

## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Parts 3 and 13

RIN 2900-AO53

#### Fiduciary Activities

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of Veterans Affairs (VA) proposes to amend its fiduciary program regulations, which govern the oversight of beneficiaries who, because of injury, disease, the infirmities of advanced age, or minority, are unable to manage their VA benefits, and the appointment and oversight of fiduciaries for these vulnerable beneficiaries. The proposed amendments would update and reorganize regulations consistent with current law, VA policies and procedures, and VA's reorganization of its fiduciary activities. They would also clarify the rights of beneficiaries in the program and the roles of VA and fiduciaries in ensuring that VA benefits are managed in the best interest of beneficiaries and their dependents.

**DATES:** Comments must be received by VA on or before March 4, 2014.

**ADDRESSES:** Written comments may be submitted through [www.regulations.gov](http://www.regulations.gov); by mail or hand-delivery to Director, Office of Regulation Policy and Management (O2REG), Department of Veterans Affairs, 810 Vermont Avenue NW., Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. Comments should indicate that they are submitted in response to "RIN 2900-AO53, Fiduciary Activities." Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Call (202) 461-4902 for an appointment. (This is not a toll-free number.) In addition during the comment period, comments may be viewed online through the Federal Docket Management System at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Cynthia Lewis, Chief, Fiduciary Policy and Procedures Staff, Department of Veterans Affairs, 810 Vermont Ave. NW., Washington, DC 20420; (202) 632-8863. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** Since as early as 1924, VA and its predecessor agencies have administered a fiduciary program for beneficiaries who, as a result of injury, disease, the infirmities of advanced age, or being less than 18

years of age, cannot manage their own VA benefits. Under this program, VA oversees these vulnerable beneficiaries, and appoints and oversees fiduciaries who manage these beneficiaries' benefits. VA's current statutory authority for this program is in 38 U.S.C. chapters 55 and 61.

Under current law, "[w]here it appears to the Secretary that the interest of the beneficiary would be served thereby, payment of benefits under any law administered by the Secretary [of Veterans Affairs] may be made directly to the beneficiary or to a relative or some other fiduciary for the use and benefit of the beneficiary, regardless of any legal disability on the part of the beneficiary." 38 U.S.C. 5502(a)(1). VA's longstanding interpretation of this authority is that the Department may establish a fiduciary program, under which it oversees beneficiaries who cannot manage their own VA benefits, and may either pay benefits directly to a beneficiary under VA supervision or to a third-party fiduciary, who may be a relative or some other individual or entity. We interpret "regardless of legal disability" in section 5502(a)(1) to mean that in creating the fiduciary program, Congress intended to preempt State law regarding guardianships and other matters to the extent necessary to ensure a national standard of practice for payment of benefits to or on behalf of VA beneficiaries who cannot manage their benefits. This proposed rule would establish that national standard of practice and remove the distinction between "Federal" fiduciaries and "court-appointed" fiduciaries. Except as discussed below in this preamble, we intend to apply this approach to all fiduciary matters on the effective date of the final rule.

VA implemented its authority to administer a fiduciary program in current 38 CFR part 13, most of which has not been updated since as early as 1975. There have been several significant changes to the program since the last update. First, in 2004, Congress amended 38 U.S.C. chapters 55 and 61 to add new provisions, which, among other things, authorize VA to conduct specific investigations regarding the fitness of individuals to serve as fiduciaries, conduct onsite reviews of fiduciaries who serve more than 20 beneficiaries, require fiduciaries to file reports or accountings, and reissue certain benefits that are misused by fiduciaries. See 38 U.S.C. 5507-5510, 6106-6107. VA has not implemented these changes in law in its regulations.

Second, VA has consolidated its fiduciary activities into six regional fiduciary hubs and one foreign fiduciary

activity at the VA Manila, Philippines Regional Office. This consolidation, which VA completed in March 2012, was based on the positive results of a pilot project at the Western Area Fiduciary Hub in Salt Lake City, Utah. Among other things, VA found that the consolidation improved the timeliness and accuracy of fiduciary operations. Under the consolidation, authority is delegated to the Fiduciary Hub Manager (Hub Manager) for each hub to administer VA's regional fiduciary activities. Each Hub Manager reports to the Director of the VA Regional Office where the hub is located. Accordingly, current regulations, which refer to the authority delegated to the Veterans Service Center Manager in each regional office, are out of date.

Finally, as we describe in greater detail in this preamble, the U.S. Court of Appeals for Veterans Claims (Veterans Court) held in April 2011 that VA's fiduciary appointments may be appealed to the Board of Veterans' Appeals and thereafter to the Veterans Court and the U.S. Court of Appeals for the Federal Circuit. Prior to this holding, it was VA's view that fiduciary appointments were, by law, committed to the discretion of the Secretary of Veterans Affairs and could not be appealed. Therefore, current regulations do not address the right to appeal a fiduciary appointment or the notice and transparency that are necessary to provide beneficiaries a meaningful right of appeal.

Also, VA's current fiduciary regulations tend to be general policy statements, rather than the binding rules for VA, beneficiaries, and fiduciaries that one might expect to find in regulations. Current regulations are also written in archaic language. For example, current regulations use the terms "estate," "incompetent adult," "payee," "legal custodian," "custodian-in-fact," "court-appointed fiduciary," and "commission." As a result, current regulations are not written in plain, easy-to-understand language for the general public.

Although VA's current fiduciary regulations are in 38 CFR part 13, there are regulations in 38 CFR part 3 that also address fiduciary matters. See 38 CFR 3.850 through 3.857. VA generally promulgated these regulations in the 1960s and 1970s, and they are either obsolete, redundant of current part 13 provisions, or general policy statements that do not constitute binding rules. Accordingly, we propose to remove these regulations from part 3 and consolidate all rules applicable to the fiduciary program in part 13. There are references to these part 3 regulations in

38 CFR 3.401, 3.403, 3.452, 3.500, and 3.501, which generally pertain to effective dates. We propose to update §§ 3.403 and 3.452 consistent with our proposed regulations and current VA policy and to remove the other references because they are also obsolete or are not applicable to fiduciary matters. There are a few references to current part 13 regulations in current 38 CFR 3.353. We propose to update § 3.353 by replacing these references with references to proposed provisions.

As described in the section-by-section supplementary information below, we propose to rewrite all of VA's part 13 fiduciary regulations consistent with current law, current VA policy and procedures, and VA's current organizational structure. We also propose to rewrite the regulations in plain language that is easier for beneficiaries and current and proposed fiduciaries to understand.

### 13.10 Purpose and applicability of other regulations

This regulation would provide general notice regarding the statutory authority for and purpose of VA's fiduciary program. It would also distinguish fiduciary matters from benefit claims and clarify that the VA regulations in 38 CFR part 3 are not for application in fiduciary matters, unless VA has prescribed applicability in its part 13 fiduciary regulations.

### 13.20 Definitions

Proposed § 13.20 would set forth definitions applicable to part 13.

The fiduciary program is responsible for ensuring that VA benefit payments made directly to a beneficiary in the fiduciary program or to a fiduciary on behalf of a beneficiary in the fiduciary program are used to maintain the well-being of the beneficiary and the beneficiary's dependents. Consistent with this responsibility, we propose to define *dependent* to mean the beneficiary's spouse, child, or parent who does not have income sufficient for reasonable maintenance and who obtains support for such maintenance from the beneficiary. For purposes of this definition, we propose to define *spouse* to mean a husband or wife whose marriage meets the requirements of 38 U.S.C. 103(c), including "common law" marriage and same-sex marriage, and use the definition of *child* in current 38 CFR 3.57, and the definition of *parent* in current 38 CFR 3.59.

We propose to define *fiduciary* to mean an individual or entity that has been appointed by VA to receive VA benefits on behalf of a beneficiary for the use and benefit of the beneficiary

and the beneficiary's dependents. We interpret sections 5502 and 5506 to mean that a fiduciary appointed to manage VA benefits on behalf of a beneficiary has a financial obligation to the beneficiary and his or her dependents. We intend the definition to cover any individual or entity that has been appointed pursuant to VA's part 13 fiduciary regulations.

As noted above in this preamble, since the promulgation of VA's current part 13 fiduciary regulations, VA consolidated all of its fiduciary activities, except the activities at the VA Manila, Philippines Regional Office, into regional entities called fiduciary hubs. Within each hub, the Hub Manager has the authority to oversee the hub's activities, but the Veterans Service Center Manager at the Manila Regional Office retains jurisdiction over fiduciary matters in the Philippines. Because the term *Hub Manager* is used throughout our proposed part 13 regulations, we propose to define the term to mean the individual who has the authority to oversee the activities of a VA Fiduciary Hub or the Veterans Service Center Manager of the Manila Regional Office.

We propose to define *in the fiduciary program* to mean that a beneficiary has been rated by VA as incapable of managing his or her own VA benefits as a result of injury, disease, or the infirmities of advanced age, has been determined by a court with jurisdiction as unable to manage his or her own financial affairs, or is less than 18 years of age.

We use the term *rating authority* throughout our proposed regulations to refer to the VA entity with the authority to determine whether a beneficiary can manage his or her own VA benefits. We propose to define the term to mean VA employees who have authority under 38 CFR 3.353 to determine whether a beneficiary can manage his or her VA benefits. These employees generally work in VA's regional offices under the direction of a Veterans Service Center Manager or in a VA Pension Management Center (PMC) under the direction of a PMC Manager.

We propose to define *relative* to mean an adopted child or a person who is related to a beneficiary by blood or marriage. We intend a broad definition of this term consistent with current law and VA policy, under which VA prefers appointing relatives to serve as fiduciaries for beneficiaries. This broad definition would also be consistent with current VA policy regarding appointment of paid fiduciaries. VA prefers to appoint unpaid relatives prior to considering any other individual who is willing to provide fiduciary services

only for a fee. VA's order of preference is based on the type of fiduciary relationship and seeks to establish the least restrictive and most effective relationship. Relatives typically have a one-on-one relationship with the beneficiary they serve and also serve without a fee.

Restricted withdrawal agreements are used in some cases to protect VA benefit funds under management by a fiduciary when adequate bonding is not available. In order for a bond to be adequate, it must be reasonably priced and easily enforced by VA. In cases where the beneficiary and fiduciary reside in a territory of the United States or the Republic of the Philippines and the surety company fails to perform the obligation stated in the bond, it would be difficult to commence legal action and collect the liability from the surety company. For this reason, a fiduciary in the Commonwealth of Puerto Rico, Guam, or any other territory of the United States, or in the Republic of the Philippines, whose location precludes adequate bonding would be able to use a restricted withdrawal agreement in lieu of a corporate surety bond. We propose to define *restricted withdrawal agreement* to mean a written contract between VA, a fiduciary, and a financial institution in which the fiduciary has VA benefit funds under management for a beneficiary, under which certain funds cannot be withdrawn without the consent of the VA Hub Manager.

To refer to the VA benefits that a fiduciary manages for a beneficiary, to include funds in accounts and invested funds, we use the term *VA benefit funds under management* throughout our proposed regulations. We propose to define the term to mean the combined value of the fiduciary account or accounts managed by a fiduciary for a beneficiary and any funds invested by the fiduciary for the beneficiary, to include any interest income and return on investment derived from any account.

### 13.30 Beneficiary rights

Generally, a person to whom VA has awarded monetary benefits, a beneficiary, has the right to have VA pay those benefits directly to him or her. However, under 38 U.S.C. 5502(a)(1), VA may appoint a fiduciary on behalf of a beneficiary when it appears that "the interest of the beneficiary" would be served by such appointment. In fact, section 5502(a)(1) authorizes VA to pay benefits directly to a beneficiary even if VA or a court has determined that the beneficiary is incapable of managing his benefits if VA determines that direct payment would serve the beneficiary's

interest. Beneficiaries also have the right to seek appointment of a successor fiduciary if the current fiduciary is not performing his or her responsibilities adequately. Under 38 U.S.C. 6107(a), certain beneficiaries have the right to reissuance of benefits that a fiduciary misused. Further, under *Freeman v. Shinseki*, 24 Vet. App. 404 (2011), a beneficiary has a right to appeal VA's fiduciary appointment decisions. In addition, VA has established various beneficiary rights in its policies and procedures. Current regulations do not clearly prescribe these rights. For purposes of clear notice regarding beneficiary rights under current law and policy, we propose to add § 13.30 as described below. We intend this regulation as a comprehensive list of the various rights addressed in more detail in other proposed part 13 regulations.

In the introductory text to proposed § 13.30, we propose to state VA's policy that, except as prescribed in the part 13 fiduciary regulations, a beneficiary in the fiduciary program has the same rights as any other VA beneficiary. In proposed paragraph (a), we state that a beneficiary generally has a right to manage his or her own VA benefits, subject only to VA's authority under section 5502(a)(1) to pay benefits directly to a beneficiary with limited VA supervision or to appoint a fiduciary to receive and manage VA benefit payments on behalf of a beneficiary.

Paragraph (b) would provide notice regarding specific rights that we believe Congress intended to afford beneficiaries when it created the fiduciary program. We would prescribe that, if the beneficiary is 18 years old or older, a beneficiary in the fiduciary program has the right to receive recurring monthly benefit payments until VA has completed the process required to appoint a fiduciary. This policy would ensure that beneficiaries and their dependents receive the benefits they need while VA is fulfilling its statutory obligations in the appointment of a fiduciary.

Proposed paragraph (b)(2) would prescribe that every beneficiary in the fiduciary program has the right to notice regarding VA's appointment of a fiduciary or any other decision on a fiduciary matter that affects VA's provision of benefits to the beneficiary. The Hub Manager would provide written notice of such decisions to the beneficiary or the beneficiary's legal guardian, and the beneficiary's accredited veterans service organization representative, attorney, or claims agent. This notice is essential because beneficiaries would have the right to appeal some of these determinations.

Proposed paragraph (b)(3) would prescribe that a beneficiary in the fiduciary program has the right to appeal to the Board of Veterans' Appeals VA's appointment of a fiduciary.

Proposed paragraph (b)(4) through (6) would prescribe the beneficiary's basic right to be informed of a fiduciary's name, telephone number, mailing address, and email address; the right to contact his or her fiduciary and request a disbursement of funds for current or foreseeable needs or consideration for payment of previously incurred expenses or other information or assistance consistent with the responsibilities of the fiduciary prescribed in proposed § 13.140; and the right to obtain from the fiduciary a copy of the fiduciary's VA-approved annual accounting. These rights are basic to a fiduciary-beneficiary relationship and are necessary to define a fiduciary's role in such a relationship. They are also necessary to clarify that VA is not the beneficiary's fiduciary and is limited to an oversight role.

Proposed paragraph (b)(7) would provide notice regarding a beneficiary's right under 38 U.S.C. 6107 to have VA reissue benefits misused by a fiduciary under certain circumstances, and proposed paragraph (b)(8) would prescribe a beneficiary's right to appeal VA's determination regarding its own negligence in misuse and reissuance of benefits matters.

Proposed paragraph (b)(9) would allow a beneficiary to make a reasonable request for the appointment of a successor fiduciary if the current fiduciary receives a fee paid from the beneficiary's benefits and the beneficiary is requesting an unpaid volunteer fiduciary who has a higher preference under proposed § 13.100(e), or if the beneficiary provides credible information that the current fiduciary is not acting in the beneficiary's interest or is unable to effectively serve the beneficiary. We propose to prescribe this right consistent with current VA policy, which, in all cases, requires VA to consider the beneficiary's stated preference for a fiduciary appointment. It would also allow a beneficiary to request supervised direct payments of his or her VA benefits after the removal of a fiduciary, which would be one of the rights afforded under proposed § 13.30.

Proposed paragraph (b)(10) would prescribe that a beneficiary has the right to receive his or her VA benefits directly without VA supervision if removed from the fiduciary program, or receive benefits directly with VA supervision if the beneficiary demonstrates the ability

to manage his or her VA benefits through supervised direct payment (proposed § 13.110), or VA otherwise determines that the beneficiary no longer requires fiduciary services (proposed § 13.500).

Proposed paragraph (b)(11) would provide that a beneficiary has the right to be represented by a VA-accredited attorney, claims agent, or representative of a VA-recognized veterans service organization.

#### **13.40 Representation of beneficiaries in the fiduciary program**

Under 38 U.S.C. chapter 59, Congress limited representation in the preparation, presentation, and prosecution of claims before VA to VA-recognized veterans service organizations and VA-accredited attorneys and claims agents. See 38 U.S.C. 5901, 5902, and 5904. VA implemented this authority in 38 CFR 14.626 through 14.637, which address recognition and accreditation procedures, standards of conduct for individuals providing representation before VA, limitations on fees, and disciplinary matters. It is reasonable to impose the same limitations on representation before VA in fiduciary matters.

We propose in § 13.40 that the provisions of 38 CFR 14.626 through 14.629 and 14.631 through 14.637 are generally applicable to representation before VA in fiduciary matters. We would exclude the application of § 14.630, which authorizes non-accredited representation in claims for VA benefits. We intend to ensure that the vulnerable beneficiaries who are in the fiduciary program have the assistance of qualified accredited representatives. We also propose to remove any ambiguity that might be created by the references to "claims" in the part 14 regulations as applied to fiduciary matters, which are not claims for benefits. We would remove this ambiguity by specifying in proposed paragraph (b)(1) that the terms "claim" and "claimant" in § 14.632 include a fiduciary matter before VA and a beneficiary in the fiduciary program, respectively. Regarding fees, we propose that the provisions of 38 CFR 14.636 that reference past-due benefits, use the amount of past-due benefits to calculate a permissible fee, or authorize the direct payment of fees by VA out of withheld past-due benefits are not applicable in fiduciary matters. This proposal is based upon the fact that fiduciary matters do not concern the award of past-due benefits. At the time of a fiduciary appointment, VA has already awarded benefits to the beneficiary, and any

representation provided by an accredited attorney or claims agent would relate only to the fiduciary appointment decision or decision to pay benefits directly with VA supervision.

### 13.50 Suspension of benefits

In 38 U.S.C. 5502(a)(1), Congress authorized payment of benefits to a fiduciary on behalf of a beneficiary if VA determines that such payment would serve the interest of the beneficiary. However, Congress also recognized that VA would encounter situations in which it is necessary to suspend payment of benefits to a fiduciary and take appropriate action to ensure continuity of benefits. In section 5502(b), Congress authorized VA to suspend payment of benefits to any fiduciary who neglects or refuses to comply with VA accounting requirements.

In section 5502(d), Congress also authorized VA to pay benefits to certain other individuals in any case in which VA suspends benefit payments to a fiduciary. In such cases, Congress prescribed that benefits not paid to those individuals may be “held in the Treasury to the credit of such beneficiary” and authorized disbursement of such held funds “under the order and in the discretion of the Secretary for the benefit of such beneficiary or the beneficiary’s dependents.” 38 U.S.C. 5502(d). Congress prescribed similar authority in 38 U.S.C. 5504 regarding administration of trust funds. That statute, which generally pertains to the personal funds of patients and other trust funds established by VA, authorizes the transfer of such funds into “deposit fund accounts with the United States Treasury” and provides that “such balances and deposits shall thereupon be available for disbursement for properly authorized purposes.”

VA implemented these provisions in various regulations, all of which interpret VA’s authority as allowing suspension of benefit payments and appropriate VA action to ensure continuity of benefits for VA’s most vulnerable beneficiaries. See current 38 CFR 13.61 (payments to chief officers of institutions), 13.72 (release of funds from personal funds of patients), and 13.73 (transfer of funds from funds due incompetent beneficiaries). We interpret VA’s current statutory authority and VA’s current regulations as authorizing suspension of benefit payments and appropriate action by VA to ensure continuity of benefit payments if a beneficiary has an immediate need for disbursement of funds and it is not possible to appoint a temporary or

permanent fiduciary in time to address that need. Accordingly, we propose a new regulation, § 13.50, which would clearly prescribe VA’s authority to suspend benefit payments and take appropriate action on behalf of a beneficiary, provided that such action serves the beneficiary’s interest.

In proposed paragraph (a), we would state that, notwithstanding any rights afforded to a beneficiary under proposed § 13.30, the Hub Manager may temporarily suspend payments of a beneficiary’s VA benefits and hold such benefits in the United States Treasury to the credit of the beneficiary, or take any other action the Hub Manager deems appropriate to prevent exploitation of the beneficiary’s VA benefits or ensure that the beneficiary’s needs are being met. We intend that this regulation would implement VA’s authority under the above-referenced statutes to suspend benefit payments and act in the beneficiary’s interest in the rare case where independent VA action is necessary. However, we would limit the Hub Manager’s discretion to use this regulation as prescribed in paragraphs (a)(1) and (2).

Based upon VA’s experience in administering the program, we have determined that there are generally two situations in which VA action under this proposed regulation would be necessary. First, in some cases, a beneficiary or the beneficiary’s accredited representative, attorney, or claims agent may withhold cooperation in the fiduciary appointment process and thus risk suspension of benefits. In these instances, VA has an obligation to ensure that the beneficiary’s or the beneficiary’s dependents’ needs are being met, to include payment of recurring bills, such as mortgages. Second, VA occasionally removes a fiduciary for one of the reasons prescribed in proposed § 13.500(b), such as fiduciary misuse of benefits, and is unable to appoint a successor fiduciary before the beneficiary has an immediate need for disbursement of funds. Under these two situations only, proposed paragraph (b) would authorize the VA Regional Office Director who has jurisdiction over the fiduciary hub or regional office involved to order disbursement of funds in the beneficiary’s and the beneficiary’s dependents’ interests.

In light of the temporary fiduciary appointment authority in proposed § 13.100(h) and the removal and withdrawal provisions in proposed §§ 13.500 and 13.510, we anticipate that this proposed regulation would be reserved for rare cases in which VA has

no option but to take appropriate independent action.

### 13.100 Fiduciary appointments

Under 38 U.S.C. 5502(a)(1), VA is authorized to appoint a fiduciary on behalf of a beneficiary when VA determines that “the interest of the beneficiary would be served.” Under this authority, before VA decides to pay benefits to a fiduciary, VA considers whether VA benefits can be paid directly to the beneficiary with temporary and limited VA supervision. VA may also appoint a temporary fiduciary under 38 U.S.C. 5502(d) and 5507(d) if the circumstances require a temporary appointment. With respect to fiduciary appointments, VA must conduct the investigation prescribed by Congress in 38 U.S.C. 5507, which includes conducting a face-to-face interview with the proposed fiduciary to the extent practicable.

VA implemented its authority under section 5502 in current 38 CFR 13.55. While § 13.55 authorizes the Veterans Service Center Manager to select and appoint the individual or entity best suited to receive VA benefits in a fiduciary capacity on behalf of a beneficiary, it does not fully implement section 5502. Specifically, it does not prescribe the obligations in initial appointments, to include VA’s order of preference that must be considered in selecting a fiduciary to ensure that the appropriate fiduciary is appointed for a beneficiary. Further, the current regulation was promulgated in 1975, long before Congress added section 5507 regarding the investigation required to appoint a fiduciary. Also, the current regulation does not provide notice of current VA policy and procedures.

We therefore propose a new § 13.100, which would prescribe the Hub Manager’s obligations in the appointment of a fiduciary. This proposed regulation would also prescribe the order of preference the Hub Manager must consider when appointing a fiduciary, the legal requirements regarding investigation and qualification of a fiduciary, rules governing expedited and temporary fiduciary appointments, and rules governing disclosure of information by fiduciaries to the beneficiaries they serve. This proposed regulation is necessary to fully inform beneficiaries and fiduciaries of VA’s interpretation of current law and the procedures for appointing fiduciaries.

