

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

Proposed Amendments to H.R. 2770, the *Veterans Research and Education Corporations Enhancement Act of 2009* and Rational for the Changes

TITLE 38 – SUBCHAPTER IV - RESEARCH AND EDUCATION CORPORATIONS

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

Existing NPC Statute	HR 2770	Proposed Amendment to H.R. 2770	Rationale for the Revision
§7363. Board of directors; executive director		<b>Change 1</b>	
<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>(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, <u>who may be an employee of the Department</u>, shall be responsible for the operations of the corporation and shall have such specific duties and responsibilities as the board may prescribe.</p>	<p>The purpose of adding this phrase is to clarify that a VA employee may serve as the executive director of an NPC. By necessity, NPCs are established by VA employees, and VA employees generally serve as executive directors, at least for the first few years. As NPCs grow and become more complex operations, they transition to hiring non-VA individuals for this position. Clarifying that VA employees may serve in this position through establishment of a new NPC, and until the NPC is ready to hire a non-VA individual, will allow for orderly transitions. At this time, about only one-third of NPC executive directors are VA personnel. Over time, and more rapidly with implementation of “multi-medical center research corporations” as provided for in section 2 of H.R. 2770, we expect the number of VA executive directors to continue to decline. However, because the requirement to have an</p>

Existing NPC Statute	HR 2770	Proposed Amendment to H.R. 2770	Rationale for the Revision
			executive director is statutory (and we believe it should remain a statutory requirement), VA has recommended this addition as a way to facilitate compliance and ensure that these appointments are managed appropriately.

Existing NPC Statute	HR 2770	Proposed Amendment to H.R. 2770	Rationale for the Revision
§7366. Accountability and oversight		Change 2	
<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 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><del>(2)(A)</del> A corporation with revenues in excess of \$300,000 for any year shall obtain an audit of the corporation for that year.</p> <p><del>(B)</del> 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.</p> <p><del>(C)</del> Any audit <u>under the preceding sentences under this paragraph</u> shall be performed by an independent auditor.</p>	<p><del>(2)(A)</del> A corporation with revenues in excess of \$<u>350</u>,000 for any year shall obtain an audit of the corporation for that year.</p> <p><del>(B)</del> A corporation with annual revenues between \$10<u>0</u>,000 and - \$<u>350</u>,000 shall obtain an independent audit of the corporation at least once every three years.</p> <p><del>(C)</del> Any audit <u>under the preceding sentences under this paragraph</u> shall be performed by an independent auditor.</p>	<p>The changes at left would align the audit requirement applicable to NPCs more closely with the requirements stated in OMB Circular A-133 and would establish a more reasonable audit threshold for low-revenue NPCs. The current statute requires NPCs with revenues between \$10,000 and \$300,000 to obtain an audit once every three years. However, such a low limit provides auditors with very little to review, and we propose raising this to \$100,000.</p> <p>Also, the increasing cost of audits plus inflation have raised the generally accepted threshold for nonprofit audits to \$500,000, up from \$300,000, which was considered reasonable when audits were first imposed on NPCs in 1996. This change in views is evidenced by the government increasing from \$300,000 to \$500,000 the threshold effective in 2003 for audits of nonprofits making expenditures of government grants. Therefore, we propose raising the annual audit threshold for NPCs to \$500,000, but making this applicable to revenues as provided in the existing statute.</p>

Existing NPC Statute	HR 2770	Proposed Amendment to H.R. 2770	Rationale for the Revision
§7366. Accountability and oversight		Change 3	
<p>(c)(1) 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 in the performance of official functions.</p>	<p>(c)(1) Each member of the board of directors of a corporation established under this subchapter, <u>each officer and</u> each employee of such a corporation, <del>and each employee of the Department who is involved in the functions of the corporation during any year</del> 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><u>(c) Each director, officer and employee of a corporation established under this subchapter shall be subject to a conflict of interest policy adopted by such corporation.</u></p>	<p>After performing its review of VA's statement for the June 18 Health Subcommittee hearing on H.R. 2770, the Office of Government Ethics conveyed to VA its concerns regarding applying the federal conflict of interest regulations to private sector nonprofits as provided in section 7366(c)(1) of the current authorizing statute. As a result, in its hearing statement, VA recommended replacing the current language in section 7366(c) with a new conflict of interest provision requiring each NPC to adopt an enforceable code of conduct, reviewable by VA.</p> <p>NAVREF agrees that the current section 7366(c) is problematic, but instead respectfully recommends requiring NPCs to adopt a conflict of interest policy. A code of conduct encompasses many matters beyond conflicts of interest. As independent, private sector organizations, we believe NPCs should retain the ability to establish rules of conduct, which are commonly addressed in NPC employee handbooks, separately from a conflict of interest policy applicable to employees, but also to directors and officers who may not be employees.</p> <p>The proposed new section 7366(c) is brief, but we believe it is adequate to accomplish the objective of ensuring that each NPC adopts an effective conflict of interest policy applicable to directors, officers and employees. Section 7366(a)(1)(A) renders all NPC "records" available to the Secretary so in our view, there is no need to re-state that an NPC's conflict of interest policy must be reviewable by VA. Also,</p>

			<p>enforcement and consequences for non-adherence are inherent elements of conflict of interest policies. Therefore it is not necessary to state in the NPC statute that the policy must be enforceable. Upon enactment of H.R. 2770 with this amendment, NAVREF would be pleased to work with VA ethics officials to develop a model conflict of interest policy for NPCs.</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, <u>officer</u> and employee has certified awareness of the <del>laws and</del> regulations referred to in paragraph (1) and of the consequences of violations of those <del>laws and</del> regulations <u>in the same manner as Federal employees are required to so certify.</u></p>	<p><del>(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.</del></p>	<p>The above change makes this requirement obsolete. In our view, a formal process for disclosure of conflicts, which is another inherent element of conflict of interest policies, will provide more meaningful management of potential conflicts.</p>