

National Association of Veterans' Research and Education Foundations (NAVREF)

Rational for Changes Made to 38 USC §§7361-7366 by
 Title VI, *Nonprofit Research and Education Corporations of S. 252, the Veterans Health Care Authorization Act of 2009*
and
 H.R. 2770: *Veterans Research and Education Corporations Enhancement Act of 2009*

Note: Redlined changes not included in previous versions of this bill - S. 2926 or S. 2969 in 2008 – are indicated by yellow highlighting.

TITLE 38 – SUBCHAPTER IV - RESEARCH AND EDUCATION CORPORATIONS

- §7361. Authority to establish; status
- §7362. Purpose of corporations
- §7363. Board of directors; executive director
- §7364. General powers
- §7364A5. Coverage of employees under certain Federal tort claims laws
- §7365. ~~Applicable State law~~
- §7366. Accountability and oversight

NPC Statute	Proposed Revisions	Rationale for the Revision
§7361. Authority to establish; status		Unless otherwise noted, section citations refer to the sections in the revised statute provided in the middle column
<p>(a) The Secretary may authorize the establishment at any Department medical center of a nonprofit corporation to provide a flexible funding mechanism for the conduct of approved research and education at the medical center. Except as otherwise required in this subchapter or under regulations prescribed by the Secretary, any such corporation, and its directors and employees, shall be required to comply only with those Federal laws, regulations, and executive orders</p>	<p>(a) The Secretary may authorize the establishment at any Department medical center of a nonprofit corporation to provide a flexible funding mechanism for the conduct of approved research and education at the medical center. Except as otherwise required in this subchapter or under regulations prescribed by the Secretary, any such corporation, and its directors and employees, shall be required to comply only with those Federal laws, regulations, and executive orders and directives which apply generally to private nonprofit corporations. Such a</p>	<p>The objectives of the changes in §7361 are to 1) focus this clause primarily on just two elements – establishment of NPCs and their legal status; 2) authorize the formation of “multi-medical center research corporations” and 3) consolidate most discussion of NPC purposes in §7362.</p> <p>To accomplish this, the sentence starting with “Except. . .” has been moved to §7361(d)(1), keeping it in the section focused on NPC establishment and status.</p>

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<p>and directives which apply generally to private nonprofit corporations. Such a corporation may be established to facilitate either research or education or both research and education.</p>	<p>corporation may be established to facilitate either research or education or both research and education.</p>	
	<p><u>(b)(1) Subject to paragraph (2), a corporation established under this subchapter may facilitate the conduct of research, education, or both at more than one Department medical center. Such a corporation shall be known as a 'multi-medical center research corporation.'</u></p> <p><u>(2) The board of directors of a multi-medical center research corporation under this subsection shall include the official at each Department medical center concerned who is, or who carries out the responsibilities of, the medical center director of such center as specified in section 7363(a)(1)(A)(i) of this title.</u></p> <p><u>(3) In facilitating the conduct of research, education or both at more than one Department medical center under this subchapter, a multi-medical center research corporation may administer receipts and expenditures relating to such research, education, or both as applicable, performed at the Department medical centers concerned.</u></p>	<p>The purpose of adding provision (b) to the statute is to allow formation of “multi-medical center research corporations” and to describe the applicable conditions. Interpretation of the current statute requires that if an NPC administers funds on behalf of PIs and their research conducted at one or more other VAMCs, then all of the statutory VA board members described in §7363(a)(1) from the other VAMCs must serve on the board of the NPC. That is, the medical center director, the chief of staff and the associate chief of staff for research and the associate chief of staff for education.</p> <p>This adds a significant burden to these busy VA employees’ responsibilities and creates a very cumbersome board of directors. It simply is not a good use of their time, particularly when the other VAMCs may have just a few active research projects. Allowing multi-medical center research corporations without requiring all of these already overburdened senior management officials to serve on the board is one of the primary objectives of revising the NPC statute.</p> <p>The additions in (b)(2) and 7363(a)(1)(A)(i) specify that at a minimum, the medical center director of each facility served by a multi-medical center research corporation must serve on the board. While the board as a whole is responsible for oversight and management of an NPC, having the medical center director of each facility served by the NPC provides VA with one official who may be held accountable by VA at each facility. The board would have the discretion to appoint additionally the chief of staff, ACOS/R and/or ACOS/E from the other facilities served as well as PIs and other representatives should it wish to do so.</p> <p>See §7361(f) below for additional requirements applicable to formation of multi-medical center research corporations.</p> <p>Multi-medical center research corporations are intended to allow two or more VAMCs to share one NPC while preserving their fundamental nature as medical center-based organizations. As described in (b)(3), multi-medical center research corporations retain</p>