In proposed paragraph (a), we would authorize the Hub Manager to appoint a fiduciary for beneficiaries in the fiduciary program. Paragraph (a) would generally require appointment of a

fiduciary for beneficiaries who are the subject of a VA rating or court order regarding inability to manage financial affairs and for beneficiaries who are under 18 years of age. Proposed paragraph (b) would prescribe the exceptions to the authority granted under proposed paragraph (a). We would clarify that VA will not appoint fiduciaries for (1) beneficiaries who qualify under proposed § 13.110 for supervised direct payment or (2) beneficiaries who (i) have not reached age 18 but (ii) serve in the military, were discharged from military service, or qualify for VA survivors' benefits as a surviving spouse, and (iii) have not been rated by VA as unable to manage VA benefits and have not been determined by a court to be unable to manage financial affairs. The provisions of proposed paragraphs (i), (ii) and (iii) restate or clarify current provisions. We do not intend a substantive change.

Current 38 CFR 3.855 prescribes that VA will continue benefit payments directly to a beneficiary pending appointment of a fiduciary. VA has interpreted this provision to mean that beneficiaries are entitled to direct payment of recurring monthly benefits while VA processes a fiduciary appointment. However, VA withholds any retroactive benefit payment until a fiduciary has been appointed and, if applicable, the fiduciary has obtained a surety bond. This long-standing policy protects any large, one-time benefit payment that the beneficiary may need for future care and services and that VA would not be able to reissue under 38 U.S.C. 6107 if it were made directly to the beneficiary prior to a fiduciary appointment. We propose to remove current § 3.855 and replace it with proposed paragraph (c), in which we would provide clear notice that the Hub Manager will withhold such payments until a fiduciary has been appointed.

Proposed paragraph (d) would prescribe the obligations of the Hub Manager in initially appointing a fiduciary to act on behalf of a beneficiary. We would essentially restate the statutory language and require every effort to appoint a fiduciary that would best serve the interest of a beneficiary. In achieving this objective, we propose, consistent with section 5507 and current VA practice, to require a field examination prior to appointing a fiduciary, which would include a "face-to-face" meeting with the beneficiary at the beneficiary's residence to the extent practicable, and the investigation of the proposed fiduciary prescribed in proposed paragraph (f). Proposed paragraph (d) would also implement section

5502(a)(1) by requiring the Hub Manager to consider, based upon the field examination, whether the beneficiary is able to manage his or her VA benefits with limited and temporary supervision by VA. See proposed 38 CFR 13.110 regarding supervised direct payment.

Proposed paragraph (d) would also require the Hub Manager to consider whether the beneficiary's circumstances require appointment of a temporary fiduciary under proposed paragraph (h). Finally, proposed paragraph (d) would require the Hub Manager to consider the number of beneficiaries the proposed fiduciary already serves and whether the fiduciary would be able to meet the responsibilities of a fiduciary prescribed in proposed 38 CFR 13.140 in all appointments, if the Hub Manager appointed the fiduciary. We intend that the Hub Manager would limit the number of beneficiaries a fiduciary may reasonably serve.

In proposed paragraph (e), we would prescribe the order of preference the Hub Manager must consider in appointing a fiduciary. We interpret section 5502(a) to authorize a paid fiduciary only if VA cannot appoint a relative or other fiduciary who would be willing to serve without a fee. We therefore propose the order of preference in proposed paragraphs (e)(1) through (10), beginning with the beneficiary's preference and progressing to the most restrictive and least desirable options. Consistent with our interpretation of current law and VA policy, VA will consider appointment of paid fiduciaries, including fiduciaries who are also appointed by a court, only when no other appropriate person or entity is willing to serve without a fee. VA does not favor diverting VA benefits to individuals or entities who will profit from beneficiaries' disabilities.

Proposed paragraph (f) would implement 38 U.S.C. 5507 and would prescribe the investigation VA must conduct of a prospective fiduciary to receive benefits payments for a beneficiary under section 5502(a)(1). We would generally restate the provisions in section 5507 but propose to require that the Hub Manager must obtain and review a credit report on the proposed fiduciary that was issued by a credit reporting agency no more than 30 days prior to the date of the proposed appointment. We intend that appointment of fiduciaries would be based upon the best available and most relevant information. We would also require that a proposed fiduciary must provide proof of identity and relationship to the beneficiary, but not require an investigation of a proposed fiduciary that is an entity, such as the

trust department of a bank that provides fiduciary services. We interpret the specific investigation requirements in section 5507, such as the criminal history and credit check, as applying only to individuals. We would also delegate to the Hub Manager the authority to again conduct all or part of the investigation prescribed in paragraph (f) after the initial appointment of the fiduciary. We interpret the authority delegated by Congress in section 5507 as including the authority to monitor fiduciaries' qualifications to ensure that they remain fit for service and that there is no current bar to service under proposed § 13.130.

Proposed paragraph (g) would implement section 5507(c) and would prescribe the requirements for expedited appointments under section 5502(a)(1). We would restate the provisions of section 5507(c) and authorize the Hub Manager to waive the face-to-face interview, criminal background check, and credit report requirements for a proposed fiduciary who is (1) the parent (natural, adopted, or step-parent) of a minor beneficiary; or (2) the spouse of a beneficiary; or the proposed fiduciary is being considered to manage annual VA benefits that do not exceed \$3,600, as adjusted pursuant to 38 U.S.C. 5312.

Proposed paragraph (h) would implement section 5507(d) and would prescribe the circumstances under which a temporary fiduciary may be appointed. In accordance with the provisions of section 5507(d), the period for which a Hub Manager could appoint a temporary fiduciary would not exceed 120 days, and a temporary fiduciary may be appointed if a beneficiary is appealing a VA rating that the beneficiary cannot manage his or her own VA benefits. Also consistent with 5502(d), we propose to authorize appointment of a temporary fiduciary when VA has removed a fiduciary for the reasons prescribed in proposed § 13.500, cannot expedite the appointment of a successor fiduciary, and the beneficiary has an immediate need for fiduciary services. Consistent with VA's authority under section 5502 to act in the interest of beneficiaries, we also propose to authorize a temporary fiduciary appointment in any other case in which the Hub Manager determines that it is necessary to protect a beneficiary's assets.

In proposed paragraph (h)(2), to ensure that an entity or individual who serves as a temporary fiduciary meets the qualification requirements under section 5507, we would limit appointment 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 for whom the fiduciary has submitted an annual accounting that VA has approved. This provision would ensure that VA expeditiously appoints a qualified fiduciary under these rare circumstances who can temporarily meet the beneficiary's immediate needs.

Proposed paragraph (i) would require every proposed fiduciary who is an individual to provide the Hub Manager a written authorization for VA to disclose information about the proposed fiduciary to the beneficiary. Any individual who refuses to provide the authorization would not be eligible to serve as a fiduciary for a beneficiary. See proposed paragraph (c) of § 13.130 regarding bars to serving as a fiduciary. Under *Freeman v. Shinseki*, a beneficiary has a right to appeal VA's fiduciary appointment decisions. As described below in this preamble, we would extend a beneficiary's right to appeal to certain other VA decisions made in the fiduciary program. See proposed 38 CFR 13.600 regarding appeals. These decisions must provide the beneficiary the bases for VA's decision, to include any information regarding the disqualification of the proposed fiduciary. For example, during the course of the investigation required by section 5507, VA might discover that the proposed fiduciary has a disqualifying criminal conviction or a poor credit history. Without the authorization required in proposed § 13.100(i), application of the Privacy Act might prevent VA from providing the beneficiary meaningful notice regarding the bases for VA's appointment of a fiduciary other than the one with a criminal history or poor credit history.

The same concern exists during VA's processing of an appeal to the Board of Veterans' Appeals. Under 38 U.S.C. 7105(d), upon receipt of a notice of disagreement regarding a fiduciary appointment decision, VA must issue a statement of the case summarizing the pertinent evidence, citing the pertinent laws and regulations, and discussing how the law and regulations affect VA's decision. The purpose of this statement is to assist the beneficiary in making a decision regarding appeal and preparing the appeal for review by the Board of Veterans' Appeals. The statement might be viewed as inadequate for the purpose it serves if VA cannot fully discuss the bases for its decision.

Accordingly, to ensure the transparency that beneficiaries need to perfect an appeal or understand the

bases for a VA decision regarding a fiduciary matter, we propose to require a proposed fiduciary who is an individual to provide the Hub Manager a written authorization for VA to disclose to the beneficiary information regarding any fiduciary matter that may be appealed described in proposed paragraph (i)(1). The Hub Manager would provide the proposed fiduciary notice regarding the purpose of the authorization and the potential use of disclosed information by the beneficiary in seeking review of VA decisions. Under proposed paragraph (i)(3), the Hub Manager would terminate consideration of a proposed fiduciary if the individual refuses to provide the required authorization.

### 13.110 Supervised direct payment

In 38 U.S.C. 5502(a)(1), Congress authorized VA to pay benefits directly to a beneficiary, regardless of any legal disability on the beneficiary's part, if VA determines that direct payment to that beneficiary will serve his or her interest. Congress did not address the scope of direct payment to a beneficiary who was initially rated as being unable to manage his or her VA benefits, but later, through supervised direct payment, demonstrated the ability to independently manage those benefits.

VA implemented its authority under section 5502(a)(1) in current 38 CFR 13.56 regarding supervised direct payment. Under § 13.56, VA may pay benefits directly to a beneficiary rated as being unable to manage his or her VA benefits "in such amount as [VA] determines the [beneficiary] is able to manage with continuing supervision by [VA], provided a fiduciary is not otherwise required." If the amount paid under direct supervision is less than the full benefit entitlement, such partial payment cannot exceed 1 year for a beneficiary who is successfully managing his or her financial affairs.

We have determined that current § 13.56 does not fully implement section 5502(a)(1) or current VA policy regarding supervised direct payment to beneficiaries in the fiduciary program. We note that while the current regulation allows direct payment of benefits, it is unclear as to how such payments will be accomplished while VA provides continued supervision. The current regulation is silent as to what continued supervision entails or whether such supervision must continue despite evidence that the beneficiary can actually manage his or her VA benefits. Furthermore, current language in the regulation which provides that VA may pay the beneficiary "in such amount as [VA]

determines the [beneficiary] is able to manage" is not a clear substantive rule. Therefore, we propose a new § 13.110, which would clearly prescribe the roles of both VA and the beneficiary during the supervised direct payment period, with the objective of having the beneficiary independently managing his or her benefits without VA supervision at a later date, and without having a fiduciary appointed.

In proposed paragraph (a), we would authorize the Hub Manager to pay benefits directly to an adult beneficiary. Consistent with current VA policy and section 5502(a), the Hub Manager would determine, based upon a field examination, whether the beneficiary can manage his or her VA benefits with limited and temporary VA supervision. A beneficiary would also be allowed to request supervised direct payment of his or her VA benefits following the removal of a fiduciary as prescribed in proposed § 13.500. We would prescribe the types of information that the Hub Manager would consider in determining whether a beneficiary can manage his or her VA benefits with limited and temporary supervision. Such information would include the beneficiary's awareness of his or her financial obligations and ability to meet those obligations through appropriate fund management, while still conserving excess funds. The Hub Manager would have authority to consider any other information relevant to the beneficiary's ability to manage his or her VA benefits.

Proposed paragraph (b) would prescribe the limited and temporary supervision provided by VA to a beneficiary who the Hub Manager determines is eligible for supervised direct pay. This supervision would consist of budgeting assistance and assistance in creating a fund usage report, with the intent being that supervised direct payment would include instruction and monitoring components. Finally, the supervision prescribed by proposed § 13.110(b) would include periodic reviews of the beneficiary's fund usage reports by fiduciary hub personnel. We have determined that this limited supervision would strike the proper balance between VA supervision and independent fund management by the beneficiary.

Current § 13.56 does not address whether a beneficiary who has been rated as being unable to manage his or her VA benefits may nonetheless establish such ability through supervised direct payment. We propose to address this gap in proposed paragraph (c), which would require the

Hub Manager to reassess the beneficiary's ability at or before the end of the first 12-month period of supervised direct pay. Such reassessment would be based upon the results of a field examination, the factors in proposed paragraph (a), and the results of the limited supervision prescribed in proposed paragraph (b). If the Hub Manager determines that the beneficiary has demonstrated the ability to manage his or her own VA benefits without further supervision, the Hub Manager would be required to report that determination to the rating authority for application of 38 CFR 3.353(b)(3) regarding reevaluation of ability to manage VA benefits and § 3.353(d) regarding the presumption of ability to manage VA benefits without restriction. The Hub Manager would have authority to extend supervised direct payment for an additional period up to 12 months but would otherwise be required to appoint a fiduciary for any beneficiary who does not demonstrate the requisite ability to manage one's own VA benefits. The decision as to whether to extend supervised direct payment for not longer than one additional 12-month period or appoint a fiduciary would be based on a field examination and factors such as whether the beneficiary is aware of his or her monthly income and fixed monthly expenses and has the ability to allocate appropriate funds, pay monthly bills in a timely manner, and conserve excess funds.

In our view, proposed § 13.110 would be a significant reform which would allow beneficiaries who were initially rated as being unable to manage their VA benefits to achieve the same level of financial independence as other beneficiaries with similar disabilities.

### 13.120 Field examinations

Under 38 U.S.C. 5502(a), VA may pay benefits directly to a beneficiary who has been rated by VA as being unable to manage his or her VA benefits or may pay benefits to a fiduciary on behalf of such a beneficiary, when VA determines that doing so would serve the beneficiary's interest. With respect to fiduciary appointments, VA must conduct the investigation prescribed by Congress in 38 U.S.C. 5507 and thereafter conduct sufficient oversight to determine whether fiduciaries are properly providing services for beneficiaries. Such oversight may include the periodic onsite reviews of certain fiduciaries under the authority granted in 38 U.S.C. 5508 or the monitoring or investigation regarding misappropriation or misuse of benefits required by 38 U.S.C. 6101, 6106, and

6107. Congress did not specifically address how VA should conduct the various activities required for proper administration of the fiduciary program. However, in 38 U.S.C. 5711(a), Congress authorized VA to, among other things, "[m]ake investigations and examine witnesses upon any matter within the jurisdiction of the Department."

Current 38 CFR 13.2(a) regarding the authority to conduct field examinations restates the authority granted by Congress in section 5711(a). Current paragraph (b) then prescribes the scope of field examinations in very general terms. It states that field examinations include but are not limited to matters related to administration of estates and the well-being of beneficiaries. Certain field examination provisions are in VA's 38 CFR part 3 adjudication regulations, rather than in the current part 13 fiduciary regulations where the reader might expect to find them. Specifically, upon a rating that a beneficiary cannot manage his or her VA benefits, current 38 CFR 3.353(b)(2) authorizes the Service Center Manager to "develop information as to the beneficiary's social, economic and industrial adjustment" and appoint a fiduciary.

We have determined that current § 13.2 lacks clarity regarding the purpose and scope of field examinations in the fiduciary program. VA promulgated the current regulation before the enactment of sections 5507, 5508, 6106, and 6107, and thus it does not reflect current law and VA policy. Accordingly, we propose to replace current § 13.2 with proposed § 13.120 as described below.

In proposed paragraph (a), we would define "field examination" and authorize the Hub Manager with jurisdiction over a fiduciary matter to order a field examination in connection with that matter. The term "field examination" would describe the broad scope of duties performed by VA's current field examiners, who generally live near the beneficiaries they serve and are responsible for checking beneficiary needs, beneficiary well-being, and fiduciary qualifications and performance. In this regard, field examinations are a critical component of the fiduciary program, under which VA oversees vulnerable beneficiaries and appoints and oversees fiduciaries for those beneficiaries.

Proposed paragraph (b) would prescribe the scope of field examinations. As noted above, under current § 3.353(b)(2), assessment of the beneficiary is one component of a field examination. Further, section 5507(a)(1) prescribes "an inquiry or investigation by [VA] of the fitness of that person to

serve as fiduciary for that beneficiary," which we interpret to mean that Congress intended that VA would conduct any necessary investigations, visits, or other inquiries to confirm the qualifications of any person seeking to provide fiduciary services for a VA beneficiary prior to appointment. Paragraph (b) would list the scope of a field examiner's duties under current VA policies and procedures. In listing the scope of these duties, we do not intend a substantive change and instead intend to clarify the purpose of field examinations and the authority of field examiners who conduct them.

Proposed paragraph (c) would provide the reasons for which a Hub Manager may order a field examination. Consistent with the primary purposes for field examinations, which are to ensure the well-being of beneficiaries and protect a beneficiary's VA benefit funds through the oversight of beneficiaries in the program and the appointment and oversight of fiduciaries, the Hub Manager would have authority to order a field examination at any time for those purposes. Again, VA does not intend any substantive change in proposing to expressly prescribe the circumstances under which VA would conduct a field examination. Our intent is to clarify current practice and provide clear notice regarding our field examination activities in the fiduciary program.

### 13.130 Bars to serving as a fiduciary

In establishing the fiduciary program, Congress intended that VA would take appropriate action to ensure that only qualified individuals and entities provide fiduciary services for beneficiaries. In 38 U.S.C. 5502(a)(1), Congress authorized payment of benefits to a fiduciary on behalf of a beneficiary if VA determines that such payment would serve the interest of the beneficiary. In section 5502(b), Congress authorized VA to appear in court regarding a fiduciary if the fiduciary "is not properly executing or has not properly executed the duties of the trust of such fiduciary" and suspend payments to any fiduciary who fails to properly submit an accounting to VA. Finally, under 38 U.S.C. 5507, VA must conduct an investigation regarding a proposed fiduciary before appointing the individual to serve as a fiduciary. Among other things, this investigation must include an inquiry regarding the proposed fiduciary's criminal and credit history. 38 U.S.C. 5507(a)(1)(C) and (b). Appointment of a fiduciary must be based, in addition to that investigation, on "adequate evidence that certification of that person as fiduciary for that

beneficiary is in the interest of such beneficiary.” 38 U.S.C. 5507(a)(2). We interpret these provisions to mean that certain individuals should not be considered qualified for purposes of acting as a fiduciary for a beneficiary.

Although VA’s current regulations prescribe the appointment of a fiduciary if VA determines that such appointment is in the interest of the beneficiary, they do not contain any provisions establishing clear qualification standards for proposed or currently serving fiduciaries. Specifically, VA does not currently have a regulation that lists the circumstances under which VA would not consider an individual or entity for appointment or continuation of service. We have determined that such a regulation is necessary to ensure consistency in the more than 30,000 initial fiduciary appointments that VA conducts annually and to ensure that VA’s fiduciary personnel appoint only the best qualified individuals or entities to manage the funds of VA’s most vulnerable beneficiaries. Further, it is VA’s obligation in its oversight role to remove any fiduciary who no longer meets the requirements for appointment. Without a clear standard regarding the circumstances that would bar appointment or continuation of service, we could not consistently conduct oversight and beneficiaries and fiduciaries would not have adequate notice of VA’s interpretation of governing law. Accordingly, we propose to add a new § 13.130 regarding bars to serving as a fiduciary.

Proposed paragraph (a)(1) would bar the appointment or further service of any person or entity that misused or misappropriated VA benefits while serving as a beneficiary’s fiduciary. Paragraph (a) would continue current VA policy, under which VA does not reappoint any individual or entity that has misused or misappropriated beneficiary funds. We interpret VA’s authority under 38 U.S.C. chapters 55 and 61 as establishing an obligation to eliminate as much as possible the risk of exploitation of beneficiary funds. We could not meet this obligation if we reappointed or continued the service of a person who has engaged in such exploitation.

Proposed paragraph (a)(2)(i) would prescribe the general rule that a felony conviction is a bar to appointment or continuation of service as a fiduciary for the 10-year period following the conviction, provided that the conviction is not for one of the offenses listed in proposed paragraph (a)(2)(ii). A felony conviction for one of the offenses in paragraph (a)(2)(ii), which generally concern fraud, financial crimes, or the

abuse or neglect of another person, would be a permanent bar to serving as a fiduciary. Under section 5507(b), Congress authorized VA to appoint a convicted felon “only if [VA] finds that the person is an appropriate person to act as fiduciary for the beneficiary concerned under the circumstances.” This proposed rule is not inconsistent with that limitation on VA’s appointment authority.

In section 5502, Congress authorized VA to appoint a fiduciary for a beneficiary only if it appears to VA that it would serve the beneficiary’s interest. We have determined that there is no circumstance under which it would serve a vulnerable beneficiary’s interest to have VA benefits managed by a felon convicted for one of the offenses listed in proposed paragraph (a)(2)(ii). To do otherwise would call into question the integrity of the fiduciary program. Accordingly, we propose to authorize the Hub Manager to appoint a person who has been convicted of a felony offense other than the proscribed offenses listed under paragraph (a)(2)(ii) only if the Hub Manager determines that there is no other person or entity willing and qualified to serve, there is no risk to the beneficiary, and such appointment is in the beneficiary’s interest.

Proposed paragraph (b) would prescribe other bars to an individual serving as a fiduciary. Paragraph (b)(1) would bar appointment or continuation as a fiduciary, if the individual being considered refuses or neglects to authorize VA to disclose information regarding the individual to the beneficiary the individual wishes to serve. Under *Freeman v. Shinseki*, a beneficiary has a right to appeal VA’s fiduciary appointment decisions. In these proposed regulations, we propose to acknowledge the right to appeal certain other VA decisions made in the fiduciary program. See proposed 38 CFR 13.600 regarding appeals. We described our basis for requiring each proposed fiduciary to provide VA an authorization for VA disclosure of information to the beneficiary in the supplementary information for proposed § 13.100(i).

Proposed paragraphs (b)(2) through (4) would bar appointment or continuation of service as a fiduciary if the individual does not have the current capacity to provide fiduciary services for a beneficiary. Paragraph (b)(2) would bar appointment or continuation of service of any individual who is unable to manage his or her own Federal or State benefits and is in a Federal or State agency’s fiduciary or representative payment program.

Paragraph (b)(3) would bar appointment or continuation of service if a court with jurisdiction has adjudicated the individual as being unable to manage his or her own financial affairs. Finally, paragraph (b)(4) would bar appointment or continuation of service if the proposed fiduciary is incarcerated in a Federal, State, local, or other penal institution or correctional facility, sentenced to home confinement, released from incarceration to a half-way house, or on house arrest or in custody in any facility awaiting trial on criminal charges. Such incarceration or custody would make the proposed fiduciary effectively unavailable for purposes of fulfilling the obligations of a fiduciary.

Proposed paragraph (b)(5) would bar appointment or continuation of service as a fiduciary if the individual has felony criminal charges pending. Although a fiduciary or proposed fiduciary who has been charged with a felony might ultimately be acquitted or found not guilty and at that time qualify for appointment, we have determined that it would be inconsistent with our obligation to protect vulnerable beneficiaries in the fiduciary program to allow such individuals to provide fiduciary services to beneficiaries while the charges are pending. Also, a person who is on trial for a felony offense or who is preparing for such a trial would not, in our view, be able to properly attend to the needs of VA beneficiaries. However, upon request of a beneficiary, we would remove the bar and consider the individual for appointment if he or she is acquitted or found not guilty of the charges. We propose in paragraph (b)(6) that being under 18 years of age bars being appointed as a fiduciary because it would be unreasonable to appoint as a fiduciary a person who is deemed unable to manage his or her own VA benefits. Last, we propose in paragraph (b)(7) that any knowing violation or refusal to comply with the regulations governing service as a fiduciary would also be a bar.

