

Notes

COMBATING PRIVATIZATION: MODIFYING THE VETERANS ADMINISTRATION FIDUCIARY PROGRAM TO PROTECT INCOMPETENT VETERANS

WHITNEY BOSWORTH BLAZEK[†]

ABSTRACT

Created to supervise the distribution of Veterans Administration benefits, the Veterans Benefit Administration Fiduciary Program was designed to help thousands of incompetent veterans handle their finances. Rather than directly managing each veteran's funds, the Fiduciary Program employs a privatization model whereby a private individual or institution is appointed to manage a veteran's assets. The Fiduciary Program then monitors these fiduciaries to ensure the veteran's funds are properly expended.

This Note argues that in practice this privatization model is seriously flawed and that it exposes some of the most vulnerable portions of the veteran population's funds to misuse. In support of this conclusion, this Note compares the federal statutes, regulations, and internal directives that govern the Fiduciary Program—paying special attention to the Fiduciary Program Manual—with audits performed by the Veterans Affairs Office of Audits and Evaluations and the U.S. Government Accountability Office. Relying on these audits, this inquiry rejects total reliance on substantive statutory reform in light of legislative and judicial barriers. Instead, this Note advocates for critical internal reforms designed to improve the Program's efficiency and functionality, the adoption of a state enforcement mechanism, and reliance on principles of cooperative federalism and interagency cooperation.

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[†] Duke University School of Law, J.D. expected 2014; University of Texas at Austin, B.A. 2010. Many many thanks to Professor Margaret Lemos for her patient advice and constant encouragement; to the *Duke Law Journal* editors for their thorough and thoughtful editorial work; to Mark Blazek for his love, support, and general reasonableness; and to my parents for teaching me to just keep swimming.

INTRODUCTION

Billy Brown's military service in Korea earned him benefits from the U.S. Department of Veterans Affairs (VA) for life.¹ To help Billy Brown manage those benefits in his old age, the VA appointed Marcus Brown (no relation), a cabinet maker with a high-school diploma and no financial training, to serve as the veteran's mandatory personal-finance manager (fiduciary).² Neither Billy Brown nor his family had any input in Marcus Brown's appointment.³ Once appointed, Marcus Brown controlled all of Billy Brown's income, including his monthly VA checks and his life savings, which totaled more than \$100,000.⁴ In exchange for this service, the VA required Billy Brown to pay Marcus Brown a portion of his VA check each month.⁵

The methods used to manage Billy Brown's finances and the finances of those similarly situated raise serious concerns about fundamental fairness and functionality; in fact, those methods threaten to undermine the core purpose of the VA—the protection of vulnerable veterans. The VA faces an increasing array of challenges resulting from insufficient resources, an overloaded system, and never-before-seen hurdles.⁶ That said, solutions to these problems do not uniformly require an outpouring of financial resources or an army of staff. Indeed, as this Note argues, the VA's Fiduciary Program provides at least one example of a VA program that could instead benefit from reforms focused on increased efficiency and oversight.

1. John Schwartz, *Instead of Helping, Trustee Program Is Hurting Veterans, Families Say*, N.Y. TIMES, Apr. 8, 2011, at A16. For more information regarding the federal benefits awarded to veterans, see generally U.S. DEP'T OF VETERANS AFFAIRS, FEDERAL BENEFITS FOR VETERANS, DEPENDENTS AND SURVIVORS (2013), available at http://www.va.gov/opa/publications/benefits_book/2013_Federal_Benefits_for_Veterans_English.pdf.

2. Schwartz, *supra* note 1. The VA's Fiduciary Program defines a "fiduciary" as "a person or legal entity (such as a bank) charged with the duty of managing the estate of an incompetent beneficiary." U.S. DEP'T OF VETERANS AFFAIRS, FIDUCIARY PROGRAM MANUAL, ch. 1, § A.4.e (2005), available at <http://www.benefits.va.gov/FIDUCIARY/references.asp>. VA-supervised fiduciaries can include either court-appointed fiduciaries or federal fiduciaries. *Id.*

3. Schwartz, *supra* note 1.

4. *Id.*

5. *Id.*; see U.S. DEP'T OF VETERANS AFFAIRS, *supra* note 2, ch. 2, § E.29 (authorizing federal fiduciaries to collect fees).

6. See, e.g., Thomas J. Reed, *Parallel Lines Never Meet: Why the Military Disability Retirement and Veterans Affairs Department Claim Adjudication Systems Are a Failure*, 19 WIDENER L.J. 57, 59–60 (2009) (addressing the systemic problems associated with distributing VA benefits).

The Fiduciary Program is a classic example of agency privatization at work. In a world of limited resources, privatization—the process by which a government agency uses “private means to achieve public ends”⁷—has become a permanent fixture in federal, state, and local government.⁸ Federal law requires VA beneficiaries deemed incapable of managing their personal finances due to injury, disease, or infirmities of age to receive help managing their money.⁹ To minimize the number of VA employees required to run the Fiduciary Program, the VA instead either finds volunteers or uses the veterans’ funds to hire private citizens or organizations to manage the veterans’ finances.¹⁰ Government employees working for the VA then monitor these private money managers to make sure they properly handle the veterans’ funds.¹¹ In theory, privatizing this system increases the number of incompetent veterans receiving help while simultaneously empowering the Fiduciary Program to shift from administering the Program to monitoring fiduciaries.

Serving approximately one hundred thirty-four thousand incompetent beneficiaries,¹² the Fiduciary Program’s sole mission is to provide oversight to ensure that incompetent veterans’ financial resources are managed effectively.¹³ As it currently exists, however, the Fiduciary Program inadequately protects incompetent beneficiaries. The VA Office of the Inspector General (VA OIG)¹⁴

7. Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389, 389 (2003).

8. Nestor M. Davidson, *Relational Contracts in the Privatization of Social Welfare: The Case of Housing*, 24 YALE L. & POL’Y REV. 263, 263 (2006).

9. U.S. DEP’T OF VETERANS AFFAIRS, *supra* note 1, at 41–42. Individuals entitled to receive VA benefits are called beneficiaries. U.S. DEP’T OF VETERANS AFFAIRS, *supra* note 2, ch. 1, § A.4.c. Beneficiaries are classified as “minors,” “veterans,” and “other adults, including” “helpless adults,” “surviving spouses,” “dependent parents, and” “insurance proceeds recipients.” *Id.*

10. See 38 U.S.C. § 5502(a)(1) (2006) (“Where it appears to the Secretary [of Veterans Affairs] that the interest of the beneficiary would be served thereby, payment of benefits under any law administered by 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.”).

11. See 38 C.F.R. § 13.100(a) (2013) (authorizing Veterans Service Center Managers (VSCMs) to supervise fiduciaries).

12. VETERANS BENEFITS ADMIN., U.S. DEP’T OF VETERANS AFFAIRS, ANNUAL BENEFITS REPORT: FISCAL YEAR 2012, at 41 (2013), available at http://www.vba.va.gov/REPORTS/abr/2012_abr.pdf.

13. U.S. DEP’T OF VETERANS AFFAIRS, *supra* note 1, at 41.

14. The VA OIG is the investigative arm of the Secretary of Veterans Affairs, and its Office of Audits and Evaluations is designed to “provide[] independent evaluations of VA’s activities in order to ensure the integrity of [VA operations].” *About the Office of Audits and*

concluded in 2010 that the Fiduciary Program was inadequate and posed a threat to “approximately \$161 million” belonging to veterans or their families.¹⁵ Unfavorable reports from the VA OIG triggered further inquiry by the House Committee on Veterans’ Affairs in 2003.¹⁶ Since 2003, various subcommittees within the House Committee on Veterans’ Affairs have held three additional hearings seeking to pressure the VA to address the Fiduciary Program’s shortcomings.¹⁷ And in 2010, after separately reviewing the Fiduciary Program’s performance, the Government Accountability Office (GAO) confirmed the VA OIG’s reports.¹⁸ In light of these findings, the House of Representatives passed a bill amending the framework of the Fiduciary Program to better protect incompetent veterans in 2012.¹⁹ But despite budding legislative change, critical reports, and

Evaluations, U.S. DEP’T OF VETERANS AFF., <http://www.va.gov/oig/about/audit.asp> (last visited Feb. 9, 2014).

15. OFFICE OF AUDITS & EVALUATIONS, U.S. DEP’T OF VETERANS AFFAIRS, NO. 09-01999-120, VETERANS BENEFITS ADMINISTRATION: AUDIT OF THE FIDUCIARY PROGRAM’S EFFECTIVENESS IN ADDRESSING POTENTIAL MISUSE OF BENEFICIARY FUNDS 10–14 (2010). The Fiduciary Program’s shortcomings originally came to the attention of the VA OIG in 2003 following a routine investigation of several VA regional offices. OFFICE OF INSPECTOR GEN., U.S. DEP’T OF VETERANS AFFAIRS, NO. 04-00034-141, COMBINED ASSESSMENT PROGRAM REVIEW OF THE VA REGIONAL OFFICE: DETROIT, MICHIGAN i–ii, 1–2 (2004).

16. *Department of Veterans Affairs’ Fiduciary Program: Hearing Before the Subcomm. on Benefits of the H. Comm. on Veterans’ Affairs*, 108th Cong. 1 (2003) (statement of Rep. Henry Brown, Chairman, Subcomm. on Benefits).

17. *Legislative Hearing on H.R. 2985, H.R. 3730, H.R. 4481, H.R. 5948: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Veterans’ Affairs*, 112th Cong. (2012) [hereinafter *Legislative Hearing*]; *Reforming VA’s Flawed Fiduciary System: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Veterans’ Affairs*, 112th Cong. (2012) [hereinafter *Reforming VA’s Flawed Fiduciary System*]; see *Examining the U.S. Department of Veterans Affairs Fiduciary Program: How Can VA Better Protect Vulnerable Veterans and Their Families?: Hearing Before the Subcomm. on Disability Assistance & Mem’l Affairs of the H. Comm. on Veterans’ Affairs*, 111th Cong. 2–3 (2010) [hereinafter *Examining the Fiduciary Program*] (statement of Rep. John J. Hall, Chairman, Subcomm. on Disability Assistance & Mem’l Affairs) (outlining some of the concerns raised by the VA OIG and the Government Accountability Office (GAO)).

18. See generally U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-678, INCAPACITATED ADULTS: OVERSIGHT OF FEDERAL FIDUCIARIES AND COURT-APPOINTED GUARDIANS NEEDS IMPROVEMENT (2011), available at <http://www.gao.gov/assets/330/321761.pdf> [hereinafter GAO, INCAPACITATED ADULTS] (identifying deficiencies in the Fiduciary Program and areas for improvement); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-241, VA’S FIDUCIARY PROGRAM: IMPROVED COMPLIANCE AND POLICIES COULD BETTER SAFEGUARD VETERANS’ BENEFITS (2010), available at <http://www.gao.gov/assets/310/301237.pdf> [hereinafter GAO, VA’S FIDUCIARY PROGRAM] (recommending additional oversight, monitoring, and training of fiduciaries).

19. H.R. 5948, 112th Cong. (2012); see H.R. REP. NO. 112-678, at 13–16 (2012) (describing the purposes of the bill). For a discussion of this amendment, see Part III.A.

other calls to action, the amendment stalled in the Senate in 2012.²⁰ Although an almost identical bill was revived for the 113th legislative session,²¹ the amended legislation is currently awaiting a full vote of the House Committee on Veterans' Affairs.²²

Given such widely identified deficiencies and to-date unsuccessful attempts to remedy them, this Note seeks to chart a new course in thinking about how to best reform the Fiduciary Program. In so doing, it makes two contributions to existing legal scholarship.²³ First, it seeks to navigate the framework of rules and regulations that govern the Fiduciary Program to provide insight for those trying to help incompetent veterans assert their legal rights. Second, this Note argues that effective reform of the Fiduciary Program requires critical internal reforms, the adoption of a state enforcement mechanism, and reliance on principles of cooperative federalism and interagency cooperation. In arguing for these reforms, this approach stands in stark contrast to another proposed solution: total reliance on substantive statutory reform. Such reform, this Note submits, cannot overcome the political hurdles or enforcement issues inherent in social-welfare programs without the aid of the courts. Judicial review, moreover, provides an unsatisfactory avenue for beneficiaries to vindicate their rights; federal law limits their available judicial forum to the Court of Appeals for Veterans Claims (CAVC), which is plagued by insufficient judicial resources and numerous jurisdictional hurdles.

This Note will proceed in four parts. Part I provides an overview of the Fiduciary Program, explaining how the Program works in theory. Part II examines the Program's identifiable flaws through an examination of three critical problems. Part III identifies why a new

20. See *H.R. 5948 (112th): Veterans Fiduciary Reform and Honoring Noble Service Act*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/112/hr5948#overview> (last visited Feb. 9, 2014).

21. H.R. 894, 113th Cong. (2013).

22. *H.R. 894: To Amend Title 38, United States Code, To Improve the Supervision of Fiduciaries of Veterans Under the Laws Administered by the Secretary of Veterans Affairs*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/hr894> (last visited Feb. 9, 2014).

