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STATEMENT OF
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Mr. Chairman and Members of the Committee, thank you for the opportunity to testify today on a number of legislative items of great interest to veterans. I am joined at the witness table by John H. Thompson, Deputy General Counsel.

S. 2121

S. 2121, the ?Veterans Housing Fairness Act of 2005,? would authorize VA to guarantee loans for stock in certain developments, structures, or projects of a cooperative housing corporation (co-ops).

VA cannot support this bill because we do not believe that VA participation in co-ops would be in the best interest of the veteran or of the Government as guarantor of the loan. Under current law, a veteran may purchase a conventional home, a condominium unit, or a manufactured home and a manufactured home lot. In all cases except a manufactured home, the veteran is purchasing real property. Although the manufactured home is normally considered personal property, the veteran also obtains title to the actual home he or she will be occupying. In contrast, the buyer of a co-op does not acquire an interest in real estate or obtain title to his or her dwelling unit. Instead, the purchaser acquires personal property in the form of a share of the cooperative's stock, coupled with the right to occupy a particular apartment in the building. A buyer normally obtains a share loan that finances the purchase of an ownership interest in the co-op. This loan is evidenced by a promissory note and is secured by a pledge of the stock, shares, membership certificate, or other contractual agreement that evidences ownership in the corporation and by an assignment of the proprietary lease or occupancy agreement. VA would be guaranteeing this corporate share loan. Unlike other VA loans, there would be no lien on real property or tangible personal property.

Cooperative housing projects are usually subject to blanket mortgages. This is a matter of great concern because of the significant risk to which the buyer, the loan holder, and VA are exposed. The buyer of a co-op is responsible for the monthly payment on the share loan as well as the assessments levied by the corporation, which can be significant. The survival of the project may depend upon each member of the co-op meeting his or her obligations. Failure to do that could lead to foreclosure of the blanket mortgage on the entire building. Such foreclosure would wipe out any interest individual co-op owners, even owners who are timely in the payment of their share loans, may have in the project since they have no interest in real property. It would also

leave the holder of the share loan without any security. This is what principally sets co-ops apart from condominiums.

Many co-ops also retain a right of first refusal or a right by the co-op board to approve or reject a prospective buyer. Rights of first refusal are not permitted by VA regulation, 38 C.F.R. § 36.4350, and VA does not participate in projects that have them. We believe that the issue of right of first refusal alone would disqualify most projects from VA eligibility.
We understand that some co-op projects impose other restrictions on sales, such as imposing a fee when the owner sells his or her unit to someone other than the corporation, or granting the exclusive right to sell units to a particular real estate broker, often at a higher commission. These and similar practices would be viewed as detrimental to the interests of veterans and, therefore, not permitted under current VA regulations for conventional or condominium developments. These practices could also adversely affect the marketability of a unit. If a veteran-borrower is experiencing financial difficulties and cannot freely dispose of his or her unit at an advantageous price, foreclosure with a resultant loss to VA is more likely.
We also understand that conventional lenders, as well as the secondary mortgage market agencies, generally have additional underwriting and project requirements for co-ops because of the additional risks they present. In addition, valuation of these properties would be very complicated because of the blanket mortgage.

Costs associated with this legislation would likely be insignificant compared to the overall VA guaranteed loan portfolio.

S. 2416

S. 2416, the ?Veterans Employment and Training Act of 2006,? would expand the programs of education for which accelerated payment of educational assistance may be made under the chapter 30 Montgomery GI Bill (MGIB) program. Specifically, this measure would permit accelerated payment of the basic educational assistance allowance to veterans pursuing an approved program of education (in addition to the programs now authorized such payment) lasting less than two years and leading to employment in a sector of the economy that is projected to experience substantial job growth, positively affects the growth of another sector of the economy, or consists of existing or emerging businesses that are being changed by technology and innovation and require new skills for workers, as determined by the Department of Labor (DOL).