#### 13.140 Responsibilities of fiduciaries

Sections 5502 and 5507 require VA to consider whether payment of benefits to a fiduciary is in a beneficiary’s interest. We interpret this authority as authorizing VA to remove any fiduciary who is not meeting the fiduciary’s responsibilities to a beneficiary and thus not acting in the beneficiary’s interest. However, current regulations do not clearly prescribe those responsibilities.

Current 38 CFR 13.100(a) regarding supervision of VA-appointed fiduciaries authorizes VA to require an accounting from, or terminate the appointment of,



a VA-appointed fiduciary when the Veterans Service Center Manager “deems it necessary for the protection of the beneficiary’s interests.” However, it is unclear when such action might be necessary, and there is no notice to fiduciaries or beneficiaries regarding VA’s expectations. Current paragraph (b) authorizes any necessary informal action regarding court-appointed fiduciaries to ensure that “benefits are prudently administered and adequately protected.” Current paragraphs (c) regarding unsatisfactory conditions and (d) regarding misappropriation, embezzlement, or violation of Federal statutes generally track the language of sections 5502(b) and 6101 and authorize suspension of benefits and referral to the VA Regional Counsel if the fiduciary has performed inadequately. These provisions do not prescribe any meaningful standards, which might instruct fiduciaries and beneficiaries regarding VA’s expectations or the grounds for further VA action to suspend payment of benefits, remove the fiduciary, or appoint a successor fiduciary. Nor do they establish binding obligations that have the force and effect of law for VA, beneficiaries, or fiduciaries. Accordingly, we propose to clearly prescribe the responsibilities of VA-appointed fiduciaries in a new § 13.140 as described below.

In proposed paragraph (a), we would prescribe the core requirements for all fiduciaries, which are to monitor the well-being of the beneficiaries they serve and to disburse funds according to beneficiary needs. It is our intent to change the culture in the fiduciary program to ensure that it is the fiduciary that determines the beneficiary’s needs and whether disbursement of funds to address those needs is in the beneficiary’s interest. VA is not the fiduciary for the beneficiary and must defer to the fiduciary consistent with VA regulations. However, we also intend to change the culture in the program to the extent that fiduciaries are unnecessarily conserving beneficiaries’ funds. We are concerned that some elderly beneficiaries are dying with a large amount of funds under management by a fiduciary that could have been used during the beneficiary’s life to improve his or her standard of living. To address this concern, we propose to prescribe in paragraph (a) that a fiduciary must disburse or otherwise manage funds according to the best interests of the beneficiary and the beneficiary’s dependents and “in light of the beneficiary’s unique circumstances, needs, desires, beliefs, and values.”

Furthermore, under 38 U.S.C. 5502(a)(1), Congress authorized payments of VA benefits to a fiduciary on behalf of a beneficiary if it appears to VA that such payment would serve the interest of the beneficiary. Under this authority, it is VA’s obligation to oversee the fiduciaries it appoints to manage VA benefit funds on behalf of beneficiaries. Although Congress did not expressly prescribe in section 5502 protection of beneficiaries’ private information, such protection is inherent in the obligation of a fiduciary to act in good faith and in the interest of the beneficiary. We have determined that it would be inconsistent with a fiduciary’s position of trust to permit the fiduciary to use inadequate information protection measures. The fiduciary’s failure to protect the information would put the beneficiary at risk of identity theft, misappropriation of funds, or other harm. Accordingly, we propose to prescribe in paragraph (a)(2) the minimum requirements for protection of beneficiaries’ private information. In proposing to prescribe these requirements, we do not intend to impose onerous security requirements upon fiduciaries, most of whom are beneficiaries’ family members. Rather, we intend that fiduciaries will take the reasonable precautions that every person should take when maintaining his or her private information in paper or electronic records to prevent identity theft and unauthorized access. In proposing these requirements, we do not intend to supersede State law or other professional industry standards, under which a fiduciary may have additional requirements that exceed the minimum standard proposed by VA.

Consistent with VA’s oversight of beneficiaries obligation under 38 U.S.C. 5502(a)(1), paragraph (a)(2) would require a fiduciary, if VA removes the fiduciary under § 13.500 or the fiduciary withdraws under § 13.510, to keep all records relating to the management of the beneficiary’s VA benefit funds for 2 years after the date of removal or withdrawal. VA needs this requirement to facilitate any inquiry regarding a fiduciary’s past services and the proper management of funds and to effectively oversee beneficiaries if a fiduciary is removed or withdraws.

In proposed paragraph (b), we would prescribe the fiduciary’s financial responsibilities. This paragraph generally references the requirements of other regulations in part 13 to provide clear notice to fiduciaries regarding their financial obligations. Fiduciaries would be required to use funds in the interest of beneficiaries and their dependents, protect funds from loss,

maintain separate accounts, determine and pay just debts, provide the beneficiary information regarding VA benefit funds under management, protect funds from the claims of creditors, and provide beneficiaries a copy of any VA-approved annual accounting. In particular, proposed paragraph (b)(8) would prescribe the requirements for a fiduciary’s best-interest determination regarding VA benefit funds under management. We would prescribe that beneficiaries in the fiduciary program are entitled to the same standard of living as a beneficiary with comparable resources who is not in the program, and that the fiduciary program is not for the purpose of preserving funds “for the beneficiary’s heirs or disbursing funds according to the fiduciary’s own beliefs, values, preferences, and interests.” We intend that these provisions will have a positive effect on the well-being of beneficiaries in the program by proscribing unreasonable conservation of funds.

Proposed paragraph (c) would prescribe fiduciaries’ non-financial responsibilities. These responsibilities generally concern a fiduciary’s obligation to monitor the beneficiary’s well-being and report any concerns to appropriate authorities, including any legal guardian for the beneficiary. It would also reinforce VA’s view that a fiduciary must maintain regular contact with a beneficiary and be responsive to beneficiary requests. Without such contact, a fiduciary could not reasonably determine whether a beneficiary’s needs are being met by the fiduciary’s disbursement of funds.

Proposed paragraph (d) would prescribe fiduciaries’ responsibilities to VA under its oversight function. This paragraph would generally prescribe fiduciary compliance with VA’s part 13 fiduciary regulations, such as the proposed accounting and face-to-face interview requirements. It would also require fiduciaries to keep VA apprised of any change in the beneficiary’s circumstances which might adversely impact the beneficiary’s well-being. VA needs this information for purposes of coordinating a proper response to the beneficiary’s benefit or other needs, to include referral to the Veterans Health Administration or other public or private agencies for delivery of services.

### 13.200 Fiduciary accounts

In section 5502(a)(1), Congress authorized VA to pay benefits to a VA-appointed fiduciary for the use and benefit of the beneficiary, and in section 5509(a), Congress authorized VA to require fiduciaries to file reports or

accountings regarding the management of funds by the fiduciary on behalf of the beneficiary. Under 38 U.S.C. 5711, VA has authority to require the production of any documentation or other evidence and to conduct investigations relating to any matter under VA's jurisdiction. However, Congress has not prescribed the types of accounts that VA-appointed fiduciaries must establish for purposes of managing beneficiary funds and complying with annual accounting requirements.

Although current regulations prescribe the payment of benefits to certain individuals or entities on behalf of a beneficiary who cannot manage his or her VA benefits and address certain fund-management matters, no current regulation prescribes the requirements for fiduciary accounts. We propose to prescribe those requirements in § 13.200 as described below.

Proposed paragraph (a) would require a fiduciary to establish a separate Federally-insured account, if VA benefit funds under management qualify for such deposit insurance, in a Federally-insured financial institution for each beneficiary whom the fiduciary serves. However, it would not prohibit establishment of multiple accounts for the same beneficiary if the fiduciary deems it necessary for proper management of beneficiary funds. It would prohibit the commingling of beneficiary funds with the fiduciary's or any other beneficiary's funds at any time, prescribe direct deposit of VA benefits, and prescribe a standard for identifying ownership of the account and the fiduciary's relationship with the beneficiary. We intend that these account-establishment requirements will assist VA in overseeing fiduciaries, specifically with respect to auditing fiduciary accountings under proposed § 13.280, and make it harder for fiduciaries to conceal the misuse of benefits in pooled accounts or through transfer of beneficiary funds between accounts.

Proposed paragraph (b) would exempt VA-appointed spouses, State or local Government entities, institutions in which beneficiaries receive care or that have custody of beneficiaries, nursing homes, and a trust company or a bank with trust powers organized under the laws of the United States or a state from this separate account requirement prescribed in proposed paragraph (a). Regarding spouses, it is VA's policy to minimize the Government's intrusion into the marital relationship and avoid dictating requirements for property that is jointly owned by a beneficiary and spouse. The listed organizations would be exempt from the requirement because

VA's experience in administering the program indicates that the burden of establishing separate accounts would outweigh by far the risk of fund exploitation.

### 13.210 Fiduciary investments

In 38 U.S.C. 5502(a), Congress authorized VA to pay benefits to a fiduciary on behalf of a beneficiary if it appears to VA that it would serve the beneficiary's interest. However, Congress did not prescribe how fiduciaries should manage beneficiary funds. VA filled this gap in the legislation in current 38 CFR 13.103 regarding investments by "Federal" fiduciaries and current 38 CFR 13.106 regarding investments by "court-appointed" fiduciaries. Current § 13.103(a) prescribes the types of investments that fiduciaries may use, specifically United States savings bonds or interest or dividend-paying accounts in State or Federally-insured institutions. Paragraph (a) also prescribes exceptions for fiduciaries who are spouses or chief officers of institutions. Current paragraph (b) prescribes specific "registration" requirements for authorized investments, to include the beneficiary's name and Social Security number, the fiduciary's name, and specific language regarding "custodianship by designation of the Department of Veterans Affairs." Paragraph (c) authorizes fiduciaries to purchase pre-need burial plans.

Current § 13.106 provides a general policy statement regarding prudent investment by fiduciaries. It also states that it is the Veterans Service Center Manager's responsibility to review and determine the legality of investments by court-appointed fiduciaries, and prescribes referral to the VA Regional Counsel for action regarding investments that appear to be inconsistent with VA policy.

As noted in this preamble, we propose to discontinue the distinction between "Federal" fiduciaries and "court-appointed" fiduciaries, and instead refer only to "fiduciary" or "fiduciaries" in VA's part 13 fiduciary regulations. It is VA's long-standing interpretation of current law and its practice to appoint and conduct oversight regarding all individuals and entities who provide fiduciary services for beneficiaries. Therefore, the proposed rules would be uniform for all fiduciaries appointed by VA to manage VA benefit payments on behalf of a beneficiary. We intend to apply this approach to our regulation regarding fiduciary investments effective with investments acquired after the effective date of the final rule. We propose to

remove current §§ 13.103 and 13.106 and replace them with a new § 13.210 as described below.

Proposed paragraph (a) would prescribe the general rule that a fiduciary must conserve or invest any funds under management that the beneficiary or the beneficiary's dependents do not immediately need for maintenance, reasonably foreseeable expenses, or reasonable improvements in the beneficiary's and the beneficiary's dependents' standard of living. We would clarify that the limited purpose of conservation of beneficiary funds is to provide the fiduciary the means to address unforeseen circumstances or plan for future care needs in light of the beneficiary's circumstances and disabilities. We would prohibit the conservation of funds based upon the interests of the beneficiary's heirs or according to the fiduciary's own belief, values, preferences, and interests. Our intent in proposing these rules is to change the culture in the fiduciary program, to the extent it still exists, under which a fiduciary may accumulate an extraordinary amount of funds in a beneficiary's account which the beneficiary is not able to use in his or her lifetime. Under current VA policy, the purpose of the fiduciary program is to provide beneficiaries and their dependents the best possible standard of living that funds under management will reasonably allow. A beneficiary in the fiduciary program should be allowed the same standard of living as a beneficiary with comparable resources who is not in the fiduciary program. Finally, we note that the fiduciary program is not an estate planning program for a beneficiary's heirs. We propose to expressly prohibit the management of funds for that purpose.

Proposed paragraph (b) would restate without substantive change the provisions of current regulations requiring prudent investment and generally limiting investments to Federally-insured interest or dividend-paying accounts. It would also restate the current "registration" requirements. However, in administering the program, we have learned that some institutions will not permit the establishment of accounts using the exact language prescribed in current § 13.103. Accordingly, we propose to prescribe only that the account must be clearly titled in the beneficiary's and fiduciary's names and identify the fiduciary relationship.

Proposed paragraph (c) would restate without substantive change the exceptions in current regulations for

fiduciaries who are spouses or chief officers of institutions.

### 13.220 Fiduciary fees

In 38 U.S.C. 5502(a)(2), in cases in which VA determines that a commission is necessary to obtain a fiduciary in the best interests of a beneficiary, Congress authorized “a reasonable commission for fiduciary services rendered” to be paid from the beneficiary’s VA funds, but such commissions for any year may not exceed 4 percent of the beneficiary’s monetary VA benefits paid to the fiduciary during the year. VA implemented this authority in current 38 CFR 13.64 regarding fiduciary commissions. Section 13.64 authorizes the Veterans Service Center Manager to determine when it is necessary to authorize a commission, tracks the language of section 5502(a)(2) regarding the maximum commission that may be deducted from a beneficiary’s estate, and requires the Veterans Service Center Manager to furnish appropriate notice to beneficiaries regarding such deductions. It also prohibits commissions for beneficiaries’ dependents or other close relatives of beneficiaries acting as fiduciary.

We have determined that § 13.64 is inconsistent with current VA policy and does not provide clear rules regarding the circumstances under which VA may authorize a fiduciary commission or the limitations on such commissions. In particular, the current rule does not address whether a commission may be computed based upon retroactive, lump-sum, or other one-time benefit payments to fiduciaries. Nor does it address computation based upon surplus funds maintained by the fiduciary in the beneficiary’s account or funds transferred to the fiduciary by a predecessor fiduciary for the beneficiary. Finally, the current rule does not address the circumstances under which there would be a bar to deducting a commission for a given month. Accordingly, we propose to replace current § 13.64 with proposed § 13.220 as described below.

We propose to discontinue use of the term “commission” in VA’s part 13 fiduciary regulations and instead use the term “fee” or “fees” when referring to the payment made from a beneficiary’s VA funds to a fiduciary for fiduciary services. This is not a substantive change; it is for the limited purpose of simplifying our regulations through the use of common terms and plain language.

In proposed paragraph (a), we would authorize the Hub Manager with jurisdiction over the appointment to

determine whether a fee is necessary in a particular case. Consistent with current VA policy, the Hub Manager would appoint a paid fiduciary as a last resort and only if the Hub Manager determines that such appointment would serve the beneficiary’s interest and that no other person or entity is qualified and willing to serve without a fee. Consistent with section 5502(a)(2) as interpreted by current § 13.64, proposed paragraph (a) would prohibit fees for dependents or relatives of the beneficiary, or any other person who will receive any other compensation of any kind for providing fiduciary services for the beneficiary. We do not intend a substantive change in paragraph (a) but note that the current regulation is unclear to the extent that it refers to “close” relatives. We propose to clarify that the bar applies to the beneficiary’s “relatives” and define the term in proposed § 13.20.

Proposed paragraph (b) would prescribe the limitations applicable to fiduciary fees. We interpret “a reasonable commission [not to exceed 4 percent of monetary benefits] for fiduciary services rendered” in section 5502(a)(2) to mean that Congress intended the 4-percent ceiling to permit a moderate fee to be paid on a periodic basis from an ongoing award and that the fee would bear a relation to the amount of benefits being received on an ongoing basis. To read the statute otherwise would permit a fiduciary to receive a windfall fee in a particular year that bears no relation to what the fiduciary could receive in other years or what other fiduciaries are receiving for providing comparable services to other beneficiaries. Further, a fee computed on the basis of a retroactive award would bear little relation to the “services rendered” by the fiduciary, which would generally be the same from year to year, regardless of whether the beneficiary happened to receive a lump-sum payment in a particular year. We also note that VA generally awards entitlement to retroactive benefits to a beneficiary before the appointment of a fiduciary, but pays the retroactive benefits following the appointment of a fiduciary. Allowing a fiduciary to deduct up to 4 percent of such an award simply because the funds are transferred to the fiduciary and deposited in a fiduciary account would amount to unjust enrichment of the fiduciary at the beneficiary’s expense and with no fiduciary services rendered by the fiduciary.

Consistent with our interpretation of section 5502(a)(2), proposed paragraph (b)(1) would define “reasonable monthly fee” to mean a monetary

amount authorized by the Hub Manager that does not exceed 4 percent of the beneficiary’s monthly VA benefits. Upon authorization, the fiduciary would have permission to deduct the fee from the beneficiary’s account for each month in which the fiduciary is eligible for a fee under paragraph (b)(2). As a general rule, eligibility would exist in each month in which the fiduciary receives a benefit payment on behalf of the beneficiary and provides fiduciary services.

Proposed paragraph (b)(3) would prescribe limitations on the computation of fees. In proposed paragraph (b)(3)(i), we would bar the computation of a fee upon one-time, retroactive, or lump-sum benefit payments. As described above, this rule is consistent with the plain language of section 5502(a)(2), which authorizes VA to allow a reasonable fee for “fiduciary services rendered.” Allowing fees on these types of payments would amount to paying a fiduciary for services the fiduciary did not provide to the beneficiary.

Proposed paragraph (b)(3)(ii) would prohibit computing a fee upon any funds conserved by the fiduciary in the beneficiary’s account under proposed § 13.200 or invested by the fiduciary under proposed § 13.210, to include any interest income and return on investment derived from any account. Any funds conserved do not constitute a running monthly benefit award upon which a fiduciary may calculate a fee. As noted above, we interpret section 5502(a)(2) to mean that the total fee payable to a fiduciary for all fiduciary services rendered, including the management of conserved funds, is a percentage of the monthly benefit payments made.

In proposed paragraph (b)(3)(iii) we would prohibit computing a fee upon any funds transferred to the fiduciary by a prior fiduciary. Again, consistent with section 5502(a)(2), this would ensure that fiduciaries are allowed fees from beneficiary accounts only for fiduciary services rendered.

Proposed paragraph (b)(4)(i) would restate and implement 38 U.S.C. 6106, which prohibits a fiduciary from collecting a fee for any month for which VA or a court with jurisdiction determines that the fiduciary misused benefits. The statute also authorizes VA to treat any fees collected by a fiduciary during a month in which VA or a court finds that the fiduciary misused benefits as being misused benefits. In addition, we propose to prohibit fees for any month in which VA or a court with jurisdiction determines that a fiduciary

has misappropriated benefits, as defined in 38 U.S.C. 6101.

Proposed paragraph (b)(4)(ii) would clarify that the Hub Manager may retroactively authorize a fee for a month in which the beneficiary did not receive a benefit payment if VA later issues a payment for that month and the fiduciary continued to provide fiduciary services. Consistent with the provisions of this proposed regulation on payment of fees to fiduciaries, paragraph (b)(4)(ii) would ensure that fiduciaries are paid for the services they provide to beneficiaries during a temporary suspension of benefits.

### 13.230 Protection of beneficiary funds

Under 38 U.S.C. 5507(a)(3), “[a]ny certification of a person for payment of benefits of a beneficiary to that person as such beneficiary’s fiduciary . . . shall be made on the basis of,” among other things, “the furnishing of any bond that may be required by [VA].” Section 5507(a)(3) essentially codified a VA preexisting regulation regarding surety bonds, current 38 CFR 13.105.

Current § 13.105 authorizes the Veterans Service Center Manager to require a fiduciary to furnish a surety bond in an amount sufficient to protect the interest of the beneficiary. It also authorizes the Veterans Service Center Manager to require an “agreement in lieu of a surety bond or additional surety bond” in cases where the fiduciary has deposited beneficiary funds in an account with a State- or Federally-insured institution. Finally, it authorizes the Veterans Service Center Manager to take necessary action to protect beneficiary funds when a surety company ceases to do business in a State, to include referring matters to the VA Regional Counsel with jurisdiction.

We have determined that current § 13.105 uses unclear terminology and is inconsistent with current VA policy. Further, we note that Veterans Service Center Managers have discretion to require a bond under the current regulation, but there are no criteria to guide them in exercising that discretion. Finally, current § 13.105 is silent regarding who must bear the expense of obtaining a bond for fund protection purposes. Accordingly, we propose to replace current § 13.105 with proposed § 13.230 as described below.

Proposed paragraph (a) would state the general rule that a fiduciary must within 60 days of appointment furnish to the fiduciary hub a surety bond conditioned upon faithful discharge of all of the responsibilities of a fiduciary if the VA benefit funds that are due and to be paid will exceed \$25,000. We note that VA generally awards entitlement to

retroactive benefits to a beneficiary before the appointment of a fiduciary but withholds payment until the appointment is complete and the fiduciary obtains a surety bond. It would prohibit the payment of any retroactive, one-time, or other pending lump-sum benefit amount to the fiduciary on behalf of the beneficiary until the fiduciary has furnished the prescribed bond. Our intent is to require certain fiduciaries who manage accumulated funds to obtain additional protection of those funds on behalf of their beneficiaries before receiving large, lump-sum benefit payments. While it would be impossible to determine the exact amount of accumulated benefits at which a beneficiary might be significantly more at risk of fund exploitation by a fiduciary, we propose to use \$25,000 as the threshold because, based upon our experience in administering the program, we have determined that the cost of obtaining a bond for smaller amounts of accumulated funds under management would outweigh any benefit to the beneficiary. For the same reasons, proposed paragraph (b) would apply this rule to a fiduciary who is not initially required to obtain a bond but later accumulates funds on behalf of a beneficiary that exceed the \$25,000 threshold.

Proposed paragraph (c) would prescribe several exceptions to the general rule regarding surety bonds in proposed paragraphs (a) and (b). We propose to limit these exceptions because a proposed fiduciary’s ability to obtain a surety bond is an important, additional screening tool for VA. If a proposed fiduciary cannot obtain a bond based upon a bonding company’s assessment of risk, VA should weigh that information in deciding whether to continue the appointment or appoint a successor fiduciary. First, we would not require a surety bond from a VA-appointed trust company or bank that has adequate protection of funds under management such as an umbrella bond or insurance required under Federal or state law. Second, consistent with VA’s long-standing policy of requiring less intrusive oversight of spouse fiduciaries, we would not require spouses to obtain a surety bond.

It has been VA’s practice to occasionally allow a fiduciary, generally a family member or other close acquaintance of the beneficiary, to enter into a restricted withdrawal agreement with the beneficiary and VA regarding accumulated funds under management in lieu of obtaining a surety bond. However, we have determined that the use of restricted withdrawal agreements

is generally inconsistent with VA policy regarding the role of VA and fiduciaries in the fiduciary program. In our view, it is the fiduciary’s obligation to make best-interest determinations regarding beneficiary funds under management. The use of a restricted withdrawal agreement may improperly insert VA into matters reserved for fiduciaries. Nevertheless, we have determined to use restricted withdrawal agreements for fiduciaries in locations where obtaining an adequate surety bond is not practicable. Under proposed paragraph (c), the Hub Manager would have discretion to waive the bond requirement and enter into a restricted withdrawal agreement regarding accumulated funds in cases where the location of the fiduciary precludes obtaining adequate bonding. Currently, adequate bonding may not be available in Puerto Rico, other territories of the United States, and the Philippines.

Under proposed paragraph (c)(2), the Hub Manager would be authorized to require a bond at any time, without regard to the amount of funds under management, if the Hub Manager determines that special circumstances indicate that obtaining a bond would be in the beneficiary’s interest. Among other things, such circumstances would include a marginal credit report regarding the fiduciary or a fiduciary’s misdemeanor criminal conviction for any criminal offense listed in proposed § 13.130(a)(2)(ii) regarding bars to serving as a fiduciary.

