**STATEMENT OF**
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**DEPARTMENT OF VETERANS AFFAIRS**
**BEFORE THE**
**OVERSIGHT AND INVESTIGATIONS SUBCOMMITTEE**
**COMMITTEE ON VETERANS' AFFAIRS**
**U.S. HOUSE OF REPRESENTATIVES**

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Good morning Chairman Coffman, Ranking Member Kuster, and Members of the Committee. Thank you for inviting me here today to present our views on several bills on matters of whistleblower protection, VA's hospital construction project in Denver, Colorado, information technology, procurement and management of biological implants, and Veteran and service-disabled Veteran-owned small businesses. Joining me today are Dr. Michael Icardi, VHA's National Director of Pathology and Laboratory Services, Stan Lowe, who serves as VA's Deputy Assistant Secretary for Information Security as well as its Chief Information Security Officer, and finally Dennis Milsten, VA's Associate Executive Director, Office of Operations, of VA's Office of Construction and Facilities Management.

## H.R. 571 Veterans Affairs Retaliation Prevention Act of 2015

H.R. 571 would add a new subchapter to title 38, U.S. Code on whistleblower complaints. The new section 721 would define a "whistleblower complaint" to include not only a VA employee's disclosure of wrongdoing, but also a complaint made by a VA employee assisting another employee to disclose wrongdoing.

Section 722 would establish a process for employees to file whistleblower complaints with their immediate supervisors; require supervisors to notify employees in writing, within two business days of receiving a complaint, whether the disclosure meets the statutory definition of whistleblowing; require supervisors to notify employees of actions taken to address their complaints, and permit employees to elevate complaints if the employee determines the action taken was inadequate; and require the Secretary to notify whistleblowing employees of the opportunity to transfer to another position.

Section 723 would require the Secretary to discipline any employee found to have committed an offense listed in subsection 723(d), with a first offense punishable by at least a 14-day suspension and a second offense punishable by removal, and would limit the notice and reply period associated with such discipline to not more than five days. Section 723 would also limit the appeal rights of employees who are removed so

that they would match the limited appeal rights of VA Senior Executives under 38 U.S.C. § 713. Section 723(b) would require the Secretary to charge employees found to have committed any offense listed in subsection 723(d) a fee to recoup the costs borne by the government as a result of the offense.

Section 724 would require the Secretary to consider protection of whistleblowers in evaluating supervisors' performance, prohibit payment of an award to a supervisor within a year after the supervisor is found to have committed an offense listed in subsection 723(d), and require the Secretary to recoup an award paid to a supervisor during a period in which the supervisor committed such an offense.

Section 725 would require the Secretary to coordinate with the Whistleblower Protection Ombudsman to provide annual training to all VA employees on whistleblower rights and protections, including the right to petition Congress regarding a whistleblower complaint. Section 726 would require annual reports to Congress on the number and disposition of whistleblower complaints filed with VA supervisors and through other disclosure mechanisms, and would also require the Secretary to notify Congress of whistleblower complaints filed with the Office of Special Counsel (OSC).

VA is absolutely committed to correcting deficiencies in its processes and programs, and to ensuring fair treatment for whistleblowers who bring those deficiencies to light. Secretary McDonald talks frequently about his vision of "sustainable accountability," which he describes as a workplace culture in which VA leaders provide the guidance and resources employees need to successfully serve Veterans, and employees freely and safely inform leaders when challenges hinder their ability to succeed. We need a work environment in which all participants – from front-line staff through lower-level supervisors to senior managers and top VA officials – feel safe sharing what they know, whether good news or bad, for the benefit of Veterans.

