

CHAPTER 12

STUDY PLAN

DEBT MANAGEMENT AND FIDUCIARY

OBJECTIVE

To learn how to assist veterans facing overpayments and other debts with the Department of Veterans Affairs (VA). To learn about fiduciary appointment for veterans declared incompetent.

REFERENCES

- Title 38, U.S. Code, §§ 1505; 3108(g); 3231(d); 3482(g); 3532(e); 5313; 5313A; 5313B; 5502; 5507
- 38 Code of Federal Regulations §§ 1.900–1.970; 3.102; 3.353; 3.665; 3.666; 13.58
- Adjudication Manual M21-1, Part IV, Chapters 24 and 25
- Adjudication Manual M21-1MR (Manual Rewrite), Parts 3, 4, 5, and 10
- VA Financial Policy Manual MP-4
- Veterans Benefits Manual, §§ 9.2.1-9.2.5; and 9.4.1-9.4.8
- VA Forms:
 - 21-592, *Request for Appointment of a Fiduciary, Custodian, or Guardian*
 - 20-5655, *Financial Status Report*

CREATION OF A DEBT AND VA DEBT MANAGEMENT

VA benefits are either direct monetary payments (compensation, pension, or education assistance), or the furnishing of goods or services having a monetary value (loan guaranty or health care). In either case, it happens from time to time that a beneficiary will be paid more than he or she is entitled to, or is furnished goods or services to which he or she is not entitled to or are beyond the limits of entitlement. For example, in the case of a beneficiary receiving pension, the beneficiary may underreport the type of income that is supposed to

reduce the pension amount, resulting in an overpayment. Or, in loan guaranty cases, the beneficiary may default on the loan and the property goes into foreclosure, leaving VA liable for the amount of the guarantee. In either of these situations, an overpayment is established, and the beneficiary is indebted to the VA.

Whenever an overpayment is established in any program under the jurisdiction of the Veterans Benefits Administration (VBA), the Debt Management Center at the St. Paul, Minnesota, VA Regional Office assumes jurisdiction under the Centralized Accounts

Receivable System (CARS). If the debtor is in receipt of compensation or pension benefits, the Debt Management Center will also handle first-party medical debts over 90 days old

owed to the Veterans Health Administration (VHA), generally from non-payment of required co-payments.

To be sure that the debtor's response is timely received within the 30-day period, before withholding will be instituted by VA, duplicate copies of the debtor's response should be sent to both the Debt Management Center and to the Regional Office (or Medical Center) of jurisdiction.

Once an overpayment has been established, the Debt Management Center must send a notice to the debtor of the existence and amount of the overpayment (or debt) and demanding repayment. If the debt is a loan guaranty default, the notice is sent by Certified Mail (Return Receipt Requested). The notice must advise the debtor that if he or she is presently receiving benefits, those benefits may be automatically withheld to recover or offset the amount of the overpayment unless the debtor responds within 30 days of the date of the notice, either agreeing to repay the debt or offering a compromise, or disputing the fact and/or amount of the debt, or requesting a waiver of the overpayment.

If the debtor does not respond to this first letter, withholding of benefits is automatically initiated. If there is no response to the first notice and there are no benefits to offset, second and third notices are sent, at 30-day intervals, advising the debtor that failure to

If the debtor responds within 30 days of the first letter, no withholding of benefits will be instituted pending the outcome and disposition of the debt.

repay or settle the debt will result in the debtor's name being referred to credit reporting agencies and/or the Treasury Department for collection.

Under certain circumstances, VA will charge interest and/or administrative costs on delinquent debts, which are defined as debts more than 30 days old. Loan guaranty debts are charged interest at the rate of 4% per year, but are not charged administrative costs. Education overpayments may be charged both interest and administrative costs, at variable rates. Compensation and pension overpayments do not accrue either interest charges or administrative costs. Veterans owing more than \$25 at least 90 days overdue who are also receiving Social Security benefits may have their Social Security benefits offset. This will apply only to those veterans receiving Social Security benefits of more than \$750 per month – of the amount over \$750, 15% can be withheld.