Proposed paragraph (d) would prescribe the requirements for a bond. This paragraph would generally restate and clarify the provisions of current § 13.105 without substantive change but would add a new rule regarding adjustment of bonds. We propose to require the fiduciary to adjust the bond to account for significant changes in amount of funds managed to ensure adequate protection of funds under management and in some cases to save the beneficiary the cost of unnecessary fund protection. The fiduciary would be required to make such an adjustment any time the funds under management increase or decrease by 20 percent or more. We propose 20 percent because our experience in administering the program indicates that a smaller fluctuation in funds under management might require frequent adjustments with only minimal added protection or cost savings for beneficiaries.

Proposed paragraph (e) would require that the fiduciary must submit proof of adequate bonding with each annual accounting and at any other time the Hub Manager requests proof. This requirement, which is not in the current

regulation, would facilitate VA's oversight regarding the fund protection requirements prescribed in proposed § 13.230.

Proposed paragraph (f) would provide notice regarding joint and several liability of sureties and fiduciaries for any misappropriation or misuse of beneficiary funds by fiduciaries, and that VA may collect on the bond regardless of any prior VA reissuance of benefits under proposed § 13.410. These provisions are consistent with current policy and the protection generally afforded by surety bonds. However, we propose to expressly state the policy and scope of bond protection in our regulations for purposes of notice.

Under 38 U.S.C. 5507(a)(3), VA's certification of a prospective fiduciary as a fiduciary "shall be made on the basis of . . . the furnishing of any bond that may be required by the Secretary." Congress did not address whether the beneficiary or the fiduciary must pay for the bond. However, we interpret the requirement to mean that the certification of any person as a fiduciary must be based in part upon the proposed fiduciary's ability to qualify for and purchase a bond. In this regard, the requirement is a screening tool for VA to use in confirming an appointment decision before releasing a lump-sum, retroactive payment to a fiduciary. If a fiduciary cannot obtain a bond because the bonding company considers the risk of fund exploitation too high, VA should not appoint the prospective fiduciary and appoint an individual or entity who can obtain the necessary fund protection. Proposed paragraph (g) would clarify that the fiduciary may deduct the cost of a surety bond from the VA benefit funds under management by the fiduciary for the beneficiary.

Regarding payment from beneficiary funds, we have determined that requiring fiduciaries to bear the cost of a surety bond would create a disincentive for both volunteer and paid fiduciaries, and would significantly impair VA's ability to find qualified fiduciaries for the beneficiaries who need them. Approximately 90,000 of the current 95,000 fiduciaries in VA's program have a one-on-one relationship with the beneficiary. Most of these fiduciaries are family members, friends, and other individuals who have expressed a willingness to serve an individual beneficiary without charge. Even in paid fiduciary cases, which currently comprise less than 10 percent of all beneficiaries in the program, Congress has limited fiduciary fees to 4 percent or less of the beneficiary's annual benefit payments, and under current VA policy a Hub Manager may

not authorize calculation of a fee based upon a retroactive, lump-sum, or other one-time payment of benefits to the beneficiary. Under these circumstances, a fiduciary might be required to incur significant out-of-pocket expenses to provide fiduciary services.

As a general rule, bonding companies charge approximately \$100 annually for every \$10,000 under management by a fiduciary. This means that the annual out-of-pocket expense for a volunteer family member fiduciary who manages \$100,000 in accumulated VA funds for a beneficiary would be \$1,000 if VA determined that the fiduciary must pay for the bond. In a paid fiduciary case, assume that the beneficiary has \$100,000 in accumulated VA benefit funds under management for the beneficiary and receives a \$1,500 monthly VA benefit payment. The fiduciary's maximum monthly 4-percent fee would be \$60 or \$720 annually, while the fiduciary would incur a \$1,000 annual surety bond expense. In this case, the fiduciary will incur a loss of \$280 per year. Therefore, it would not be reasonable for VA to require the fiduciary to bear the cost of a surety bond, which would essentially eliminate any incentive for serving vulnerable veterans and their survivors.

For the above reasons, it is VA's long-standing policy to require fiduciaries to purchase a surety bond and permit them to use beneficiary funds to pay the expense. Given the nature of the fiduciary program and the statutory context in which Congress enacted section 5507, we believe that Congress intended a continuation of this policy. In addition, we note that deducting bond expenses from beneficiary funds would be consistent with the protection of funds in guardianships under State and uniform laws. *See, e.g.*, Fla. Stat. § 744.641 (2012); Ga. Code Ann. § 29-7-15 (2012); Mo. Rev. Stat. § 475.100 (2012); N.J. Stat. Ann. § 3B:13-17 (2012); N.C. Gen. Stat. § 34-12 (2012); Wis. Stat. § 54.852 (2012); Unif. Guardianship and Protective Proceedings Act § 416 cmt. (1997); Unif. Veterans' Guardianship Act § 35.78 (1937).

#### **13.240 Funds of beneficiaries less than 18 years old**

Under 38 U.S.C. 5502(a)(1), VA has authority to pay benefits to a fiduciary on behalf of a beneficiary who is a minor. VA implemented this authority in current 38 CFR 13.101, which generally prescribes that such payments should be used for the minor's benefit and only to the extent that the person or persons responsible for the minor's needs are unable to provide for them.

The current regulation prescribes one exception for VA education benefits, which the fiduciary may disburse without regard to the ability of responsible persons to provide for the minor's needs.

We propose to replace current § 13.101 with proposed § 13.240 without making any substantive change. We would make only minor plain language changes and reorganize the regulation text.

#### **13.250 Funds of deceased beneficiaries**

Under 38 U.S.C. 5502(e), "[a]ny funds in the hands of a fiduciary . . . derived from benefits payable under laws administered by [VA], which under the law of the State wherein the beneficiary had last legal residence would escheat to the State, shall escheat to the United States and shall be returned by such fiduciary." In section 5502(e), Congress also authorized fiduciaries to deduct from the funds under management the cost of determining whether such escheat to the State would occur under State law.

VA implemented this authority in current 38 CFR 13.110(a), which restates the provisions of section 5502(e). Current paragraph (b) requires fiduciaries to account for and turn over to VA the personal property owned by a veteran who dies intestate and without heirs while receiving care in a VA facility. Current paragraph (c) requires the submission of a report to the VA Regional Counsel with jurisdiction if a fiduciary refuses to comply with the requirements of § 13.110.

We have determined that current § 13.110 does not provide clear rules for fiduciaries to close out the accounts of deceased beneficiaries. It does not provide time limits for the return of funds to VA or prescribe final accounting rules, and clarity is needed regarding the property in the possession of a fiduciary that must be returned to VA. Accordingly, we propose to remove current § 13.110 and replace it with proposed § 13.250 as described below.

Section 5502(e) is applicable to "funds in the hands of" a fiduciary which are "derived from [VA] benefits." We interpret this language in section 5502(e) to mean VA benefit funds under management by the fiduciary for the beneficiary, as defined in proposed § 13.20, on the date of the beneficiary's death. In proposed paragraph (a), we would essentially restate section 5502(e) and require the return of VA benefit funds under management by a fiduciary to VA when a beneficiary for whom the fiduciary provides fiduciary services dies without a valid will and without

heirs if such funds would escheat to the State under State law. For purposes of plain language, we replace the word “escheat” with “be forfeited.”

Proposed paragraph (b) would prescribe the circumstances under which a fiduciary must submit a final accounting to VA. We propose to require a final accounting in cases where the fiduciary determines that the VA benefit funds under management by the fiduciary would be forfeited to a State and thus must be returned to VA under proposed paragraph (a). In this situation, VA needs to confirm that the fiduciary properly managed funds after the beneficiary’s death and returned all funds under management to the Government. We also propose to require a final accounting in any case in which the fiduciary was required to submit an annual accounting under proposed § 13.280 prior to the beneficiary’s death regardless of whether funds under management would be forfeited to a State. This final accounting is necessary for purposes of VA’s oversight of fiduciaries, to include detecting misuse of benefits.

Under section 5502(e), the fiduciary for a deceased beneficiary may deduct “legal expenses of any administration necessary to determine that an escheat is in order.” Proposed paragraph (c) would restate this provision and clarify that the fiduciary may deduct a reasonable fee or pay a reasonable charge from the beneficiary’s account to cover the expense of determining whether forfeiture to a State would occur. We recognize that a fiduciary may have the authority under State law or pursuant to State licensure to make this decision without referring the matter. However, upon the death of the beneficiary, a paid fiduciary’s authority to collect a fee for fiduciary services under proposed § 13.220 expires. In such cases, we interpret section 5502(e) as authorizing the fiduciary to deduct a reasonable fee for separate services associated with determining whether forfeiture would occur. We also interpret section 5502(e) as authorizing the fiduciary to incur a reasonable third-party fee for determining whether forfeiture would occur, and to pay that expense from the deceased beneficiary’s account. For purposes of paragraph (c), we propose to define “reasonable fee,” whether charged by the fiduciary or a third party, as an amount customarily charged by persons authorized to do such work, such as attorneys or other professionals, in the State where the deceased beneficiary resided.

Proposed paragraph (d) would clarify that in all cases in which the deceased beneficiary has a valid will or heirs,

such that the VA benefit funds under management by the fiduciary will not be forfeited to a State, the fiduciary must hold the funds in trust for the beneficiary’s estate. In these cases, the fiduciary’s responsibilities to the deceased beneficiary’s estate are defined by applicable State law.

### 13.260 Personal funds of patients

Under 38 U.S.C. 5502(d), Congress prescribed the procedure for VA distribution of funds held in trust for a veteran in a personal funds of patients account at a VA facility upon the veteran’s death. Congress decided that VA should not pay such funds to the deceased veteran’s personal representative, but should instead pay them to certain individuals in the order of preference prescribed by Congress. These are the “surviving spouse, the children (without regard to age or marital status) in equal parts, and the dependent parents of such veteran, in equal parts.” Congress further prescribed that any balance remaining in the account after VA’s attempt to distribute it according to the statute must be deposited to the credit of the applicable VA appropriation, except that VA has authority to reimburse a person who bore the expenses of last sickness or burial of the veteran for such expenses. Any disbursement of funds according to the priority established by Congress or for expenses related to the veteran’s last sickness or burial must be based upon a claim filed with VA within 5 years after the veteran’s death. This 5-year limitation period may be tolled based upon an eligible person being under legal disability at the time of the veteran’s death.

VA’s current part 13 fiduciary regulations do not address the distribution of funds under section 5502(d). However, we propose to restate the statutory requirements in proposed § 13.260 without substantive change but reorganized to make them easier to read and understand.

### 13.270 Creditors’ claims

Under 38 U.S.C. 5301(a)(1), VA benefits generally cannot be assigned and are exempt from taxation and the claims of creditors. They are also not “liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.” The exemptions in section 5301 do not apply to debts owed to the United States arising in a VA benefits program or to the use of benefits for the repayment of loans made to beneficiaries.

VA provides fiduciaries notice of these exemptions in current § 13.111,

which restates the generally applicable statutory provisions, advises fiduciaries to invoke the exemptions where applicable, and prescribes referral to the VA Regional Counsel if a fiduciary does not properly invoke them. We propose to restate the current regulation without substantive change in proposed § 13.270.

### 13.280 Accountings

Under 38 U.S.C. 5509(a), VA has authority to require fiduciaries to file accountings regarding funds under management. Such accounting may include disclosure of “any additional financial information concerning the beneficiary (except for information that is not available to the fiduciary).” 38 U.S.C. 5502(b). Under 38 U.S.C. 6101(b), the willful neglect or refusal to file proper accountings “shall be taken to be sufficient evidence prima facie of . . . embezzlement or misappropriation.”

VA implemented the authority to require submission of accountings in current 38 CFR 13.102, 13.104 and 13.107. Current § 13.102(a) requires the fiduciaries of certain veterans to provide VA an accounting when requested. Current § 13.104 requires fiduciaries who are also court-appointed to arrange for the provision to VA of copies of their State-court-prescribed accountings. It also exempts, in the Veterans Service Center Manager’s discretion, fiduciaries and beneficiaries who permanently reside in a jurisdiction other than the United States, the Commonwealth of Puerto Rico, or the Republic of the Philippines, if the fiduciary appointment occurred in the foreign jurisdiction. Current § 13.107 requires the chief officer of a non-Federal institution appointed as fiduciary for a beneficiary to render to VA an accounting if the Service Center Manager requests one.

We have determined that §§ 13.102, 13.104, and 13.107 do not provide clear rules for fiduciaries and do not reflect current VA policy and procedures. Furthermore, section 6101 regarding willful neglect or refusal to file accountings has not been implemented in VA’s part 13 fiduciary regulations. Therefore, to provide clear, comprehensive notice regarding VA’s accounting policy and procedures and interpretation of current law, we propose to combine the fiduciary accounting requirements into one proposed rule, § 13.280, as described below.

In proposed paragraph (a), we would prescribe the general rule for accountings, under which each fiduciary who meets any of the criteria in paragraphs (a)(1) through (3) would

be required to provide VA an annual accounting regarding funds under management for a beneficiary. Under current policy, VA does not require an accounting from every fiduciary. This policy recognizes the nature of the VA fiduciary program, in which most fiduciaries are volunteer family members or friends who have a one-on-one relationship with the beneficiary, and that in many cases such fiduciaries manage only small benefit amounts or disburse all the beneficiary's monthly benefits for the beneficiary's care. Further, the submission and auditing of accountings in every case in which a beneficiary has a family member fiduciary would be unduly intrusive if VA knows that there is very little risk of exploitation of funds. Current policy also recognizes, based upon VA's experience in administering the program, that the burden of preparing, submitting, and auditing accountings outweighs any oversight benefit for many beneficiaries and VA. Accordingly, we propose to continue to generally require accountings only when the amount of VA benefit funds under management by the fiduciary exceeds \$10,000, the fiduciary receives a fee deducted from the beneficiary's account under proposed § 13.220, or the beneficiary is being paid monthly benefits in an amount equal to or greater than the rate for service-connected disability rated totally disabling. Under this policy, VA currently audits more than 30,000 accountings each year.

Proposed paragraph (b) would define *accounting* to mean the fiduciary's written report of his or her management of the beneficiary's income and accumulated funds. We would further prescribe that an accounting pertains to all activity in the beneficiary's accounts, regardless of the source of income. While VA's authority is limited to appointing fiduciaries for purposes of managing VA benefits, for accounting purposes, Congress has authorized VA to request information regarding all activity in a beneficiary's account. It would be very difficult to detect misuse of benefits, if VA were required to limit its audit to activity related only to income and expenditures actually derived from VA benefits. Instead, consistent with our authority and current practice, we would prescribe the scope of an accounting, including a beginning and ending inventory or account balance, in proposed paragraphs (b)(1) through (6).

In proposed paragraph (c) we would prescribe the procedures for submitting an annual accounting. As a general rule, accountings would be due not later than 30 days after the end of the accounting

period prescribed by the Hub Manager. Consistent with current VA policy, proposed paragraph (d) would prescribe exceptions to the general accounting rules. First, no spouse would be required to submit an annual accounting. It is VA's long-standing policy to avoid undue intrusion in the relationship between a beneficiary and the beneficiary's spouse. We propose to continue that policy. Second, we would not require the chief officer of a Federal institution to account because such officers generally do not disburse funds, disburse only small fund amounts for the beneficiary's personal use, or disburse funds according to the discretion delegated to the Secretary of Veterans Affairs by law. Third, we would not require an accounting from the chief officer of a non-VA institution when the cost of the monthly care and maintenance of the beneficiary in the institution exceeds the beneficiary's monthly benefit and the beneficiary's funds under management by the fiduciary do not exceed \$10,000. Finally, we would restate the provisions of current § 13.104, which exempt certain foreign fiduciaries, without substantive change.

Proposed paragraph (e) would implement section 6101(b), under which the willful neglect or refusal to comply with the accounting requirements prescribed by VA is prima facie evidence of embezzlement or misappropriation of benefits. We propose to restate the statutory provision and provide notice that such evidence is grounds for starting a VA misuse investigation under proposed § 13.400.

### 13.300 Onsite reviews

Under 38 U.S.C. 5508, VA must conduct periodic onsite reviews of any fiduciary who is located in the United States and serving more than 20 beneficiaries and who has total VA funds under management for beneficiaries in excess of \$50,000, as adjusted under 38 U.S.C. 5312. The purpose of section 5508 is to create a mechanism by which the Secretary can fulfill his statutory oversight responsibility. Section 5312 prescribes an increase in the payment rates and dollar limitations applicable to certain need-based VA benefits whenever there is an increase in benefit amounts payable under title II of the Social Security Act. In section 5508, Congress also authorized VA to conduct onsite reviews of fiduciaries under other circumstances as VA deems appropriate, regardless of the number of beneficiaries served by the fiduciary or the amount of funds under management for

beneficiaries. The plain language of section 5508, "[i]n addition to such other reviews of fiduciaries as the Secretary may otherwise conduct," indicates that VA may conduct onsite reviews of fiduciaries as necessary to ensure the well-being of beneficiaries or prevent exploitation of beneficiary funds.

VA implemented section 5508 based upon the statutory requirements but has since determined that regulations are necessary to remove ambiguity regarding the \$50,000 threshold for mandatory onsite reviews, provide VA's interpretation of current law, and prescribe the scope of onsite reviews. Accordingly, we propose to add a new § 13.300 regarding onsite reviews as described below.

Proposed paragraph (a) would require the Hub Manager to conduct periodic, scheduled onsite reviews of certain fiduciaries. Proposed paragraph (a) would prescribe routine, periodic onsite reviews for all fiduciaries that meet the requirements of section 5508 as interpreted by VA in this proposed rule. Although section 5508 refers to a "fiduciary serving in that capacity with respect to more than 20 beneficiaries," we propose to require a periodic onsite review if a "fiduciary serves 20 or more beneficiaries." This difference from the statutory reference is authorized by section 5508's reference to "such other reviews of fiduciaries as the Secretary may otherwise conduct." We interpret "total annual amount of such benefits exceeds \$50,000" to mean the total amount of recurring monthly VA benefits paid to the fiduciary for all of the beneficiaries served by the fiduciary during a year. To read the statute otherwise might result in VA providing onsite reviews of fiduciaries based solely on a beneficiary's receipt of a retroactive, lump-sum, or one-time benefit payment. In our view, Congress intended that VA would conduct onsite reviews of fiduciaries who manage recurring monthly benefit payments that exceed the statutory threshold during a given year. We would not prescribe in the regulation the applicable monetary threshold for periodic onsite reviews, which, based upon the application of section 5312, would soon be out of date and require amendment. The current threshold for periodic onsite reviews is available on VA's Web site at <http://www.benefits.va.gov/fiduciary/fiduciary.asp>. Proposed paragraph (a)(3) would prescribe procedures for providing the fiduciary notice of the date for which VA has scheduled a periodic onsite review and the documents that VA will inspect.

Although Congress required “periodic” onsite reviews in section 5508, it did not specify the length of the period. However, we interpret section 5508 to mean that Congress intended a regular schedule of reviews, such that each fiduciary that meets the requirements for the reviews receives a visit from VA auditors according to the schedule. Based upon our experience in administering the program and conducting such reviews in conjunction with other oversight activities, we propose to require a periodic onsite review of every fiduciary that meets the requirements of paragraph (a)(1) triennially. We have determined that this schedule is feasible with current resources and is a reasonable interpretation of Congress’s intent that we enhance oversight of certain fiduciaries who serve multiple beneficiaries.

Consistent with our interpretation of section 5508, proposed paragraph (b) would authorize the Hub Manager to conduct unscheduled onsite reviews, without regard to the number of beneficiaries served by the fiduciary or the amount of funds under management by the fiduciary, if the circumstances meet any one of the criteria in proposed paragraphs (b)(1) through (4). Such unscheduled onsite reviews are necessary to immediately respond to information indicating that the well-being of a beneficiary may be in jeopardy or that exploitation of beneficiary funds has occurred or may occur. Accordingly, we propose to authorize such unscheduled reviews if VA receives from any source credible information that a fiduciary has misused or is misusing VA benefits, the fiduciary has failed to file a required accounting not later than 120 days after the end of the accounting period, VA receives credible information that the fiduciary is not adequately performing the responsibilities of a fiduciary under proposed § 13.140, or the Hub Manager determines that an unscheduled onsite review is necessary to ensure that the fiduciary is acting in the interest of the beneficiary or beneficiaries the fiduciary serves.

Proposed paragraph (c) would prescribe the procedures for conducting onsite reviews, to include the scope of such reviews. Although VA has internal guidelines and policies regarding the scope of onsite reviews, we have determined that general rules regarding these reviews should be promulgated in regulations for purposes of enforcing compliance, limiting VA discretion, and providing legal notice. We have determined that industry standards and other agencies’ practices, such as Social

Security Administration’s manner of conducting onsite reviews, would accomplish Congress’s intent that VA enhance its oversight of certain fiduciaries. Specifically, reviewing records and conducting interviews with the beneficiary and third parties (to determine, among other things, accurate record keeping, reliable reporting, compliance with laws and regulations, and whether the beneficiary needs are met) are common oversight measures for ensuring that fiduciaries are satisfactorily performing their duties and beneficiaries are protected from misuse of their benefits by fiduciaries. Accordingly, we propose to prescribe a face-to-face meeting with the fiduciary, review of records, and interviews of other persons as determined necessary by the Hub Manager.

Proposed paragraph (c) would also prescribe the procedures for notifying fiduciaries of deficiencies. We would require the Hub Manager to provide the fiduciary a report regarding onsite review findings, including any deficiencies or request for additional information, not later than 30 days after completing the review. Unless the fiduciary establishes good cause for an extension, the fiduciary would be required to respond with information regarding correction of the deficiencies or provide requested information not later than 30 days after the date the Hub Manager mailed VA’s report. Paragraph (c) would also require the Hub Manager to remove a fiduciary who does not cooperate in the onsite review process, is unable to produce required documents during the onsite review, fails to respond to a VA request for additional information or recommendation for corrective action, or is found during an onsite review to have misused benefits.

These provisions are necessary to ensure that fiduciaries have notice of VA’s policies and procedures regarding onsite reviews, and to establish binding rules for VA personnel and fiduciaries. We also intend that they will promote consistency and predictability in VA’s oversight activities.

### **13.400 Misuse of benefits**

Under 38 U.S.C. 6106(a), a fiduciary may not collect a fee for providing fiduciary services for a beneficiary for any month for which VA or a court finds that the fiduciary misused the beneficiary’s benefits. Under section 6106(b), misuse of benefits by a fiduciary occurs in any case in which the fiduciary receives payment of VA benefits for the “use and benefit” of a beneficiary and uses such payment, or any part of the payment, for a use other

than the use and benefit of the beneficiary or the beneficiary’s dependents. Section 6106(c) authorizes VA to prescribe the meaning of “use and benefit” in regulations. In 38 U.S.C. 6107, Congress authorized VA to reissue certain benefits to a beneficiary based upon a determination that the beneficiary’s fiduciary misused benefits.

VA implemented the misuse provisions of section 6106 based upon the statutory language and does not currently have a regulation that prescribes binding rules for VA, beneficiaries, and fiduciaries. Consistent with current law and VA policy, we propose to implement section 6106 in a new § 13.400 as described below.