In recent months the Department has taken several important steps to improve the way we address operational deficiencies, and to ensure that those who disclose such deficiencies are protected from retaliation. Last summer, the Secretary reorganized and assigned new leadership to the VA Office of the Medical Inspector (OMI), the component of the Veterans Health Administration that reviews whistleblower disclosures related to VA health care operations. Also last summer, the Secretary established the Office of Accountability Review, or OAR, to ensure leadership accountability for whistleblower retaliation and other serious misconduct. VA has also improved its collaboration with the Office of Special Counsel, which is the independent office responsible for overseeing whistleblower disclosures and investigating whistleblower retaliation across the Federal government. VA has negotiated with OSC an expedited process to speed corrective action for employees who have been subject to retaliation. That process is working well, and we are now beginning a collaborative effort with OSC's Director of Training and Outreach to create a robust new training program to ensure all VA supervisors understand their roles and responsibilities in protecting whistleblowers.

While we appreciate the Committee's efforts to assist the Department in these endeavors, we believe the specific whistleblower disclosure and protection procedures provided by this bill would be unworkable. We also believe they are duplicative of the long-standing system of OSC authorities, remedies and programs specifically created to address claims of improper retaliation in the workplace. We believe these current whistleblower protections are effective, and as noted above VA is working closely with OSC to ensure the Department and its employees are gaining the maximum benefits from its remedies and protections.

First, turning to what we see as likely unintended consequences of H.R. 571, the bill's strict notification requirements, short timelines, and severe penalties may create an adversarial relationship between supervisors and subordinates that would likely hinder rather than foster sustainable accountability. The bill would require the supervisor to notify the employee within two days after receiving a disclosure to indicate whether the supervisor has determined that the disclosure meets the statutory criteria for whistleblowing and, if so, what specific actions the supervisor will take to address the complaint. Two days would be inadequate in many cases for a supervisor to come to an informed conclusion that "there is a reasonable likelihood that a complaint discloses a violation of any law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific and danger to public health and safety," in the terms of the bill. The fact that there are substantial "downstream" effects from these two-day determinations will in our view create unpredictable and destabilizing effects in a workplace where collaboration and trust is paramount.

The bill would also impose specific penalties on supervisors found to have engaged in retaliation and would significantly limit the time those supervisors have to defend themselves against the imposition of those penalties. The bill would also require VA supervisors to reimburse the government for the costs associated with retaliation, a requirement unparalleled in any other Executive Branch agency. While well-intentioned and designed to protect VA whistleblowers, we believe the cumulative effect of these provisions, in combination with the two-day notification requirement, would not only raise a host of constitutional and other legal issues, but would also leave supervisors too fearful about the possible penalties for retaliation to effectively manage their employees. We also believe that imposing onerous new requirements on VA supervisors, alone in government, would significantly impede the Secretary's efforts to recruit and retain the talented leaders needed to improve service to Veterans.

From a legal perspective, our analysis suggests that portions of H.R. 571 present due process problems and conflicts with other laws. We'd be happy to share those concerns with you in greater detail. VA is unable to estimate the costs for H.R. 571 at this time.

**H.R. 593, the Aurora VA Hospital Financing and Construction Reform Act**

Section two of the bill would extend the authorization of the major medical facility project to replace the VA Medical center in Denver, Colorado, in an amount not to exceed $1,100,000,000.

Section three of the bill would require within thirty days of enactment that VA enter into an agreement with the U.S. Army Corps of Engineers (USACE) to obtain, on a reimbursable basis, the services of USACE for "construction agent responsibilities" for VA's Aurora, Colorado medical facility project (the "Aurora Project"). The section further sets out responsibilities under the agreement, including performing the project, design, contract and construction management necessary to complete the Aurora Project.

Section three further requires VA to submit a report to the House Veterans Affairs Committee within 180 days after reaching the agreement that includes detailed plans and cost estimates, and then requires progress reports on the Aurora Project every 180 days. It also contains provisions to ensure VA provides USACE with documents and information it determines necessary to carry out the agreement, as well as any other assistance, to be provided at no cost to USACE.

