THE VETERANS BENEFITS ADMINISTRATION'S FIDUCIARY PROGRAM, INCLUDING IMPLEMENTATION OF TITLE V OF PUBLIC LAW 108-454

HEARING

BEFORE THE

COMMITTEE ON VETERANS' AFFAIRS

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS

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THE VETERANS BENEFITS ADMINISTRATION'S FIDUCIARY PROGRAM, INCLUDING IMPLEMENTATION OF TITLE V OF PUBLIC LAW 108-454

Thursday, June 8, 2006

U.S. House of Representatives,
Subcommittee on Disability Assistance and Memorial Affairs,
Committee on Veterans' Affairs,
Washington, D.C.

The Subcommittee met, pursuant to call, at 10:00 a.m., in Room 340, Cannon House Office Building, Hon. Jeff Miller presiding.

Present: Representatives Miller, Berkley and Udall.

Staff Present: Paige E. McManus, Majority Counsel; Mary Ellen McCarthy, Minority Counsel.

Mr. Miller. Good morning, the hearing will come to order. We are meeting to receive testimony this morning on the Veterans Benefits Administration's implementation of Title V of Public Law 108-454, as well as VBA's Field Examination Activity.

As the veteran population ages, more Department of Veterans Affairs beneficiaries will require the appointment of a fiduciary to assist them in managing the monetary benefits provided by VBA. The process of appointing a fiduciary is different than the legal process of appointing a guardian or an conservator. However, the goal is the same, and that is to protect the interests of the beneficiary. Once a fiduciary is recognized by the VBA, the Department conducts periodic field examinations to ensure that the beneficiary's assets are being properly managed. During 2005, the VBA completed over 77,000 field exams, annual accountings and other fiduciary-related actions for over 100,000 beneficiaries.

Under Title V of Public Law 108-454, signed into law on the 10th of December of 2004, changes were made to VBA's Fiduciary Program to improve fiduciary accountability and strengthen protections for the beneficiary. Among other things, the law requires VBA to conduct more thorough investigations of fiduciaries before being appointed, and requires VBA to reissue benefits that were misused if

VBA was negligent in failing to investigate the fiduciary.

Today the Subcommittee would like a report on the implementation of these provisions. So, without further ado, I yield to my Ranking Member.

[The statement of Hon. Jeff Miller appears on p. 13]

MS. BERKLEY. First, I would like to thank the Chairman for holding this hearing, and welcome our witnesses. I appreciate the time you're taking to come here and help educate us.

Veterans and their survivors who are unable to handle their own financial affairs need appropriate assistance and oversight to obtain the benefits they deserve in a timely manner. I'm pleased that the Department of Veterans Affairs has made progress in implementing the Veterans Benefits Act of 2004, but in my mind more needs to be done.

Last December, this Committee was contacted by a veteran who had been rated 100 percent disabled, and was determined to be incompetent by the VA to handle his financial affairs. He wanted to move closer to his family, as his family wanted him to move closer to them, but he was unable to do so until a fiduciary was appointed, and he could receive the funds he needed to move. Resolving his issue took the Committee's staff three months and repeated inquiries involving two Regional Offices. Due to the work of the Committee staff, a fiduciary was eventually appointed. However, the entire process was extremely stressful for the veteran, his family, and unfortunately, or fortunately, the Committee staff can't do this for every veteran that needs the help.

I'm also worried that the VA does not recognize durable powers of attorney. A durable power of attorney executed under state laws becomes effective upon the person becoming incompetent or unable to manage his or her affairs. Because the VA is not recognizing persons who hold a durable power of attorney for purposes of filing an application for benefits, I plan to introduce legislation which would require the VA to do so.

I'm also concerned that there may be inadequate coordination between the Veterans Benefits Administration and the Inspector General's Office to ensure that benefits are reissued when a fiduciary with ten or more beneficiaries misuses funds, which is shameful, and we shouldn't even have to be discussing this, but unfortunately we do. It appears that this was not done in a recent case.

I hope that the witnesses will be able to address the issues that I have raised, and I thank you again for being here today. I look forward to your testimony.

[The statement of Hon. Shelley Berkley appears on p. 14]

MR. MILLER. Thank you very much. We have one panel this morning. They are seated at the table, and testifying for VBA is Ms. Renee Szybala, Director of VBA's Compensation and Pension Service. Ms. Szybala is accompanied by Ms. Patricia Knapp, Fiduciary Chief of the Compensation and Pension Service. I welcome both of you here this morning, and before you begin your testimony, I'd like to recognize Ms. Knapp for her years of dedicated service at VA. She's retiring in July. She began her career in the Regional Office in Cleveland as a Benefits Counselor, and after 25 years at the Regional Office she was promoted to the VA Central Office where she was a Program Analyst at the Fiduciary Program. She was appointed Chief of the program in 2002. Ms. Knapp, we all thank you for service and we wish you the best of luck in your retirement.

MS. KNAPP. Thank you.

MR. MILLER. Ms. Szybala, you may proceed.

STATEMENT OF RENEE L. SZYBALA, DIRECTOR, COMPENSATION AND PENSION SERVICE, VETERANS BENEFITS ADMINISTRATION; ACCOMPANIED BY PATRICIA K. KNAPP, FIDUCIARY CHIEF, COMPENSATION AND PENSION SERVICE, VETERANS BENEFITS ADMINISTRATION

STATEMENT OF RENEE L. SZYBALA

MS. SZYBALA. Mr. Chairman, and Ms. Berkley, I'm happy to appear before you today to report on the activities and accomplishments of the Fiduciary Program, and our implementation of the law that was passed in December, 2004. I'm really happy to be accompanied by Pat Knapp, who has 23 years of experience which will get you the best answers to the questions you may have.

As you know, the Fiduciary Program oversees VA benefits paid to others on behalf of beneficiaries who have been found incompetent, incapable of handling their VA funds due to their minor status, injury, disease, or the infirmities of age. We currently provide supervision to just over 100,000 VA beneficiaries. These beneficiaries are among the most vulnerable, and they receive more than $114 million monthly in VA benefits. They have estates exceeding $2.8 billion.

