Chair Manning, Vice Chair Thatcher, and members of the Committee. Thank you for your unwavering support to veterans. My name is Anthony Barber. I serve as the National Legislative Committee Member from Oregon for the Veterans of Foreign Wars of the United States.

I testified before this Committee last September regarding the need for protection of veterans from predatory claims services. In short, there is existing federal legislation that attempts to afford this protection, but it does not currently have any enforcement provisions. There are many private services currently violating this requirement to be accredited.

The Department of Veterans Affairs requires accreditation for anyone who helps veterans prepare, present, or prosecute claims for veterans' benefits. This requirement is in Title 38 of the Code of Federal Regulations, sections 14.626 through 14.637. These regulations are meant to ensure that those serving the veterans are responsible and qualified. The language therein clear that "No individual may assist claimants in the preparation, presentation, and prosecution of claims for VA benefits as an agent or attorney unless he or she has first been accredited by VA for such purpose." I am including for your reference below a document from the VA Office of General Counsel that outlines many of our concerns regarding illegal fees, assignment of benefits, and what preparation, prosecution, and presenting are.

Following these regulations brings private marketplace for-profit service providers into the awareness and oversight of the VA. Only accredited agents and attorneys may receive fees from claimants or appellants for their services provided in connection with representation, and only under certain circumstances. Additionally, these regulations provide for limitations on fees these private parties may charge.

Representatives from Veterans Guardian and Veterans Benefits Guide testified before this Committee on February 27, 2025, both falsely claiming that they "…operate in full compliance with federal law…". Simply put, they are assisting veterans in Oregon and elsewhere with their VA disability claims without being VA accredited. They admitted in their testimony that they have been actively working with Oregon veterans. That is not in compliance with federal law.

I will summarize below how to get and maintain accreditation:

- Be of good character and reputation
- Demonstrate an ability to represent claimants before the VA
- Not be employed in any civil or military department or agency of the United States
- Apply to the VA's Office of the General Counsel
- Self-certify admission information
- Pass a written exam
- Complete 3 hours of qualifying continuing legal education (CLE) within 12 months of initial accreditation
- Complete 3 hours of qualifying CLE every 2 years
- Certify completion of CLE to the VA's Office of the General Counsel

While the process to get and stay accredited isn't an automatic "rubber stamp", it's not very hard! So then, why do Veterans Guardian, VBG, and others avoid accreditation? The reason is because it allows them to operate without the strict ethical and regulatory oversight of the VA, potentially enabling them to charge excessive fees, engage in predatory practices, and exploit veterans by making false promises about their claims, all while avoiding accountability for their

actions; essentially acting as "claim sharks" without the required standards of conduct. The VA has the authority to investigate and discipline accredited representatives for misconduct, which unaccredited individuals are not subject to. Additionally, unaccredited representatives may use deceptive advertising tactics to attract veterans by promising guaranteed approvals or inflated benefit amounts. Often, unaccredited (and therefore unlawful) representatives say they don't charge for filing a claim, but that they are just "consulting", "guiding", or "coaching". Why, then, do they require the veterans to sign contracts that will make them pay unregulated amounts of money on their future benefits?

The Veterans of Foreign Wars agrees that Veterans Service Organizations do not currently have the resources to promptly meet the need. We very much welcome free-market for-profit service providers into the mix. Not a problem at all! Such capacity to help handle supplemental claims and appeals is important, even while they should never be the first step. We are simply asking that they be made to follow the law. The current federal laws they are violating have no teeth at all. Senate Bill 150 in its original, unamended form, restores the enforcement mechanism that will bring companies, some of which may certainly be well-meaning, back into full compliance with the law.

The VFW supports SB150 unamended. If the intent of the Committee is to amend the bill, I ask that you allow VFW to continue to be part of that conversation with a seat at the table, as you have already offered to Veterans Guardian and VBG.

Department of Veterans Affairs (VA)
Response to Senator Tester and 30 Members' Questions
Regarding Enforcement of Existing Protections for Veterans Seeking Assistance with Filing Initial Claims for Benefits and What Resources Are Needed to Enhance Protections at the Federal Level

Question 1: What is VA's official position on contracts in which a veteran agrees to pay a product of the increase in future benefits?