Mr. Chairman, we appreciate your continuing engagement and collaboration with VA to move this project forward in the wake of the setbacks that we are all familiar with. We will continue to depend on open communication and collaboration, working together to ensure that the hospital is completed in good order to meet the needs of Colorado Veterans. I know that VA leadership has been regularly briefing you and others on the progress we have made in conjunction with USACE to move the project forward.

Before commenting on H.R. 593, we'd note that the views presented here are those of VA, and not those of the USACE, who would bear significant responsibilities under the legislation.

We appreciate and support the inclusion of authorization language in section two of the bill. Based on the USACE's estimate to complete construction, VA estimates that that the final cost of the project will total $1.73 billion, which is larger than the amount that would be authorized in H.R. 593. Therefore, we would like to work with the Committee to ensure any enacted authorization addresses the full estimated cost of the project.

Turning to section three, while we support the intent of this section, we are concerned that the legislation is duplicative of actions already underway and may result in unintended consequences for us as well as USACE. VA has not waited for legislation to begin the process of bringing USACE on as our construction agent for the Aurora Project. VA has engaged USACE through the Economy Act to provide support at the project site as we continue under the interim agreement. In addition, VA and USACE entered into an agreement to begin transitioning the construction agent duties to USACE. USACE has had full access to the planning documents, the designer, the

construction contractor and all VA staff. Members of USACE staff are now located at the project site and participate in progress meetings, work authorization meetings, partnering meetings, and are included in the Executive Program Review meetings. VA and USACE are finalizing the agreement that will allow USACE to award and administer the construction and all ancillary contracts necessary to complete the construction and commissioning of the Aurora Project.

VA remains committed to completing the Aurora Project for our Veterans as soon as practical; at the best value to taxpayers, given where we are today. We welcome the opportunity to discuss our concerns with H.R. 593 with the Committee. VA is unable to estimate the costs for H.R. 593 at this time.

**H.R. 1015 Protecting Business Opportunities for Veterans Act of 2015**

This bill seeks both to improve oversight and ensure Veteran-owned small businesses (VOSBs) and service-disabled Veteran-owned small businesses (SDVOSBs) actually perform the majority of contract requirements awarded to them. It would import into VA's Veterans First legislation the performance requirements currently applicable to other small business programs under the Small Business Act.

As amended by the National Defense Authorization Act for Fiscal Year 2013, the Small Business Act requires that when small businesses perform contracts awarded under a sole-source or set-aside authority, they may not subcontract out more than 50% of the total contract cost to other firms, except firms with the same socioeconomic profile as the prime contractor (i.e., a "similarly situated firm"). This Government-wide performance requirement applies to contracts where the prime contractor received the award through a set-aside or sole source process. Because the prime contractor received the award based in part on its socioeconomic status, the Small Business Act does not permit the firm then to subcontract out most of the work to firms that would have been ineligible to receive the award.

The proposed bill would update the VA counterpart to this provision to apply the same cost-based formula for performance as adopted in the Small Business Act. However, it would apply to all awards to SDVOSBs and VOSBs that count toward those goals, not just set-asides or sole source awards under the Veterans First Contracting Program. VA, like other Federal agencies, awards contracts through myriad acquisition authorities, and applying this contract clause in all cases will likely have unintended consequences.

While supportive of the goal of improving the program's oversight and performance, there are other technical matters and ambiguities that VA would like to discuss with the Committee in order to provide a position on the bill. VA will be pleased to discuss these issues further with staff, and provide technical assistance where requested, to aid the Committee in crafting language to carry out the Committee's intended purposes. VA is unable to estimate the costs for H.R. 1015 at this time.

