

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Parts 3 and 13

RIN 2900-AO53

Fiduciary Activities

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) amends its fiduciary program regulations, which govern the oversight of beneficiaries, who because of injury, disease, or age, are unable to manage their VA benefits, and the appointment and oversight of fiduciaries for these vulnerable beneficiaries. The amendments will update and reorganize regulations consistent with current law, VA policies and procedures, and VA's reorganization of its fiduciary activities. They will 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. The amendments to this rulemaking are mostly mandatory to comply with the law. They are also in line with the law's goals to streamline and modernize the fiduciary program and process. These amendments by Congress, reduce unnecessary regulations, streamline and modernize processes, and improve services for Veterans. Furthermore, VA is unable to alter proposed amendments that directly implement mandatory statutory provisions.

DATES: *Effective Date:* The final rule is effective August 13, 2018.

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SUPPLEMENTARY INFORMATION: In a document published in the *Federal Register* on January 3, 2014, (79 FR 430), VA proposed to amend, via a comprehensive rewrite and reorganization, its fiduciary program regulations, which govern the oversight of beneficiaries who, because of injury, disease, or age, are unable to manage their VA benefits, and the appointment and oversight of fiduciaries for these vulnerable beneficiaries. The 60-day public comment period ended on March 4, 2014. VA received 26 comments from interested individuals and organizations. The comments are discussed below under the appropriate section headings. VA made a number of

revisions based on the comments received. Those revisions, which are primarily technical, are discussed in the final rule. Based on the rationale described in this document and in the notice of proposed rulemaking (NPRM), VA adopts the proposed rule, as revised in this document, as a final rule.

Section 13.10—Purpose and Applicability of Other Regulations

This regulation will provide general notice regarding the statutory authority for and purpose of VA's fiduciary program. It will 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. We did not receive any comments on this section, but in order to clarify the scope of these regulations and the fact that they pertain to the oversight of VA-derived monetary benefits by persons who previously have been adjudicated incompetent to manage their VA-derived funds, we have revised the text of the regulation by adding the word "monetary" between the words "VA" and "benefits" in the first sentence of § 13.10(b).

Section 13.20—Definitions

We received one comment regarding the definitions in proposed § 13.20. The commenter recommended that VA recognize all legal marriages, domestic partnerships and civil unions for the purposes of fiduciary activities, thereby adding a definition of "domestic partner" to proposed § 13.20. The commenter noted that the broad authority granted by Congress in 38 U.S.C. 5502 allows VA to add classes of appropriate fiduciaries, to include legally married partners and domestic partners to serve as fiduciaries. The commenter noted that a place-of-celebration rule would be consistent with other definitions adopted by other agencies following the Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013).

On June 26, 2015, the U.S. Supreme Court held that the Fourteenth Amendment of the U.S. Constitution requires a state to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). As a result of this decision, VA now recognizes the same-sex marriage of any veteran, where the veteran or the veteran's spouse resided anywhere in the United States or its territories at the

time of the marriage or at the time of application for benefits. VA has always determined a marriage to be valid, for the purposes of all laws administered by VA, according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to the benefits accrued. See 38 U.S.C. 103(c). Consistent with the Supreme Court decisions in *Obergefell* and *Windsor*, VA recognizes the validity of same-sex marriages. Accordingly, this rule defines the term "spouse" in § 13.20 to mean a husband or wife of any marriage, including common law marriages and same-sex marriages, that meets the requirements of 38 U.S.C. 103(c).

The separate question of how to address domestic partnerships and civil unions (which are not considered legal marriages), within the scope of VA's fiduciary program, is a policy matter that was not considered during the development of the proposed regulation. As a result, expanding the definition of spouse, for purposes of VA's fiduciary program, to include domestic partners and/or civil union partners or defining those terms in this final rule would be premature. VA is sensitive to this issue and plans to consider whether to expand the "beneficiary's spouse" class of fiduciaries listed in § 13.20(e)(2) to explicitly include domestic partners and civil union partners. If VA decides to make changes, VA will promulgate a separate rulemaking to address this issue.

We made non-substantive changes to the proposed definitions for "Hub Manager" and "spouse" and added a definition for "written notice," which we discuss below.

Section 13.30—Beneficiary Rights

We received two comments regarding proposed § 13.30, "Beneficiary rights." The first commenter stated that the proposed rule imposed "unnecessary restrictions" on the rights of beneficiaries. The commenter stated, "We see no reason or legal requirement that beneficiaries under this program should have fewer rights or protections than any other VA beneficiary." The commenter questions whether "the fundamental right to control one's own property" should be based on the view of a single examiner and makes other general assertions that VA's procedures are insufficient.

We do not agree that we proposed "unnecessary restrictions" on the rights of beneficiaries, or that these procedures violate a beneficiary's rights. Our intention in drafting the NPRM was to ensure that VA benefits are managed in

the best interest of beneficiaries and their dependents. In that regard, we proposed to update and reorganize our regulations consistent with current laws and VA policies and procedures, and clarify the rights of beneficiaries in the fiduciary program. The suggestion that our proposed rules unnecessarily limit the rights of beneficiaries is incorrect. Further, assertions that determinations made in VA's fiduciary program are based solely on the views of "one examiner" mischaracterize the efforts expended by VA fiduciary program staff. While a field examiner may conduct visits with a beneficiary and make a recommendation, fiduciary-related decisions are not based solely on the views of one individual. A field examiner's recommendation is reviewed by a VA supervisor and action is taken based on a comprehensive view of which steps are in the best interest of the beneficiary.

In drafting the rules on beneficiary rights, we focused on our general policy that a beneficiary in the fiduciary program has the same rights as any other VA beneficiary. We specifically stated in proposed § 13.30, "The rights of beneficiaries in the fiduciary program include, but are not limited to" those listed in the regulation text. Thus, we did not propose to prescribe all of the rights of beneficiaries in the fiduciary program. We prescribed that a beneficiary has the right to written notice of appealable fiduciary decisions. However, in responding to the foregoing comment, we discovered that, although we prescribed that a beneficiary is entitled to written notice on such matters, we did not prescribe rules for the Hub Manager as to what such notice should include. As such, we revised § 13.20 to include a definition of written notice.

We prescribed the right to be informed of a fiduciary's name, telephone number, mailing address, and email address. We prescribed the right to obtain from the fiduciary a copy of the fiduciary's VA-approved annual accounting, and other rights that we believe are basic to a fiduciary-beneficiary relationship and are necessary to define a fiduciary's role in such a relationship. See 79 FR 432. We prescribed rights to clarify that VA is not the beneficiary's fiduciary and that VA's role is limited to oversight. See 79 FR 432. In that regard, in § 13.140(a), our core requirement for fiduciaries is to ensure that a beneficiary's benefits are managed in that beneficiary's interest. We do not agree that our proposed regulations limit the rights of beneficiaries and make no changes based upon the comment.

The commenter also stated that the proposed regulation on beneficiary rights is incomplete and it should prescribe a statement regarding the reasons and bases for determining that the appointment of a fiduciary is in the beneficiary's interest. We did not intend that we would make a decision on a fiduciary matter without providing adequate notice to a beneficiary regarding the reasons and bases for such a decision. However, as stated above, we revised the proposed rule to include a definition of "written notice" and to specifically prescribe such notice for certain decisions.

We proposed 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. We explained that VA 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. See 79 FR 432. We explained that this notice is essential because beneficiaries would have the right to appeal these determinations. See 79 FR 432. Furthermore, we specifically proposed that a beneficiary in the fiduciary program has the right to appeal to the Board of Veterans' Appeals (Board) a VA decision on a fiduciary matter that affects VA's provision of benefits to the beneficiary, such as VA's appointment of a fiduciary and its determination regarding its own negligence in misuse and reissuance of benefits matters. To assist the beneficiary in making a decision related to appealing a decision, and to facilitate review by the Board in the event of an appeal, any decision that affects the provision of benefits must be supported by reasons for our decision, as required under the new definition for "written notice." We revised proposed § 13.30(b)(2) to clarify that every beneficiary in the fiduciary program has the right to "written 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.

In responding to the foregoing comment, we noticed that a provision in proposed § 13.30 needed clarification. Specifically in proposed § 13.30(b)(10)(i)(B), we prescribed that a beneficiary has the right to be removed from the fiduciary program if a court of jurisdiction determines the beneficiary is able to manage his or her financial affairs. There are beneficiaries in the fiduciary program who are determined to be unable to manage their financial

affairs by a court and without any rating decision by VA. It is our intent that these beneficiaries will have the right to be removed from the fiduciary program if the court makes a determination that the beneficiary is able to manage his or her financial affairs. Accordingly, we have revised proposed

§ 13.30(b)(10)(i)(B) to clarify that a beneficiary who is in the fiduciary program based upon a court determination that he or she cannot manage financial affairs may be removed from the fiduciary program if the court later determines that the beneficiary can manage his or her financial affairs. Other beneficiaries, who are in the fiduciary program as a result of a VA rating decision, may also submit evidence from a court regarding their ability to manage VA benefits. However, such evidence will be forwarded to a VA rating authority for a decision regarding whether the beneficiary is able to manage his or her VA benefits, as the rating authority has sole responsibility for making such determinations. See 38 CFR 3.353.

The same commenter also stated, "The Secretary's position that the VA fiduciary program regulations pre-empt state laws in this area deserves specific rebuttal," adding that "the NPRM failed to establish an adequate legal basis for the disruption of a traditional area of state authority." The commenter then went on to urge that VA recognize state fiduciary laws, which "offer a broad array of [] rules establishing fiduciary responsibilities." In the proposed rule, we stated 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." See 79 FR 430. We stand by that interpretation and make no changes based on this comment.

While state law provides some guidance concerning fiduciary matters, those laws vary significantly from state to state and do not pertain to VA's fiduciary program. Further, VA does rely on state laws in cases where a state court has appointed a fiduciary for oversight of the veteran's assets and where there is no conflict between state and Federal law, and/or when the court-appointed fiduciary is the same as the VA-appointed fiduciary. State laws often provide helpful guidance; however, under the Supremacy Clause of the Constitution, Federal law is controlling. See U.S. Const. art. VI, cl 2; *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372–73 (2000). To the extent that a dispute arises between

Federal and state law, Federal law establishing and governing VA's fiduciary program as codified in parts 55 and 61 of title 38 of the United States Code, as well as in regulations implementing those statutes, controls. See VAOPGC 3–86 (10–28–85) (citing the Supremacy Clause and holding that a state court lacks jurisdiction to override VA's authority in making determinations affecting payment of an incompetent veteran's VA benefits to a VA-appointed fiduciary).

The second commenter favorably mentioned the beneficiary rights section described in the proposed rule, stating: "Overall, we believe that VA's proposed fiduciary program regulations reflect an acknowledgement of the rights of veterans and other beneficiaries who are under the jurisdiction of the program. For example, § 13.30 enumerates the rights and benefits of veterans and other beneficiaries in the program." We make no changes based upon the comment.

Section 13.40—Representation of Beneficiaries in the Fiduciary Program

We received two comments from the same commenter regarding § 13.40. First, the commenter quoted from the NPRM, which distinguished fiduciary matters from decisions on claims for benefits and noted that, 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." See 79 FR 432–33. This distinction will be the same for all fiduciary matters. Nonetheless, the commenter read this portion of the preamble to mean that VA had proposed to limit attorney fees to appointment decisions.

We intended that the portion of the preamble quoted immediately above would explain applicability of the proposed fee provisions in the context of a fiduciary appointment. We did not intend that commenters would read the preamble as a general limitation on fees, such that beneficiaries could not pay attorneys for assistance in other fiduciary matters. In fact, the introductory text to proposed § 13.40 was clear that the proposed fee provisions were applicable to representation of beneficiaries before VA "in fiduciary matters governed by [38 CFR part 13]." Proposed paragraph (c) was also clear that a VA-accredited attorney or claims agent could charge a reasonable fixed or hourly fee for representation of a beneficiary "in a fiduciary matter," provided that the fee meets the requirements of 38 CFR

14.636. We intended that beneficiaries would have the choice of hiring an attorney or claims agent and paying the attorney or claims agent a reasonable fixed or hourly fee for assistance with any fiduciary matter. As proposed, § 13.40(c) reflected this intent and addressed the commenter's concerns. We will not make any changes based upon the comment.

Second, the commenter suggested that VA should allow contingent fees on recouped past-due benefits, to include funds recovered from a prior fiduciary or placed under control of a successor fiduciary. However, as we explained in the preamble to the proposed rule, "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." See 79 FR 432. We based this statement on the fact that fiduciary matters do not concern the award of past-due benefits. At the time of a fiduciary appointment and all other fiduciary program matters, VA has already awarded benefits to the beneficiary, and any representation provided by an accredited attorney or claims agent could relate only to the fiduciary matter. Even in the case of a retroactive benefit payment, see § 13.100(c), VA has already awarded the benefit pursuant to a decision on a benefit claim and withheld it for payment to a qualified fiduciary on behalf of the beneficiary. An attorney representing a beneficiary in the fiduciary appointment could not claim that his or her legal services resulted in VA's prior award of the retroactive benefit.

The commenter also appears to assert that, independent of any payment of past-due benefits, a contingent fee could be calculated based upon the amount of funds being placed under the control of a fiduciary who is "acceptable to the client," and that "this methodology has been submitted for review to fiduciary program managers and was found to be compliant with regulations." The method proposed by the commenter would require a finding on the amount of the funds placed under the control of the successor fiduciary and a conclusion that the successor fiduciary was "acceptable to the client." As mentioned above, the amount of VA benefits due to the beneficiary would not change. The commenter's suggested revision would add unnecessary complexity to fee determinations in fiduciary cases, and would risk creating a conflict of interest for the representative by increasing the chances

that fees charged based upon representation on benefit claims are duplicated by fees charged for representation on fiduciary matters. As a result, we have concluded that it would not be a prudent revision and make no change based on this comment.

Section 13.50—Suspension of Benefits

We received one comment regarding proposed § 13.50. The commenter read the proposed provisions to mean that a Hub Manager may suspend and "hold" payment of benefits, and generally commented that VA must ensure that beneficiaries have access to their benefits when VA implements a suspension for the reasons prescribed in the proposed rule in which we agree.

VA occasionally encounters situations in which it must suspend payment of benefits to a fiduciary and take appropriate action to ensure continuity of benefits. In the rare case where VA suspends benefits under proposed § 13.50, the VA Regional Office Director who has jurisdiction over the fiduciary hub would have authority to ensure that the beneficiary's needs are being met through the appropriate coordination with the beneficiary and disbursement of the beneficiary's funds. We emphasized that proposed § 13.50 would be reserved for those rare cases in which VA has no option but to take appropriate, temporary steps to suspend and separately manage disbursement of benefits on behalf of a beneficiary. To further limit any adverse impact that might result from such a suspension, we proposed to limit the Hub Manager's discretion to cases where the beneficiary or the beneficiary's representative withholds cooperation in any fiduciary matter or where VA must immediately remove the fiduciary for cause and is unable to appoint a successor fiduciary before the beneficiary has an immediate need for disbursement of funds. Under these two situations only, VA will be forced to take appropriate action and disburse funds in the beneficiary's and the beneficiary's dependents' interests so that the beneficiary has access to the funds while VA takes steps to remediate the problem. We will not make any changes based upon the comment because we believe that controls prescribed in § 13.50 address the commenter's concerns.