VA Response: Under 38 U.S.C. § 5301(a), a contract with a claimant generally may not obligate that claimant to pay fees from their payments of Veterans benefits received from the Department of Veterans Affairs (VA). Generally, if not converted into investments and retained as bank deposits, a Veteran's VA benefits are protected by section 5301 from attachment, seizure or levy as a debt by creditors. Section 5301(a)(1) states that VA benefits remain exempt from claims of creditors and from any legal or equitable process "either before or after receipt by the beneficiary." Where a contract ties the existence and extent of a claimant's payment obligation to the award of VA benefits, it is logically construed as contemplating those benefits as the source of the payment, regardless of whether that premise is stated explicitly.

The statute allowing for the payment of fees to VA-accredited attorneys and agents for the preparation, presentation or prosecution of VA benefit claims from past-due benefits, 38 U.S.C. § 5904, is considered an exception to the prohibition on assignments set forth in section 5301(a)(1). But, under current law, even this exception does not go as far as to allow for an attorney or agent to contract for the payment of fees from a claimant's future benefits.

VA did not reference 38 U.S.C. § 5301(a) in VA's views on the draft bill titled, "Preserving Lawful Utilization of Services (PLUS) for Veterans Act of 2023," because if the draft bill were to be enacted into law, the courts would likely also treat its language expanding section 5904 to allow for additional fees to be charged to claimants—to include payment from future payments—as part of the exception to the section 5301(a).

Question 2: If the above contracts are a violation of the assignment of benefits under section 5301 of title 38, what if any remedy or enforcement is there? Is it limited to civil enforcement by the veteran?

VA Response: VA's authority to enforce 38 U.S.C. § 5301(a) is limited to the Department's ability to decline to give effect to any prohibited assignment if there is an attempt to direct VA to deposit payment into an account controlled by a third party (instead of by the Veteran or other intended VA beneficiary). Most of the unrecognized companies avoid involvement with VA by collecting payment on their contracts directly from the Veterans, rather than from VA.

VA believes that others may also be able to utilize section 5301(a) as an enforcement tool in, at least, two ways. First, section 5301(a) may potentially be invoked as an

affirmative defense by a Veteran or a VA beneficiary in a collection or contract matter. *See Porter v. Aetna Cas. & Sur. Co.*, 370 U.S. 159, 159-60 (1962). Second, section 5301(a) may potentially be used in conjunction with other provisions by state and Federal enforcement entities in their prosecutions. Section 5301 has been used in the past as a valuable tool in conjunction with other laws to provide remedies against companies who knowingly executed agreements with Veterans that included an assignment of benefits that was prohibited by section 5301. *See, e.g.*, *Henry v. Structured Investments Co.*, No. 05CC00167, 2012 Cal. Super. LEXIS 20722 (Cal. Super. Ct., Orange Cty. (Jul. 12, 2012)) (ruling that "Annuity Utilization Agreements" pertaining to VA benefits and executed by members of the plaintiff class were assignments in violation of Federal law, including section 5301, and thus prohibited and unenforceable, and then awarding money damages for violation of California's Unfair Competition Law).

Question 3: If VA believes these contracts are a violation of assignment of benefits, why is VA not enforcing that law on existing contracts?

VA Response: Please see VA's response to Question 2.

Question 4: Has VA ever sent a cease-and-desist letter to an individual or company for assignment of benefits in a contract?

VA Response: Yes, VA's Office of General Counsel (OGC) can confirm that letters have been sent referencing possible violations of section 5301(a). However, data on the specific number of letters that reference section 5301 is not readily retrievable from OGC's data tracking system.

Question 5: Without re-instating criminal penalties for violating VA's accreditation scheme, what else can VA do aside from sending a cease-and-desist letter and or referring it to a state law enforcement agency?

VA Response: VA is working across the Department and with external partners to better detect and disrupt financial exploitation. In addition to sending warning cease-and-desist letters and referring matters to state enforcement entities, OGC also refers matters to Federal investigative and law enforcement entities, such VA's Office of Inspector General, the Department of Justice and the Federal Trade Commission. Since 2017, OGC has referred 9 separate matters to these various Federal enforcement entities for action.

VA's Veterans Experience Office has established the Veteran Scam and Fraud Evasion (VSAFE) Integrated Project Team (IPT), which is a Department-wide team that aims to develop long-term solutions to combat potential fraud through knowledge-sharing and the implementation of best practices. Recently, the VSAFE IPT developed several targeted communications and campaigns to educate and warn the Veteran community about the fraud schemes and unsavory predatory practices that affect Veterans' lives daily, including a one-page infographic that can easily be shared within the Veteran

community, a more robust fraud prevention booklet on how to identify and report potentially fraudulent schemes, and a centralized webpage that makes it easy for the Veteran community to electronically connect with VA on this important issue.

