STATEMENT OF

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ACTING DEPUTY UNDER SECRETARY FOR DISABILITY ASSISTANCE,

VETERANS BENEFITS ADMINISTRATION

AND

BEFORE THE

SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS

HOUSE COMMITTEE ON VETERANS' AFFAIRS

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Mr. Chairman and Members of the Subcommittee, we are pleased to be here today to provide the views of the Department of Veterans Affairs (VA) on pending legislation affecting VA's programs. Accompanying me today is Mr. Matthew Sullivan, Deputy Under Secretary for Finance and Planning, National Cemetery Administration and Mr. David Barrans, Assistant General Counsel.

We regret that due to the short notice we received for some of the bills, we do not yet have cleared views and cost estimates concerning the draft bills related to "Veterans National Remembrance Act" and the "Veterans' Survivors Claims Processing Automation Act of 2015."

Also, at this time, cost estimates are not available for the following bills: H.R. 1302, H.R. 1338, H.R. 1380, and H.R. 2605.

H.R. 303

H.R. 303, the "Retired Pay Restoration Act," would permit receipt of VA disability compensation for service-connected disabilities and either retired pay by reason of years of service in the Uniformed Services or Concurrent Retirement and Disability Pay. Because the bill would primarily affect the Uniformed Services and would not affect the operation of VA, we defer to the Uniformed Services as to whether H.R. 303 should be enacted.

H.R. 303 would expand eligibility for concurrent receipt of Veterans' disability compensation and either retired pay based on years of service or Combat-Related Special Compensation to retirees receiving disability compensation for service-connected disabilities with a combined disability rating of less than 50 percent. Specifically, the bill would amend section 1414 of title 10, United States Code, to redefine "qualified retiree" to remove the requirement of a combined disability rating of 50 percent or more, and to specifically exclude members retired from the Selected Reserve based on physical disability not incurred in the line of duty. These changes would be effective January 1, 2016, and would apply to payments for months beginning on or after that date.

Payments to chapter 61 retirees under this bill would result in additional cost to VA only for those rated less than 50 percent disabled. Therefore, VA did not consider Veterans with a rating greater than 40 percent in estimating the costs of this bill. According to the Department of Defense (DoD), any additional payment for those Veterans (with ratings of 50 percent or above) under this bill would be incurred by DoD, not VA, because these Veterans are already on the compensation rolls.

There are three groups of retirees who would become eligible to receive VA disability compensation concurrently with retired pay by reason of years of service in the Uniformed Services or Combat-Related Special Compensation due to this legislation: (1) Current retirees who filed a claim with VA and have been determined to have one or more service-connected disabilities with a combined rating of less than 50 percent, but have elected to receive military retirement payments instead of VA disability compensation; (2) Current retirees who have never filed a claim with VA but would otherwise have one or more service-connected disabilities with a combined rating of less than 50 percent; and (3) future retirees who have one or more service-connected disabilities with a combined rating of less than 50 percent. Benefit costs to VA associated with current and future retirees with ratings less than 50 percent are estimated to be $467 million during the first year, $3 billion over five years, and $6 billion over ten years. Currently, these benefits costs are not funded in VA's budget. If the bill were to be enacted, Congress would have to provide additional mandatory appropriations to pay for the cost of this legislation.

H.R. 1302

H.R. 1302, the "VA Appeals Backlog Relief Act," would require VA regional offices (RO) to certify a “VA Form 9, Appeal to Board of Veterans’ Appeals”, commonly referred to as a “substantive appeal,” filed by a Veteran not later than one year after receipt of the form.

Although VA appreciates the intent of the bill to expedite processing of appeals, the Department does not support this bill because we believe that timeliness should be

improved through a more holistic, comprehensive reform of the multi-step claims appeals process under current law. However, this bill seeks to address a single step in the multi-step process by imposing a statutory deadline, while ignoring the underlying laws that currently preclude efficiency in the overall process.

A significant factor contributing to delay in certifying appeals to the Board of Veterans' Appeals (Board) is the fact that a claimant may submit or identify additional evidence at any point in the appeals process, and if VA receives such evidence, the claim must be adjudicated anew, including complying again with the duty to assist in obtaining information and evidence to substantiate the claim under 38 U.S.C. § 5301A. Therefore, in many cases VA cannot control the time it takes for completion of a particular stage in the appeal process. For this reason, it would not be helpful to enact processing deadlines without first reforming the law that governs the process.