The program is administered by the Fiduciary Field Examination activities in VA's 57 Regional Offices throughout the country. Monitoring the needs of beneficiaries of the program and the protection of their funds is the shared responsibility of the field examiners and the legal instrument examiners within those Regional Offices. There are currently 241 field examiners, and 110 legal instrument examiners at the VA Regional Offices.

Field examiners make determinations concerning the type of fiduciary best suited to the situation, and monitor the welfare of the beneficiary through personal contacts and visits. They observe living

conditions, financial requirements, and capacity of the beneficiary to handle their own affairs, recommending action in state court when necessary.

In fiscal year 2005, VA field offices conducted more than 55,000 field examinations, in which they had personal contact with incompetent beneficiaries and their fiduciaries. Many federal fiduciaries and all state court appointed fiduciaries are required to submit accountings at regular intervals, which are established by VA policy or state law. Monitoring the filings of such accountings, and reviewing them, is the responsibility of VA's legal instrument examiners. The LIE's review the information submitted by the fiduciary, following up as necessary when the need arises.

Oversight of the field's efforts in this program is the responsibility of my office under Pat Knapp's direction, our Fiduciary staff at C & P Service. That staff conducts site visits to each Regional Office on a three year schedule. It conducts 242 quality reviews of field station work monthly as part of our quality assurance program. The Fiduciary staff has organized three national conferences in the past five years, including one last month in Baltimore for legal instrument examiners.

The responsibility for implementing Title V of Public Law 108-454 also fell to Pat Knapp's staff. I'm very proud of the manner in which this responsibility has been implemented. VA welcomed the legislation, which gave it additional fiduciary qualification and oversight responsibilities, and we went at it with no time wasted. Within one month of the passage of the law, we hit the ground running, convening a working group to develop basic procedures and a plan of action. A nationwide teleconference was held with all 57 Regional Office Fiduciary Activities, to make them aware of the Title V provision, and outline the preliminary plans for implementation. As procedures developed during the first quarter of 2005 and beyond, a series of three instructional letters was issued to the field, covering a wide range of topics that were included in the legislation. Two additional nationwide teleconferences assisted us in communicating later instructions to the field.

All of these procedural letters, and all of the teleconferences occurred prior to July 1, 2005, when most of the requirements of Title V became effective. We accomplished all of the subsidiary tasks, most of them, that need to be accomplished as well, including changing our procedural manual. We sent changes to the field in late October, 2005. We modified the Fiduciary Program database to gather the data needed by the law. To help us review the qualifications of proposed fiduciaries, we developed a new VA form, the Fiduciary Statement in Support of Appointment that is now required for every fiduciary who wants to work in VA. We posted training materials on the Fiduciary Website. And finally, we have gathered the statistical

information required for the next annual report.

I'm confident that we've responded promptly and diligently in implementing the provisions of Title V. We'll continue to fine tune our operational processes as necessary, as we learn through real life situations. And I welcome any questions that the Committee may have.

[The statement of Ms. Renee L. Szybala appears on p. 16]

MR. MILLER. Thank you very much. Mr. Udall, do you have a statement you want to make, or enter into the record?

MR. UDALL. I do have an opening statement. I'll just pass it to be put in the record.

MR. MILLER. That will be very good.

MR. UDALL. So we can move on.

[The statement of Hon. Tom Udall appears on p. 15]

MR. MILLER. Let me ask you one question, and we'll rotate through the members here. And this pertains to someone from my district. I had a conversation with the family of a veteran in my district, and it's my understanding through conversations with them that the St. Petersburg Regional Office has not been accepting Durable Powers of Attorney under the Fiduciary Program. My statement is, that it is about an $80,000 cost to the family because of the delay. It appears that every other organization accepts Durable Powers of Attorney. And I want to know, is there a specific mandate that precludes you from recognizing it?

MS. SZYBALA. The durable power of attorney is not the same thing as being appointed as a fiduciary under VA's regulations. This law requires us to do certain steps to qualify fiduciaries. Those are not necessarily covered by a durable power of attorney. In truth, durable power of attorney wasn't mentioned to me until two days ago. It's the first time I've heard the word in this context. And it's certainly something we can look at. I'm not sure, Ms. Berkley described what a durable power of attorney is, I really don't know what it is. I always thought it was like a healthcare proxy. But it's something we will look at. Anything that can help us do this better and faster is something we want to do. Right now, though, in the Fiduciary Program, we need to do certain things accepting someone as a fiduciary, including meet with them, including look into their background. And we take these responsibilities seriously. We think it helps protect the beneficiary.

MR. MILLER. And of course the question, I guess, would be, do you anticipate that this is something that can be resolved by rule? Or does it need a legislative change?

MS. SZYBALA. It doesn't need a legislative change. Should we look at it, and should it be the right thing to do, we can do it.

MR. MILLER. How long do you think it will take you to look at it?

MR. SZYBALA. I'll say, we'll do it quickly. Give me quarter. We'll do it very quickly.

MR. MILLER. Thank you. Ms. Berkley?

MS. BERKLEY. Actually, the Chairman has asked the question that I was going to ask you about. If you guys can resolve this without legislation, that would be fine with me. If you need the legislation, I would be delighted to introduce it because I think there's a need and an issue here. But, we will wait as long as you will do this shortly.

MS. SZYBALA. We will absolutely do it shortly. And we want to do it smarter and better, and if we're missing what can help, we will grab it.

MS. BERKLEY. Well, it's very apparent to me just listening to your testimony and observing your demeanor that you have the best interests of the veterans in your heart and mind and will do whatever it takes to make this work. And I appreciate that very much.

Let me ask you a question. The Committee is aware of a number of cases in which erroneous information has been provided to the VA by incompetent veterans who have been directed to sign a document by an "X" or a thumbprint, with no indication that the veteran understood the document which was being signed. Thousands of dollars of overpayments, I understand, have resulted when the VA did not communicate with the spouse or the person handling the veteran's finances. Should VBA letters which request that an application or other form be signed by a veteran with an "X" or a thumbprint also indicate that if the veteran is not able to understand the document that he or she is signing, the Regional Office should be notified? And should the applications for aid and attendance, or other disability information, indicate that the veteran or other claimant has dementia, or Alzheimer's, trigger inquiry into a claimant's competency? I mean, just the reality that they are suffering from dementia or Alzheimer's, should that be a pretty good indication that they're not fully competent?

