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Part V

Department of Veterans Affairs

**38 CFR Part 74
VA Veteran-Owned Small Business
Verification Guidelines; Interim Final Rule**

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 74

RIN 2900-AM78

VA Veteran-Owned Small Business Verification Guidelines

AGENCY: Department of Veterans Affairs.

ACTION: Interim final rule with request for comments.

SUMMARY: This interim final rule implements portions of the Veterans Benefits, Health Care, and Information Technology Act of 2006. This law requires the Department of Veterans Affairs (VA) to verify ownership and control of veteran-owned small businesses, including service-disabled veteran-owned small businesses. According to this interim final rule, a contracting officer in the Department of Veterans Affairs may restrict competition for a requirement to a service-disabled veteran-owned small business (SDVOSB) or to a veteran-owned small business (VOSB) if that business is listed as "verified" in the VetBiz.gov Vendor Information Pages (VIP) database. The interim final rule defines the eligibility requirements for businesses to obtain "verified" status, explains examination procedures, and establishes records retention and review processes.

DATES: *Effective Date:* May 19, 2008.

Comments must be received on or before July 18, 2008.

ADDRESSES: Written comments may be submitted through <http://www.Regulations.gov>; by mail or hand-delivery to the Director, Regulations Management (00REG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. Comments should indicate that they are submitted in response to "RIN 2900-AM78-VA Veteran-Owned Small Business Verification Guidelines." Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments may be viewed online in through the Federal Docket Management System at <http://www.Regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Gail Wegner, Center for Veterans Enterprise (00VE), Department of Veterans Affairs, 810 Vermont Ave., NW., Washington, DC, 20420, phone (866) 584-2344.

SUPPLEMENTARY INFORMATION: It is the mission of the Department of Veterans Affairs (VA) to serve veterans, and buying from veteran-owned small businesses (VOSBs) and service-disabled veteran-owned small businesses (SDVOSBs) directly supports VA's mission. Supporting the service-disabled veterans who own their own businesses contributes significantly toward restoring their capability and the quality of their lives and contributes toward smoothing their transition from active duty to civilian life. Such purchases from service-disabled veteran-owned businesses support the socioeconomic well-being of the Nation and support VA's Strategic Goals. It is public policy, as expressed in 15 U.S.C. 637 and 644, that small businesses owned by veterans and service-disabled veterans, among others, shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency.

On December 22, 2006, President Bush signed Pub. L. 109-461, Veterans Benefits, Health Care, and Information Technology Act of 2006. Title V—Housing and Small Business Matters, contains provisions that enable VA to create a unique procurement program among Federal agencies. This program permits VA contracting officers to conduct acquisition actions limited to SDVOSBs or VOSBs in the Department's requirements when such businesses appear as "verified" in the VetBiz.gov VIP database. In addition, prime contractors of the Department are required to use verified SDVOSBs and VOSBs to obtain credit in their subcontract plan achievement reports submitted to the Department.

On October 20, 2004, President Bush issued Executive Order 13360, which directs the heads of agencies to significantly increase opportunities for service-disabled veteran businesses in Federal prime contracting and subcontracting actions. To achieve that objective, agencies shall more effectively implement section 15(g) of the Small Business Act (15 U.S.C. 644(g)) through various efforts, including the development of a strategic plan to implement the policy set forth in the Executive Order. The Executive Order also directs the Center for Veterans Enterprise (CVE) to assist agencies in verifying the accuracy of contractor databases.

This rulemaking establishes regulations that implement Pub. L. 109-461. Much of the content of these regulations simply reflects the language of the authorizing law, as well as Pub. L. 106-50, the Veterans Entrepreneurship and Small Business

Development Act of 1999, and comparable regulations governing similar programs administered by the Small Business Administration (SBA) (*see generally* chapter 1 of 13 CFR).

This rulemaking requires VOSBs, including SDVOSBs, to register in the VetBiz.gov Vendor Information Pages database, available at <http://www.VetBiz.gov>, in order to be eligible to participate in set-asides for SDVOSBs and VOSBs issued by VA contracting officers, pursuant to section 502 of Pub. L. 109-461. In completing registration, businesses must provide information establishing that the business is owned and controlled by eligible parties, according to the criteria defined in section 502 of Pub. L. 109-461. The Department of Veterans Affairs will examine the information provided by the owners and approve or disapprove applications for "verified" status.

A verification examination is an investigation by VA's CVE officials which verifies the accuracy of any statement or information provided as part of the VetBiz VIP Verification application process. Thus, examiners may verify that the concern currently meets the program's eligibility requirements, and that it met such requirements at the time of its application or its most recent size recertification.