Proposed paragraph (a) would restate the statutory definition of misuse and define “use and benefit” as “any expenditure reasonably intended for the care, support, or maintenance of the beneficiary or the beneficiary’s dependents.” This definition would be consistent with current VA policy and would facilitate VA’s identification of possible misuse. Furthermore, this definition would prevent a fiduciary from being held liable for misuse of benefits if an expenditure resulted in economic loss, but at the time of expenditure, it appeared to be reasonably intended for the care, support, or maintenance of the beneficiary or the beneficiary’s dependents. In using the word “support,” we intend to authorize the fiduciary to take any steps the fiduciary deems necessary, given the beneficiary’s VA benefit funds under management by the fiduciary and the beneficiary’s circumstances, to improve the beneficiary’s and the beneficiary’s dependents’ standard of living. A fiduciary’s efforts to ensure that a beneficiary in the fiduciary program has the same standard of living as a beneficiary who is not in the program and has comparable resources would not be misuse of benefits.

Proposed paragraph (b) would prescribe the procedures for misuse determinations by VA and authorize the Hub Manager to make such determinations. The Hub Manager would be authorized to start a misuse investigation based upon receipt of credible information from any source. The results of the investigation and the Hub Manager’s determination would be issued in a decision that meets the requirements in proposed paragraph (b). We propose to standardize the requirements for such determinations to ensure consistency and predictability for fiduciaries and beneficiaries.

In proposed paragraph (c), we would prescribe specific notice procedures for



misuse determinations by the Hub Manager. This notice is necessary because we have decided to continue the practice of allowing fiduciaries and beneficiaries to request reconsideration of misuse determinations, and we provide the right to appeal misuse determinations. See proposed 38 CFR 13.600. We propose that beneficiaries and fiduciaries may both request reconsideration of initial misuse determinations, but these requests are intended for different reasons. Beneficiaries may request reconsideration because they may have information to support an initial finding of misuse or a finding of additional misuse. Depending upon the number of beneficiaries that the fiduciary serves or any VA negligence in appointing and monitoring the fiduciary, such a beneficiary might be entitled to reissuance of benefits. On the other hand, fiduciaries may seek reconsideration after receiving notice regarding the initial misuse decision because the determination may result in a bar to future service, be the basis for the creation of a debt to the Government, or be the subject of a criminal proceeding. We propose to continue this current policy to ensure that we have sound reasons for removing a fiduciary from service for other beneficiaries. Such removals are disruptive for beneficiaries in the program and redirect limited fiduciary program resources to successor appointments. We would not afford a fiduciary the right to appeal a misuse determination.

In spite of section 5507(d)'s reference to the appeal of a misuse determination by a fiduciary and the appointment of a temporary fiduciary during this period, we do not interpret section 5507(d) as expressing Congress' intent to authorize a right of appeal for fiduciaries. In fact, in a compromise agreement regarding the predecessor bill, the Committees intentionally omitted a provision that would have granted a right of appeal to fiduciaries accused of misuse. The Committees concluded that they needed to "assess further the appropriateness of requiring a fiduciary accused of misuse by the Secretary to appeal such a finding in the appeals venue established for adjudicating veterans' entitlement claims." Thus, in our view, any "appeal" that a fiduciary might have pending regarding a misuse matter would likely be in a criminal proceeding.

In addition, in proposed § 13.410, we would delegate to the Director of VA's Pension and Fiduciary Service the authority for determining whether VA

was negligent for purposes of reissuance of benefits. Proposed paragraph (c) would require notice of the Hub Manager's misuse determination to the Director for this purpose.

Proposed paragraph (d) would prescribe the procedure for reconsideration of the Hub Manager's misuse determination. While there is no right to act as a fiduciary for a beneficiary and VA's misuse determinations are not appealable by the fiduciary, we continue to believe that a reconsideration procedure ensures that VA has all of the information necessary to make the best possible decisions regarding misuse of benefits. Accordingly, we propose to allow fiduciaries and beneficiaries, using the procedure prescribed in proposed paragraph (d), to seek reconsideration of a Hub Manager's misuse determination. To obtain reconsideration of a Hub Manager's misuse determination, the fiduciary or the beneficiary would have to file a written request for reconsideration, not later than 30 days after the date on which the Hub Manager provides notice of his or her misuse decision under paragraph (c). Reconsideration of a misuse decision would be delegated to the VA Regional Office Director who has jurisdiction over the fiduciary hub and would be based upon a review of information of record as of the date of the Hub Manager's decision and any new information submitted with the written reconsideration request. For purposes of consistency in decision-making, proposed paragraph (d) would also prescribe the requirements for the Regional Office Director's decision and require the same notice as prescribed for the initial misuse determination.

It is current VA policy to seek the prosecution of fiduciaries who misuse VA benefits. Prosecution is a deterrent for acting fiduciaries and may provide a basis for a restitution order that will return misused benefits to the beneficiary. In proposed 13.400, we would provide a cross reference to 38 CFR 1.204, which requires VA employees to immediately refer to the VA Office of Inspector General possible criminal matters involving felonies, i.e., serious crimes, to include theft of Government funds in excess of \$1,000. This regulation requires VA management officials to immediately report certain criminal matters to the Inspector General. Thus, in the fiduciary misuse context, § 1.204 requires the Hub Manager to report information regarding suspected misuse of beneficiary funds to the Office of Inspector General long before the notice prescribed in paragraph (e). We also propose to codify

VA's current practice in proposed paragraph (e), under which the Regional Office Director reports final misuse determinations, whether made by the Hub Manager or the Director upon reconsideration, to the VA Office of Inspector General not later than 30 days after a final determination for evaluation by the Inspector General for further action notwithstanding the 30-day notice requirement. We also note that VA must occasionally withhold taking action regarding misuse and reissuance of benefits while the Office of Inspector General completes an investigation or while a matter is being prosecuted. However, VA has a legal obligation to reissue misused benefits in certain cases and must act promptly in restoring benefits to beneficiaries upon the completion of an Inspector General evaluation or a prosecution. Accordingly, proposed paragraph (e) would also require the Office of Inspector General to advise the Director of the Pension and Fiduciary Service of any final decision regarding prosecution of a fiduciary who misused VA benefits and any final judgment of a court in such a prosecution not later than 30 days after the decision or judgment.

#### **13.410 Reissuance and recoupment of misused benefits**

Under 38 U.S.C. 6107(a) through (c), VA has authority to reissue misused benefits when VA is negligent in administering aspects of the fiduciary program or, without regard to negligence, when the fiduciary is an entity who provides fiduciary services for one or more beneficiaries or an individual who provides fiduciary services for 10 or more beneficiaries. Section 6107(d) requires VA to make a "good faith effort to obtain recoupment" from fiduciaries who misuse benefits. VA implemented its authority under section 6107 based upon the statutory provisions and does not currently have a regulation governing reissuance of benefits. However, the statute does not prescribe the procedures that VA is to use in reissuance cases, the scope of VA's negligence determinations, or the extent to which VA is to seek recoupment of benefits from certain fiduciaries. Accordingly, we propose to implement section 6107 in proposed § 13.410 as described below.

Proposed paragraph (a) restates section 6107(b) without substantive change as the general rule in reissuance cases. Under this rule, which would be administered at the local level by the VA Regional Office Director who has jurisdiction over the fiduciary hub in which the misuse case arose, VA would reissue benefits if the fiduciary is an

individual who served 10 or more beneficiaries during any month in which the misuse occurred, or is a corporation or other entity serving one or more beneficiaries. Consistent with section 6107(c) and VA's policy requiring removal of fiduciaries who misuse benefits, we would clarify in proposed paragraph (a) that the Regional Office Director will reissue benefits in the amount equal to the amount of funds misused to the beneficiary's successor fiduciary.

Proposed paragraph (b) implements the provisions of section 6107(a) regarding reissuance of benefits based upon a determination that VA negligence resulted in misuse of benefits. The proposed rule is intended to make clear that the relevant statutory and regulatory provisions are applicable in cases of misuse by an individual fiduciary who has funds under management for fewer than 10 beneficiaries during any month in which misuse occurred. One of the criteria in section 6107(a) for reissuance of benefits based upon a negligence determination is that "actual [VA] negligence is shown." We interpret this provision to mean that Congress did not intend to limit the criteria for reissuance of benefits based upon negligence to the circumstances in section 6107(a)(2)(A) and (B) regarding review of accountings and misuse allegations. Rather, Congress intended to authorize VA to reissue benefits in any case in which VA negligence proximately caused misuse. We propose to define "actual negligence" using a common legal definition of "negligence" and prescribe the criteria for making such a determination.

We have determined that VA should not prescribe local administration of reissuance of benefits under section 6107(a). Program integrity requires that someone other than the Regional Office Director or Hub Manager determine whether VA's field fiduciary personnel were negligent in administering the program. Accordingly, in proposed paragraph (b), we would require the Hub Manager to refer all final misuse determinations that meet the criteria in section 6107(a) to the Director of the Pension and Fiduciary Service for a negligence determination. The Regional Office Director would be required to reissue benefits if the Pension and Fiduciary Service Director determines that VA negligence caused the misuse.

Proposed paragraph (c) would implement section 6107(d), which requires VA to "make a good faith effort to obtain recoupment" of misused benefits from the fiduciary in any case in which VA reissues benefits. Congress

did not address how VA would accomplish such recoupment of benefits. We do not interpret section 6107(d) as limiting VA's authority under 38 U.S.C. chapters 55 and 61 to generally make a good faith effort to recoup benefits in all cases of misuse, particularly in cases where VA is not authorized to reissue benefits.

Accordingly, the introductory text in proposed paragraph (c) would prescribe the general rule that VA will make a good faith effort to recoup benefits from the fiduciary in every misuse case. In proposed paragraph (c)(1), we would define "good faith effort" to mean that the Hub Manager will attempt to recoup benefits from the surety company if a bond was in place. If a bond was not in place, the Hub Manager will request the creation of a debt to the United States in the amount of any misused benefits, and coordinate further recoupment or debt collection action with the appropriate Federal and State agencies. Consistent with VA's current policy of removing fiduciaries who misuse benefits, proposed paragraph (c)(2) would prescribe repayment of any recovered benefits to the beneficiary's successor fiduciary after deducting any amount reissued under proposed paragraph (a) or (b).

Proposed paragraph (d) would prescribe written notice to the beneficiary or the beneficiary's legal guardian, and the beneficiary's accredited representative, attorney, or claims agent regarding any matter governed by proposed § 13.410.

Although VA does not have authority to reissue benefits to all beneficiaries who are victims of misuse, we intend that proposed § 13.410 would implement the broadest possible interpretation of current law, such that every beneficiary who qualifies has the benefit of reissuance or recoupment procedures.

### 13.500 Removal of fiduciaries

Under 38 U.S.C. 5502(a)(1), when a fiduciary is acting in such a number of cases that the fiduciary is not able to properly perform the responsibilities of a fiduciary for each beneficiary, VA may "refuse to make future payments in such cases." Also, under section 5502(b), VA may suspend payments to any fiduciary who does not comply with VA's accounting requirements or "who shall neglect or refuse to administer the estate according to law." Congress otherwise delegated authority to VA to determine the circumstances under which it would be appropriate to remove a fiduciary. VA implemented this authority in current 38 CFR 13.100, which generally prescribes that the Veterans Service

Center Manager may remove a fiduciary and appoint a successor fiduciary when it is in the beneficiary's interest. Current § 13.100(b) distinguishes fiduciaries who are also appointed by the court by requiring that the Service Center Manager will "take such informal action as may be necessary" to meet the needs of the beneficiary.

We have determined that current § 13.100 does not provide clear notice regarding all of the circumstances under which VA will remove a fiduciary. Further, as noted in this preamble, VA appoints and oversees all fiduciaries, regardless of whether the fiduciary is also appointed by a court. In attempting to distinguish between "Federal" fiduciaries and VA-appointed fiduciaries who are also appointed by a court, the current regulations needlessly add complexity and ambiguity for users. As noted above in this preamble, we propose to generally refer to "fiduciaries" and apply our proposed rules uniformly to all fiduciaries. For these reasons, we propose to remove current § 13.100 and replace it with proposed § 13.500 as described below.

In proposed § 13.500(a), we would authorize the Hub Manager to remove a fiduciary. The regulation would then be organized to provide notice regarding the reasons for removal that may be attributed to the beneficiary or the fiduciary, followed by applicable removal procedures. We do not intend any substantive change by listing in one section the reasons and procedures for removal. Our intent is to provide beneficiaries and fiduciaries notice regarding the grounds for removal and references to the regulations that contain substantive provisions or additional procedures.

Proposed paragraph (a)(1), regarding beneficiary reasons for removal, would authorize removal if the beneficiary is subsequently rated as being able to manage his or her own VA benefits, requests appointment of a successor fiduciary, requests supervised direct payment of his or her VA benefits under proposed § 13.110, or dies while receiving fiduciary services.

Proposed paragraph (a)(2), regarding fiduciary reasons for removal, would authorize removal when further service is barred or the fiduciary is not adequately performing the responsibilities of a fiduciary. These reasons, listed under proposed paragraph (a)(2)(i) through (viii) include, among other things, the fiduciary's failure to follow accounting requirements, misuse of benefits, failure to obtain a surety bond, or inability to continue the management of beneficiary funds.

Current § 13.100 does not prescribe the procedures for removal of a fiduciary. This has led to inconsistency in the manner in which VA ensures that beneficiary needs are being met during the removal of a fiduciary and appointment of a successor fiduciary. To ensure consistency in VA's removal actions and continuity of service for beneficiaries, proposed paragraph (b)(1) would require the Hub Manager to provide the fiduciary and the beneficiary written notice of the removal and to instruct the fiduciary regarding the fiduciary's responsibilities prior to transfer of funds to a successor. In proposed paragraph (b)(2), we would require the fiduciary to continue as fiduciary for the beneficiary until the Hub Manager instructs the fiduciary to transfer funds to the successor fiduciary. Finally, we would generally require the removed fiduciary to submit a final accounting to the fiduciary hub not later than 30 days after the date on which the fiduciary transferred funds to the successor.

We intend that the provisions of proposed § 13.500 would provide clear notice regarding the grounds for removal and the procedures for transitioning to a successor fiduciary.

### 13.510 Fiduciary Withdrawals

In administering the fiduciary program, we have encountered cases in which a fiduciary chooses to withdraw from service for a beneficiary and discontinues such service with very little notice to VA or the beneficiary. In these circumstances, VA may be unable to expeditiously appoint a successor fiduciary and arrange for transfer of accumulated funds, which could harm the beneficiary to the extent that a fiduciary is not available to meet immediate needs or ensure payment of recurring bills. While Congress gave VA broad authority to appoint and remove fiduciaries, it did not address whether a fiduciary may withdraw from service for a beneficiary at any time without regard to the impact on the beneficiary. Current VA regulations also do not address the circumstances under which a fiduciary may withdraw from service or the procedures for such withdrawal. We interpret VA's authority under 38 U.S.C. chapters 55 and 61 as also authorizing VA to establish withdrawal procedures for fiduciaries to ensure continuity of service. Accordingly, we propose to add a new § 13.510 as described below.

Proposed paragraph (a) would prescribe the general rule that a fiduciary may not voluntarily withdraw from service for a beneficiary until the fiduciary receives notice from the Hub Manager regarding transfer of the

beneficiary's funds to a successor fiduciary. The Hub Manager would provide such notice after having arranged for transfer of VA benefit funds under management by the fiduciary and the establishment of recurring payments to a successor fiduciary. While we recognize that there is no right to act as a fiduciary for a beneficiary and that VA cannot force an individual or entity to provide fiduciary services, VA has authority under our interpretation of current law to require individuals and entities that choose to provide fiduciary services to continue those services until VA appoints a successor. An alternative interpretation, under which a fiduciary may withdraw at any time and without regard to VA's appointment of a successor, would be unreasonable because it would jeopardize the well-being of the beneficiaries whom Congress sought to protect when it created the fiduciary program. Nonetheless, we recognize that there may be circumstances under which a fiduciary would need to withdraw as quickly as possible. We therefore propose to establish a withdrawal procedure that requires the Hub Manager to expeditiously process a withdrawal request.

Proposed paragraph (b) would prescribe the applicable withdrawal procedure. We would require the fiduciary to provide the Hub Manager written notice of the fiduciary's intent to withdraw as fiduciary for a beneficiary. To facilitate the appointment of a successor and ensure continuity of service for the beneficiary, we would require the fiduciary to describe the reasons for withdrawal and to continue service until the Hub Manager arranges for transfer of services to a successor fiduciary. Not later than 30 days after transferring the beneficiary's funds to the successor, the former fiduciary would be required to submit a final accounting to the fiduciary hub. The 30-day requirement is consistent with the current practice for submission of annual accountings and would ensure the timely transfer of funds to the successor fiduciary for the benefit of a beneficiary whose basic needs may depend on the services of a fiduciary.

To protect the interests of fiduciaries seeking to withdraw, proposed paragraph (b)(2) would require the Hub Manager to make a reasonable effort under the circumstances to expedite the appointment of a successor fiduciary. In our view, this "under the circumstances" determination would require a case-by-case analysis. For example, a corporate fiduciary that serves many beneficiaries might not be able to withdraw as quickly as a family

member fiduciary who serves only one beneficiary and who will be replaced by another family member. We would prescribe criteria for the Hub Manager to use in determining the extent to which the processing of a withdrawal request must be expedited, including the fiduciary's stated reasons for the withdrawal request, the number of beneficiaries affected, the relationship between the fiduciary and the affected beneficiary or beneficiaries, and whether expedited withdrawal is necessary to protect the interests of the beneficiary or beneficiaries.

Proposed paragraph (c) would require the Hub Manager to provide the beneficiary or beneficiary's legal guardian, and the beneficiary's accredited representative, attorney, or claims agent written notice of the withdrawal request and the procedures for appointment of a successor fiduciary.

### 13.600 Appeals

In *Freeman v. Shinseki*, the Veterans Court held that a beneficiary may appeal VA's fiduciary appointment decisions to the Board of Veterans' Appeals (Board) and, consequently, to the Veterans Court and the U.S. Court of Appeals for the Federal Circuit. Although a fiduciary appointment decision is not a decision on a claim for benefits, the Veterans Court concluded that a fiduciary appointment decision is made under a law that affects the provision of benefits, which places it within the Board's jurisdiction.

Prior to the Veterans Court's decision, VA's longstanding interpretation of the law was that fiduciary appointments are committed to the Secretary of Veterans Affairs' discretion by law and could not be appealed. VA policy recognized that beneficiaries rated by VA as being unable to manage their own VA benefits had already been afforded the right of appeal regarding that rating. It also recognized that affording an additional right of appeal regarding the individual or entity best suited to handle financial matters for the beneficiary would be inconsistent with the fact that the beneficiary had already been found incapable of managing financial matters. Accordingly, VA did not promulgate regulations regarding appeals in fiduciary appointments prior to the *Freeman* decision. We propose to implement the court's decision in § 13.600 regarding appeals as described below.

The introductory text to proposed § 13.600 would prescribe the general rule that fiduciary matters are committed to the Secretary of Veterans Affairs' discretion by law and cannot be

appealed to the Board or any court. Consistent with VA's interpretation of the *Freeman* decision, the exceptions to this general rule would be prescribed in proposed paragraph (a).

Although the court's holding in *Freeman* was limited to fiduciary appointments under section 5502, we interpret it to mean that there is a right to appeal any fiduciary decision that is made under a law that affects the provision of benefits to veterans or to the dependents or survivors of veterans. Accordingly, we propose to extend this right to removal decisions. We also propose to permit appeals of VA's reissuance-of-benefits decisions under proposed § 13.410. Thus, any decision that VA will not reissue benefits, regardless of the bases for that decision, could be appealed by the beneficiary to the Board. However, a finding of misuse is a prerequisite to reissuance of benefits under proposed § 13.410, and a finding that VA negligence caused fiduciary misuse of benefits is an additional prerequisite for reissuance of benefits under proposed § 13.410(b). For these reasons, proposed paragraphs (a)(1) through (5) would list the various appointment, removal, misuse, and negligence decisions that may be appealed by beneficiaries in the fiduciary program.

Proposed paragraph (b)(1) would prescribe that VA decisions regarding fiduciary matters are final, subject only to the beneficiary's right of appeal as further prescribed in section 13.600. We would also prescribe that the record regarding these final decisions will close on the date the decision is made. As noted in this preamble, decisions on fiduciary matters are not decisions on claims for benefits and would not be afforded the same procedures as prescribed by VA for benefit claims under 38 CFR part 3. We intend that appeals in fiduciary matters would be processed expeditiously to avoid delaying VA's effort to resolve the beneficiary's disagreement with an appointment or issue a statement of the case or certify an appeal to the Board.

Except as prescribed in proposed paragraph (b)(1), VA's appeal regulations in 38 CFR parts 19 and 20 would be applicable to the appeals authorized in this regulation. We would provide notice regarding the applicability of these provisions in proposed paragraph (b)(2). Although we would close the record regarding appealable decisions under paragraph (b)(1), we would clarify that such action would not limit the Board's authority to remand a matter to the Hub Manager, Regional Office Director, or Director of the Pension and Fiduciary Service

under 38 CFR 19.9 for any action necessary for an appellate decision or the issuance of a supplemental statement of the case under 38 CFR 19.31(b)(2), (b)(3), or (c).

#### Paperwork Reduction Act

This proposed rule contains provisions constituting collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521), at 38 CFR 13.30, 13.140, 13.230, 13.280 and 13.600.

The information collection requirements for §§ 13.280 and 13.600 are currently approved by the Office of Management and Budget (OMB) and have been assigned OMB Control Nos. 2900–0017 and 2900–0085. The proposed rule at §§ 13.30, 13.140, and 13.230 contains collections of information that require approval by OMB. The collection required by § 13.30, while implicit in the plan of collection approved by OMB control number 2900–0017, would now become an explicit requirement under the proposed rule. Accordingly, under 44 U.S.C. 3507(d), VA has submitted a copy of this rulemaking to OMB for review. OMB assigns a control number for each collection of information it approves. VA may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. If OMB does not approve the collection of information as requested, VA will immediately remove the provisions containing a collection of information or take such other action as is directed by OMB.

Comments on the collections of information contained in this proposed rule should be submitted to the Office of Management and Budget, Attention: Desk Officer for the Department of Veterans Affairs, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies sent by mail or hand delivery to: Director, Office of Regulation Policy and Management (02REG), Department of Veterans Affairs, 810 Vermont Ave, NW., Room 1068, Washington, DC 20420; fax to (202) 273–9026 (this is not a toll-free number); or email comments through [www.Regulations.gov](http://www.Regulations.gov). Comments should indicate that they are submitted in response to “RIN 2900–AO53.”

OMB is required to make a decision concerning the collections of information contained in this proposed rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the

deadline for the public to comment on the proposed rule. VA requests comments by the public on proposed collections of information in—

- Evaluating whether the proposed collections of information are necessary for the proper performance of the functions of VA, including whether the information will have practical utility;
- Evaluating the accuracy of VA's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of the collections of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other form of information technology, e.g., permitting electronic submission of responses.

The collection of information contained in 38 CFR 13.30, 13.140, and 13.230 is described immediately following this paragraph, under their respective titles.

*Title:* Beneficiary rights.

*Summary of collection of information:*

Under proposed 38 CFR 13.30(b)(6), a beneficiary has the right to obtain from his or her fiduciary a copy of the fiduciary's VA-approved annual accounting. Although the collection requirement of the annual accounting itself is already authorized under OMB Control No. 2900–0017, the proposed rule would make explicit the fiduciary's duty to provide a copy of such accounting to the beneficiary upon request. A fiduciary could provide this copy to the beneficiary by mail, email, or in person. The required form is authorized under OMB Control No. 2900–0017.

*Description of the need for information and proposed use of information:* This information is needed for purposes of keeping the beneficiary informed as to the status of his or her VA benefit funds under management.