MS. SZYBALA. There is. There's a couple of questions in there. I'll take the last one first.

Things coming from the doctor, or applications for A & A, or housebound, that show that the veteran is mentally disabled, 100 percent mentally disabled, or needs A & A because of mental disability, do trigger immediate fiduciary investigations. That is, we start a competency rating, and then a fiduciary gets appointed. They are linked. So, if we get a medical from VHA that says, ``Housebound is needed because of the veteran's condition," we immediately start a competency rating. That much is easy.

The "X" is a little more difficult. The "X", which I'm not sure we all understand is the same thing. The "X" is our proof that the veteran is there, that the veteran is in the room. But the "X" is supposed to be witnessed by either two strangers, or people who are close, fam-

ily members, or the POA, or the veteran's rep, who would be then, I would hope, making sure that information being submitted is the correct information.

MS. BERKLEY. If they are strangers, how do they know that?

MS. SZYBALA. Well, by stranger, I mean, the person in the hospital. If the veteran is hospitalized, and they are putting an "X" on a desire for an increased rating, say, the nurse can say, "This is the veteran who put this 'X' here." Without real situations, I'm having trouble thinking of hypotheticals. But the "X" is not meant to slow things down, it's meant to speed things up. And to accept an initial claim without any signature or mark from the veteran would be a very big change in VA processes. In one formal claim, the veteran has to have signed. That's really the only requirement for the veteran's signature in the whole thing.

To the extent we get hung up, and RO's are waiting for signatures, sometimes we're just wrong. There are just many situations after the formal claim has been done where the POA, doesn't even have to be a durable power of attorney, the POA can sign for the veteran, do lots of activities within the claim. And in those that he can't, where the veteran is incapable of signing, the "X," the thumbprint witnessed does the trick. Before, and without needing, a fiduciary to be appointed.

MS. BERKLEY. Let me see if I've got this. All right, so a veteran puts their "X" and that triggers the beginning of the claim process?

MS. SZYBALA. Yes. An original claim can be filed, the formal 556, can be filed with a thumbprint, witnessed by two people, starts the duty to assist, which might lead to an incompetency rating.

MS. BERKLEY. And, I know you're going to look into this, but the durable power of attorney, would that trigger the need for the durable power for attorney? How would that work in your mind? What's the sequence here?

MS. SZYBALA. I'm not sure. I don't think I can answer that. I'm not sure where the durable power of attorney comes in. But the sense I'm getting is that the durable power of attorney would tell us who the fiduciary is, and would maybe, and you guys are thinking, that it would tell us that we need a fiduciary, it would stand in for the rating of the competency. That's where I have more of a problem, because we can't take someone else's paper and have that be our rating. And so we'll have to look at that closely. We'll do it quickly, but we will look at it.

The durable power of attorney I would think would come in at the point of which we find somebody incompetent, this is where I can see it working well, and they have a durable power of attorney, that person might with no further ado be the fiduciary.

MS. BERKLEY. So if the "X" is not an indication, in your mind, of incompetence. What is it an indication of?

MS. SZYBALA. The fact that they can't sign. Whether it's physical

infirmity, whether it's a moment, they're unconscious. They cannot at the moment sign. It doesn't trigger an automatic competency review.

I have to say that we did a survey, very informal survey, of the service centers, asking how many times they take an "X" or a thumbprint. We could only get three to tell us that they knew of one. It's a very, very rare thing. It's a safeguard. It's not something that's done often. But it helps you if you have a veteran who is right now totally unconscious, there is a way to get his claim started.

MS. BERKLEY. Okay, thanks a lot.

MR. MILLER. Thank you very much. Mr. Udall?

MR. UDALL. Thank you, Mr. Chairman. And thank you to the witnesses. We very much appreciate you being here today, and obviously these are very difficult situations, I think, for veterans and their families in terms of having somebody have to have a fiduciary. I've run into this situation several times as a state attorney general, where we were giving advice to the veteran's agents in the State of New Mexico, where they were dealing with these kinds of situations.

Now, could you please describe the circumstances under which the VA appoints a fiduciary for a veteran without first proposing a finding of incompetency?

MS. SZYBALA. We do not do that. Right now, under the new law, under Title V, we can appoint a temporary fiduciary for a competent veteran, while we look at a rating of incompetency. While the competency rating is ongoing we can appoint a temporary fiduciary, which is a very helpful provision in this law. Otherwise, I'll bounce to Pat whether we can do that at any other time, appoint a fiduciary before a rating of incompetency.

MS. KNAPP. No. But we did welcome the temporary fiduciary measure, although we did implement that to be used in only extreme situations. Because what you're doing is taking a competent individual and putting a fiduciary over them without the regular due process period. So when we receive an indication that a beneficiary may be incompetent, and it's an emergency type situation, perhaps such as the one you spoke about, sir, we do immediately go out and do a field examination to actually find out what the facts and circumstances are before that appointment of a temporary fiduciary. Which, again, as Renee indicated is only for 120 day period while we develop to get the actual medical information or court information that we need.

MR. UDALL. I'm curious to your opinion on this part of the statute. I guess this is Title 5502, Payments to and Supervision of Fiduciaries, where it says, ``The Secretary 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." And your opinion is you can't move forward under that statute?

MS. KNAPP. Our interpretation of that portion of the statute was to allow VA to select a fiduciary other than a court appointed fiduciary, if it would be in the best interest of the beneficiary. That language was added to allow us to bypass a court appointed fiduciary. For example, if it would be better to pay benefits directly to a nursing home as fiduciary for an incompetent beneficiary rather than a court appointed fiduciary, which would incur additional legal costs, accountings, etc. That was our take on that. Other than the temporary fiduciary that I just described, we do not automatically appoint a fiduciary without either the rating of incompetency, or evidence of a legal disability.

MR. UDALL. Has the VA issued any guidelines to staff as to the circumstances under which a fiduciary can be appointed regardless of any legal disability?

MS. SZYBALA. Legal disability of the fiduciary?

MR. UDALL. Of the beneficiary.