Examiners may conduct the review, or parts of the review, by phone, by electronic message exchange or in person at one or all of the concern's offices. Representatives from the Department will determine the location of the examination. Examiners may review any information related to the concern's eligibility requirements including, but not limited to, documentation related to the legal structure, ownership and control of the concern. As a minimum, examiners shall review all documents supporting VA Form 0877. These include: Financial statements; Federal personal and business tax returns; personal history statements; and a Transcript of Tax Form, obtained by submitting an IRS Form 4506. Two-three years of transcripts are preferred. Other documents, which may be reviewed when necessary based on the application of these regulations to a particular application include: Articles of Incorporation/Organization; corporate By-Laws or Operating Agreements; Organizational, Annual and Board/Member meeting records; stock ledgers and certificates; State-issued Certificates of Good Standing; contract, lease and loan agreements; payroll records; bank account signature cards; and licenses.

Upon receipt of specific and credible information alleging that a participant no longer meets eligibility requirements, CVE will review the concern's eligibility and will decide to withdraw the firm's verified status or continue its verified status.

Administrative Procedure Act

Pursuant to 5 U.S.C. 553(b)(3)(B) and (d)(3), we find that there is good cause to dispense with advance public notice and opportunity to comment on this rule and with publication not less than 30 days before the rule's effective date.

Public Law 109-461 requires VA to complete examination before June 19, 2008 of all businesses registered in VIP on the date the law was enacted. After that date, such businesses will be ineligible to participate in Public Law 109-461 opportunities until such time as they complete verification. This will require VA to verify up to 13,380 businesses, if all businesses desire to participate in VA's unique procurement opportunities for SDVOSBs and VOSBs. The majority of businesses that have registered in the VIP database have affirmed their interest in selling to VA. In addition, with unique procurement tools available, it is imperative that businesses be formally examined for eligibility to participate in VA contracts in order to protect the integrity of the database. Advance solicitation of comments for this rule would be impracticable and contrary to the public interest, as it would delay the initiation of the examination procedures by a minimum of 3 to 6 months. Any such delay would be extremely detrimental to SDVOSBs and VOSBs. It is likely that contracting personnel would not offer acquisition as a sole source or set-aside for VOSBs due to uncertainty that the businesses are actually owned and controlled by veterans, disabled veterans or their eligible surviving spouses. Currently, there is no mechanism other than U.S. Small Business Administration (SBA)'s regulations to validate Veteran-Owned Small Businesses and Service-Disabled Veteran-Owned Small Businesses (VOSBs/SDVOSBs) status through protests and appeals. There appear to be business concerns that are representing themselves as VOSBs/SDVOSBs to contracting officers. Under Public Law 109-461, VA contracting officers may now award sole source and set-aside contracts to business concerns that represent themselves as VOSBs/SDVOSBs. VA has good cause to publish this rule as an interim final rule in light of the urgent need to implement procedures to assure that a business concern is a VOSB/SDVOSB. This will

be accomplished through verification of ownership and control.

Moreover, immediate implementation of these rules will, at a minimum, permit VA to begin reviewing the basic information necessary to the verification process. This information will be necessary even if, as a result of comments received after this rulemaking, VA needs to revise any of the rules set forth herein.

In addition, many of these rules simply codify statutory language or instruction, adding mere descriptions of procedural or practice with no interpretation or substantive revision.

To that extent, these rules are not subject to the notice requirement of 5 U.S.C. 553(b)(3)(A). For example, the definition of "service-disabled veteran-owned small business concern" simply reflects the definition set forth in section 103 of Public Law 106-50.

Finally, VA also believes, based upon its contacts with interested members of the public, that there is strong interest in implementation of this rule. VA is aware of many acquisition opportunities and business concerns that will be assisted by the adoption of this rule. In order to implement the legislation and benefit these veterans as quickly as possible, it is critical that we begin our verification process immediately.

Regulatory Flexibility Act

The Secretary hereby certifies that this interim final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612.

This interim final rule would generally be small business neutral. Any negative impact on small businesses that are not owned by veterans would be off-set with an equal benefit to small businesses that are owned by veterans. The overall impact of the interim final rule will be of benefit to small businesses owned by veterans or service-disabled veterans. On this basis, the Secretary certifies that the adoption of this interim rule would not have a significant economic impact on a substantial number of small entities as they are defined in the RFA. Therefore, under 5 U.S.C. 605(b), this amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Order 12866

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential

economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Executive Order classifies a "significant regulatory action," requiring review by the Office of Management and Budget (OMB) unless OMB waives such review, as any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

The economic, interagency, budgetary, legal, and policy implications of this rule have been examined and it has been determined to be a significant regulatory action under the Executive Order.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any given year. This rule would have no such effect on State, local, and tribal governments, or the private sector.