23. Although there has been no scholarship on the Fiduciary Program, there have been a few articles written about the Representative Payment Program, the Social Security Administration's (SSA) version of the Fiduciary Program. See generally Margaret G. Farrell, *Administrative Paternalism: Social Security's Representative Payment Program and Two Models of Justice*, 14 CARDOZO L. REV. 283 (1992); Margaret G. Farrell, *Doing unto Others: A Proposal for Participatory Justice in Social Security's Representative Payment Program*, 53 U. PITT. L. REV. 883 (1992); Samuel Saks, *Representative Payment Under the Social Security Protection Act of 2004*, 51 WAYNE L. REV. 1569 (2005).

statutory scheme cannot effectively respond to the Fiduciary Program's challenges in light of the limitations on judicial review. Part IV proposes alternative mechanisms for reform including interagency cooperation, parallel state enforcement, and vigorous advocacy by individuals.

I. THE FIDUCIARY PROGRAM ON PAPER

Originally created in 1935,²⁴ the Fiduciary Program, managed under the Veterans Benefit Administration (VBA) division of the VA,²⁵ protects the benefits of those whom the VA deems incapable of managing their personal finances.²⁶ Once the VA determines a beneficiary is unable to manage his or her financial affairs, the beneficiary is deemed incompetent and the Fiduciary Program appoints a private citizen or organization as the incompetent beneficiary's fiduciary.²⁷ Once appointed, the fiduciary is responsible for ensuring that the veteran's funds are expended for "the care, support, welfare and needs of the beneficiary and their recognized dependents."²⁸ In fiscal year 2012, the Fiduciary Program included

24. Act of Aug. 12, 1935, ch. 510, 49 Stat. 607.

25. The Fiduciary Program is "administered by VA Regional Offices (VAROs) and their respective Offices of Regional Counsel (ORC) that deal directly with VA beneficiaries and State courts in guardianship and commitment matters." OFFICE OF AUDITS & EVALUATIONS, *supra* note 15, at 1; see 38 U.S.C. § 5502(a)(1) (2006) (authorizing the payment of benefits to fiduciaries "for the use and benefit of [beneficiaries]"); see also *id.* § 512 (authorizing the Secretary of Veterans Affairs to delegate that authority to lower-level employees). The Secretary of the VA delegates his authority to appoint fiduciaries to the VSCM at each regional office. 38 C.F.R. § 13.55 (2013).

26. U.S. DEP'T OF VETERANS AFFAIRS, *supra* note 1, at 41–42. The Fiduciary Program not only serves veterans but also protects all incompetent beneficiaries. For the Program's definition of "beneficiary," see *supra* note 9.

27. U.S. DEP'T OF VETERANS AFFAIRS, *supra* note 1, at 39. Federal law empowers the VA to appoint a private citizen to manage a veteran's finances. See 38 U.S.C. § 5502(a)(1) ("Where it appears to the Secretary [of Veterans Affairs] that the interest of the beneficiary would be served thereby, payment of benefits under any law administered by 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."); see also 38 C.F.R. § 13.55(a) (describing the different types of federal fiduciaries, including legal custodians and institutional payees). Although the Fiduciary Program guidelines do not explicitly reference the appointment of private individuals to serve as paid fiduciaries, the fact that "dependents or close relatives" are generally not allowed to receive a commission, combined with the regular use of commissions, implies that private individuals and institutions can be appointed as paid fiduciaries. See U.S. DEP'T OF VETERANS AFFAIRS, *supra* note 2, ch. 2, § E.29.b.

28. U.S. DEP'T OF VETERANS AFFAIRS, FEDERAL BENEFITS FOR VETERANS, DEPENDENTS AND SURVIVORS 39 (2012), available at http://www.va.gov/opa/publications/benefits_book/2012_federal_benefits_ebook_final.pdf.

134,128 beneficiaries receiving a total of \$2,337,816,110 in VA benefits.²⁹

Because the Fiduciary Program involves money management for individuals extremely susceptible to abuse, there is ample opportunity for misuse.³⁰ To protect these vulnerable beneficiaries, federal law establishes minimum threshold requirements related to the selection and monitoring of VA fiduciaries.³¹ The VA provides further guidance through regulations that flesh out the federal requirements.³² In addition, the VBA, the subset of the VA responsible for administering the Fiduciary Program, routinely issues further guidance in the form of fast letters,³³ training letters,³⁴ and manuals.³⁵ This guidance details the Fiduciary Program's internal processes and functions and is instrumental in the daily administration of the Fiduciary Program.³⁶ In practice, fast letters "introduce new laws before they become regulations," "adjust guidance from the [VBA Fiduciary Manual (the Manual)] with

29. VETERANS BENEFITS ADMIN., *supra* note 12, at 41. By categorizing the data based on the type of fiduciary retained by each beneficiary, the Benefits Report fails to account for fiduciaries providing services to multiple veterans. As such, the Benefits Report does not identify the actual number of fiduciaries in the system.

30. *Cf. Saks, supra* note 23, at 1578–79 (discussing the dangers inherent to a beneficiary under the SSA's fiduciary program).

31. *See, e.g.*, 38 U.S.C. § 5507(a)(1)(C) (requiring a credit report for proposed fiduciaries to the extent practicable); *id.* § 5507(b) (requiring investigators to inquire into a proposed fiduciary's criminal background).

32. *See, e.g.*, 38 C.F.R. § 13.105 (indicating which types of fiduciaries may be required to provide bonds).

33. Fast letters are written and published by the Director of the Fiduciary Program and transmit information and instructions to local VA offices about changes or policies relating to the Fiduciary Program. Jeffrey Parker, *Two Perspectives on Legal Authority Within the Department of Veterans Affairs Adjudication*, 1 VETERANS L. REV. 208, 210 n.21 (2009). For examples of fast letters, see *Garcia v. Shinseki*, No. 11-1924, 2011 WL 4448186, at 3–4 & n.3 (Vet. App. Sept. 27, 2011); Fast Letter 13-29, Fiscal Year 2014 National Training Curriculum for Fiduciary Hub and Manila Office Fiduciary Personnel (Nov. 14, 2013), *available at* https://www.ttande.org/VBA_Learning_Catalog/Pension/FL/FL13-029_SOP.doc; Fast Letter 04-11, Processing Claims Releasing Retroactive Benefits to Beneficiaries Under Fiduciary Supervision (May 17, 2011), *available at* http://www.legion.org/documents/legion/pdf/VA&R_Bulletin_4_11_11.pdf; *References, Fast Letters and Forms*, U.S. DEP'T VETERANS AFF., <http://benefits.va.gov/fiduciary/references.asp> (last visited Feb. 9, 2014).

34. For an example of a training letter, see Training Letter 11-04, From Thomas J. Murphy, Dir., Compensation Serv., Veterans Benefits Admin., to All VA Regional Offices, Processing Virtual VA Electronic VA Form 21-592, Request for Appointment of a Fiduciary, Custodian, or Guardian, Documents (Sept. 20, 2011), *available at* <http://www.vfwilserviceoffice.com/upload/TL%2011-04%20Fiduciary%20Processing.doc>.

35. *E.g.*, U.S. DEP'T OF VETERANS AFFAIRS, *supra* note 2.

36. Parker, *supra* note 33, at 210 & n.19.

pending changes,” and “co-ordinate action between divisions in a regional office.”³⁷ Fast letters are easy to issue and revoke, providing the Program with substantial flexibility.³⁸ These directives, however, may not be considered binding law,³⁹ making it difficult to hold Fiduciary Program employees accountable for following or failing to follow the issued directives.⁴⁰

Setting aside numerous nuances and qualifications beyond the scope of this Note, the structure of the Fiduciary Program is fairly straightforward: After determining that a veteran is incapable of managing his or her personal finances,⁴¹ the Fiduciary Program assigns an employee (the investigator) to select a fiduciary for the veteran.⁴² The investigator interviews the beneficiary and any potential applicants for the position of fiduciary before making a selection.⁴³ If the investigator determines that no suitable fiduciary is available to serve for free, a portion of the beneficiary’s money can be used to pay a fiduciary to manage the beneficiary’s finances.⁴⁴

37. N.D. DEP’T OF VETERANS AFFAIRS, TRAINING, RESPONSIBILITY, INVOLVEMENT, AND PREPARATION OF CLAIMS, ch. 3, at 10, *available at* <http://www.nd.gov/veterans/files/resource/Chapter%203%20-%20Reference%20Materials.pdf>.

38. Parker, *supra* note 33, at 217; *see, e.g.*, Fast Letter 12-13, From David R. McLenachen, Dir., Pension and Fiduciary Servs., Veterans Benefits Admin., to All Veterans Service Center and Fiduciary Hubs Personnel, Pre-approval of Single Expenditures by a Fiduciary (Apr. 19, 2012), *available at* <http://benefits.va.gov/fiduciary/FL12-013.doc> (rescinding Fast Letter 09-42, which had been issued in October 2009, and clarifying the expenditure-review policy outlined in the Manual).

39. *See* 38 C.F.R. § 19.5 (“In consideration of appeals, the Board [of Veterans’ Appeals] . . . is not bound by Department manuals, circulars, or similar administrative issues.”).

40. For further discussion of this issue, *see infra* notes 196–203.

41. *See* 38 C.F.R. § 13.55(a) (limiting the use of fiduciaries to those beneficiaries who are physically or legally disabled). Although determining a beneficiary’s competence is a source of substantial controversy, this Note focuses exclusively on the administration of the Fiduciary Program after the determination of competence is made.

42. *See* 38 U.S.C. § 5507(a)(2) (2006) (endowing the VA with broad discretion to determine whether the proposed fiduciary’s certification is “in the interest of [the] beneficiary”).

43. *See id.* (requiring face-to-face interviews with beneficiaries and fiduciaries when practicable). Waiver of an in-person examination is only acceptable when a proposed fiduciary is a state or local government agency that is already serving as a VA fiduciary with a recent history of compliance with VA policy (for example, by timely filing their accountings). U.S. DEP’T OF VETERANS AFFAIRS, *supra* note 2, ch. 2, § D.11.m.

44. 38 U.S.C. § 5502(a)(2). Necessity exists only when “the beneficiary’s best interest would be served by the appointment of a qualified professional, or, if a qualified professional is not available, the proposed fiduciary is the only qualified person available and is not willing to serve without a fee.” 38 C.F.R. § 13.64(a). Only approximately 8 percent of all beneficiaries pay a commission. Stephen Spotswood, *Recent Investigations Question VA’s Paid Fiduciary Program for Disabled Veterans*, U.S. MED., Mar. 2012, at 6.

The investigator has wide discretion in selecting a fiduciary, but there are a few federal laws involved in the selection process: The investigator must review a proposed fiduciary's recent credit report,⁴⁵ check his or her criminal history,⁴⁶ and provide "adequate evidence" that the proposed fiduciary's selection is in the interest of the beneficiary (though what constitutes "adequate evidence" is largely undefined).⁴⁷ The investigator also decides whether to protect the veteran's funds using a bond.⁴⁸ Once selected, the fiduciary is responsible for ensuring that the beneficiary has basic necessities including food, shelter, and medical expenses. The fiduciary is also responsible for paying all bills and income taxes on time, collecting any rent or unpaid debts on behalf of the beneficiary, and purchasing insurance if needed.⁴⁹ After selection, a different employee (the auditor) monitors the fiduciary's spending through periodic financial

45. See 38 U.S.C. § 5507(a)(1)(C) (requiring the VA to determine the fitness of the proposed fiduciary by reviewing a credit report, issued within one year of the date of the proposed appointment to the extent practicable). Credit scores are widely regarded as a useful indicator of financial responsibility, providing important "information about one's responsibility and stability, stress level, and distractibility" to create an accurate picture of the individual's risk-assessment behavior. Patrick L. Brockett & Linda L. Golden, *Biological and Psychobehavioral Correlates of Credit Scores and Automobile Insurance Losses: Toward an Explanation of Why Credit Scoring Works*, 74 J. RISK & INS. 23, 26 (2007).

46. See 38 U.S.C. § 5507(b) (mandating that the VA inquire whether the proposed fiduciary has been convicted of any offense that resulted in imprisonment for more than one year).

47. *Id.* § 5507(a)(2). In narrowing selection standards, VA regulations require all determinations to be made based on the "best interest of the beneficiary." 38 C.F.R. § 3.850 (emphasis added). Though the best-interest standard remains undefined, the Manual provides specific instructions to help field examiners select the best fiduciary. U.S. DEP'T VETERANS AFFAIRS, *supra* note 2, ch. 2, § E.28; see also *Freeman v. Shinseki*, 24 Vet. App. 404, 416–17 (2011) (per curiam) (finding sufficient regulatory guidance to allow the court to review the selection of fiduciaries).