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		<p>funds and administer receipts and expenditures in support of PIs and research or education conducted at one or more other VAMCs.</p> <p>Authority for multi-medical center research corporations will permit higher revenue NPCs to provide research and education services for facilities with programs too small to generate the revenue stream necessary to sustain an NPC. Multi-medical center research corporations allow economies of scale, pooling of resources to ensure an appropriate level of administrative staffing and reduce the burden on medical center officials who must serve on NPC boards.</p> <p>NAVREF anticipates that as many as 20 existing low-revenue NPCs may take advantage of the opportunity to close down and/or merge with larger NPCs. This also has the advantage of reducing the number of NPCs that VA must oversee. Consolidation is more appealing and more manageable if secondary facilities may be represented on the board by just the medical center director as described in (A).</p>
	<p><u>(c)</u> Any corporation established under this subchapter shall be established in accordance with the nonprofit corporation laws of the State in which the applicable Department medical center is located and shall, to the extent not inconsistent with any Federal law, be subject to the laws of such State. In the case of any multi-medical center research corporation that facilitates the conduct of research, education, or both at Department medical centers located in different States, the corporation shall be established in accordance with the nonprofit corporation laws of the State in which one of such Department medical centers is located.</p>	<p>The clause previously found at §7365. <i>Applicable state law</i>, which establishes the NPCs to be state-chartered organizations, has been moved to this section on status instead of being a free-standing clause. This puts all of the clauses addressing NPC status in one section.</p> <p>The first sentence of §7361(c) is unchanged from §7365 except for the addition of the word "Department."</p> <p>The second - and new - sentence addresses multi-medical center research corporations that may administer funds on behalf of research or education at more than one VAMC and the possibility that the VAMCs may be located in different states. This leaves it up to the discretion of the VAMCs consolidating NPCs into one multi-medical center research corporation to determine which applicable VAMC and state best meet their needs. It is most likely this will be the VAMC with the largest research program and the state in which that VAMC is located.</p>
	<p><u>(d)(1)</u> Except as otherwise required in this subchapter or under regulations prescribed by the Secretary, any</p>	<p>At left, (d)(1) has been moved from §7361(a) to this location and is otherwise unchanged except to add "officers" who in some cases may be neither directors or employees.</p> <p>The additional statutory statements regarding NPC status in (2) are needed to resolve</p>

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	<p>corporation established under this subchapter, and its <u>officers</u>, directors and employees, shall be required to comply only with those Federal laws, regulations, and executive orders and directives that apply generally to private nonprofit corporations.</p> <p><u>(2) A corporation under this subchapter is not-</u> <u>(A) owned or controlled by the United States; or</u> <u>(B) an agency or instrumentality of the United States.</u></p>	<p>longstanding confusion and uncertainty over the extent to which NPCs are private vs. governmental vs. independent. NPC status has been subject to misunderstanding by private sector, state and federal entities as well as VA and non-VA oversight organizations. Resolving NPC status as private organizations subject to VA regulation [§7361(d)(1)], policies [§7364(e)] and oversight [§7366(a)] would benefit all stakeholders by making clearer the rules applicable to NPCs as well as the funds and programs that NPCs may administer.</p> <p>That the NPCs have appeared under different classifications in successive updates of the Congressional Research Service report “The Quasi Government: Hybrid Organizations with Both Government and Private Sector Legal Characteristics” [Tab 10 - excerpts] attests to the confusion.</p> <p>The purpose of adding the new provision (2) to the authorizing statute is to clarify the NPCs’ status using language in H. Rept. 100-373, the House report regarding their establishment, as the basis. Regarding (A):</p> <p>House Report 100-373 (accompanying HR 3449) [Tab 11] states, “These corporations would not be considered for any purposes as corporations owned or controlled by the United States except for the limitations made applicable to these corporations by this Act.” Bringing this statement into the statute clarifies the non-governmental status of the NPCs as well as congressional expectations of their relationship with VA.</p> <p>The new section (B) – “shall not be an agency of the United States Government” - comes from the authorizing statute for the Henry Jackson Foundation which is referenced in House Report 100-373 as the model for the NPCs, and is intended to further clarify the non-governmental status of the NPCs.</p> <p>Inserting these provisions in the statute in no way diminishes VA’s right to regulate or oversee the NPCs. Additionally, VA, the IG and GAO would continue to have full access to NPC records.</p> <p>Examples of the consequences of confusion about NPC status:</p> <ul style="list-style-type: none"> ▪ NPCs are perceived by some as being “VA.” The VHA directive [Tab 12] establishing the Facility Human Protections Program (FHPP) fee states that it applies to “any grant accepted by VA.” However, grants to NPCs, which are the entity responsible for the grants they agree to administer, are not the same as grants accepted by VA. Even though the purpose of the mandate was to impose a fee on

