STATEMENT OF

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BEFORE THE

THE HOUSE COMMITTEE ON VETERANS' AFFAIRS

REGARDING "VETERANS APPEALS IMPROVEMENT AND MODERNIZATION ACT OF 2017"

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EXECUTIVE SUMMARY

The Veterans Appeals Improvement and Modernization Act of 2017 provide a far-reaching restructuring of the VA administrative appeals process. It contains many positive features that are likely to decrease appeal times while providing claimants with various options for pursing their appeals. As with any substantial change to a complex system, there will clearly be effects that we cannot now predict. But given that the current appeals process is not functioning well, we have ultimately concluded that the proposed legislation – even without being able to predict all of its effects – is a necessary step.

However, NVLSP opposes some of the substantive changes to the draft bill that VA is seeking under the guise of "technical amendments." First, VA seeks to eliminate subsection (a)(2)(E) from the draft bill's amendments to 38 U.S.C. § 5110. This subsection appears on lines 10-14 of page 13 of the draft bill. This subsection is critically important and NVLSP's support of the draft bill is contingent on this provision remaining intact.

If the Board of Veterans' Appeals denies a claim under the draft bill – *regardless* whether proposed subsection (a)(2)(E) remains or is eliminated -- the veteran would be required, in order to preserve the earliest effective date, to choose between appealing to the CAVC and filing a supplemental claim with the RO. Eliminating subsection (a)(2)(E) would be unjust because it would put a heavy thumb on the scale when veterans make this choice. It would strongly discourage veterans from appealing to the CAVC in favor of filing a supplemental claim.

NVLSP also opposes VA's effort to amend Section 3 of the draft bill, which wisely requires VA to report and the Comptroller General of the United States to assess VA's plans for processing appeals on legacy claims. The VA obviously needs to make choices in allocating resources between processing legacy appeals and processing new appeals. VA's precise plans on this allocation and its effects on timeliness should be exposed to public view and analysis. Its desire for technical amendments that would undermine public disclosure and analysis should be rejected.

Mr. Chairman and Members of the Committee:

Thank you for inviting our organization to submit a statement for the record concerning the "Veterans Appeals Improvement and Modernization Act of 2017," an important legislative effort to reform the veterans claims and appeals process in the United States Department of Veterans Affairs (VA). (Throughout the rest of this statement, we refer to this document as "the draft bill").

The National Veterans Legal Services Program (NVLSP) is a nonprofit veterans service organization founded in 1980 that has been providing free legal representation to veterans and assisting advocates for veterans for the last 37 years. NVLSP has represented veterans and their survivors at no cost on claims for veterans benefits before the VA, the U.S. Court of Appeals for Veterans Claims (CAVC), and other federal courts. As a result of NVLSP's representation, the VA has paid more than $4.6 billion in retroactive disability compensation to hundreds of thousands of veterans and their survivors.

NVLSP publishes numerous advocacy materials, recruits and trains volunteer attorneys, trains service officers from such veterans service organizations as The American Legion, and Military Order of the Purple Heart in veterans benefits law, and conducts local outreach and quality reviews of the VA regional offices on behalf of The American Legion. NVLSP is one of the four veterans service organizations that comprise the Veterans Consortium Pro Bono Program, which has, since 1992, recruited and trained volunteer lawyers to represent veterans who have appealed a Board of Veterans' Appeals decision to the CAVC without a representative. In addition to its activities with the Pro Bono Program, NVLSP has trained thousands of veterans service officers and lawyers in veterans benefits law, and has written educational publications that thousands of veterans advocates regularly use as practice tools to assist them in their representation of VA claimants.

The Draft Bill

Since the beginning of last year, NVLSP has participated with a workgroup of veterans service organizations convened by the VA to find common ground on a set of reforms to address the serious dysfunctions that exist in the current VA appeals process. The text of the draft bill takes the text of the draft bill that VA developed last year and adds additional language that NVLSP welcomes and believes should be kept intact.