REQUEST FOR WAIVER OF THE DEBT

In all cases except for loan guaranty defaults, **the time limit for requesting waiver of an overpayment is 180 days from the date the debtor is first advised of the existence of the overpayment and the notification specifies the amount of the debt.** The 180-day period will not be delayed/suspended due solely to the mental condition of the debtor. In loan guaranty cases, the debtor has one year from the date of receipt by Certified Mail (Return Receipt Requested) of the notice of indebtedness to request a waiver. If the waiver request is received more than 30 days after the date of the initial notice, however, any withholding of benefits begun will continue until the issue has been finally resolved. If the waiver is granted, the withheld benefits would then be refunded.

The VA does not require the use of a specific form to request a waiver. A waiver request must be in writing, and should explain why the debtor feels he or she should not be held responsible for the debt. The request should include a statement as to any financial hardship recovery of the debt might cause, or any other circumstance which would cause collection or recovery of the debt to be inequitable. **The request for waiver must be accompanied by a completed VA Form 20-5655, *Financial Status Report*.**

The debtor may request a personal hearing at any point in the process. A waiver may be requested by the debtor or representative, or by any other interested party on the debtor's behalf. If the waiver is denied, the debtor may appeal the denial to the Board of Veterans' Appeals and the Court of Appeals for Veterans Claims. If the debtor requests a waiver, a determination as to the validity of the debt must also be done before the waiver request is considered.

In general, **waiver of a debt will usually be granted if there is a showing that collection of the debt would be against equity and good conscience.**



Factors considered in this determination include:

- whether the debtor was entirely at fault in creation of the overpayment, or was there also fault on the part of VA;
- whether collection of the debt, including withholding of benefit payments, produce

undue hardship on the debtor in the form of depriving the debtor and his or her family of basic necessities;

- whether collection of the debt would defeat the purpose for which the benefit was intended;

- whether waiver of the debt would result in unjust enrichment of the debtor; and,

- whether the debtor's reliance on the overpaid VA benefits resulted in the relinquishment of a valuable right or incurrence of a legal obligation which would be impaired by collection of the debt.

ADVOCACY TIP

The debtor should argue multiple factors in requesting a waiver. For example, if the debtors only income is VA pension and the debtor faces a reduction in monthly payments as the result of an overpayment, the debtor would likely want to argue: **1.** the withholding of the benefit payments produces undue hardship in depriving the debtor of basic necessities such as food and shelter; and, **2.** the withholding would defeat the purpose of VA pension which is to ensure the debtor has basic necessities such as food and shelter.



Waiver of a debt is precluded if there is

evidence of fraud or misrepresentation of material facts, or if there is evidence of bad faith or lack of good faith on behalf of the debtor. For example, if the debtor knew he or she was receiving two benefits and he or she knew they were only entitled to concurrently receive one of the two benefits, the debtor will not be able to receive a waiver.

Certain types of debts or overpayments may not be waived. Examples of debts which cannot be waived include: the cost of medical emergency or humanitarian services; where there is a statutory bar against payment, such as simultaneous payment of compensation and regular military retired pay; and, debts resulting from erroneous payment of benefits to a person who is not a payee and has no claim or entitlement to such payments.

Waiver of an overpayment in an education assistance claim will result in a loss of future entitlement to education benefits equal to the amount waived. To regain the entitlement, the education debt must be paid in full. In a loan guaranty or direct loan case, a waiver of the debt counts as entitlement used; the total debt must be paid in full to restore the previous entitlement.

APPEAL THE UNDERLYING VALIDITY OF THE DEBT OR ITS EFFECTIVE DATE



ADVOCACY TIP

All of the rights of the debtor discussed in these sections can be exercised separately or simultaneously. If the waiver request is denied, the debtor may contact the VA to repay or make a compromise offer. Similarly, the debtor may dispute the validity of the underlying debt while simultaneously requesting a waiver of the debt.