**H. R 1016 Biological Implant Tracking and Veteran Safety Act of 2015**

Section 2 of H.R. 1016 would add a new section 7330B to title 38, United States Code, to require the Secretary to adopt and implement the unique device identification system developed by the U.S. Department of Health and Human Services, Food and Drug Administration (FDA) for medical devices (or else a comparable standard identification system) for use in identifying biological implants intended for utilization in VA medical procedures. Section 2 would require that VA permit a vendor to use any accredited agency identified by the FDA as an issuing agency pursuant to section 830.100 of title 21 of the Code of Federal Regulations (C.F.R.). Section 2 would also require the Secretary to implement, not later than 180 days after the date of enactment, a system for tracking biological implants from donor to implantation and implement a system of inventory controls compatible with such system. The inventory controls would need to enable the Secretary to notify, as appropriate (based on an evaluation of the risks and benefits provided by appropriate VA medical personnel), VA patients who are in receipt of biological implants that are subject to recall by the FDA.

In addition, section 2 of the bill would provide that in cases of conflict between the proposed revision to Title 38 and a provision of the of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 301 et seq.) or sections 351 or 361 of the Public Health Service Act (42 U.S.C. § 262) (including any regulations issued under such Acts), the provision of the Federal Food, Drug, and Cosmetic Act or the Public Health Service Act (including any regulations issued under such Acts) would apply.

For purposes of section 2, the term "biological implant" would be defined as any human cell, tissue, or cellular or tissue-based product: (1) under the meaning given the term "human cells" in 21 C.F.R. § 1271.3 (or any successor regulation); or (2) that is regulated as a device under section 201(h) of the Federal Food, Drug, and Cosmetic Act. With respect to biological implants defined in the former case (definition of "human cells"), the standard identification system would have to be implemented not later than 180 days after the Act's enactment. With respect to those defined in the latter case (product that is regulated as a device), the Secretary would be required to adopt or implement such standard identification system in compliance with the (compliance) dates established by the FDA pursuant to section 519(f) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 360i(f)).

Should the tracking system for biological implants not be operational by the 180-day deadline described above, the Secretary would be required to submit a written

explanation to the Congressional Committees on Veterans' Affairs on the impediment to such implementation, the steps being taken to remediate such impediment, and the target dates for a solution. The reporting requirement would continue for each month until such time as the system is operational.

Section 3 of H.R. 1016 would add a new section 8129 to title 38 to govern the procurement of biological implants. Section 3 of the bill would limit procurement of human biological implants to vendors that use the standard identification system set forth in section 2 and have safeguards to ensure that a production identifier has been in place for each step of distribution from its donor. This section would require that each vendor and any tissue distribution intermediaries or tissue processors are appropriately registered with the FDA. The Vendor would also have to ensure donor eligibility determinations and any other required records required by the Secretary accompany each biological implant at all times regardless of the country of origin of the donor. The vendor would also have to consent to inspection and audit, which would include the accuracy of records and handling of products. Vendors would be required to cooperate with FDA and other recalls and provide adverse event reports or warning letters to the Secretary within 60 days. Records of procurement would have to be maintained for at least 5 years. In addition, the vendor would be required to provide biological implants only from tissue processors that maintain active accreditation with the American Association of Tissue Banks or similar national accreditation.

Section 3 of the bill would also limit procurement of non-human biological implants to vendors that use the standard identification system set forth in Section 2. This section would require that each vendor and any tissue distribution intermediaries are appropriately registered with the FDA. The vendor would also have to consent to periodic inspection and audit, which would include the accuracy of records and handling of products. Vendors would be required to cooperate with FDA and other recalls and provide adverse event reports or warning letters to the Secretary within 60 days. Records of procurement would have to be maintained for at least 5 years. Section 3 would require the Secretary to procure biological implants under the Federal Supply Schedules (FSS) of the General Services Administration, unless such implants are not available under such schedules. The measure would also require the Secretary to accommodate reasonable FSS vendor requests to undertake outreach efforts to educate VA medical professionals about the use and efficacy of such FSS biological implants. It would further provide that section 8123 of title 38 (related to procurement of prosthetic appliances) does not apply to the procurement of biological implants. For biological implants not available on the FSS, the Secretary would be required to procure these items using competitive procedures in accordance with the Federal Acquisition Regulations and applicable law.