Under 38 U.S.C. § 7105(e)(1) as amended by Public Law 112-154, the Board has jurisdiction to review evidence submitted by a claimant or claimant's representative with a substantive appeal or after filing a substantive appeal, unless a claimant or the claimant's representative requests in writing that the RO initially review the evidence. Following enactment of this statute, the Veterans Benefits Administration (VBA) instructed the ROs to certify appeals to the Board at the earliest time allowable by law. Section 7105(e)(1), however, does not address whether VA has a duty to obtain evidence the claimant identifies, rather than submits, or to develop further evidence at this point in the proceedings. The Board therefore has implemented section 7105(e)(1) by remanding appeals to the RO to obtain and consider the evidence in the first instance, which unnecessarily prolongs the appellate process. Absent changes to this

adjudicative scheme, the RO may need to conduct additional cycles of development and review even after a substantive appeal is received. Therefore, in many cases, the delay in certifying an appeal to the Board is attributable to identification or development of new evidence. To address this issue, VA submitted a legislative proposal in the FY 2016 Budget to amend 38 USC § 7105(e)(1) to transfer jurisdiction over this function to the Board.

We also have noted a few technical issues with the bill. First, section 2 of the bill refers only to a VA Form 9 "submitted by a veteran." The plain language of the statute would not require expeditious certification of an appeal filed by any other claimant, including a Veteran's survivor. Second, section 2 states that an RO would certify a VA Form 9. However, under VA regulations, the RO certifies an "appeal" to the Board, not a form.

Costs related to this bill are not available at this time.

H.R. 1338

H.R. 1338, the "Dignified Interment of Our Veterans Act of 2015," would require VA to conduct a study and report to Congress on matters relating to the interment of unclaimed remains of Veterans in national cemeteries under the control of the National Cemetery Administration (NCA), including: (1) determining the scope of issues relating to unclaimed remains of Veterans, to include an estimate of the number of unclaimed remains; (2) assessing the effectiveness of VA's procedures for working with persons or entities having custody of unclaimed remains to facilitate interment in national cemeteries; (3) assessing State and local laws that affect the Secretary's ability to inter

such remains; and (4) recommending legislative or administrative action the VA considers appropriate.

The bill would provide flexibility for VA to review a subset of applicable entities in estimating the number of unclaimed remains of Veterans as well as assess a sampling of applicable State and local laws.

In December 2014, NCA published a Fact Sheet to provide the public with information on VA burial benefits for unclaimed remains of Veterans. NCA prepared the Fact Sheet in collaboration with representatives from VBA and the Veterans Health Administration (VHA). As well as being posted on VA's website, the Fact Sheet was widely distributed to targeted employees in VA, including Homeless Veteran Coordinators, Decedent Affairs personnel, VBA Regional Compensation Representatives, and NCA Cemetery Directors as well as shared in a GovDelivery message sent to over 28,000 funeral director and coroner's office recipients who are entities that may come to NCA seeking assistance to ensure burial of a Veteran whose remains are unclaimed.

NCA strongly supports the goal of ensuring all Veterans, including those whose remains are unclaimed, where sufficient resources for burial are not available, who earned the right to burial and memorialization in a national, state, or tribal Veterans cemetery, are accorded that honor. We remain unclear, however, about how the results of such a study could be used to further NCA’s mission. NCA appreciates the continued Congressional support to meet the needs of Veterans whose remains are unclaimed. While NCA is concerned that the study may be unnecessary or premature at this time, we would appreciate working with the Committee to make sure any study that the

Department is mandated to produce is targeting data that can be used to better serve these Veterans.

Over the past several years, Congressional and Departmental actions have increased the Department's ability to ensure dignified burials for the unclaimed remains of eligible Veterans. The Dignified Burial and Other Veterans' Benefits Improvement Act of 2012 (Public Law 112-260) authorizes VA to furnish benefits for the burial in a national cemetery for the unclaimed remains of a Veteran with no known next-of-kin, where sufficient financial resources are not available for this purpose. Those benefits include reimbursements for the cost of a casket or urn, for costs of transportation to the nearest national cemetery, and for certain funeral expenses.

NCA is pleased to report that our final rule to implement this authority was published on April 13, 2015, and on May 13, 2015, we began to accept requests for reimbursement for caskets or urns purchased for the interment of deceased Veterans who died on or after January 10, 2014, without next of kin, where sufficient resources for burial are not available. As this new benefit is administered, NCA will have a new source for collecting data on the number of Veterans whose unclaimed remains are brought to NCA for interment. The data can be used to assist in targeting outreach efforts to partners and getting a fuller understanding of the issue.