We believe the draft bill is a welcome attempt to address the serious problems veterans and their dependents face in processing appeals in the VA. Before we address its merits in more detail, we begin with a general point that is important to remember. The proposed structuring of the administrative appeals process envisioned under the draft bill is far-reaching. As with any change to a complex system, there will clearly be effects that we cannot now predict. We have considered this reality quite seriously. If the system were functioning generally well, a concern with unintended consequences might be sufficient to oppose such a comprehensive change in the system, at least without first conducting a pilot program. But we are not dealing with a well-functioning system. Given that state of affairs, we have ultimately concluded that the draft bill – even without being able to predict all of its effects – is a necessary step. We support it, as long

as Congress rejects the attempts that we understand VA is spearheading to make substantive changes to the additional language that appears in the draft bill that was not contained in the bill that VA drafted and supported last year.

I. POSITIVE FEATURES OF THE DRAFT BILL

We briefly highlight the significant positive features of the changes envisioned under the draft bill. Taken together, we believe these features will decrease appeal times while providing claimants with various options for pursing their appeals. The most significant positive features in the draft bill are:

- It provides for enhanced "notice letters" to veterans and other claimants concerning the denial of their claims. Enhanced notice is critically important to veterans as they make determinations about how to proceed when they are dissatisfied with a VA decision.

- It also eliminates the requirements under current law concerning the preparation of a Statement of the Case (SOC), the veteran's corresponding need to complete an additional step to perfect an appeal to the Board (i.e., VA Form 9) and VA's subsequent need to certify the appeal by completing VA Form 8. While there may have been a time at which the SOC served a useful function in this system, the enhanced "notice letters" required by the proposal eliminate the need for an SOC. Thus, the SOC process serves only to delay the processing of claims.

- It lowers the standard necessary for re-opening a claim under Section 5108. The current standard of "new and material evidence" is replaced with "new and relevant evidence." The lowering of the standard is critically important. In addition, and as we discuss in more detail below, the revised Sections 5108 and 5110 will allow veterans to obtain earlier effective dates in many circumstances than they would be able to do under the current version of this provision.

- It allows veterans a meaningful choice when they appeal to the Board of Veterans' Appeals (Board). A veteran may elect to forgo the submission of new evidence and a hearing in cases in which he or she determines such an approach is best. This would provide for more expeditious treatment of such appeals. On the other hand, a veteran can elect to proceed on a track in which the submission of new evidence and a hearing is allowed. This dual-track approach recognizes the reality that not all appeals are alike.

- It allows a claimant to seek the assistance of a lawyer for pay after an initial denial but before the filing of a Notice of Disagreement (NOD). This is a change from current law in which a lawyer may not charge a fee before the filing of an NOD. While seemingly a small change, we believe this is significant because the structure of the proposed new system provides claimants with myriad ways in which to proceed. Advice to such claimants will be critical and the proposed change allows more options for that advice.

• We believe the draft bill also reduces the means by which the VA can "develop to deny." NVLSP has reviewed many regional office and BVA cases in which the existing record before the VA supports the award of benefits, but instead of deciding the claim based on the existing record, VA has delayed making a decision on the claim by taking steps to develop additional evidence for the apparent purpose of denying the claim. Certain aspects of the current proposal – for example, the restriction on the application of the duty to assist at the Board – will likely reduce such actions.

II. THE NEED TO RESIST VA'S EFFORTS TO AMEND THE DRAFT BILL UNDER THE GUISE OF PROPOSING TECHNICAL AMENDMENTS

A. The Change VA Wants to Discourage Veterans From Appealing to the CAVC

We understand that one of the "technical amendments" supported by VA is to eliminate subsection (a)(2)(E) from the draft bill's amendments to 38 U.S.C. § 5110. This subsection appears on lines 10-14 of page 13 of the draft bill. This subsection is critically important and NVLSP's support of the draft bill is contingent on this provision remaining intact.