MS. SZYBALA. Of the beneficiary. We've disseminated guidelines on temporary fiduciaries, and the kinds of circumstances in which we should appoint one. And those are, you know, as Pat described, cases in which we are looking, we think that the beneficiary's incompetent, but the beneficiary has not yet been rated incompetent. I don't think we have any circumstances in which we have suggested the appointment of a fiduciary for someone who is otherwise believed to be competent.

MR. UDALL. Thank you very much.

MR. MILLER. Can I ask you, off Ms. Berkley's question regarding the thumbprint. Who takes the thumbprint? How does that usually work?

MS. SZYBALA. I would assume, and I'm going to bounce it to Pat in a minute, but I assume it's something that is done the same way someone signs a will. I mean, somebody just goes to the person who's in bed at home, takes a thumbprint, and signs as witness.

MR. MILLER. And how often, you said it's very rare?

MS. SZYBALA. Very, very rare.

MR. MILLER. All right, and once that's done, then what happens? I mean, all right, they do that, then what's the next step in the process?

MS. SZYBALA. Then whatever that paper was is signed and accepted by VA. Whatever the people who are trying to help the person who is in bed get done VA will process. Whether it's a claim, or a bank transfer.

MR. MILLER. Is there a chance that somebody could take a fingerprint from somebody who's not living?

MS. SZYBALA. Absolutely. But that's why there are two witnesses required. And those witnesses are signing notarized, and, you know, I assume there's penalties for them if this is a fraud.

MR. MILLER. I just wanted to know, under those very special cir-

cumstances, does VA take any additional actions to verify the legality of the document?

MS. SZYBALA. I think this is seen as the protection against fraud. I think this is seen as better protection against fraud than would be just acceptance of someone else's signature in lieu of the veteran's. Because you have two people who have signed, and attested to the fact that this is the veteran's thumbprint. It's actually a very, very old, longstanding section of VA regs. It probably should be looked at again to see if it makes any sense, but in advance of this hearing I had numerous discussions with my staff about it. They all believe it's still good procedure.

MR. MILLER. I know people in my district that would sign with an "X", so I'm not saying that they're incompetent people today, but my question is, if someone wants to commit fraud they can still commit it. I would think that in these special circumstances that there might be a little additional follow-up.

On the 20th of this month, we're going to have a joint hearing with the Economic Opportunity Subcommittee on the recent data theft and current cyber-security procedures at VBA. While we'll delve further into the security measures for fiduciaries in the next two weeks, I want to know today what your oversight procedures are of fiduciaries after they've been appointed.

MS. SZYBALA. Beyond the accountings and the visits? I mean, we do visit fiduciaries. Under the law, we visit those who have more than ten beneficiaries on a regular schedule. Twenty, excuse me. And we review their accounting. In terms of their use of data, I don't know of any oversight that we do of their use of our data.

MR. MILLER. Can you tell me what the regular schedule would be?

MS. KNAPP. For the field examination? After the initial appointment of a fiduciary, we routinely do a one year follow-up of that fiduciary, and then subsequent visits are as the individual circumstances dictate. A beneficiary that receives minimal benefits, or is in a nursing home, say on Medicaid, may only be seen every five years. A case of 100 percent service connected veteran, who's living in a very unstable situation, would obviously receive more frequent visits.

MS. SZYBALA. Many fiduciaries are the parents of the child, or the spouse of the veteran. And they are visited less frequently. I mean, fiduciaries where the situation is very good, and where there's no questions that any thing is going wrong, the schedule gets further and further pushed out. And so, it's really as needed. We go to those we need to go to.

MR. MILLER. Ms. Berkley?

MS. BERKLEY. According to the Inspector General, an individual who was fiduciary for 11 beneficiaries misused funds and was charged in federal court in Texas in August of 2005. It doesn't appear that the procedures to reissue checks was followed in that particular case.

Are you aware of this? How does the VA determine the date of the termination for purposes of the reissue provision? And how does the information concerning the misuse by a fiduciary for ten or more persons get communicated to the Veterans Benefits Administration in cases where the Inspector General is involved, so that the checks can be reissued?

MS. SZYBALA. We work very closely with the Inspector General. That is, as soon as we have doubts we ask them to investigate, because they are better at investigating that kind of thing than we are. I'm surprised because I don't know of the case that you have mentioned, the case where 11 beneficiaries had their funds reissued.

MS. BERKLEY. You know, I'm going to provide you, we received a copy from the office of the Inspector General, Department of VA, semi-annual report to Congress. So let me provide this to you so you can see it.

MS. SZYBALA. Thank you.

MS. BERKLEY. You're welcome.

MS. SZYBALA. That would be failing in whatever our procedures are. We get to them locally, at the RO, where the problem is. They would contact their local, whatever the local office of the IG is, and ask them to investigate. The IG would assess and would determine whether they're going to go or not. I mean, I'm aware of one case in which we went to the IG quickly. They assessed, and they said, ``No, we're not going to get involved." And we continued on. Ultimately, the IG was interested, and now that fiduciary has been charged in court. It took a while to get the IG interested. Everybody's got their own judgements on these things. But working with the IG is very important. They have the forensic accounting expertise to get to the bottom of what was misused and that's what we need.

MS. KNAPP. I just wanted to add that I also am not familiar with this particular case. But the reissuance provisions of the law were effective on the date of passage, December 10, 2004, and applied to any misuse determinations made after that date, regardless of when the misuse occurred. Now, this particular case could have been in the pipeline prior to the law. It may have been a case that we actually referred to the IG prior to the implementation of the law. So, this would have been the procedure in effect at that time, is to refer the case to the IG, and then the IG would go about its business and its investigative technique. So it may not have fallen under that criteria, but we will look into it.

MS. SZYBALA. Yes, we will follow up.

MS. BERKLEY. Can I just do a quick follow-up? And how does the VA determine the date of determination for the purposes of the reissuance provision?

MS. KNAPP. Any misuse determinations that have been made after December 10, 2004, again, even if they refer to prior periods of mis-

use, and if it meets one of the reissuance categories, i.e. a multiple fiduciary serving more than ten, as you mentioned, or an individual fiduciary where VA has been negligent in the oversight, that would also trigger reissuance. So far, and all those negligence determinations on individual fiduciaries are done in the VA Central Office, and we have made no findings of negligence to date, nor have there been any multiple fiduciaries to date where there has been reissuance. That may change.