The Department continues to identify areas to recommend legislative or administrative action that would support dignified burial of unclaimed remains of Veterans. Two legislative proposals are included in VA's FY 2016 Budget Submission. Currently, VA may furnish a reimbursement for the cost of a casket or urn and for the cost of transportation to the nearest national cemetery. These benefits are based on

the Veteran being interred in a VA national cemetery. The legislative proposals are to expand these two benefits to include those Veterans who are interred in a state or tribal organization Veteran cemetery.

In conjunction with discussions we had last year with congressional staff, NCA reviewed its internal procedures and began to follow-up every thirty days with public officials on any unclaimed remain cases shown as pending until the cases are scheduled for burial and the Veterans' remains are interred. While state and local laws designate who may act as an authorized representative to claim remains, NCA can work with any individual or entity that contacts us to determine a Veteran's eligibility for burial and schedule the burial in a VA national cemetery.

The work of the Missing in America Project (MIAP) and individual funeral directors is invaluable in complementing VA's role of ensuring that all Veterans, including those whose unclaimed remains are brought to us, receive the proper resources to ensure receipt of a dignified burial. Over the past several years, NCA has developed a strong working relationship with funeral homes, coroner offices, and medical examiners to actively provide responses to requests for eligibility reviews. In FY 2014, NCA processed 2,805 MIAP requests to determine eligibility for burial in a VA national cemetery, of which 1,642 were verified as eligible.

In light of VA's recent activities, detailed above, to implement legislation targeted at ensuring appropriate burial of the unclaimed remains of Veterans, NCA feels it is premature to undertake the proposed study. Furthermore, if legislation is passed requiring the study, we do not object to the proposed scope and content, but we are concerned that the timeframe for reporting in the bill is unrealistic.

To implement the mandatory requirements outlined in the bill, even with the flexibilities included in the bill language, the Department would be required to contract with one or more private entities to perform such a study. Survey instruments would need to be developed to assess the number of remains in the possession of funeral directors and other entities for individuals with no known next of kin, and an appropriate sample would have to be identified and a legal review of state and local laws conducted regarding unclaimed remains of Veterans.

The bill provides a reporting timeframe of one year. The need to get formal clearances on survey instruments takes several months; therefore, a more realistic timeframe would be two years.

The bill does not identify a funding source for this mandate. VA is still evaluating the cost associated with this legislation.

H.R. 1380

H.R. 1380 would amend 38 U.S.C. § 2306(d) to extend eligibility for a medallion furnished by VA in order to signify the deceased's status as a Veteran regardless of date of death. Public Law 110-157 gave VA authority to "furnish, upon request, a medallion or other device of a design determined by the Secretary to signify the deceased's status as a veteran, to be attached to a headstone or marker furnished at private expense," for eligible Veterans who died on or after November 1, 1990. H.R. 1380 would remove the date of death limitation by codifying in statute that eligibility exists regardless of date of death.

VA strongly supports the concept to expand eligibility for the medallion benefit; however, VA requests that the Committee amend rather than remove the current eligibility date of November 1, 1990. VA would greatly support an amendment to provide eligibility for individuals who served "on active duty on or after April 6, 1917." This amendment would align the bill to a legislative proposal that is included in VA's FY 2016 Budget Submission, which assumed benefit costs of $482,000 in FY 2016, $2.5 million over five-years, and $5.2 million over 10 years.

Since VA began providing the medallion benefit in 2009 through January 15 2014, the vast majority (91 percent) of those claims were denied because the otherwise eligible Veteran died between 1960 and 1990. Additionally, there are more than 4.5 million deceased Veterans with service prior to April 6, 1917, which is the date the United States formally entered World War I. These Veterans could become eligible for the medallion benefit which could significantly impact the landscape of historic cemeteries and the historic headstones marking the graves of those who served prior to this date as well as impact the ability of NCA and other entities to comply with historic preservation and Federal stewardship statutes and regulations.

Costs related to this bill are not available at this time.

H.R. 1384

H.R. 1384, the "Honor America's Guard-Reserve Retirees Act," would honor as a Veteran any person entitled under chapter 1223 of title 10, United States Code, to retired pay for nonregular service or who, but for age, would be entitled under that

chapter to retired pay for nonregular service. However, these individuals would not be entitled to any benefit by reason of this honor.

VA does not support H.R. 1384. It would conflict with the definition of "Veteran" in 38 U.S.C. § 101(2) and would cause confusion about the definition of a Veteran and associated benefits. In title 38, United States Code, Veteran status is conditioned on the performance of "active military, naval, or air service." Under current law, a National Guard or Reserve member is considered to have had such service only if he or she served on active duty, was disabled or died during active duty for training from a disease or injury incurred or aggravated in line of duty, or was disabled or died during inactive duty training from an injury incurred or aggravated in line of duty or from an acute myocardial infarction, a cardiac arrest, or a cerebrovascular accident. H.R. 1384 would eliminate these service requirements for National Guard or Reserve members who served in such a capacity for at least 20 years. Retirement status alone would make them eligible for Veteran status.