Section 3 would establish penalties for an agency employee who is found responsible for procuring a biological implant with the intent to avoid or with reckless disregard of the requirements of this section. Specifically, such an individual would be ineligible to hold a certificate of appointment as a contracting officer or to serve as the representative of an ordering officer, contracting officer, or purchase card holder.

Section 3 defines 'biological implant' as it would be defined in section 7330B(d). A "production identifier" would be defined as a distinct identification code that relates a biological implant to the human donor and to all records of the implant, and includes information designed to facilitate effective tracking and satisfy the requirement of sub-section (c) of section 1271.290 of title 21 of the C.F.R. The term 'tissue distribution intermediary' is an agency that acquires and stores human tissue for further distribution but performs no other tissue banking functions. Lastly, 'tissue processor' is defined as an entity processing human tissue for use in biological implants.

The bill states that the effective date of section 8129 of title 38 would be 180 days after the date on which the tracking system required in subsection (b) of section 7330B is implemented.

Lastly, this section contains a special rule for cryopreserved products which allows a three-year period after the effective date of section 8129 of title 38 for VA to utilize previously produced and labeled biologics without relabeling under section 7330B.

While VA agrees with the general purpose of the first two components of the H.R. 1016, i.e., to adopt a standard identification system and to implement a tracking system, VA does not support the bill, which we find both unnecessary and limiting to those purposes. The bill while recognizing a fundamental difference between human and non-human biologics requires VA to use the FDA's unique device identification (UDI) or comparable standard for both. H.R. 1016 does recognize the need for a higher standard for human biologics as indicated by the requirement for a vendor to ensure safeguards are in place for the use of a production identifier at all stages in production; however, it then prohibits VA from using such an identifier to track the human biologics it possesses, transfers, or implants. Section 2 also states that the Secretary shall permit vendors to use any of the FDA accredited entities identified as an issuing agency for adopting or implementing a standard identification system for biological implants. This effectively limits VA to the use of the FDA's UDI and its minimum standards. For VA's purposes, those standards are not sufficient to provide the Donor to Final disposition tracking of human derived biologics, nor enable implementing a standard system.

VA currently has a tracking system for recalls through VHA Directive 1068 that extends to suspending use of the recalled product. The tracking system proposed in H.R. 1016 is tied to the FDA UDI component and to that extent is premature and not inclusive to all biologic implants as indicated by the numerous exceptions present in 21 C.F.R. § 1271.3. Further the UDI is only manufacturer specific and as a result when present on a device will not be assured of being unique within the VA's system. This will create unnecessary difficulties and delays compared to an already well-functioning system for blood and pharmacy products fields by VA Division of Quality and Safety.

Section 3 discusses VA performance of inspections and audits. We believe these should be functions of FDA. While it is typical that VA asks for the ability to inspect paperwork and facilities with which it contracts, this section seems to go further,

indicating that the VA asking for consent for periodic inspections and audits of both documentation and handling practices. When coupled with section C this implies that the VA would need to verify periodically the documentation and practices involved in procurement of tissue by a contractor and any intermediaries by direct inspection This should be a function of the FDA which registers the vendor and intermediaries.

Section 3 discusses the retention of records associated with procurement of an implant for five years and is not consistent with the record retention requirement by FDA. FDA requires retention of donor records for 10 years after administration. See 21 C.F.R. § 1271.55(d)(4). Similarly AATB requires 10 year retention. It should be noted that some institutions permanently retain these records. In particular some types of biologic may be stored for extended periods prior to use and it may take several years for an adverse outcome to manifest. Disposal of records, in particular, the actual production identifier and donor documentation will prevent the ability to track human derived biologics to their donor and ensure the presence of biologics in the VHA which cannot be reliably tracked back to the original donor.