Paperwork Reduction Act

This interim final rule contains provisions that constitute collections of information under the Paperwork Reduction Act (44 U.S.C. 3501-3521). OMB has approved these collections and has assigned control number 2900-0675. VA displays this control number under the applicable sections of the regulations in this interim final rule. OMB assigns control numbers to collections of information it approves. VA may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

List of Subjects in 38 CFR Part 74

Administrative practice and procedures, Privacy, Reporting and

recordkeeping requirements, Small business, Veteran, Veteran-owned small business, Verification.

Approved: February 1, 2008.

Gordon H. Mansfield,

Deputy Secretary of Veterans Affairs.

■ For the reasons set forth in the preamble, the Department of Veterans Affairs is amending 38 CFR chapter I by adding part 74 to read as follows:

PART 74—VETERANS SMALL BUSINESS REGULATIONS

General Guidelines

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Authority: 38 U.S.C. 501, 513, and as noted in specific sections.

General Guidelines

§ 74.1 What definitions are important for VetBiz Vendor Information Pages (VIP) verification?

For the purposes of part 74, the following definitions apply.

Center for Veterans Enterprise (CVE) is an office within the U.S. Department of Veterans Affairs (VA) and is a

subdivision of VA's Office of Small and Disadvantaged Business Utilization. The CVE helps veterans interested in forming or expanding their own small businesses. It also helps VA contracting offices identify veteran-owned small businesses and works with the Small Business Administration's Veterans Business Development Officers and Small Business Development Centers nationwide regarding veterans' business financing, management, and technical assistance needs.

Days are calendar days. In computing any period of time described in Part 74, the day from which the period begins to run is not counted, and when the last day of the period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal holiday. Similarly, in circumstances where CVE is closed for all or part of the last day, the period extends to the next day on which the agency is open.

Day-to-day management means supervising the executive team, formulating sound policies and setting strategic direction.

Day-to-day operations mean the marketing, production, sales, and administrative functions of the firm.

Eligible individual means a veteran, service-disabled veteran or surviving spouse, as defined in this section.

Immediate family member means father, mother, husband, wife, son, daughter, brother, sister, grandfather, grandmother, grandson, granddaughter, father-in-law, and mother-in-law.

Joint venture is an association of two or more small business concerns to engage in and carry out a single, specific business venture for joint profit, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally. For VA contracts, a joint venture must be in the form of a separate legal entity.

Negative control includes, but is not limited to, instances where a minority shareholder has the ability, under the concern's chapter, by-laws, or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders.

Non-veteran means any individual who does not claim veteran status, or upon whose status an applicant or participant does not rely in qualifying for VetBiz Vendor Information Pages (VIP) Verification Program participation.

Office of Small and Disadvantaged Business Utilization is the office within the Department of Veterans Affairs that establishes and monitors small business program goals at the prime and

subcontract levels and which functions as the ombudsman for veterans and service-disabled veterans seeking procurement opportunities with the Department.

Participant means a veteran-owned small business concern that has verified status in the VetBiz Vendor Information Pages database.

Primary industry classification means the six-digit North American Industry Classification System (NAICS) code designation which best describes the primary business activity of the participant. The NAICS code designations are described in the North American Industry Classification System (NAICS) Manual published by the U.S. Office of Management and Budget.

Principal place of business means the business location where the individuals who manage the concern's day-to-day operations spend most working hours and where top management's current business records are kept. If the office from which management is directed and where the current business records are kept are in different locations, CVE will determine the principal place of business for program purposes.

Same or similar line of business means business activities within the same three-digit "Major Group" of the NAICS Manual as the primary industry classification of the applicant or participant. The phrase "same business area" is synonymous with this definition.

Service-disabled veteran is a veteran who possesses either a disability rating letter issued by the Department of Veterans Affairs, establishing a service-connected rating between 0 and 100 percent, or a disability determination from the Department of Defense.

Service-disabled veteran-owned small business concern is a business not less than 51 percent of which is owned by one or more service-disabled veterans, or in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more service-disabled veterans; the management and daily business operations of which are controlled by one or more service-disabled veterans, or in the case of a veteran with a permanent and severe disability, a spouse or permanent caregiver of such veteran. In addition, some businesses may be owned and operated by an eligible surviving spouse. Reservists or members of the National Guard disabled from a disease or injury incurred or aggravated in the line of duty or while in training status also qualify.

Small business concern is—

(1) A small business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor. For purposes of this program, a small business concern must meet Federal size standards.

(2) A business concern may be in the legal form of an individual proprietorship, partnership, limited liability company, corporation, joint venture, association, trust or cooperative.

Surviving spouse is any individual identified as such by VA's Veterans Benefits Administration and listed in its database of veterans and family members. To be eligible for VetBiz VIP Verification, the following conditions must apply:

(1) If the death of the veteran causes the small business concern to be less than 51 percent owned by one or more veterans, the surviving spouse of such veteran who acquires ownership rights in such small business shall, for the period described in paragraph (2) of this definition, be treated as if the surviving spouse were that veteran for the purpose of maintaining the status of the small business concern as a service-disabled veteran-owned small business.