MS. SZYBALA. But, what would be reissued is all the funds found to be misused. And so, it depends on the accounting. The date from which the misuse starts is the date from which we would reissue the funds.

MS. KNAPP. Based on factual evidence, a field exam has to be done, etc., etc. we don't want to reissue more than was misused, obviously. We have to guard the taxpayers' money also.

MR. MILLER. Very good. Mr. Udall, any more questions?

MR. UDALL. I don't have any other questions. So, Ms. Berkley, you can continue if you wish?

MS. BERKLEY. When you review that case, could you get back to us so that we can actually discuss the real case?

MS. SZYBALA. Absolutely.

MS. BERKLEY. All right, thanks.

MR. MILLER. Any other questions? If not, thank you very much for being with us this morning. We all agree it's vitally important that VBA ensure the beneficiaries who are no longer competent to handle their compensation have access to trained staff as well as honest and trustworthy fiduciaries. And if they don't receive their benefits, neither the veterans' nor VA's interests are served. Without objection, the statement from Mr. William Burns will be entered into the record. Ms. Szybala, I'd ask that you review Mr. Burns' statement and provide a written response to me by the 22nd of this month addressing his concerns.

[The statement of Mr. William D. Burns appears on p. 24]

MR. MILLER. All members will have five legislative days to submit a statement for the record, as well as pose post-hearing questions to the witnesses. And with nothing further, the hearing is adjourned and we'll move into Executive Session, marking up several bills pending before the Subcommittee. Thank you.

[Whereupon, at 10:40 a.m., the Subcommittee proceeded to other business.]

APPENDIX

Chairman Jeff Miller
Opening Statement

Oversight Hearing on VBA's Fiduciary Program

June 8, 2006

Good morning. The hearing will come to order.

We are meeting to receive testimony on the Veterans Benefits Administration's (VBA) implementation of Title 5 of Public Law 108-454, as well as VBA's Field Examination Activity.

As the veteran population ages, more Department of Veterans (VA) beneficiaries will require the appointment of a fiduciary to assist them in managing the monetary benefits provided by VBA. The process of appointing a fiduciary is different than the legal process of appointing a guardian or conservator. However, the goal is the same - to protect the interests of the beneficiary.

Once a fiduciary is recognized by VBA, the Department conducts periodic field examinations to ensure that the beneficiary's assets are being properly managed. During 2005, VBA completed over 77,000 field examinations, annual accountings, and other fiduciary-related actions for over 100,000 beneficiaries.

Title 5 of Public Law 108-454, signed into law on December 10, 2004, made some changes to VBA's fiduciary program to improve fiduciary accountability and strengthen protections for the beneficiary. Among other things, the law requires VBA to conduct more thorough investigations of fiduciaries before being appointed and requires VBA to reissue benefits that were misused if VBA was negligent in failing to investigate or monitor the fiduciary. Today, the Subcommittee would like a report on the implementation of these provisions.

I now recognize the ranking member, Ms. Berkley.

Before you begin, I would like to recognize Mrs. Knapp for her years of dedicated service at VA. Mrs. Knapp, who is retiring in July, began her career at the regional office in Cleveland as a Veterans Benefits Counselor. After 25 years at the regional office, she was promoted to VA Central Office where she was a program analyst to the fiduciary program; she was appointed Chief of the program in 2002. Mrs. Knapp, thank you for your service and we wish you the best of luck in retirement.

Statement of Ranking Member Shelley Berkley
Subcommittee on Disability Assistance and Memorial Affairs
Oversight Hearing on Veterans Benefits Administration Fiduciary Program
June 8, 2006

First, I would like to thank Chairman Miller for holding this hearing. Veterans and their survivors who are unable to handle their own financial affairs need appropriate assistance and oversight to obtain the benefits they deserve in a timely manner. I am pleased that the Department of Veterans Affairs has made some progress in implementing The Veterans' Benefits Act of 2004, but it is clear that more needs to be done.

Last December, the committee was contacted by a veteran who had been rated 100% disabled and was determined to be incompetent by the VA to handle his financial affairs. He wanted to move closer to family, but was unable to do so until a fiduciary was appointed and he could receive the funds needed to move. Resolving this issue took the committee staff three months and repeated inquiries involving two regional offices. Due to the work of the committee staff a fiduciary was eventually appointed. However, the entire process was extremely stressful for the veteran and his family. Unfortunately, the committee staff cannot do the same for every veteran.

I am also concerned that VA does not recognize durable powers of attorney. A durable power of attorney is executed under state laws and becomes effective upon the person becoming incompetent or unable to manage his or her affairs. Because the VA is not recognizing persons who hold a durable power of attorney for purposes of filing an application for benefits, I intend to introduce legislation which would require the VA to do so.

I am also concerned that there may be inadequate coordination between the Veterans Benefits Administration and the Inspector General's Office to assure that benefits are reissued when a fiduciary for 10 or more beneficiaries misuses funds. It appears that this was not done in a recent case.

I hope that the witnesses will be able to address my concerns. Again, thank you for being here today and I look forward to your testimony.

Congressman Tom Udall (NM-3)
House Veterans Affairs Subcommittee
On Disability Assistance and Memorial Affairs
Hearing on VBA Fiduciary Program
June 8, 2006

Mr. Chairman,

Thank you for holding today's hearing, and I thank the witnesses for their testimony.

The Fiduciary Program of the Veterans' Benefits Administration manages the financial responsibilities for over 100,000 individuals who are unable to do so for themselves. This program is one of the most important in terms of "serving those who have served," because the VBA must ensure that every aspect of the oversight of these individuals' finances is being executed with full honesty and with complete integrity.

When an individual is unable to properly handle their own funds, either because they are a minor, they are injured, or they have determined by a court to be incapable of such personal responsibility, the Fiduciary Program takes over, transferring payments to a separate individual or financial entity for the purposes of management. I strongly appreciate the need for this program, and I know that in my home state, the New Mexico Department of Veterans' Services is working in tandem with the VA to ensure that the program runs smoothly and that all proper procedure is being followed.

The need to completely protect the integrity of the process is absolutely vital. We must ensure that proper identification of beneficiaries is in place. We must ensure that the entire $2.8 billion being handled by the VBA is efficiently distributed to the appropriate individuals. And we must ensure that any misuse of funds is immediately investigated and addressed.