There is **no deadline** for challenging the validity of the debt or its effective date. If the challenge is denied, the debtor may appeal the decision. The debtor has **one year** from the date of the decision to file an appeal with the regional office of jurisdiction. The deadline is not suspended during a waiver request. If the debtor simultaneously requests a waiver of the debt and disputes the underlying validity of the debt, the VA Regional Office must first decide the validity of the debt.

The debtor may dispute the validity determination

under the theory of **administrative error**. Congress has provided that when the VA realizes that it has been paying a VA claimant more money in benefits than the law authorizes, **the VA must allow the beneficiary to keep the excess payments if they were awarded based solely on VA administrative error.**

VA administrative error may occur when:

- the beneficiary was completely without fault in the creation of the overpayment; or,
- the Agency had the correct information but erroneously authorized an incorrect amount, and the beneficiary either attempted to notify VA that the amounts paid were wrong, or relied in good faith on the agency's assurance that the amounts paid were correct.

If the Regional Office of jurisdiction, or the BVA, determines the overpayment was caused solely by VA administrative error after payments have been made or withheld, those payments should be refunded to the debtor.

There is a limited exception to the one-year deadline to file an appeal for some cases involving the overpayment of VA pension. Where an overpayment was caused by the revocation of pension eligibility due to the failure to provide income information, the veteran can provide the income information at any time. When the debtor provides the income information, the eligibility decision must be revised and the overpayment must be adjusted to reflect the debtor's income for the period requested by the VA.

REPAYMENT AND REQUEST TO MAKE A COMPROMISE OFFER OF THE DEBT

If the debtor is willing to make repayment of the debt, a lump sum payment is preferred but installment payments of a reasonable amount for a reasonable period of time will be accepted. If the beneficiary disputes either or both the fact and/or the amount of the overpayment, the Regional Office of jurisdiction will verify the overpayment.

The indebted person may make a compromise offer at any time in the collection process.

A compromise is an offer to pay some portion of the debt in a lump sum in exchange for forgiveness of the balance. The VA does not require the use of a specific form to make a compromise offer. The compromise offer must be in writing and must be accompanied by a completed **VA Form 20-5655, *Financial Status Report***. The offer must be sent to the Debt Management Center, which

has jurisdiction of compromise offers. **There is no time limit for making a compromise offer.** A compromise offer may be considered even if waiver of the debt has been denied. Rejection or denial of a compromise offer may not be appealed to the Board of Veterans' Appeals; however, rejection of a compromise offer does not preclude submitting additional compromise offers.

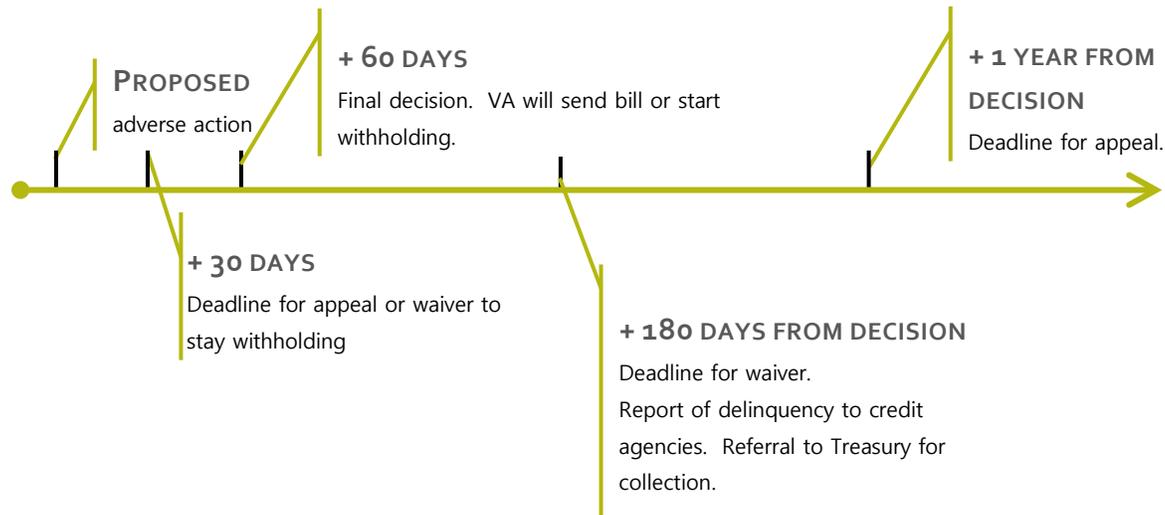
Factors for consideration in a compromise offer include whether the debtor would be able to repay the entire amount of the debt within a reasonable time given the debtor's age, health, present and potential income, and availability of assets; also, whether the amount of the debt would justify the costs of litigation or other means of collection. If a compromise offer is accepted in an education overpayment, entitlement will be charged for the portion of the overpayment written off by VA. If a compromise offer is accepted for a loan guaranty debt, the compromised amount must also be paid in full to restore entitlement.