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		<p>NPCs and universities that receive funds in support of VA research, the phrase “grants to VA” has been interpreted by some to exclude grants accepted by NPCs and universities from the FHPP mandate.</p> <ul style="list-style-type: none"> ▪ Uncertainty about the status of NPCs results in NIH treating them differently from other grantee institutions. For example, NIH policy allows institutions to administer grants for investigators who are employees of other institutions. However, NIH currently is contemplating a special determination only for NPCs in this situation. <p>Additionally, clarity is needed for purposes of exemption from state excise taxes on purchases, and classification by rating agencies such as Dun and Bradstreet.</p>
<p>(b) If by the end of the four-year period beginning on the date of the establishment of a corporation under this subchapter the corporation is not recognized as an entity the income of which is exempt from taxation under the Internal Revenue Code of 1986, the Secretary shall dissolve the corporation.</p>	<p>(b) If by the end of the four-year period beginning on the date of the establishment of a corporation under this subchapter the corporation is not recognized as an entity the income of which is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986, the Secretary shall dissolve the corporation.</p>	<p>The revision reinstates the requirement that NPCs must obtain IRS recognition as 501(c)(3) organizations. The original statute contained this requirement. It was subsequently removed due to misunderstanding of the various IRS sub-classifications. All of the current NPCs are 501(c)(3) organizations.</p> <p>This reinstatement benefits VA by specifying the designation most appropriate for the NPCs’ statutorily mandated activities and because it is the most advantageous classification in terms of protecting funds against taxation, therefore maximizing the funds available for the support of VA research and education. Further, it both establishes and reinforces congressional intent about the purpose and nature of the NPCs.</p>
	<p>(f) A corporation established under this subchapter may act as a multi-medical center research corporation under this subchapter in accordance with subsection (b) if – (1)The board of directors of the corporation approves a resolution permitting facilitation by the corporation of the conduct of research, education, or both at the other Department medical center or medical centers concerned; and (2)The Secretary approves the resolution of the corporation under paragraph (1).</p>	<p>In addition to the requirement that the medical center directors of each VAMC concerned must serve on the board of a multi-medical center research corporation [see (b)(2) above and §7363(1)(A)(i)], section (f) imposes additional conditions on forming multi-medical center research corporations.</p> <p>Section (f)(1) has been added because an NPC board incurs significant liability in assuming responsibility for administration of research conducted at another VAMC. As a result, the boards of existing NPCs must have the discretion to make decisions about sharing NPCs. Sharing of NPCs should not be imposed by the VISN office or any other VA authority.</p> <p>Section (f)(2) provides that VA must approve multi-medical center research corporation arrangements, presumably in accordance with policy established in a new version of the applicable VHA handbook.</p>

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§7362. Purpose of corporations		
<p>(a) Any corporation established under this subchapter shall be established solely to facilitate research as described in section 7303(a) of this title and education and training as described in sections 7302, 7471, 8154, and 1701(6)(B) of this title in conjunction with the applicable Department medical center. Any funds received by the Secretary for the conduct of research or education at the medical center other than funds appropriated to the Department may be transferred to and administered by the corporation for these purposes.</p>	<p>(a) Any corporation established under this subchapter shall be established solely to facilitate <u>A corporation established under this subchapter shall be established to provide a flexible funding mechanism for the conduct of approved research and education at one or more Department medical centers and to facilitate functions related to the conduct of</u> research as described in section 7303(a) of this title and education and training as described in sections 7302, 7471, 8154, and 1701(6)(B) of this title in conjunction with the applicable Department medical center <u>or centers.</u> Any funds received by the Secretary for the conduct of research or education at the medical center other than funds appropriated to the Department may be transferred to and administered by the corporation for these purposes.</p>	<p>The revisions in (a):</p> <ol style="list-style-type: none"> 1. Consolidate the purposes of NPCs in section 7362 of the statute and otherwise clarify NPC purposes without changing them except to accommodate multi-medical center research corporations. 2. Establish that NPCs may support “functions” related to VA research and education – but only VA research and education - not just administer approved research projects and education and training activities. This clarification is necessary because NPCs have been faulted for expenditures that cannot be tied directly to an approved project but do provide a general VA research benefit, such as travel to scientific conferences, recruitment of clinician investigators, improvements in laboratories, procurement of general use research equipment and support for the institutional review board (IRB) and the facility human protections program. [See January 16, 2004, IG Report 03-00966-73 – “The Corporations exist solely to facilitate research projects and education activities.” – Tab 13] <p>“Or centers” has been added to accommodate multi-medical center research corporations and to clarify that both research and education administered by NPCs may be in conjunction with one or more VA medical centers. See §7361(b) and §7361(f) for additional language enabling multi-medical center research corporations.</p> <p>Discussion of transferring non-VA federal and private sector funds has been moved to the section on general powers in order to consolidate all discussion of powers in one section. Accordingly, the sentence deleted from (a) has been moved to §7364(b)(1).</p>
<p>(b) For purposes of this section, the term ‘education and training’ means the following:</p>	<p>(b) For purposes of this section, the term ‘education and training’ <u>the term “education” includes education and training and</u> means the following:</p>	<p>The purposes of defining “education” as including education and training for purposes of this statute is to clarify that NPCs may support both and to reduce wordiness.</p>
<p>(1) In the case of employees of the Veterans Health Administration, such term means work-related instruction or other learning experiences to--</p>	<p>(1) In the case of employees of the Veterans Health Administration, such term means work-related instruction or other learning experiences to-- (A) improve performance of current</p>	<p>The second sentence of (C) has been deleted to eliminate the erroneous perception that NPCs can readily support residencies and fellowships.</p> <p>Supporting residencies and fellowships raises the possibility of a nonprofit conferring a potentially problematic personal benefit on the recipients. Also, managing the applicable</p>

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<p>(A) improve performance of current duties;</p> <p>(B) assist employees in maintaining or gaining specialized proficiencies; and</p> <p>(C) expand understanding of advances and changes in patient care, technology, and health care administration.</p> <p>Such term includes (in the case of such employees) education and training conducted as part of a residency or other program designed to prepare an individual for an occupation or profession.</p> <p>(2) In the case of veterans under the care of the Veterans Health Administration, such term means instruction or other learning experiences related to improving and maintaining the health of veterans to patients and to the families and guardians of patients.</p>	<p>duties;</p> <p>(B) assist employees in maintaining or gaining specialized proficiencies; and</p> <p>(C) expand understanding of advances and changes in patient care, technology, and health care administration.</p> <p>Such term includes (in the case of such employees) education and training conducted as part of a residency or other program designed to prepare an individual for an occupation or profession.</p> <p>(2) In the case of veterans under the care of the Veterans Health Administration, such term means instruction or other learning experiences related to improving and maintaining the health of veterans to patients and to the families and includes <u>education and training for patients and families</u> and guardians of patients.</p>	<p>salaries, stipends, benefits and taxes is complex for non-academic institutions such as the NPCs, particularly because the recipients are unlikely to be employees of the NPC.</p> <p>An IRS spokesperson has informally recommended that NPCs should pass through to VA any funds they may receive for residencies and fellowships. Absent the deleted provision, NPCs could still support VA trainee education should they wish to do so – and navigate the complex IRS implications - because such persons are considered by VA to be “VA employees.”</p> <p>Despite this deletion, the statute still allows NPCs to support travel or purchase textbooks for the use of VA trainees.</p> <p>The changes in (2) are simply wordsmithing for purposes of clarity.</p>