VA recognizes that the National Guard and Reserves have admirably served this country and in recent years have played an important role in our Nation's overseas conflicts. Nevertheless, VA does not support this bill because it represents a departure from active service as the foundation for Veteran status. This bill would extend Veteran status to those who never performed active military, naval, or air service, the very circumstance which qualifies an individual as a Veteran. Thus, this bill would equate longevity of reserve service with the active service long ago established as the hallmark for Veteran status.

VA estimates that there would be no additional benefit or administrative costs associated with this bill if enacted.

H.R. 2001

H.R. 2001, the "Veterans 2nd Amendment Protection Act," would provide that a person who is mentally incapacitated, deemed mentally incompetent, or unconscious for an extended period will not be considered adjudicated as a "mental defective" for purposes of the Brady Handgun Violence Protection Act in the absence of an order or finding by a judgment, magistrate, or other judicial authority that such person is a danger to himself, herself, or others. The bill would, in effect, exclude VA determinations of incompetency from the coverage of the Brady Handgun Violence Prevention Act. VA does not support this bill.

VA determinations of mental incompetency are based generally on whether a person because of injury or disease, lacks the mental capacity to manage his or her own financial affairs. We believe adequate protections can be provided to these Veterans under current statutory authority. Under the [National Instant Criminal Background Check System (NICS)] Improvement Amendments Act of 2007, individuals whom VA has determined to be incompetent can have their firearms rights restored in two ways: First, a person who has been adjudicated by VA as unable to manage his or her own affairs can reopen the issue based on new evidence and have the determination reversed. When this occurs, VA is obligated to notify the Department of Justice to remove the individual's name from the roster of those barred from possessing and purchasing firearms. Second, even if a person remains adjudicated incompetent by

VA for purposes of handling his or her own finances, he or she is entitled to petition VA to have firearms rights restored on the basis that the individual poses no threat to public safety. VA has relief procedures in place, and we are fully committed to continuing to conduct these procedures in a timely and effective manner to fully protect the rights of our beneficiaries.

Also the reliance on an administrative incompetency determination as a basis for prohibiting an individual from possessing or obtaining firearms under Federal law is not unique to VA or Veterans. Under the applicable Federal regulations implementing the Brady Handgun Violence Prevention Act, any person determined by a lawful authority to lack the mental capacity to manage his or her own affairs is subject to the same prohibition. By exempting certain VA mental health determinations that would otherwise prohibit a person from possessing or obtaining firearms under Federal law, the bill would create a different standard for Veterans and their survivors than that applicable to the rest of the population and could raise public safety issues.

The enactment of H.R. 2001 would not impose any costs on VA.

H.R. 2214

H.R. 2214, the "Disabled Veterans' Access to Medical Exams Improvement Act," would extend from December 31, 2015, through December 31, 2017, VA's authority under the Veterans Benefits Act of 2003 to provide for medical examinations by contract physicians in claims for VA disability benefits.

VA strongly supports this provision to extend VA's authority to contract for disability compensation and pension examinations to December 31, 2017. Extending

this authority is essential to VA's goal of ensuring the timely adjudication of disability claims. The extension would allow VHA to continue to focus its resources on providing health care that Veterans need. Further, this program provides quality disability examinations to Veterans in locations near their homes. This bill would also provide VA with additional flexibility needed to effectively utilize funds.

The bill would further revise provisions of the Veterans Benefits Act of 2003 and the Veterans' Benefits Improvement Act of 1996 relating to contract examinations to clarify that, notwithstanding any law regarding the licensure of physicians, a licensed physician may conduct disability examinations for VA in any State, the District of Columbia, or a Commonwealth, territory, or possession of the United States, provided the examination is within the scope of the physician's authorized duties under a contract with VA and the physician is not barred from conducting such an examination in the location in which it occurs.

VA supports the provision regarding licensure requirements as a means to ensure the quality of contract examinations. The demand for medical disability examinations has increased, largely due to an increase in the complexity of disability claims, an increase in the number of disabilities which Veterans claim, and changes in eligibility requirements for disability benefits. This authority would help provide flexibility in examinations through non-VA medical providers while maintaining licensure standards and accelerating benefits delivery.