Under current law, only an MGIB participant pursuing high-cost courses leading to employment in a high technology occupation in a high technology industry has the option of receiving an accelerated benefit payment. This optional lump-sum accelerated benefit payment may cover up to 60 percent of the cost of such a course, provided the pro-rated course costs exceed 200 percent of the applicable monthly MGIB rate. The lump-sum payment is deducted from the veteran's MGIB entitlement balance in the same manner as if paid on a monthly basis and may not exceed that balance.

In addition, S. 2416 specifically states that, for purposes of accelerated payment of educational assistance, the term ?program of education? would include such a program pursued at a tribally

controlled college or university (as defined in the Tribally Controlled College or University Assistance Act of 1978).

VA supports S. 2416, subject to Congress' enactment of legislation offsetting the cost of the increased benefits. However, as discussed below, we believe there may be a more efficient way of achieving its objective.

We note that implementation would be challenging for VA. The DOL employment projections change every two years. In addition, depending on the definition of ?sector,? it is possible that almost all programs would lead to employment in one sector of the economy that would affect at least one other sector positively. It would be cleaner and more direct if the bill simply stated that all high-cost short-term courses were eligible for accelerated payment. Secondly, S. 2416 would exclude from the proposed expansion of accelerated payment eligibility those individuals who are enrolled in an associate's or higher degree program. Thus, such an individual only could receive an accelerated payment if his or her program of education leads to employment in a high technology occupation in a high technology industry (as determined by VA). We can see no sound public policy basis for making this distinction.
Concerning the bill's express provision for accelerated payments under chapter 30 to eligible veterans pursuing a program of education at a tribally controlled college or university, VA has no objection. We note, however, that VA currently considers such programs to be ?programs of education? for MGIB purposes, and we are not aware of any situations pertaining to servicemembers or veterans attending tribally controlled colleges or universities that adversely affect their eligibility for accelerated benefit payments.

VA estimates S. 2416, if enacted, would cost $11.5 million during FY 2007 and approximately $121.6 million over the period FYs 2007-2016. The estimates for the years following FY 2007 would need to be reassessed annually due to DOL initiative changes.

S. 2562

S. 2562, the ?Veterans' Compensation Cost of Living Adjustment Act of 2006,? would authorize a cost-of-living adjustment (COLA) in the rates of disability compensation and dependency and indemnity compensation (DIC). This bill would direct the Secretary of Veterans Affairs to increase administratively the rates of compensation for service-disabled veterans and of DIC for the survivors of veterans whose deaths are service related, effective December 1, 2006. Consistent with the President's FY 2007 budget request, the rate of increase would be the same as the COLA that will be provided under current law to veterans' pension and Social Security recipients, which is currently estimated to be 2.6 percent. We believe this COLA is necessary and appropriate to protect the benefits of affected veterans and their survivors from the eroding effects of inflation. These worthy beneficiaries deserve no less.

We estimate that enactment of this bill would cost $590.3 million during FY 2007, $3.7 billion over the 5-year period FY 2007 through FY 2011, and $8.2 billion over the 10-year period FY 2007 through FY 2016. However, the cost is already assumed in the budget baseline, and, therefore, enactment of this provision would not result in any additional cost.

S. 2659

S. 2659, the ?Native American Veterans Cemetery Act of 2006,? would authorize the Secretary of Veterans Affairs to make grants to Native American tribal organizations to assist them in establishing, expanding, or improving veterans' cemeteries on trust lands in the same manner and under the same conditions as grants to states are made under 38 U.S.C. § 2408. We strongly support enactment of this bill.

The cemetery grants program has proven to be an effective way of making the option of veterans cemetery burial available in locations not conveniently served by our national cemeteries. S. 2659 would create another means of accommodating the burial needs of Native American veterans who wish to be buried in tribal lands.

S. 2694

S. 2694, the ?Veterans' Choice of Representation Act of 2006,? would eliminate the current prohibition on the charging of fees for services of an agent or attorney provided before the Board of Veterans' Appeals (Board) makes its first final decision in the case. It would also authorize VA to restrict the amount of fees agents or attorneys may charge and subject fee agreements between agents or attorneys and claimants to review by the Secretary, such review to be appealable to the Board. In addition, it would eliminate fee matters as grounds for criminal penalties under 38 U.S.C. § 5905.