VA also disagrees with the requirement that biological implants be procured from FSS sources (unless the products are not available from these sources) and the prohibition against using VA's authority in 38 U.S.C. § 8123 to purchase biological implants. The first unduly restricts VA's authority to determine the hierarchy of sources. All biological implants are not currently available on the FSS and clinicians are not involved in the decision to place these products on contract. Additionally, VHA has determined that these should be available through national contracts that would take precedence over FSS. VA is developing an appropriate initial contract vehicle to acquire such products.

Removing these products from the scope of section 8123 would, we believe, unduly interfere with a clinician's authority to determine the particular device (biological implant) that best meets the patient's individual medical needs by restricting VA's authority to acquire that particular device. Like other procurements under section 8123, quality assurance and regulatory compliance could be achieved here through internal acquisition processes and controls, avoiding needless treatment delays due to the federal contracting process.

Finally, H.R. 1016 would limit VHA purchases to contracted products or through competitive processes from vendors meeting the listed procurement requirements and would provide penalties to procurement employees of the Department who may need to purchase products off contract to meet the immediate needs of the patient and provider. In addition, vendors with single source or multi-source products may not choose to contract with the VA under the proposed requirements, thereby eliminating or limiting availability of these products to our patients. Shortages of biologic products could also affect the ability of VHA to obtain products under contract or through competitive processes. As a result, the medical care of Veterans could be delayed or interfered with. VHA must maintain the ability to provide safe, effective and timely care to Veterans. VA is unable to estimate the costs for H.R. 1016 at this time.

**H.R. 1017, the Veterans Information Security Improvement Act**

The bill would add section 5723A to 38 U.S.C. with a series of required processes for the management of VA's information technology (IT) portfolio. H.R. 1017 would require implementation of specific processes related to the management and security of VA's critical network infrastructure, computers and servers, operating systems, web applications, and VistA, the electronic health record. The bill prescribes specific operational controls, procedures, monitoring and testing. It also requires VA to increase existing transparency through increased reporting, certification of compliance with all relevant laws and regulations regarding information security, and an additional Office of Inspector General report on implementation the Act.

According to Government Accountability Office (GAO) testimony from March, 2014, "in a dynamic environment where innovations in technology and business practices supplant the status quo, control activities that are appropriate today may not be appropriate in the future." The GAO testimony also states that legislation should emphasize specific "security-related actions should be taken based on risk." Information Security: VA Needs to Address Long-Standing Challenges (GAO-14-469), before the Subcommittee on Oversight and Investigations, Committee on Veterans Affairs, House of Representatives (March 25, 2014).

VA opposes H.R. 1017 because while many provisions are well-intended, they would impede the flexibility necessary for effective and nimble IT management to meet mission-critical needs. As Veterans' needs change, as laws change, and as the threat environment changes, VA must have flexibility in managing its IT resources to support care and services provided to Veterans.

VA's unique mission of delivering care and benefits to Veterans relies upon a considerable IT enterprise that must remain flexible in a risk-based world. VA works tirelessly to ensure it is doing everything possible to protect Veteran information and VA systems through its defense-in-depth security posture, while understanding that risks and vulnerabilities exist. To provide high quality services we must remain agile both in responding to the needs of the Veterans and in our ability to adopt evolving technology and best practices. Our management of risks and vulnerabilities demonstrates the maturity of our IT organization and our commitment to both deliver on our mission to serve Veterans with our obligation to protect Veteran information.

In a dynamic environment where innovations in technology and business practices are frequent, practices that are appropriate today may well be less than ideal when compared to alternatives in the future. VA must have the flexibility to adjust to the natural evolution of security practices as circumstances warrant. VA is concerned that very detailed legislation prescribing those practices could impede our ability to quickly adapt to the constantly changing security environment.