The bill would also limit to 15 the number of ROs at which the pilot program of contract disability examinations may be carried out under the Veterans' Benefits Improvement Act of 1996. Section 504 of Public Law 104-275 (1996) authorized VA to

provide contract examinations at 10 ROs using funds from the mandatory compensation and pension appropriation. Section 704 of Public Law 108-183 (2003) authorized VA to provide contract examinations "using appropriated funds, other than funds available for compensation and pension," but did not limit the number of ROs where such contract examinations may occur. Section 241 of Division I, Title II, Public Law 113-235 (2014) expanded VA's authority under the 1996 statute to provide contract examinations funded from the compensation and pension appropriation at no more than 12 ROs in FY 2015, 15 ROs in FY 2016, and as many ROs as the Secretary considers appropriate in FY 2017. H.R. 2214 would limit VA's authority under the 1996 statute to apply to 15 ROs. Sites would be selected based on: the number of backlogged claims, the total pending case workload, the length of time cases have been pending, the accuracy of completed cases, and overall timeliness of completed cases.

VA strongly opposes this provision as it would limit to 15 ROs VA's authority to utilize contract examinations using funds from the compensation and pension appropriation. Under current law, VBA has authority at 15 ROs in FY 2016 and at as many ROs as VA considers appropriate in FY 2017 and subsequent years. Limiting this authority to 15 ROs would restrict VA's ability to improve timeliness of benefit delivery if VBA determines it would be beneficial to use this authority at additional ROs in FY 2017 and subsequent years.

In addition, VA does not support the provision that would mandate factors VA must consider in selection of sites under authority of the Veterans Benefits Act of 2003 to provide for medical examinations by contract. Currently, VA has discretion to choose sites for this program and already considers the factors outlined in the bill as well as

other important criteria. These include: number of backlogged claims; total pending workload; and the length of time that claims have been pending. VA is concerned that limiting VA's discretion in this regard may lead to unintended consequences. The criteria in the bill exclude considerations such as availability of VA examiners in a selected area and workload of VA Medical Center examination units. High-performing ROs where the program has already proven successful could also be excluded if VA is held to rigid criteria in providing contract examinations. Therefore, it is imperative that the Secretary has the discretion to adjust to unforeseen factors unanticipated in this legislation.

Subsections 2(a) and 2(c) would not impose any costs on VA. VBA cannot estimate the savings of subsection 2(c) as we have not yet determined if the authority will be expanded beyond 15 ROs in FY 2017 and subsequent years.

H.R. 2605

H.R. 2605, the “Veterans Fiduciary Reform Act of 2015,” would amend chapter 55 and 61 of title 38, United States Code, to change VA’s administration of its fiduciary program for beneficiaries who cannot manage their own VA benefits.

Under this program, VA conducts oversight of beneficiaries and appoints and conducts oversight of fiduciaries for these beneficiaries. Currently, there are approximately 176,000 beneficiaries in the program who receive services from approximately 150,500 fiduciaries. Of those fiduciaries, approximately 90 percent are unpaid or volunteer fiduciaries. If the bill becomes law, it would, among other things, significantly expand the scope of VA’s fiduciary program, create disincentives for

recruiting volunteer and paid fiduciaries, and generally add complexity that VA cannot address without additional resources.

Section 2(a) of the bill would require VA to notify a beneficiary of VA's decision that the beneficiary is incompetent for purposes of appointing a fiduciary and would state that the beneficiary may appeal that determination. These provisions are unnecessary, because current 38 U.S.C. § 5104 addresses notice to beneficiaries regarding VA's decisions, and 38 U.S.C. § 7105 prescribes a beneficiary's right to appeal.

Subsection (a) also would allow a beneficiary for whom VA has appointed a fiduciary to request removal of the fiduciary and appointment of a successor. Under current VA policy, a beneficiary may at any time for good cause request the appointment of a successor fiduciary. Accordingly, VA does not oppose this provision of subsection (a).

Subsection (a) would also require VA, in cases where a fiduciary has been removed, to ensure that a beneficiary's benefits are not delayed or interrupted. VA's objective, in cases where it removes a fiduciary and appoints a successor fiduciary, is to ensure the continuation of benefits. However, in some cases beyond the control of VA, benefits are delayed or interrupted during the replacement of a fiduciary. VA opposes this provision to the extent that it mandates, without exception or qualification, the delivery of benefits without delay upon removal of a fiduciary. Under current law, VA must conduct the investigation prescribed by Congress in 38 U.S.C. § 5507 when it replaces a fiduciary and sometimes encounters an uncooperative beneficiary or beneficiary's representative. This results in unavoidable delays in some cases.