(2) The period referred to in paragraph (1) of this definition is the period beginning on the date on which the veteran dies and ending on the earliest of the following dates:

- (i) The date on which the surviving spouse remarries;
 - (ii) The date on which the surviving spouse relinquishes an ownership interest in the small business concern;
 - (iii) The date that is 10 years after the date of the veteran's death; or
 - (iv) The date on which the business concern is no longer small under Federal small business size standards,
- (3) The veteran must have had a 100 percent service-connected disability.

Note to definition of surviving spouse: For program eligibility purposes, the surviving spouse has the same rights and entitlements of the service-disabled veteran who transferred ownership upon his or her death.

Unconditional ownership means ownership that is not subject to conditions precedent, conditions subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights, or other arrangements causing or potentially causing ownership benefits to go to another (other than after death or incapacity). The pledge or encumbrance

of stock or other ownership interest as collateral, including seller-financed transactions, does not affect the unconditional nature of ownership if the terms follow normal commercial practices and the owner retains control absent violations of the terms.

VA is the U.S. Department of Veterans Affairs.

Vendor Information Pages (VIP) is a database of businesses eligible to participate in VA's Veteran-owned Small Business Program. The online database may be accessed at no charge via the Internet at <http://www.VetBiz.gov>.

Verification eligibility period is a 12-month period that begins on the date the Center for Veterans Enterprise issues the approval letter establishing verified status. The participant must submit a new application each year to continue eligibility.

VetBiz.gov (VetBiz) is a Web portal VA maintains at <http://www.VetBiz.gov>. It hosts the Vendor Information Pages database.

Veteran is a person who served on active duty with the U.S. Army, Air Force, Navy, Marine Corps or Coast Guard, for any length of time and at any place and who was discharged or released under conditions other than dishonorable. Reservists or members of the National Guard called to Federal active duty or disabled from a disease or injury incurred or aggravated in the line of duty or while in training status also qualify as a veteran.

Veteran-owned small business concern (VOSB) is a small business concern that is not less than 51 percent owned by one or more veterans, or in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more veterans; the management and daily business operations of which are controlled by one or more veterans and qualifies as "small" for Federal business size standard purposes. All service-disabled veteran-owned small business concerns (SDVOSBs) are also, by definition, veteran-owned small business concerns. When used in these guidelines, the term "VOSB" includes SDVOSBs.

Veterans Affairs Acquisition Regulation (VAAR) is the set of rules that specifically govern requirements exclusive to the U.S. Department of Veterans Affairs (VA) prime and subcontracting actions. The VAAR is chapter 8 of title 48, Code of Federal Regulations, and supplements the Federal Acquisition Regulation (FAR), which contains guidance applicable to most Federal agencies.

§ 74.2 What are the eligibility requirements a concern must meet for VetBiz VIP Verification?

(a) *Ownership and control.* A small business concern must be unconditionally owned and controlled by one or more eligible veterans, service-disabled veterans or surviving spouses, have completed the online Vendor Information Pages database forms at <http://www.VetBiz.gov>, and has been examined by VA's Center for Veterans Enterprise. Such businesses appear in the VIP database as "verified."

(b) *Good character.* Veterans, service-disabled veterans and surviving spouses with ownership interests in VetBiz verified businesses must have good character. Debarred or suspended concerns or concerns owned or controlled by debarred or suspended persons are ineligible for VetBiz VIP Verification.

(c) *False Statements.* If, during the processing of an application, CVE determines that an applicant has knowingly submitted false information, regardless of whether correct information would cause CVE to deny the application, and regardless of whether correct information was given to CVE in accompanying documents, CVE will deny the application. If, after verifying the Participant's eligibility, CVE discovers that false information has been knowingly submitted by a firm, CVE will remove the "verified" status from the VIP database and notify the business by phone and mail. Whenever CVE determines that the applicant submitted false information, the matter will be referred to the Office of Inspector General for review. In addition, the CVE will request that debarment proceedings be initiated by the Department.

(d) *Federal financial obligations.* Neither a firm nor any of its eligible individuals that fails to pay significant financial obligations owed to the Federal Government, including unresolved tax liens and defaults on Federal loans or other Federally assisted financing, is eligible for VetBiz VIP Verification.

§ 74.3 Who does Center for Veteran's Enterprise (CVE) consider to own a veteran-owned small business?

An applicant or participant must be at least 51 percent unconditionally and directly owned by one or more veterans or service-disabled veterans.

(a) *Ownership must be direct.* Ownership by one or more veterans or service-disabled veterans must be direct ownership. An applicant or participant owned principally by another business entity or by a trust (including employee

stock ownership trusts) that is in turn owned by one or more veterans or service-disabled veterans does not meet this requirement. However, ownership by a trust, such as a living trust, may be treated as the functional equivalent of ownership by a veteran or service-disabled veteran where the trust is revocable, and the veteran or service-disabled veteran is the grantor, a trustee, and the sole current beneficiary of the trust.