*Description of likely respondents:* Fiduciaries appointed by VA to manage VA benefit payments on behalf of a beneficiary.

*Estimated number of respondents per year:* 33,000.

*Estimated frequency of responses:*

Once per year.

*Estimated total annual reporting and recordkeeping burden:* 5,550 additional hours.

*Title:* Responsibilities of fiduciaries.

*Summary of collection of information:* Under proposed 38 CFR 13.140, a

fiduciary is required to keep VA apprised of any change in the beneficiary's circumstances which might adversely impact the beneficiary's well-being. A fiduciary could report any change telephonically or in writing. No form is required for the submission of this information.

*Description of the need for information and proposed use of information:* This information is needed for purposes of coordinating a proper response to the beneficiary's benefit or other needs, to include referral to the Veterans Health Administration or other public or private agencies for delivery of services.

*Description of likely respondents:* Fiduciaries appointed by VA to manage VA benefit payments on behalf of a beneficiary.

*Estimated number of respondents per year:* 37,500.

*Estimated frequency of responses:* Once per year.

*Estimated total annual reporting and recordkeeping burden:* 1,875 additional hours.

*Title:* Protection of beneficiary funds.

*Summary of collection of information:* Under proposed 38 CFR 13.230, a fiduciary is required to submit proof of adequate bonding with each annual accounting and at any other time the Hub Manager requests such proof. The proof could be a copy of the bond certificate or the contractual agreement between the fiduciary and the bonding company. No form is required.

*Description of the need for information and proposed use of information:* The information is needed to facilitate VA's oversight regarding the funds under management protection requirements prescribed in proposed § 13.230.

*Description of likely respondents:* Certain fiduciaries appointed by VA who manage VA benefit funds in excess of \$25,000.

*Estimated number of respondents per year:* 10,000.

*Estimated frequency of responses:* Once per year.

*Estimated total annual reporting and recordkeeping burden:* 167 additional hours.

### Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. The proposed rule would primarily affect individual beneficiaries and fiduciaries. It would not cause a significant economic impact on fiduciaries since

VA generally appoints individual family members, friends, or caretakers, who provide fiduciary services for beneficiaries. Further, only a small portion of the business of entities that provide fiduciary services concerns VA beneficiaries. Therefore, pursuant to 5 U.S.C. 605(b), this proposed rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

### Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a "significant regulatory action," which requires review by the Office of Management and Budget (OMB), as "any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

The economic, interagency, budgetary, legal, and policy implications of this proposed rule have been examined and it has been determined to be a significant regulatory action under Executive Order 12866.

### Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more

(adjusted annually for inflation) in any one year. This proposed rule would have no such effect on State, local, or tribal governments, or on the private sector.

### Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance program number and title for this proposed rule are as follows: 64.104, Pension for Non-Service-Connected Disability for Veterans; 64.105, Pension to Veterans Surviving Spouses, and Children; 64.109, Veterans Compensation for Service-Connected Disability; and 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death.

### Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Jose D. Riojas, Interim Chief of Staff, Department of Veterans Affairs, approved this document on May 20, 2013 for publication.

### List of Subjects

#### 38 CFR part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Radioactive materials, Veterans, and Vietnam.

#### 38 CFR part 13

Surety bonds, Trusts and trustees, and Veterans.

Dated: December 12, 2013.

#### Robert C. McFetridge,

Director, Office of Regulation Policy and Management, Office of the General Counsel, Department of Veterans Affairs.

For the reasons stated in the preamble, VA proposes to amend 38 CFR parts 3 and 13 to read as follows:

### PART 3—ADJUDICATION

#### Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

- 1. The authority citation for part 3, subpart A continues to read as follows:

**Authority:** 38 U.S.C. 501(a), unless otherwise noted.

#### § 3.353 [Amended]

- 2. Amend § 3.353 by:
  - a. In paragraph (b)(1), removing “§ 13.56” and adding, in its place, “§ 13.110”.

■ b. In paragraph (b)(2), removing “§ 13.55”, “§ 13.56”, and “§ 13.57” and adding, in each place, “§ 13.100”.

#### § 3.401 [Amended]

■ 3. Amend § 3.401 by removing and reserving paragraph (d).  
 ■ 4. In § 3.403, revise the paragraph heading for paragraph (a)(2) to read as follows:

#### § 3.403 Children.

(a) \* \* \*

(2) *Majority* (§ 13.100). \* \* \*

\* \* \* \* \*

■ 5. In § 3.452, revise the CROSS REFERENCES immediately after paragraph (d) to read as follows:

#### § 3.452 Situations when benefits may be apportioned.

\* \* \* \* \*

CROSS REFERENCES: Disappearance of veteran. See § 3.656. Reduction because of hospitalization. See 3.551. Penal institutions. See § 3.666.

#### § 3.500 [Amended]

■ 6. In § 3.500, remove and reserve paragraphs (l) and (m).

#### § 3.501 [Amended]

■ 7. In § 3.501, remove and reserve paragraph (j) and remove paragraph (n). §§ 3.850 through 3.857 [Removed]

■ 8. Remove §§ 3.850 through 3.857 and the undesignated center heading “INCOMPETENTS, GUARDIANSHIP AND INSTITUTIONAL AWARDS” immediately preceding § 3.850.

■ 9. Part 13 is revised to read as follows:

### PART 13—FIDUCIARY ACTIVITIES

Sec.

- 13.10 Purpose and applicability of other regulations.
- 13.20 Definitions.
- 13.30 Beneficiary rights.
- 13.40 Representation of beneficiaries in the fiduciary program.
- 13.50 Suspension of benefits.
- 13.100 Fiduciary appointments.
- 13.110 Supervised direct payment.
- 13.120 Field examinations.
- 13.130 Bars to serving as a fiduciary.
- 13.140 Responsibilities of fiduciaries.
- 13.200 Fiduciary accounts.
- 13.210 Fiduciary investments.
- 13.220 Fiduciary fees.
- 13.230 Protection of beneficiary funds.
- 13.240 Funds of beneficiaries less than 18 years old.
- 13.250 Funds of deceased beneficiaries.
- 13.260 Personal funds of patients.
- 13.270 Creditors' claims.
- 13.280 Accountings.
- 13.300 Onsite reviews.
- 13.400 Misuse of benefits.
- 13.410 Reissuance and recoupment of misused benefits.
- 13.500 Removal of fiduciaries.
- 13.510 Fiduciary withdrawals.

13.600 Appeals.

**Authority:** 38 U.S.C. 501, 5502, 5506–5510, 6101, 6106–6108, and as noted in specific sections.

#### § 13.10 Purpose and applicability of other regulations.

(a) *Purpose.* The regulations in this part implement the Department of Veterans Affairs (VA) fiduciary program, which is authorized by 38 U.S.C. chapters 55 and 61. The purpose of the fiduciary program is to protect certain VA beneficiaries who, as a result of injury, disease, or infirmities of advanced age, or by reason of being less than 18 years of age, cannot manage their VA benefits. Under this program, VA oversees these vulnerable beneficiaries to ensure their well-being, and appoints and oversees fiduciaries who manage these beneficiaries' benefits.

(b) *Applicability of other regulations.* Fiduciary matters arise after VA has determined that a beneficiary is entitled to benefits, and decisions on fiduciary matters are not decisions on claims for VA benefits. Accordingly, VA's regulations governing the adjudication of claims for benefits, *see* 38 CFR part 3, do not apply to fiduciary matters unless VA has prescribed applicability in this part.

(Authority: 38 U.S.C. 501)

#### § 13.20 Definitions.

The following definitions apply to this part:

*Dependent* means a beneficiary's spouse as defined by this section, a beneficiary's child as defined by § 3.57 of this chapter, or a beneficiary's parent as defined by § 3.59 of this chapter, who does not have an income sufficient for reasonable maintenance and who obtains support for such maintenance from the beneficiary.

*Fiduciary* means an individual or entity appointed by VA to receive VA benefits on behalf of a beneficiary for the use and benefit of the beneficiary and the beneficiary's dependents.

*Hub Manager* means the individual who has authority to oversee the activities of a VA Fiduciary Hub or the Veterans Service Center Manager of the VA Manila Regional Office.

*In the fiduciary program* means, with respect to a beneficiary, that the beneficiary:

(i) Has been rated by VA as incapable of managing his or her own VA benefits as a result of injury, disease, or the infirmities of advanced age;

(ii) Has been determined by a court with jurisdiction as being unable to manage his or her own financial affairs; or

(iii) Is less than 18 years of age.

*Rating authority* means VA employees who have authority under § 3.353 of this chapter to determine whether a beneficiary can manage his or her VA benefits.

*Relative* means a person who is an adopted child or is related to a beneficiary by blood or marriage.

*Restricted withdrawal agreement* means a written contract between VA, a fiduciary, and a financial institution in which the fiduciary has VA benefit funds under management for a beneficiary, under which certain funds cannot be withdrawn without the consent of the Hub Manager.

*Spouse* means a husband or wife whose marriage, including “common law” marriage and same-sex marriage, meets the requirements of 38 U.S.C. § 103(c).

*VA benefit funds under management* means the combined value of the VA funds maintained in a fiduciary account or accounts managed by a fiduciary for a beneficiary under § 13.200 and any VA funds invested by the fiduciary for the beneficiary under § 13.210, to include any interest income and return on investment derived from any account.

(Authority: 38 U.S.C. 501)

#### § 13.30 Beneficiary rights.

Except as prescribed in this part, a beneficiary in the fiduciary program is entitled to the same rights afforded any other VA beneficiary.

(a) *General policy.* Generally, a beneficiary has the right to manage his or her own VA benefits. However, due to a beneficiary's injury, disease, or infirmities of advanced age or by reason of being less than 18 years of age, VA may determine that the beneficiary is unable to manage his or her benefits without VA supervision or the assistance of a fiduciary. Or a court with jurisdiction might determine that a beneficiary is unable to manage his or her financial affairs. Under any of these circumstances, VA will apply the provisions of this part to ensure that VA benefits are being used to maintain the well-being of the beneficiary and the beneficiary's dependents.

(b) *Specific rights.* The rights of beneficiaries in the fiduciary program include, but are not limited to, the right to:

(1) Receive direct payment of recurring monthly benefits until VA appoints a fiduciary if the beneficiary is 18 years of age or older;

(2) Receive notice regarding VA's appointment of a fiduciary or any other decision on a fiduciary matter that affects VA's provision of benefits to the beneficiary;

(3) Appeal to the Board of Veterans' Appeals VA's appointment of a fiduciary;

(4) Be informed of the fiduciary's name, telephone number, mailing address, and email address;

(5) Contact his or her fiduciary and request a disbursement of funds for current or foreseeable needs or consideration for payment of previously incurred expenses, account balance information, or other information or assistance consistent with the responsibilities of the fiduciary prescribed in § 13.140;

(6) Obtain from his or her fiduciary a copy of the fiduciary's VA-approved annual accounting;

(7) Have VA reissue benefits misused by a fiduciary if VA is negligent in appointing or overseeing the fiduciary or if the fiduciary who misused the benefits meets the criteria prescribed in § 13.410;

(8) Appeal to the Board of Veterans' Appeals VA's determination regarding its own negligence in misuse and reissuance of benefits matters;

(9) Submit to VA a reasonable request for appointment of a successor fiduciary. For purposes of this paragraph, *reasonable request* means a good faith effort to seek replacement of a fiduciary, if:

(i) The beneficiary's current fiduciary receives a fee deducted from the beneficiary's account under § 13.220 and the beneficiary requests an unpaid volunteer fiduciary who ranks higher in the order of preference under § 13.100(e);

(ii) The beneficiary requests removal of his or her fiduciary under § 13.500(a)(1)(iii) and supervised direct payment of benefits under § 13.110; or

(iii) The beneficiary provides credible information that the current fiduciary is not acting in the beneficiary's interest or is unable to effectively serve the beneficiary due to a personality conflict or disagreement and VA is not able to obtain resolution;

(10)(i) Be removed from the fiduciary program and receive direct payment of benefits without VA supervision provided that the beneficiary:

(A) Is rated by VA as able to manage his or her own benefits; or

(B) Is determined by a court with jurisdiction as able to manage his or her financial affairs; or

(C) Attains the age of 18 years;

(ii) Have a fiduciary removed and receive direct payment of benefits with VA supervision as prescribed in § 13.110 regarding supervised direct payment and § 13.500 regarding removal of fiduciaries generally, provided that the beneficiary establishes the ability to

manage his or her own benefits with limited and temporary VA supervision; and

(11) Be represented by a VA-accredited attorney, claims agent, or representative of a VA-recognized veterans service organization. This includes the right to have a representative present during a field examination and the right to be represented in the appeal of a fiduciary matter under § 13.600.

(Authority: 38 U.S.C. 501)

#### § 13.40 Representation of beneficiaries in the fiduciary program.

The provisions of 38 CFR 14.626 through 14.629 and 14.631 through 14.637 regarding accreditation and representation of VA claimants and beneficiaries in proceedings before VA are applicable to representation of beneficiaries before VA in fiduciary matters governed by this part.

(a) *Accreditation.* Only VA-accredited attorneys, claims agents, and accredited representatives of VA-recognized veterans service organizations who have complied with the power-of-attorney requirements in § 14.631 of this chapter may represent beneficiaries before VA in fiduciary matters.

(b) *Standards of conduct.* Accredited individuals who represent beneficiaries in fiduciary matters must comply with the general and specific standards of conduct prescribed in § 14.632(a) through (c) of this chapter, and attorneys must also comply with the standards prescribed in § 14.632(d). For purposes of this section:

(1) A fiduciary matter is not a claim for VA benefits. However, the term *claimant* in § 14.632 of this chapter includes VA beneficiaries who are in the fiduciary program, and the term *claim* in § 14.632 includes a fiduciary matter that is pending before VA.

(2) The provisions of § 14.632(c)(7) through (9) of this chapter mean that an accredited individual representing a beneficiary in a fiduciary matter may not:

(i) Delay or refuse to cooperate in the processing of a fiduciary appointment or any other fiduciary matter, including but not limited to a field examination prescribed by § 13.120 and the investigation of a proposed fiduciary prescribed by § 13.100;

(ii) Mislead, threaten, coerce, or deceive a beneficiary in the fiduciary program or a proposed or current fiduciary regarding payment of benefits or the rights of beneficiaries in the fiduciary program; or

(iii) Engage in, or counsel or advise a beneficiary or proposed or current fiduciary to engage in, acts or behavior

prejudicial to the fair and orderly conduct of administrative proceedings before VA.

(3) The Hub Manager will submit a written report regarding an alleged violation of the standards of conduct prescribed in this section to the VA Assistant General Counsel who administers the accreditation program for a determination regarding further action, including suspension or cancellation of accreditation under § 14.633 of this chapter, and notification to any agency, court, or bar to which the attorney, agent, or representative is admitted to practice.

(c) *Fees.* Except as prescribed in paragraphs (c)(1)(i) through (iii) of this section, an accredited attorney or claims agent may charge a reasonable fixed or hourly fee for representation services provided to a beneficiary in a fiduciary matter, provided that the fee meets the requirements of § 14.636 of this chapter.

(1) The following provisions of § 14.636 of this chapter do not apply in fiduciary matters:

(i) Fees under § 14.636(e) of this chapter, to the extent that the regulation authorizes a fee based on a percentage of benefits recovered;

(ii) The presumptions prescribed by § 14.636(f) of this chapter based upon a percentage of a past-due benefit amount. In fiduciary matters, the reasonableness of a fixed or hourly-rate fee will be determined based upon application of the reasonableness factors prescribed in § 14.636(e); and

(iii) Direct payment of fees by VA out of past-due benefits under § 14.636(g)(2) and (h) of this chapter.

(2) An accredited attorney or claims agent who wishes to charge a fee for representing a beneficiary in a fiduciary matter must comply with the fee agreement filing requirement prescribed in § 14.636(g)(3) of this chapter.

(3) VA, the beneficiary, or the beneficiary's fiduciary may challenge the reasonableness of a fee charged by an accredited attorney or claims agent using the procedures prescribed in § 14.636(i) of this chapter.

(Authority: 38 U.S.C. 501, chapter 59)

#### § 13.50 Suspension of benefits.

(a) Notwithstanding the beneficiary rights prescribed in § 13.30, the Hub Manager will temporarily suspend payment of benefits and hold such benefits in the U.S. Treasury to the credit of the beneficiary or take other action that the Hub Manager deems appropriate to prevent exploitation of VA benefit funds or to ensure that the beneficiary's needs are being met, if:

(1) The beneficiary or the beneficiary's attorney, claims agent, or

representative withholds cooperation in any of the appointment and oversight procedures prescribed in this part; or

(2) VA removes the beneficiary's fiduciary for any reason prescribed in § 13.500(b) and is unable to appoint a successor fiduciary before the beneficiary has an immediate need for disbursement of funds.

(b) All or any part of the funds held in the U.S. Treasury to the beneficiary's credit under paragraph (a) of this section will be disbursed under the order and in the discretion of the VA Regional Office Director who has jurisdiction over the fiduciary hub or regional office for the benefit of the beneficiary or the beneficiary's dependents.

(Authority: 38 U.S.C. 501, 512, 5502, 5504)

### § 13.100 Fiduciary appointments.

(a) *Authority.* Except as prescribed in paragraph (b) of this section, the Hub Manager will appoint a fiduciary for a beneficiary who:

(1) Has been rated by VA as being unable to manage his or her VA benefits,

(2) Has been determined by a court with jurisdiction as being unable to manage his or her financial affairs, or

(3) Has not reached age 18.

(b) *Exceptions.* The Hub Manager will not appoint a fiduciary for a beneficiary who:

(1) Is eligible for supervised direct payment under § 13.110, or

(2) Is not a beneficiary described in paragraph (a)(1) or (a)(2) of this section and has not reached age 18, and

(i) Is serving in the Armed Forces of the United States,

(ii) Has been discharged from service in the Armed Forces of the United States, or

(iii) Qualifies for survivors' benefits as a surviving spouse.

(c) *Retroactive benefit payments.* The Hub Manager will withhold any retroactive, one-time, or other lump-sum benefit payment awarded to a beneficiary described in paragraph (a) of this section until the Hub Manager has appointed a fiduciary for the beneficiary and, if applicable, the fiduciary has obtained a surety bond under § 13.230.

(d) *Initial appointment.* In appointing a fiduciary, the Hub Manager will make every effort to appoint the person, agency, organization, or institution that will best serve the interest of the beneficiary. The Hub Manager will consider the results of a field examination, which will include a face-to-face meeting with the beneficiary and the beneficiary's dependents at their residence when practicable, and will conduct the investigation prescribed in

paragraph (f) of this section. The Hub Manager will also consider whether:

(1) VA benefits can be paid directly to the beneficiary with limited and temporary supervision by VA, as prescribed in § 13.110;

(2) The circumstances require appointment of a temporary fiduciary under paragraph (h) of this section; and

(3) The proposed fiduciary is complying with the responsibilities of a fiduciary prescribed in § 13.140 with respect to all beneficiaries in the fiduciary program currently being served by the proposed fiduciary and whether the proposed fiduciary can handle an additional appointment without degrading service for any other beneficiary.

(e) *Order of preference in appointing a fiduciary.* The Hub Manager will consider individuals and entities for appointment in the following order of preference, provided that the proposed fiduciary is qualified and willing to serve and the appointment would serve the beneficiary's interest:

(1) The preference stated by the beneficiary in the fiduciary program, if the beneficiary has the capacity to state such a preference. If the beneficiary has a legal guardian appointed to handle the beneficiary's affairs, the Hub Manager will presume that the beneficiary does not have the capacity to state a preference and will consider individuals and entities in the order of preference prescribed in paragraphs (e)(2) through (10) of this section;

(2) The beneficiary's spouse;

(3) A relative who has care or custody of the beneficiary or his or her funds;

(4) Any other relative of the beneficiary;

(5) Any friend, acquaintance, or other person who is willing to serve as fiduciary for the beneficiary without a fee;

(6) The chief officer of a public or private institution in which the beneficiary receives care or which has custody of the beneficiary;

(7) The bonded officer of an Indian reservation, if applicable;

(8) An individual or entity who has been appointed by a court with jurisdiction to handle the beneficiary's affairs;

(9) An individual or entity who is not willing to serve without a fee; or

(10) A temporary fiduciary, if necessary.

(f) *Investigation of a proposed fiduciary.* Except as prescribed in paragraph (f)(3) of this section, before appointing a fiduciary for a beneficiary in the fiduciary program, the Hub Manager will conduct an investigation

regarding the proposed fiduciary's qualifications.

(1) The investigation will include:

(i) To the extent practicable, a face-to-face interview of the proposed fiduciary;

(ii) A review of a credit report on the proposed fiduciary issued by a credit reporting agency no more than 30 days prior to the date of the proposed appointment;

(iii) A criminal background check to determine whether the proposed fiduciary has been convicted of any offense which would be a bar to serving as a fiduciary under § 13.130 or which the Hub Manager may consider and weigh under the totality of the circumstances regarding the proposed fiduciary's qualifications;

(iv) Obtaining proof of the proposed fiduciary's identity and relationship to the beneficiary, if any; and

(v) A determination regarding the need for surety bond under § 13.230 and the proposed fiduciary's ability to obtain such a bond.

(2) The Hub Manager may, at any time after the initial appointment of the fiduciary for a beneficiary, repeat all or part of the investigation prescribed by paragraph (f)(1) of this section to ensure that the fiduciary continues to meet the qualifications for service and there is no current bar to service under § 13.130.

(3) VA will not conduct the investigation prescribed by paragraph (f) of this section if the proposed fiduciary is an entity, such as the trust department of a bank that provides fiduciary services.

(g) *Expedited appointment.* The Hub Manager may waive the requirements of paragraphs (f)(1)(i) through (iii) of this section and expedite the appointment of a proposed fiduciary if the Hub Manager determines that an expedited appointment would be in the beneficiary's interest and:

(1) The proposed fiduciary is:

(i) The beneficiary's parent (natural, adopted, or step-parent) and the beneficiary is less than 18 years old, or

(ii) The beneficiary's spouse; or

(2) The annual amount of VA benefits the proposed fiduciary would manage for the beneficiary does not exceed the amount specified in 38 U.S.C. 5507(c)(2)(D), as adjusted by VA pursuant to 38 U.S.C. 5312.

(h) *Temporary fiduciary appointments.* (1) The Hub Manager may appoint a temporary fiduciary for a period not to exceed 120 days in any of the following circumstances:

(i) The beneficiary is appealing a VA rating that the beneficiary cannot manage his or her own VA benefits;

(ii) VA has removed a fiduciary for cause under § 13.500 and cannot



expedite the appointment of a successor fiduciary, and the beneficiary has an immediate need for fiduciary services; or

(iii) The Hub Manager determines that the beneficiary has an immediate need for fiduciary services and it would not be in the beneficiary's or the beneficiary's dependents' interest to pay benefits to the beneficiary until a fiduciary is appointed.

(2) Any temporary fiduciary appointed under this paragraph (h) must be:

(i) An individual or entity that has already been subject to the procedures for appointment in paragraphs (d) and (f) of this section, and

(ii) Performing satisfactorily as a fiduciary for at least one other VA beneficiary for whom the fiduciary has submitted an annual accounting that VA has approved.