48. See 38 U.S.C. § 5507(a)(3) (granting the VA discretion to require a bond). VA regulations clarify which types of fiduciaries might be required to provide bonds. See 38 C.F.R. § 13.105(a) (listing "legal custodian, custodian-in-fact or chief officer of a [qualified] private institution" as those federal fiduciaries that the VSCM may require to provide bonds). Bond payments are made by the beneficiary's estate. *Examining the Fiduciary Program*, *supra* note 17, at 41 (statement of Gary Chesterson, Chief of Fiduciary Program Staff, Veterans Benefits Administration, U.S. Department of Veterans Affairs).

49. PENSION & FIDUCIARY SERV., U.S. DEP'T OF VETERANS AFFAIRS, A GUIDE FOR VA FIDUCIARIES 4 (2013), available at http://benefits.va.gov/FIDUCIARY/Fid_Guide.pdf; see also *Fiduciary*, U.S. DEP'T VETERANS AFF., <http://www.benefits.va.gov/fiduciary/fiduciary.asp> (last visited Feb. 9, 2014) (describing a fiduciary's potential responsibilities).

statements called accountings⁵⁰ and periodic personal visits to the beneficiary.⁵¹ The auditor is expected to “aggressive[ly]” follow up on delinquent accountings to ensure the fiduciary is complying with Fiduciary Program policy⁵² while simultaneously looking for indicators of misuse.⁵³ If the fiduciary performs unsatisfactorily and informal efforts by the local Veterans Service Center Manager (VSCM) fail to correct the fiduciary’s deficiency, the case will be referred to the VA Regional counsel.⁵⁴ If a misuse determination is made, the matter will be referred to the VA Office of Investigations for further review.⁵⁵ If the VA OIG finds “a prima facie case of misappropriation, embezzlement or a violation of the Federal statutes,” the case may be submitted to the U.S. Attorney’s office for potential prosecution.⁵⁶

Several different punishments exist for failure to comply with Program policy and/or misuse of funds. First, a Fiduciary Program employee can terminate fiduciaries who misuse funds or fail to follow Fiduciary Program rules and appoint a successor fiduciary at any time.⁵⁷ Additionally, under federal law, misappropriation and embezzlement by a fiduciary is punishable by up to five years’ imprisonment.⁵⁸ Beyond potential criminal prosecution, federal law provides a cause of action for negligence against the government “in any case in which the negligent failure of the Secretary to investigate or monitor a fiduciary [resulted] in misuse of benefits by the fiduciary.”⁵⁹ If the VA is found negligent, federal law requires the VA to “pay the beneficiary or the beneficiary’s successor fiduciary an amount equal to the amount of benefits that were so misused.”⁶⁰

50. See U.S. DEP’T OF VETERANS AFFAIRS, *supra* note 2, ch. 3, § C.7 (requiring accountings for several different types of federal fiduciaries). Required accountings can be waived for any federal fiduciary under appropriate circumstances. *Id.* ch. 2, § E.28.b.

51. See *id.* ch. 2, § E.33.c (detailing the timeline for secondary field examinations).

52. See *id.* ch. 3, §§ C.12.a–b (citing 38 U.S.C. § 6107) (providing a step-by-step table describing the appropriate technique for handling delinquent accounts).

53. *Id.* ch. 2, § A.2.f. For guidance on misuse investigations, see generally *id.* ch. 5.

54. 38 C.F.R. § 13.100(c) (2013).

55. U.S. DEP’T OF VETERANS AFFAIRS, *supra* note 2, ch. 5, § F.18.

56. 38 C.F.R. § 13.100(d).

57. *Id.* § 13.100(a)(2).

58. 38 U.S.C. § 6101(a)(2) (2006).

59. *Id.* § 6107(a)(1). In this context, a negligent failure exists when the VA fails to review an accounting or follow up an allegation of abuse within sixty days. *Id.* § 6107(a)(2).

60. *Id.* § 6107(a)(1).

II. THE FIDUCIARY PROGRAM AS APPLIED

In practice, the Fiduciary Program struggles to effectively protect vulnerable beneficiaries from abuse. A woman serving as a fiduciary for her injured son recently described her experiences with the Fiduciary Program as “disturbing,” citing among many problems a complete lack of guidance about Fiduciary Program requirements, difficulty contacting Program employees, and inconsistent reports as to whether she had complied with Program procedures.⁶¹ According to the Wounded Warrior Project, a charity supporting wounded veterans, her description is an accurate reflection of community experiences.⁶²

Rather than exhaustively detailing the Program’s flaws, this Note highlights three major problems illustrative of the Program’s shortcomings as a whole. First, the Fiduciary Program assigns unsuitable fiduciaries.⁶³ Second, fiduciaries are not always required to fulfill the mandatory bond requirement.⁶⁴ Third, the Program’s staff routinely fails to identify abuse.⁶⁵

A. *The Selection of Inappropriate and Incompetent Fiduciaries*

Investigations,⁶⁶ hearings,⁶⁷ and media reports⁶⁸ have identified many instances in which either inadequate or inappropriate fiduciaries have been assigned to incompetent beneficiaries. These problems manifest themselves in at least three ways. First, investigators hire strangers despite the availability of willing and qualified family members. Second, unqualified fiduciaries apply for positions as paid fiduciaries. Third, technology limits the Program’s ability to identify potentially abusive fiduciaries.

First, the Fiduciary Program inappropriately assigns paid strangers to serve as fiduciaries instead of selecting capable family members willing to serve for free. For example, Billy Brown, the

61. *Reforming VA’s Flawed Fiduciary System*, *supra* note 17, at 26–27 (statement of Pam Estes, Veteran Fiduciary).

62. *Id.* at 60–62 (statement of the Wounded Warrior Project).

63. *See infra* Part II.A.

64. *See infra* Part II.B.

65. *See infra* Part II.C.

66. *See supra* notes 14–18 and accompanying text.

67. *See supra* notes 61–62 and accompanying text.

68. *E.g.*, Schwartz, *supra* note 1; Bill Murphy, Jr., *VA Fiduciary Program Comes Under Fire*, STRIPES CENT. (Apr. 8, 2011), <http://www.stripes.com/blogs/stripes-central/stripes-central-1.8040/va-fiduciary-program-comes-under-fire-1.140500>.

veteran assigned a cabinet maker as a paid fiduciary, had an adult son who already possessed a power of attorney for the veteran and was willing to serve as his fiduciary for free.⁶⁹ In another example, a Fiduciary Program employee selected a third party as a fiduciary over a retired lieutenant colonel's daughter who had a valid durable financial power of attorney and had managed the veteran's finances for more than ten years.⁷⁰

These seemingly absurd results are largely explained by several factors. First, in the face of minimal regulatory guidance,⁷¹ the Manual affords VA employees substantial discretion in selecting a fiduciary. It states that the employee assigned to select the fiduciary must determine "the type of fiduciary relationship that will best serve the needs of the beneficiary."⁷² The Manual then lists the various types of fiduciaries without creating a hierarchy⁷³ and later, buried in the section on commissions, notes that commission should not be authorized when another qualified fiduciary is willing to serve without pay.⁷⁴ This substantial discretion leads to questionable results in the practice of selecting fiduciaries.⁷⁵ The Director of Pension and Fiduciary Services has told the House Committee on Veterans' Affairs that employees are required to follow an order of preference when selecting a fiduciary: (1) the beneficiary's preference; (2) the beneficiary's spouse, if available; (3) a family member, friend, or other individual willing to serve without a fee; and (4) a paid

69. Schwartz, *supra* note 1.

70. See Solze v. Shinseki, 26 Vet. App. 118, 119 (2013) (per curiam).

71. Cf. 38 C.F.R. § 3.850 (2013) (requiring that "[p]ayments of benefits" to incompetent beneficiaries be made "to a duly recognized fiduciary . . . when it is determined to be in the best interest of the beneficiary"); *id.* § 13.55 ("The Veterans Service Center Manager is authorized to select or appoint . . . the person or legal entity best suited to receive Department of Veterans Affairs benefits in a fiduciary capacity for a beneficiary who is . . . incompetent . . ."); *id.* § 13.58 ("In absence of special circumstances, the person or legal entity to be appointed legal custodian will be the person or legal entity caring for and/or having custody of the beneficiary or the beneficiary's estate.")

72. U.S. DEP'T OF VETERANS AFFAIRS, *supra* note 2, ch. 2, § E.26.a.

73. *Id.* ch. 2, § E.28.

74. *Id.* ch. 2, § E.29.b. A commission cannot exceed 4 percent of a veteran's annual VA benefits payment. *Id.*

75. See, e.g., Schwartz, *supra* note 1, at A16 ("Families of veterans like Mr. Brown, 80, and William E. Freeman, whose sister was denied the ability to manage his benefits, and beneficiaries like Dennis Keyser, whose appointed trustee turned out to be a felon, say the system is badly flawed."); *Legion Critiques VA Fiduciary Program*, AM. LEGION (Feb. 10, 2012), <http://www.legion.org/legislative/161404/legion-critiques-va-fiduciary-program> ("In one example, VA denied the request of one man to be appointed as his father's fiduciary—although he already had power of attorney.")

stranger.⁷⁶ This requirement, however, is not explicitly provided for in the Manual. Additionally, last updated in 2005,⁷⁷ the current Manual does not incorporate any of the modern changes or modifications made to the Program. Instead, many changes come in the form of fast letters, which override one another to constantly change the rules governing the Program.⁷⁸

Second, selection is further complicated when unqualified fiduciaries apply for positions as paid fiduciaries. Potential fiduciaries' criminal or financial backgrounds may render them unsuitable to serve as a financial guardian for vulnerable beneficiaries. For example, one report indicates that, despite previously pleading guilty to eight counts of tax fraud while working for the Internal Revenue Service, a convicted felon was appointed as a paid fiduciary for a disabled beneficiary.⁷⁹ His unlawful selection is likely explained by inadequacies in the criminal-background-inquiry process. During the selection process, the Manual requires the investigator, by way of a criminal background check, to request that the potential fiduciary "sign a statement as to whether he or she has been convicted of any offense under Federal or State law that resulted in imprisonment for more than one year."⁸⁰ Nothing in the Manual, however, requires the

76. *Legislative Hearing*, *supra* note 17, at 35 (statement of David McLenachen, Director of Pension and Fiduciary Service, U.S. Department of Veterans Affairs); *see also* U.S. DEP'T OF VETERANS AFFAIRS, FEDERAL BENEFITS FOR VETERANS: DEPENDENTS AND SURVIVORS 41 (2013), available at http://www.va.gov/opa/publications/benefits_book/2013_Federal_Benefits_for_Veterans_English.pdf (stating that the VA will only consider a paid fiduciary "as a last resort").

77. The Fiduciary Manual was last updated in July 2005. *See References, Fast Letters and Forms*, *supra* note 33. The Compensation and Pension Manual Rewrite, however, in which the current Fiduciary Manual was previously published, has been updated as part of the VA's ongoing Rewrite Project, which "focus[es] on rewriting the regulations concerning the department's compensation and pension benefit program." William L. Pine & William F. Russo, *Making Veterans' Benefits Clear: The Regulation Rewrite Project*, FED. LAW., July 2010, at 38, 39; *see also* *M21-1MR Compensation and Pension Manual Rewrite*, U.S. DEP'T OF VETERANS AFFAIRS, http://www.benefits.va.gov/WARMS/M21_1MR.asp (last visited Feb. 9, 2014).

78. *See supra* note 38.

79. Jennifer Kraus, *VA Hired Convicted Felon To Manage Veterans' Money*, NEWSCHANNEL5.COM (Feb. 21, 2011, 7:21 PM), <http://www.newschannel5.com/story/14071970/va-hires-convicted-felon-to-manage-veterans-money>.

80. U.S. DEP'T OF VETERANS AFFAIRS, *supra* note 2, ch. 2, § D.11.g. In contrast, according to the Society for Human Resource Management, 93 percent of employers pay for criminal background checks from checking companies for some prospective applicants, and 73 percent purchase criminal background checks for all potential applicants. PERSIS S. YU & SHARON M. DIETRICH, NAT'L CONSUMER LAW CTR., *BROKEN RECORDS: HOW ERRORS BY CRIMINAL BACKGROUND CHECKING COMPANIES HARM WORKERS AND BUSINESSES* 7 (2012), available at <http://www.nclc.org/images/pdf/pr-reports/broken-records-report.pdf>.

field examiner to verify the fiduciary's truthfulness with a neutral third party,⁸¹ making it fairly easy for the applicant to conceal a criminal past. Moreover, because the potential fiduciary is only required to report convictions resulting in more than one year of imprisonment,⁸² lesser crimes of financial dishonesty need not be reported despite their particular relevance when selecting a fiduciary. This is especially troubling considering that many states are increasing the threshold dollar amount required to trigger imprisonment for financial crimes, such as theft and check kiting, to avoid costly prison terms.⁸³ Under the current guidelines, small-time fraudsters can honestly complete the background check without bringing their past indiscretions to the investigator's attention.