(b) *Ownership must be unconditional.* Ownership by one or more veterans or service-disabled veterans must be unconditional ownership. Ownership must not be subject to conditions precedent, conditions subsequent, executory agreements, voting trusts, restrictions on assignments of voting rights, or other arrangements causing or potentially causing ownership benefits to go to another (other than after death or incapacity). The pledge or encumbrance of stock or other ownership interest as collateral, including seller-financed transactions, does not affect the unconditional nature of ownership if the terms follow normal commercial practices and the owner retains control absent violations of the terms. In particular, CVE will evaluate ownership according to the following criteria for specific types of small business concerns.

(1) *Ownership of a partnership.* In the case of a concern that is a partnership, at least 51 percent of every class of partnership interest must be unconditionally owned by one or more veterans or service-disabled veterans. The ownership must be reflected in the concern's partnership agreement.

(2) *Ownership of a limited liability company.* In the case of a concern that is a limited liability company, at least 51 percent of each class of member interest must be unconditionally owned by one or more veterans or service-disabled veterans.

(3) *Ownership of a corporation.* In the case of a concern that is a corporation, at least 51 percent of each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding must be unconditionally owned by one or more veterans or service-disabled veterans.

(c) *Stock options' effect on ownership.* In determining unconditional ownership, CVE will disregard any unexercised stock options or similar agreements held by veterans or service-disabled veterans. However, any unexercised stock options or similar agreements (including rights to convert non-voting stock or debentures into voting stock) held by non-veterans will be treated as exercised, except for any

ownership interests that are held by investment companies licensed under part 107 of title 13, Code of Federal Regulations.

(d) *Profits and distributions.* One or more veterans or service-disabled veterans must be entitled to receive:

(1) At least 51 percent of the annual distribution of profits paid on the stock of a corporate applicant concern;

(2) 100 percent of the value of each share of stock owned by them in the event that the stock is sold; and

(3) At least 51 percent of the retained earnings of the concern and 100 percent of the unencumbered value of each share of stock owned in the event of dissolution of the corporation.

(e) *Change of ownership.* (1) A participant may remain eligible after a change in its ownership or business structure, so long as one or more veterans or service-disabled veterans own and control it after the change and the participant files a new application identifying the new veteran owners or their new business interest.

(2) Any participant that is performing contracts and desires to substitute one veteran owner for another shall submit a proposed novation agreement and supporting documentation in accordance with FAR Subpart 42.12 to the contracting officer prior to the substitution or change of ownership for approval.

(3) Where the transfer results from the death or incapacity due to a serious, long-term illness or injury of an eligible principal, prior approval is not required, but the concern must file a new application with the contracting officer and CVE within 60 days of the change. Existing contracts may be performed to the end of the instant term. However, no options may be exercised.

(4) Continued eligibility of the participant with new ownership and the award of any new contracts require that CVE verify all eligibility requirements are met by the concern and the new owners.

(f) *Community property laws given effect.* In determining ownership interests when an owner resides in any of the community property States or territories of the United States, CVE considers applicable State community property laws. If only one spouse claims veteran status, that spouse's ownership interest will be considered unconditionally held only to the extent it is vested by the community property laws.

§ 74.4 Who does CVE consider to control a veteran-owned small business?

(a) Control means both the day-to-day management and long-term decision-

making authority for the VOSB. Many persons share control of a concern, including each of those occupying the following positions: officer, director, general partner, managing partner, managing member and manager. In addition, key employees who possess expertise or responsibilities related to the concern's primary economic activity may share significant control of the concern. CVE will consider the control potential of such key employees on a case-by-case basis.

(b) Control is not the same as ownership, although both may reside in the same person. CVE regards control as including both the strategic policy setting exercised by boards of directors and the day-to-day management and administration of business operations. An applicant or participant's management and daily business operations must be conducted by one or more veterans or service-disabled veterans. Individuals managing the concern must have managerial experience of the extent and complexity needed to run the concern. A veteran need not have the technical expertise or possess a required license to be found to control an applicant or participant if he or she can demonstrate that he or she has ultimate managerial and supervisory control over those who possess the required licenses or technical expertise. However, where a critical license is held by a non-veteran having an equity interest in the applicant or participant firm, the non-veteran may be found to control the firm.

(c)(1) An applicant or participant must be controlled by one or more veterans or service-disabled veterans who possess requisite management capabilities. Owners need not work full-time but must show sustained and significant time invested in the business.

(2) An eligible full-time manager must hold the highest officer position (usually President or Chief Executive Officer) in the applicant or participant.