Moreover, VA, in partnership with the Department of Education, Federal Trade Commission, Social Security Administration, Consumer Financial Protection Bureau, State Department and Department of Defense, is working to develop new consumer education initiatives, consolidate fraud reporting processes and provide more rapid responses to fraud attempts against Veterans and military personnel.

Question 6: Is there anything VA can do without further legislation to enforce its accreditation?

VA Response: No. VA's enforcement authority is limited when addressing allegations about non-accredited individuals or organizations engaging in misconduct or charging improper fees for the preparation, presentation and prosecution of Veterans benefits claims. *See* 38 U.S.C. §§ 5901, 5904(c)(1). Aside from actions that VA is already taking, such as sending cease-and-desist letters, referring matters to state and Federal enforcement entities for possible investigation and/or prosecution, conducting outreach to the Veterans community and coordinating with Federal and state stakeholders to improve collaboration, VA cannot do anything more without further legislation that would provide the Federal government additional enforcement tools.

Beginning in fiscal year 2018, and every year thereafter, VA has proposed legislation that would reinstate the penalties for directly or indirectly charging or receiving any fee or compensation with respect to the preparation, presentation and prosecution of claims for VA benefits except as provided by law. Prior to 2006, section 5905 of title 38 authorized penalties for this range of conduct related to fees and compensation for representation on claims for VA benefits. However, current section 5905 only authorizes penalties for wrongfully withholding from a claimant or beneficiary any part of a benefit due to the claimant or beneficiary, a circumstance that rarely arises. From 2018 through 2022, over 40% of the complaints received by OGC's Accreditation, Discipline and Fees (ADF) Program were against unaccredited individuals and organizations. The existence of a Federal criminal prohibition would provide a significant and consistent deterrent against bad actors, providing another layer of protection to Veterans.

Question 7: What is VA's definition of preparation, presentation, and prosecution of claims?

VA Response: In practice, VA's OGC generally determines whether specific activity is included within the "practice before VA" and/or the "preparation, presentation and prosecution of a claim" on a case-by-case basis through the examination of the following questions:

(1) Has the Veteran or beneficiary expressed an interest in filing a VA benefit claim?

(2) What are the services being provided to the Veteran or beneficiary, and do those services have significance beyond entitlement to VA benefits?

Consistent with this analysis, and in an attempt to be helpful to both Veterans and companies that may be trying to figure out whether they are operating within the confines of the law, OGC has explained on its frequently asked questions webpage located at https://www.va.gov/ogc/accred_faqs.asp that the phrase "practice before VA" is intended to both incorporate and clarify the meaning of the phrase "preparation, presentation and prosecution of claims," and the variations thereof that are used within the relevant statutes and regulations governing representation. More specifically, OGC explains that the phrase "practice before VA" signifies the preparing, presenting or prosecuting a claim for benefits under the laws administered by VA. OGC further informs that preparing a benefits claim generally includes, but is not limited to, consulting with or giving advice to a claimant or potential claimant in contemplation of filing a benefits claim, gathering evidence in support of a benefits claim on behalf of a claimant or potential claimant, or filling out VA forms for their submission to VA. Likewise, OGC informs that presenting and prosecuting a benefits claim generally includes, but is not limited to, filing, or pursuing in any way, an initial claim for VA benefits, a request for further review of a decision by the agency of original jurisdiction, or an appeal to the Board of Veterans' Appeals. Moreover, OGC cautions that services that strongly suggest the "practice before VA" are those that would have no value or purpose, or very little value or purpose, outside of VA's adjudication process for benefits claims.

OGC is also considering revising its part 14 regulations that generally govern the accreditation of individuals who assist Veterans with their VA benefit claims to include a definition of the "practice before VA," which would incorporate, and explain, what is included in the phrase "preparation, presentation and prosecution" of Veterans benefits claims.

Question 8: At what point does third party medical evidence become preparation of a claim?

VA Response: The roles of the medical provider and the role of the VA-accredited representative (attorney, agent, Veteran service organization (VSO) representative) are separate and distinct within the VA adjudication scheme. The medical provider is the expert witness who provides their objective opinion on which the VA decisionmakers can base their decision. The VA-accredited representative is the one who prepares, presents and prosecutes the claimant's claim and in doing so advocates on the claimants' behalf.

However, the role of a "medical consultant"—rather than a medical provider—is more similar to the role of a VA-accredited representative. A medical consultant—meaning someone who assists in evaluating the medical aspects of a potential benefits claim and/or assists with preparing the medical issues involved for submission in the case—would be participating in "claims preparation." Accordingly, the medical consultant would

be obligated to adhere to the statutes and regulations requiring VA accreditation and limiting when fees may be charged to a claimant and the amount that may be charged.