Section 13.100—Fiduciary Appointments

We received several comments regarding proposed § 13.100. One commenter suggested that VA establish a maximum time period for appointing a fiduciary once a beneficiary has been rated as being unable to manage his or

her VA benefits. The commenter stated that VA makes long-delayed appointments without reconsidering whether a beneficiary is able to manage his or her VA benefits. The commenter noted that delays in fiduciary appointments are disruptive because they could replace “well-functioning caregiving structures with adversarial relationships.” Along the same lines, another commenter suggested we develop timelines for the completion of the investigation process to ensure expeditious appointment of fiduciaries.

VA makes every effort to appoint fiduciaries in accordance with internal performance goals. Furthermore, VA’s appointment process ensures that the appointment reflects the beneficiary’s current capacity to manage his or her funds. In our experience in administering the fiduciary program, each fiduciary appointment is unique. The time it takes to appoint a fiduciary varies depending upon the facts of individual cases, workload, program growth, and available resources. Because of the foregoing factors, we cannot create a bright-line rule for the completion of the investigation process or the appointment of a fiduciary that would be enforceable. While we will not change § 13.100 to establish a timeliness rule, VA takes seriously its responsibility to protect beneficiaries who are unable to manage their benefits and will make every effort to improve the timeliness of fiduciary appointments.

Regarding concerns that long delays in appointments should require reconsideration of medical evidence as to the beneficiary’s ability to manage his or her VA benefits, we agree that medical evidence plays an important role in the determination of one’s ability to manage his or her VA benefits and a beneficiary should have an opportunity to present such evidence. According to 38 CFR 3.353(c), “[u]nless the medical evidence is clear, convincing and leaves no doubt as to the person’s incompetency, the rating agency will make no determination of incompetency without a definite expression regarding the question by the responsible medical authorities.” At the time a fiduciary is appointed, a field examiner performs a face-to-face interview with the beneficiary for the purpose of assessing the beneficiary’s ability to manage his or her VA benefits and to afford the beneficiary the opportunity to submit evidence regarding his or her ability to manage VA benefits. Any information gathered at that face-to-face interview is forwarded to the rating agency for consideration as to whether the beneficiary has the ability to manage his

or her VA benefits. This is consistent with a pertinent regulation that provides that if evidence is developed that a person is capable of managing his or her VA funds, that evidence is forwarded to the rating agency for a determination as to whether any prior decision of incompetency should remain in effect. See 38 CFR 3.353(b)(3). Therefore, if a beneficiary believes he or she is able to manage his or her VA benefits, including at the time of a fiduciary appointment, the beneficiary may request a review of his or her incompetency rating.

Regarding the commenter’s concern that delayed fiduciary appointments could replace “well-functioning caregiving structures with adversarial relationships,” we did not intend to disturb well-functioning relationships with those that are adversarial. In fact, we did not propose to appoint a particular fiduciary if we believed such an appointment would create an adversarial relationship. Instead, we proposed to make every effort to appoint a fiduciary that would best serve the interest of a beneficiary, provided that the proposed fiduciary is qualified and willing to serve. In § 13.100(e), we proposed to establish an order of preference for the appointment of fiduciaries. We proposed to first appoint the beneficiary’s preference if the beneficiary has the capacity to state such a preference. In these cases, a beneficiary could request appointment of a person with whom he or she has a well-functioning relationship. We then proposed to appoint the beneficiary’s spouse or other individuals or entities as set forth in proposed § 13.100(e) that we believed would result in an effective beneficiary-fiduciary relationship. Furthermore, pursuant to § 13.600, a beneficiary may appeal VA’s appointment of a fiduciary if the beneficiary believes that the appointment is not in his or her best interest. When VA receives such an appeal, it will try to resolve the disagreement by again requesting the beneficiary’s preference. For the foregoing reasons, we make no change based on this comment.

The same commenter stated that VA should revise proposed § 13.100 to require a credit and criminal history check at each reappointment of a fiduciary and conduct periodic, routine credit and criminal history checks on fiduciaries thereafter. The commenter noted that such requirement would be cost-effective and identify suspicious financial activities.

In § 13.100, we proposed to implement 38 U.S.C. 5507 regarding the investigation VA must conduct of a

prospective fiduciary. We proposed to perform a face-to-face interview, when practicable, and 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 also proposed to conduct a criminal background check for the purposes of determining whether a proposed fiduciary was convicted of any offense that would be a bar to serving as a fiduciary under proposed § 13.130 or that we could consider and weigh under the totality of the circumstances regarding the proposed fiduciary’s qualifications.

Regarding this investigation, we agree with the commenter and revised § 13.100(f) to add paragraph (3), which requires the Hub Manager to conduct the investigation, specifically the requirements of paragraph (f)(1)(i) through (iii), for every subsequent appointment of the fiduciary for a beneficiary. These requirements must be met without regard to the proposed fiduciary’s service to any other beneficiary. Regarding the commenter’s suggestion that we conduct periodic, routine credit and criminal history checks of fiduciaries, in proposed § 13.100(f)(2), we prescribed that, at any time after the initial appointment of the fiduciary, the Hub Manager may repeat all or part of the investigation to ensure that a fiduciary continues to meet the qualifications for service. Although we understand the commenter’s concern, our program administration experience suggests that periodic, routine checks in all fiduciary appointments would not be an efficient use of program resources. Instead, we have determined that the matter should be left to the Hub Manager’s discretion on a case-by-case basis. In addition, we have other controls in place that will alert us regarding the need for a review of a fiduciary’s qualifications or to remove him or her from service as fiduciary. For example, if a fiduciary is not meeting his or her accounting requirements under § 13.280, or any of his financial responsibilities under § 13.140, based on the circumstances, we will conduct a review of his or her qualifications or remove him or her from service as a fiduciary. Although we currently do not have information to support prescribing mandatory periodic, routine credit and criminal history checks of VA-appointed fiduciaries, we will continue to monitor the activities of fiduciaries and may address the matter in a future rulemaking. To this end, we added the phrase “or reappointment” after initial appointment in § 13.100(f)(2) to clarify

that Hub Managers may repeat all or part of an investigation of a fiduciary when the fiduciary is appointed to another VA beneficiary. At this time, we do not believe any additional changes are needed based on this comment.

In a separate comment on proposed § 13.100, the same commenter stated that face-to-face beneficiary interviews should be limited to situations where the information sought cannot be obtained by other means. The commenter was not aware of any statutory requirement for this type of beneficiary interview. The commenter suggested that beneficiary interviews do not provide new information and VA could substitute information obtained from caregivers, medical providers or other third parties. The commenter believed that beneficiary interviews are for the purpose of establishing the “financial needs of the beneficiary and set[ting] the budget for the fiduciary to implement.” Thus, the commenter suggested we revise proposed § 13.100 to limit beneficiary interviews to situations where the beneficiary is the only source for the information we are seeking.

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.” See 38 U.S.C. 5502(a)(1). Our longstanding interpretation of this broad authority is that VA may establish a fiduciary program, under which it oversees beneficiaries who cannot manage their own VA benefits. Congress generally deferred to VA to determine the appropriate program requirements. With respect to specific statutory requirements for fiduciary appointments, VA must conduct the investigation prescribed in 38 U.S.C. 5507 and then conduct sufficient oversight to determine whether fiduciaries are properly providing services for beneficiaries. While Congress specifically mandated the foregoing provisions, Congress did not address how VA should conduct the various activities required for proper administration of the fiduciary program, to include aspects of oversight to ensure that a beneficiary’s benefits are used for the “benefit of the beneficiary.” However, in 38 U.S.C. 5711(a)(5), Congress authorized VA to, among other things, “make investigations and examine witnesses upon any matter within the jurisdiction of the

Department.” Under the authority in sections 5502 and 5711, we conduct face-to-face visits with beneficiaries to assess their well-being and oversee the fiduciaries we appoint to ensure they are meeting the beneficiaries’ needs.

Contrary to the commenter’s reading of our proposed rule, VA conducts face-to-face beneficiary visits for a much broader purpose. It is VA’s statutory obligation to ensure that the fiduciaries it appoints on behalf of beneficiaries are fulfilling their core requirement of monitoring the well-being of the beneficiaries they serve and are disbursing funds according to the beneficiaries’ needs. Speaking with the beneficiary and viewing that beneficiary’s environment allows VA to confirm that the fiduciary is monitoring the beneficiary and fulfilling his or her responsibilities under § 13.140 as the beneficiary’s fiduciary. In addition, VA assesses the beneficiary’s ability to manage his or her VA funds during the face-to-face visit. Thus, speaking to a beneficiary is crucial for obtaining information about the welfare and financial abilities of the beneficiary and adequacy of the fiduciary’s services. For these reasons, we will not revise § 13.100 to limit face-to-face visits with beneficiaries.

One commenter noted 38 U.S.C. 5507(d), which states that temporary fiduciary appointments may not exceed 120 days in cases where a beneficiary is appealing an incompetency rating decision, and inquired about our policy regarding appeals of incompetency rating decisions that may take more than 120 days.

Regarding the commenter’s concern that a beneficiary may be without a fiduciary at the end of the 120-day period, we note that VA does not appoint a temporary fiduciary in lieu of a permanent fiduciary when the beneficiary is appealing an incompetency rating. Under section 5507(d), “[w]hen in the opinion of [VA], a temporary fiduciary is needed in order to protect the assets of the beneficiary while a determination of incompetency is being made or appealed. . . . [VA] may appoint one or more temporary fiduciaries for a period not to exceed 120 days.” We interpret this statute to mean that VA does not have to appoint a temporary fiduciary in these cases, but if it does, the appointment(s) cannot exceed a total of 120 days. Under VA’s current administration of the program, when a beneficiary is appealing an incompetency decision, the beneficiary is already rated as being unable to manage his or her VA benefits and is in the fiduciary program. The decision is based on medical evidence or a legal

determination of incompetency. As a general rule, VA makes permanent fiduciary appointments pending a decision on the appeal of the incompetency decision, which may take one or more years. We have found that this policy best protects beneficiaries and is the least disruptive procedure for them. In fact, we intended that our proposed rules on temporary fiduciary appointments would be reserved for situations where VA has removed a fiduciary for the reasons prescribed in proposed § 13.500, cannot expedite a successor fiduciary appointment, and the beneficiary has an immediate need for fiduciary services. We revised proposed § 13.100 by removing paragraph (h)(1)(i) requiring appointment of a temporary fiduciary when a beneficiary is appealing an incompetency decision.

In § 13.100(h)(2), we proposed to 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 audited and approved. A commenter disagreed with the proposed limitation on temporary appointments and suggested that our proposed rule would exclude family members, including spouses and other caregivers, from serving as temporary fiduciaries. The commenter stated that we did not provide a sufficient basis for not considering the usual order of preference, as proposed in our regulations, in temporary fiduciary appointments.

In prescribing the rules on temporary fiduciary appointments, our intention is to expeditiously appoint a qualified, well-performing fiduciary, who can temporarily meet the beneficiary’s immediate needs in rare circumstances. In that regard, we intend to ensure that the entity or individual we appoint as temporary fiduciary not only meets the qualification requirements under section 5507, but is also 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. Both requirements are crucial in our decision to appoint a temporary fiduciary.

VA needs to appoint temporary fiduciaries promptly in rare cases where VA has removed a fiduciary for the reasons prescribed in proposed § 13.500, VA cannot expedite the appointment of a successor fiduciary, or the beneficiary has an immediate need for fiduciary services, and in other cases in which VA determines that it is necessary to protect

a beneficiary. Because of the urgency in ensuring that a fiduciary is immediately appointed in such cases, we might not be able to complete the qualification process prescribed by Congress in 38 U.S.C. 5507. As the commenter suggested, it might sometimes be ideal to appoint a family member as temporary fiduciary in these rare cases. While we implemented section 5507(c) to exempt spouses from face-to-face interviews, criminal background checks, and credit checks, to ensure adequate protection for beneficiaries, we still have an obligation to explain the responsibilities and requirements of service to an individual who has never served as a fiduciary. This would require scheduling and conducting an interview, and ensuring compliance of the spouse or family member. This would not be the case if VA appoints an individual or entity successfully serving as fiduciary. While these types of appointments are rare, they are generally time sensitive. The delay associated with addressing fiduciary responsibilities and ensuring agreement from a spouse or family member is unnecessary when we have a fiduciary who can serve in an emergent but temporary situation. A temporary fiduciary allows VA to immediately deliver benefits while we consider the appointment of a fiduciary in accordance with the priority of appointment prescribed in § 13.100(a). For the foregoing reasons we limit our temporary fiduciary appointments as prescribed in § 13.100(h) and make no change based on this comment.

Under proposed § 13.100(c), “[t]he Hub Manager will withhold any retroactive, one-time, or other lump-sum benefit payment awarded to a beneficiary . . . until the Hub Manager has appointed a fiduciary for the beneficiary and, if applicable, the fiduciary has obtained a surety bond under § 13.230.” A commenter stated that VA should not withhold a beneficiary’s entire retroactive benefit but should consider the size of the award before we make a decision to withhold. The commenter believed that VA should release any amount that is not larger than a beneficiary’s monthly recurring benefits and a percentage of larger retroactive benefits, or provide a method for a beneficiary to access his or her retroactive benefits in order to ensure that his or her needs are being met.

Our policy for withholding a beneficiary’s retroactive benefits is to protect benefits 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 they were paid

directly to the beneficiary prior to a fiduciary appointment. Under sections 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 that provides fiduciary services for one or more beneficiaries or an individual who provides fiduciary services for 10 or more beneficiaries. VA has determined that it is not prudent to release retroactive benefits to a beneficiary prior to a fiduciary appointment because, at that point in the process, VA has already determined that the beneficiary cannot manage his or her VA benefits. Moreover, VA’s authority to reissue benefits is limited to cases of fiduciary misuse. If VA released a beneficiary’s retroactive award prior to a fiduciary appointment and a family member, care provider, or other person assisting the beneficiary misappropriated the funds, VA would be unable to reissue benefits to the beneficiary because there would not have been misuse by an appointed fiduciary. For this reason, we proposed § 13.100(c) with the intent of preserving vulnerable beneficiaries’ VA benefits for their future needs.

Regarding the commenter’s suggestion that we release smaller amounts of retroactive benefits and portions of larger retroactive benefits to the beneficiary prior to a fiduciary appointment, or add provisions to ensure the beneficiary’s needs are being met, we have determined that current fiduciary program policy, under which VA initiates and continues payment of monthly benefits to the beneficiary while a fiduciary appointment is pending, strikes the proper balance between ensuring that beneficiaries’ current needs are met with protection of lump-sum benefit payments for future needs. For the foregoing reasons we will not make any changes based on this comment.