Again, thanks to the witnesses for their testimony on today's important issue. I look forward to hearing more on this issue.

Thank you, Mr. Chairman.

STATEMENT OF RENÉE L. SZYBALA

DIRECTOR, COMPENSATION AND PENSION SERVICE

VETERANS BENEFITS ADMINISTRATION

BEFORE THE

SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS

JUNE 8, 2006

Mr. Chairman and members of the Subcommittee, thank you for the opportunity to appear before you to report on the activities and accomplishments of the Fiduciary Program in the Veterans Benefits Administration. I am accompanied today by Ms. Pat Knapp, Chief, Fiduciary Program, in the Compensation and Pension Service. I will begin my testimony with an overview of the Fiduciary Program and then discuss the implementation of Title V of Public Law 108-454, the Veterans Benefits Act of 2004.

Overview of the Fiduciary Program

The Fiduciary Program oversees VA benefits paid to beneficiaries who are incapable of handling their funds either because they are minors or because of injury, disease, or the infirmities of age. We currently provide supervision to just over 100,000 VA beneficiaries who lack the capacity to manage their VA benefits. These beneficiaries, who are among our most vulnerable constituents, receive more than $114 million monthly in VA benefits and have estates exceeding $2.8 billion.

Under the program, payment of VA benefits is made to another individual

or entity recognized as responsible for managing the beneficiary's financial affairs. Payment of VA benefits may be made to a State court-appointed fiduciary, to a fiduciary whose duties and authority are established by Federal statute, or by means of supervised direct payment to an incompetent adult beneficiary. State court-appointed fiduciaries are used when the broad trust powers generally provided by a State court to such a fiduciary are necessary to protect the beneficiary's interests. Federally-authorized fiduciaries (Federal fiduciaries) are used in all other cases. Federal fiduciaries, which are appointed by VA under authority contained in 38 U.S.C. § 5502(a)(1), may be the spouse of a veteran, the chief officer of a VA or non-VA institution in which a veteran is receiving care, a legal custodian who is the person or entity caring for the beneficiary or his or her estate, or another responsible person.

We administer the program through Fiduciary and Field Examination (F&FE) activities at the Veterans Benefits Administration's (VBA) 57 regional offices. There are currently 241 field examiners and 110 legal instruments examiners located in our 57 VA regional offices. They are charged with monitoring the needs of Fiduciary Program beneficiaries and the protection of their VA funds.

To determine the type of fiduciary best suited to each situation, field examiners personally contact minor or incompetent beneficiaries and their families, if any, and observe the living conditions, the financial requirements, and the capacity of adult beneficiaries to manage their payments. The field examiner then determines the best method of payment. If necessary to protect the rights

of the beneficiary and the Government, the field examiner will also recommend appropriate action in State court.

In adult cases, periodic personal follow-up contacts are made to assess the welfare of the beneficiary and to ensure that the fiduciary VA selected, instructed, and appointed is properly using and protecting the VA benefits entrusted to him or her. The field examiner also reviews the competency of the beneficiary and evaluates the need for continuing the fiduciary arrangement.

A court-appointed fiduciary is required to submit an accounting at intervals established by State law to ensure proper estate administration by the fiduciary. Certificates of balance on deposit are furnished with accountings. Many Federal fiduciaries must also file periodic accountings with the F&FE unit at the servicing VA regional office. VA's legal instruments examiners review the accountings and independently verify the information on a certificate of balance if it does not appear to be authentic or when financial information does not agree with other information in the accounting.

The Fiduciary Program has made great strides over the past several years to provide consistent, quality service to these deserving beneficiaries. We have a dedicated, experienced core of employees in our Central Office who have conducted site visits to all stations and have organized three national conferences in the past five years, including a training conference last month exclusively for the legal instruments examiners who analyze fiduciary accountings. The staff also conducts 342 quality reviews of field station work monthly, are responsible for all procedural and manual updates, and conduct

quarterly teleconferences to apprise field stations of issues of program concern. In fiscal year 2005, VA field staff conducted more than 55,000 field examinations where the VA field examiners had personal contact with incompetent beneficiaries and their fiduciaries.

Title V of P. L. 108-454

The passage of Public Law 108-454 in December 2004 tasked VA with additional fiduciary qualification and oversight responsibilities. Title V of the law was the first major change to the Fiduciary Program in more than 25 years. VA welcomed this legislation, and I am pleased to report to you on the provisions that directly affect the way the Fiduciary Program operates and on VBA's progress in implementing those provisions.

Key features of Title V

Title V codified some existing Fiduciary Program operating procedures, including the requirement for face-to-face interviews with a potential fiduciary and the need for a fiduciary to furnish a bond upon VA request. New fiduciary qualification criteria required VA to obtain a credit report issued within one year prior to the appointment of a fiduciary to handle VA funds. The law further required that VA request information regarding whether a proposed fiduciary has ever been convicted of any offense under State or Federal law that resulted in imprisonment for more than one year. A person so convicted can only be certified as fiduciary if VA determined that the appointment is appropriate. The law also authorized appointment of a temporary fiduciary for a beneficiary while a

determination of incompetency is being made or appealed, or when a fiduciary is appealing a determination of misuse of funds.

A major change codified by Title V requires VA to reissue benefits when a fiduciary that is not an individual, or who is an individual who serves ten or more beneficiaries, misuses all or part of the benefits due to a beneficiary. VA must also reissue benefits when its negligent failure to investigate or monitor a fiduciary results in misuse of benefits by the fiduciary. Prior to this Act, there was no remedy to make financially whole beneficiaries whose VA funds were misused by the fiduciaries entrusted to handle them, short of referring cases to VA's Office of Inspector General for possible criminal prosecution by the Office of the U.S. Attorney. In Fiscal Year 2005, no findings of fiduciary misuse involved organizations or fiduciaries serving 10 or more beneficiaries. There were also no findings of VA negligence in the appointment or supervision of fiduciaries, and thus no VA benefits were reissued under either of these provisions that would have triggered such reissuance.