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<p>§7363. Board of directors; executive director</p>		
<p>(a) The Secretary shall provide for the appointment of a board of directors for any corporation established under this subchapter. The board shall include-</p>		
<p>(1) the director of the medical center, the chief of staff of the medical center, and as appropriate, the assistant chief of staff for research for the medical center and the assistant chief of staff for education for the medical center, or, in the case of a facility at which such positions do not exist, those officials who are responsible for carrying out the responsibilities of the medical center director, chief of staff, and, as appropriate, the assistant chief of staff for research and the assistant chief of staff for education; and;</p>	<p>(1) <u>with respect to the Department medical center-</u> <u>(A)(i) the director (or directors of each medical center, in the case of a multi-medical center research corporation);</u> <u>(ii) the chief of staff; and</u> <u>(iii) as appropriate for the activities of such corporation, the associate chief of staff for research and the associate chief of staff for education; or</u> <u>(B) In the case of a Department medical center at which one or more of the positions referred to in subparagraph (A) do not exist, the official or officials who are responsible for carrying out the responsibilities of such position or positions at the Department medical center; and</u> the director of the medical center, the chief of staff of the medical center, and as appropriate, the assistant chief of staff for research for the medical center and the assistant chief of staff for education for the medical center, or, in the case of a facility at which such positions do not exist, those officials who are responsible for carrying out the</p>	<p>The revisions improve clarity and reduce wordiness without changing the original intent.</p>

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	responsibilities of the medical center director, chief of staff, and, as appropriate, the assistant chief of staff for research and the assistant chief of staff for education; and;	
<p>(2) subject to subsection (c), members who are not officers or employees of the Federal Government and who are familiar with issues involving medical and scientific research or education, as appropriate.</p>	<p>(2) subject to subsection (c), <u>not less than two</u> members who are not officers or employees of the Federal Government and who are familiar with issues involving medical and scientific research or education, as appropriate <u>and who have backgrounds, or business, legal, financial, medical or scientific expertise of benefit to the operations of the corporation.</u></p>	<p>Deleting the qualification that the non-VA board members must be familiar with issues involving medical and scientific research and education is necessary to give the board the discretion to use these positions to recruit members who possess the skills needed on the board.</p> <p>The criteria in the current statute are not in the best interests of the NPC or VA assuming that the MCD, COS, ACOS/R and ACOS/E already fill the need to have research and medical education expertise on the board. A better use of the mandated non-VA positions would be to acquire the legal or financial expertise needed to ensure sound governance and financial management or to otherwise broaden representation on the board. Inclusion of persons with "backgrounds" of benefit to the NPC is intended to allow NPCs to appoint to NPC boards veterans who may not possess the other listed qualifications should they wish to do so.</p>
<p>(b) Each such corporation shall have an executive director who shall be appointed by the board of directors with concurrence of the Under Secretary for Health of the Department. The executive director of a corporation shall be responsible for the operations of the corporation and shall have such specific duties and responsibilities as the board may prescribe.</p>		
<p>(c) An individual appointed under subsection (a)(2) to the board of directors of a corporation established under this subchapter</p>	<p>(c) An individual appointed under subsection (a)(2) to the board of directors of a corporation established under this subchapter may not be</p>	<p>The phrase "or have any other financial relationship with" has been deleted because it conflicts with §7366 (c)(1) which invokes the federal conflict of interest statutes and regulations applicable to federal employees.</p>