ADVOCACY TIP

Beware, if the debtor disputes the underlying debt to the Board of Veterans' Appeals, a recalculation of the debt by the Regional Office could result in a greater overpayment amount than the amount originally calculated.

RELEVANT DEADLINES FOR VA DEBT



INCOMPETENCY AND APPOINTMENT OF FIDUCIARIES

A fiduciary may be appointed when a VA beneficiary is found incompetent to handle his or her monetary VA benefits. The fiduciary is supposed to receive and apply VA benefit payments “for the best interests of the beneficiary.” (38 C.F.R. § 13.58(b)(2)(i).) Before a fiduciary can be appointed, the veteran must be **declared incompetent**, meaning that because of injury or disease, he or she lacks the mental capacity to contract or to manage his or her affairs, including disbursement of funds. VA Rating Veterans Service Representatives (RVSRs) have authority to make competency determinations, but unless the medical evidence is clear, convincing, and leaves no doubt, the RVSR should not propose



incompetency. (38 C.F.R. § 3.353.) Judicial findings of a court with regard to the competency of a veteran are not binding on the VA. When reasonable doubt arises as to the veteran’s capacity to manage his or her own affairs, the doubt is resolved in favor of competency. (38 C.F.R. § 3.102.)

In cases of mental health disorders, some symptoms for the 100% evaluation such as gross impairment in thought processes and communication could cause inability to manage VA

payments. RVSRs are directed to carefully consider the facts to determine whether the regulatory standard warrants a proposal of incompetency. Incompetency is not automatic in such cases.

The VA is required to provide due process and notify the beneficiary if it proposes to make an incompetency determination and of the right to a hearing (38 C.F.R. §3.103). The notice is frequently a part of a notice of rating decision evaluating a mental disorder. Notice need not be provided if the veteran has already been declared incompetent by a judicial finding of a court. The veteran is given 60 days to respond to the notice. If the veteran does not wish to contest the competency determination, he or she can waive the 60 days and request an immediate decision. If the veteran requests a hearing, the veteran may have anyone of his or her choosing to participate and may be represented by a VSO. The hearing is conducted by a Decision Review Officer (DRO). The veteran can appeal the decision through normal procedures (i.e. filing a Notice of Disagreement).

Once a veteran is determined incompetent, an RSVR must reconsider the determination in response to any evidence showing the beneficiary may be capable of handling funds. A current psychiatric examination is not required for restoration of competency but may be requested to assist in evaluation.

The veteran is notified of the determination by mail. The VA also makes reasonable efforts to contact the veteran by telephone to notify him or her that: **1.** the determination will prohibit the purchase, possession, receipt or transportation of a firearm or ammunition; and **2.** violation of the law may result in a fine and/or imprisonment. (M21-1MR, Part III.v.9.B.5.e.)

After a finding of incompetency, the VA requests the appointment of a fiduciary using VA Form 21-592, *Request for Appointment of a*



ADVOCACY TIP

Veterans requiring fiduciaries should be discouraged from choosing close friends or family to act in this capacity, as it can unnecessarily strain those relationships. Instead, veterans should be encouraged to utilize a fiduciary service, which is offered by many social service agencies at little to no cost to the veteran.

Fiduciary, Custodian, or Guardian. The VA may appoint a temporary fiduciary if the veteran's funds are being misused or the beneficiary is unable or unwilling to use the funds for urgent needs. A temporary fiduciary appointment may not exceed 120 days.

