Colin Clarke, M.D.

August 22, 2011

Honorable William E. Reukauf
Associate Special Counsel
United States Office of Special Counsel
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505

Re: OSC FILE D1-10-1024

Dear Mr. Reukauf:

I have reviewed the July 15, 2011 report by Department of Veterans Affairs Assistant General Counsel Walter H. Hall regarding the Department's ongoing response to issues raised in my disclosure. I find VA's efforts to be adequate in addressing those issues and preventing their recurrence in the future.

As mentioned in my comments of June 1, 2011, the VA system has barriers to the successful recruitment and retention of highly qualified physicians. In my prior comments I described an unintended effect of VA's streamlined hiring and firing policies and procedures. Here, I will identify a well-intentioned policy, the interpretation and implementation of which has the potential to erode the quality of VA's physician pool.

Federal Statute requires VA physicians to possess a medical license in a state. It prohibits physicians with any history of license revocation from providing care to VA patients. In addition, VA has promulgated regulations requiring its physicians to hold an "unrestricted" license. VA has adopted a very narrow interpretation of its regulation by considering any requirement or prohibition imposed on a physician's license to constitute a "restriction."

As a result of VA's policy, all employment solicitations for VA physicians now contain language to the effect that applicants must possess a full, current, unrestricted license to practice medicine in a state. That language deters qualified physicians who might have a blemish on their only medical license from applying, and selects for troubled physicians with multiple state licenses, some or all of them seriously impaired.

Please consider the following:

1. *Is the regulation requiring an unrestricted license a lawful construction of the authorizing statute?*

No. The regulation requiring an unrestricted license is inconsistent with the laws administered by VA, thereby violating the agency's rule-making authority.[1] The applicable statute, 38 USC § 7402, states four qualification for VA physicians. Appointees are required to have a medical degree, a state medical license, to have completed an internship, and to have no history of license revocation. The statute does not require an unrestricted medical license, nor does it place any condition on medical licenses other than prohibiting their revocation.

The statutory history demonstrates that Congress did not intend to require an unrestricted license for VA physicians. Prior to its amendment by Public Law 106-117 in 1999, the statute required a medical license in a State, with no further conditions on the license.[2] Public Law 106-117[3] added a prohibition on license revocations. If Congress had wanted to place *further* conditions on medical licensure, i.e. beyond the revocation prohibition, it would have done so with the 1999 amendment.[4] In contrast, Congress did impose such a restriction when it amended Title 10 to require an *unrestricted* license for Department of Defense (DoD) physicians.[5] The DoD

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[1] *See* 38 U.S.C. § 501(a) ("The Secretary has authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department and are consistent with those laws").

[2] *See* 38 USC § 7402 (b) (1)(C).

[3] Added to 38 USC § 7402 as (f).

[4] *See, e.g.,* Whitman v. American Trucking Assns, Inc., 531 U.S. 457, 468 (2001). ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not . . .hide elephants in mouseholes").

[5] *See* (10 USC §1094 [a] [1]) (" A person under the jurisdiction of the Secretary of a military department may not provide health care independently as a health-care professional under this chapter unless the person has a current license to provide such care. In the case of a physician, the physician may not provide health care as a physician under this chapter unless the current license is

amendment *preceded* by a year the bill that would become 38 USC 7402 (f), VA's prohibition on license revocation. Congress consciously chose not to impose, on VA physicians, the additional licensure condition, i.e. prohibiting license restrictions that it had placed on DOD physicians.[6]

2. Origin of the term, "unrestricted license."

"Unrestricted license" is a technical term, a "term of art," and should be treated as such in its interpretation. The DoD experience offers some historical insight into the term's statutory meaning. Congress's understanding of, and motivation for, introducing the term is clear in Senator Thurmond's address of June 19, 1998, in which he proposed to the Senate an amendment requiring an unrestricted license for military doctors:

> While civilian doctors hold a license in the state where they practice, military physicians can hold a license from one state and practice medicine in U.S. military facilities in all fifty states and around the world. This exemption is needed obviously because military doctors frequently are transferred to other facilities.
>
> ...Generally, the system works well. Unfortunately, one state has been offering "special" licenses for doctors practicing at mental institutions, Indian reservations, and military facilities. The Dayton Daily News reported last year that 77 military doctors received "special" medical licenses, which were easier to obtain and has [sic] less rigorous testing requirements. In essence, the "special" license lowered the level of standardized competency.

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an unrestricted license that is not subject to limitation on the scope of practice ordinarily granted to other physicians for a similar specialty by the jurisdiction that granted the license").

[6] *See, e.g.,* FDA v. Brown & Williamson Tobacco Corp., 529 US 120 - Supreme Court (2000) ("the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand"); *See also* Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation").

> The amendment I introduced today will eliminate this loop hole. Specifically, it will require the Defense Department to have their physicians carry a current "unrestricted" license.[7]

The above comments show that Congress was motivated by a threat to the military's high standard of medical care. One state was offering an inferior version of its standard medical license, and Congress wanted to exclude from military employment doctors who held that category of license. Accordingly, Congress passed Public Law PL 105-261, codified as 10 USC §1094 (a) (1), prohibiting restricted licenses. One year later, Congress amended 38 USC 7402 to prohibit VA physicians with license *revocations*, not license restrictions. Congress stopped short of prohibiting license restrictions for VA physicians, in contrast to what it had done at DoD.

Conclusion

VA's requirement for an unrestricted license is unlawful because it exceeds the rule-making authority granted VA by Congress.[8]

Respectfully submitted,

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Colin Clarke, M.D.

Sincerely,

Colin Clarke, M.D.

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[7] (Congressional Record: June 19, 1998 [Senate], Page S6662-S6693) (Senator Thurmond introducing Section 208 of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 [became PL 105-261 sec 734]).

[8] *See* 38 U.S.C. § 501 (a).