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<p>may not be affiliated with, employed by, or have any other financial relationship with any entity that is a source of funding for research or education by the Department unless that source of funding is a governmental entity or an entity the income of which is exempt from taxation under the Internal Revenue Code of 1986.</p>	<p>affiliated with, employed by, or have any other financial relationship with or employed by any entity that is a source of funding for research or education by the Department unless that source of funding is a governmental entity or an entity the income of which is exempt from taxation under the Internal Revenue Code of 1986.</p>	<p>The deleted phrase imposes an absolute prohibition on a board member having any financial relationship with any for-profit organization that is a source of funding for research or education by the Department. However, §7366 (c)(1) states that board members “shall be subject to Federal laws and regulations applicable to Federal employees with respect to conflicts of interest in the performance of official functions.” The conflict in these two statutes is that federal conflicts of interest laws and regulations permit certain exceptions to the absolute prohibition in this clause §7363 (c) of the current NPC statute.</p> <p>Briefly, the federal statutes and regulations that §7366 (c)(1) refer to are the statutory criminal code and the regulatory conflict of interest regulations [specifically, 18 U.S.C. §208 and 5 C.F.R. §§2635.401 – 2635.403]. Both the criminal statute and the conflict of interest regulations provide a means of disqualification and recusal and also refer to 5 C.F.R. Part 2640 which contains <i>de minimis</i> exceptions. All of these are in contrast to the absolute prohibition of §7363 (c). The latter has been interpreted to prohibit individuals from serving on the board who may ever have accepted travel reimbursement from a for-profit funder of VA research even if the purpose of the travel was entirely unrelated to the VA or an NPC.</p> <p>It should be noted that when §§7363 (c) and 7366 (c)(1) were first enacted in May 1988, the Office of Government Ethics (OGE) did not exist as an independent federal agency. OGE became an independent agency in the early 1990s and promulgated government-wide conflict of interest regulations in 5 C.F.R. Part 2635 and the 18 U.S.C. §208 waiver regulations in 5 C.F.R. Part 2640 in August 1992 and December 1996, respectively. All of these events occurred after §§7363 (c) and 7366 (c)(1) were first enacted. During the intervening years, the federal conflict of interest standards have become well developed and guidance is readily available.</p> <p>Furthermore, the IRS has promulgated a sample conflict of interest policy for nonprofits that focuses on disclosure and management of the conflict [see page 25 of the IRS instructions for Form 1023 – Tab 14]. This is an indication that even the IRS does not support an absolute prohibition on financial relationships and we see no rationale for holding NPCs to a narrower – and extremely impractical – standard that has the effect of disqualifying from NPC board service otherwise qualified individuals.</p>

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§7364. General powers		
(a) A corporation established under this subchapter may-	(a)(1) A corporation established under this subchapter may, <u>solely to carry out the purposes of this subchapter-</u>	This change is only wordsmithing to clarify that the phrase “solely to carry out purposes of this subchapter” applies to all of the NPC powers that follow.
(1) accept gifts and grants from, and	(1) (A) <u>accept, administer, retain, and spend funds derived from gifts, contributions, grants fees, reimbursements, and bequests from individuals and public and private entities;</u>	The additional words clarify NPC power to administer, retain and spend as well as accept funds. It also broadens the type of funds they may accept to include fees, reimbursements and bequests. Contracting is addressed separately in the next provision. See §7364(C) below for the reason for adding “fees.” See §7364(b)(2) for the reason for adding “reimbursements.” More specificity is needed because from time to time overseers have maintained that NPCs may accept only the types of income specified in the statute.
enter into contracts with, individuals and public and private entities solely to carry out the purposes of this subchapter; and	(B) enter into contracts <u>and agreements</u> with, individuals and public and private entities solely to carry out the purposes of this subchapter; and	The additions of agreements is necessary to allow NPCs to enter the full range of contracting mechanisms needed to conduct their business operations and to support VA research. Note: This change does not alter the existing prohibition against VA contracting with NPCs for goods or services.
	(C) <u>subject to paragraph (2), set fees for education and training facilitated under 7362 of this title, and receive, retain, administer and spend funds in furtherance of such education and training;</u>	The intent of this addition and (2) below is to allow NPCs to charge registration fees for the education and training programs they administer, and to retain such funds to offset program expenses or for future educational purposes while sustaining the existing prohibition against NPCs accepting fees derived from VA appropriations. These additions are necessary for two reasons: 1. We understand that although NPCs are authorized to facilitate education and training, specific authority is required for them to charge and retain fees for these programs. See more discussion below under “Background.” The benefit to VA of this addition is that the revenues would enhance the NPCs’ ability to support educational programs of interest to VA personnel while also making them available to non-VA personnel. 2. Interpretation of the current NPC statute prohibits NPCs from charging VA employees registration fees when VA-appropriated funds would be the source of payment or if the

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		<p>employee fronts the costs personally and then subsequently seeks VA reimbursement. The recommended addition of (2) clarifies and codifies this prohibition.</p> <p>We are seeking authority to charge registration fees because university and community health care professionals often wish to attend training at VA medical centers. This provision allows NPCs to charge such non-VA personnel a fee and to use the funds to offset the training expenses.</p> <p>Additionally, VA health care professionals, such as social workers, often ask NPCs to administer a training program and are willing to cover the cost of refreshments, training materials, speaker fees, etc., out of their own personal funds. The new provision (2) allows NPCs to charge the modest fees necessary to make these programs possible.</p> <p>Background : 38 USC §8154[Tab 15] provides that only the Secretary has authority to conduct VA educational programs and to charge non-VA attendees fees for such programs. It also specifies that the fees will be “credited to the applicable Department medical appropriation.” The NPC statute allows NPCs to facilitate education and training and to accept funds in support of their statutory purposes. However, the current version does not specifically address charging and retaining fees.</p> <p>OGC has informally concluded that an NPC may accept education fees, transfer them to the VA and then VA may transfer them back to the NPC. While well-intended, this is a cumbersome process, particularly if the NPC is incurring costs for speakers, a non-VA meeting site, temporary meeting planning assistance, AV services, etc.</p>
	<p>(D) reimburse amounts to the applicable Department appropriation for the Office of General Counsel for any expenses of that Office in providing legal services attributable to research and education agreements under this subchapter; and</p>	<p>The objective of this clause is to help VA appropriately staff OGC and Regional Counsel offices to address the growing volume of Cooperative Research and Development Agreements (CRADAs). CRADAs are the form of agreement mandated by VA to establish terms and conditions for industry-sponsored studies performed at VA medical centers and administered by NPCs. Each agreement must be reviewed and approved by a VA attorney before signing by the medical center director. Although NPCs generally handle the preliminary negotiations, VA attorney review can take a number of hours.</p> <p>Statutory authority is necessary for these reimbursements because otherwise OGC has no authority to accept reimbursement for its services. Amounts are unspecified. However, it is anticipated that “reimbursement” would be based on attorneys’ hourly compensation rates.</p>