(3) One or more veterans or service-disabled veterans who manage the applicant or participant must devote full-time to the business during the normal working hours of firms in the same or similar line of business. Work in a wholly-owned subsidiary of the applicant or participant may be considered to meet the requirement of full-time devotion. This applies only to a subsidiary owned by the VOSB itself, and not to firms in which the veteran has a mere ownership interest.

(4) Except as provided in paragraph (d)(1) of this section, a veteran owner's unexercised right to cause a change in the management of the applicant

concern does not in itself constitute veteran control, regardless of how quickly or easily the right could be exercised.

(d) In the case of a partnership, one or more veterans or service-disabled veterans must serve as general partners, with control over all partnership decisions. A partnership in which no veteran is a general partner will be ineligible for participation.

(e) In the case of a limited liability company, one or more veterans or service-disabled veterans must serve as management members, with control over all decisions of the limited liability company.

(f) One or more veterans or service-disabled veterans must control the board of directors of a corporate applicant or participant.

(1) CVE will deem veterans or service-disabled veterans to control the board of directors where:

(i) A single veteran owns 100 percent of all voting stock of an applicant or participant concern;

(ii) A single veteran owns at least 51 percent of all voting stock of an applicant or participant, the individual is on the board of directors and no supermajority voting requirements exist for shareholders to approve corporation actions. Where supermajority voting requirements are provided for in the concern's articles of incorporation, its by-laws, or by State law, the veteran must own at least the percent of the voting stock needed to overcome any such supermajority voting requirements; or

(iii) No single veteran owns 51 percent of all voting stock but multiple veterans in combination do own at least 51 percent of all voting stock, each such veteran is on the board of directors, no supermajority voting requirements exist, and the veteran shareholders can demonstrate that they have made enforceable arrangements to permit one of them to vote the stock of all as a block without a shareholder meeting. Where the concern has supermajority voting requirements, the veteran shareholders must own at least that percentage of voting stock needed to overcome any such supermajority ownership requirements.

(2) Where an applicant or participant does not meet the requirements set forth in paragraph (d)(1) of this section, the veteran(s) upon whom eligibility is based must control the board of directors through actual numbers of voting directors or, where permitted by state law, through weighted voting (e.g., in a concern having a two-person board of directors where one individual on the board is a veteran and one is not, the

veteran vote must be weighted—worth more than one vote—in order for the concern to be eligible for VetBiz VIP Verification). Where a concern seeks to comply with this paragraph:

(i) Provisions for the establishment of a quorum cannot permit non-veteran directors to control the board of directors, directly or indirectly;

(ii) Any executive committee of the board of directors must be controlled by veteran directors unless the executive committee can only make recommendations to and cannot independently exercise the authority of the board of directors.

(3) Non-voting, advisory, or honorary directors may be appointed without affecting veterans' or service-disabled veterans' control of the board of directors.

(4) Arrangements regarding the structure and voting rights of the board of directors must comply with applicable state law.

(g) Non-veterans may be involved in the management of an applicant or participant, and may be stockholders, partners, limited liability members, officers, or directors of the applicant or participant. With the exception of a spouse or personal caregiver who represents a severely disabled veteran owner, no such non-veteran or immediate family member may:

(1) Exercise actual control or have the power to control the applicant or participant;

(2) Be a former employer or a principal of a former employer of any affiliated business of the applicant or participant, unless it is determined by the CVE that the relationship between the former employer or principal and the eligible individual or applicant concern does not give the former employer actual control or the potential to control the applicant or participant and such relationship is in the best interests of the participant firm; or

(3) Receive compensation from the applicant or participant in any form as directors, officers or employees, including dividends, that exceeds the compensation to be received by the highest officer (usually chief executive officer or president). The highest ranking officer may elect to take a lower salary than a non-veteran only upon demonstrating that it helps the applicant or participant.

(h) Non-veterans who transfer majority stock ownership or control of the firm to an immediate family member within 2 years prior to the application and remain involved in the firm as a stockholder, officer, director, or key employee of the firm are presumed to control the firm. The presumption may

be rebutted by showing that the transferee has independent management experience necessary to control the operation of the firm, and indeed is participating in the management of the firm.

(i) Non-veterans or entities may be found to control or have the power to control in any of the following circumstances, which are illustrative only and not all inclusive:

(1) Non-veterans control the board of directors of the applicant or participant, either directly through majority voting membership, or indirectly, where the by-laws allow non-veterans effectively to prevent a quorum or block actions proposed by the veterans or service-disabled veterans.

(2) A non-veteran or entity, having an equity interest in the applicant or participant, provides critical financial or bonding support or a critical license to the applicant or participant which directly or indirectly allows the non-veteran significantly to influence business decisions of the participant, unless an exception is authorized by the Office of Small and Disadvantaged Business Utilization.