VA supports the provision in subsection (a) requiring fiduciaries to operate independently in determining how to disburse funds in the best interest of the beneficiaries they serve. This provision would codify current VA policy.

VA opposes the provisions of subsection (a) that would allow a Veteran to "predesignate" a fiduciary prior to any actual need, as the passage of time would in many cases render the initial designation outdated and of no use to the beneficiary or VA. We also note that VA's current appointment policy gives preference to the beneficiary's choice and family members' or guardian's desires as expressed at the time of the field examination, which VA believes is the best available and most relevant information for purposes of making a best-interest determination. Such determination should not be based upon outdated information.

Subsection (a) would also require VA to provide notice to beneficiaries regarding the bases for appointing someone other than the individual designated by the beneficiary. VA has already implemented notice procedures for its fiduciary appointment decisions and therefore this provision is unnecessary.

VA opposes the provisions of subsection (a) that would mandate preference for an individual who is the beneficiary's court-appointed guardian and give priority in appointment consideration to individuals holding a beneficiary's durable power of attorney (POA). This provision would not be a good policy choice for VA's most vulnerable beneficiaries. Under current policy, VA first considers the beneficiary's preference and then considers family members, friends, and other individuals who are willing to serve. VA prefers to appoint unpaid relatives prior to considering any other individual who is willing to provide fiduciary services only for a fee. VA's order of

preference is based on the type of fiduciary relationship and seeks to establish the least restrictive and most effective relationship.

Appointment of a court-appointed guardian often is the most restrictive method of payment and the most costly. Under current law, a VA-appointed fiduciary may collect a maximum of four percent of the monthly VA benefits paid to the beneficiary. Further, under VA's interpretation of the law, fiduciaries cannot calculate a fee based upon retroactive, lump-sum, or other one-time payments, or upon receipt of accumulated funds under management. However, under state law, guardians may collect fees in excess of the 4-percent Federal limit. Although the fee structure varies from state to state, basic fees range between 5 percent of all income received by the guardian to as high as 10 to 15 percent of all income and funds under management by the guardian.

Additionally, courts often allow extraordinary fees in excess of the standard fee. The appointment of a guardian often results in the guardian incurring the cost of attorney fees for filing motions and annual court accountings. These fees and costs can be in the range of thousands to tens of thousands of dollars per year and are paid for by the beneficiary out of the beneficiary's VA benefits. Additionally, VA is unable to conduct consistent and effective oversight of guardians who are appointed by a court, resulting in disparate treatment for vulnerable beneficiaries depending upon state of residence. VA does not support such treatment and believes that Congress established the fiduciary program for the purpose of ensuring a nationwide standard for beneficiaries who cannot manage their own benefits.

Based upon VA's experience, it would not be good policy to give a person holding a beneficiary's POA priority based only upon the existence of a POA. Veterans

and other beneficiaries in the fiduciary program can be extremely vulnerable and easily coerced into signing documents. Additionally, a POA can be executed and revoked by the beneficiary at any time. If an individual is holding a POA, VA would have no way of determining whether the POA is still in effect or if the beneficiary had the capacity to execute a legally enforceable POA under state law at the time. Implementing policies and procedures related to the adjudication of POAs would needlessly complicate and delay the fiduciary-appointment process. Also, under current law, VA has a duty to appoint, based upon a field examination and consideration of the totality of the circumstances, the individual or entity that is in the beneficiary's best interest. While such a determination might conclude that appointment of an individual who holds the beneficiary's POA is in the beneficiary's interest, VA strongly opposes giving undue preference and weight to the existence of a POA.

Subsection (b) would amend current law to limit fiduciary fees to 3 percent of the monthly benefits paid to a fiduciary on behalf of a beneficiary or $35, whichever is lower. VA strongly opposes this provision. Payment of a fee is necessary if there is no other person who is qualified and willing to serve without compensation. Instances exist when the beneficiary's interests can only be served by the appointment of a qualified paid fiduciary. As of June 3, 2015, VA has identified and appointed fiduciaries willing to serve without a fee for more than 90 percent of its beneficiaries.

Under current VA policy, fiduciaries are not mere bill payers. To the contrary, it is VA's view that fiduciaries should remain in contact with the beneficiaries they serve and assess their needs. Without such an assessment, fiduciaries who serve VA's most vulnerable beneficiaries would be unable to fulfill their obligation to determine whether

disbursement of funds is in the beneficiary's interest. As noted above, for the vast majority of beneficiaries, a relative or close personal friend will perform the duties without cost to the beneficiary. However, there are difficult cases in which VA has no alternative but to turn to an individual or entity that is willing to serve Veterans and their survivors for a nominal fee. Reducing the fee further, at a time when VA is attempting to strengthen the role of fiduciaries in the program, would create a disincentive for serving these vulnerable beneficiaries. VA strongly opposes such a reduction because it would harm beneficiaries and needlessly hinder the program, which has a clear preference for volunteer service but recognizes the need for a pool of paid fiduciaries who are willing to accept appointment for a nominal fee in some of VA's most difficult cases.