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(2) employ such employees as it considers necessary for such purposes and fix the compensation of such employees.	(2E) employ such employees as it considers necessary for such purposes and fix the compensation of such employees.	
	<u>(2) Fees charged under paragraph (1)(C) for education and training described in that paragraph to individuals who are officers or employees of the Department may not be paid for by any funds appropriated to the Department.</u>	See discussion regarding (C) above.
	<u>(3) Amounts reimbursed to the Office of General Counsel under paragraph (1)(D) shall be available for use by the Office of General Counsel only for staff and training and related travel for the provision of legal services described in that paragraph and shall remain available without fiscal year limitation.</u>	
	<u>(b)(1) Except as provided in paragraph (2), any funds received by the Secretary for the conduct of research or education at a department medical center or centers, other than funds appropriated to the Department, may be transferred to and administered by the corporation for these such purposes.</u>	This provision has been moved from §7362(a) in the original statute in order to group it with other provisions addressing funds.
	<u>(2) A Department medical center may reimburse the corporation for all or a portion of the pay, benefits, or both of an employee of the corporation who is assigned to the Department medical center if such assignment is carried out</u>	This new provision has been added to address a recent IG finding that questions whether reimbursements from VA to NPCs pursuant to Intergovernmental Personnel Act (IPA) assignments are allowable. The IPA statute allows federal agencies to reimburse approved nonprofits for salary and benefits for skilled employees who are temporarily loaned to the agencies. In the case of the VA and NPCs, the IG has concluded that such reimbursements are transfers of VA-appropriated funds prohibited under §7362(a) of the

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	<p>pursuant to subchapter IV of chapter 33 of title 5.</p>	<p>current statute [§7364(b)(1) immediately above in the revised statute].</p> <p>IPA assignments between VAMCs and NPCs have been an accepted practice since soon after their inception and have withstood previous reviews by OGC and the IG. Over the years, IPAs have proven to be of significant benefit to VA-funded research programs. Including this provision in the NPC statute resolves varying opinions on the appropriateness of reimbursements pursuant to IPAs and allows VA to continue to benefit from this cost-effective means to obtain necessary research staffing.</p>
	<p>(3) A Department medical center may retain and use funds provided to it by a corporation established under this subchapter. Such funds shall be credited to the applicable Department appropriation account and shall be available, without fiscal year limitation, for the purposes of that account.</p>	<p>This new clause:</p> <ol style="list-style-type: none"> 1) Establishes explicit authority for VAMCs to accept funds provided by NPCs that may fall outside of VA's gift acceptance authority. 2) Allows VAMCs to retain such funds locally and deposit them in the appropriate VA account without having to go through the General Post Funds or cumbersome steps to get the funds to the right VA account. 3) Makes the reimbursements "no year" money. <p>Although VA has broad authority to accept gifts (38 USC §8301), many NPC payments to VAMCs are more accurately described as reimbursements to the VAMC or payments for services and may not be consistent with VA's gift acceptance authority. For example, NPCs typically reimburse VAMCs for the cost of clinical services provided exclusively for research purposes; VA employees' time spent on NPC-administered programs; and animal per diems. This clause also will allow VA to resolve longstanding VAMC uncertainty about how to treat such reimbursements and will let the VAMC that incurred the cost retain the amounts reimbursed. Currently, VAMCs must send such reimbursements to the Treasury and then the Fiscal Office must use a cumbersome process to bring the funds back to the VAMC.</p>
<p>(b) A corporation established under this subchapter may not spend funds for a research project unless the project is approved in accordance with procedures prescribed by the Under Secretary for Health for research carried out with Department funds. Such procedures shall include a peer review process.</p>	<p>(b)(c) Except for reasonable and usual preliminary costs for project planning before its approval, Aa corporation established under this subchapter may not spend funds for a research project unless the project is approved in accordance with procedures prescribed by the Under Secretary for Health for research carried out with Department funds. Such procedures shall include a</p>	<p>The addition to the beginning of this clause and a similar one in (d) below clarify that NPCs may spend funds for purposes of "project planning" without violating the requirement that they may spend funds on a research project only after it has been approved by the facility R&D Committee. Such project planning expenditures may include the cost of hiring a grant writer or a study coordinator to help a VA PI prepare a grant proposal.</p> <p>"Peer" review has been changed to "scientific" because peer review – which entails enlisting expert scientists to review a study protocol - is not necessary or appropriate for all research projects administered by NPCs. For example, protocols related to industry-sponsored clinical trials are not usually subject to "peer" review as such. Rather, they are</p>