Proposed subsection (a)(2)(D) would allow a veteran to file a Section 5108 supplemental claim which preserves the earliest possible effective date if the veteran receives a Board of Veterans' Appeals (BVA) denial and files the supplemental claim within one year of the BVA decision. Proposed subsection (a)(2)(E) mirrors proposed subsection (a)(2)(D) by allowing a veteran to file a Section 5108 supplemental claim which preserves the earliest possible effective date if the veteran loses his appeal to the Court of Appeals for Veterans Claims (CAVC) or a higher court and files the supplemental claim within one year of the final court denial. The VA supports proposed subsection (a)(2)(D), but wants to eliminate proposed subsection (a)(2)(E).

If the BVA denies a claim under the draft bill – *regardless* whether proposed subsection (a)(2)(E) remains or is eliminated -- the veteran would be required, in order to preserve the earliest effective date, to choose between appealing to the CAVC and filing a supplemental claim with the RO. Eliminating subsection (a)(2)(E) would be unjust because it would put a heavy thumb on the scale when veterans make this choice. The veteran would have nothing to lose by filing a supplemental claim within one year of the BVA denial because if the supplemental claim is denied, the veteran can keep the right to retroactive benefits alive by appealing. But if subsection (a)(2)(E) is eliminated, the veteran has a lot to lose by appealing to the CAVC. If the judicial appeal results in the court affirming the BVA's denial (as occurs in approximately 30% of all appeals), the veteran's right to retroactive benefits is lost forever. For a disabled veteran, this can mean losing the opportunity for tens of thousands of dollars.

The explanation we received from VA for VA's objection to subsection (a)(2)(E) is that "it is contrary to VA policy interest in encouraging dissatisfied claimants to stay within VA unless it is truly necessary to go to a higher court." The flip side of this statement is the desire to discourage veterans from appealing to the CAVC, and discouraging appeals to the CAVC is exactly what eliminating subsection (a)(2)(E) would do. Veterans are not omniscient. At the time they have to choose between appealing to the CAVC and filing a supplemental claim, they

cannot know whether an appeal to the CAVC would be successful. In the 120 days they have to decide whether to appeal a BVA decision to the CAVC, they also will be unlikely to know if "it is truly necessary to go to a higher court," as the VA puts it.

If subsection (a)(2)(E) is eliminated, the safest course of action would be to file a supplemental claim. The unfortunate result of VA's attempt to place a heavy thumb on the scale would be that veterans who should appeal to the CAVC will not. Instead, they will file a supplemental claim that will unnecessarily prolong the time the veteran's claim is on the hamster wheel. NVLSP strongly supported the Veterans' Judicial Review Act of 1988. We oppose this unwise effort to discourage veterans from appealing to the court that this important Act created.

B. VA's Efforts to Escape Oversight of Its Processing of Legacy Claims

Section 3 of the draft bill wisely requires VA to report and the Comptroller General of the United States to assess VA's plans for processing appeals on legacy claims. This is a critical issue. NVLSP would have preferred that the draft bill structure the VA's decision-making on how to allocate its resources between new appeals and legacy appeals. But at least Section 3 would expose the VA's plans on this issue to public view and Comptroller General analysis.

The technical amendments to Section 3 supported by VA would significantly dilute this requirement. Ironically, the VA's explanation for these technical amendments undermines, rather than support their position. VA admits that it "has established a timeliness goal average of 365 days in the Board non-hearing lane option" for new appeals. VA also candidly states that it "does not have an established timeliness goal for legacy appeals." The VA obviously needs to make choices in allocating resources between processing legacy appeals and processing new appeals. VA's precise plans on this allocation and its effects on timeliness should be exposed to public view and analysis. Its desire for technical amendments that would undermine public disclosure and analysis should be rejected.

Conclusion

Thank you for this opportunity to present our views, and we would be pleased to respond to any questions that Members of the Committee may have.

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