One commenter, a corporate fiduciary, suggested that proposed paragraph (d)(3) would not adequately restrict a Hub Manager’s discretion in fiduciary appointments. In proposed § 13.100(d) regarding initial fiduciary appointments, we did not propose to prescribe a specific limit on the number of beneficiaries a single fiduciary could serve. We had no data to support proposing a bright-line rule for discontinuing further appointments to a fiduciary and determined that each Hub Manager should have discretion to determine whether it is in a beneficiary’s interest to appoint a particular fiduciary. However, to avoid default appointments to certain paid

fiduciaries in lieu of the best interest determination required by 38 U.S.C. 5507(a)(2), we did not propose to give the Hub Managers unfettered discretion in such matters. First, under proposed paragraph (d)(3), a Hub Manager would consider whether the fiduciary could handle an additional appointment without degrading the service that the fiduciary provides to any other beneficiary who has funds under management with the fiduciary. Second, under proposed paragraph (e), we would establish an order of preference for appointing fiduciaries, with the result being that beneficiaries generally have a one-on-one relationship with a volunteer family member, friend, or caregiver fiduciary. In our view this placed an adequate check on the Hub Manager’s discretion in these situations. On a case-by-case basis, a Hub Manager may consider appointment of a single fiduciary with multiple appointments if it is in the best interest of the beneficiary.

This commenter clarified that it was not seeking a higher order of preference in the appointment process or a bright-line rule for the maximum number of beneficiaries that a fiduciary may serve, and understood that VA might have a valid business reason to restrict further appointments of a fiduciary in some cases. However, the commenter expressed concern that certain paid fiduciaries would not have an equal opportunity to compete for appointments in those cases where VA cannot appoint a qualified volunteer fiduciary. Although we considered the commenter’s concerns, we believe VA’s primary obligation is to act in the best interest of its beneficiaries and will allow Hub Manager discretion in the appointment process in the event a paid fiduciary is required. Accordingly, other than a technical change to § 13.100(e), we are not making any changes to § 13.100 based upon the commenter’s suggestion.

Finally, one commenter suggested that VA’s fiduciary regulations accommodate durable power of attorneys (POAs). We interpret this to mean that VA should give appointment preference to the person who holds the beneficiary’s POA.

Based upon VA’s experience, it would not be good policy to give a person holding a beneficiary’s POA priority based only upon the existence of a POA. Veterans and other beneficiaries in the fiduciary program can be extremely vulnerable and easily coerced into signing documents. Additionally, a POA can be executed and revoked by the beneficiary at any time. If an individual is holding a POA, VA would have no

way of determining whether the POA is still in effect or if the beneficiary had the capacity to execute a legally enforceable POA under state law at the time of execution. Implementing policies and procedures related to the adjudication of POAs would needlessly complicate and delay the fiduciary appointment process. Also, under current law, VA has a duty to appoint, based upon a field examination and consideration of the totality of the circumstances, the individual or entity that is in the beneficiary's best interest. While such a determination might conclude that appointment of an individual who holds the beneficiary's POA is in the beneficiary's interest, VA has determined that it cannot give undue preference and weight to the existence of a POA. Accordingly, we will not make any changes to § 13.100 based upon the commenter's suggestion.

Section 13.120—Field Examinations

In § 13.120(b), we proposed to prescribe the scope of field examinations, which could include, but would not be limited to, “[a]ssessing 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.” We also proposed that, among other things, VA would conduct a field examination for the purpose of making appropriate referrals in cases of actual or suspected physical or mental abuse, neglect, or other harm to a beneficiary, as well as when investigating allegations that a fiduciary has misused funds or failed to comply with the responsibilities of a fiduciary under § 13.140.

We received two comments regarding this proposed regulation. One commenter shared his story of his mother leaving her home to care for him after he was injured in combat. The commenter's mother participates in the VA caregiver support program administered by the Veterans Health Administration (VHA). The commenter recommended that VA exempt beneficiaries who have VHA-approved caregivers from the home visit component of a field examination because VHA is already monitoring the well-being of these beneficiaries. Another commenter had the same concerns. We agree that beneficiaries whose family members are actively participating in the VA caregiver support program, and who remain eligible to participate in this program,

should generally be exempted from the home visit component of the fiduciary field examination because VHA is already assessing their physical well-being.

In 2010, the President signed into law the Caregivers and Veterans Omnibus Health Services Act of 2010. Section 101(a)(1) of that law added a new 38 U.S.C. 1720G to title 38, U.S.C., which required VA to establish a program of comprehensive assistance for family caregivers of eligible veterans and a program of support services for caregivers of covered veterans, which are collectively referred to as the Caregiver Support Program. Congress mandated, among other things, that as part of the program of comprehensive assistance for family caregivers, “[t]he Secretary shall monitor the well-being of each eligible veteran receiving personal care services under the program [and] . . . ensure appropriate follow-up regarding findings [by] . . . [v]isiting an eligible veteran in the eligible veteran's home to review directly the quality of personal care services provided to the eligible veteran.” See 38 U.S.C. 1720G(a)(9)(A), (C). The statute further prescribes that VHA may take corrective action, including providing additional training or suspending or revoking the caregiver's approval or designation. See 38 U.S.C. 1720G(a)(9)(C)(ii). The implementing regulations provide: “The primary care team will maintain the eligible veteran's treatment plan and collaborate with clinical staff making home visits to monitor the eligible veteran's well-being, adequacy of care and supervision being provided. This monitoring will occur no less often than every 90 days, unless otherwise clinically indicated, and will include an evaluation of the overall health and well-being of the eligible veteran.” See 38 CFR 71.40(b)(2).

Based on the foregoing oversight mandated by Congress and provided by VHA, we have decided to generally exempt beneficiaries who have a VHA-approved and monitored family caregiver from the home visit component of field examinations because VHA already assesses their physical well-being and environment. In these cases, VHA's oversight overlaps with the fiduciary program's oversight that we proposed. We do not intend to intrude on these beneficiaries, as we believe VHA provides ample oversight. In fact, we respect the relationship of veterans and their family members, and appreciate the ability to revise our rules to limit any unnecessary or duplicative oversight. In that regard, we will revise § 13.120 to reflect that VA will generally

exempt beneficiaries who have a family member participating in the VA caregiver support program from face-to-face visits in the home to assess their physical well-being and environment. Specifically, we revise § 13.120 to add paragraph (b)(1)(i) and prescribe that the Hub Manager will waive the requirements of paragraph (b)(1) of this section if the beneficiary has a VHA-approved family caregiver and VHA reports that the veteran is in an excellent situation. However, we prescribe an exception in new paragraph (b)(1)(ii), which states that the provisions of paragraph (b)(1)(i) do not apply in cases where the Hub Manager has information concerning the beneficiary's unmet needs or welfare or information that the fiduciary has violated his or her responsibilities under § 13.140. This exception allows VA to ensure that a fiduciary is meeting his or her obligations to the beneficiary based upon current information that the Hub Manager obtains in the course of overseeing fiduciary services. In the event there is an allegation of misuse of a veteran's VA funds under management or an allegation that a fiduciary is neglecting a beneficiary or there is insufficient evidence to determine the veteran's well-being, this exception will allow the Hub Manager to provide appropriate oversight.

However, VA will still conduct a face-to-face visit, any necessary investigations, or other inquiries to confirm the qualifications of a family caregiver seeking to provide fiduciary services for a veteran prior to appointment. 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, before appointing a person as fiduciary.

Section 13.130—Bars to Serving as a Fiduciary

We received two comments regarding § 13.130. One commenter stated that his comment is specifically geared towards VA's need to coordinate with state courts with jurisdiction over adult guardianship and conservatorship. The commenter cited two U.S. Government Accountability Office reports—“Guardianships: Collaboration Needed to Protect Incapacitated Elderly People” (2004) and “Incapacitated Adult: Oversight of Federal Fiduciaries and Court-Appointed Guardians Needs Improvement” (2011). Both reports discussed the lack of coordination in sharing information between the state courts handling guardianships, the VA fiduciary program, and the Social

Security Administrative (SSA) payee program. The commenter relied on these reports to propose that this lack of coordination could result in vital information regarding a beneficiary's welfare or the mismanagement of his or her VA benefits not being shared. The commenter singled out court information in particular, by concluding that bars to serving as a fiduciary should be expanded to include previous court sanctions or removals as a guardian or conservator and failure to file timely reports with the court.

The topic of coordinating with guardianship courts and other governmental agencies is beyond the scope of this rulemaking. However, it is our current practice to coordinate with courts and other agencies and share information when it is appropriate or necessary. We will continue to work on any necessary protocols for coordinating and information sharing between courts, VA and other agencies. Nonetheless, we agree with the commenter's suggestion that VA revise § 13.130 to bar a fiduciary from service if he or she has been removed as legal guardian by a court for misconduct. At this time, we decline to bar service as a fiduciary based solely upon a court sanction or other discipline short of removal. We anticipate situations where it is in the best interest of a particular beneficiary for VA to appoint a guardian, such as a family member or care provider, who has been disciplined by a court but not removed from service as a beneficiary's guardian.

There are various reasons a court-appointed guardian may be sanctioned by a court and his or her appointment may not pose a risk to the beneficiary or still be in best interest of the beneficiary. We believe it is best to retain the ability to assess these situations on a case-by-case basis. We intend to weigh the totality of the circumstances regarding the proposed fiduciary's qualifications and other factors, including any court discipline while serving as a guardian, in determining whether the appointment is in the beneficiary's best interest.

Also, to mitigate the risk of appointing as fiduciary a legal guardian who has been disciplined by a court, we proposed under § 13.140(d)(1) that a fiduciary who is also appointed by a court must annually provide to VA a certified copy of the accounting provided to the court or facilitate VA's receipt of such an accounting. In addition, in § 13.500(a)(2)(ii), we proposed to remove a fiduciary if he or she fails to maintain his or her qualifications or does not adequately perform the responsibilities of a

fiduciary prescribed in § 13.140. Thus, a fiduciary will be removed if the continuation of his or her appointment poses a risk to the beneficiary.

Accordingly, we will revise this section to add paragraph (b)(6) regarding a bar to service as a fiduciary if a guardian has been removed from service by a court for misconduct but do not make any additional changes based on these two comments.

Another commenter recommended that VA expand the 10-year period in proposed § 13.130(a)(2)(i) to 20 years following the conviction of a felony as a bar to appointment or continuation of service as fiduciary. The commenter submitted two papers in support of the recommendation and claimed that both support the conclusion that a person who is crime free for 20 years is "less likely" to commit a crime than a person who has been crime free for 10 years. However, the research presented does not support the recommendation that there is value in waiting an additional 10 years, *i.e.*, the longer a person goes without committing a crime the less he or she is likely to commit a crime. In our view, a person who has been previously convicted of a felony, but has been crime free for 10 years, should not be barred from serving as a fiduciary.

One of the papers submitted by the commenter cites to a 1994 Bureau of Justice Statistics (BJS) study, "Recidivism of Prisoners Released in 1994" (June 2002), which tracked 272,111 former inmates for 3 years after their release from prison in 1994. The study found that 30 percent of the 272,111 were rearrested for a new crime within the first 6 months of their release; 44 percent were rearrested within the first year; 59 percent were rearrested within the first 2 years; 68 percent were rearrested within 3 years.

The BJS collects criminal history data from the Federal Bureau of Investigation and state record repositories to study the recidivism patterns of various offenders, including persons on probation or discharged from prison. Its latest study, "Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010" (April 2014), tracked the recidivism patterns of about 400,000 persons released from state prisons in 2005. The study found that 28 percent of the 400,000 were rearrested for a new crime within the first 6 months of their release; 44 percent were rearrested within the first year; 60 percent were rearrested within 2 years; 68 percent were rearrested within 3 years; and 77 percent were rearrested within 5 years. See <https://www.bjs.gov/content/pub/pdf/rpr94.pdf>. The report concluded that the longer

released prisoners went without being arrested, the less likely they were to be arrested at all during the 5-year period. See <https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>.

Another report, "State of Recidivism—The Revolving Door of America's Prisons" (April 2011), prepared by the Pew Center on the States (Pew) in collaboration with the Association of State Correctional Administrators was based on a survey of state corrections departments. This report noted that 41 states provided recidivism data on prisoners released in 2004, and 33 states provided data on prisoners released in 1999. The responding states represented 87 percent of all releases from state prisons in 1999 and 91 percent of all releases in 2004. "In the first ever state-by-state survey of recidivism rates, state corrections data show that nearly 43 percent of prisoners released in 2004, and 45 percent of those released in 1999, were reincarcerated within three years, either for committing a new crime or violating the terms of their supervised release." See <http://www.pewtrusts.org/en/about/newsroom/press-releases/0001/01/01/pew-finds-four-in-10-offenders-return-to-prison-within-three-years>. Studies by BJS and Pew do not examine post-release recidivism for someone who has been crime free for 10 years or more.

In further consideration of the comment to expand the 10-year period to 20 years, we looked at industry standards for guidance. There are no bright-line rules used by states or SSA for the appointment of convicted felons. Although all fifty states and the District of Columbia have enacted guardianship statutes, there is a lack of statutory consistency among the states regarding the appointment of a guardian who was convicted of a felony, and how long after a conviction one should be barred from serving. Research revealed three distinct categories of state laws concerning the eligibility of guardianship candidates with past felony convictions. Some states' statutes prescribed a complete disqualification of a past felon as guardian. See, *e.g.*, Fla. Stat. Ann. § 744.309(3) (LexisNexis 2017); Wash. Rev. Code Ann. § 11.88.020(1)(c) (LexisNexis 2017). Some states require the disclosure of the prior felony with consideration given to the ward's best interest and no bright-line rule regarding the numbers of years after the conviction of a felony before appointment. See, *e.g.*, Ariz. Rev. Stat. § 14-5106(A)(1) (LexisNexis 2017); N.H. Rev. Stat. Ann. § 464-A:4(V)(b) (LexisNexis 2017). Other states' statutes do not address the issue. See, *e.g.*, Ala.

Code § 26–2A–104 (LexisNexis 2017); Conn. Gen. Stat. § 45a–676(f) (LexisNexis 2017).

SSA obtains information on whether a prospective representative payee was convicted of any offense under Federal or state law and sentenced to a period of imprisonment for more than 1 year before appointment. As a general rule, SSA will not appoint a convicted felon as a representative payee unless it cannot identify a suitable payee, there is no risk to the beneficiary, and the appointment is in the best interest of the beneficiary. Thus, although SSA considers certain crimes an absolute bar to service as a representative payee, it may still appoint a convicted felon if it determines that the appointment is in the best interest of the beneficiary. See 20 CFR 416.622, 416.624.

We proposed a 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 fraud, financial crimes, or the abuse or neglect of another person, all of which would be a permanent bar to serving as a fiduciary. See 79 FR 437. The commenter's suggestion that we should revise the rule by lengthening the look-back period "to a period longer than ten years" because a research study on the usefulness of criminal background checks stated that a violent offender is "less likely" to commit a crime if he or she has been crime free for 20 years does not mean that it would be good policy to wait longer than 10 years to appoint a person VA finds appropriate to act as fiduciary for the beneficiary, particularly when the person is the beneficiary's choice, it is the least restrictive option, and in most cases is the beneficiary's family member.

We proposed that we could appoint a convicted felon after 10 years only if we determine 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. See 79 FR 437. We intend with the foregoing criteria in place, we will not appoint a person that may pose a risk to the beneficiary. In addition, in § 13.500, we proposed to promptly remove a fiduciary if he or she poses a risk to a beneficiary after appointment. We believe that the measures we have in place will allow us to carefully consider a prospective fiduciary, who was convicted of a felony more than 10 years prior to consideration for appointment, to determine whether it is in the beneficiary's best interest to have such person serve as fiduciary.

Therefore, we make no change based on this comment.

