

VA completes follow-up field examinations and telephone contact oversight when the fiduciary fails to fulfill their responsibilities. For example, VA follows up on delinquent accountings and funds usage reports and seeks further clarification if the necessary information is not submitted. Should the fiduciary refuse to submit the accounting, fund usage report or supporting documents when contacted, VA will remove the fiduciary.

In FY 2023 through August 31, VA completed 13,567 follow-up contacts in an average of 29 days.

Onsite Reviews

An onsite review strengthens VA's oversight of fiduciaries. Onsite reviews are intended to ensure fiduciaries who serve multiple beneficiaries are performing their duties satisfactorily and to protect beneficiaries from misuse. VA conducts scheduled periodic onsite reviews under 38 U.S.C. § 5508 on fiduciaries who meet all the following criteria:

- Are located in the United States;
- Serve more than 20 beneficiaries; and
- Total VA funds under management for beneficiaries is more than \$78,860.76 as of December 1, 2022.

VA may conduct unscheduled onsite reviews of fiduciaries as necessary to ensure the well-being of beneficiaries or prevent exploitation of beneficiary funds.

Beneficiary Oversight

In addition to overseeing the fiduciary's performance, VA conducts regular oversight of vulnerable beneficiaries to ensure their well-being through various means, based on the unique circumstances of each case. VA strives to conduct the least intrusive method of oversight to maintain a beneficiary's dignity and to minimize any disruption of family routine.

Annual Written Contact

VA contacts every beneficiary in the fiduciary program annually through written correspondence to remind them of their rights and status in the fiduciary program. This letter also advises the beneficiary and their representative to contact VA if there is an issue or concern with their fiduciary.

For some beneficiaries, an added layer of oversight is not deemed necessary because their well-being is actively monitored by a trusted individual or entity. In these instances, VA leverages annual written contact as the least intrusive form of regular contact while continuing oversight of the beneficiary. These situations include where the fiduciary is:

- The beneficiary's spouse;
- The beneficiary's parent (in cases of minor beneficiaries);
- VHA; or
- Another government agency.

As of August 31, 2023, there are approximately 66,303 beneficiaries served through this type of oversight.

Telephone Contact

If the beneficiary's situation does not meet the criteria for annual written contact, the beneficiary may qualify for scheduled telephonic contact. Beneficiaries who qualify for telephonic oversight are not socially isolated, able to respond to VA requests and oriented to person, place, events and time as of the most recent VA contact.

VA will conduct a telephone call with the beneficiary to assess their well-being, and the beneficiary-fiduciary relationship. Telephonic oversight allows VA to maintain oversight of beneficiaries in a way that is minimally intrusive when the beneficiary's evidence of record indicates that they are able to correspond with VA. As of August 31, 2023, there are approximately 9,722 beneficiaries served through this type of oversight.

Biennial Face-to-Face Contact

For the most vulnerable beneficiaries, such as those who are socially isolated, unable to respond to VA requests or are not oriented to person, place, events and time during the most recent contact, VA will schedule a face-to-face field examination with the beneficiary. These examinations occur every 2 years and help ensure the beneficiary's well-being and assess the current fiduciary situation. As of August 31, 2023, there are approximately 24,935 beneficiaries provided this type of oversight.

Fiduciary Removals and Withdrawals

A fiduciary may withdraw from service by providing a written intent to withdraw that includes the reason for withdrawal. However, a fiduciary is not relieved of their fiduciary duties until they receive written notice in response to their request to withdraw, which includes their requirement to transfer the beneficiary's funds to a successor fiduciary and receive notice of approval for a final accounting.

VA will also take action to remove a fiduciary when oversight reveals evidence of misuse, if the fiduciary refuses to respond to VA's request for accounting or fund usage report documentation or is otherwise found unfit or unsuitable to continue performing fiduciary responsibilities. For VA to further ensure proper oversight of the fiduciary and complete removal actions timely, an annual criminal background inquiry is completed on all active individual fiduciaries to determine whether any active fiduciary has been convicted of an offense which would be a bar to serving as a fiduciary since VA's most recent criminal background investigation. VA takes action to remove any fiduciary found to have a bar to service because of the annual criminal background inquiry.

VA takes misuse of beneficiary funds very seriously and any credible allegation or finding of such is swiftly and comprehensively investigated. Misuse of benefits occurs when the fiduciary receives payment of VA benefits and uses any part of such payment for a purpose that is not for the use and benefit of the beneficiary or their dependents. VA fiduciary program personnel investigate and act on misuse, which is distinct from fraud. For example, fraud could be the continued acceptance of payments after the entitlement to the payment ceases to exist, such as when a beneficiary dies, and the fiduciary conceals the fact to continue receiving VA payments. Allegations of fraud are immediately referred to VA's Office of Inspector General (OIG) for criminal investigation.

VA's oversight is designed to detect and address misuse through accountings, funds usage reports, beneficiary interviews and other contacts, but it is not foolproof. VA relies on allegations of misuse of funds from many sources, such as from the beneficiary themselves, a concerned family member or friend or a beneficiary's social worker. Every allegation, whether written or verbal, is taken seriously and investigated thoroughly, objectively and impartially. If misuse of a beneficiary's funds is confirmed, VA issues a formal misuse determination which serves as the basis to immediately remove the fiduciary if removal has not already occurred. VA simultaneously establishes a debt against the fiduciary and refers the case to VA's OIG for possible criminal investigation. Any fiduciary found to have misused a beneficiary's funds is further barred from serving as a VA fiduciary in the future.

VA's primary obligation is always the beneficiary and their well-being. If a beneficiary's VA benefits were misused by their VA-appointed fiduciary, VA will make the beneficiary or the beneficiary's successor fiduciary whole, while simultaneously seeking recovery from the person who misused the funds.

VA Negligence

VA does not spare itself from scrutiny and conducts review of its own oversight. After VA issues a formal finding of misuse, VA reviews the record to determine if VA was negligent, as required by law. VA is considered negligent if the misuse would not have occurred but for VA's failure to exercise proper oversight. VA is also considered negligent when VA fails to:

- Review an accounting within 60 days of receipt;
- Decide to investigate an allegation of misuse within 60 days of receipt of the allegation; or
- Take action to replace the fiduciary within 60 days of the allegation of misuse after deciding to investigate an allegation of misuse and finding misuse.

Thanks to Congressional action, P.L. 116-315, the Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020, VA was able to improve its ability to make beneficiaries whole after a finding of misuse by decoupling a finding of VA negligence from reissuance. With the passing of this law, VA is now able

to reissue the equivalent amount of funds misused by a fiduciary to the beneficiary in every instance of misuse.

Conclusion

The VA fiduciary program has undergone significant modernization in recent years and VA remains committed to protecting the most vulnerable of its beneficiaries. VA strives to maintain the balance of oversight and intrusiveness, while remaining steadfast in our oversight of appointed fiduciaries and the funds it has entrusted to them. VA shares Congress' goal of continuous improvements to its program and its customer service to Veterans and beneficiaries and looks forward to continued collaboration. VA expresses its appreciation for your continued support of Veterans and their families, caregivers and survivors. Chairman Luttrell, Ranking Member Pappas, this concludes my statement. I am happy to respond to any questions you or the Committee may have.