Pending appointment of a fiduciary, the VA makes a determination whether to withhold benefits if evidence indicates that a beneficiary is not receiving or is being deprived of the full benefits. Benefits should not be withheld if doing so would cause undue hardship. Any retroactive payment must be withheld pending a determination of incompetency. If the veteran is found incompetent, the retroactive payment will be withheld until it can be released to the appointed fiduciary.



The fiduciary's duty is to protect the beneficiary's assets from loss or diversion. The fiduciary develops a financial plan and arranges to pay all recurring bills on necessities and a monthly cash allowance for the veteran. The plan must be approved by the VA. Previously, the fiduciary was required to obtain approval for any single payments that were not pre-approved. This policy changed with the issuance of VA Fast Letter 12-13 (April 19, 2012) which allows one-time expenditures on behalf of a beneficiary in any amount. However, VA examiners scrutinize any payments in excess of \$1000. In return for their work, fiduciaries may receive up to 4% of the veteran's VA benefits payments.



STUDY QUESTIONS

Using the assigned references and reading materials, answer the following questions:

1. For any VA benefit other than Loan Guaranty, the beneficiary must make a written request for waiver of an overpayment within _____ days after notification by VA of the debt.
 - a. 30 days
 - b. 60 days
 - c. 180 days
 - d. One year

38 C.F.R. § 1.963(b)(2)

2. A response to the first notification by the Debt Management Center, VAROIC St. Paul, of the existence of an overpayment must be submitted within _____ days to avoid collection of the debt by withholding of benefit payments.
 - a. 30 days
 - b. 60 days
 - c. 90 days
 - d. 120 days

38 C.F.R. § 1.912a(c)

3. If benefit payments are being withheld to collect a debt and the beneficiary submits a timely request for waiver of the debt, the withholding will be suspended pending a decision on the waiver request. (T/F)

38 C.F.R. § 1.912a(a); and 38 C.F.R. § 1.967(a)

4. How long does a person with a Loan Guaranty default have from the date of notice to request a waiver of the debt?
 - a. 30 days
 - b. 60 days
 - c. 180 days
 - d. One year

38 C.F.R. § 1.964(e)

5. Must a debtor be completely without fault in the creation of the overpayment in order to be granted a waiver? (Y/N) 38 C.F.R. § 1.965(a)(2)
6. A non-veteran is given emergency treatment at a VA medical facility on a humanitarian basis. May this debt be waived? (Y/N)
38 C.F.R. § 1.956(a)(2)(ii); 38 C.F.R. § 17.103(c)(2); and 38 C.F.R. § 17.105
7. If a waiver of overpayment has been already denied, may the debtor still offer a compromise settlement of the debt? (Y/N)
8. What is the time limit for making a compromise offer on a debt?
a. 60 days
b. 180 days
c. One year
d. There is no time limit for making a compromise offer to settle a debt.
38 C.F.R. §§ 1.930-1.938
9. Due to a clerical error, a veteran's compensation payments are erroneously directly deposited into the account of another person, who is not a veteran or any other class of VA beneficiary. Is this a debt which can be waived? (Y/N)
38 C.F.R. § 1.962
10. If a waiver of indebtedness is granted on a Loan Guaranty case, does this restore the claimant's entitlement to future loan guaranty benefits? (Y/N)
38 C.F.R. § 36.4302(e)(2) and (3); (f-k)
11. After a finding of incompetency, but prior to appointment of a fiduciary, the VA does not release the retroactive payment to the vet unless there is a showing of hardship. (T/F) M21-1MR, Part III.v.g.B.5.c
12. If a RVSR receives medical evidence that suggests the veteran may not be able to handle his or her funds, the RVSR begins development to make a determination of incompetency. (T/F)

13. Under which of the following circumstances will the VA not provide a 60-day due process notice when proposing incompetency:
- a. The veteran is in a psychiatric facility
 - b. The beneficiary is a minor
 - c. The veteran has been adjudged incompetent by a court
 - d. All of the above.