In § 13.130, we proposed that an individual or entity may not serve as a fiduciary for a VA beneficiary if the individual or entity was convicted of a financial crime, *e.g.*, fraud, theft, bribery, embezzlement, identity theft, money laundering, or forgery, or for the abuse of or neglect of another person. These offenses are permanent bars to serving as fiduciary. One commenter stated that our proposed list of disqualifying offenses does not include crimes related to dishonesty and deception, which are offenses that could place a beneficiary at risk for victimization. However, the commenter did not specifically identify the additional crimes that the commenter would like to see as bars to service as a fiduciary.

The nature of specific offenses included within the phrase dishonesty and deception as expressed in Federal regulations and state rules varies. For example, banking regulations define dishonesty as the following: "[D]irectly or indirectly to cheat or defraud, to cheat or defraud for monetary gain or its equivalent, or to wrongfully take property belonging to another in violation of any criminal statute. Dishonesty includes acts involving a want of integrity, lack of probity, or a disposition to distort, cheat, or act deceitfully or fraudulently, and may include crimes which federal, state or local laws define as dishonest." See 12 CFR 585.40. Department of Labor regulations define "fraud or dishonesty" as encompassing "all those risks of loss that might arise through dishonest or fraudulent acts in handling of funds" and note that, under state law, "the term 'fraud or dishonesty' encompasses such matters as larceny, theft, embezzlement, forgery, misappropriation, wrongful abstraction, wrongful conversion, willful misapplication or any other fraudulent or dishonest acts resulting in financial loss." See 29 CFR 453.12.

Furthermore, crimes of dishonesty and deception can be either a felony or misdemeanor offense, depending on the jurisdiction and crime. In addition, sentences for such crimes may differ widely. As a result, not all crimes of dishonesty and deception will be a bar to service as fiduciary. For purposes of our proposed regulations, we defined a felony offense to mean 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. We further explained that such a conviction is not a bar to serving as a fiduciary if the conviction occurred more than 10

years preceding the proposed date of appointment and the crime is not one of the crimes listed in proposed § 13.130(a)(2)(ii). We believe our proposed rules on bars to service provide the correct level of detail to effectively consider a potential fiduciary's criminal background and the best interests of beneficiaries. Therefore, we will monitor the implementation of this rule to ensure that it adequately protects beneficiaries but will not make any changes at this time based on this comment.

Section 13.140—Responsibilities of Fiduciaries

We received several comments regarding proposed § 13.140. In paragraph (c) we proposed that a fiduciary's non-financial responsibilities, among other things, will include contacting social workers or mental health professionals regarding the beneficiary, when necessary. One commenter recommended we include as a part of this responsibility that a fiduciary also contact a court-appointed guardian or conservator regarding the beneficiary when necessary. We agree. Without such contact, a fiduciary might not be able to determine whether a beneficiary's needs are being met by the fiduciary's disbursement of funds. In proposing paragraph (c), we intended that fiduciary responsibilities would include an obligation to monitor the beneficiary's well-being and report any concerns to appropriate authorities, or anyone legally tasked with ensuring the beneficiary's well-being. Amending this rule to include contact with a legal guardian or conservator is consistent with our intent. We therefore revise paragraph (c)(1) to state, "The fiduciary's primary non-financial responsibilities include, but are not limited to . . . Contacting social workers, mental health professionals, or the beneficiary's legal guardian regarding the beneficiary, when necessary."

One commenter, citing 38 U.S.C. 5507, noted that our "principal responsibility in appointing a fiduciary is to determine [his or her] fitness to serve as a fiduciary." The commenter noted that we nonetheless tasked a fiduciary with financial and non-financial responsibilities, that proposed § 13.140(a) calls for a fiduciary to monitor the beneficiary's well-being, and that proposed § 13.140(c) states that a fiduciary has non-financial responsibilities that "include but are not limited to[.]" seven specific enumerated responsibilities. The commenter stated that the proposed "not limited to" language is vague, particularly when the

non-performance of such responsibilities can subject a fiduciary to removal under proposed § 13.500.

The commenter is correct that under section 5507 VA has authority to ensure that a person or entity appointed as fiduciary for a beneficiary is fit to serve. However, under 38 U.S.C. 5502(a)(1) Congress also authorized VA to make benefit payments to a fiduciary on behalf of a beneficiary if it appears to VA that such payment will serve the interest of the beneficiary. Under this authority, it is VA's obligation to oversee the fiduciaries it appoints to manage VA benefits on behalf of beneficiaries, and this oversight includes prescribing fiduciary responsibilities. While we may appoint a fiduciary pursuant to the requirements in section 5507, and remove them pursuant to our oversight authority under section 5502(a)(1) and (b), prior to this rulemaking, we provided no binding notice to beneficiaries and fiduciaries regarding the responsibilities of fiduciaries in VA's program. For this reason, we proposed to prescribe the core requirements for all fiduciaries, which are to monitor the well-being of the beneficiaries they are appointed to serve and to disburse funds according to beneficiary needs. Prescribing these requirements is consistent with Congress' intent when it authorized VA to create the fiduciary program. As we explained in the proposed rule, our intention is to change the culture in the fiduciary program to ensure that the fiduciary we appoint determines the beneficiary's needs and disburses funds to address those needs in the beneficiary's interest. See 79 FR 438. We explained that VA is not the fiduciary for the beneficiary and must defer to the fiduciary consistent with VA regulations. See 79 FR 438.

We also proposed to prescribe fiduciaries' specific 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. These responsibilities, among other things, reinforce VA's view that a fiduciary must maintain regular contact with a beneficiary and be responsive to beneficiary requests.

Furthermore, we used the "include, but are not limited to" language in paragraph (c) to clarify that the relationship between the beneficiary and fiduciary must be defined by each beneficiary's needs. This rulemaking provides the minimum expectations for the fiduciaries whom VA appoints but recognizes that fiduciaries may have

additional responsibilities to particular beneficiaries depending upon the fiduciary-beneficiary relationship and the beneficiary's individual needs.

Regarding the commenter's concern that a fiduciary could be removed for any unknown reasons as a result of the "include, but are not limited to" language, the alternative is to list all possible non-financial responsibilities of a fiduciary, which is impossible because of all the unique circumstances specific to individual beneficiaries. Rather, consistent with VA's intent to emphasize the fiduciary's responsibility for not only managing the beneficiary's VA funds, but also monitoring the beneficiary's general well-being, we believe § 13.140 provides sufficient guidance regarding our expectations for a fiduciary. Moreover, a fiduciary may always consult with a Fiduciary Hub regarding the scope of his or her duties and responsibilities relating to a particular beneficiary. Prior to initiating removal action, VA will thoroughly investigate any alleged misconduct or failure to satisfy responsibilities by a fiduciary and assess whether to pursue removal action. Furthermore, we explained in the preamble to proposed § 13.600 that, although the Court of Appeals for Veterans Claims' holding in *Freeman v. Shinseki*, 24 Vet. App. 404 (2011), was limited to fiduciary appointments under section 5502, it would be consistent to interpret the court's opinion to mean that there is a right to appeal any VA fiduciary decision that is made under a law that affects the provision of benefits to a VA beneficiary. See 79 FR 449. We therefore proposed in § 13.600 that a beneficiary could appeal the removal of a fiduciary. Under § 13.500, VA will provide a beneficiary clear notice of any decision to remove a fiduciary and the beneficiary's right to appeal the removal. If the basis for removal does not involve a deficiency falling within the seven enumerated non-financial responsibilities, again, VA will, consistent with VA's general fiduciary oversight authority in 38 U.S.C. 5502(a) and (b), thoroughly investigate any alleged misconduct or failure to satisfy responsibilities by a fiduciary and assess whether to pursue removal action prior to initiating removal action. For the foregoing reasons, we make no change to this proposed rule.

One commenter cited to the preamble of the proposed rule on accountings, which stated that "[c]urrent 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." See 79 FR 444. The commenter interpreted this statement as VA's acknowledgement that certain fiduciary responsibilities are burdensome. The commenter suggested that a fiduciary's financial responsibilities are burdensome and technical, and complained that VA would require family member fiduciaries to be fiscal managers, prudent investors and financial planners. The commenter suggested that VA instead promulgate rules regarding VA's responsibilities to fiduciaries, to include providing family member fiduciaries with technical support and software to carry out their financial responsibilities and protection of private information.

VA's fiduciary program policies have long recognized that service as a fiduciary for a beneficiary includes financial and other obligations that may at times be burdensome, particularly for fiduciaries that are family members. For this reason, VA's policies attempt to strike the appropriate balance between oversight and fiduciary burden. VA must protect beneficiaries from fiduciary misuse of their benefits, while also promoting service by family members and other volunteers. We do not agree with the commenter's assertion that the proposed responsibilities of a fiduciary in § 13.140 impose an unwarranted burden on family members. In our proposed rules on accountings we explained that we would continue to 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. See 79 FR 444. As a general rule, no other fiduciaries will be required to submit an annual accounting. Regarding this rule, we stated, "[c]urrent 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." See 79 FR 444. Thus, contrary to the commenter's interpretation, we did not intend the quoted portion of the preamble to mean that our proposed rules of fiduciary responsibilities are burdensome.

Furthermore, we did publish proposed rules that impose obligations comparable to financial management and planning. In fact, we proposed separate rules for fiduciary accounts

(§ 13.200), fiduciary investments (§ 13.210), and accountings (§ 13.280) for the express purpose of clearly notifying fiduciaries regarding their basic financial management and reporting obligations. These rules require maintenance of a separate fiduciary account, establish policy regarding conservation of beneficiary funds, limit investments to United States savings bonds or Federally-insured interest or dividend-paying accounts, exempt spouses and chief officers of institutions from the investment limitations, and, as described above, exempt most fiduciaries from the submission of annual audits. We do not agree that the responsibilities prescribed in § 13.140 or more specifically in § 13.200, § 13.210, or § 13.280 are unduly burdensome for family member fiduciaries. Rather, it is our intent that these rules will strike the appropriate balance between oversight and encouraging volunteer fiduciary service, with the emphasis being on allowing the fiduciary to determine the beneficiary's needs and disburse funds to address those.

We also explained our intent to change the culture of the program to ensure that fiduciaries do not unnecessarily conserve beneficiary funds. We explained, “[w]e 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.” See 79 FR 438. We intend that fiduciaries will conserve or invest 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. In our view, these basic responsibilities are consistent with industry standards and the fiduciary-beneficiary relationship, protect beneficiaries while limiting the burden on family member and other volunteer fiduciaries, and promote policies intended to improve beneficiaries' standard of living.

Regarding the responsibility of protecting a beneficiary's financial information, we prescribed the basic precautions, which if not taken, might put the beneficiary at risk of identity theft, misappropriation of funds, or other harm. In that regard, we prescribed the minimum requirements for protection of beneficiaries' private information. 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 did 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. We therefore make no change based on this comment.

Section 13.140(a)(2)(iv) requires a fiduciary to maintain financial records for a minimum of 2 years from the date VA removes the fiduciary under § 13.500, and § 13.500(a)(1)(iv) provides that VA may remove a fiduciary if “[t]he beneficiary dies.” Therefore, we note that § 13.140(a)(2)(iv) includes the requirement that a fiduciary must maintain financial records for a minimum of 2 years after a fiduciary is removed following a beneficiary's death. This requirement facilitates any inquiry into the fiduciary program and allows VA to address questions regarding the fiduciary's past services to the beneficiary. We also made a few nonsubstantive changes to § 13.140.

Section 13.210—Fiduciary Investments

We made a minor revision to § 13.210 by substituting “Fiduciaries should not conserve VA benefit funds under management for a beneficiary based primarily upon the interests of the beneficiary's heirs or according to the fiduciary's own values, preferences, and interests” for “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.” This change is necessary to provide fiduciaries with some flexibility and to avoid the perception that belief systems are an element of VA's oversight.

Section 13.220—Fiduciary Fees

We received three comments regarding proposed § 13.220. One commenter agreed with our proposal to bar fiduciary fees on retroactive benefits payments, but suggested we explicitly preempt state laws that allow a higher than 4 percent fee for fiduciary services. The commenter stated that while we proposed that our regulations would preempt state laws, we failed to invoke this preemption for fiduciary fees. The commenter read our proposed rules on fiduciary fees to mean that a fiduciary can receive a higher than 4 percent fee for his or her services, if state laws allow such higher fees.

The commenter may have overlooked our explicit language to preempt state

law in fiduciary matters. We specifically stated that we interpret 38 U.S.C. 5502(a)(1) to mean, “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.” See 79 FR 430. We further explained that we intended to apply this approach to all fiduciary matters on the effective date of the final rule. See 79 FR 430. We did not propose to authorize a higher than 4 percent fee for services performed by a fiduciary even if a state authorizes a higher fee. In the preamble to proposed § 13.220, we made it clear that when we determine that a fee is necessary to obtain a fiduciary in the best interests of a beneficiary, Congress authorized a reasonable fee to be paid from the beneficiary's VA funds, but such fee for any year may not exceed 4 percent of the beneficiary's monetary VA benefits paid to the fiduciary during any month in which the fiduciary serves. See 79 FR 440. We will not make any changes based on this comment because § 13.220 clearly prescribes that a fiduciary fee cannot exceed 4 percent of a beneficiary's monetary VA benefits paid to the beneficiary during any month in which the fiduciary serves.

Another commenter cited to proposed § 13.140(d)(1), where we prescribed that “[i]f the fiduciary is also appointed by a court, [the fiduciary must] annually provide to [VA] a certified copy of the accounting provided to the court or facilitate [VA's] receipt of such an accounting,” and proposed § 13.30(a), which prescribed the circumstances in which we would appoint a fiduciary on behalf of a beneficiary, to include when “a court with jurisdiction might determine that a beneficiary is unable to manage his or her financial affairs.” The commenter appears to have read our references to “court” in these sections to mean that VA would continue to recognize court-appointed guardians as fiduciaries, which would grant them certain exemptions from our proposed rules.

It is our intent to continue to appoint a beneficiary's court-appointed guardian to serve as VA fiduciary if we determine that no other appropriate person or entity is willing to serve without a fee and such an appointment will be in the beneficiary's interest. For existing court-appointed guardians who are serving satisfactorily as fiduciaries, we will continue their appointments as fiduciaries. However, in such appointments, only VA's regulations will prescribe the fiduciary's

responsibilities, as well as the fees they are authorized to receive. Accordingly, fees in excess of 4 percent of a beneficiary's monthly benefit payment are not authorized. Our proposed rules were clear that they would apply to existing court-appointed guardians who are also fiduciaries. We proposed to discontinue the distinction between "Federal" fiduciaries and "court-appointed" fiduciaries, and instead refer only to "fiduciary" or "fiduciaries" in our regulations. We explained that it is VA's long-standing interpretation of current law to appoint and conduct oversight regarding all individuals and entities that provide fiduciary services for beneficiaries. See 79 FR 430. We intend to issue uniform rules for all VA-appointed fiduciaries, such as allowable fees, surety bond requirements and appropriate investments, to include fiduciaries who also serve as court-appointed guardians for beneficiaries. However, for fiduciary investments that already exist, we do not intend to disturb these investments, as we recognize the risks that may be involved in any liquidation or changes. Therefore, we intend to apply our proposed regulations on fiduciary investment only to those investments acquired after the effective date of the final rule.

