

Date: October 20, 1994

O.G.C. Advisory 43-94

From: General Counsel (024)

Subj: CFO Responsibilities Regarding VA Nonprofit Research Corporations

To: Deputy Assistant Secretary for Budget (041)

QUESTION:

Do the financial oversight provisions of the CFO Act, Pub. L. No. 101-576 (November 15, 1990), apply to VA Nonprofit Research Corporations which have been established pursuant to Chapter 73 of title 38, United States Code?

DISCUSSION:

1. You requested an opinion concerning the responsibilities of VA's Chief Financial Officer (CFO) with regard to VA Nonprofit Research Corporations (NRC's). NRC's were created by Pub. L. No. 100-322 (May 20, 1988), hereinafter referred to as the NRC Act, to facilitate research under Chapter 73 of title 38, United States Code. Subsequently, Congress enacted the Executive branch-wide Chief Financial Officers Act (the CFO Act), Pub. L. No. 101-576 (November 15, 1990), which, inter alia, requires agency CFO's to "oversee all financial management activities relating to the programs and operations of the agency." See § 205 of the CFO Act, codified at 31 U.S.C. § 902(a)(2). In order to resolve your question, the analysis will be subdivided into two issues: first, whether VA Research Programs are "programs or operations of the agency;" and second, whether NRC's engage in financial management activities related to VA Research Programs; if the answer to both these questions is "yes," then the CFO Act would apply to NRC's. With regard to the first issue, VA clearly has authority to "carry out a program of medical research in connection with the provision of medical care and treatment to veterans," pursuant to 38 U.S.C.

§ 7303(a)(1).

2. As background to the second issue, prior to the creation of NRC's, VA did not have specific authorization to administer research funds from sources other than appropriations. There were "awkward and occasionally ill-suited mechanisms in place to channel contributed funds for such research," such as through affiliated medical schools, and through the General Post Fund (which was originally established to deal with the personal property of veterans who die while in VA facilities). H.R. Rept. No. 373, 100th Cong., 1st Sess. 4 (1987). Congress accordingly established NRC's "in order to provide a mechanism by which research funds received from non-VA sources could be better and more appropriately managed." H.R. Conf. Rep. No. 578, 100th Cong., 2d Sess. 99 (1988). Thus, it is also clear that NRC's engage in financial management activities.

3. There are indications throughout the NRC Act (codified in chapter 73 of title 38, United States Code), that NRC's may be characterized as VA "operations" from a functional standpoint. For example, § 7362 provides the *sole purpose* of an NRC is to facilitate VA research under 38 U.S.C. § 7303(a). Section 7361(b) provides that "The Secretary may authorize the estab-

lishment at any Department medical center of a nonprofit corporation" Furthermore, under the same section, the Secretary is authorized to prescribe regulations for NRC's. According to § 7366: records of a NRC must be made available to the Secretary, subsection (a)(1)(A); NRC's are subject to oversight by the Inspector General; subsection (a)(1)(B); NRC's are accountable to the Comptroller General, subsection (a)(2); NRC's must provide an annual report to the Secretary, including a report of independent auditors, subsection (b); and the Secretary must submit an annual report to the Senate and House Committees on Veterans' Affairs, subsection (d). Section 7363 provides that an NPR Board of Directors must include the VA medical center director, and the assistant chief of staff for research. From the foregoing, it might be argued that from a functional standpoint, NRC's are a part of VA. Even if they are not, from the close connection demonstrated, it is clear that financial management activities, performed by NRC's, significantly relate to the VA Research Program of the Department. 31 U.S.C. § 902(a)(2).

4. It is noted that section 7361(a) generally makes federal requirements applicable to NRC's only to the extent that other private nonprofit research corporations are subject to these requirements. Thus, it might be argued that NRC's are generally not required to turn over their books to the CFO. However, as indicated previously, the Secretary has a right of access to those records under 7366(a)(1)(A). The CFO, acting under the Secretary, in the capacity of advisor to the Secretary on financial management of the Department pursuant to 38 U.S.C. § 309, has authority to those records as well.

HELD:

The oversight provisions contained in the CFO Act apply to financial management activities relating to the programs and operations of the Department. Because NRC's perform financial management activities relating to the VA's Research Program, section 902(a)(2) of the CFO Act applies to NRC's. The CFO would have the authority to perform oversight of NRC's in the capacity of advisor to the Secretary on financial management matters.

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