S. 2694 would also authorize VA to regulate the qualifications and standards of conduct applicable to agents and attorneys, add three grounds to the list of grounds for suspension or exclusion of agents or attorneys from further practice before VA, subject VSO representatives and individuals recognized for a particular claim to suspension on the same grounds as apply to agents and attorneys, and authorize VA to periodically collect registration fees from agents and attorneys to offset the cost of these regulatory activities.

We understand, and in fact agree with, the argument that veterans are as capable as anyone of deciding whether to employ attorneys on their behalves. However, that is not the issue. The Government has an obligation to ensure that veterans derive maximum value from taxpayer-supported VA programs. This Committee expressed its concern in 1988 when it reported out a bill (S. 11, 100th Cong.) that would have retained the prior $10 limitation on fees for claims resolved before or in the first Board decision, that any changes relating to attorneys' fees "be made carefully so as not to induce unnecessary retention of attorneys by VA claimants." Under S. 2694, attorney fees would consume significant amounts of payments under programs meant to benefit veterans, and Congress should not enact this bill unless it becomes convinced veterans would gain more in terms of increased benefits than they would lose to their attorneys. Available evidence shows that is unlikely, hence we cannot support the bill's enactment.

Throughout the years, Congress has recognized, correctly, that integration of VSO representatives into the process of developing and deciding claims is one of the most valuable features of the VA adjudication system. These representatives are available to guide through the claims process all claimants who seek their assistance, without charge. VSO representatives are well-versed in veterans benefits law as a result of the training they receive and therefore are well-equipped to successfully assist claimants throughout the administrative processing of their claims. Further, VSOs must certify to VA that their representatives are fully qualified to

represent claimants. These facts alone cause us to doubt that participation by attorneys would gain claimants more in increased benefits than it would cost them in fees.

Moreover, what empirical data exist do not indicate attorneys would provide service superior to that rendered by VSO representatives. For example, in FY 2005, 7.5 percent of appellants before the Board of Veterans' Appeals were represented by attorneys, and approximately 80 percent were represented by VSOs. Approximately the same percentage of claims was granted in matters appealed to the Board whether a claimant was represented by a VSO representative or was represented by an attorney. In FY 2005, the Board granted one or more of the benefits sought in 21.3 percent of the appeals in which a claimant was represented by an attorney. The Board granted one or more of the benefits sought in 22.3 percent of the cases in which a claimant was represented by a VSO.

The expense of employing an attorney to obtain veterans benefits would appear to be largely unwarranted. For example, many claims are granted immediately by VA based on a presumption of service connection or incurrence of an injury or disease during service. VA currently has presumptions of service connection for several different kinds of service and many diseases. For example, a Vietnam veteran is entitled to a presumption of service connection if he or she develops diabetes mellitus (Type 2). Giving VA an opportunity to decide such a claim without attorney involvement may well save a veteran money. In addition, claimants do not appeal to the Board in about 90 percent of claims decided by VA regional offices, suggesting a high level of satisfaction with the regional offices' decisions in their cases. Paying an attorney to assist in presenting these claims would seem to be a waste of claimants' financial resources.

Also, as this Committee recognized in 1988 when it reported out S. 11, there is "no compelling justification" for hiring an attorney prior to that point. The Supreme Court recognized in Walters v. National Ass'n of Radiation Survivors that, "[a]s might be expected in a system which processes such a large number of claims each year, the process prescribed by Congress for obtaining disability benefits does not contemplate the adversary mode of dispute resolution." Rather, the Supreme Court said, "The process is designed to function throughout with a high degree of informality and solicitude for the claimant."