In proposed § 13.140(d)(1), we prescribed that a court-appointed guardian who is also a VA fiduciary should annually provide us with a certified copy of the accounting he or she provides to the court. We did not propose that this will be in lieu of submitting an accounting to VA pursuant to proposed § 13.280. Fiduciaries who are also court-appointed guardians are required to provide VA with an annual accounting as prescribed in § 13.280. Pursuant to our oversight authority, we must ensure consistency in reporting to the court and VA, and ensure that funds are used in the interest of beneficiaries.

Furthermore, proposed § 13.30(a) stated that our authority to appoint a fiduciary on behalf of a beneficiary includes cases in which "a court with jurisdiction . . . determine[s] that a beneficiary is unable to manage his or her financial affairs." This language does not mean that VA will continue to recognize court-appointed guardians without subjecting them to our rules. If VA appoints or continues the appointment of a court-appointed guardian as fiduciary, that fiduciary will be subject to VA rules only for purposes of managing the beneficiary's VA benefits. For the foregoing reasons, we do not make any changes to § 13.220 based upon the commenter's inquiry.

In proposed § 13.220(b)(4), we prescribed that VA will not authorize fiduciary fees for any month a court with jurisdiction or VA determines that a fiduciary misused or misappropriated benefits. A commenter suggested that VA would need to coordinate with courts to obtain information on misuse. The commenter further stated that there is also a need for coordination regarding fiduciary fees, as a fiduciary could receive fees from both the court and VA.

We agree with the commenter that coordination with courts is important to curtail misuse. It is our current practice to coordinate with courts and other agencies and share information when it is appropriate or necessary. We will continue to work on any necessary protocols for coordinating and information sharing between courts, VA and other agencies. However, the topic of coordinating with guardianship courts and other governmental agencies is beyond the scope of this rulemaking. With regard to fees, we clarify that a fiduciary, who is also acting as a state-appointed guardian for the beneficiary, may receive a fee not to exceed 4 percent of the monthly VA benefit for the fiduciary responsibilities but may additionally receive a fee for his or her responsibilities as a state-appointed guardian.

Section 13.230—Protection of Beneficiary Funds

We received three comments regarding proposed § 13.230. A commenter suggested that we not only exempt spouses from the surety bond requirements, but also exempt all family members who are fiduciaries. The commenter stated that requiring family members to obtain surety bonds to protect beneficiaries' funds is a waste of the beneficiary's VA funds.

Under current law, "[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]." See 38 U.S.C. 5507(a)(3). We interpret this requirement to mean that, where VA has imposed a bond requirement, the certification of any person as a fiduciary must be based in part upon the proposed fiduciary's ability to qualify for and purchase such bond. As such, this requirement is a screening tool for VA to use in confirming qualification for appointment before releasing any large 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 will not appoint the prospective

fiduciary and appoint an individual or entity who can obtain the necessary fund protection. In addition, requiring a prospective fiduciary to secure a surety bond is consistent with our oversight obligations, which among other things, include deterring fiduciary misuse of benefits. VA's surety bond requirements put a fiduciary on notice that he or she is liable to a third party for any payment on the bond, and in the event a fiduciary misuses a beneficiary's VA benefits, the bonding requirements protect the beneficiary's funds.

For the foregoing reasons, we proposed that all fiduciaries with the general exception of spouses must, within 60 days of appointment, furnish to the fiduciary hub of jurisdiction 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 also proposed to apply this rule to a fiduciary who is not initially required to obtain a bond but later over time accumulates funds on behalf of a beneficiary that exceed the \$25,000 threshold. Based on our experience in administering the program, the risks of not requiring all fiduciaries, with the exception of spouses, to furnish a surety bond significantly outweigh any burden on a prospective fiduciary.

We have exempted spouses who are fiduciaries from the surety bond requirements consistent with our long-standing policy of requiring less intrusive oversight of spouse fiduciaries. It has always been our policy to minimize the Government's intrusion into the marital relationship and to avoid dictating requirements for property that is jointly owned by a beneficiary and his or her spouse. We therefore make no changes based on this comment.

One commenter suggested that VA should require a court-appointed guardian who was previously sanctioned, disciplined, or removed by a court to furnish a surety bond as an additional screening tool, if VA is considering the appointment of that guardian as a fiduciary. In 38 U.S.C. 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. Depending on the sanction, discipline or removal a guardian received from a court, VA may appoint or continue the appointment of that fiduciary only if VA determines that there is no other person or entity willing and qualified to serve, there is no risk to the beneficiary, and the appointment is in the beneficiary's interest. VA will consider the totality of the circumstances before the

appointment or continuation of the appointment. Should VA decide to appoint or continue the appointment of a guardian as fiduciary, who was sanctioned, disciplined or removed by a court, we agree with the commenter that requiring a surety bond in such appointments may serve as an additional screening tool. Accordingly, we prescribed in § 13.230(c)(2), that “the Hub Manager may, at any time, require the fiduciary to obtain a bond described in [§ 13.230(a)] and meeting the requirements of [§ 13.230(d)], 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 cases where a fiduciary was sanctioned, disciplined or removed by the court. We therefore make no changes based on this comment.

One commenter stated that family caregivers who are also fiduciaries should be exempted from the surety bond requirements. Another commenter generally stated that family caregivers who are fiduciaries should also be exempted from the surety bond requirements because they are approved and monitored by VHA.

We note that VHA does not monitor caregivers’ management of veterans’ VA benefits. Under 38 U.S.C. 1720G(a)(1)(A), VA “establish[ed] a program of comprehensive assistance for family caregivers of eligible veterans.” As part of this program, VA has authority to provide family caregivers with “instruction, preparation and training” appropriate to provide services as caregivers, and to monitor the well-being of each eligible veteran receiving personal care services under the program. See 38 U.S.C. 1720G(a)(3)(A)(i)(I), (a)(9)(A).

VHA’s monitoring consists of maintaining a “veteran’s treatment plan and collaborat[ing] with clinical staff making home visits to monitor the eligible veteran’s well-being, adequacy of care and supervision being provided.” See 38 CFR 71.40(b)(2). Thus, while VHA provides monitoring of the adequacy of care as it pertains to the veteran’s health and well-being, it does not provide any training or oversight as it pertains to the ability of a family caregiver to manage the veteran’s VA benefits. See 38 U.S.C. 1720G(a)(9)(C); 38 CFR 71.15, 71.25(c) and (d). The fiduciary program appoints fiduciaries on behalf of beneficiaries who are unable to manage their VA benefits and provides oversight to these fiduciaries. VA-appointed fiduciaries are tasked with, among other things,

managing a beneficiary’s monetary VA benefits, while family caregivers are tasked with supporting the veteran’s health and well-being. We note further that requirements for caregivers are distinguishable in many ways from the requirements of fiduciaries. In this regard, the fact that someone may qualify as a family caregiver does not mean that they also would be able to serve as a fiduciary and/or obtain a surety bond.

Under 38 U.S.C. 5507, VA must conduct an investigation regarding a proposed fiduciary before appointing the individual to serve as a fiduciary. This investigation must include an inquiry regarding the proposed fiduciary’s criminal and credit history.

See 38 U.S.C. 5507(a)(1)(C) and (b). Furthermore, under 38 U.S.C. 5507(a), “[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].” In order to meet our oversight responsibilities and ensure that only the most qualified individuals are appointed as fiduciary to serve our vulnerable beneficiaries, we require prospective fiduciaries to furnish a surety bond consistent with proposed § 13.230. We cannot exempt a family caregiver from the surety bond requirements because the VHA caregiver program does not provide oversight as it pertains to a beneficiary’s VA benefits. We therefore do not make any changes based on this comment.

One commenter did not agree with VA’s proposal to generally eliminate the use of restricted withdrawal agreements. The commenter believes the process of converting restricted withdrawal agreements into surety bonds would result in a cost to VA by generating more work for VA’s field fiduciary employees, to include scheduling new field examinations to replace fiduciaries who cannot obtain surety bonds.

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 management of accumulated funds under management in lieu of obtaining a surety bond. We proposed to eliminate the use of withdrawal agreements in proposed § 13.230, except for fiduciaries residing in the Commonwealth of Puerto Rico, Guam, or another territory of the United States, or in the Republic of the Philippines, where surety bonds may not be available. We have determined that withdrawal agreements are

generally inconsistent with VA policy regarding the role of VA and fiduciaries in the fiduciary program. See 79 FR 441.

One of the overall goals of our rewrite of VA’s fiduciary regulations was to change the program’s culture to ensure that it is the fiduciary, and not VA, that determines the beneficiary’s needs and disburses funds to address those needs in the beneficiary’s interest. 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. In that regard, we proposed 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. VA is not the fiduciary for the beneficiary and must defer to the fiduciary consistent with VA regulations.

We do not anticipate a change in workload or any budget increases with the implementation of this rule. Currently, less than 1/8th of 1 percent of our fiduciaries have withdrawal agreements. This is a result of our current policy to require surety bonds in lieu of withdrawal agreements. For the few fiduciaries that still have withdrawal agreements, effective with our final rule, we will require them to obtain surety bonds. It will be incumbent upon the fiduciary to obtain a surety bond and provide VA with proof of the surety bond. If a fiduciary cannot obtain a surety bond because the bonding company considers the risk of fund exploitation too high, VA will not continue the appointment of the fiduciary and will instead appoint an individual or entity that can obtain the necessary fund protection. To the extent this will require additional field examinations, we expect any additional costs for this activity to be marginal. Consistent with Congress’ intent, VA makes every effort to ensure that only qualified individuals and entities provide fiduciary services for beneficiaries. As such, this requirement is a screening tool for VA to use in confirming an appointment decision before releasing any large retroactive payment to a fiduciary. We make no change based on this comment.

Section 13.250—Funds of Deceased Beneficiaries

We did not receive any comments on this regulation; however, we made a technical change consistent with governing authority. Under 38 U.S.C. 5502(e), when a beneficiary who has a fiduciary dies without leaving a valid

will and without heirs, all VA benefits under management by the fiduciary for the deceased beneficiary must be returned to VA if such funds will “escheat” to the state, less any deductions of expenses to determine that escheat is in order. In our proposed rules, we used the plain language term “forfeited” instead of “escheat.” However, to be more precise and consistent with the governing authority, we replaced the term “forfeited” with “escheat.”

Section 13.260—Personal Funds of Patients

We did not receive any comments on this rule; however, we made a couple of nonsubstantive changes to § 13.260.

Section 13.280—Accountings

In proposed § 13.280(b), we defined “accounting” to mean “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 proposed rule further states that, “[t]he accounting prescribed by this section pertains to all activity in the beneficiary’s accounts, regardless of the source of funds maintained in those accounts.” One commenter questioned VA’s authority to require accountings regarding non-VA funds that are under management by a VA-appointed fiduciary. The commenter also believed that it is VA policy to require fiduciaries to disburse non-VA funds before VA funds, and again questioned our authority for such actions.

Under 38 U.S.C. 5509(a), VA has authority to require fiduciaries to file accountings regarding funds under management. Pursuant to 38 U.S.C. 5502(b), such accountings may include disclosure of “any additional financial information concerning the beneficiary (except for information that is not available to the fiduciary).” For accounting purposes, VA has authority 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. Therefore, we prescribed, consistent with our statutory authority, that an accounting pertains to all activity in the beneficiary’s accounts, regardless of the source of income.

It is not VA’s policy to require fiduciaries to disburse a beneficiary’s non-VA funds before his or her VA funds. In fact, it is our policy as clarified in this rulemaking that it is the fiduciary who determines the beneficiary’s needs

and disburses funds to address those needs in the beneficiary’s interest. In that regard, we specifically prescribed in § 13.140(a) that a fiduciary must disburse or otherwise manage funds, which would include all non-VA funds of the beneficiary under the fiduciary’s control, 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.” We did not propose to require fiduciaries to disburse funds under management in any specific order. Accordingly, we make no change based upon these comments.

In § 13.280, we proposed that a fiduciary would be required to provide VA an annual accounting regarding funds under management for a beneficiary 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 a service-connected disability rated totally disabling. We received several comments that generally suggested that we should exempt fiduciaries who are VHA-approved family caregivers from our accounting requirements because they receive ample oversight from the VA Caregiver Support Program. One commenter specifically stated that the VA Caregiver Handbook states that joint checking, investment, and other accounts are allowed between veterans and their caregivers.

Congress granted VA the authority to “establish a program of comprehensive assistance for family caregivers of eligible veterans,” as well as a program of general support services for caregivers of “veterans who are enrolled in the health care system established under [38 U.S.C. 1705(a)] (including caregivers who do not reside with such veterans).” See 38 U.S.C. 1720G(a), (b). VHA has since established a Caregiver Support Program, which provides certain medical, travel, training, and financial benefits to caregivers of certain veterans and service members who were seriously injured in the line of duty on or after September 11, 2001. As discussed above, neither the statute and implementing regulations nor the VA Caregiver Support Program provides for any oversight as it pertains to a veteran’s VA benefits.

For fiduciaries in the fiduciary program, VA must conduct the investigation prescribed in 38 U.S.C. 5507, and thereafter conduct sufficient oversight for the purpose of, among

other things, monitoring a fiduciary regarding misappropriation or misuse of benefits and reissuance of benefits under 38 U.S.C. chapter 61. Under 38 U.S.C. 5509(a), VA has authority to require fiduciaries to file accountings regarding funds under management, and it is the responsibility of the fiduciary program to oversee the actions of fiduciaries as it relates to the use of VA benefits. Accordingly, we propose to continue to 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, 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. At this time, we will not exempt VHA-approved caregivers from the fiduciary accounting requirement because the caregiver program does not include alternative oversight of the caregiver’s fiduciary obligations.

While a commenter cited page 157 of the “VA Caregiver Handbook” and stated that the Caregiver Support Program allows joint accounts between veterans and family caregivers, a review of both the VA Caregiver Support Program Guidebook, which is no longer in use following the issuance of VHA Directive 1152, Caregiver Support Program (June 14, 2017), and the National Caregiver Training Program Caregiver Workbook did not confirm the commenter’s assertion. In the “Resources” module of the National Caregiver Training Program Caregiver Workbook, pages 153 through 168, VA outlines the resources that are available to family caregivers and mentions joint accounts, but it does not state that caregivers can open joint accounts with veterans. Because the VA Caregiver Support Program does not provide oversight of a caregiver-fiduciary’s management of a veteran’s VA benefits, we make no change based on these comments.

Two commenters suggested that we should require accountings from all fiduciaries, to include spouses. The commenters generally stated that some family members exploit the beneficiaries they are appointed to serve, and requiring accountings would serve as an additional deterrent to the misuse of benefits. Another commenter stated that a spouse caregiver who is also a fiduciary should be exempted from the accounting requirement. As stated previously, VA proposed only to require accountings 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, or the beneficiary is being paid monthly benefits in an amount equal to or greater than the rate for a service-connected disability rated totally disabling. It is our general policy that every fiduciary that meets the foregoing criteria must submit an annual accounting to VA.