(i) *Authorization for disclosure of information.* The Hub Manager will:

(1) Obtain from every proposed fiduciary who is an individual a written authorization for VA to disclose to the beneficiary information regarding any fiduciary matter that may be appealed under § 13.600, including but not limited to the fiduciary's qualifications for appointment under § 13.100 or misuse of benefits under § 13.400. Such disclosures may occur in VA's correspondence with the beneficiary, in a VA fiduciary appointment or misuse of benefits decision, in a statement of the case for purposes of appeal under § 13.600, or upon request by the beneficiary, the beneficiary's guardian, or the beneficiary's accredited attorney, claims agent, or representative;

(2) Notify the proposed fiduciary that the disclosed information may be used by the beneficiary in appealing a VA appointment or misuse decision to the Board of Veterans' Appeals under § 13.600; and

(3) Terminate consideration of a proposed fiduciary if the individual refuses to provide the authorization prescribed in paragraph (i)(1) of this section. Such refusal is a bar to serving as a fiduciary for a beneficiary under § 13.130(b).

(Authority: 38 U.S.C. 501, 5502, 5506, 5507)

#### § 13.110 Supervised direct payment.

(a) *Authority.* The Hub Manager may authorize the payment of VA benefits directly to an adult beneficiary in the fiduciary program 18 years of age or older if the Hub Manager determines, based upon a field examination, that the beneficiary can manage his or her VA benefits with limited and temporary VA supervision. In making this

determination, the Hub Manager will consider:

(1) Whether the beneficiary is aware of his or her monthly income;

(2) Whether the beneficiary is aware of his or her fixed monthly expenses such as rent, mortgage, utilities, clothing, food, and medical bills;

(3) The beneficiary's ability to:

(i) Allocate appropriate funds to fixed monthly expenses and discretionary items;

(ii) Pay monthly bills in a timely manner; and

(iii) Conserve excess funds; and

(4) Any other information that demonstrates the beneficiary's actual ability to manage his or her VA benefits with limited VA supervision.

(b) *Supervision.* The limited and temporary supervision of beneficiaries receiving direct payment under paragraph (a) of this section will consist of:

(1) Assistance in the development of a budget regarding the beneficiary's income and expenses,

(2) Assistance with creating a fund usage report to aid the beneficiary in tracking his or her income and expenses, and

(3) Periodic reviews of the beneficiary's fund usage report, as required by the Hub Manager.

(c) *Reassessment.* The Hub Manager will reassess the beneficiary's ability to manage his or her VA benefits at or before the end of the first 12-month period of supervision. Based upon a field examination, an evaluation of the factors listed in paragraph (a) of this section, and the results of the supervision prescribed in paragraph (b) of this section, the Hub Manager will determine whether the beneficiary can manage his or her benefits without VA supervision.

(1) If the beneficiary demonstrates the ability to manage his or her VA benefits without supervision, the Hub Manager will prepare a report that summarizes the findings and refer the matter with a recommendation and supporting evidence to the rating authority for application of § 3.353(b)(3) of this chapter regarding reevaluation of ability to manage VA benefits and § 3.353(d) of this chapter regarding the presumption of ability to manage VA benefits without restriction.

(2) If the beneficiary does not demonstrate the ability to manage his or her VA benefits without VA supervision, the Hub Manager will:

(i) Appoint a fiduciary, or

(ii) Continue supervised direct payment for not longer than one additional 12-month period based upon evidence that additional supervision

might assist the beneficiary in developing the ability to manage his or her own VA benefits. At the conclusion of the additional period of supervised direct payment, the Hub Manager will conduct the reassessment prescribed by paragraph (c) of this section and either recommend reevaluation under paragraph (c)(1) of this section or appoint a fiduciary under paragraph (c)(2)(i) of this section.

(Authority: 38 U.S.C. 501, 5502)

#### § 13.120 Field examinations.

(a) *Authority.* The Hub Manager will order a field examination regarding fiduciary matters within the Hub Manager's jurisdiction for any of the reasons prescribed in paragraph (c) of this section. For purposes of this section, *field examination* means the inquiry, investigation, or monitoring activity conducted by designated fiduciary hub or other qualified VA personnel who are authorized to:

(1) Interview beneficiaries,

dependents, and other interested persons regarding fiduciary matters;

(2) Interview proposed fiduciaries and current fiduciaries regarding their qualifications, performance, or compliance with VA regulations;

(3) Conduct investigations and examine witnesses regarding any fiduciary matter;

(4) Take affidavits;

(5) Administer oaths and affirmations;

(6) Certify copies of public or private documents; and

(7) Aid claimants and beneficiaries in the preparation of claims for VA benefits or other fiduciary or claim-related material.

(b) *Scope of field examinations.* Field examinations may include, but are not limited to:

(1) Assessing a beneficiary's and the beneficiary's dependents' welfare and physical and mental well-being, environmental and social conditions, and overall financial situation, based upon visiting the beneficiary's current residence and conducting a face-to-face interview of the beneficiary and the beneficiary's dependents, when practicable;

(2) Assessing the beneficiary's ability to manage his or her own VA benefits with only limited VA supervision (see § 13.110 regarding supervised direct payment);

(3) Collecting and reviewing financial documentation, including income and expenditure information;

(4) Providing any necessary assistance to the beneficiary with issues affecting current or additional VA benefits, claims, and non-VA matters that may affect or conflict with VA benefits;

(5) Making appropriate referrals in cases of actual or suspected physical or mental abuse, neglect, or other harm to a beneficiary;

(6) Investigating, when necessary, allegations that a beneficiary's fiduciary has engaged in misconduct or misused VA benefits to include but not limited to allegations regarding:

(i) Theft or misappropriation of funds,  
(ii) Failure to comply with the responsibilities of a fiduciary as prescribed in § 13.140,

(iii) Other allegations of inappropriate fund management by a fiduciary, and

(iv) Other special circumstances which require a visit with or onsite review of the fiduciary, such as a change in an award of benefits or benefit status, or non-fiduciary program matters.

(c) *Reasons for conducting field examinations.* A Hub Manager will order a field examination to:

(1) Determine whether benefits should be paid directly to a beneficiary under § 13.110 or to a fiduciary appointed for the beneficiary under § 13.100;

(2) Determine whether benefit payments should continue to be made directly to a beneficiary under § 13.110 or to a fiduciary on behalf of a beneficiary; or

(3) Ensure the well-being of a beneficiary in the fiduciary program or to protect a beneficiary's VA benefit funds.

(Authority: U.S.C. 501, 512, 5502, 5506, 5507, 5711)

### § 13.130 Bars to serving as a fiduciary.

(a) An individual or entity may not serve as a fiduciary for a VA beneficiary if the individual or entity:

(1) Misused or misappropriated a beneficiary's VA benefits while serving as the beneficiary's fiduciary;

(2) Has been convicted of a felony offense. For purposes of this paragraph, *felony offense* means a criminal offense for which the minimum period of imprisonment is 1 year or more, regardless of the actual sentence imposed or the actual time served. However, such conviction is not a bar to serving as a fiduciary for a beneficiary if all of the following conditions are met:

(i) The conviction occurred more than 10 years preceding the proposed date of appointment;

(ii) The conviction did not involve any of the following offenses:

- (A) Fraud,
- (B) Theft,
- (C) Bribery,
- (D) Embezzlement,
- (E) Identity theft,
- (F) Money laundering,
- (G) Forgery,

(H) The abuse of or neglect of another person, or

(I) Any other financial crime;

(iii) There is no other person or entity who is willing and qualified to serve; and

(iv) The Hub Manager determines that the nature of the conviction is such that appointment of the individual poses no risk to the beneficiary and is in the beneficiary's interest;

(b) An individual may not serve as a fiduciary for a VA beneficiary if the individual:

(1) Refuses or neglects to provide the authorization for VA disclosure of information prescribed in § 13.100(i);

(2) Is unable to manage his or her own Federal or State benefits and is in a Federal or State agency's fiduciary, representative payment, or similar program;

(3) Has been adjudicated by a court with jurisdiction as being unable to manage his or her own financial affairs;

(4) Is incarcerated in a Federal, State, local, or other penal institution or correctional facility, sentenced to home confinement, released from incarceration to a half-way house, or on house arrest or in custody in any facility awaiting trial on pending criminal charges;

(5) Has felony charges pending;

(6) Is under 18 years of age; or

(7) Knowingly violates or refuses to comply with the regulations in this part.

(Authority: 38 U.S.C. 501, 5502, 5506, 5507, 6101, 6106.)

### § 13.140 Responsibilities of fiduciaries.

Any individual or entity appointed by VA as a fiduciary to receive VA benefit payments on behalf of a beneficiary in the fiduciary program must fulfill certain responsibilities associated with the services of a fiduciary. These responsibilities include:

(a) *General.* (1) Fiduciaries appointed by VA to manage the VA funds of a beneficiary are also responsible for monitoring the beneficiary's well-being and using available funds to ensure that the beneficiary's needs are met. In all cases, the fiduciary must disburse or otherwise manage funds according to the best interests of the beneficiary and the beneficiary's dependents and in light of the beneficiary's unique circumstances, needs, desires, beliefs, and values.

(2) The fiduciary must take all reasonable precautions to protect the beneficiary's private information contained in the fiduciary's paper and electronic records.

(i) For purposes of this section:

(A) *Reasonable precautions* means protecting against any unauthorized

access to or use of the beneficiary's private information that may result in substantial harm or inconvenience to the beneficiary; and

(B) *Private information* means a beneficiary's first name and last name or first initial and last name in combination with any one or more of the following data elements that relate to such beneficiary: VA claim number, Social Security number, date of birth, address, driver's license number or State-issued identification card number, or financial account number or credit card or debit card number, with or without any required security code, access code, personal identification number, or password, that would permit access to the beneficiary's account.

(ii) At a minimum, fiduciaries must place reasonable restrictions upon access to paper records containing the beneficiary's private information, including storage of such records in locked facilities, storage areas, or containers.

(iii) For electronic records containing the beneficiary's private information, the fiduciary must:

(A) Use unique identifications and passwords, which are not vendor-supplied default identifications and passwords, for computer, network, or online site access that are reasonably designed to maintain the security of the beneficiary's information and the fiduciary's financial transactions;

(B) Control access to data security passwords to ensure that such passwords are kept in a location and format that do not compromise the security of the beneficiary's private information; and

(C) For records containing private information on a computer system that is connected to the Internet, keep reasonably up-to-date firewall and virus protection and operating system security patches to maintain the integrity of the beneficiary's private information and prevent unauthorized disclosure. For purposes of this section, a system is reasonably updated if the fiduciary installs software updates immediately upon release by the original equipment or software manufacturer, uses internet browser security settings suitable for transmission of private information, and maintains password-protected wireless connections or other networks;

(iv) The fiduciary must keep all paper and electronic records relating to the fiduciary's management of VA benefit funds for the beneficiary for the duration of service as fiduciary for the beneficiary and for a minimum of 2 years from the date that VA removes the fiduciary under § 13.500 or from the

date that the fiduciary withdraws as fiduciary for the beneficiary under § 13.510.

(b) *Financial responsibilities.* The fiduciary's primary financial responsibilities include, but are not limited to:

(1) The use of the beneficiary's VA benefit funds under management only for the care, support, education, health, and welfare of the beneficiary and his or her dependents. Except as authorized under § 13.220 regarding fiduciary fees, a fiduciary may not derive a personal financial benefit from management or use of the beneficiary's funds;

(2) Protection of the beneficiary's VA benefits from loss or diversion;

(3) Except as prescribed in § 13.200 regarding fiduciary accounts, maintenance of separate financial accounts to prevent commingling of the beneficiary's funds with the fiduciary's own funds or the funds of any other beneficiary for whom the fiduciary has funds under management;

(4) Determination of the beneficiary's just debts. For purposes of this section, *just debts* means the beneficiary's legitimate, legally enforceable debts;

(5) Timely payment of the beneficiary's just debts, provided that the fiduciary has VA benefit funds under management for the beneficiary to cover such debts;

(6) Providing the beneficiary with information regarding VA benefit funds under management for the beneficiary, including fund usage, upon request;

(7) Providing the beneficiary with a copy of the annual accounting approved by VA under § 13.280;

(8) Ensuring that any best-interest determination regarding the use of funds is consistent with VA policy, which recognizes that beneficiaries in the fiduciary program are entitled to the same standard of living as any other beneficiary with the same or similar financial resources, and that the fiduciary program is not for the purpose of preserving funds for the beneficiary's heirs or disbursing funds according to the fiduciary's own beliefs, values, preferences, and interests; and

(9) Protecting the beneficiary's funds from the claims of creditors as described in § 13.270 of this section.

(c) *Non-financial responsibilities.* The fiduciary's primary non-financial responsibilities include, but are not limited to:

(1) Contacting social workers or mental health professionals regarding the beneficiary, when necessary;

(2) To the extent possible, ensuring the beneficiary receives appropriate medical care;

(3) Correcting any discord or uncomfortable living or other situations when possible;

(4) Acknowledging and addressing any complaints or concerns of the beneficiary to the best of the fiduciary's ability;

(5) Reporting to the appropriate authorities, including any legal guardian, any type of known or suspected abuse of the beneficiary;

(6) Maintaining contact with the beneficiary for purposes of assessing the beneficiary's capabilities, limitations, needs, and opportunities; and

(7) Being responsive to the beneficiary and ensuring the beneficiary and his or her legal guardian have the fiduciary's current contact information.

(d) *The fiduciary's responsibilities to VA.* Any fiduciary who has VA benefit funds under management on behalf of a beneficiary in the fiduciary program must:

(1) If the fiduciary is also appointed by a court, annually provide to the fiduciary hub with jurisdiction a certified copy of the accounting provided to the court or facilitate the hub's receipt of such an accounting;

(2) Notify the fiduciary hub regarding any change in the beneficiary's circumstances, to include the beneficiary's relocation, the beneficiary's serious illness, or any other significant change in the beneficiary's circumstances which might adversely impact the beneficiary's well-being;

(3) Provide documentation or verification of any records concerning the beneficiary or matters relating to the fiduciary's responsibilities within 30 days of a VA request, unless otherwise directed by the Hub Manager;

(4) When necessary, appear before VA for face-to-face meetings; and

(5) Comply with the policies and procedures prescribed in this part.

(Authority: 38 U.S.C. 501, 512, 5502, 5507, 5509, 5711)

#### § 13.200 Fiduciary accounts.

Except as prescribed in paragraph (b) of this section, any fiduciary appointed by VA to receive payments on behalf of a beneficiary must deposit the beneficiary's VA benefits in a fiduciary account that meets the requirements prescribed in paragraph (a) of this section.

(a) *Separate accounts.* Except as prescribed in paragraph (b) of this section, a fiduciary must establish and maintain a separate financial institution account(s) for each VA beneficiary that the fiduciary serves. The fiduciary must not commingle a beneficiary's funds with the fiduciary's funds or any other

beneficiary's funds, either upon or after receipt. The account must be:

(1) Established for direct deposit of VA benefits,

(2) Established in a Federally-insured financial institution, and in Federally-insured accounts when funds qualify for such deposit insurance, and

(3) Titled in the beneficiary's and fiduciary's names and note the existence of the fiduciary relationship.

(b) *Exceptions.* The general rule prescribed in paragraph (a) of this section regarding establishment and maintenance of separate accounts does not apply to the following fiduciaries:

(1) The beneficiary's spouse,

(2) State or local Government entities,

(3) Institutions, such as public or private medical care facilities, nursing homes, or other residential care facilities, when an annual accounting is not required. *See* § 13.280 regarding accounting requirements, or

(4) A trust company or a bank with trust powers organized under the laws of the United States or a state.

(Authority: U.S.C. 501, 5502, 5509, 5711)

#### § 13.210 Fiduciary investments.

(a) *General.* A fiduciary must conserve or invest any VA benefits that the fiduciary receives on behalf of a beneficiary, whether such benefits are in the form of recurring monthly payments or a one-time payment, if the beneficiary or the beneficiary's dependents do not need the benefits for current maintenance, reasonably foreseeable expenses, or reasonable improvements in the beneficiary's and the beneficiary's dependents' standard of living. Conservation of beneficiary funds is for the purpose of addressing unforeseen circumstances or planning for future care needs given the beneficiary's disabilities, circumstances, and eligibility for care furnished by the Government at Government expense. Fiduciaries will not conserve VA benefit funds under management for a beneficiary based upon the interests of the beneficiary's heirs or according to the fiduciary's own beliefs, values, preferences, and interests.

(b) *Types of investments.* An investment must be prudent and in the best interest of the beneficiary. Authorized investments include United States savings bonds or interest or dividend-paying accounts insured under Federal law. Any such investment must be clearly titled in the beneficiary's and fiduciary's names and identify the fiduciary relationship.

(c) *Exceptions.* The general rules regarding investment of VA benefits do not apply to the following fiduciaries:

(1) The beneficiary's spouse, and

(2) The chief officer of an institution in which the beneficiary is being furnished hospital treatment or institutional, nursing, or domiciliary care. VA benefits paid to the chief officer may not be invested.

(Authority: 38 U.S.C. 501, 5502)

**§ 13.220 Fiduciary fees.**

(a) *Authority.* The Hub Manager with jurisdiction over a fiduciary appointment may determine whether a fee is necessary to obtain the services of a fiduciary. A fee is necessary only if no other person or entity is qualified and willing to serve without a fee and the beneficiary's interests would be served by the appointment of a qualified paid fiduciary. The Hub Manager will not authorize a fee if the fiduciary:

- (1) Is a spouse, dependent, or other relative of the beneficiary; or
- (2) Will receive any other form of payment in connection with providing fiduciary services for the beneficiary.

(b) *Limitation on fees.* The Hub Manager will authorize a fiduciary to whom a fee is payable under paragraph (a) of this section to deduct from the beneficiary's account a reasonable monthly fee for fiduciary services rendered.

(1) For purposes of this section, *reasonable monthly fee* means a monetary amount that is authorized by the Hub Manager and does not exceed 4 percent of the monthly VA benefit paid to the fiduciary on behalf of the beneficiary for a month in which the fiduciary is eligible under paragraph (b)(2) of this section to collect a fee.

(2) A monthly fee may be collected for any month during which the fiduciary:

- (i) Provides fiduciary services on behalf of the beneficiary,
- (ii) Receives a recurring VA benefit payment for the beneficiary, and
- (iii) Is authorized by the Hub Manager to receive a fee for fiduciary services.

(3) Fees may not be computed based upon:

- (i) Any one-time, retroactive, or lump-sum payment made to the fiduciary on behalf of the beneficiary;
- (ii) Any funds conserved by the fiduciary for the beneficiary in the beneficiary's account under § 13.200 or invested by the fiduciary for the beneficiary under § 13.210, to include any interest income and return on investment derived from any account; or
- (iii) Any funds transferred to the fiduciary by a prior fiduciary for the beneficiary, or from the personal funds of patients or any other source.

(4) The Hub Manager will not authorize a fee for any month for which:

(i) VA or a court with jurisdiction determines that the fiduciary misused or misappropriated benefits, or

(ii) The beneficiary does not receive a VA benefit payment. However, the Hub Manager may authorize a fee for a month in which the beneficiary did not receive a benefit payment if VA later issues benefits for that month and the fiduciary:

(A) Receives VA approval to collect a fee for the month for which payment was made,

(B) Provided fiduciary services during the month for which payment was made, and

(C) Was the beneficiary's fiduciary when VA made the retroactive payment.

(Authority: 38 U.S.C. 501, 5502, 6101, 6106)

**§ 13.230 Protection of beneficiary funds.**

(a) *General.* Except as prescribed in paragraph (c) of this section, within 60 days of appointment, the fiduciary must furnish to the fiduciary hub with jurisdiction a corporate surety bond that is conditioned upon faithful discharge of all of the responsibilities of a fiduciary prescribed in § 13.140 and meets the requirements of paragraph (d) of this section, if the VA benefit funds that are due and to be paid for the beneficiary will exceed \$25,000 at the time of appointment. The Hub Manager will not authorize the release of a retroactive, one-time, or other pending lump-sum benefit payment to the fiduciary until the fiduciary has furnished the bond prescribed by this section.

(b) *Accumulated funds.* The provisions of paragraph (a) of this section which require a fiduciary to furnish a surety bond apply in any case in which the accumulation over time of VA benefit funds under management by a fiduciary for a beneficiary exceeds \$25,000. Except as prescribed in paragraph (c) of this section, within 60 days of accumulated funds exceeding the prescribed threshold, the fiduciary will furnish to the fiduciary hub a bond that meets the requirements of paragraph (d) of this section.

(c) *Exceptions.* (1) The provisions of paragraphs (a) and (b) of this section do not apply to:

(i) A fiduciary that is a trust company or a bank with trust powers organized under the laws of the United States or a State;

(ii) A fiduciary who is the beneficiary's spouse; or

(iii) A fiduciary in the Commonwealth of Puerto Rico, Guam, or another territory of the United States, or in the Republic of the Philippines, who has entered into a restricted withdrawal agreement in lieu of a surety bond.

(2) The Hub Manager may, at any time, require the fiduciary to obtain a bond described in paragraph (a) of this section and meeting the requirements of paragraph (d) of this section, without regard to the amount of VA benefit funds under management by the fiduciary for the beneficiary, if special circumstances indicate that obtaining a bond would be in the beneficiary's interest. Such special circumstances may include but are not limited to:

(i) A marginal credit report for the fiduciary; or

(ii) A fiduciary's misdemeanor criminal conviction either before or after appointment for any offense listed in § 13.130(a)(2)(ii);

(d) *Bond requirements.* A bond furnished by a fiduciary under paragraph (a) or (b) of this section must meet the following requirements:

(1) The bond must be a corporate surety bond in an amount sufficient to cover the value of the VA benefit funds under management by the fiduciary for the beneficiary.

(2) After furnishing the prescribed bond to the fiduciary hub, the fiduciary must:

(i) Adjust the bond amount to account for any increase or decrease of more than 20 percent in the VA benefit funds under management by the fiduciary for the beneficiary, and

(ii) Furnish proof of the adjustment to the fiduciary hub not later than 60 days after a change in circumstance described in paragraph (d)(2)(i) of this section.

(3) The bond furnished by the fiduciary must also:

(i) Identify the fiduciary, the beneficiary, and the bonding company; and

(ii) Contain a statement that the bond is payable to the Secretary of Veterans Affairs.

(e) *Periodic proof of bond.* A fiduciary must furnish proof of adequate bonding:

(1) With each annual accounting prescribed by § 13.280, and

(2) At any other time the Hub Manager with jurisdiction requests proof.

(f) *Liability.* (1) Except as otherwise provided by the terms of the bond, the surety and the fiduciary guaranteed by the surety are jointly and severally liable for any misappropriation or misuse of VA benefits by the fiduciary.

(2) VA may collect on the bond regardless of any prior reissuance of benefits by VA under § 13.410 and until liability under the terms of the bond is exhausted.

(g) *Bond expenses.* (1) *Authority.* The fiduciary may deduct from the beneficiary's account any expense related to obtaining, maintaining, or

adjusting a bond prescribed by this section.

(2) *Notice.* The Hub Manager will provide the beneficiary written notice regarding any bond furnished at the beneficiary's expense under paragraph (a), (b), or (c)(2) of this section or adjusted under paragraph (d)(2) of this section.

(Authority: 38 U.S.C. 501, 5502, 5507)

**§ 13.240 Funds of beneficiaries less than 18 years old.**

(a) *General.* Except as prescribed in paragraph (b) of this section, a fiduciary who receives VA benefits on behalf of a beneficiary who is less than 18 years old may use the benefits only for the use and benefit of that beneficiary and only if the fiduciary first determines that the person or persons who have custody of the beneficiary and are responsible for the beneficiary's needs are unable to provide for those needs.

(b) *Education benefits.* A fiduciary who receives VA education benefits on behalf of a beneficiary who is less than 18 years old may use the benefits for the beneficiary's education regardless of the ability of the person or persons who have custody of the beneficiary to pay for the beneficiary's education.