Third, technology also limits the Program's ability to identify potentially abusive fiduciaries. The Fiduciary Benefit System (FBS), the electronic case-management software intended to facilitate the bulk of day-to-day operations in the Fiduciary Program,⁸⁴ "lacks an external interface for fiduciaries, beneficiaries and other external entities."⁸⁵ As a result, the system cannot process electronically submitted accounting information or access financial institutions to verify account balances. This system drastically increases the potential for error as auditors must manually review the accountings for math errors and cross-reference the accountings with data separately provided by financial institutions to verify that the balances provided are accurate.⁸⁶ Additionally, FBS does not retain a list of fiduciaries replaced due to misuse, making it difficult to track fiduciaries to ensure that no new beneficiaries are assigned to them.⁸⁷

81. See U.S. DEP'T OF VETERANS AFFAIRS, *supra* note 2, ch. 2, § D.11 (discussing criminal history inquiries and noting no neutral third-party requirement).

82. *Id.* ch. 2, § D.11.h. The Manual states that a criminal background statement can be waived "where immediate payment is made to the parent of a minor beneficiary." *Id.* ch. 2, § D.11.g.

83. Kevin Johnson, *Some States Rethink Felony Property Crimes*, USA TODAY (Oct. 30, 2011, 9:55 PM), <http://usatoday30.usatoday.com/news/washington/story/2011-10-30/states-rethink-felony-property-crimes/51008424/1>.

84. OFFICE OF AUDITS & EVALUATIONS, *supra* note 15, at 7–8.

85. *Id.* at 10.

86. *Id.*

87. *Id.* at 9.

B. Failure To Secure a Surety Bond

In addition to struggling to select appropriate fiduciaries, the Fiduciary Program routinely fails to ensure that estates worth more than \$20,000 are bonded when appropriate. The Manual explicitly requires the Fiduciary Program to consider a corporate surety bond⁸⁸ or other method of protection for paid fiduciaries managing estates valued in excess of \$20,000.⁸⁹ When the investigator determines a surety bond is not required, the Manual requires that the reason for deeming this protection unnecessary be documented in a report and filed with the beneficiary's claim.⁹⁰ Moreover, when a bond is required, the Manual places a positive duty on the Fiduciary Program investigator to help the fiduciary secure the appropriate bond.⁹¹

Despite these clear requirements, the 2010 audit conducted by the VA OIG found that no method of protection (or reason for the lack of protection) existed for 86 percent of estates exceeding \$20,000.⁹² Additionally, despite a clear requirement that benefit payments must be held until a bond or other adequate control is in place,⁹³ in one office two investigators authorized the release of \$571,256 in funds without providing the appropriate protection or a documented justification for the lapse.⁹⁴ Corroborating the VA OIG's findings, the GAO identified at least two cases involving estates worth \$82,000 and \$62,000, respectively, with no documentation of a bond or a waiver in the file.⁹⁵

There are several explanations for investigators' routine failure to secure a bond. First, investigators and auditors lack experience and training. For instance, when asked why they failed to follow the Fiduciary Program's policy regarding bonds, investigators cited uncertainty "about what types of bonds are required for certain types

88. In this context, surety bonds provide a private remedy for beneficiaries harmed by fiduciaries' misuse. James A. Black, Jr., *Miscellaneous Surety Bonds and the Restatement*, 34 WM. & MARY L. REV. 1195, 1196 (1993).

89. U.S. DEP'T OF VETERANS AFFAIRS, *supra* note 2, ch. 2, § E.28.i.

90. *Id.*

91. *Id.* If the examiner considers a bond unnecessary, the report must document the reason. When a bond is considered necessary, VA payments cannot be made to the fiduciary until the bond is in place. *Id.*

92. OFFICE OF AUDITS & EVALUATIONS, *supra* note 15, at 9.

93. U.S. DEP'T OF VETERANS AFFAIRS, *supra* note 2, ch. 2, § E.28.i.

94. OFFICE OF AUDITS & EVALUATIONS, *supra* note 15, at 10.

95. GAO, VA'S FIDUCIARY PROGRAM, *supra* note 18, at 11-12.

of fiduciaries.”⁹⁶ Investigators and auditors also possess substantial discretion. Although the Manual states that investigators must consider a surety bond or other method of protection for these high-value estates, bonds are not required.⁹⁷ As a result, investigators frequently waive the requirement without providing justifications, or they authorize the acquisition of inadequate bonds.⁹⁸ Moreover, the Fiduciary Program does not provide a list of approved sureties,⁹⁹ requiring only that the bonding authority be recognized in the state of jurisdiction.¹⁰⁰ This leaves an investigator with substantial discretion to select the appropriate surety.

Technological constraints also play a large role in the Program’s inability to track surety bonds. The FBS is painfully out-of-date. The Program cannot record surety-bond values or other types of accounting information such as benefit amounts, spending, or account balances,¹⁰¹ making it nearly impossible for management to keep track of which fiduciaries have surety bonds. Additionally, FBS cannot interface with other VA programs, including the Veterans Service Network (VETSNET),¹⁰² requiring staff to manually search for impending retroactive disability payments.¹⁰³ This limitation can result in the release of large payments to fiduciaries without the establishment of proper safeguards.¹⁰⁴

96. *Id.* at 12.

97. See U.S. DEP’T OF VETERANS AFFAIRS, *supra* note 2, ch. 2, § E.28.i (indicating that investigators may consider “other method[s] of protection” in place of a bond and that, in some instances, protection may not be necessary).

98. See GAO, VA’S FIDUCIARY PROGRAM, *supra* note 18, at 11 (“Our nationwide sample showed that program staff sometimes failed to obtain proof that a fiduciary purchased a bond, when required, or did not adequately document in the beneficiary case files that the bond requirement was waived.”); see also OFFICE OF AUDITS & EVALUATIONS, *supra* note 15, at 9 (noting that 86 percent of the beneficiary estates exceeding \$20,000 lacked withdrawal agreements or surety bonds).

99. Approved sureties are those who have complied with the law and regulation of the U.S. Department of the Treasury (Treasury) and are listed by the Treasury as an authorized bonding company. See Surety Companies Doing Business with the United States, 31 C.F.R. § 223.1–223.3 (2013).

100. U.S. DEP’T OF VETERANS AFFAIRS, *supra* note 2, ch. 3, § E.23.b.

101. OFFICE OF AUDITS & EVALUATIONS, *supra* note 15, at 9.

102. VETSNET is the system used to store information about veterans benefits. See *Veterans Service Network Corporate Mini Master File (VETSNET File)*, U.S. DEP’T VETERANS AFF., <http://www.virec.research.va.gov/VETSNET/Overview.htm> (last visited Feb. 9, 2014).

103. OFFICE OF AUDITS & EVALUATIONS, *supra* note 15, at 10.

104. *Id.*

C. Inability To Identify Misuse

The biggest problem with the Fiduciary Program, however, is the failure to effectively identify abuses. Joe Phillips, for example, managed twenty-eight veterans' accounts for more than twenty-five years without receiving even one VA audit, allowing him to steal more than \$2 million from beneficiaries.¹⁰⁵ Similarly, Hazel Diane Hill controlled sixteen veterans' finances under the Fiduciary Program and embezzled \$62,000 from three of them.¹⁰⁶ Unlike Phillips, however, no audit caught Hill, who actually turned herself in as a result of feelings of guilt.¹⁰⁷

The failure to identify misuse is partially a result of the failure to efficiently examine financial reports. Program employees routinely struggle to hold fiduciaries responsible for failing to meet financial reporting deadlines.¹⁰⁸ In fact, Fiduciary Program staff at three of the five VAROs surveyed failed to follow up on 63 percent of delinquent reports at those three offices.¹⁰⁹ In one particularly egregious instance, a fiduciary submitted a financial report two years late without receiving a reprimand.¹¹⁰ In another case, the VA OIG identified a single fiduciary still serving four beneficiaries despite multiple allegations of misuse and seriously delinquent accountings for all beneficiaries, ranging from 134 to 215 days late.¹¹¹ Because the Fiduciary Program routinely fails to appropriately follow up on delinquent financial reports, millions of dollars belonging to incompetent veterans are exposed to possible misappropriation.¹¹²

The Fiduciary Program is particularly ineffective at addressing allegations of misuse. For example, the VA OIG found that staff failed to timely respond to misuse allegations in 96 percent of the

105. Eric Nalder & Lise Olsen, *Investigation: Some Vets' Money Managed—and Stolen—by Scoundrels*, HOUS. CHRON., June 17, 2012, at A1.

106. *Id.*

107. *Id.*

108. See GAO, VA'S FIDUCIARY PROGRAM, *supra* note 18, at 10 (showing that in a majority of the case files examined, auditors failed to follow up or document the follow-up on time). The VA OIG found active fiduciaries with accounts delinquent by up to 710 days. OFFICE OF AUDITS & EVALUATIONS, *supra* note 15, at 3.

109. OFFICE OF AUDITS & EVALUATIONS, *supra* note 15, at 3.

110. GAO, VA'S FIDUCIARY PROGRAM, *supra* note 18, at 11.

111. OFFICE OF AUDITS & EVALUATIONS, *supra* note 15, at 5.

112. See *id.* at 6 (“When VBA fails to take appropriate actions in a timely manner to replace fiduciaries that are responsible for multiple delinquent accountings, beneficiary estates are put at risk, and the potential for misuse or inappropriate diversion of beneficiary funds is increased.”).

cases reviewed.¹¹³ In one instance, a regional office failed to investigate a fiduciary despite allegations from field examiners and a third party that the fiduciary may have misused funds.¹¹⁴ When the VA does follow up on misuse reports, responses are extremely delayed, taking, on average, an extra eighty-one days to complete an investigation.¹¹⁵ Once an investigation report is completed, the timeliness of the determination decision is spotty; in cases in which the VA OIG issued late determinations, the total average time taken to complete the determinations was ninety-nine days.¹¹⁶ The extent of the delay is especially troubling because the Manual specifies that the misuse-response process, which includes both investigation and determination, should only take seventy-five days total.¹¹⁷ Because of delays among field examiners and auditors, the Fiduciary Program takes an average of thirty-two months to catch thieving fiduciaries.¹¹⁸

These performance delays are partially attributable to unrealistic expectations. Despite internal aspirations to meet 90 percent of deadlines,¹¹⁹ that delays often occur, sometimes egregiously,¹²⁰ suggests that current performance expectations may be impractical.¹²¹ Unrealistic performance standards distort the priorities of the employees, decrease performance quality, and incentivize staff to bend standards to meet deadlines.¹²² Moreover, some investigators

113. *Id.* at 6.

114. *Id.* at 7.

115. *See id.* at 6 (noting that the average inspection took 126 days to complete); *cf.* U.S. DEP'T OF VETERANS AFFAIRS, *supra* note 2, ch. 5, § A.1.e (requiring that investigations occur within 45 days of the assignment for investigation).

116. OFFICE OF AUDITS & EVALUATIONS, *supra* note 15, at 6–7. The Manual requires that determinations occur within thirty days of the completed investigation. U.S. DEP'T OF VETERANS AFFAIRS, *supra* note 2, ch. 5, § A.1.e. In its case study of misuse allegations, the VA OIG found that 25 percent of cases never received a determination, 45 percent of the determinations were completed in a timely fashion, and 30 percent of the determinations were delayed by four to 175 days beyond the thirty-day requirement. *See* OFFICE OF AUDITS & EVALUATIONS, *supra* note 15, at 6–7.

117. U.S. DEP'T OF VETERANS AFFAIRS, *supra* note 2, ch. 5, § A.1.e.

118. Nalder & Olsen, *supra* note 105.

119. GAO, VA'S FIDUCIARY PROGRAM, *supra* note 18, at 12.

120. *See supra* notes 109–18 and accompanying text.

121. *Cf. Examining the Fiduciary Program*, *supra* note 17, at 22–23 (statement of Katherine R. Pflanz, Field Examiner, Winston-Salem Veterans Affairs Regional Office) (discussing problems with performance measures in other programs under the VBA).

122. *Cf. CNA ANALYSIS & SOLUTIONS, QUALITATIVE ANALYSIS OF VBA EMPLOYEE WORK CREDIT AND WORK MANAGEMENT SYSTEMS 30–31 (2009)*, available at http://www.veteranslawlibrary.com/files/Commission_Reports/CNA_work_credit_analysis_Nov

and auditors travel long distances to hold in-person interviews with beneficiaries and fiduciaries, making it onerous to conduct timely visits.¹²³

Outdated technology also shares some of the blame for the Program's failure to follow up on delinquent financial reports and address misuse allegations. The FBS substantially limits the daily functions of the Fiduciary Program, as the software accepts only one due date for a financial report (thereby overriding older due dates when a report has not been submitted), provides no means of comparing monthly or yearly budgets to actual expenditures, and cannot accept or process electronically submitted documents.¹²⁴ FBS data field limitations also prevent staff from recording all pertinent information regarding beneficiaries or fiduciaries within the software.¹²⁵ To compensate, staff manually track such dates using personal notes to remind themselves of pending actions,¹²⁶ which inevitably creates inefficiencies and substantial room for error.