Question 9: Do medical providers need to become accredited if they are assisting with medical evidence as part of an initial claim?

VA Response: No. Medical providers do not need VA accreditation to provide medical opinions or fill out VA's Diagnostic Benefits Questionnaires (DBQs). Just as VA medical providers or contract medical providers would be providing medical services under their medical license when they provide VA medical opinions and evaluate DBQs, so would private medical providers when completing those same tasks.

Question 10: What consequences does VA see if Congress authorized accreditation for assistance with initial claims?

VA Response: Under current law, VA is authorized, pursuant to 38 U.S.C. §§ 5902-5904, to recognize certain organizations and individuals for the purpose of preparing, presenting and prosecuting VA benefits claims before the Department. Such recognition includes authorization to assist on initial claims as well as the authorization to assist on the further review of, submission of additional evidence for, and appeals of claims. The majority of the claims services provided on initial claims are performed by VSO representatives who may never charge a fee for their services. *See* 38 U.S.C. § 5902(b)(1)(A). VA-accredited attorneys and claims agents are also permitted to provide services on initial claims, but they are only allowed to charge a claimant a reasonable fee for their services provided after VA has issued its initial decision on the benefits claim. *See* 38 U.S.C. § 5904(c)(1). Most VA-accredited attorneys and agents choose to begin their representation when they are able to charge fees for their services. To the extent that Question 10 is intending to ask about the potential consequences that VA foresees if Congress were to enact legislation authorizing VA-accredited attorneys and claims agents to charge claimants fees when assisting them on their initial claim, VA offers the explanation below.

- **A smaller amount of the benefits that are earmarked for the Nation's Veterans will be directed to them.** Under current 38 U.S.C. § 5904(c)(1), no one may charge for assistance with initial claims. That limitation has been in place for decades for a logical and noble reason, which is to ensure that Veterans' benefits are going into Veterans' pockets to the largest extent possible. The VA adjudication system is designed to be uniquely weighted in favor of Veterans and in favor of granting claims wherever possible, with VA assisting in developing evidence to support the claim and with VA's guiding policy to grant every benefit that can be supported in law. In that environment, if VA grants a Veteran's claim on the first pass, the Veteran should be entitled to enjoy the full measure of those earned benefits without having to divert any of them unnecessarily to an attorney or agent. That is balanced by allowing attorneys and agents to provide services for a fee after the first denial. In short, the system is designed to maximize grants and to ensure that Veterans whose claims are

granted on initial review will get to keep and enjoy the full measure of their earned benefits. A high percentage of initial claims are going to be granted by VA, with or without the assistance of attorneys and agents. Therefore, if the law were changed to allow attorneys and agents to charge fees on initial claims, it would be relatively easy for an attorney or agent to profit by signing up claimants and letting the system operate the way it normally would. For reference, in fiscal years 2022 and 2023, the overall grant rate of initial claims was approximately 83%. In contrast, although the charging of fees is permitted for initial claims in the Social Security Administration disability benefits adjudication system, the approval rate of initial claims is less than 40%—significantly lower than the 83% in VA's system.

- **Additional resources would be necessary to oversee VA accreditation and to process complaints relating to representation.** If fees were permitted to be charged for preparation on initial claims, many more individuals, who are currently operating outside of the VA accreditation system, would likely then seek accreditation. While this would give OGC's ADF Program the opportunity to have more oversight over their activities because they would then be subject to OGC's monitoring and disciplinary regulations, such oversight would require many more resources than are currently available to the ADF Program. Additionally, it is likely that many of those seeking accreditation to provide services at the initial stage of a VA claim would be seeking accreditation as claims agents. Far more is required to accredit a claims agent, including background checks, references and the administration of the accreditation examination to ensure competence, than is required to accredit an attorney, for whom we rely on the respective state bar who has admitted such attorney, or a VSO representative, for whom we rely on the VSO to certify that the potential representative has good character and is fit to represent before the Department. Allowing fees to be charged at the initial stage of the claim would also likely increase the number of complaints that are filed with OGC relating to representation. Additional resources would be necessary to initiate the additional inquiries, hold hearings to ensure due process and decide whether discipline should be taken against the VA-accredited individuals.