(3) A non-veteran or entity controls the applicant or participant or an individual veteran owner through loan arrangements. Providing a loan guaranty on commercially reasonable terms does not, by itself, give a non-veteran or entity the power to control a firm.

(4) Business relationships exist with non-veterans or entities which cause such dependence that the applicant or participant cannot exercise independent business judgment without great economic risk.

§ 74.5 How does CVE determine affiliation?

The Center for Veterans Enterprise applies the affiliation rules established by the Small Business Administration in 13 CFR 121.

Application Guidelines

§ 74.10 Where must an application be filed?

An application for VetBiz VIP Verification status must be electronically filed in the Vendor Information Pages database located in the Center for Veterans Enterprise's Web portal, <http://www.VetBiz.gov>. Guidelines and forms are located on the Web portal. Upon receipt of the applicant's electronic submission, an acknowledgment message will be dispatched to the concern, containing estimated processing time and other information. Address information for the CVE is also contained on the Web portal. Correspondence may be

dispatched to: Director, Center for Veterans Enterprise (00VE), U.S. Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420.

(The Office of Management and Budget has approved the information collection provisions in this section under control number 2900-0675.)

§ 74.11 How does CVE process applications for VetBiz VIP Verification?

(a) The Director, Center for Veterans Enterprise, is authorized to approve or deny applications for VetBiz VIP Verification. The CVE will receive, review and evaluate all VetBiz VIP Verification applications. CVE will advise each applicant within 30 days after the receipt of an application whether the application is complete and suitable for evaluation and, if not, what additional information or clarification is required to complete the application. CVE will process an application for VetBiz VIP Verification status within 60 days of receipt of a complete application package. Incomplete application packages will not be processed.

(b) CVE, in its sole discretion, may request clarification of information contained in the application at any time in the eligibility determination process. CVE will take into account any clarifications made by an applicant in response to a request for such by CVE.

(c) An applicant's eligibility will be based on circumstances existing on the date of application, except where clarification is made pursuant to paragraph (b) of this section or as provided in paragraph (d) of this section.

(d) Changed circumstances for an applicant occurring subsequent to its application and which adversely affect eligibility will be considered and may constitute grounds for denial of the application. The applicant must inform CVE of any changed circumstances that could adversely affect its eligibility for the program (i.e., ownership or control changes) during its application review. Failure to inform CVE of any such changed circumstances constitutes good cause for which CVE may withdraw verified status for the participant if non-compliance is discovered after a participant has been verified.

(e) The decision of the Director, CVE, to approve or deny an application will be in writing. A decision to deny verification status will state the specific reasons for denial, and will inform the applicant of any appeal rights.

(f) If the Director, CVE, approves the application, the date of the approval letter is the date of participant verification for purposes of determining

the participant's verification eligibility term.

(The Office of Management and Budget has approved the information collection provisions in this section under control number 2900-0675.)

§ 74.12 What must a concern submit to apply for VetBiz VIP Verification?

Each VetBiz VIP Verification applicant must submit the electronic forms and attachments CVE requires. All electronic forms are available on the VetBiz.gov Vendor Information Pages database Web pages. At the time the applicant dispatches the electronic forms, the applicant must also retain on file at the principal place of business a completed copy of the electronic forms supplemented by manual records that will be used in verification examinations. These forms and attachments will include, but not be limited to, financial statements, Federal personal and business tax returns, payroll records and personal history statements. An applicant must also retain in the application file IRS Form 4506, Request for Copy or Transcript of Tax Form. These materials shall be filed together to maximize efficiency of verification examination visits. Together with the electronic documents, these manual records will provide the CVE verification examiner with sufficient information to establish the management, control and operating status of the business on the date of submission.

(The Office of Management and Budget has approved the information collection provisions in this section under control number 2900-0675.)

§ 74.13 Can an applicant ask CVE to reconsider its initial decision to deny an application?

(a) An applicant may request that the Director, CVE, reconsider his or her decision to deny an application by filing a request for reconsideration with CVE within 30 days of receipt of CVE's denial decision. "Filing" means a document is received by CVE by 5:30 p.m., eastern time, on that day. Documents may be filed by hand delivery, mail, commercial carrier, or facsimile transmission. Hand delivery and other means of delivery may not be practicable during certain periods due, for example, to security concerns or equipment failures. The filing party bears the risk that the delivery method chosen will not result in timely receipt at CVE.

(b) The Director, CVE, will issue a written decision within 30 days of receipt of the applicant's request. The Director, CVE, may either approve the

application, deny it on the same grounds as the original decision, or deny it on other grounds. If denied, the Director, CVE, will explain why the applicant is not eligible for the VetBiz VIP Verification and give specific reasons for the denial.

(c) If the Director, CVE denies the application solely on issues not raised in the initial denial, the applicant may ask for reconsideration as if it were an initial denial.