The FBS also makes it difficult for management to monitor employees. The software does not generate a single management report showing staff deadlines.¹²⁷ Instead, managers must physically cross-reference several reports to determine monthly deadlines, a task requiring considerable time and experience.¹²⁸ The FBS also provides no efficient means of monitoring staff performance because the Program only stores two months of production data: the current month and the previous month.¹²⁹ As a result, to analyze a particular employee's performance, managers must manually evaluate the individual's performance for each month under review and then compare those to an employee's overall performance,¹³⁰ an extremely taxing analysis.

2009.pdf (noting that unrealistic performance expectations are present in the VBA more generally).

123. *Examining the Fiduciary Program*, *supra* note 17, at 51 (statement of Daniel Bertoni, Director, Education, Workforce, and Income Security, U.S. Government Accountability Office).

124. *See* GAO, VA'S FIDUCIARY PROGRAM, *supra* note 18, at 14–15. This forces fiduciaries to submit their annual reports by mail. OFFICE OF AUDITS & EVALUATIONS, *supra* note 15, at 10.

125. GAO, VA'S FIDUCIARY PROGRAM, *supra* note 18, at 14–15.

126. *Id.* at 15.

127. *Id.* at 16.

128. *See id.* (describing the process as one "which can be cumbersome").

129. OFFICE OF AUDITS & EVALUATIONS, *supra* note 15, at 21–22.

130. GAO, VA'S FIDUCIARY PROGRAM, *supra* note 18, at 16.

III. BEYOND TRADITIONAL REFORM: THE PROBLEMS WITH COMPREHENSIVE STATUTORY REFORM

Despite numerous reports indicating that the Fiduciary Program needs substantial reform, successful reform has not yet occurred. Critics of an agency's performance might turn to the legislative or judicial branch for relief.¹³¹ Congressional adoption of a more explicit statutory scheme to regulate the Fiduciary Program would likely encounter hurdles to effective, meaningful judicial review. To explain, this Note first examines why a new statutory scheme would be insufficient to fix the Fiduciary Program and then second explores why, even if an amended statute were passed, the limitations on judicial review would render the new statute ineffective.

A. *The Inadequacies of a Purely Legislative Solution*

Congress can reign in agency action by using several techniques, including oversight hearings to increase public pressure and, when appropriate, the adoption of new statutes crystallizing congressional expectations.¹³² Oversight hearings in this context, however, have made little progress in reforming the Fiduciary Program,¹³³ prompting veterans' advocates to lobby for a new statute. This proposed reform, despite identifying and attempting to rectify many of the current problems, will not fix the Fiduciary Program.

After years of encouraging reform and achieving little progress, several representatives proposed legislation overhauling the Fiduciary Program.¹³⁴ A proposed bill, known as the Veterans Fiduciary Reform Act of 2012,¹³⁵ stalled in the Senate, but a nearly identical version was revived in the House in 2013.¹³⁶ H.R. 894 aims to improve accounting practices and increase transparency in the system.¹³⁷ It addresses many

131. Some authors disfavor external review of agency decisionmaking altogether. See Richard J. Pierce & Sidney A. Shapiro, *Political and Judicial Review of Agency Action*, 59 TEX. L. REV. 1175, 1178 (1981) (arguing that “[a]gencies should be scrutinized only to determine whether the benefit of the administrative program outweighs whatever costs—including those of capricious action—may be imposed by the inevitable play in the regulatory process”).

132. Edward J. Markey, *Congress to Administrative Agencies: Creator, Overseer, and Partner*, 1990 DUKE L.J. 967, 971.

133. See *supra* notes 15–19 and accompanying text.

134. H.R. REP. NO. 112-678, at 14 (2012).

135. H.R. 5948, 112th Cong. (2012).

136. H.R. 894, 113th Cong. (2013).

137. See Press Release, House Comm. on Veterans' Affairs, Miller, Johnson, Roe Introduce VA Fiduciary Reform Act of 2012 (June 19, 2012), available at <http://veterans.house.gov/press->

of the procedural and discretionary flaws in the Fiduciary Program. H.R. 894 reduces staff discretion by giving the beneficiary more authority to designate or remove a fiduciary, makes in-person interviews and background checks mandatory, and codifies the previously discretionary preference for appointing a fiduciary designated by a beneficiary.¹³⁸ It also standardizes annual accounting reports;¹³⁹ requires fiduciaries to annually report any criminal convictions, bankruptcy filings, or legal judgments acquired during the previous year; and requires the Fiduciary Program to transmit the fiduciary's annual financial report to the beneficiary and any legal guardian.¹⁴⁰ In an effort to improve monitoring, H.R. 894 requires each regional office to maintain a list of fiduciaries along with their personal information, a requirement designed to promote cooperation among regional offices.¹⁴¹

Despite proposing essential reforms, H.R. 894 is unlikely to fix the Fiduciary Program's flaws. First, there is the practical issue of political will. Despite almost universal recognition that the Fiduciary Program needs reform,¹⁴² the Veterans Fiduciary Reform Act stalled in the Senate without ever reaching the floor for debate.¹⁴³ H.R. 894 has failed to garner even a full vote of the House Committee on Veterans' Affairs.¹⁴⁴ This stagnation emphasizes the limitations of congressional action as an effective means to reform administrative agencies. Beyond this practical limitation, there is the larger issue of prioritization. The veterans community has limited lobbying resources, and many of those resources are focused elsewhere. For example, the high suicide rate among disabled veterans¹⁴⁵ and the

release/miller-johnson-roe-introduce-va-fiduciary-reform-act-of-2012 (stating the aims of the 2012 act).

138. H.R. 894, 113th Cong. § 1.

139. *See id.* (proposing certain requirements for inclusion in annual financial reports in § 5509(c)).

140. *Id.*

141. *Id.*

142. *See supra* Parts II.A–C.

143. *See supra* note 20.

144. *See supra* note 22.

145. *See* Michelle Castillo, *Study: Suicide Rates Among Army Soldiers Up 80 Percent*, CBS NEWS (July 10, 2012), <http://www.cbsnews.com/news/study-suicide-rates-among-army-soldiers-up-80-percent>.

massive delays associated with processing VA disability claims¹⁴⁶ arguably make reform of other VA programs a higher priority for advocates than reform of the Fiduciary Program. This state of affairs reveals the other practical danger inherent in relying on Congress to reform the Program: external support is necessary to motivate political change.¹⁴⁷

But even if sufficient political will existed to pass the proposed legislation, the Fiduciary Program's struggles to comply with its statutory mandate would continue. First, the legislation is too ambiguous. For example, the Fiduciary Program would still authorize the Secretary of Veterans Affairs to obtain a fiduciary "in the best interests of a beneficiary" without defining that phrase,¹⁴⁸ perpetuating the previously discussed problems related to excessive discretion.¹⁴⁹ Similarly, although the proposed statute does explicitly prefer the beneficiary's selected fiduciary, the statute still leaves the ultimate determination to the VA.¹⁵⁰ Political pressure forces Congress to use very general enabling language in legislation regulating administrative bodies.¹⁵¹ This language, in turn, makes it extremely difficult to bind administrative employees, creating logistical difficulties regarding noncompliance.¹⁵²

Second, the proposed legislation does not address the Fiduciary Program's underlying problem with employee compliance. As discussed above, employees are ignoring Program policy at every stage. During the selection process, investigators frequently disregard the bonding requirement and the preference for family-member fiduciaries.¹⁵³ At the monitoring stage, auditors miss deadlines by

146. Steve Vogel, *Veterans Face Another Backlog as a Quarter-Million Appeal Disability Claims*, WASH. POST (Sept. 8, 2013, 7:52 PM), http://articles.washingtonpost.com/2013-09-10/politics/41934907_1_veterans-claims-va-secretary-eric-k-veterans-affairs.

147. See Michael D. Sant'Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 GEO. WASH. L. REV. 1381, 1418 (2011) ("Although individual members of Congress frequently write to agencies on their constituents' behalf, only when delays begin to affect large numbers of intended beneficiaries of politically popular programs will Congress begin to hold hearings and consider imposing statutory deadlines.").

148. See H.R. 894, 113th Cong. § 1 (2013).

149. See *supra* notes 71–78 and accompanying text.

150. See H.R. 894, 113th Cong. § 1 (listing potential fiduciary appointees and directing the Secretary to select one of the listed options "to the extent possible").

151. Pierce & Shapiro, *supra* note 131, at 1197.

152. For further discussion of the difficulties associated with discretionary language, see *infra* notes 196–202 and accompanying text.

153. See *supra* Parts II.A–B.

weeks and routinely fail to follow documentation requirements.¹⁵⁴ Agency effectiveness in tackling misuse is even more startling: in 2011 fiduciary personnel conducted only 561 misuse investigations, and only twenty-five cases (representing less than 5 percent) resulted in the removal of the fiduciary.¹⁵⁵ Lower-level employees are not the only ones bypassing accountability mechanisms. At the highest level, leadership within the VA has ignored the legal controls designed to provide accountability. For example, despite an explicit requirement that the Fiduciary Program's central office report misuse to Congress in an Annual Benefits report,¹⁵⁶ the central office failed to report misuse activities in every year from fiscal year 2005 to fiscal year 2008.¹⁵⁷ In this light, changes to the text of the statutes authorizing the Fiduciary Program fail to address this underlying compliance problem.

Third, legislative efforts to reduce employee discretion might exacerbate, not remedy, issues regarding noncompliance. A certain amount of discretion is critical for agencies to function effectively.¹⁵⁸ Considering the complexity of the decisions being made, the importance of the intangible information gained through personal visits, and the effect of a determination on the well-being of the individual beneficiary, some amount of discretion is inevitable and even preferable. As such, rather than tempering discretion, reform should focus on establishing effective monitoring by internal and external actors to ensure accountability.¹⁵⁹

B. Judicial Review: Not a Realistic Reform Tool

Practically speaking, there is little hope that judicial review will improve the selection or dismissal of fiduciaries. First, Congress narrowly limits judicial review of fiduciary selection and dismissal to a single, overwhelmed court for preliminary review. Second, the

154. See *supra* Part II.C.

155. VETERANS BENEFITS ADMIN., U.S. DEP'T OF VETERANS AFFAIRS, ANNUAL BENEFITS REPORT: FISCAL YEAR 2011, at 35 (2012), available at http://www.vba.va.gov/REPORTS/abr/2011_abr.pdf.

156. 38 U.S.C. §§ 5510(5)–(9) (2006 & Supp. V 2011).

157. OFFICE OF AUDITS & EVALUATIONS, *supra* note 15, at 8.

158. See Pierce & Shapiro, *supra* note 131, at 1178 (arguing “that a certain amount of discretion is necessary if agencies are to function effectively in a complex society”).

159. Cf. *id.* at 1180 (“Although an effective regulatory process requires that agencies be given considerable freedom, the presence of wide administrative discretion increases the importance of democratic controls over the entire process.”).

requirements of administrative law funnel all cases through a lengthy judicial process, forcing beneficiaries to endure years of financial management by unwanted and potentially abusive fiduciaries.

1. *Only One Federal Court Has Jurisdiction To Hear VA-Related Claims.* The Veterans' Judicial Review Act (VJRA)¹⁶⁰ creates a very specific pipeline for judicial review of claims related to the Fiduciary Program. Dissatisfied beneficiaries must first appeal the decision to the Board of Veterans' Appeals (BVA)¹⁶¹ and then to the CAVC, an Article I court composed of nine judges appointed for fifteen-year terms¹⁶² with exclusive jurisdiction over decisions made by the BVA.¹⁶³ After exhausting both forums, the dissatisfied veteran may then turn to the Court of Appeals for the Federal Circuit, which can decide only "relevant questions of law, including interpreting constitutional and statutory provisions,"¹⁶⁴ and then by certiorari to the U.S. Supreme Court.¹⁶⁵

There are several problems with this form of judicial review. First, although Congress intended the CAVC to exist independently of the VA,¹⁶⁶ the court frequently serves as a rubber stamp for VA procedures in practice. The court often remands cases back to the BVA for further review without reprimand, even in the face of clear evidentiary or procedural issues.¹⁶⁷ For example, consider the case of Allen and Darren Crenshaw. In February 2012, Darren Crenshaw

160. Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988) (codified as amended in scattered sections of 38 U.S.C.).

161. See 38 U.S.C. § 7104(a) (2006) (subjecting the Secretary's decisions "to one review on appeal to the Secretary," with "[f]inal decisions on such appeals [to] be made by the Board").

162. See 38 U.S.C. §§ 7253(a)–(c) (indicating the name of the court, the number of members, the length of their terms, and noting that judges are to be appointed by the President with the advice and consent of the Senate). Although the court traditionally has seven judges, two additional judges were authorized in 2008 as part of a temporary expansion provision. Veterans Benefits Improvement Act of 2008, Pub. L. No. 110-389, § 601, 122 Stat. 4145, 4176–77 (codified at 38 U.S.C. § 7253 (2006 & Supp. V 2011)).

163. 38 U.S.C. § 7252(a). The exclusive jurisdiction explicitly includes constitutional questions. *Id.* § 7261(a)(1).

164. *Id.* §§ 7292(a), (c)–(d); see also *Chinnock v. Turnage*, 995 F.2d 889, 892 (9th Cir. 1993) (holding that the Ninth Circuit was without jurisdiction to review a VA interpretation of regulations governing veterans' "service-connected" disabilities).