Title V also requires VA to conduct periodic on-site reviews of any person or agency serving as fiduciary for more than 20 beneficiaries where the total amount of such benefits paid annually exceeds $50,000, as adjusted periodically. Should one of these fiduciaries misuse the VA funds entrusted to him or her, VA reissuance of the misused funds is required.

A final provision of the Act requires VA to report annually on statistical data concerning the Fiduciary Program, to include types and numbers of

fiduciaries and beneficiaries and types and amounts of VA benefits paid to these fiduciaries. The report is also required to address the number of cases of misuse, how these cases were addressed and the final disposition of such cases.

Implementation Actions

We have made great strides in implementing the new requirements of Public Law 108-454. Within one month of passage, VA convened a working group to make policy decisions, develop basic implementation procedures, and assign specific implementation tasks. In January 2005, a nationwide teleconference was conducted with all 57 VA Regional Office Fiduciary Activities to make them aware of the Title V provisions and outline preliminary plans for implementation.

As procedures were developed in the first quarter of 2005, a series of instructional letters was issued. The first concerned procedures for the new fiduciary qualification criteria that require credit reports and inquiries into the criminal background of proposed fiduciaries. That letter also provided instructions for the appointment of temporary fiduciaries for competent beneficiaries. Two subsequent letters provided instructions for the conduct of on-site reviews for fiduciaries handling multiple beneficiaries, and for investigating allegations of fiduciary misuse of funds and the reissuance of benefit payments. All procedural letters were issued prior to July 1, 2005 when most of the requirements of Title V took effect.

As part of the implementation plan, we revised the Fiduciary Program operating manual to incorporate the procedures outlined in the instructional

letters. We also modified the Fiduciary Program database (the Fiduciary Beneficiary System or FBS) to incorporate new workload tracking and statistical data resulting from the legislation. Additionally, to help F&FE staff review the qualifications of potential fiduciaries we developed a new VA form. VA Form 21-0972, Fiduciary Statement in Support of Appointment, that is now completed by all fiduciary candidates as part of our process of qualifying to become a VA fiduciary.

Each regional office now has procedures in place to obtain credit reports of proposed fiduciaries as required by law. The additional information available to a VA field examiner through review of a proposed fiduciary's credit report gives VA a valuable tool to use in qualifying those individuals entrusted with these funds.

Procedures on the misuse provisions of the law were initially issued to the field stations in a letter of June 10, 2005 and were then subject of a nationwide teleconference on June 27, 2005. This activity was followed by written lesson plans and other training material being sent electronically and posted on a Fiduciary Program intranet site. A second nationwide teleconference to discuss changes to the electronic tracking system and to answer questions on the misuse procedures was held on July 28, 2005.

Fiduciary Program manual changes, incorporating all of the procedures, were released to the field in late October 2005 and a final draft of the required 38 CFR regulation changes is currently under review prior to publication for comment.

Finally, statistical data for the FY 2005 Annual Report of the Veterans Benefits Administration was collected earlier this year for inclusion in the upcoming edition of that report, which is expected to be available in late June or July.

Mr. Chairman, I am confident that we have responded promptly and diligently in implementing the provisions of Title V of the Veterans Benefits Act of 2004, and we will continue to fine tune the operational processes necessary to apply this law as "real life" situations arise. I thank you again for the opportunity to provide this testimony on the Fiduciary Program. I welcome any questions that you and the other members of the Subcommittee may have.

Statement of William D. Burns
Before the
Subcommittee on Disability Assistance and Memorial Affairs
June 8, 2006

Mr. Chairman and Members of the Committee:

Thank you for the opportunity today to bring to your attention a very disturbing situation that requires resolution.

By way of introduction, my name is William D. Burns. I am the President of a firm that specializes in providing insurance, asset protection, financial planning and health crisis management planning services to retirees and seniors. As such, the firm frequently provides services to a family experiencing a health and or a long term care crisis. The firms work with these families often includes – but is not limited to – helping them to apply for and qualify for various government assistance programs that the family member in crisis mode might be eligible for. For the record, I am also a United States Veteran.

I am submitting testimony to your committee in order to bring to light an issue that, in my opinion, should be addressed immediately. The issue at hand is that the Department of Veterans Affairs (VA) will not accept or honor a properly executed Durable Power of Attorney (DPOA) from a Veterans family, not even from the Veterans spouse.

In lieu of accepting a DPOA, the VA has a woefully antiquated and painfully slow program known as the Fiduciary Program. The VA gives no credibility to the fact that the veteran had the fore thought and presence of mind to prepare a DPOA. The DPOA expresses the veteran's wishes – in writing – making it clear for all to see who the veteran intended to grant the legal power to watch over the veteran's affairs in the event of the veteran's inability to do so.

As previously indicated, the Fiduciary Program is woefully antiquated and painfully slow, even if it is the veteran's spouse who has applied to be named as the fiduciary of an incapacitated veteran and even if the VA knows that it is a crisis situation. Unfortunately, the veteran's spouse must complete the same steps as a non spouse. According to the Regional VA office in St. Petersburg, Florida, the following steps are required in order to apply to be a veteran's fiduciary:

A) First of all, the applicant must write a letter to the regional VA office requesting that they be named as the veteran's fiduciary and list the reasons as to why the veteran needs a fiduciary. The VA strongly recommends that the applicant submit supporting medical data to aid the VA in its decision making process. This means that the applicant must deal with obtaining the veteran's medical records or a letter from the veteran's doctor. The spouse does so by using the veteran's DPOA.

B) Secondly, the applicant must mail this letter to a P.O. Box address. In an urgent situation, you can not fax or e-mail the request and you usually can not send overnight mail to a P.O. Box. There is no established procedure for the fiduciary applicant to track the progress of the process or to even confirm that the VA has received the letter.
C) Upon receipt of the letter, the VA mail room is supposed to send the letter to a Triage Unit, who in turn is supposed to send the letter to the Fiduciary Unit.
D) The Fiduciary Unit then either requests additional data or approves or rejects the request. This process can take anywhere from three to nine months and averages approximately six months.

Three to nine months with an average of six months. Think about the implications of this timeframe to a family in crisis mode.