We prescribed exceptions to the general accounting rules. First, no spouse will be required to submit an annual accounting. As we explained above, it is VA's long-standing policy to avoid undue intrusion into the relationship between a beneficiary and the beneficiary's spouse. It is our 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 his or her spouse. Second, we will not require the chief officer of a Federal institution to submit an annual accounting 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 will not require an annual accounting from the chief officer of a non-VA facility receiving benefits for a beneficiary institutionalized in the facility when the cost of the monthly care and maintenance and personal cost expenses of the beneficiary in the institution equals or exceeds the beneficiary's monthly benefit and the beneficiary's funds under management by the fiduciary do not exceed \$10,000. However, VA will continue to require accountings from all family members who serve as fiduciaries with the exceptions noted above. We make no change based on these comments but will continue to monitor the accounting requirements to ensure that we have the proper balance between oversight and fiduciary burden. We have, however, added new language in paragraph (a)(4) stating that accounting is required if the Hub Manager determines that it is necessary to ensure the fiduciary has properly managed the beneficiary's funds. This will allow the Hub Manager, on a case-by-case basis, to determine when an annual accounting is required to protect the beneficiary.

Section 13.400—Misuse of Benefits

We received three comments regarding proposed § 13.400. One commenter suggested our definition of misuse should include the failure of a fiduciary to distribute funds to fulfill a beneficiary's needs. However, VA cannot conclude, without a clear evidentiary basis, that a fiduciary is

misusing a beneficiary's VA benefits if that fiduciary is not distributing funds to fulfill a beneficiary's needs. A fiduciary, for example, could be conserving a beneficiary's funds instead of distributing funds to fulfill the beneficiary's needs, or be unable to perform his or her duties as fiduciary for a number of reasons, which would not equate to misuse but might justify removing the fiduciary. Our definition of misuse restates the statutory definition, and consistent with current VA policy, will facilitate VA's identification of possible misuse. Nonetheless, in the event a fiduciary is not distributing funds to fulfill a beneficiary's needs in accordance with proposed § 13.140, which would prescribe that a fiduciary must monitor the well-being of the beneficiary the fiduciary serves and disburse funds according to beneficiary's needs, the fiduciary will be removed under § 13.500. We therefore make no changes based on the comment.

Another commenter suggested that when we make a misuse determination on reconsideration, the decision should identify whether a fiduciary is a court-appointed guardian or conservator. We agree. We have amended paragraph (d)(4) to reflect that we would identify in our final misuse determination whether the fiduciary is a court-appointed guardian or conservator.

The same commenter also suggested that VA develop protocols and notify the court, in addition to the beneficiary and legal guardian, of our misuse determinations when the fiduciary is also a court-appointed guardian. We agree. In cases where a fiduciary, who is also the beneficiary's legal guardian, misappropriates or misuses a beneficiary's VA benefits and there is a bond in place payable to the court, VA will contact the court to make it aware of the situation and facilitate recovery of any misappropriated or misused funds from the surety company. In addition, VA will put the court on notice that the continuation of the appointment of the legal guardian may no longer be in the beneficiary's interest. Accordingly, in response to this comment, we have revised § 13.400(c) and (e)(1) by requiring the Director of the VA Regional Office of jurisdiction to also report misuse cases to "the court of jurisdiction if the fiduciary is also the beneficiary's court-appointed legal guardian and/or conservator."

We have amended proposed § 13.400(b) to clarify the discretionary authority of the Hub Manager to investigate or not investigate an allegation of misuse. The Hub Manager's decision is discretionary because it

involves the complicated balancing of a number of factors, including whether the misuse allegation is likely to lead to a finding of misuse and whether to expend limited funds and staffing resources in an investigation and issuance of a formal decision in response to such allegation. The revised language provides that "[u]pon receipt of information from any source regarding possible misuse of VA benefits by a fiduciary, the Hub Manager may, upon his or her discretion, investigate the matter and issue a misuse determination in writing."

Section 13.410—Reissuance and Recoupment of Misused Benefits

Section 6107(a)(2) provides that VA negligence causes misuse when the Hub Manager fails to properly investigate or monitor the fiduciary, such as when the Hub Manager fails to timely review the fiduciary's accounting or receives notice of an allegation of misuse but fails to act within 60 days of the date of notification of the alleged misuse to terminate the fiduciary. We made a technical change to proposed § 13.410(b)(1) through (b)(3) to more accurately reflect 38 U.S.C. 6107(a)(2).

In reviewing proposed § 13.410, we noticed that we failed to list one criterion in section 6107(a) for the reissuance of benefits based upon a determination that VA negligence resulted in misuse of benefits. As such, we are adding a new paragraph (b)(1)(iii) to make clear that negligence includes situations where VA received an allegation of misuse, decided to investigate after exercising its discretion, and found misuse, but failed to initiate action within 60 days of receipt of the misuse allegation to terminate the fiduciary. We are also clarifying paragraph (b)(1)(ii) to state, "The Hub Manager did not decide whether to investigate an allegation of misuse within 60 days of receipt of the allegation," which more accurately reflects the responsibility of the Hub Manager to exercise his or her discretionary authority to investigate a misuse allegation in a timely manner.

Section 13.600—Appeals

In proposed § 13.600, we proposed to close the evidentiary record on an appealable fiduciary matter once we reviewed the evidence relating to the fiduciary matter and made a decision. See 79 FR 449. We explained that our intent was to expeditiously process appeals in fiduciary matters to avoid delaying VA's effort to resolve the beneficiary's disagreement with a decision or issuing a statement of the case or certifying an appeal to the

Board. See 79 FR 449. We further explained that closing the record 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). See 79 FR 449.

We received several comments regarding proposed § 13.600 as it pertains to closing the record. One commenter is concerned that closing the record on the date our decision is made to remove a fiduciary would prevent a beneficiary from submitting new information about "the continuation of misfeasance or malfeasance by the fiduciary." The commenter is concerned that if a fiduciary retaliates against the beneficiary during the appeals process, VA could be negligent for not having such information, as the record would be closed. The commenter further believes that the closing of the record would prevent a beneficiary from submitting additional evidence for reconsideration or additional misuse.

Another commenter stated that closing the evidentiary record will obstruct compliance with the duty-to-assist statute, which provides that VA has an affirmative duty to assist a claimant in obtaining evidence to substantiate the claimant's claim for VA benefits, which may include obtaining relevant private or Government records or providing a medical examination or obtaining a medical opinion when necessary to decide the claim. See 38 U.S.C. 5103A.

In light of the foregoing comments, we reexamined proposed § 13.600 and agreed with the commenters that closing the record could prevent an appellant from submitting additional evidence that could impact a final decision under current regulations. A reexamination of this regulation also led us to conclude that closing of the evidentiary record would interfere with the general appellate process. Under 38 CFR 20.800, an appellant may submit additional evidence after initiating an appeal. Under 38 U.S.C. 7105(e), if an appellant submits additional evidence to the agency of original jurisdiction or the Board after the filing of a substantive appeal, the Board may review it for the first time on appeal unless the appellant specifically requests the agency of original jurisdiction to review it first; under 38 CFR 20.1304(a), an appellant may submit additional evidence within 90 days after an appeal is certified to the Board or before the Board issues a decision, whichever comes first; under

§ 20.1304(b), an appellant may submit additional evidence after the 90-day period upon a showing of good cause. Accordingly, we have revised § 13.600(b) to remove reference to closing the record, thus permitting the potential submission of additional evidence to the extent allowed by statutes and regulations generally governing appeals.

Regarding the commenter's concerns that the duty to assist should apply to all stages of the appeal, we stated in the preamble to proposed § 13.600 that, although decisions on fiduciary matters are made under laws that affect the provision of benefits and, therefore, fall within the scope of 38 U.S.C. 511(a) (Decisions of the Secretary; finality), 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. See 79 FR 449. Any duty to assist will be triggered at the claim development stage. Fiduciary matters arise after a beneficiary has established his or her claim for VA benefits. Therefore, the duty to assist is not applicable to fiduciary matters.

Another commenter suggested that we include incompetency rating decisions in our list of appealable decisions. The commenter stated that it is unclear whether we intend to include incompetency rating decisions as an appealable decision in our part 13 fiduciary regulations or leave such decisions in VA's 38 CFR part 3 adjudication regulations.

We did not propose to include incompetency rating decisions in our fiduciary regulations because VA determinations of incompetency are the subject of the adjudication regulations in part 3, see 38 CFR 3.353(e), which precede the appointment of a fiduciary in cases where a beneficiary is determined unable to manage his or her VA-derived monetary benefits. Beneficiaries rated by VA as being unable to manage their VA benefits are afforded the right of appeal regarding that rating through VA's regulations in 38 CFR parts 3, 19, and 20. A beneficiary enters the fiduciary program after he or she is rated unable to manage his or her VA benefits. VA's rating agencies are authorized to find beneficiaries incompetent for the purpose of disbursement of benefits, see 38 CFR 3.353(b), (c), (d), and the rules that govern these determinations are contained in VA's part 3 regulations. While VA adjudication regulations trigger entry into VA's fiduciary program, these regulations have aspects that operate independently from VA's fiduciary program. Finally, we have

found that the process described above works effectively. For the foregoing reasons, we did not propose to consolidate the rules applicable to incompetency rating decisions in our proposed part 13 regulations.

The same commenter stated that VA did not provide any reasons for closing the record after we make a final decision on an appealable fiduciary matter. The commenter stated that because fiduciary appeals involve "mentally challenged and impaired beneficiaries, the record is highly likely to be incomplete or otherwise in need of enhancement to ensure a fair and well-founded decision of appeal." Citing to 38 CFR 3.103 and *Cushman v. Shinseki*, 576 F.3d 1290 (Fed. Cir. 2009), the commenter stated that existing VA appellate procedures should govern fiduciary appeals. The commenter further stated that an appellant's right to due process includes the right to a complete and accurate record, and closing the record amounts to a violation of a beneficiary's right to due process.

As previously explained, we are amending § 13.600 to remove reference to closing the evidentiary record.

Regarding an appellant's right to due process in fiduciary matters, VA's fiduciary regulations will afford beneficiaries all of the process that is due to them under the law through specific notice and opportunity-to-be-heard provisions. After the appointment of a fiduciary, we will afford due process in VA decisions regarding fiduciary matters as prescribed in the part 13 regulations. For instance, VA will provide to the beneficiary a written decision and notice of appellate rights in a fiduciary matter that is appealable under § 13.600. See 38 CFR 13.30(b). Regarding misuse, VA will issue a decision and provide the parties an opportunity to request reconsideration and submit any additional information, see § 13.400(c), (d), and will provide to the beneficiary a written decision and notice of appellate rights following reconsideration, see §§ 13.400(d), 13.600(a)(4).

For the foregoing reasons, we have changed our position regarding the evidentiary record on appeal. To reflect these changes, in § 13.600(b), we have removed language as it pertains to the closing of the record.

General Matters

In 38 U.S.C. 5502(a)(1), Congress authorized VA to appoint a fiduciary for the purpose of receiving and disbursing VA benefits on behalf of a beneficiary: "Where it appears to the Secretary that the interest of the beneficiary would be served thereby, payment of benefits

under any law administered by [VA] 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.” In the preamble to the proposed rule, we explained that VA interprets “regardless of any legal disability” in section 5502(a)(1) to mean that, in creating the fiduciary program, Congress intended VA to preempt state laws 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. See 79 FR 430.

One commenter disagreed with our interpretation that Congress intended VA to preempt state law. The commenter stated that Congress intended VA to utilize “well-developed state law in this area to aid in the appointment, regulation, and oversight of its fiduciaries.” Citing to various Supreme Court cases, the commenter generally stated that there is no reasonable basis for our interpretation of section 5502(a)(1) and we did not address well-established legal tests for whether Congress intended a Federal statute to preempt state laws.

Matters regarding the governance of guardianships for persons with legal disabilities have their jurisdiction in state courts. See, e.g., Neb. Rev. Stat. Ann. § 30–2602(a) (LexisNexis 2017). Congress specifically provided that, “regardless of any legal disability on the part of the beneficiary,” VA can act and appoint a fiduciary on behalf of such beneficiary. Contrary to the commenter’s concern, as discussed below, this language cannot be construed to mean that Congress explicitly authorized VA to create a fiduciary program whereby it appoints a fiduciary on behalf of a beneficiary, irrespective to any legal disability, and then defers to state laws for the administration of the fiduciary program.

We do not disagree with the commenter that there are well-developed laws in matters of guardianship. We did not propose to preempt these state laws regarding the administration of state guardianship matters. When Congress enacted section 5502, it did not intend a sweeping preemption of state laws that govern guardianship activities. As we discuss further below, we believe Congress only intended for VA to preempt state law in guardianship matters as they relate to VA benefits. Under the authority granted by current law, we proposed to promulgate uniform rules for all fiduciaries appointed by VA to manage

VA benefit payments on behalf of beneficiaries. As such, if we appoint a state-appointed guardian to serve as a fiduciary on behalf of a beneficiary who is receiving VA benefits, our regulations, not state law, are applicable to the appointment and oversight of the fiduciary and the fiduciary’s management of VA benefits for the beneficiary, as Congress intended.

In establishing the fiduciary program, Congress did not intend for VA to refer to various state laws for the administration of the fiduciary program. For example, Congress did not intend for VA to utilize state laws regarding fiduciary fees that are paid from a beneficiary’s VA benefits and subject beneficiaries to the various fee schedules prescribed by states, such that beneficiaries will be treated differently depending upon state of residence. Under section 5502(a)(2), Congress specifically mandated “a reasonable commission for fiduciary services rendered” to be paid from the beneficiary’s VA funds, “but the commission for any year may not exceed 4 percent of the monetary benefits.” Furthermore, among other things, Congress authorized VA to remove any fiduciary who is not meeting the fiduciary’s responsibilities to a beneficiary or who is not acting in the beneficiary’s interest. See 38 U.S.C. 5502. VA’s authority also extends to appointment of a temporary fiduciary in certain circumstances, suspending payments to any fiduciary who fails to properly submit an accounting to VA, and, with respect to the appointment of a fiduciary, conducting investigations of prospective fiduciaries. See 38 U.S.C. 5502, 5507. The foregoing statutory obligations demonstrate Congress’ intent to create a uniform system of fiduciary services for VA beneficiaries, irrespective of inconsistent state laws.

The commenter relied on *Hines v. Stein*, 298 U.S. 94 (1936), and stated that the United States Supreme Court addressed the matter as to whether Congress intended VA to preempt state laws regarding guardianships and rejected VA’s supremacy theory 75 years ago. The commenter’s reliance on *Hines* for this proposition is misplaced. In *Hines*, the then Administrator of Veterans Affairs objected to an attorney’s fee, which was allowed by a state court for an attorney’s special services in a guardianship matter, on the grounds that the fees were in excess of the amount fixed by Federal statutes. See Id. at 96–97. The Court found that “[n]othing brought to our attention would justify the view that Congress intended to deprive state courts of their usual authority over fiduciaries, or to

sanction the promulgation of rules to that end by executive officers or bureaus.” See Id. at 98. It accordingly affirmed the order of the court of common pleas allowing the attorney’s fees. The Supreme Court’s decision in *Hines* reflects that state courts at the time of that decision had the authority to make decisions in state-appointed guardianship cases involving veterans.

This remains true in matters that do not involve matters affecting the payment of VA monetary benefits to persons whom VA has adjudicated as unable to manage these funds. In cases that involve VA’s appointment of fiduciaries and their oversight of VA funds due to persons adjudicated by VA as incompetent to manage those funds, Congress has provided specific authority authorizing VA oversight via statutes now codified in chapters 55 and 61 of title 38 of the United States Code. Because these statutes were enacted after *Hines* and therefore were not addressed in *Hines*, *Hines* does not control in matters involving VA’s appointment of fiduciaries and oversight of VA funds.