165. 38 U.S.C. § 7291.

166. H.R. REP. NO. 100-963, at 26 (1988), reprinted in 1988 U.S.C.C.A.N. 5782, 5808.

167. See James T. O'Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process Is Needed To Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223, 232–33 (2001) (describing a pattern of remand without consequence by the CAVC in the face of meaningful error by the VA).

was deemed incompetent and in need of a fiduciary.¹⁶⁸ In response, Allen Crenshaw, Darren's father and caretaker, sent six letters requesting his appointment as Darren's fiduciary, none of which received a response from the VA.¹⁶⁹ In November 2012, the Crenshaws, no doubt frustrated with the lack of progress, filed a petition for a writ of mandamus to the CAVC asking the court to direct the Secretary of Veterans Affairs to appoint Allen Crenshaw as Darren's fiduciary.¹⁷⁰ In response to the petition, the Secretary introduced a letter stating that a paid fiduciary had been appointed, though nothing indicated that the letter had ever been sent to the Crenshaws.¹⁷¹ Despite the Fiduciary Program's disorganization and untimeliness, the CAVC explicitly refused to take a position on whether the VA properly appointed a fiduciary and instead concluded that the Crenshaws had been afforded sufficient relief because they had the opportunity to appeal the matter to the BVA.¹⁷² Though the court has raised concerns in the past that the Fiduciary Program may be incapable of "thoroughly and impartially investigat[ing] misuse allegations raised by incompetent veterans," the CAVC has decided it is "procedurally and jurisdictionally precluded" from reviewing petitions for mandamus related to challenging misuse allegations,¹⁷³ leaving beneficiaries with few mechanisms to effectively challenge the selection or dismissal of a fiduciary.¹⁷⁴

Second, because the CAVC rarely uses the writ of mandamus to bypass the BVA,¹⁷⁵ beneficiaries must endure the grueling wait

168. *Crenshaw v. Shinseki*, No. 12-3419, 2013 WL 846700, at *1 (Vet. App. Mar. 7, 2013).

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at *2.

173. *Mimms v. Shinseki*, No. 12-2651, 2013 WL 2629248, at *12 (Vet. App. June 12, 2013).

174. Although *Freeman v. Shinseki*, 24 Vet. App. 404 (2011) (per curiam), is an exception to this general rule, the CAVC's language in *Mimms* reflects a strong preference for rarely using "the 'drastic' remedy of a writ of mandamus." *Mimms*, 2013 WL 2629248, at *12. As discussed above, the CAVC is the only avenue of meaningful appellate review for veterans. *See supra* notes 161-65 and accompanying text.

175. *See, e.g., Dickson v. West*, No. 99-2128, 2000 WL 649170, at *1 (Vet. App. Mar. 21, 2000) (declining to issue a writ of mandamus in a case alleging delay in the appointment of a replacement fiduciary); *Brower v. Nicholson*, No. 05-1253, 2005 WL 2105418, at *1 (Vet. App. July 19, 2005) (declining to issue a writ of mandamus, concluding, instead, that it did not have authority to review the Secretary's appointment of a fiduciary); *cf., e.g., Willis v. Brown*, 6 Vet. App. 433, 434 (1994) (concluding that the CAVC did not have authority to review the

associated with filing an initial claim before the BVA. Each year, the BVA, composed of only sixty-four judges,¹⁷⁶ confronts an enormous volume of cases.¹⁷⁷ Because the overloaded BVA plays a critical part in the appeals process, resolution of any VA claims takes an incredibly long time. According to the most recent VA figures, a veteran who appeals to the BVA can expect to wait an average of 1,598 days, with an additional 321 days tacked on if the claim is appealed to the CAVC.¹⁷⁸ In contrast, according to disability practitioners, it takes 530 days on average to appeal a decision of the Social Security Administration (SSA) to an administrative-law judge and an additional 270 days to appeal that determination to the Social Security Appeals Council.¹⁷⁹ By routing fiduciary selection and removal issues through this type of lengthy process,¹⁸⁰ beneficiaries must wait years to give control over their financial assets to their preferred fiduciaries.

Third, fiduciaries cannot even hire lawyers to defend their rights until the case has been appealed. Federal law prohibits veterans from hiring attorneys prior to the filing of the notice of disagreement,¹⁸¹ the document that initiates the appeal.¹⁸² Moreover, any fees paid to an

Secretary's appointment of a fiduciary). *But see* Freeman v. Shinseki, 24 Vet. App. 404 (2011) (per curiam).

176. BD. OF VETERANS' APPEALS, U.S. DEP'T OF VETERANS AFFAIRS, REPORT OF THE CHAIRMAN: FISCAL YEAR 2012, at 3, available at http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2012AR.pdf. In contrast, there are more than sixteen hundred administrative-law judges. ASS'N ADMIN. L. JUDGES, <http://www.aalj.org> (last visited Feb. 9, 2014).

177. Petitioners filed 45,959 cases in fiscal year 2012. The most recent BVA estimates project that appealed cases could increase to 54,033 in 2013 and 64,941 in 2014. BD. OF VETERANS' APPEALS, *supra* note 176, at 16, 20.

178. Vogel, *supra* note 146. These wait times are expected to increase as resources are shifted away from resolving appeals to addressing the backlog related to disability claims. *Id.*

179. *The Social Security Disability Appeals Process*, MARC WHITEHEAD & ASSOCS., <http://www.disabilitydenials.com/social-security-disability-appeals-process> (last visited Feb. 9, 2014).

180. The exclusive jurisdiction of the CAVC may also extend to suits for negligence against the VA. *See* Lujan v. Sec'y of Veterans Affairs, No. 2:09CV56, 2009 WL 2920341, at *2 (D. Utah Sept. 11, 2009) (holding that claims under 38 U.S.C. § 6107 fall within the exclusivity of the VJRA). For further discussion of the negligence cause of action against the VA, see *supra* notes 59–60 and accompanying text.

181. 38 U.S.C. § 5904(c)(1) (2006) (“[A] fee may not be charged, allowed, or paid for services of agents and attorneys with respect to services provided before the date on which a notice of disagreement is filed with respect to the case.”).

182. The notice of disagreement is discussed in further detail in the VA Adjudication Procedures Manual Rewrite. *See generally* U.S. DEP'T OF VETERANS AFFAIRS, M21-1MR,

attorney during the appellate process must be approved by the VA.¹⁸³ Although the Supreme Court has found the fee limitation constitutional,¹⁸⁴ the practical effect of this law is to deny attorneys the opportunity to preserve the appellate record or counsel veteran clients prior to filing the complaint, leaving veterans to navigate an extremely complicated legal system either pro se or based on the generosity of lawyers.¹⁸⁵ This is especially troubling when the VA attempts to use complicated jurisdictional arguments to deny beneficiaries a forum to challenge the selection of a fiduciary. In *Freeman v. Shinseki*,¹⁸⁶ the legal counsel for the VA argued that the CAVC did not have jurisdiction to review decisions related to the appointment of a veteran's fiduciary.¹⁸⁷ Yet the court noted that the VA legal counsel had previously won motions to dismiss in cases in which a beneficiary challenged the selection of a fiduciary in federal courts by arguing that *only* the CAVC had jurisdiction over these cases.¹⁸⁸ By playing both sides of the field, the VA functionally denied beneficiaries any opportunity to appeal the selection of the person designated to manage his financial resources. Although *Freeman v. Shinseki* resolved this jurisdictional issue by finally giving the beneficiary the right to appeal the appointment of a fiduciary,¹⁸⁹ the willingness of the VA to use jurisdictional arguments to avoid judicial

COMPENSATION AND PENSION MANUAL REWRITE, pt. I, ch. 5, § B, available at http://www.benefits.va.gov/WARMS/docs/admin21/m21_1/mr/part1/M21-1MRI_5_SecB.doc.

183. 38 U.S.C. §§ 5904(c)(2)–(3). To receive fees, an attorney must file an application under the Equal Access to Justice Act, 28 U.S.C. §§ 2412(d)(1)–(2) (2012), proving that the attorney (1) is a prevailing party; (2) has a net worth less than \$2,000,000; and (3) provided an itemized statement of the attorney fees and expenses sought. The attorney must also prove that the Secretary's position was not substantially justified. *Id.*; see also *Wilbon v. Shinseki*, No. 11-1908(E), 2012 WL 1058939, at *2 (Vet. App. Mar. 30, 2012) (denying attorneys' fees because the petitioner was not a prevailing party when the agency changed its petition in favor of the veteran while the petition for writ of mandamus was pending).

184. See *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 326 (1985) (“It would take an extraordinarily strong showing of probability of error under the present system—and the probability that the presence of attorneys would sharply diminish that possibility—to warrant a holding that the fee limitation denies claimants due process of law. . . . [N]o such showing was made out on the record before the District Court.”).

185. See Benjamin W. Wright, *It's All About the Money: Denying Disabled Veterans the Right to an Attorney*, 6 NAELA J. 203, 211 (2010).

186. *Freeman v. Shinseki*, 24 Vet. App. 404 (2011) (per curiam).

187. *Id.* at 408.

188. *Id.* at 407 (citing *Judkins v. Veterans Admin.*, 415 F. Supp. 2d 613, 617–18 (E.D.N.C. 2005); *Carney v. G.I. Jane*, No. Civ. A. B-03-173, 2005 WL 2277490, at *2 (S.D. Tex. Sept. 16, 2005); *Whitmire v. U.S. Veterans Admin.*, 661 F. Supp. 720, 722 (W.D. Wash. 1986)).

189. *Freeman*, 24 Vet. App. at 416–17.

review of the Fiduciary Program undermines the working assumption that the VA always protects the interest of veterans.

2. *Administrative Law Bars Judicial Review.* In addition to a limited and narrowly construed forum for judicial review, several principles of administrative law bar the CAVC from reviewing the decisions of the Fiduciary Program on the merits in a timely manner.¹⁹⁰

First, the CAVC can rely on the doctrine of administrative exhaustion to refrain from reviewing challenges to the selection of fiduciaries when the arguments were not previously raised. The doctrine of exhaustion prohibits an appeal based on certain challenges and arguments when “the appellant has failed to present those challenges and arguments, either expressly or implicitly, to the Board.”¹⁹¹ Despite the Federal Circuit’s determination that the BVA must read all filings liberally whether or not the veteran is represented by counsel,¹⁹² the CAVC often invokes the exhaustion doctrine to refuse to entertain newly raised arguments.¹⁹³

The finality requirement imposes an alternative bar against raising challenges to the Fiduciary Program’s selection or removal of a fiduciary. To obtain review by the CAVC, the BVA must issue a final decision following the notice of disagreement.¹⁹⁴ As a result, the CAVC routinely denies petitions for extraordinary relief that challenge the selection or removal of a fiduciary on the basis that the BVA has not yet issued a final decision on the status of the fiduciary.¹⁹⁵ These denials force petitioners back into the queue where they must wait for several years while a stranger manages their money.

190. The Administrative Procedure Act (APA), 5 U.S.C. §§ 551–559, 701–706 (2012), applies to the Veterans Administration. See *Castellano v. Shinseki*, 25 Vet. App. 146, 150 (2011).

191. *Van Alstine v. Principi*, No. 99-1322, 2002 WL 31757849, at *4 (Vet. App. July 26, 2002) (quoting *Stuckey v. West*, 13 Vet. App. 163, 174 (1999), *withdrawn* *Stuckey v. Principi*, No. 96-1373 (Vet. App. Jan. 24, 2001)). For a more comprehensive discussion of issue exhaustion, see generally Gary E. O’Connor, *Did Decide or Should Have Decided: Issue Exhaustion and the Veterans Benefits Appeals Process*, 49 AM. U. L. REV. 1279 (2000).

192. *Robinson v. Shinseki*, 557 F.3d 1355, 1361 (Fed. Cir. 2009).

193. *E.g.*, *Owens v. Shinseki*, No. 12-1626, 2013 WL 3283492, at *6 (Vet. App. June 28, 2013); *Gibbons v. Shinseki*, No. 11-2662, 2012 WL 6651974, at *7 (Vet. App. Dec. 21, 2012).

194. 38 U.S.C. § 7266(a) (2006).

195. *E.g.*, *Evans v. Shinseki*, No. 12-1023, 2012 WL 1560379, at *2–3 (Vet. App. May 4, 2012).