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	<p>peerscientific review process.</p>	<p>subject to rigorous scientific scrutiny by the Food and Drug Administration and industry review boards.</p> <p>This change will not affect the types or quality of research administered by NPCs because the provision leaves in place the overarching requirement for VA approval which includes a scientific review by the medical center R&D Committee. The medical center R&D Committee remains in a position to determine on a case-by-case basis whether a project also requires peer review as a condition of approval for NPC administration.</p>
<p>(c)(1) A corporation established under this subchapter may not spend funds for an education activity unless the activity is approved in accordance with procedures prescribed by the Under Secretary for Health.</p>	<p>(c)(1)(d) Except for reasonable and usual preliminary costs for activity planning before its approval, A corporation established under this subchapter may not spend funds for an education activity unless the activity is approved in accordance with procedures prescribed by the Under Secretary for Health.</p>	
<p>(2) The Under Secretary for Health shall prescribe policies and procedures to guide the expenditure of funds by corporations under paragraph (1) consistent with the purpose of such corporations as flexible funding mechanisms.</p>	<p>(2)(e) The Under Secretary for Health shall may prescribe policies and procedures to guide the expenditurespending of funds by corporations under paragraph (1) this subchapter that are -consistent with the purpose of such corporations as flexible funding mechanisms- and with Federal and State laws and regulations, and executive orders, circulars, and directives that apply generally to the receipt and expenditure of funds by nonprofit organizations exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986.</p>	<p>The existing provision addressing guidance on expenditures has been re-worked to make it more broadly applicable to NPC expenditures and to establish for NPCs and overseers mutual understanding of the rules governing NPC expenditures.</p> <ol style="list-style-type: none"> 1. The provision has been renumbered to apply to both research and education expenditures instead of just to education. 2. "Shall" has been changed to "may" to reflect that a great deal of guidance on nonprofit expenditures already exists in IRS regulations, OMB Circulars, auditing standards and federal accounting rules, and to give the Under Secretary the flexibility to conclude that additional guidance is not necessary without breaking this law. 3. The provision clarifies that in addition to any policies issued by the Under Secretary being consistent with the intent of Congress that the NPCs should be "flexible funding mechanisms," they should also be consistent with guidance generally applicable to nonprofits in order to avoid confusion and conflicting requirements.

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<p>§7364A. Coverage of employees under certain Federal tort claims laws</p>	<p>§7364A5. Coverage of employees under certain Federal tort claims laws</p>	<p>This is a change in numbering only. Moving section §7365 of the current statute to §7361(c) in the revised statute frees up the section numbered 7365.</p>
<p>(a) An employee of a corporation established under this subchapter who is described by subsection (b) shall be considered an employee of the Government, or a medical care employee of the Veterans Health Administration, for purposes of the following provisions of law:</p> <p>(1) Section 1346(b) of title 28. (2) Chapter 171 of title 28. (3) Section 7316 of this title.</p>		
<p>(b) An employee described in this subsection is an employee who-</p> <p>(1) has an appointment with the Department, whether with or without compensation;</p> <p>(2) is directly or indirectly involved or engaged in research or education and training that is approved in accordance with procedures established by the Under Secretary for Health for research or education and training; and</p> <p>(3) performs such duties under the supervision of Department personnel.</p>		

NPC Statute	Proposed Revisions	Rationale for the Revision
<p>§7365. Applicable State law</p> <p>Any corporation established under this subchapter shall be established in accordance with the nonprofit corporation laws of the State in which the applicable medical center is located and shall, to the extent not inconsistent with any Federal law, be subject to the laws of such State.</p>	<p>§7365. Applicable State law</p> <p>Any corporation established under this subchapter shall be established in accordance with the nonprofit corporation laws of the State in which the applicable medical center is located and shall, to the extent not inconsistent with any Federal law, be subject to the laws of such State.</p>	<p>This provision has been moved to §7361(c) under <i>Authority to establish; status</i>, where it is germane.</p>

NPC Statute	Proposed Revisions	Rationale for the Revision
<p>§7366. Accountability and oversight</p>		
<p>(a)(1)(A) The records of a corporation established under this subchapter shall be available to the Secretary.</p> <p>(B) For the purposes of sections 4(a)(1) and 6(a)(1) 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 with respect to which the Inspector General of the Department has responsibilities under such Act.</p> <p>(2) Such a corporation shall be considered an agency for the purposes of section 716 of title 31 (relating to availability of information and inspection of records by the Comptroller General).</p>		
<p>(b) Each such corporation shall submit to the Secretary an annual report providing a detailed statement of its operations, activities, and accomplishments during that year. A corporation with revenues in excess of \$300,000 for any year shall obtain an audit of the corporation for that year.</p>	<p>(b) (1) Each such corporation shall submit to the Secretary <u>each year a an annual</u>-report providing a detailed statement of <u>the</u> operations, activities, and accomplishments <u>of the corporation</u> during that year.</p>	<p>Wordsmithing only.</p>