In light of the fact that the Veteran's spouse and/or family is already dealing with the emotional trauma of the Veteran's health crisis and frequently the guilt and other related emotions associated with having to place their loved one in a Long Term Care Facility, the VA Fiduciary Program simply adds to the burden of the spouse and/or the family of a Veteran in crisis mode. ***This burden is what the Veteran had intended to prevent their loved ones from having to deal with in the Veteran's time of crisis. This is why the Veteran had the DPOA implement in the first place.***

The VA Fiduciary Program is out of touch with current societal and private sector business norms. The majority of governmental and private sector business entities accept and honor a properly executed DPOA. I have personal knowledge of and experience with the following organizations accepting a properly executed DPOA; Banks, Credit Unions, Brokerage Houses, Mutual Fund Companies, Insurance Companies, Funeral Homes, Automobile Dealerships, Realtors, Nursing Homes, Hospitals, State Government Bureaucracies, County Government Bureaucracies, Medicare and Medicaid, etc. Why not the Veteran's Administration?

In order to illustrate why the VA should be required to accept a properly executed DPOA, I am including as part of this testimony the very case that compelled me to contact Congressman Jeff Miller's office regarding the Fiduciary Program. This case study is an actual client whose application to Medicaid was delayed by two months because of the time it took to have the Veteran's spouse named as the Fiduciary. Yes, it took two months even with the involvement of a United States Congressman's staff aiding in the process. Because of the fact that this Veteran was in crisis mode and had recently been placed in a Long Term Care facility, ***this two month delay cost this family over $8,000.00.***

This case study is an actual client whose case we are working on now. The events are real the names are fictitious in order to protect the client's privacy. For the purpose of this testimony, we will call them Bob E. Smith and Jane B. Smith. The Smith's were referred to our firm by a local attorney for us to help the family apply for and qualify Mr. Smith for Medicaid Institutional Care Program (Medicaid) benefits in order to help the family pay for Mr. Smith's nursing home bills. Mr. Smith had had the foresight to prepare a DPOA in November of 2003 naming his wife, Jane B. Smith as his Durable

Power of Attorney. This DPOA was properly executed, notarized and filed in the public records at the Okaloosa County Clerk of the Circuit Courts office.

When we first met with Mrs. Smith, Mr. Smith had been recently placed in a Long Term Care Facility as he is suffering from Parkinson's disease and advanced Dementia. Mr. Smith is incapacitated and requires twenty-four hour per day around the clock care. Mrs. Smith was in a very fragile emotional state due to having just placed her husband of fifty plus years in a Long Term Care Facility.

At our first meeting with Mrs. Smith and her daughter, our firm was hired, as stated above, to apply for and qualify Mr. Smith for the Medicaid. We then developed a strategy to qualify Mr. Smith for Medicaid. In implementing our strategy, we successfully used Mr. Smith's DPOA at banks, credit unions, two different Nursing Homes, a Funeral Home, Insurance companies, etc.

Our strategy required that we establish an Income Trust and an Income Trust checking account due to the fact that Mr. Smith's income was over the income cap allowed by Florida's Medicaid rules. Additionally, we needed to divert a significant portion of Mr. Smith's income to Mrs. Smith so she could maintain a minimal standard of living. In order to accomplish the above, Mr. Smith's VA pension check had to be moved from a credit union that would not administer an income trust checking account to a bank that would administer an income trust checking account. This is the very task that the VA would not honor Mr. Smith's DPOA to accomplish.

We were simply asking that Mr. Smith's VA pension check be moved from one account that was in his name at a credit union, to a new account in his name at a bank so that we could establish the income trust account that was required for Medicaid qualification. Once again, EVERY SINGLE other organization that we dealt with honored Mr. Smith's DPOA. Once again, why not the VA?

The two month delay and the subsequent loss of over $8,000.00 of the Smith's limited life savings was absolutely unfortunate and totally unnecessary. The Smith's did not have a substantial amount of life savings in the first place and as such this $8,000.00 loss represented approximately 10% of the money available to Mrs. Smith for life support and maintenance during her lifetime.

If this case study in and of itself does not represent sufficient motivation for your committee to require the VA to honor a properly executed DPOA, then I implore you to consider the broader societal implications of the graying of America. Please consider the following:

A) According to the United States Census Bureau ***there are approximately 250 people per day celebrating their 100th birthday.*** Americans over the age of 100 are one of the fastest growing segments of the US population. The problem with this statistic is that people are living longer, sicker too.
B) According to the U.S. General Accounting Office in 2002, in an article titled, Long Term Care: Diverse Growing Population Includes Millions of Americans, "75% of people over 65 will need home care services, with the average length of care at 8 years. The average nursing home stay is 2.5 years". ***The study says,***

75% of people over the age of 65. A lot of these people are Veteran's with a properly executed DPOA.

C) To quote a book titled, "The Coming Generational Storm" by Laurence J. Kotlikoff and Scott Burns, "In the year 2030, as 77 million baby boomer hobble into old age, walkers will outnumber strollers..."

I submit to you that the graying of America is REAL. The current generation of retirees and seniors as well as future generations of retirees and seniors are experiencing long term care crises at an unprecedented level. This reality will continue for generations to come. I implore you, in fact, I beg you to please require the Veteran's Administration to honor a Veteran's properly executed Durable Power of Attorney, especially in a time of crisis.

Finally, I recently met with the director of the Okaloosa County Veteran's Service Office to solicit her input on the Fiduciary Program. When I informed her that your committee was scheduled to conduct an oversight hearing on the Fiduciary Program, she expressed her opinion that the program definitely needed changing. She specifically requested that in this testimony I ask of you, on her behalf, that your committee's oversight hearing result in some form of significant improvement in the application of the Fiduciary Program for veteran's in crisis mode.

She further indicated her support of the initiative that the Veteran's Administration be required to honor a Veteran's properly executed Durable Power of Attorney, but requested that ***at a minimum your committee put the Fiduciary Program, "on speed and with more accountability".***

In closing, I thank you for the opportunity to present this testimony for your consideration. I want to state that neither my firm nor I have received any Federal grants during the current year or the previous two fiscal years. In fact neither my firm nor I have ever received any Federal grants. All across this great land of ours, the spouses and families of Veterans, who are in crisis mode, need your help. The Fiduciary Program is a draconian process that does not serve the needs of veterans in crisis. ***It truly is time for a change.***