Finally, considering the substantial flexibility afforded to investigators and auditors by the Manual, the standards used to review large portions of the Program remain unclear. For example, take the VA policies regarding the appointment of fiduciaries: Federal law allows the Secretary of Veterans Affairs to pay benefits to a fiduciary “[w]here it appears to the Secretary that the interest of the beneficiary would be served.”¹⁹⁶ This discretion is carried over into the regulations and guidelines, which encourage the investigator to focus on the “best interest of the beneficiary” in appointing a fiduciary.¹⁹⁷ And the Manual indicates that VA employees should determine “the type of fiduciary relationship that will best serve the needs of the beneficiary,” a determination that employees might make by reference to a VA policy prioritizing (1) the beneficiary’s preference; (2) the beneficiary’s spouse, if available; (3) a family member, friend, or other individual willing to serve without a fee; and (4) a paid stranger.¹⁹⁸

In this example, even assuming that Program determinations such as those about the “best interest of the beneficiary” in appointing a fiduciary are reviewable,¹⁹⁹ the CAVC has yet to determine how it will treat such discretionary portions of the Manual and implementing directives. There is precedent suggesting that some portions of the Manual sufficiently restrict VA discretion to be considered legislative rules that substantively bind the VA.²⁰⁰ Additionally, the CAVC has previously held that “the mere existence of some discretion is not sufficient . . . for a rule to be classified as a general statement of policy” or an interpretative rule.²⁰¹ These distinctions would most likely affect the level of deference courts

196. 38 U.S.C. § 5502(a)(1).

197. *See supra* note 47. For other regulatory constraints on the selection of a fiduciary, see *supra* note 71.

198. *See supra* notes 73–76 and accompanying text.

199. The CAVC has determined that the Program’s statutory and regulatory standards are sufficient to permit judicial review of the selections of fiduciaries. *Freeman v. Shinseki*, 24 Vet. App. 404, 411, 413–14 (2011) (per curiam).

200. *See Fugere v. Derwinski*, 1 Vet. App. 103, 106–07 (1990) (considering an earlier version of the Compensation and Pension Manual Rewrite and reaching this conclusion); *see also Morton v. West*, 13 Vet. App. 205, 206–07 (1999) (relying on substantive rules in the Compensation and Pension Manual related to the VA duty to assist); *cf. Buzinski v. Brown*, 6 Vet. App. 360, 69 (1994) (noting that VA directives are binding only to the extent they “prescribe substantive rules—not interpretive rules” (quotation marks omitted)).

201. *Morton*, 13 Vet. App. 208–09 (quoting *Guardian Fed. Sav. & Loan Ass’n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 667 (D.C. Cir. 1978)).

would afford the agency in evaluating whether employees complied with the standard.²⁰²

Judicial challenge may very well remain open to plaintiff-beneficiaries. For instance, if a court were to hold that portions of the Manual, fast letters, or other subregulatory directives²⁰³ were binding legislative rules, rather than general statements of policy or interpretative rules, it could raise questions about whether they need to go through the process of notice and comment.²⁰⁴ Similarly, although plaintiffs have (so far unsuccessfully) challenged the VA's fiduciary-appointment procedures on due process grounds, at least one court remains open to considering this potential argument.²⁰⁵ These issues, in conjunction with the significant procedural hurdles discussed above, will most likely play a substantial role in future litigation by plaintiff-beneficiaries.²⁰⁶

IV. THE SOLUTION: INTERNAL REFORM AND EXTERNAL ACCOUNTABILITY

As neither adopting a new statute nor litigating the application of the Fiduciary Program in the current judicial system will provide relief, this Note advocates turning to other mechanisms for reform. This Note recommends two reforms: (1) the Fiduciary Program

202. When reviewed by a court, legislative rules will get *Chevron* deference, whereas interpretive rules will get *Skidmore* deference. Jamie A. Yavelberg, *The Revival of Skidmore v. Swift: Judicial Deference to Agency Interpretations After EEOC v. ARAMCO*, 42 DUKE L.J. 166, 174–75 (1992). Despite this precedent, the CAVC has not yet determined whether the discretionary portions of the Manual are legislative or interpretive. For more information on interpretative rules, see generally Thomas J. Fraser, *Interpretive Rules: Can the Amount of Deference Accorded Them Offer Insight into the Procedural Inquiry?*, 90 B.U. L. REV. 1303 (2010).

203. For discussion of these subregulatory directives, see *supra* notes 33–40 and accompanying text.

204. *Cf. Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112–13 (D.C. Cir. 1993) (holding that the APA requires that legislative rules be submitted for comment and distinguishing between legislative and interpretive rules). To the extent these subregulatory directives in fact cabin agency discretion, they would seem to clash with 38 C.F.R. § 19.5, which indicates that “the Board [of Veterans’ Appeals] . . . is not bound by Department manuals, circulars, or similar administrative issues.” 38 C.F.R. § 19.5 (2013); *cf. Am. Mining Cong.*, 995 F.2d at 1112 (noting that a rule is not interpretive to the extent it “repudiates or is irreconcilable with an existing legislative rule”).

205. *See Solze v. Shinseki*, No. 12,1512, 2012 WL 4801411, at *6 (Vet. App. Oct. 10, 2012) (ordering the Secretary of Veterans Affairs “to show cause as to why the Court should not determine that his actions violated [the plaintiff]’s right to due process under the Fifth Amendment”); *infra* note 216.

206. *See supra* notes 181–89 and accompanying text.

should make specific changes intended to address internal problems, and (2) the Fiduciary Program should rely on third parties to provide independent monitoring that will ensure compliance with Program regulations.

A. *Internal Reform*

Some of the most important changes to the Fiduciary Program must be tackled internally. The Program can make significant progress by improving its management structure and taking steps to provide staff with key resources. Such changes would go a long way toward improving policy compliance and efficiency. By identifying these issues and proposing reasonable modifications to address particular problems, this Note aims to make reform a tangible possibility.

1. *National Standards.* The Fiduciary Program should develop national performance standards to ensure consistent performance across regional offices. According to the VA OIG, regional offices performed substantially better at securing delinquent accountings when management consistently conducted local quality reviews, reviewed available management reports, and assisted employees with case.²⁰⁷ Moreover, whereas some regional offices failed to verify questionable expenses in 47 percent of their case reviews, other regional offices produced zero errors.²⁰⁸ This huge performance gap suggests that the Fiduciary Program is working effectively in at least some of the regional offices and that those with high error rates could benefit from emulating the processes adopted by these successful offices. By implementing the techniques employed by successful regional offices at a national level, the Fiduciary Program could improve across-the-board performance.

Effective national standards also require accurate performance measures. As the business world has long recognized, “What you measure is what you get”²⁰⁹—quality performance measures are the key to superior staff performance. As such, the Fiduciary Program needs to synchronize performance measures with the Program’s objectives. For example, despite the importance of investigating

207. See OFFICE OF AUDITS & EVALUATIONS, *supra* note 15, at 3–4.

208. *Id.* at 4.

209. Robert S. Kaplan & David P. Norton, *The Balanced Scorecard—Measures That Drive Performance*, HARVARD BUS. REV., Jan.–Feb. 1992, at 71, 71.

misuse allegations, the Fiduciary Program currently does not hold staff responsible for the timely and thorough processing of misuse allegations.²¹⁰ Changing performance standards to evaluate individual employee follow-up on misuse allegations would incentivize timeliness and would encourage management to identify noncompliant employees, thereby improving the likelihood that staff will observe internal policies.²¹¹

Those performance standards already in existence should be reviewed for effectiveness. By making performance expectations more accurate, the Fiduciary Program would ensure that employees select qualified fiduciaries and would promote more effective monitoring. In addition to improving performance quality, reforming expectations may decrease the strain on staff associated with unrealistic deadlines,²¹² thereby reducing the likelihood of burnout by qualified examiners and auditors in the Fiduciary Program.

Regularly updated guidelines would also aid in the development of realistic national standards. Because other parts of the VA have already adopted updated and clear regulations,²¹³ the Fiduciary Program would be unlikely to face substantial resistance should it follow suit—and the January 3, 2014 proposed rule suggests that new regulations may be forthcoming.²¹⁴

Finally, national standards require the development of streamlined processes. For example, instead of asking an incompetent beneficiary to designate a preferred fiduciary during the investigation,²¹⁵ the Fiduciary Program could consider asking older

210. OFFICE OF AUDITS & EVALUATIONS, *supra* note 15, at 6.

211. *See id.* (noting that “VARO management said non-compliance by some VAROs was due to the lack of effective oversight and training of fiduciary staff,” and that “processing allegations of misuse is not part of the agency’s performance measures or part of staff and management performance standards,” nor was it “included in national quality reviews, which may provide a lack of incentive for VBA staff to thoroughly and timely review and investigate misuse allegations”).

212. *Cf.* Jill Kickul & Margaret Posig, *Supervisory Emotional Support and Burnout: An Explanation of Reverse Buffering Effects*, 13 J. MANAGERIAL ISSUES 328, 338–39 (2001) (describing the effect of unrealistic performance standards on employee performance).

213. *See* William L. Pine & William F. Russo, *Making Veterans Benefits Clear: VA’s Regulation Rewrite Project*, 61 ADMIN. L. REV. 407, 409–10 (2009) (discussing the VA’s Rewrite Project, which was an effort to reform regulations on the VA’s compensation and pension benefits programs).

214. The VA proposed to amend the Fiduciary Program regulations, opening the amendment for comment on January 3, 2014. *Fiduciary Activities*, 79 Fed. Reg. 430 (proposed Jan. 3, 2014) (to be codified at 38 C.F.R. pts. 3 and 13).

215. U.S. DEP’T OF VETERANS AFFAIRS, *supra* note 2, ch. 2, § D.11.c.

veterans to routinely identify their preferred fiduciary every three to five years, thereby reducing the difficulties inherent in selecting an appropriate fiduciary and increasing the likelihood that the selected fiduciary is someone the beneficiary would have chosen. Additionally, despite the concerns of the VA, the Fiduciary Program should seriously consider the benefits of recognizing a preselected fiduciary already designated by the beneficiary to possess a power of attorney (POA).²¹⁶ Though the VA is absolutely correct in asserting that an individual with a POA should not be considered to the exclusion of all other candidates for fear that the document will bypass some of the Fiduciary Program's most important safety features,²¹⁷ a POA is a strong indicator of a beneficiary's preferences and should be given some weight. At minimum then, the Program should develop a comprehensive process for approving or rejecting potential fiduciaries who already possess a POA.

2. *Training.* Staff at every level would benefit from more rigorous training. Studies conclude that leadership training has a positive impact on the effectiveness of organizations at every level.²¹⁸

216. In *Solze v. Shinseki*, No. 12-1512, 2012 WL 3108837 (Aug. 1, 2012) (per curiam), the CAVC ordered argument be prepared on whether the VA is constitutionally or statutorily obligated to accept a durable POA as sufficient to establish a fiduciary relationship. *Id.* at *2; see also *Solze v. Shinseki*, No. 12,1512, 2012 WL 4801411, at *6 (Vet. App. Oct. 10, 2012) (ordering the Secretary of Veterans Affairs "to show cause as to why the Court should not determine that his actions violated [the plaintiff]'s right to due process under the Fifth Amendment"). Although the court ultimately did not have occasion to rule on the issue, it noted congressional concern with the VA's apparent failure to give effect to its "policy . . . that they prefer family members and friends to serve as fiduciaries." *Solze v. Shinseki*, 26 Vet. App. 118, 126 n.13 (2013) (quoting *Reforming VA's Flawed Fiduciary System*, *supra* note 17, at 2 (statement of Rep. Bill Johnson, Chairman, H. Subcomm. on Oversight & Investigations)). *But see Reforming VA's Flawed Fiduciary System*, *supra* note 17, at 10 (statement of David McLenachen, Director of Pension and Fiduciary Service, U.S. Dep't of Veterans Affairs) (arguing against reliance on a POA).

217. *Reforming VA's Flawed Fiduciary System*, *supra* note 17, at 10 (statement of David McLenachen, Director of Pension and Fiduciary Service, U.S. Department of Veterans Affairs).

218. See Laura L. Methot, W. Larry Williams, Anne Cummings & Beth Bradshaw, *Measuring the Effects of a Manager-Supervisor Training Program Through the Generalized Performance of Managers, Supervisors, Front-Line Staff and Clients in a Human Service Setting*, 16 J. ORGANIZATIONAL BEHAV. MGMT. 3, 20-21 (1996) ("[A] cost-effective supervisor training intervention can influence the supervisory process with effects that, in some cases, influence[] performance at other levels in the organization."); Carol Woltring, Wendy Constantine & Liz Schwarte, *Does Leadership Training Make a Difference? The CDU/UC Public Health Leadership Institute: 1991-1999*, 9 J. PUB. HEALTH MGMT. & PRAC. 111, 125 (2003) (concluding that training provided by the Leadership Health Institute was successful "in enhancing the leadership capacities of senior public health leaders").

Fiduciary Program managers, the first line of defense against ground-staff noncompliance, have received training from the central office only three times since 1987 and have received no training since 2004.²¹⁹ Moreover, Fiduciary Program employees often attribute their noncompliance with Program guidelines to inexperience.²²⁰ By providing formal training for subject-matter experts, including the opportunity to work on mock cases, conduct practice interviews, and work on live cases under direct supervision,²²¹ the Fiduciary Program could eliminate ignorance as an explanation for staff noncompliance.

