**Notes on VA Authorities over NPCs**

**November 30, 2016**

1. **Department of Veterans Affairs Act of 1988**

Sec. 2. “There shall be at the head of the Department a Secretary of Veterans Affairs, who shall be appointed by the President... The Department shall be administered under the supervision and direction of the Secretary.”

The Secretary has the authority to administer and direct all activities at all VA locations. The VA NPC’s conduct some or all of their activities at VAMC’s and are therefore subject to the Secretary’s supervision and direction. With respect to the Secretary’s authority over the NPCs, the authority has been delegated down to the VHA Nonprofit Program Oversight Board (NPOB).which holds regular quarterly meetings and relies upon OGC and NPPO for the conduct of the day-to-day oversight.

1. **Chief Financial Officers Act of 1990**

The CFO Act established the position of Chief Financial Officer for VA and other departments and agencies with powers, duties, and responsibilities for financial management, auditing, and budgeting. The NPCs, in operating on VA property and being subject to VA oversight, may be audited by the VA CFO and his designees. Not only do the NPCs conduct some or all of their activities on VA property, making them subject to the VA CFO’s scrutiny, but all of the NPCs are also included in the President’s Annual Budget and referred to therein as “Medical Service Organizations”. The CFO is responsible for and has the authority to compile this portion of the President’s Budget. Admittedly, this is a very small portion of that Budget, but is nonetheless important.

1. **38 U.S. Code Section 7361**

“ (a) The Secretary (of Veterans Affairs) may authorize the establishment at any Department medical center of a nonprofit corporation…”

The VA medical centers are clearly Department facilities subject to being administered and supervised by the Secretary. Therefore all activities, including all activities of the NPCs conducted on VA property, are subject to the Secretary’s supervision and direction. Furthermore, as a corollary to the Secretary’s authority to establish a corporation, likewise the Secretary has the authority to disestablish a corporation that the Secretary has previously established. The authority to establish and disestablish NPCs has been delegated down to the Under Secretary for Health, and in turn, to the NPOB. Thus far, it has not been necessary to disestablish a NPC.

1. **38 U.S. Code Section 7362**

“(a) A corporation established under this subchapter shall be established…at one or more Department medical centers…”

As noted above, all VA NPC’s conduct some or all of their activities at VAMC’s and are therefore subject to the Secretary’s supervision and direction. With respect to the NPCs, the authority has been delegated down to the Under Secretary for Health, and in turn, to the NPOB.

1. **38 U.S. Code Section 7363**

“(a)The Secretary (of Veterans Affairs) shall provide for the appointment of a board of directors for any corporation established under this subchapter.”

Appointments beyond those called for in the statute (Medical Center Director, Chief of Staff, ACOS/Research, and ACOS/E, the so-called “Statutory NPC Directors”, and two qualified community members), if any, are made at the pleasure of the Secretary. VHA Handbook 1200.17 (“the Handbook”) has delegated the appointment of these other board members to the individual NPC boards consistent with their bylaws and state law. Of course, the Handbook can be revised to rescind this delegation of authority and make it consistent with the provision of the law which provided that “the Secretary shall provide for the appointment of a board of directors…”

“Each such corporation shall have an executive director who shall be appointed by the board of directors with the concurrence of the Under Secretary for Health of the Department.” This concurrence authority has been delegated to the Medical Center Directors by the Handbook, which as noted above is subject to revision if necessary.

As a corollary to the Medical Center Director’s concurrence authority to appoint an executive director, likewise the Medical Center Director has the authority to revoke the appointment of an executive director.

1. **38 U.S. Code Section 7364**

“(e) The Under Secretary for Health may prescribe policies and procedures to guide the spending of funds by corporations established under this subchapter that are consistent with the purpose of such corporations...”

The Under Secretary for Health has delegated this authority to the NPOB. Nowhere in the laws or regulations is an authorized purpose of the NPCs the lobbying of government or VA officials. Therefore, lobbying is not permitted under the law for the NPCs and the NPOB may so assert that simple fact as it chooses.

1. **38 U.S. Code Section 7366**

“(a) (1) (a) The records of a corporation established under this subchapter shall be available to the Secretary.”

This authority has been delegated down to the NPOB which, in turn, relies principally upon the Nonprofit Program Office (NPPO) for the actual execution of audits and reviews.

“(a) (1) (b) For purposes…. of the Inspector General Act of 1978, the programs and operations of such a corporation shall be considered to be programs and operations of the Department…”

In addition to the Secretary’s oversight, additional oversight by the VA OIG is authorized for the NPCs:

“(a) (2) Such a corporation shall be considered an agency for the purposes of…availability of information and inspection of records by the Comptroller General.”

Still more oversight over the NPCs is authorized for the Comptroller General of the United States. The Comptroller General serves as the head of the Government Accountability Office (GAO). The Comptroller General answers only to Congress.

1. **Inspector General Act of 1978**

Authorizes the creation of independent and objective units in VA and other departments and agencies:

 (2) to provide leadership and coordination and recommend policies for activities designed

1. to promote economy, efficiency, and effectiveness in the administration of, and
2. to prevent and detect fraud and abuse in, such programs and operations; and

(3) to provide a means for keeping the head of the establishment (e.g., VA) and the Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations and the necessity for and progress of corrective action.