VA supports the provisions of subsection (b) that codify VA's current policy regarding limitations on fees from retroactive and one-time payments and has no objection to the remaining fee provisions because they appear to restate current law.

Subsection (b) would require VA to provide materials and tools to assist a fiduciary in carrying out the responsibilities of a fiduciary under this chapter. It is always VA’s objective to ensure that our most vulnerable Veterans and beneficiaries are properly taken care of. In assigning a fiduciary to handle the disbursement of funds for such an individual, VA equips the fiduciary with the needed resources and tools to perform these responsibilities. VA currently provides its fiduciaries with written materials, web-based training, and a dedicated telephone line for additional assistance. In addition, VA is actively working to enhance and increase the number of tools available to its fiduciaries. Therefore, this provision is unnecessary.

This subsection would amend the current statutory definition of "fiduciary" to add certain state, local, and nonprofit agencies. VA does not oppose this provision, as VA already appoints such agencies under current law if VA determines that it is in the beneficiary's best interest. However, including the listed agencies under the statutory definition of fiduciary codifies that VA must conduct the investigation required under current 38 U.S.C. § 5507 prior to appointment. Some of the current provisions of section 5507, such as credit and criminal background check requirements, cannot be made applicable to such agencies. While VA favors the investigation and qualification of agencies, the manner in which the qualification is performed will differ from that of an individual.

VA also opposes the provisions of subsection (c) that would require VA to compile and maintain a list of state, local, and nonprofit agencies eligible to serve in a fiduciary capacity for beneficiaries because it would be too burdensome and divert limited resources away from the primary program mission. VA notes that there are as many as 3,009 counties, 64 parishes, 16 boroughs, and 41 independent municipalities in the United States. In addition, there are over 19,000 municipal governments and more than 30,000 incorporated cities in the country. The resources needed to build and maintain such a list would exceed by far any benefit for VA beneficiaries in the fiduciary program. VA currently appoints fiduciaries according to an order of preference, which begins with the beneficiary's preference and otherwise seeks to appoint family members, friends, or other individuals who are willing to serve without a fee. VA rarely needs to appoint a state, local, or nonprofit agency for a beneficiary. Subsection (d) would amend current law to essentially strike “to the extent practicable” from 38

U.S.C. § 5507(a)(1)(B), thereby requiring a face-to-face VA visit with every proposed fiduciary. VA opposes this provision because it does not account for the circumstances actually encountered by VA in the administration of the program, and would needlessly delay some initial fiduciary appointments. There are certain cases in which a face-to-face interview of a proposed fiduciary should be waived. For example, a face-to-face interview may be unnecessary for natural parents of minor children or certain fiduciaries who have funds under management for multiple beneficiaries.

Subsection (d) would also require VA to complete the face-to-face interview of a proposed fiduciary within "30 days after the date on which such inquiry or investigation begins." VA opposes this provision. VA's current standard is to complete all initial appointment field examinations within 45 days. The face-to-face interview is only one element of the field examination. VA must also meet with the beneficiary, check the proposed fiduciary's criminal background and credit history, and develop additional information as necessary prior to recommending appointment. Other facts that impact the timeliness of initial-appointment field examinations include travel, availability of beneficiaries and proposed fiduciaries, workload, and availability of resources. Mandating the completion of an interview within 30 days without providing a significant increase in resources could negatively impact the quality of appointments and thus risk exploitation of beneficiary funds.

VA supports the provisions of subsection (d) that authorize criminal background checks and consideration of any crime in the best-interest determination applicable to fiduciary appointments.

VA is not opposed to the provisions of subsection (d) that would require VA to report to the beneficiary a crime committed by a fiduciary that affects the fiduciary's ability to serve, unless the disclosure of such information would harm the beneficiary.