Section 4(b)(2) for example would not allow for flexibility or necessary risk-based decisions. It requires VA to implement automated patching tools and processes that ensure security patches are installed for any software or operating system on a computer by not later than 48 hours after the patch is made available. That timeline would preclude VA from reviewing patches to ensure they do not interfere with systems utilized to provide care and services to Veterans. Indiscriminately implementing software patches would increase the likelihood of system crashes and outages to VA's 45,000 applications. An automated patching tool would prevent authorized personnel from conducting in-depth analysis of the patches prior to implementation. As VA has experienced, patches received from the vendor may cause unanticipated operability issues with VA systems. An evaluation must be performed on any patches to ensure the operability of the particular application or system to ensure the patch does not have a deleterious impact to services that VA provides.

Section 5(a) is another example of how H.R. 1017 could preclude an effective review or risk-based decision process. It requires VA to upgrade or phase out outdated or unsupported operating systems to protect computers of the Department from harmful viruses, spyware, and other malicious software that could affect the confidentiality of sensitive personal information of Veterans. While this requirement appears straightforward, in literal application we believe there would be unintended consequences. VA utilizes many systems that are necessary to the operational and mission needs of the Department that could be defined as "outdated" or "unsupported."

VA has isolated all systems that are operating on operating systems that could be considered "outdated" or "unsupported" due to unique mission needs, to ensure they are not accessible to unauthorized users. Indiscriminately phasing out "outdated" or "unsupported" systems would impact physicians at the point of care. Many of these systems serve specialized purposes and their function cannot simply be transitioned without proper testing and migration planning to other, newer systems without impact. Indiscriminate mandates which force migration of these systems to newer, supported operating systems would undoubtedly affect patient care and the broader VA mission.

Another reason VA cannot support H.R. 1017 is because many of the operational mandates have already been promulgated through Executive Branch policies, Executive Orders and other policy guidelines. With few exceptions, the processes and tasks prescribed in sections 2 through 7 are already either complete, underway, or planned in a variety of efforts. For example, VA Directive and Handbook 6500 is consistent with VA's information security statutes, 38 United States Code (U.S.C) §§ 5722-5727; the Federal Information Security Management Act (FISMA), 44 U.S.C §§ 3541-3549; and Office of Management and Budget (OMB) Circular A-130, Appendix III, *Security of Federal Automated Information Resources*.

These directives establish policy and responsibilities for incorporating National Institute of Standards and Technology (NIST) Special Publication (SP) 800-37, *Guide for Applying the Risk Management Framework to Federal Information Systems: A Security Life Cycle Approach;* SP 800-39, *Managing Information Security Risk:*

*Organization, Mission, and Information System View;* and SP-800-53, *Recommended Security Controls for Federal Information Systems and Organizations.* These requirements we believe are fully adequate to ensure appropriate security for VA information technology assets that store, process, or transmit VA information.

In addition VA continues to work with the Office of Inspector General to ensure full compliance with FISMA requirements. VA has established robust and comprehensive plans of actions to carry out many OIG suggestions, in addition to establishing a permanent project team to maintain its Continuous Readiness in Information Security Program (CRISP). Placing many of these mandates in law would we believe hinder the ability of VA to quickly and effectively respond to the constantly changing cybersecurity environment.

Each year VA methodically improves our defense-in-depth security posture by introducing and refining technologies and procedures that enhance our ability to protect VA networks and devices in response to constantly changing threat environments. These efforts ensure VA employees, contractors, and other staff using VA computing devices are compliant with mandatory privacy and security training requirements and provide responsive and timely submissions to various legislative reporting requirements.

VA understands and appreciates the Committee's interest in this critical area, and its responsibilities for oversight. VA has an obligation to safeguard the data we hold on Veterans — and takes that obligation seriously. As VA faces ever-evolving threats in an increasingly complex IT landscape, VA is constantly refining its ability to protect Veteran information. VA continuously employs progressive security measures to protect data and secure the VA network and its IT systems. We look forward to working with the committee to ensuring Veteran information and VA systems are protected, and the Department is eager to work with the committee on solutions that will serve Veterans. VA is unable to estimate the costs for H.R. 1017 at this time.