- **Additional resources would be necessary to regulate and administer the proper payment of fees.** Both the Veterans Benefits Administration (VBA) and OGC would require additional resources to regulate and administer the payment of fees on initial claims. Allowing fees to be paid on initial claims would significantly increase the number of fee agreements that are collected by VA. Depending on the fee structure, this could significantly increase the number of instances in which VBA would be called upon to administer fee payments from the claimant's earned benefits and in which OGC would be called upon to review the reasonableness of the fee charged to the claimant.

In addition, VA has other concerns that would heavily depend on the different fee structures that could be proposed. For instance, a fee based on a product of the

monthly benefits award, such as 5 times, or 500% of, the amount of the monthly increase of benefits awarded on the basis of the claim, would likely be unreasonable, or worse, predatory. As an example, for a case in which a Veteran with a spouse and a child was awarded service-connected disability compensation at a rate of 40% disabling, 5 times the monthly benefit payment under current law would be $3,950. The work required by an attorney or agent to prepare such a claim could be relatively simple. In establishing a standard of five times the increase in a monthly benefit payment, Congress would essentially be setting the market rate and sending a message that such an amount is fair to Veterans, without a history of a fair market value. VA cannot support that message.

Further, a flat fee limit, such as a cap of $12,500, for services provided on an initial claim seems excessive and thus unfair to Veterans. VA data for the past 5 years indicates that fees paid directly by VA from claimants' past-due benefits (based on fee agreements for 20%, or infrequently less than 20%, of the past-due benefits) have averaged $8,129.21 per award. Notably, that is for services provided in cases where VA has denied the initial claim, which generally would be fewer and more difficult than unadjudicated initial claims. Providing a cap on fees will likely set the market rate for services at that level. (As a point of reference, most current fee agreements for services before VA provide for a fee of 20% of past-due benefits, stemming from the statutory presumption that a fee of 20% or less of past-due benefits is presumed reasonable.)

Question 11: Does VA believe the above consequences outweigh continuing without criminal penalties?

VA Response: To the extent that you are asking whether VA would prefer that Congress either: (1) permit the charging of fees on initial claims and reinstate the penalties from the prior version of section 5905, or (2) maintain the current fee structure and not reinstate penalties set forth in the prior section 5905, VA does not have enough information about the fee structure contemplated in the first scenario to properly assess this question. However, VA generally would not recommend revising the statutes governing when fees may be charged and the amount of such fees within the VA adjudicative scheme until VA has the opportunity to opine on the contemplated fee structure. VA believes that the concerns noted in the response to Question 10, above, along with the concerns identified in VA's views on the PLUS Act, amply support this position.

Question 12: How many letters has VA sent to unaccredited individuals and companies since January 2023?

VA Response: VA has sent a total of 10 letters to unaccredited individuals and companies since January 1, 2023.

Question 13: Have any of those letters resulted in the ending of an illegal practice?

VA Response: In response to the cease-and-desist letters identified in response to Question 11, OGC has received 3 responses. Of those responses, two indicated that they would stop their current business practices, and one indicated their belief that they are not violating the law.

Question 14: What resources short of re-instatement of penalties does VA need to prevent unaccredited individuals from contracting with veterans?

VA Response: In addition to VA's legislative proposal requesting that Congress reinstate the penalties for receiving fee with respect to the preparation, presentation and prosecution of claims for VA benefits except as provided by law, VA has put forth two other legislative proposals relating to VA accreditation and fees for Congress' consideration.

VA has proposed legislation that would amend sections 5902 and 5904 of title 38, United States Code, to increase the assessment amount that VA may collect when it directly pays fees for representation to accredited agents and attorneys and to authorize a reasonableness review assessment each time a fee agreement is reviewed by OGC and the fee is determined to be unreasonable or excessive. The proposed legislation would also establish a limited transfer authority to defray costs incurred by OGC in carrying out the ADF Program from funds appropriated, or otherwise available, to the Department for administrative expenses for Veterans' benefits programs. Such amendments would provide greater access to funds to cover administrative and operating expenses incurred by OGC with respect to the accreditation and oversight of VA-accredited individuals.

VA has also proposed legislation that would amend section 5904 to permit VA to only authorize individuals who are sponsored and directly supervised by a VA-accredited attorney to become accredited as claims agents. This change would align the qualifications for claims agents to practice before VA with the qualifications for non-attorney practitioners to practice before the U.S. Court of Appeals for Veterans Claims. VA believes this proposal would help improve the timeliness of OGC's review of accreditation applications, reduce the number of complaints filed with OGC about representation and result in overall greater satisfaction of Veterans with the services provided to them by VA-accredited individuals.

Department of Veterans Affairs
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