COMPETITIVE ENTERPRISE INSTITUTE

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December 9, 2024

VIA REGULATIONS .GOV
Denis McDonough
Secretary of Veterans Affairs
810 Vermont Ave. NW
Washington, DC 20420

RE: Improving Accreditation Process and Strengthening Legal Education Requirements for Accredited Agents and Attorneys, 89 Fed. Reg. 82546 (Oct. 11, 2024), Docket VA-2024-OTHER-0022-0001 (to be codified at 38 C.F.R. § 14.629).

Dear Secretary McDonough:

On behalf of the Competitive Enterprise Institute, I respectfully submit the following comments in response to the U.S. Department of Veteran Affairs' proposed rulemaking entitled "Improving Accreditation Process and Strengthening Legal Education Requirements for Accredited Agents and Attorneys." Founded in 1984, the Competitive Enterprise Institute is a non-profit research and advocacy organization that focuses on regulatory policy from a pro-market perspective.

As a member in good standing of the bar of the Court of Appeals of the District of Columbia, I would be required by the proposal to have additional continuing legal education requirements to represent individuals before the U.S. Department of Veteran Affairs (VA). Regrettably, the proposal is unlawful. These requirements exceed the VA's statutory authority and directly contradict the statutory exception for members in good standing of the bar of the highest court in a state.

I. 38 U.S.C. § 5901(a) Creates Two Methods for an Attorney to Represent Individuals Before the Veterans Administration, Either Through the Agency Practice Act, 5 U.S.C. § 500, or 38 U.S.C. § 5904.

Subsection 5901(a) of title 38 specifies who may act as an attorney in representing individuals before the VA; it requires that:

> Except as provided by section 500 of title 5, no individual may act as an agent or attorney in the preparation, presentation, or prosecution of any claim under laws administered by the Secretary unless such individual has been recognized for such purposes by the Secretary.

38 U.S.C. § 5901(a). This statute has three separate parts. It creates a default rule: that "no individual may act as an agent or attorney in the preparation, presentation, or prosecution of any claim under laws administered by the Secretary." Additionally, it creates two exceptions to this default rule. First, it creates this exception: "Except as provided by section 500 of title 5." Second, it creates another exception in stating "unless such individual has been recognized for such purposes by the Secretary."

The first exception, that of Section 500 of title 5, or 5 U.S.C § 500 also known as the Agency Practice Act, is a general statute that applies to all federal agencies and provides:

> An individual who is a member in good standing of the bar of the highest court of a State may represent a person before an agency on filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts.

5 U.S.C § 500(b).

Section 5904 of title 38 elaborates on the second exception ("unless such individual has been recognized for such purposes by the Secretary.") Specifically, 38 U.S.C. § 5904(a)(1) specifies that

> Except as provided in paragraph (4), the Secretary may recognize any individual as an agent **or attorney** for the preparation, presentation, and prosecution of claims under laws administered by the Secretary.

38 U.S.C. § 5904 (emphasis added to show that any individual can be recognized as an attorney by the Secretary, not just barred individuals). Paragraph (4) deals with those individuals that have been suspended or disbarred by any court, bar, or Federal or State agency, and prohibits the Secretary from overriding such a disciplinary decision to allow that individual to practice before the agency.

Thus, the Secretary can recognize anyone the Secretary wants, as long as that individual has not been suspended or disbarred, and can allow such an individual to represent veterans before the VA as that veteran's attorney. Such individuals do not need to have passed or been admitted to the bar in any state.

But even without recognition by the Secretary under the second exception to 38 U.S.C. § 5901(a), any person who is a member in good standing of the bar of the highest court of a state qualifies under the first exception to represent individuals without prior recognition by the Secretary by submitting "a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts." 5 U.S.C § 500(b).

II. The Agency Misreads Public Law 109-461 Changes to 38 U.S.C. § 5904(a).

The issue of the VA's authority to add requirements for attorneys was previously disputed when the VA first added such requirements. The VA was wrong then, and it is now. As previously noted in comments to the VA:

> One commenter noted that, in amending 38 U.S.C. chapter 59, Congress did not remove provisions regarding the Agency Practice Act from 38 U.S.C. 5901. . . . that because Congress did not amend section 5901, it did not authorize VA to exceed the requirements in 5 U.S.C. 500, specifically bar membership in good standing and a written declaration of representation.