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<p>A corporation with annual revenues between \$10,000 and - \$300,000 shall obtain an independent audit of the corporation at least once every three years. Any audit under the preceding sentences shall be performed by an independent auditor.</p>	<p><u>(2)(A)</u> A corporation with revenues in excess of \$300,000 for any year shall obtain an audit of the corporation for that year. <u>(B)</u> A corporation with annual revenues between \$10,000 and - \$300,000 shall obtain an independent audit of the corporation at least once every three years. <u>(C)</u> Any audit <u>under the preceding sentences under this paragraph</u> shall be performed by an independent auditor.</p>	<p>Reorganization for clarity only.</p>
<p>The corporation shall include the most recent such audit in the corporation's report to the Secretary for that year.</p>	<p><u>(3)</u> The corporation shall include <u>in each report to the Secretary under paragraph (1) the following:</u> <u>(A)</u> the most recent <u>such</u> audit of in <u>the corporation's report to the Secretary for that year under paragraph (2).</u> <u>(B)</u> <u>The most recent Internal Revenue Service Form 990 "Return of Organization Exempt from Income Tax" or equivalent and the applicable schedules under such form.</u></p>	<p>This addition would require all NPCs, even those that fall below the IRS threshold of \$25,000 in revenues, to complete and submit to VA an IRS Form 990 (not a 990 EZ) and the applicable schedules. The advantage to VA is that Form 990 contains a great deal of useful information about a nonprofit's operations that should be provided to VA regardless of revenues.</p>
<p><u>(c)(1)</u> Each member of the board of directors of a corporation established under this subchapter, each employee of such a corporation, and each employee of the Department who is involved in the functions of the corporation during any year shall be subject to federal laws and regulations applicable to Federal employees with respect to conflicts of interest</p>	<p><u>(c)(1)</u> Each member of the board of directors of a corporation established under this subchapter, <u>each officer and each employee of such a corporation, and each employee of the Department who is involved in the functions of the corporation during any year</u> shall be subject to <u>Federal laws and</u> regulations applicable to Federal employees with respect to conflicts of interest in the performance of official functions.</p>	<p>"Officers" have been added because there is a possibility – albeit remote - that an officer may be neither a director nor an employee of the NPC nor a VA employee.</p> <p>The phrase ". . . and each employee . . . during any year" has been deleted as unnecessary. It is redundant because VA employees are subject to the full range of federal conduct and conflict of interest regulations by virtue of their VA employment and regardless of this requirement.</p> <p>"Laws" has been deleted here and in (2) below because the applicable laws are criminal laws in Title 18. According to the Office of General Counsel, these apply only to federal employees and cannot be made to apply to others through a collateral statute.</p>

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<p>in the performance of official functions.</p>		
<p>(2) Each corporation established under this subchapter shall each year submit to the Secretary a statement signed by the executive director of the corporation verifying that each director and employee has certified awareness of the laws and regulations referred to in paragraph (1) and of the consequences of violations of those laws and regulations in the same manner as Federal employees are required to so certify.</p>	<p>(2) Each corporation established under this subchapter shall each year submit to the Secretary a statement signed by the executive director of the corporation verifying that each director, officer and employee has certified awareness of the laws and regulations referred to in paragraph (1) and of the consequences of violations of those laws and regulations in the same manner as Federal employees are required to so certify.</p>	<p>The last part of the clause has been deleted because there is no such requirement for federal employees. Federal employees do receive annual ethics training, but they are not required to certify their awareness of the laws and regulations pertaining to conflicts of interest.</p> <p>However, it should be noted that despite this deletion, NPC officers, directors and employees – whether researchers or research administrators - remain subject to VA requirements regarding annual ethics training and financial disclosure as a consequence of their involvement in VA-approved research and their VA without compensation (WOC) appointments.</p> <p>The 2008 House discussion draft moves "officer" from before "director" to after "director."</p>
<p>(d) The Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives an annual report on the corporations established under this subchapter. The report shall set forth the following information: (1) The location of each corporation. (2) The amount received by each corporation during the previous year, including- (A) the total amount received; (B) the amount received from governmental entities for research and the amount received from governmental entities for education;</p>	<p>(d) The Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives an annual report on the corporations established under this subchapter. The report shall set forth the following information: (1) The location of each corporation. (2) The amount received by each corporation during the previous year, including- (A) the total amount received; (B) the amount received from governmental entities for research and the amount received from governmental entities for education; (C) the amount received from all other sources for research and the amount received from all other sources for</p>	<p>Increasing from \$35,000 to \$50,000 the threshold for reporting payees makes this VA reporting requirement consistent with threshold used by the IRS in IRS Form 990, Schedule A, Parts I and II, to scrutinize compensation for higher paid individuals. At \$35,000, this NPC reporting requirement captures a large number of low-paid employees whereas we believe it is the intent of Congress to identify highly compensated individuals for purposes of providing oversight. Raising the threshold would focus attention on those who genuinely are paid significant compensation by an NPC.</p>

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<p>(C) the amount received from all other sources for research and the amount received from all other sources for education; and</p> <p>(D) if the amount received from a source referred to in subparagraph (C) exceeded \$25,000, information that identifies the source.</p> <p>(3) The amount expended by each corporation during the year including-</p> <p>(A) the amount expended for salary for research staff, the amount expended for salary for education staff, and the amount expended for salary for support staff;</p> <p>(B) the amount expended for direct support of research and the amount expended for direct support of education; and</p> <p>(C) if the amount expended with respect to any payee exceeded \$35,000, information that identifies the payee.</p> <p>(4) The amount expended by each corporation during the year for travel conducted in conjunction with research and the amount expended for travel in conjunction with education.</p>	<p>education; and</p> <p>(D) if the amount received from a source referred to in subparagraph (C) exceeded \$25,000, information that identifies the source.</p> <p>(3) The amount expended by each corporation during the year including-</p> <p>(A) the amount expended for salary for research staff, the amount expended for salary for education staff, and the amount expended for salary for support staff;</p> <p>(B) the amount expended for direct support of research and the amount expended for direct support of education; and</p> <p>(C) if the amount expended with respect to any payee exceeded \$350,000, information that identifies the payee.</p> <p>(4) The amount expended by each corporation during the year for travel conducted in conjunction with research and the amount expended for travel in conjunction with education.</p>	