**H.R. 1128, the Department of Veterans Affairs Cyber Security Protection Act**

H.R. 1128 would require VA to submit on a quarterly basis VA plans for addressing known information security vulnerabilities and plans for replacing outdated operating systems, including detailed timelines with specific milestones. It would also include in the enumerated responsibilities of the Assistant Secretary for Information and Technology the requirement to ensure that any software or Internet applications used by VA are as secure as practicable from known vulnerabilities that could affect the confidentiality of Veterans' sensitive personal information.

H.R. 1128 would require VA within 60 days to submit a report on third-party validation of VA information security, with a description of steps VA has taken to provide a systemic and ongoing evaluation of VA information security by a non-Department entity. The bill would add a new section 5727 to title 38 which would require quarterly reports on incidents of failure to comply with established IT policies, and VA's response

to those incidents. The new section would also require a detailed discussion of whether recommendations of the National Institute of Standards and Technology, the Office of Management and Budget, or the Department of Homeland Security have been implemented.

The bill would add a new section 5728 to title 38 to require a strategic plan for improving the information security and information technology infrastructure of the Department. There are other provisions relating to requirements for certain VA contracts relating to information security threats. Finally, H.R. 1128 would require within five years a report on VA information security protections and the accountability of VA for information security breaches.

VA appreciates and supports the goals of the bill, and believes some of the reporting requirements may be useful for both VA and the Congress. However, some elements of the bill would be particularly onerous in practice, and one provision applying to VA contractors would provide weaker protection than is already present in the Federal Acquisition Regulation, and thus we cannot support the bill as drafted. We would appreciate the opportunity to work with the committee to ensure the reporting requirements are feasible and useful for the committee's oversight responsibilities. VA is unable to estimate the costs for H.R. 1128 at this time.

**H.R. 1129 Veterans' Whistleblower and Patient Protection Act of 2015**

H.R. 5054 would amend title 38, chapter 3, of the U.S.C. to add a new section 319A. The bill would establish an Office of Whistleblower and Patient Protection within VA to receive, investigate, and recommend actions to address, whistleblower disclosures and retaliation complaints filed by VA employees, patients, and other individuals. The bill would require that all covered complaints – defined as complaints regarding alleged Prohibited Personnel Practices described in section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D) of title 5, or regarding the safety of a patient at a VA medical facility – be referred to this new office, and not to VHA's Office of the Medical Inspector.

The bill would require the Secretary to appoint a career Senior Executive as Director of the Office, to appropriately resource the Office with a sufficient number of attorneys, investigators, and other personnel, and to report to Congress every 180 days the number of covered complaints received, investigations commenced, and allegations sustained, among other matters. The bill would require the Director of the Office to refer complaints, as appropriate, to the Attorney General, Special Counsel, or VA Inspector General, and to coordinate with the Special Counsel and Inspector General to ensure that the actions of the Office do not duplicate those of the other entities.

As with H.R. 571, VA appreciates and shares the Committee's interest in ensuring that whistleblower disclosures are effectively investigated and addressed for the benefit of Veterans. As noted with respect to the prior bill, however, we believe that

our current processes, and those of our partners at the Office of Special Counsel, are adequate to meet the need. VA works closely with OSC to ensure that disclosures are promptly and properly investigated, that substantiated issues are corrected, and that whistleblowers are protected from discriminatory conduct.

In the specific context of patient safety issues, VA's newly reorganized Office of the Medical Inspector provides expert, unbiased, and credible investigations and recommends appropriate action to correct substantiated issues. We believe there is no need to establish a separate office to carry out those functions. VA is unable to estimate the costs for H.R. 1129 at this time. We are of course glad to discuss these important issues with the Committee at any time.