All a claimant need do is file a claim, and VA will notify the claimant of the information and evidence necessary to substantiate the claim, assist the claimant in obtaining relevant Government and private records, provide a medical examination or obtain a medical opinion when necessary to decide a compensation claim, and make an initial decision on the claim. If a claim is denied, all a claimant need do to initiate an appeal to the Board is to write VA expressing dissatisfaction or disagreement with the decision and a desire to contest the result. The VA agency that made the original decision on the claim will develop or review the claim in a final attempt to resolve the disagreement and issue a statement of the case if the disagreement is not resolved. VA assumes primary responsibility for leading a claimant through the administrative claims process, making the expenditure of a claimant's limited financial resources on an attorney unnecessary. Furthermore, we are concerned that enactment of this bill would impede the Government's paramount interest in promoting and maintaining a non-adversarial adjudicative process, as exemplified by the Veterans Claims Assistance Act of 2000 requiring VA to notify a claimant of the information and evidence necessary to substantiate a claim and to assist a

claimant in obtaining such evidence. This statute was designed to facilitate beneficial interaction between claimants and VA during the initial adjudication process. S. 2694, by permitting claimants to employ paid attorneys before issuance of the first final Board decision, would be incongruent with the beneficent VA system that Congress has nurtured over the decades.

Also, attorney-represented claimants would lose certain benefits of the current non-adversarial system. For example, the Court of Appeals for the Federal Circuit recently held in Andrews v. Nicholson that VA must sympathetically read all pro se pleadings, including a pro se motion alleging clear and unmistakable error (CUE) in a VA decision. However, the court stated in Andrews and in Johnston v. Nicholson that VA is not obligated to sympathetically read pleadings filed by counsel, and the failure to raise an issue in a CUE motion filed by counsel before the Board is fatal to subsequently raising the issue before the Court of Appeals for Veterans Claims.

S. 2694 would attempt to maintain the non-adversarial nature of the process by authorizing VA to suspend claim representatives who fail to conduct themselves "with due regard for the non-adversarial nature of" VA proceedings. However, a requirement for non-adversarial conduct by an attorney appears inconsistent with an attorney's professional responsibility to "represent a client zealously within the bounds of the law." MODEL CODE OF PROF'L RESPONSIBILITY CANON 7 (1983). "While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law" and may urge any permissible construction of the law favorable to his client. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-3 and 7-4 (1983). An attorney who "appear[s] before an administrative agency, regardless of the nature of the proceeding it is conducting, has the continuing duty to advance the cause of his client within the bounds of the law." MODEL CODE OF PROF'L RESPONSIBILITY EC 7-15. Introducing an attorney charged with such professional obligations into the non-adversarial claims process from its initial stages would, in our view, inevitably make the process more adversarial, which we believe would harm the interests of VA claimants. Further, if S. 2694 were enacted, VA would likely have to hire attorneys to work in its Regional Offices to respond to the legal pleadings filed by attorneys in support of their clients' claims. However unintentional it would be, we predict the process would inevitably become more formal and brief driven, to the point claimants may feel they must hire attorneys to establish entitlement to their benefits. The result would almost certainly be to increase the time all veterans must wait for decisions in their claims.

Finally, we cannot support S. 2694 because it would require creation of a substantial new bureaucracy to perform the additional accreditation and oversight responsibilities. Currently, an attorney in good standing with the bar of any state may represent a claimant before VA if the attorney states in a signed writing on his or her letterhead that he or she is authorized to represent the claimant. If S. 2694 were enacted, VA would have to create procedures and standards for accrediting attorneys and for reviewing fee agreements for services performed at the ROs to determine whether a fee charged by an agent or attorney is "excessive or unreasonable." The additional time and substantial resources that would be required to carry out the accreditation process and review fee agreements for work performed before the ROs would, in our view, be better spent adjudicating the approximately 800,000 benefit claims that VA receives annually.

Moreover, attorneys are licensed by the various states, which are responsible for regulating their conduct and disciplining them if they overreach with respect to fees charged. If attorneys are

permitted to practice before the Department and charge fees for their services, it would be far better to have them regulated by the states responsible for their licenses than to create a new Federal office to monitor attorney conduct.

S. 3363

S. 3363 would provide for accelerated payment of survivors' and dependents' educational assistance for certain programs of education under chapter 35 of title 38, United States Code.

VA will provide its comments and costs on S. 3363 at a later time.

That concludes my statement, Mr. Chairman. I would be happy now to entertain any questions you or the other members of the Committee may have.