VA’s longstanding interpretation of 38 U.S.C. 5502 is that VA may establish a fiduciary program, under which it oversees beneficiaries who cannot manage their own VA benefits, and 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. It is reasonable to conclude that Congress had knowledge of state laws and *Hines* as they pertain to guardianship matters, when it granted VA the authority to administer the fiduciary program. Therefore, with its enactment of 38 U.S.C. 5502, Congress expressed a remedy for subjecting VA beneficiaries to varying state laws and intended for VA to preempt state law as it relates to appointment of fiduciaries to oversee the assets of persons whom VA adjudicated as incompetent to manage their VA-derived monetary benefits.

The commenter cited various Supreme Court cases that discuss the methods by which the Court may discern whether Congress intended to preempt state law when it enacted certain Federal legislation, and the commenter stated that VA did not address any of the tests for preemption as established by the Court. There is no dispute that the Supreme Court has established various tests on the issue of whether a Federal statute preempts state laws and has discussed the various tests in numerous cases. The commenter cited *Pharmaceutical Research and*

Manufacturers of America v. Walsh, 538 U.S. 644 (2003), in which the Court noted: “the question [in this case] is whether there is a probability that [a state’s] program was pre-empted by the mere existence of the federal statute. We start therefore with a presumption that the state statute is valid . . . and ask whether petitioner has shouldered the burden of overcoming that presumption.” See *Id.* at 661–662 (citation omitted). *Walsh* concerned whether a Maine prescription drug law, under which the state attempted to renegotiate rebates with drug manufacturers, was preempted by the Federal Medicaid statute. See *Id.* at 650–51.

The above-quoted statement in *Walsh* describes how the burden of showing preemption is allocated in litigation between private parties. It does not describe how courts determine whether an agency is correct in finding that Federal law preempts certain state actions. See, e.g., *id.* at 661 (stating that, if the agency had determined that the state law impermissibly conflicted with Federal law, the agency’s “ruling would have been presumptively valid”). As explained below, our conclusion is consistent with the general standards courts apply in determining that Federal law preempts any conflicting state laws as to matters that Congress intended would be governed by Federal law. Further, unlike *Walsh*, we are not assessing the validity or invalidity of a specific state statute but, rather, are merely explaining the basis for our conclusion that Congress authorized VA to establish uniform standards governing VA fiduciary matters that would preempt state law in the event of any conflict.

As an initial matter, we emphasize that VA did not propose to intrude on state authority over a particular activity, specifically its governance of guardianship matters. In that regard, if a state appoints a person or entity to serve as legal guardian for an individual, the state law of jurisdiction would apply to that matter, and VA has no authority to interfere. VA did not propose to regulate state guardianships or to invalidate state laws as they apply to guardianship matters. However, if VA determines that it will be in a VA beneficiary’s interest to appoint the beneficiary’s state-appointed guardian as fiduciary over the beneficiary’s VA monetary benefits, VA’s regulations will apply to VA’s appointment of that fiduciary and VA’s oversight of the fiduciary’s management of VA funds.

The doctrine of preemption has its roots in the Supremacy Clause, U.S. Const., art. VI, cl. 2, and requires courts

to examine congressional intent. *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 152–53 (1982). The Supreme Court has held that preemption “may be either express or implied, and is compelled whether Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose. Absent explicit pre-emptive language, Congress’ intent to supersede state law altogether may be inferred because the scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it, because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject, or because the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose.” See *Id.* (citations and quotations omitted). Further, “[e]ven where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility.” See *Id.* at 153.

In deciding questions of preemption, courts follow two guiding principles: “First, the purpose of Congress is the ultimate touchstone in every pre-emption case. Second, in all preemption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, . . . [courts] start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” See *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (citations and quotations omitted).

Here, upon a plain reading of section 5502(a)(2) and a review of its legislative history, Congress intended VA 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. As noted above, it is well established in guardianship statutes that guardianship matters relating to legal disability have their jurisdiction in state courts. State courts ultimately determine the necessity of a legal guardian based on the individual’s legal disability. As such, Congress would have excluded the specific language “regardless of any legal disability” in

section 5502 had it intended for state laws to apply to matters of payment of VA benefits to fiduciaries on behalf of VA beneficiaries who cannot manage their VA benefits. Instead, Congress provided for VA to appoint a fiduciary irrespective to any legal disability of the beneficiary and for Federal laws, rather than state laws, to govern the fiduciary program. See 38 U.S.C. 5502(a)(2) (“a fiduciary appointed by the Secretary”). More fundamentally, by vesting VA with statutory authority over the appointment, supervision, payment, and removal VA fiduciaries, Congress has made clear its intent that Federal law will govern those matters. Thus, VA proposed rules that are uniform to all fiduciaries that it appoints to manage VA benefits on behalf of beneficiaries.

In 1974, Congress amended then 38 U.S.C. 3202 and authorized VA to make payments to a fiduciary other than a state-appointed guardian. See Public Law 93–295, sec. 301, 88 Stat. 180, 183–84 (1974). Furthermore, 38 U.S.C. 5502(b), among other things, authorizes VA to suspend benefits to a fiduciary, regardless of whether he or she is appointed as guardian by the state court, if that fiduciary refuses to render an account to VA, or if he or she neglects to administer a beneficiary’s estate according to law. Our conclusions regarding the plain language and the structure and purpose of section 5502 are bolstered by its legislative history. The language and available legislative history of the statute reflect Congress’ intent to create a uniform fiduciary program for all VA beneficiaries who are unable to manage their VA benefits.

In support of the commenter’s assertion that Congress intended VA to defer to the various state laws in its administration of the fiduciary program, the commenter noted that Congress did not prescribe any specific duty of trust for fiduciaries or administrative provisions, and generally stated that section 5502 contains language establishing Congress’ intent to have VA defer to state law. We do not agree.

As the commenter stated, there are well-established legal tests for whether Congress intended to have a Federal statute preempt state laws, and the absence of language in a Federal statute does not itself mean that Congress intended that VA will defer to state law, particularly when Congress routinely delegates broad authority to Federal agencies to determine how to best administer Federal programs. Section 5502 is this type of broad authority. Nonetheless, in light of this comment, we revised § 13.140(a)(1) to include that fiduciaries in the fiduciary program owe VA and beneficiaries the duties of good

faith and candor and must administer a beneficiary's funds under management in accordance with paragraph (b) of § 13.140. We agree with the commenter that duties of candor and good faith are essential in a fiduciary-beneficiary relationship, and a fiduciary should be required to exercise good faith and to take the same care regarding a beneficiary's funds under management as he would for his or her own funds. Although the statute is silent as to these duties, it is highly unlikely that Congress would not have intended VA to require such duties from a fiduciary it appoints.

Furthermore, pursuant to 38 U.S.C. 501(a), VA may promulgate regulations that are "necessary or appropriate to carry out the laws administered by the Department and are consistent with [38 U.S.C. 5502]." We therefore determined that the foregoing change to § 13.140(a)(1) is appropriate and consistent with Congress' intent.

The commenter's reliance on the language in section 5502(b) that states that "[VA] may appear or intervene . . . in any court as an interested party in any litigation . . . affecting money paid to such fiduciary" to argue that Congress intended VA to utilize state law in administering the fiduciary program is misplaced. The intent of the 1935 amendment to add this language to the statute was to clarify and expand the authority of the Veterans Administration to supervise court-appointed fiduciaries and to participate in litigation. See H.R. Rep. No. 74-16, at 1-2 (1935) ("[T]here is also a need for amendment to more clearly define and extend the authority of the Administrator of Veterans' Affairs to appear in courts or intervene as an interested party in litigation directly affecting money paid to fiduciaries of beneficiaries under this section."). This language, however, does not require in any way for VA to use state laws to administer its fiduciary program. Where Congress has intended to require VA to follow state law on a particular matter relevant to VA benefits, it has done so expressly. See 38 U.S.C. 103(c). In contrast, section 5502 vests VA with authority to establish uniform Federal standards governing the appointment, supervision, payment, and removal of VA fiduciaries. VA has implemented that authority by establishing such uniform Federal standard, rather than relying upon state law, in view of the complexity, inconsistency and confusion that could result from administering a Federal program by following myriad state laws.

Furthermore, the commenter's belief that the language in section 5502(e)

regarding escheat of funds held by a fiduciary demonstrates Congress' intent regarding state law is contrary to the plain text of the statute. Section 5502(e) in its entirety provides that "[a]ny funds in the hands of a fiduciary appointed by a State court or the Secretary derived from benefits payable under laws administered by the Secretary, 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, or by the personal representative of the deceased beneficiary, less legal expenses of any administration necessary to determine that an escheat is in order, to the Department, and shall be deposited to the credit of the applicable revolving fund, trust fund, or appropriation." It does not provide that any escheat of VA funds with a fiduciary should be administered pursuant to state laws.

Based on the foregoing, we find that Congress clearly intended in section 5502 that VA would be responsible for prescribing and enforcing Federal standards governing the appointment, supervision, payment, and removal of VA fiduciaries and that those Federal standards would preempt any conflicting state laws on such matters. Consistent with that intent and authority, VA has established national standards for all vulnerable VA beneficiaries, regardless of their state of residence. As such, we make no changes based on the comment.

The same commenter stated that our proposed regulations should establish clear evidentiary standards upon which VA bases its decision that a beneficiary is unable to manage his or her VA benefits; however, this matter is beyond the scope of this rulemaking. The commenter noted that such standards are necessary to ensure that a beneficiary is not arbitrarily and capriciously deprived of the right to control his or her own property.

While our proposed fiduciary regulations do not contain the evidentiary standards for determining when a beneficiary is unable to manage his or her VA benefits, the regulations in 38 CFR part 3 prescribe such standards. Therefore, there are measures in place to ensure that a beneficiary is not arbitrarily or capriciously deprived of his or her right to control his or her VA benefits. A VA regulation provides that, for purposes of payment of VA benefits, VA's rating agencies have the authority to make determinations of competency and incompetency. See 38 CFR 3.353(b)(1). "Unless the medical evidence is clear, convincing and leaves no doubt as to the person's

incompetency, [VA] will make no determination of incompetency without a definite expression regarding the question by the responsible medical authorities." See 38 CFR 3.353(c). Such determinations must be "based upon all evidence of record and there should be a consistent relationship between the percentage of disability, facts relating to commitment or hospitalization and the holding of incompetency." See *Id.* The regulation further provides that there is a presumption in favor of competency. See 38 CFR 3.353(d). "Where reasonable doubt arises regarding a beneficiary's mental capacity to contract or to manage his or her own affairs, including the disbursement of funds without limitation, such doubt will be resolved in favor of competency." See *Id.* In addition, VA regulations provide for notice and an opportunity to be heard regarding the determination of incompetency. See 38 CFR 3.103(c), 3.353(e).

Moreover, not only is a beneficiary who is deemed unable to manage his or her VA benefits entitled to all of the appellate procedures associated with other VA decisions that affect the provision of his or her VA benefits, as noted above, he or she is also entitled to a pre-determination hearing if he or she so requests. In addition, even after the beneficiary is found to be unable to manage his or her VA benefits, current part 13 regulations, in appropriate circumstances, allow a beneficiary to manage his or her own VA benefits by placing him or her in a supervised direct pay program. This option provides an additional layer of protection against the erroneous deprivation of a beneficiary to control his or her own VA benefits. Finally, a beneficiary who believes that VA did not follow all applicable procedures in selecting a fiduciary may appeal this determination to the Board. Collectively, these standards provide protection against any arbitrary and capricious determinations relating to the beneficiary's ability to control his or her own VA benefits. We therefore make no change based on this comment.

A commenter stated that our proposed rules should contain qualifications and training requirements for field examiners because, among other things, field examiners are required to make decisions regarding budgets and living conditions for beneficiaries. However, the qualifications of and training for VA field examiners is an administrative matter that is outside the scope of this rulemaking. VA makes every effort to hire the most qualified field examiners and provide any training VA deems necessary, but such matters generally

are not the subject of VA regulations. Further, while VA field examiners make recommendations about whether a beneficiary's needs are being addressed and whether his or her funds are being utilized appropriately, decisions concerning appointment and/or removal of fiduciaries are made by the fiduciary hub with jurisdiction over the case, not the individual field examiner.

One commenter stated that fiduciaries are tasked with many responsibilities and noted that our rulemaking cannot address training for fiduciaries but asked that we provide services or training for fiduciaries. VA makes every effort to provide training and services to fiduciaries we appoint to serve our beneficiaries. Currently, there is a handbook titled, "A Guide for VA Fiduciaries," which we provide to fiduciaries. In addition, VA has an internet website that provides training and other resources to fiduciaries. The link to the website is: <http://www.benefits.va.gov/fiduciary/index.asp>. Fiduciaries also have ways of contacting VA with questions. Fiduciaries can also call the VA Fiduciary's Program's assistance line at 1-888-407-0144 with questions or email questions to any of the fiduciary hubs at the following email addresses: Columbia: vavbacms/ro/fid@va.gov; Louisville: avbacms/ro/fid@va.gov; Milwaukee: vavbamiw/ro/fidhub@va.gov; Lincoln: vavbalin/ro/fidhub@va.gov; Indianapolis: ind.fidhub@va.gov; Salt Lake City: vbawa.hub@va.gov.

In proposed § 13.140, regarding the responsibilities of fiduciaries, we prescribed financial and nonfinancial responsibilities for fiduciaries. We believe that such responsibilities are consistent with industry standards for fiduciaries. We prescribed that fiduciaries will 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 addition, we prescribed a fiduciary's non-financial responsibilities to generally include 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, and that a fiduciary must maintain regular contact with a beneficiary and be responsive to beneficiary requests. We believe such responsibilities are the basic responsibilities of any fiduciary-beneficiary relationship. We do not

believe that such responsibilities are burdensome. Nonetheless, we strive to provide fiduciaries with any information that could be useful in the performance of their duties as fiduciaries.

One commenter inquired about VA's approach regarding court-appointed guardianships and the cost associated with such guardianships. The commenter noted that state courts have primary oversight of court-appointed guardians and fees associated with such guardianships. The commenter inquired about VA's approach to legal guardianships, as state courts have jurisdiction over such matters.

VA's fiduciary regulations will result in a gradual discontinuance of the current practice of recognizing a court-appointed guardian or fiduciary for purposes of receiving VA benefits on behalf of a VA beneficiary. Instead, VA will establish a national standard for appointing and overseeing fiduciaries. In certain cases, VA may appoint a beneficiary's court-appointed guardian or fiduciary to serve as VA fiduciary if we determine that such an appointment will be in the beneficiary's interest. In that regard, if VA appoints a court-appointed guardian or fiduciary to also serve as VA fiduciary, VA's rules will apply as it pertains to the management of VA funds. This final rule will, over time, result in uniformity for all fiduciaries appointed by VA to manage VA benefit payments on behalf of a beneficiary and significantly reduce costs associated with court-appointed guardians or fiduciaries. Congress enacted 38 U.S.C. 5502, under which it gave VA the authority to administer the fiduciary program. VA's longstanding interpretation of this authority is that VA may establish a fiduciary program that is governed by federal laws and not various state laws. In this regard, federal laws (and not competing state laws) apply to the appointment of a VA fiduciary and VA's oversight of the fiduciary's management of a beneficiary's VA benefits.