Accreditation of Agents and Attorneys; Agents and Attorney Fees, 73 Fed. Reg. 29852, 29855 (May 22, 2008).

The VA responded to this comment by claiming that the reference to 5 U.S.C. 500 in section 5901 must be "read as a whole to give effect to amended section 5904." *Id*. According to the agency,

> Until Congress enacted Public Law 109-461, VA's attorney accreditation requirements were limited to those prescribed in the Agency Practice Act, bar membership in good standing and a written declaration of representation. However, in amended section 5904(a), Congress expressly directed VA to prescribe in regulations additional requirements for practice before the Department. In amending section 5904(a), Congress is presumed to have been aware of the Agency Practice Act, and, as a result, section 5904(a) as implemented by VA in § 14.629(b) should not be read as being in conflict with that act or the intent of Congress.
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> ...
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> Because provisions incorporating section 500 were added to section 5901 over 37 years before the last amendment to section 5904(a), and because Congress expressly directed VA in section 5904(a) to establish attorney accreditation requirements that exceed those in section 500, a reasonable harmonization of sections 5901 and 5904 is that the reference to section 500 in section 5901 is for the purpose of establishing attorney practice requirements for VA to the extent Congress has not specifically provided otherwise in chapter 59.

Id.

The whole act canon, of course, should be applied, and it is true that "Congress is presumed to have been aware of the Agency Practice Act" when it enacted Public Law 109-461. But the agency misreads Public Law 109-461. Prior to Public Law 109-461, 38 U.S.C. § 5904(a) read:

> The Secretary may recognize any individual as an agent or attorney for the preparation, presentation, and prosecution of claims under laws administered by the Secretary. The Secretary may require that individuals, before being recognized under this section, show that they are of good moral character and in good repute, are qualified to render claimants valuable service, and otherwise are competent to assist claimants in presenting claims.

Public Law 109-461 added the "Except as provided in paragraph (4)" exception that prohibits the Secretary from allowing suspended or disbarred attorneys from representing people before the VA. It eliminated the second sentence (requiring those admitted under this section to show a good moral character and in good repute, are qualified to render claimants valuable service). And it added the following after 38 U.S.C. § 5904(a)(1):

> (2)The Secretary shall prescribe in regulations (consistent with the Model Rules of Professional Conduct of the American Bar Association) qualifications and standards of conduct for individuals recognized under this section, including a requirement that, as a condition of being so recognized, an individual must—
>
> (A) show that such individual is of good moral character and in good repute, is qualified to render claimants valuable service, and is otherwise competent to assist claimants in presenting claims;
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> (B) have such level of experience or specialized training as the Secretary shall specify; and
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> (C) certify to the Secretary that the individual has satisfied any qualifications and standards prescribed by the Secretary under this section.
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> (3) The Secretary shall prescribe in regulations requirements that each agent or attorney recognized under this section provide annually to the Secretary information about any court, bar, or Federal or State agency to which such agent or attorney is admitted to practice or otherwise authorized to appear, any relevant identification number or numbers, and a certification by such agent or attorney that such agent or attorney is in good standing in every jurisdiction where the agent or attorney is admitted to practice or otherwise authorized to appear.

A major error with the agency's interpretation is the failure to consider the limitations added to these provisions, specifically, the language in 38 U.S.C. § 5904(a)(2) that limits the Secretary's mandate. Section 5904(a)(2) authorizes the Secretary to prescribe qualifications and standards only "**for individuals recognized under this section**." This language in § 5904 and Public Law 109-461 makes it obvious that all of these requirements may apply only to individuals authorized by section 5904. Subsection 5901(a) makes clear that those individuals do not include those authorized under subsection 5901(a) and its Agency Practice Act exception.

The reason for these regulations, qualifications, and standards of conduct is obvious. This section allows the Secretary to recognize individuals with no prior legal training, who never passed the bar or been admitted to any state bar, to represent individuals as their attorney. Without these requirements, there would be no ethical duties for such individuals in how they

represent such veterans or how they treat other members of the bar, the public, or the agency. Nor would there be any accountability for wrongful behavior without such requirements as they are not subject to investigation or sanction by any state bar. It is thus critically important that the individuals who are admitted to practice as attorneys under § 5904 have the requirements that Congress authorized the VA to create.