Subsection (d) would remove the current statutory authority permitting VA, in conducting an inquiry or investigation on an expedited basis, to waive any inquiry or investigation requirement with respect to certain classes of proposed fiduciaries and would add to the list of proposed fiduciaries, the investigation of whom may be conducted on an expedited basis, a person who is authorized under a durable POA to act on a beneficiary's behalf. VA opposes removal of the waiver provision because it would needlessly delay certain fiduciary appointments, such as appointments of legal guardians and certain parents, for whom one or more of the inquiry or investigation requirements are not needed. In the case of a beneficiary's immediate family members seeking to provide fiduciary services, the proposal would result in greater intrusion into family matters with no real benefit for beneficiaries. VA's current policy is to first consider the beneficiary's preference and then to consider family members, friends, and other individuals who are willing to serve, which may include individuals designated by a POA. VA does not oppose permitting VA to expedite the inquiry or investigation regarding any proposed fiduciary, including a person holding a beneficiary's durable POA.

VA is not opposed to the investigation-of-misuse provisions in subsection (d) because they codify current VA policy. However, upon a determination of misuse, VA provides the decision to the VA Office of Inspector General for review and a determination regarding referral to the Department of Justice for prosecution. VA

opposes the provisions of this subsection to the extent that they mandate dissemination of information to specific agencies regardless of VA's own internal review.

VA has the capability to maintain the specific fiduciary-related information that subsection (d) would prescribe within its recently deployed information technology system. Accordingly, VA does not oppose the provisions that would require it to maintain additional information on the fiduciaries it appoints.

Subsection (e) would require each fiduciary to submit an annual accounting to VA for auditing. VA opposes these provisions because they would add burden for fiduciaries, most of who are volunteer family members or friends, and would not significantly improve VA's oversight of fiduciaries. Under current policy, which is based upon VA's experience in administering the program, VA requires fiduciaries to submit an annual accounting in every case in which: the beneficiary's annual VA benefit is equal to or greater than the amount paid to single Veteran compensated at the 100-percent service-connected rate; a beneficiary's accumulated VA funds managed by the fiduciary are $10,000 or more; the fiduciary is also appointed by a court; or the fiduciary receives a fee. These accountings are comprehensive and must be supported by financial documentation that identifies all transactions during the accounting period. VA audits over 38,000 accountings each year.

VA currently pays benefits to more than 20,000 spouse fiduciaries, many of whom are also caring for severely disabled or infirm Veterans. Countless other beneficiaries receive only $90 each month and reside in the protected environment of a Medicaid-approved nursing home. There are many other examples of beneficiaries being cared for by family members, who due to the recurring needs of their disabled

family member, expend all available VA benefits each month for the beneficiary's care. The additional burden imposed by documenting income and expenditure annually for the majority of our beneficiaries would be an undue hardship and would not result in any benefit to the beneficiary or the program.

VA opposes the provisions under subsection (e) that would require VA to conduct annual, random audits of paid fiduciaries. Under current policy, VA requires all paid fiduciaries to submit annual accountings. VA audits every accounting that it receives. VA already has authority to conduct any additional oversight it deems necessary based upon a case-by-case determination. Experience administering the program has not identified a need to randomly audit paid fiduciaries.

VA opposes the provision that requires caregiver fiduciaries to provide an annual accounting only with respect to the amount of VA benefits spent on food, housing, clothing, health-related expenses, and personal items and saved for the beneficiary. While we support the need for reduced personal supervision, VA is required to ensure that benefits under management are used for the benefit of the beneficiary. We interpret this provision to exclude caregivers from providing a full accounting of the benefits received. As such, this provision inhibits VA’s ability to protect against misuse.

VA is not opposed to the provisions of subsection (f) but notes that the proposed amendment may insert ambiguity where it does not currently exist. This provision would amend 38 U.S.C. § 6107(a)(2)(C), which authorizes VA to reissue benefits if it is actually negligent. The amendment would imply that "not acting in accordance with [38 U.S.C. § 5507]" is actual negligence. Whether that implication is true in a given case would depend upon the circumstances.

Under current law, VA's publicly available Annual Benefits Report includes information regarding VA's oversight of the fiduciary program, specifically with respect to its misuse of benefits determinations and the Government's prosecution of misuse cases. This subsection would amend the law to require VA to instead provide Veterans' Affairs Committees of Congress an annual report. VA opposes section 2(g) to the extent that it could be interpreted to require VA to provide information solely to Congress, excluding stakeholders.

This section 2(h) calls for VA to submit to Congress within one year a comprehensive report on the implementation of the legislation. However, VA notes that a report to cover the 12-month period following enactment might be unreasonably short given that rulemaking may be required to implement certain provisions.

VA is aggressively looking for ways to improve program services and is not opposed to a discussion on the possibility of providing financial software to fiduciaries to simplify reporting.

No mandatory benefit costs are associated with this bill. Administrative and Information Technology costs related to this bill are not available at this time.

This concludes our statement, Mr. Chairman. We would be happy now to entertain any questions you or the other members of the Subcommittee may have.