3. *Adopting Strategies Used by Other Agencies.* The Fiduciary Program should learn from other federal agencies that perform similar functions. First, the Fiduciary Program should guide investigators who select surety bonds by emulating the Department of Labor, which requires all bonds used by ERISA fiduciaries to be provided by a surety approved by the Department of the Treasury.²²² By adopting the approach employed by the Department of Labor and requiring employees to adhere to only those preapproved sureties, the Fiduciary Program would reduce workload requirements by minimizing the time an employee would need to spend searching for an appropriate bonding agency. This improvement, in turn, would free up time for employees to focus on other issues.

Second, the Fiduciary Program should copy the SSA by selecting a private company to perform credit and background checks. In response to a similar problem, the SSA hired Dunn & Bradstreet, a professional credit-check company, to perform background credit checks on all fiduciaries receiving a commission.²²³ The Fiduciary

219. OFFICE OF AUDITS & EVALUATIONS, *supra* note 15, at 13.

220. *See id.* at 17 (noting that in two of the three regional offices visited by the GAO, only 33 percent of the staff had more than two years of experience).

221. *See Examining the Fiduciary Program, supra* note 17, at 22 (statement of Katherine R. Pflanz, Field Examiner, Winston-Salem Veterans Affairs Regional Office) (discussing the use of these methods in the training for her position as a veteran-service representative, as compared to the training she received as a field examiner for the fiduciary unit, where “formal training is not available”).

222. U.S. DEP’T OF LABOR, FIELD ASSISTANCE BULLETIN, NO. 2008-04, GUIDANCE REGARDING ERISA FIDELITY BONDING REQUIREMENTS 3 (2008), *available at* <http://www.dol.gov/ebsa/pdf/fab2008-4.pdf>. For the Department of the Treasury’s list of acceptable sureties, see *Department of the Treasury’s Listing of Certified Companies*, FIN. MGMT. SERV. (July 23, 2013), <http://www.fms.treas.gov/c570/C570-certified-comp-07-01-2013.pdf>.

223. *Ensuring the Integrity of Social Security Programs: Protecting Seniors from Representative Payee Fraud: Hearing Before the S. Comm. on Aging*, 108th Cong. 14 (2003)

Program should contract with a similar company to provide credit checks and background checks. Consistently using the same neutral party could economize the costs of contracting through a volume discount and increase the accuracy of the provided information by eliminating the opportunity for the fiduciary-applicant to lie.

The Fiduciary Program should also adopt the SSA's requirement that potential fiduciaries visit the local office. By shifting the travel burden from a Program employee to a potential fiduciary,²²⁴ the Fiduciary Program could decrease the commute time for employees, freeing up time to focus on other tasks.

4. *Use of Technology.* Already in the works for processing disability claims,²²⁵ a shift to a paperless tracking system would make it easier for employees to perform and for managers to review staff performance. For example, a paperless tracking system could include the ability to transmit and receive electronic accountings from fiduciaries, review previous accountings with a click of the mouse, access old records, and manage case files. In fact, since other agencies in the federal government are already using private companies to facilitate the transition into the digital era,²²⁶ such a change would be unlikely to face internal resistance if adopted by the Fiduciary Program. Moreover, an electronic database system set to save and back up data would help prevent the loss of important case data, thereby reducing the number of files without documentation and increasing compliance with the Fiduciary Program's documentation policies.

B. *External Review*

Considering the host of problems plaguing the Fiduciary Program, many would expect reform to be a hot-button issue inside

(statement of Frederick G. Streckewald, Assistant Deputy Comm'r, Social Security Administration). For articles discussing the SSA's payee program, see *supra* note 23.

224. For discussion of current travel expectations for investigators, see *supra* note 123 and accompanying text.

225. See Emily Woodward Deutsch & Terrence T. Griffin, *Parsing the Paperless Push: A Study of the Latest Efforts To Automate the Veterans' Claims Process*, 2 VETERANS L. REV. 117, 126-29 (2010) (discussing the movement toward a paperless system as a solution to the backlog of claims).

226. See generally OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., A-04-08-18066, CONTRACT WITH LOCKHEED MARTIN GOVERNMENT SERVICES, INC. FOR DIGITAL IMAGING SERVICES: AUDIT REPORT (2008), available at http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-04-08-18066_7.pdf (discussing the transition to digital files in the SSA).

the Fiduciary Program's management structure. In reality, senior management frequently overstates the Fiduciary Program's successes and undermines the need for reform, promising change but rarely delivering. For instance, the VA OIG recommended that the Fiduciary Program develop a new version of the FBS and the Fiduciary Program concurred, promising that a workgroup would present its findings and recommendations by June 2010.²²⁷ As of March 2014, no record of a workgroup meeting could be found and no electronic database appears to be in the works. Similarly, after Congress demanded better training, the Fiduciary Program conducted a centralized pilot training program in 2011²²⁸ but made no further progress implementing the training nationwide. The Fiduciary Program's struggles to make important changes suggest that some sort of external accountability is needed to ensure forward progress. This Note proposes that the best source for this external accountability derives not from traditional third parties such as Congress or the CAVC, but rather from alternative third parties. Third-party monitoring would increase the number of watchful eyes looking for indicators of misuse.²²⁹ This Note advocates for third-party participation at the federal and state levels through cooperation among federal agencies, parallel state-law enforcement, and vigorous litigation by veterans' advocates.

First, other federal agencies dealing with the same or similar situations could provide the Fiduciary Program with a second layer of accountability. The most obvious option is the SSA, specifically the branch of the agency called the Representative Payee Program. Although the SSA operates the Representative Payee Program under different federal law,²³⁰ this SSA program performs basically the same function as the VA's Fiduciary Program, just under the direction of a different administrative agency.²³¹ Both programs share the same basic mandate, and the programs sometimes have incapacitated

227. OFFICE OF AUDITS & EVALUATIONS, *supra* note 15, at 31–32.

228. *Reforming VA's Flawed Fiduciary System*, *supra* note 17, at 6 (testimony of David McLenachen, Director of Pension and Fiduciary Service, U.S. Department of Veterans Affairs).

229. *Cf.* Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 701–03 (2011) (discussing the benefits of state enforcement of federal law).

230. 42 U.S.C. § 1007 (2006).

231. GAO, INCAPACITATED ADULTS, *supra* note 18, at 3; *see also* CONSUMER FIN. PROT. BUREAU, MANAGING SOMEONE ELSE'S MONEY: HELP FOR REPRESENTATIVE PAYEES AND VA FIDUCIARIES 8 (2013), available at http://files.consumerfinance.gov/f/201310_cfpb_lay_fiduciary_guides_representative.pdf (treating fiduciaries and representative payees similarly).

beneficiaries in common.²³² Creating an information exchange between the SSA and the VA for joint fiduciaries would improve monitoring and facilitate more accurate information about potential fiduciaries.²³³

Second, state law should also be utilized as an independent check on the performance of fiduciaries by providing a secondary mechanism to address fiduciary fraud.²³⁴ Most states provide a common-law civil remedy for a breach of a fiduciary duty,²³⁵ and some states have even enacted specific statutory language addressing abuses of the fiduciary relationship.²³⁶ Although there are few cases in which a beneficiary successfully sues his fiduciary for breach of fiduciary duty or fraud, at least one state court has entertained such a suit.²³⁷ Moreover, rather than rubberstamping the VA's choice of fiduciaries, state courts could rely on state-law requirements for guardians to bar the selection of unqualified VA fiduciaries.²³⁸ States could also modify criminal statutes to explicitly penalize VA fiduciaries for stealing from beneficiaries. Although some states already penalize financial exploitation of the elderly or the disabled,²³⁹ codifying a specific crime related to exploitation of incompetent beneficiaries as identified by the VA could serve as a jurisdictional hook for state prosecution of fraudulent fiduciaries. Such criminal provisions, in turn, could allow states to protect incompetent veterans concurrently with the federal government, thereby providing

232. GAO, INCAPACITATED ADULTS, *supra* note 18, at 11.

233. *Id.*

234. *Cf.* RESTATEMENT (SECOND) OF TORTS § 874 (1979) (violation of a fiduciary duty). For a general description of Restatement section 87, see Deborah A. DeMott, *Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences*, 48 ARIZ. L. REV. 925, 927–34 (2006).

235. See 37 AM. JUR. 2D *Fraud and Deceit* §§ 34–39 (2013) (discussing fiduciary fraud in depth).

236. See, e.g., GA. CODE ANN. § 29-5-93 (West 2007); MINN. STAT. ANN. § 356A.09 (West 2012).

237. See *Conservatorship Estate of K.H. v. Cont'l Ins. Co.*, 73 P.3d 588, 589 (Alaska 2003) (allowing the beneficiary's new fiduciary to sue the old fiduciary for breach of fiduciary duty and fraud). These suits may not be very popular because the fraudulent fiduciaries lack resources to justify the expense of the suit.

238. See, e.g., *Estate of Dickson*, No. DP-92-56, 1998 Mont. Dist. LEXIS 850, at *12–13 (Jud. Dist. Ct. Mont. Dec. 4, 1998) (refusing to grant “sham appointments of conservators” proposed by the VA).

239. See, e.g., 720 ILL. COMP. STAT. 5/17-56 (Supp. 2013).

substantial enforcement benefits.²⁴⁰ Whether or not federal law preempts state enforcement of these suits is still a matter of debate.²⁴¹ These concerns, however, may be alleviated if the agency has already identified that a fraud has occurred.²⁴²

Third, it is important to remember that new sources of external accountability should not replace traditional mechanisms of private enforcement. Veterans' advocates must continue to advance the interests of incompetent beneficiaries. First, there is the possibility of raising a system-wide challenge to the Fiduciary Program's lack of procedure. The Ninth Circuit, in *Veterans for Common Sense v. Shinseki*,²⁴³ held that the VJRA did not bar organizational plaintiffs from challenging the absence of system-wide procedures used by the VA to select and monitor fiduciaries, procedures which would be necessary for due process.²⁴⁴ Although an individual veteran can use the judicial mechanism defined by the VJRA, organizational plaintiffs cannot bring suit in the CAVC, and that court cannot claim exclusive jurisdiction over the suit.²⁴⁵ Though this theory has yet to be tested in the context of the Fiduciary Program, an organizational claim could provide veterans' advocates with a mechanism to challenge the entire Program in one instance and outside the CAVC pipeline. Second, the negligence cause of action provided under federal law could be used to address the very types of abuse that are so problematic in the Fiduciary Program.²⁴⁶ Between 2008 and 2012, however, a VA spokesperson indicated that only fifteen beneficiaries have been compensated under that cause of action.²⁴⁷ The Fiduciary Program disfavors reimbursements, forcing advocates to fight tooth-and-nail to

240. See Lemos, *supra* note 229, at 717–36 (discussing the benefits of state enforcement as compared to federal enforcement).

241. See Louis M. Bograd & Andre M. Mura, *Buckman Stops Here! Limits on Preemption of State Tort Claims Involving Allegations of Fraud on the PTO or the FDA*, 41 RUTGERS L.J. 309, 309–10 (2009) (arguing that federal law should not preempt plaintiffs' state-law claims “[w]here plaintiffs allege, and can offer evidence of, fraud on [an agency] plus all of the necessary elements of a traditional state-law cause,” but that claims may be preempted “where plaintiffs nakedly allege fraud on the agency, without the essential elements of a recognized state-law claim”).

242. See generally Catherine M. Sharkey, *The Fraud Caveat to Agency Preemption*, 102 NW. U. L. REV. 841 (2008) (arguing that allowing state enforcement when the agency identifies fraud should alleviate preemption concerns).

243. *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013 (9th Cir. 2012).

244. *Id.* at 1034–35.

245. *Id.* at 1035.

246. See *supra* notes 59–60 and accompanying text.

247. Nalder & Olsen, *supra* note 105.

prove jurisdiction; for this reason, the system's ultimate efficacy requires the work of diligent advocates who are willing to push back against the decisions made by Fiduciary Program employees.²⁴⁸ In addition to providing beneficiaries with an alternative way to recover lost money, especially when the fiduciary failed to acquire a surety bond, increased negligence suits could place a much-needed spotlight on the Fiduciary Program's struggles.

CONCLUSION

The Fiduciary Program was developed to protect those who sacrificed so much to guard the United States and who now, due to disease, illness, or infirmity, cannot protect themselves. As long as the Fiduciary Program continues in its current state, however, incompetent beneficiaries will remain susceptible to abuse by unsavory fiduciaries. Neither Congress nor the CAVC can effectively remedy this program. Instead, other actors must step up to make the Fiduciary Program function effectively. To facilitate actual improvement, the Fiduciary Program should adopt institutional reforms that address the underlying management and resource issues preventing compliance with Program regulations, and, in the process, it should also adopt new mechanisms to clarify internal policies. Additionally, external entities, such as other federal agencies and the states, must be given a seat at the table to provide additional oversight to ensure Program compliance. Only a system that prioritizes internal reform and encourages external accountability will be able to fulfill the Fiduciary Program's mandate: protecting the most vulnerable members of the veteran population from abuse.

248. See *Freeman v. Shinseki*, 24 Vet. App. 404, 405–06 (2011) (per curiam) (noting the jurisdictional hurdles advocates had to surmount to establish jurisdiction in any court).