However, individuals recognized *by the Secretary* to practice as attorneys before the VA are different from those authorized by state bars under the Agency Practice Act. Such individuals are already subject to numerous regulations, qualifications, and standards of conduct, as well as enforcement proceedings if any of those requirements are violated. Meanwhile, allowing the Secretary to determine who can represent individuals in opposition to the initial determinations of the VA creates an obvious conflict of interest. That is why Congress limited the regulations, qualifications, and standards of conduct issued by the VA to only those individuals recognized under this section.

Meanwhile, the VA's interpretation violates the canon of statutory construction known as the rule against surplusage. Under the VA's interpretation, only those individuals who are approved by the Secretary under 38 U.S.C. § 5904 are allowed to represent individuals before the VA. But Congress did not remove the Agency Practice Act exception in 38 U.S.C. § 5901(a). The VA's interpretation makes that exception pure surplusage having no effect.

Considering the act as a whole, including both 38 U.S.C. § 5901(a) and 38 U.S.C. § 5904(a)(2), including all changes made in Public Law 109-461, it is clear that the requirements issued by the VA under 38 U.S.C. § 5904(a)(2) only apply to "individuals recognized under this [§ 5904] section." Members of the bar of the highest court of the states that have never requested the approval of the Secretary under § 5904 do not qualify for any such requirement. But they can still represent individuals under the Agency Practice Act and 38 U.S.C. § 5901(a).

III. Numerous Courts Have Found Additional Requirements for Attorney Representation Allowed Under the Agency Practice Act Are Unlawful.

The Agency Practice Act "governs representation before federal administrative agencies." *Nat'l Ass'n for the Advancement of Multijurisdiction Prac., (NAAMJP) v. Simandle*, 658 F. App'x 127, 135 (3d Cir. 2016); *See also Waller v. United States*, No. CV-S-01-1190-KJD PAL, 2002 WL 31476649, at *4 (D. Nev. Aug. 7, 2002).The D.C. Circuit has noted that the Agency Practice Act "prohibits agencies from erecting their own supplemental admission requirements for duly admitted members of a state bar." *Polydoroff v. I.C.C.*, 773 F.2d 372, 374 (D.C. Cir. 1985); *See also Gould v. Harkness*, 470 F. Supp. 2d 1357, 1362 (S.D. Fla. 2006), *aff'd sub nom. Gould v. Fla. Bar*, 259 F. App'x 208 (11th Cir. 2007).

"Congress has established the procedure by which an attorney may qualify to represent a claimant before the [agency] in 5 U.S.C. s 500(b) and this court holds that this is all that is necessary and appropriate." *McDaniel v. Israel*, 534 F. Supp. 367, 370 (W.D. Va.), *amended*, 537 F. Supp. 273 (W.D. Va. 1982), *amended*, 540 F. Supp. 404 (W.D. Va. 1982). The United

States District Court for the District of Rhode Island explained that additional admission requirements, such as CLE, are prohibited by the plain, clear, and unambiguous language of the Agency Practice Act:

> [Section] 500(b)'s plain, ordinary and unambiguous language clearly applies to attorney *admission* requirements, setting up two prerequisites for "represent[ation of] a person before" a federal agency; (1) an individual must be a "member in good standing of the bar of the highest court of a State;" and (2) provide a written declaration to the agency attesting to their qualifications and authorization to represent the applicable individual.[16] *Id.* Like § 406(a)(1), 5 U.S.C. § 500 "governs who may practice before a federal agency." *Waller v. United States*, No. CV-S-01-1190-KJD PAL, 2002 WL 31476649, at *4 (D. Nev. Aug. 7, 2002). As interpreted, § 500(b) "merely prohibits [federal] agencies from erecting their own supplemental *admission requirements* for duly admitted members of a state bar[.]" *Polydoroff v. Interstate Commerce Comm'n*, 773 F.2d 372, 374 (D.C. Cir. 1985) (emphasis added). Section 500(b)'s plain, clear and unambiguous language establishes the admission requirements in order to represent individuals before federal agencies and prohibits the erection of further admission requirements.

Levine v. Saul, No. CV 19-569WES, 2020 WL 5258690, at *6 (D.R.I. Sept. 3, 2020)

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The VA should change the proposed rule to make clear that the proposed CLE requirements apply only to attorneys recognized under 38 U.S.C. § 5904 and not those who can represent individuals as an attorney under the Agency Practice Act due to being a member in good standing of the bar of the highest court of a state. In other words, the regulation should be rewritten to follow the law in 38 U.S.C. § 5901(a).

Respectfully submitted,

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