(Authority: 38 U.S.C. 501, 5502)

**§ 13.250 Funds of deceased beneficiaries.**

(a) *General.* When a beneficiary who has a fiduciary dies without leaving a valid will and without heirs, all VA benefit funds under management by the fiduciary for the deceased beneficiary on the date of death, less any deductions authorized by paragraph (c) of this section, must be returned to VA if such funds would be forfeited to a State.

(b) *Accountings.* Upon the death of a beneficiary described in paragraph (a) for whom the fiduciary must return to VA all benefit funds under management, less any deductions authorized under paragraph (c) of this section, or upon the death of any beneficiary for whom a fiduciary was required to submit an annual accounting to VA under § 13.280, the fiduciary must submit a final accounting to the fiduciary hub with jurisdiction within 90 days of the beneficiary's death.

(c) *Expenses.* The fiduciary may deduct a reasonable fee from the deceased beneficiary's account for purposes of determining whether the beneficiary's funds under management would be forfeited to a State under State law or whether the deceased beneficiary left a valid will or is survived by heirs. For the purpose of this section, *reasonable fee* means an amount customarily charged by attorneys or

other professionals authorized to do such work in the State where the deceased beneficiary had his or her permanent place of residence.

(d) *Estate matters.* Upon the death of a beneficiary who has a valid will or heirs, the fiduciary must hold the remaining funds under management in trust for the deceased beneficiary's estate until the will is probated or heirs are ascertained, and disburse the funds according to applicable State law.

(Authority: U.S.C. 501, 5502)

**§ 13.260 Personal funds of patients.**

(a) *Distribution of funds.* Benefits deposited by VA in the personal funds of patients account for a veteran who was rated by VA as being unable to manage his or her VA benefits and who died leaving an account balance are payable to an eligible person. For purposes of this section, *eligible person* means an individual living at the time the account balance is distributed in the following order of preference:

(1) The deceased veteran's spouse, as defined by § 3.1000(d)(1) of this chapter;

(2) The veteran's children (in equal shares), as defined by § 3.57 of this chapter, but without regard to age or marital status; or

(3) The veteran's dependent parents (in equal shares) or surviving parent, as defined by § 3.59 of this chapter, provided that the parents were or parent was dependent within the meaning of § 3.250 of this chapter on the date of the veteran's death.

(4) Any balance remaining in the personal funds of patients account which cannot be distributed in accordance with paragraphs (a)(1) through (3) of this section will be used by VA to reimburse anyone who bore the expense of the veteran's last sickness or the veteran's burial or will be deposited to the credit of the applicable current VA appropriation.

(b) *Application.* A person who seeks distribution of a deceased veteran's funds from the personal funds of patients account under paragraph (a) of this section must file an application with VA not later than 5 years after the veteran's death. If any person who seeks such distribution is under a legal disability that prevents him or her from filing an application at the time of the veteran's death, the 5-year period will run from the date of termination or removal of the legal disability.

(Authority: 38 U.S.C. 501, 5502)

**§ 13.270 Creditors' claims.**

Under 38 U.S.C. 5301(a)(1), VA benefit payments are exempt, both before and after receipt by the

beneficiary, from the claims of creditors and taxation. The fiduciary should invoke this defense in applicable circumstances. If the fiduciary does not do so, the Hub Manager may refer the matter to the Regional Counsel for evaluation and appropriate legal action. (Authority: 38 U.S.C. 501, 512, 5301)

**§ 13.280 Accountings.**

(a) *General.* Except as prescribed in paragraph (d) of this section, a fiduciary for a beneficiary must submit to the fiduciary hub with jurisdiction an annual accounting regarding the VA benefit funds under management by the fiduciary for the beneficiary if:

(1) The amount of VA benefit funds under management for the beneficiary exceeds \$10,000;

(2) The fiduciary deducts a fee authorized under § 13.220 from the beneficiary's account; or

(3) The beneficiary is being paid VA compensation benefits at a total disability rating (100 percent), whether schedular, extra-schedular, or based on individual unemployability.

(b) *Scope of accounting.* For purposes of this section, *accounting* means the fiduciary's written report regarding the income and funds under management by the fiduciary for the beneficiary during the accounting period prescribed by the Hub Manager. The accounting prescribed by this section pertains to all activity in the beneficiary's accounts, regardless of the source of funds maintained in those accounts. An accounting consists of:

(1) A beginning inventory or account balance,

(2) An itemization of income,

(3) An itemization of expenses,

(4) An ending inventory or account balance,

(5) Copies of financial institution documents reflecting receipts, expenditures, and beginning and ending balances, and

(6) Receipts, when required by the Hub Manager.

(c) *Submission requirements.* Fiduciaries must submit annual accountings to the fiduciary hub as follows:

(1) The fiduciary must submit accountings on the appropriate VA form not later than 30 days after the end of the accounting period prescribed by the Hub Manager.

(2) The fiduciary must submit a corrected or supplemental accounting not later than 14 days after the date of VA notice of an accounting discrepancy.

(d) *Exceptions.* The provisions of this section that generally require the submission of an annual accounting do not apply to a fiduciary who is:

(1) The beneficiary's spouse;  
 (2) A chief officer of a Federal institution;

(3) A chief officer of a non-VA facility receiving benefits for a beneficiary institutionalized in the facility and:

(i) The beneficiary's monthly care, maintenance, and personal use expenses equal or exceed the amount of the beneficiary's monthly VA benefit; and  
 (ii) The amount of VA benefit funds under management by the fiduciary does not exceed \$10,000; or

(4) A fiduciary who receives benefits on behalf of a beneficiary, both of whom permanently reside outside of the United States, the Commonwealth of Puerto Rico, or the Republic of the Philippines, and the fiduciary was appointed in such jurisdiction.

(e) *Failure to comply with accounting requirements.* The Hub Manager will treat any willful neglect or refusal to file proper accountings as prima facie evidence of embezzlement or misappropriation of VA benefits. Such evidence is grounds for starting a misuse investigation under § 13.400.

(Authority: 38 U.S.C. 501, 5502, 5509, 6101)

(The Office of Management and Budget has approved the information collection requirements in this part under control number 2900-0017)

### § 13.300 Onsite reviews.

(a) *Periodic onsite reviews.* (1) The Hub Manager will conduct a periodic, scheduled, onsite review of any fiduciary in the United States, whether the fiduciary is an individual or an entity, if:

(i) The fiduciary serves 20 or more beneficiaries, and

(ii) The total annual amount of recurring VA benefits paid to the fiduciary for such beneficiaries exceeds the threshold established in 38 U.S.C. 5508 as adjusted by VA under 38 U.S.C. 5312.

(2) The Hub Manager must complete at least one periodic onsite review triennially if the fiduciary meets the requirements of paragraph (a)(1) of this section.

(3) VA will provide the fiduciary with written notice of the periodic onsite review at least 30 days before the scheduled review date. The notice will:

(i) Inform the fiduciary of the pending review and the fiduciary's obligation under this part to cooperate in the onsite review process, and

(ii) Request that the fiduciary make available for review all relevant records, including but not limited to case files, bank statements, accountings, ledgers, check registers, receipts, bills, and any other items necessary to determine that the fiduciary has been acting in the best

interest of VA beneficiaries and meeting the responsibilities of fiduciaries prescribed in § 13.140.

(b) *Unscheduled onsite reviews.* The Hub Manager may conduct unscheduled onsite reviews of any fiduciary, regardless of the number of beneficiaries served by the fiduciary or the total amount of VA benefit funds under management by the fiduciary, if:

(1) VA receives from any source credible information that the fiduciary has misused or is misusing VA benefits;

(2) The fiduciary's annual accounting is seriously delinquent. For purposes of this section, *seriously delinquent* means the fiduciary failed to submit the required accounting not later than 120 days after the ending date of the annual accounting period;

(3) VA receives from any source credible information that the fiduciary is not adequately performing the responsibilities of a fiduciary prescribed in § 13.140; or

(4) The Hub Manager determines that an unscheduled onsite review is necessary to ensure that the fiduciary is acting in the interest of the beneficiary or beneficiaries served by the fiduciary.

(c) *Procedures.* (1) Onsite reviews will consist of the following:

(i) A face-to-face meeting with the fiduciary. In the case of a fiduciary that is an entity, the face-to-face meeting will be with a representative of the entity;

(ii) A review of all relevant records maintained by the fiduciary, including but not limited to case files, bank statements, accountings, ledgers, check registers, receipts, bills, and any other items necessary to determine whether the fiduciary has been acting in the interest of VA beneficiaries; and

(iii) Interviews of beneficiaries, the fiduciary's employees, and other individuals as determined necessary by the Hub Manager.

(2) Not later than 30 days after completing a periodic or unscheduled onsite review, the Hub Manager will provide the fiduciary a written report of VA's findings, recommendations for correction of deficiencies, requests for additional information, and notice of VA's intent regarding further action.

(3) Unless good cause for an extension is shown, not later than 30 days after the date that VA mails the report prescribed by paragraph (d)(2) of this section, the fiduciary must submit to the fiduciary hub a response to any VA request for additional information or recommendation for corrective action.

(4) The Hub Manager will remove the fiduciary for all VA beneficiaries whom the fiduciary serves if the fiduciary:

(i) Refuses to cooperate with VA during a periodic or unscheduled onsite review,

(ii) Is unable to produce necessary records,

(iii) Fails to respond to a VA request for additional information or recommendation for corrective action, or

(iv) Is found during an onsite review to have misused VA benefits.

(Authority: 38 U.S.C. 501, 5508)

### § 13.400 Misuse of benefits.

(a) *Definition of misuse.* Misuse of benefits by a fiduciary occurs in any case in which the fiduciary receives payment of benefits for the use and benefit of a beneficiary and the beneficiary's dependents, if any, and uses any part of such payment for a use other than the use and benefit of the beneficiary or the beneficiary's dependents. For the purpose of this section, *use and benefit* means any expenditure reasonably intended for the care, support, or maintenance of the beneficiary or the beneficiary's dependents. Such expenditures may include the fiduciary's efforts to improve the beneficiary's standard of living under rules prescribed in this part.

(b) *Misuse determinations.* Upon receipt of credible information from any source regarding possible misuse of VA benefits by a fiduciary, the Hub Manager will investigate the matter and issue a misuse determination in writing. This decision will:

(1) Identify the beneficiary,

(2) Identify the fiduciary,

(3) State whether the fiduciary is an individual fiduciary serving 10 or more beneficiaries or a corporation or other entity serving one or more beneficiaries,

(4) Identify the source of the information,

(5) Describe in detail the facts found as a result of the investigation,

(6) State the reasons for the Hub Manager's determination regarding whether the fiduciary misused any part of the beneficiary's benefit paid to the fiduciary, and

(7) If the Hub Manager determines that the fiduciary did misuse any part of the beneficiary's benefit, identify the months in which such misuse occurred.

(c) *Notice.* The Hub Manager will provide written notice of the misuse determination prescribed in paragraph (b) of this section, including a copy of the Hub Manager's written decision, an explanation regarding the reconsideration procedure prescribed in paragraph (d) of this section, and the beneficiary's right to appeal under § 13.600, to:

(1) The fiduciary;  
 (2) The beneficiary or the beneficiary's legal guardian, and the beneficiary's accredited representative, attorney, or claims agents; and

(3) The Director of the Pension and Fiduciary Service.

(d) *Finality and reconsideration of misuse determinations.* (1) The Hub Manager's misuse determination is a final decision, unless:

(i) The Hub Manager receives a written request for reconsideration from the fiduciary or the beneficiary not later than 30 days after the date that the Hub Manager mailed notice of his or her misuse determination; or

(ii) The Hub Manager receives a notice of disagreement from the beneficiary not later than 1 year after the date that the Hub Manager mailed notice of his or her misuse determination.

(2) The fiduciary or the beneficiary may submit additional information pertinent to reconsideration of the misuse determination and not previously considered by the Hub Manager, provided that the additional information is submitted with the written reconsideration request.

(3) The Hub Manager will close the record regarding reconsideration at the end of the 30-day period described in paragraph (d)(1)(i) of this section and furnish a timely request submitted by the fiduciary or the beneficiary, including any new information, to the Director of the VA Regional Office with jurisdiction over the fiduciary hub for a final decision.

(4) In making the misuse determination on reconsideration, the Regional Office Director's decision will be based upon a review of the information of record as of the date of the Hub Manager's misuse determination and any new information submitted with the request. The decision will:

(i) Identify the beneficiary,  
 (ii) Identify the fiduciary,  
 (iii) Identify the Hub Manager's prior decision,  
 (iv) Describe in detail the facts found as a result of the Director's review of the Hub Manager's decision and any new information submitted with the reconsideration request, and

(v) State the reasons for the Director's final decision, which may affirm, modify, or overturn the Hub Manager's decision.

(5) The Hub Manager will provide written notice of the Regional Office Director's final decision on reconsideration to:

(i) The fiduciary,  
 (ii) The beneficiary or the beneficiary's legal guardian, and the

beneficiary's accredited representative, attorney, or claims agent; and

(iii) The Director of the Pension and Fiduciary Service.

(e) *Reporting of misuse.* Except as prescribed in § 1.204 of this chapter, which requires VA management officials to promptly report possible criminal matters involving felonies to the VA Office of Inspector General, reporting of misuse cases will occur as follows: (1) Not later than 30 days after a final determination is made under paragraph (d) of this section that a fiduciary has misused VA benefits, the Director of the VA Regional Office who has jurisdiction over the fiduciary hub will notify the VA Office of Inspector General for purposes of any further action that the Inspector General deems appropriate under separate authority.

(2) For purposes of application of § 13.410 regarding reissuance and recoupment of benefits, the Office of Inspector General will advise the Director of the Pension and Fiduciary Service of any final decision regarding prosecution of a fiduciary who misused VA benefits and any final judgment of a court in such a prosecution not later than 30 days after the decision is made or judgment is entered.

(Authority: 38 U.S.C. 501, 5502, 6106)

**§ 13.410 Reissuance and recoupment of misused benefits.**

(a) *General.* (1) If the Hub Manager or the Regional Office Director upon reconsideration determines that a fiduciary described in paragraph (a)(2) of this section misused any part of a beneficiary's benefit paid to the fiduciary, the Regional Office Director will reissue benefits to the beneficiary's successor fiduciary in an amount equal to the amount of funds misused.

(2) This paragraph (a) applies to a fiduciary that is:

(i) An individual who served 10 or more beneficiaries during any month in which misuse occurred; or  
 (ii) A corporation or other entity serving one or more beneficiaries.

(b) *Negligence.* In any case in which the Hub Manager or the Regional Office Director upon reconsideration determines that an individual fiduciary who served fewer than 10 beneficiaries during any month in which misuse occurred misused a beneficiary's funds under management by the fiduciary, the Hub Manager will refer the matter to the Director, Pension and Fiduciary Service, for a determination of whether VA negligence caused the misuse. The Regional Office Director will reissue benefits to the beneficiary's successor fiduciary in an amount equal to the amount of funds misused if the Director

of the Pension and Fiduciary Service determines that VA negligence caused the misuse. The Pension and Fiduciary Service Director's negligence determination will be based upon a review of the VA information of record as of the date of the Hub Manager's or Regional Office Director's misuse determination. For purposes of this section, VA negligence causes misuse when:

(1) The Hub Manager failed to properly investigate or monitor the fiduciary;

(2) The Hub Manager failed to review the fiduciary's accounting not later than 60 days after the date on which the accounting was scheduled for review. The date that an accounting is scheduled for review is the date the fiduciary hub receives the accounting;

(3) The Hub Manager did not investigate an allegation of misuse not later than 60 days after the date that the fiduciary hub received the allegation; or

(4) Actual negligence is shown. For purposes of this section, *actual negligence* means the Hub Manager's failure to exercise toward a beneficiary in the fiduciary program the care which a reasonable or prudent person would exercise in the circumstances, or the Hub Manager's taking action that a reasonable or prudent person would not take. The Regional Office Director shall reissue benefits based on actual negligence if the Director of the Pension and Fiduciary Service determines that:

(i) The Hub Manager owed a duty to the beneficiary under this part,

(ii) The Hub Manager's action or failure to act was negligent, and

(iii) The Hub Manager's negligence proximately caused the misuse of benefits by the fiduciary. For purposes of this section, *proximate cause* means that the misuse would not have occurred but for the Hub Manager's negligence.

(c) *Recoupment of misused benefits.* In all cases in which the Hub Manager or Regional Office Director upon reconsideration determines that a fiduciary misused benefits, VA will make a good faith effort to recoup the total amount of misused benefits from the fiduciary.

(1) For purposes of this section, *good faith effort* means that the Hub Manager will:

(i) Recover any misused benefits from the surety company, if a surety bond was in place under § 13.230 regarding protection of beneficiary funds; or

(ii) In cases in which no surety bond was in place and the fiduciary does not repay all misused benefits within the time prescribed by the Hub Manager in consultation with the fiduciary:

(A) Request the creation of a debt to the United States in the amount of any misused benefits that remain unpaid; and

(B) Coordinate further recoupment action, including collection of any debt owed by the fiduciary to the United States as a result of the misuse, with the appropriate Federal and State agencies.

(2) VA will pay benefits recouped under paragraph (c) of this section to the beneficiary's successor fiduciary after deducting any amount reissued under paragraph (a) or (b) of this section.

(d) *Notice.* The Hub Manager, or in the case of a negligence determination, the Director of the Pension and Fiduciary Service, will provide the beneficiary or the beneficiary's legal guardian, and the beneficiary's accredited representative, attorney, or claims agent written notice of any decision regarding reissuance or recoupment of benefits under this section.

(Authority: 38 U.S.C. 501, 6106, 6107)

#### **§ 13.500 Removal of fiduciaries.**

(a) The Hub Manager may remove a fiduciary if the Hub Manager determines that fiduciary services are no longer required for a beneficiary or removal is in the beneficiary's interest. Reasons for removal include, but are not limited to:

(1) *Beneficiary reasons.* (i) A VA rating authority determines that the beneficiary can manage his or her own VA benefits without VA supervision or appointment of a fiduciary;

(ii) The beneficiary requests appointment of a successor fiduciary under § 13.100;

(iii) The beneficiary requests supervised direct payment of benefits under proposed § 13.110; or

(iv) The beneficiary dies.

(2) *Fiduciary reasons.* (i) The fiduciary's further service is barred under § 13.130;

(ii) The fiduciary fails to maintain his or her qualifications or does not adequately perform the responsibilities of a fiduciary prescribed in § 13.140;

(iii) The fiduciary fails to timely submit a complete accounting as prescribed in § 13.280;

(iv) VA or a court with jurisdiction determines that the fiduciary misused or misappropriated VA benefits;

(v) The fiduciary fails to respond to a VA request for information not later than 30 days after such request is made, unless the Hub Manager grants an extension based upon good cause shown by the fiduciary;

(vi) The fiduciary is unable or unwilling to provide the surety bond prescribed by § 13.230 or, if applicable,

enter into a restricted withdrawal agreement;

(vii) The fiduciary no longer meets the requirements for appointment under § 13.100; or

(viii) The fiduciary is unable or unwilling to manage the beneficiary's benefit payments, accounts, or investments.

(b) *Procedures.* (1) If the Hub Manager determines that it is necessary to remove a fiduciary and appoint a successor fiduciary, the Hub Manager will:

(i) Provide the fiduciary and the beneficiary written notice of the removal; and

(ii) Instruct the fiduciary regarding the fiduciary's responsibilities prior to transfer of funds to a successor fiduciary or as otherwise prescribed by the Hub Manager.

(2) The fiduciary must:

(i) Continue as fiduciary for the beneficiary until the Hub Manager provides the fiduciary with the name and address of the successor fiduciary and instructions regarding the transfer of funds to the successor fiduciary; and

(ii) Not later than 30 days after transferring funds to the successor fiduciary or as otherwise instructed by the Hub Manager, provide the fiduciary hub a final accounting.

(Authority: 38 U.S.C. 501, 5502, 5507, 6106)

#### **§ 13.510 Fiduciary withdrawals.**

(a) *General.* A fiduciary may not withdraw as fiduciary for a beneficiary until the fiduciary receives notice from the Hub Manager regarding transfer of the beneficiary's funds to a successor fiduciary.

(b) *Voluntary withdrawal.* (1) Subject to the limitation prescribed in paragraph (a) of this section, a fiduciary who has VA benefit funds under management for a beneficiary may withdraw from the fiduciary relationship with the beneficiary at any time if the fiduciary:

(i) Provides the fiduciary hub with jurisdiction written notice of the fiduciary's intent to withdraw as fiduciary for the beneficiary;

(ii) Describes the reasons for withdrawal;

(iii) Continues as fiduciary for the beneficiary until the Hub Manager provides the fiduciary with the name and address of the successor fiduciary and instructions regarding the transfer of funds to the successor fiduciary; and

(iv) Not later than 30 days after transferring funds to the successor fiduciary or as otherwise instructed by the Hub Manager, provides the fiduciary hub with jurisdiction a final accounting.

(2) Upon receipt of the notice of intent to withdraw prescribed in paragraph

(b)(1)(i) of this section, the Hub Manager will make a reasonable effort under the circumstances to expedite the appointment of a successor fiduciary. In determining the extent to which the fiduciary hub must expedite a request to withdraw, the Hub Manager will consider:

(i) The reasons for the withdrawal request provided under paragraph (b)(1)(ii) of this section;

(ii) The number of beneficiaries affected;

(iii) The relationship between the affected beneficiary or beneficiaries and the fiduciary; and

(iv) Whether expedited withdrawal is necessary to protect the interests of the beneficiary or beneficiaries.

(c) *Notice.* If a fiduciary requests to withdraw from service for a beneficiary, the Hub Manager will provide the beneficiary or the beneficiary's legal guardian, and the beneficiary's accredited representative, attorney, or claims agent written notice of the withdrawal request and the procedures for appointment of a successor fiduciary.

(Authority: 38 U.S.C. 501, 5502)

#### **§ 13.600 Appeals.**

Except as prescribed in paragraph (a) of this section, VA decisions regarding fiduciary matters are committed to the Secretary of Veterans Affairs' discretion by law, as delegated to subordinate officials under this part, and cannot be appealed to the Board of Veterans' Appeals or any court.

(a) *Appealable decisions.* A beneficiary may appeal to the Board of Veterans' Appeals the following decisions:

(1) The Hub Manager's appointment of a fiduciary under § 13.100;

(2) The Hub Manager's removal of a fiduciary under § 13.500;

(3) The Hub Manager's misuse determination under § 13.400;

(4) The VA Regional Office Director's final decision upon reconsideration of a misuse determination under § 13.400(d); and

(5) The Director of the Pension and Fiduciary Service's negligence determination for purposes of reissuance of benefits under § 13.410.

(b) *Procedures.* (1) VA decisions regarding fiduciary matters are final, subject only to the right of appeal prescribed in this section. VA will close the record regarding these decisions on the date the decision is made.

(2) Except for the closure of the record prescribed in paragraph (b)(1) of this section, the initiation and processing of appeals under this section are governed by parts 19 and 20 of this chapter.



Nothing in this section will be construed to limit the Board's authority to remand a matter to the Hub Manager or the Director of the Pension and Fiduciary Service under 38 CFR 19.9 for any action that is essential for a proper

appellate decision or the Hub Manager's or Director's ability to issue a supplemental statement of the case under 38 CFR 19.31(b)(2), (b)(3), or (c). (Authority: 38 U.S.C. 501)

(The Office of Management and Budget has approved the information collection requirements in this part under control number 2900-0085)

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