1. **VA OIG Report No. 07-005565-121, May 5, 2008**

As noted above, VA OIG is given audit authority over the NPCs in 38 U.S. Code Section 7366 (a) (1) (b). VA OIG addressed the NPCs directly in its Report of May 5, 2008. Recommendation No. 4 of that Report was “We recommend that the Under Secretary for Health develop and implement oversight procedures to perform substantive reviews of NPC financial and management controls to ensure NPCs fully comply with Federal laws, VHA policies, and ***control standards*** (emphasis added).” VHA subsequently agreed to adopt all of the OIG recommendations, including Recommendation No. 4.

1. **Federal Managers Financial Integrity Act of 1982**

This law empowered OMB to set internal control standards for all Executive Branch operations and required all Federal Managers to fully comply in the conduct of their official duties.

1. **OMB Circular A-123, Management’s Responsibility for Internal Control**

In this Circular, pursuant to the Federal Managers Financial Integrity Act of 1982, OMB mandated the COSO internal control standards for all Executive Branch Operations. The COSO standards are the only internal control standards recognized for the Federal Government. It should be noted that 38 U.S.C. Section 7363 requires that the four Federal Managers (Medical Center Director, Chief of Staff, Associate Chief of Staff for Research, and Associate Chief of Staff for Education) must serve on the NPC boards in their official capacities. Therefore, since they are Federal Managers serving in their official capacities they must comply with the Federal Managers Financial Integrity Act and with OMB Circular A-123. Of course, NPOB members are all very high level Federal Managers acting in their official capacities as NPOB board members and are also bound by FMFIA and Circular A-123.

1. **Budget and Accounting Act of 1921**

This law created, among many other things, the precursor organization to OMB and the office of the Comptroller General. It empowered the Comptroller General to set auditing standards for government audits, regardless of whether or not they are performed by Federal or non-governmental auditors, and to establish internal control standards for the Federal Government. The Comptroller General has accomplished both of these tasks by publishing Standards for Internal Control in the Federal Government, known widely as the “Green Book”, and Government Auditing Standards, 2011 Revision, known widely as the “Yellow Book.” All Federal Managers, including the Statutory NPC Directors and NPOB members, are bound to follow this guidance which is not in any respects conflicting with OMB Circular A-123..

1. **VHA Handbook 1200.17**

By precedent and prior agreement, the Handbook governs the operations of the VA NPCs. This is in lieu of VA promulgating Regulations in the CFR. VA retains the option to make Regulations if the Handbook is no longer considered authoritative by all concerned and if it becomes necessary in VA’s view to have published Regulations instead.

The authority of the NPOB is underscored in the Handbook on Page 2 which states “The NPOB is VA’s senior management oversight body for NPCs, as outlined in the NPOB charter. The NPOB is responsible for reviewing NPC activities for consistency with VA policy and ***interests*** (emphasis added), and for making recommendations through the Under Secretary for Health to the Secretary of Veterans Affairs regarding VA policy pertaining to NPC’s.” The NPOB will decide what is in VA interests with respect to the NPCs, as will the Under Secretary and the Secretary.

Page 6 of the Handbook states: “Upon determination by the VA Secretary that an NPC is not acting in the best interests of VA, the VA Secretary may authorize the Under Secretary for Health to require remedial measures up to and including VA’s disassociation from the NPC.”

Beyond VA’s best interests are the legal requirements for expenditures to be made for approved VA research and approved VA education (see Handbook Page 1, et.seq.). Lobbying government officials, including VA higher management, is not considered VA approved research or VA approved education. There is no specific authorization for lobbying expenditures anywhere in the Handbook.

Page 9 of the Handbook states: “The (NPC) Board must appoint an Executive Director of the NPC. Pursuant to 38 U.S.C. 7363, the Under Secretary for Health must concur with the appointment of the Executive Director. This responsibility has been delegated to the director of (the) VA medical facility where the Single or Multi-NPC is established.” Of course, the Under Secretary may change the Handbook and revoke this delegation at any time for any reason.

Page 16 provides that each NPC must have written policies and procedures detailing its internal controls and that the internal controls “must provide for sufficient procedures and mechanisms to protect its assets….” The only recognized system of internal controls is the COSO system. It is now the standard for the Federal Government (Comptroller Generals’ Green Book and OMB Circular !-123) and is otherwise universally accepted worldwide. All VA and NPC personnel are bound to adhere to the COSO system of internal controls as specified in the foregoing Federal guidance.

Also, page 16 provides that “NPPO must evaluate the effectiveness of internal control policies through review of…(and) also will conduct other reviews as necessary. The NPPO must track the results of such reviews, and any NPCs found to have deficiencies or material weaknesses will be required to submit to the NPPO a plan for corrective action. The NPPO will continue tracking such deficiencies until corrections as agreed upon in the action plan are complete.” From this we learn that NPPO in its professional opinion will decide what constitutes deficiencies in internal control and that are not in compliance with COSO.

Pages 16 and 17 of the Handbook go on to limit certain NPC expenditures. Thus, it is appropriate for there to be limitations imposed on the NPC by VA in the Handbook. There is no prohibition, express or implied, that VA cannot add to the expenditure restrictions.

**Conclusion**

From the foregoing discussion of VA’s authorities over the NPCs, which while extensive is not necessarily meant to be exhaustive, VA may revise the Handbook from time to time to improve and enhance internal controls and its supervision and direction of the NPCs.

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