For example, all prospective fiduciaries who will receive VA benefit payments on behalf of a beneficiary will undergo a VA investigation mandated by 38 U.S.C. 5507, regardless of if that potential fiduciary serves as a court-appointed guardian and underwent a qualification process prescribed by state law, which may vary from state to state. Also, all VA fiduciaries will have the same accounting requirements regarding a beneficiary's VA funds under management, to include the frequency of submitting an accounting, irrespective of state courts requirements. In addition, VA will not rely on state

laws that subject beneficiaries to varying fee schedules depending upon the beneficiaries' state of residence. In cases in which VA determines that a fee or commission is necessary to obtain a fiduciary, Congress authorized "a reasonable commission for fiduciary services rendered" to be paid from the beneficiary's VA funds. See 38 U.S.C. 5502(a)(2). However, section 5502(a)(2) limits such commissions for any year to 4 percent of the beneficiary's VA monetary benefits paid to the fiduciary during the year. VA's regulations will consistently implement this authority and limit fees to 4 percent to any fiduciary we appoint. This will diminish the potential for adverse impacts on beneficiaries caused by orders issued in state courts approving fiduciary commissions that exceed the 4 percent Federal cap and make clear that a VA fiduciary's fees are limited to a statutory cap of 4 percent of the beneficiary's VA funds.

VA makes a distinction between commissions charged by the guardian related to the services of a fiduciary and expenses incurred by a beneficiary for administrative items. This final rule does not prohibit a fiduciary appointed by VA from disbursing funds to meet the expenses associated with a beneficiary's court-appointed guardianship, if such expenses are deemed reasonable. Duplication of work performed by VA-appointed and state-court-appointed fiduciaries is highly discouraged as it unnecessarily diminishes beneficiary assets.

One commenter recommended that we inform all probate courts in the nation that VA intends to appoint court-appointed fiduciaries as VA fiduciaries as a last resort. We agree and intend to notify certain interested parties, to include courts and guardians, of the important changes in this final rule.

We have made a few non-substantive edits to the proposed regulations: We changed references to "18 years of age" to "age of majority," changed a reference to "Regional Counsel" to "District Counsel" to reflect current terminology, changed a reference to "Assistant General Counsel" to "Chief Counsel" for the same reason, and replaced "State" with "state."

Paperwork Reduction Act

This final rule at §§ 13.30, 13.140, 13.230, 13.280, and 13.600 contains new and revised collections of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521). On January 3, 2014, in the proposed rule published in the **Federal Register**, we requested public comments on the new and revised collections of information. We

received no comments. VA has submitted the additional collections in part 13 to OMB for review under OMB Control Numbers 2900–0017, 2900–0085, 2900–0803, 2900–0804, and 2900–0815. We are adding a parenthetical statement after the authority citations in the amendatory language of this final rule to all of the sections in part 39 for which new and revised collections have been assigned control numbers, so that the control numbers are displayed for each collection.

In accordance with 44 U.S.C. 3507(d), VA submitted a copy of the proposed rule to OMB for review and they assigned OMB control Number 2900–0815 for a new information collection contained in section 13.140(a)(2)(iv) of the proposed rule. However, the proposed rule did not explicitly solicit comments on the new information collection contained in section 13.140(a)(2)(iv). Therefore, VA requests comments by the public on the new collection of information contained in section 13.140(a)(2)(iv) 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 details of the new collection of information contained in 38 CFR 13.140(a)(2)(iv) that were omitted from the comment solicitation in the proposed rule and that we seek comments through this final rule are described as follows:

Title: Maintenance of Financial Records by Federal Fiduciaries.

Summary of collection of information: Under 38 CFR 13.140, a fiduciary is required to maintain paper and electronic records relating to the management of VA benefits for the duration of service as fiduciary and for a minimum of two years following removal or resignation. 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 the purposes of continued monitoring and oversight of the fiduciary.

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.

VA welcomes comments on this new information collection. Comments on the collections of information contained in this final 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 (00REG), Department of Veterans Affairs, 810 Vermont Ave. NW, Room 1063B, Washington, DC 20420; fax to (202) 273–9026 (this is not a toll-free number); or email comments through www.Regulations.gov. Comments should indicate that they are submitted in response to “RIN 2900–AO53.”

We are providing a 30 day comment period on this new information collection. Comments are due to OMB by August 13, 2018. We will consider all comments on the above described information collection.

The information collection provisions in this final rule subject to the PRA will not become effective until OMB approves the collections.

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will 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 final rule will primarily affect individual beneficiaries and fiduciaries. It will not cause a significant economic impact on fiduciaries since VA generally appoints individual family members, friends, or caretakers to provide fiduciary services for beneficiaries. These services are, in most instances, provided without charge. While some business entities provide fiduciary services to VA beneficiaries for a fee, those fees, which are capped at 4 percent of monetary benefits paid, are not sufficient to result in a significant economic impact. Therefore, pursuant to 5 U.S.C. 605(b), this final rule is exempt from the initial

and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Order 13132, Federalism

A rule has federalism implications under Executive Order 13132, Federalism, if it has a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Under the Order, if a rule has federalism implications and preempts state law, to the extent practicable and permitted by law, an agency must consult with state officials concerning the rule. We have analyzed this rule under that Order and have determined that this rule does not have any new federalism implications but merely clarifies existing regulations that govern the VA fiduciary program and implements existing statutory authority provided by Congress for VA to establish and administer a fiduciary program relating to VA benefits on behalf of beneficiaries. VA does not intend to act through this rule to preempt state law but relies on authority provided by Congress. Accordingly, we do not believe this final rule requires VA to consult with state officials prior to its publication.

In 38 U.S.C. 5502(a)(1), Congress authorized VA to appoint a fiduciary for the purpose of receiving and disbursing VA benefits on behalf of a beneficiary: “Where it appears to the Secretary that the interest of the beneficiary would be served thereby, payment of benefits under any law administered by [VA] 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.” In the preamble to the proposed rule, we explained that VA interprets “regardless of any legal disability” in section 5502(a)(1) to mean that, in creating the fiduciary program, Congress intended VA to preempt state laws 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. See 79 FR 430.

Matters regarding the governance of guardianships for persons with legal disabilities have their jurisdiction in state courts. See *e.g.*, Neb. Rev. Stat. Ann. § 30–2602(a) (LexisNexis 2017). Congress specifically provided that, “regardless of any legal disability on the part of the beneficiary,” VA can act and appoint a fiduciary on behalf of such beneficiary. This language cannot be construed to mean that Congress

explicitly authorized VA to create a fiduciary program whereby it appoints a fiduciary on behalf of a beneficiary, irrespective to any legal disability, and then defers to state laws for the administration of the fiduciary program.

We realize that there are well-developed state laws in matters of guardianship. When Congress enacted section 5502, it did not intend a sweeping preemption of state laws that govern guardianship activities. Rather, we believe Congress only intended for VA to preempt state law in guardianship matters as they relate to VA benefits. Under the authority granted by current law, the purpose for this final rule is to promulgate uniform rules for all fiduciaries appointed by VA to manage VA benefit payments on behalf of beneficiaries. As such, if we appoint a state-appointed guardian to serve as a fiduciary on behalf of a beneficiary who is receiving VA benefits, our regulations, not state law, are applicable to the appointment and oversight of the fiduciary and the fiduciary's management of VA benefits for the beneficiary, as Congress intended.

For instance, Congress did not intend for VA to utilize state laws regarding fiduciary fees that are paid from a beneficiary's VA benefits and subject beneficiaries to the various fee schedules prescribed by states, such that beneficiaries will be treated differently depending upon state of residence. Under section 5502(a)(2), Congress specifically mandated "a reasonable commission for fiduciary services rendered" to be paid from the beneficiary's VA funds, "but the commission for any year may not exceed 4 percent of the monetary benefits." Furthermore, among other things, Congress authorized VA to remove any fiduciary who is not meeting the fiduciary's responsibilities to a beneficiary or who is not acting in the beneficiary's interest. See 38 U.S.C. 5502. VA's authority also extends to appointment of a temporary fiduciary in certain circumstances and suspending payments to any fiduciary who fails to properly submit an accounting to VA. See 38 U.S.C. 5502.

Current 38 CFR part 13 has not been updated since 1975. Congress has since 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. The foregoing statutory obligations demonstrate Congress' intent to create a uniform system of fiduciary services for VA beneficiaries, irrespective of inconsistent state laws.

Congress' intent to have Federal laws governing VA's fiduciary program preempt any conflicting state laws is clear in the chapter 55 and 61 provisions. While state law provides some guidance concerning fiduciary matters, those laws vary significantly from state to state and do not pertain to VA's fiduciary program. Further, VA does rely on state laws in cases where a state court has appointed a fiduciary for oversight of the veteran's assets and where there is no conflict between state and Federal law, and/or when the court-appointed fiduciary is the same as the VA-appointed fiduciary. State laws often provide helpful guidance; however, under the Supremacy Clause of the Constitution, Federal law is controlling. See U.S. Const. art. VI, cl 2; *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372–73 (2000). To the extent that a dispute arises between Federal and state law, Federal law establishing and governing VA's fiduciary program as codified in 38 U.S.C. chapters 55 and 61, as well as in regulations implementing those statutes, controls.

Again, because this rule does not have any new federalism implications but merely clarifies existing regulations that govern the VA fiduciary program and implements existing statutory authority provided by Congress for VA to establish and administer a fiduciary program relating to VA benefits on behalf of beneficiaries, we do not believe this final rule requires VA to consult with state officials prior to its publication and believe that this rule is in compliance with Executive Order 13132.

Executive Orders 12866, 13563, and 13771

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), unless OMB waives such review, 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.

VA has examined the economic, interagency, budgetary, legal, and policy implications of this final rule, and it has been determined to be a significant regulatory action under Executive Order 12866, because it raises novel legal or policy issues arising out of legal mandates.

This final rule is considered an E.O. 13771 regulatory action. Details on the estimated costs of this final rule can be found in the rule's economic analysis.

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 the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This final rule will have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance program numbers and titles for this final 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.

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.

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. Jacquelyn Hayes-Byrd, Deputy Chief of Staff, Department of Veterans Affairs, approved this document on March 20, 2018, for publication.

Dated: July 6, 2018.

Consuela Benjamin,

Regulation Development Coordinator, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

For the reasons stated in the preamble, VA amends 38 CFR parts 3 and 13 as follows:

PART 3—ADJUDICATION

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

■ 1. The authority citation for 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 and undesignated center heading [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 the age of majority.

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 the age of majority, 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 monetary 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 Manila, Philippines, VA Regional Office.

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

(1) 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;

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

(3) Is less than the age of majority.

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, as defined by this chapter.

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.

Written notice means that VA will provide to the beneficiary and the beneficiary's representative and legal guardian, if any, a written decision in a fiduciary matter that is appealable under § 13.600. Such notice will include:

- (1) A clear statement of the decision,
- (2) The reason(s) for the decision,
- (3) A summary of the evidence considered in reaching the decision, and
- (4) The necessary procedures and time limits to initiate an appeal of the decision.

(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 the age of majority, 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 reaches the age of majority or older;
- (2) Receive written 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 if the beneficiary is in the fiduciary program as a result of a court order and not a decision by VA's rating agency; or

(C) Attains the age of majority;

(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)

(Approved by the Office of Management and Budget under control number 2900-0017.)

§ 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 Chief 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, 38 U.S.C. 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 of majority.

(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 of majority, but

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

(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 his or her 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 or reappointment 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) The Hub Manager must conduct the requirements of paragraphs (f)(1)(i),(ii) and (iii) for every subsequent appointment of the fiduciary for each beneficiary.

(4) 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 the age of majority, 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) 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

(ii) 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 who has reached the age of majority 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;

(i) The Hub Manager will waive the requirements of paragraph (b)(1) of this section if the Veterans Health Administration (VHA) has approved the fiduciary as the beneficiary's family caregiver, and VHA's status report regarding the beneficiary indicates the beneficiary is in an excellent situation.

(ii) The provisions of paragraph (b)(1)(i) of this section do not apply when the Hub Manager has information that a fiduciary, who is also the beneficiary's VHA-designated family caregiver, is misusing a beneficiary's VA funds under management, is neglecting a beneficiary, or has failed to comply with the requirements of § 13.140, or there is insufficient evidence to determine the beneficiary's well-being.

(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)

(Approved by the Office of Management and Budget under control numbers 2900-0815 and 2900-0803.)

§ 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) Has been removed as legal guardian by a state court for misconduct;

(7) Is under the age of majority; or

(8) 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.

Fiduciaries owe VA and beneficiaries the duties of good faith and candor and must administer a beneficiary's funds under management in accordance with paragraph (b) of this section. 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* mean 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 primarily 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.

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

(1) Contacting social workers, mental health professionals, or the beneficiary's legal guardian 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;

(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(s) provided to the court or facilitate the hub's receipt of such accountings;

(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)

(Approved by the Office of Management and Budget under control numbers 2900-0017 and 2900-0085.)

§ 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 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 should not conserve VA benefit funds under management for a beneficiary based primarily upon the interests of the beneficiary's heirs or according to the fiduciary's own 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) (Approved by the Office of Management and Budget under control numbers 2900–0017 and 2900–0804.)

§ 13.240 Funds of beneficiaries less than the age of majority.

(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 the age of majority 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 the age of majority 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 escheat 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 escheat 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 that 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 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 District 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;

(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; or

(4) The Hub Manager determines an accounting is necessary to ensure the fiduciary has properly managed the beneficiary's funds.

(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 and both permanently resides outside of the United States or in the Commonwealth of Puerto Rico or the Republic of the Philippines, and the fiduciary was appointed outside of the United States or in the Commonwealth of Puerto Rico or the Republic of the Philippines.

(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) (Approved by the Office of Management and Budget 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 within 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 information from any source regarding possible misuse of VA benefits by a fiduciary, the Hub Manager may, upon his or her discretion, 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;

(3) The court of jurisdiction if the fiduciary is also the beneficiary's court-appointed guardian and/or conservator; and

(4) 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 if the fiduciary is also the beneficiary's court-appointed guardian or conservator,

(iv) Identify the date of the Hub Manager's prior decision,

(v) 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

(vi) 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;

(iii) The court, if the fiduciary is also the beneficiary's court-appointed guardian or conservator; and

(iv) 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, and the court of jurisdiction if the fiduciary is also the beneficiary's court-appointed legal guardian and/or conservator.

(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; for example, when:

(i) The Hub Manager failed to review the fiduciary's accounting within 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;

(ii) The Hub Manager did not decide whether to investigate an allegation of misuse within 60 days of receipt of the allegation;

(iii) After deciding to investigate an allegation of misuse and finding misuse, the Hub Manager failed to initiate action within 60 days of receipt of the misuse allegation to terminate the fiduciary.

(2) Actual negligence by VA 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 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 § 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 within 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 provide other instructions to the fiduciary.

(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 the appointment of a successor fiduciary, 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 appointment of a successor fiduciary 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.

(2) The initiation and processing of appeals under this section are governed by parts 19 and 20 of this chapter.

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

(Approved by the Office of Management and Budget under control number 2900-0085.)

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