(d) If CVE determines that a concern may not qualify as small, they may directly deny an application for VetBiz VIP Verification or may request a formal size determination from the U.S. Small Business Administration (SBA). A concern whose application is denied because it is other than a small business concern by CVE may request a formal size determination from the SBA Associate Administrator, Office of Government Contracting (ATTN: Director, Office of Size Standards), 409 3rd Street, SW., Washington, DC 20416. A favorable determination by SBA will enable the firm to immediately submit a new VetBiz VIP Verification.

(e) A denial decision that is based on the failure to meet any veteran or service-disabled veteran eligibility criteria is not subject to a request for reconsideration and is the final decision of CVE.

(f) Except as provided in paragraph (c) of this section, the decision on the request for reconsideration shall be final.

§ 74.14 Can an applicant reapply for admission to the VetBiz VIP Verification program?

A concern which has been denied eligibility for VetBiz VIP Verification program on the basis of ineligibility of veteran, service-disabled veteran or surviving spouse status may submit a new application for admission to the program as soon as eligibility status is finalized. In cases in which the denial stemmed from ownership, control or size factors, the applicant may file as soon as identified issues have been corrected. Once an application and its appeal have been denied, the applicant will be required to wait for a period of 6 months before a new application will be considered.

§ 74.15 What length of time may a business participate in VetBiz VIP Verification?

(a) A participant receives an eligibility term of 1 year from the date of CVE's approval letter establishing verified status. The participant must maintain its eligibility during its tenure and must inform CVE of any changes that would

adversely affect its eligibility. The eligibility term may be shortened by cancellation by CVE or voluntary withdrawal by the participant (i.e., no longer eligible as a small business concern), as provided for in this subpart.

(b) When at least 50 percent of the assets of a concern are the same as those of an affiliated business, the concern will not be eligible for verification.

(c) CVE may initiate a verification examination whenever it receives credible information calling into the question a participant's eligibility as a VOSB. Upon its completion of the examination, CVE will issue a written decision regarding the continued eligibility status of the questioned participant.

(d) If CVE finds that the participant does not qualify as a VOSB, CVE will immediately remove the "verified" status of the firm from the VetBiz Vendor Information Pages database. CVE will call and mail the participant with specifics that led to the cancellation action. The participant may file a request for reconsideration of CVE's decision in accordance with § 74.13.

(e) If CVE finds that the participant continues to qualify as a VOSB, the program term remains in effect.

Oversight Guidelines

§ 74.20 What is a verification examination and what will CVE examine?

(a) *General.* A verification examination is an investigation by CVE officials, which verifies the accuracy of any statement or information provided as part of the VetBiz VIP Verification application process. Thus, examiners may verify that the concern currently meets the eligibility requirements, and that it met such requirements at the time of its application or its most recent size recertification. An examination may be conducted on a random basis, or upon receipt of specific and credible information alleging that a participant no longer meets eligibility requirements.

(b) *Scope of examination.* CVE may conduct the examination, or parts of the program examination, at one or all of the participant's offices. CVE will determine the location of the examination. Examiners may review any information related to the concern's eligibility requirements including, but not limited to, documentation related to the legal structure, ownership and control of the concern. As a minimum, examiners shall review all documents supporting the application, as described in § 74.12. These include: financial statements; Federal personal and

business tax returns; personal history statements; and Request for Copy or Transcript of Tax Form (IRS Form 4506) for up to 3 years. Other documents, which may be reviewed include (if applicable): Articles of Incorporation/Organization; corporate by-laws or operating agreements; organizational, annual and board/member meeting records; stock ledgers and certificates; State-issued Certificates of Good Standing; contract, lease and loan agreements; payroll records; bank account signature cards; and licenses.

§ 74.21 What are the ways a business may exit VetBiz VIP Verification status?

A participant may:

(a) Voluntarily cancel its status by submitting a written request to CVE requesting that the "verified" status button be removed from the Vendor Information Pages database; or

(b) Delete its record entirely from the Vendor Information Pages database; or

(c) CVE may cancel the "verified" status button for good cause upon formal notice to the participant. Examples of good cause include, but are not limited to, the following:

(1) Submission of false information in the participant's VetBiz VIP Verification application.

(2) Failure by the participant to maintain its eligibility for program participation.

(3) Failure by the participant for any reason, including the death of an individual upon whom eligibility was based, to maintain ownership, management, and control by veterans, service-disabled veterans or surviving spouses.

(4) Failure by the concern to disclose to CVE the extent to which non-veteran persons or firms participate in the management of the participant.

(5) Debarment, suspension, voluntary exclusion, or ineligibility of the participant or its owners.

(6) A pattern of failure to make required submissions or responses to CVE in a timely manner, including a failure to make available financial statements, requested tax returns, reports, information requested by CVE or VA's Office of Inspector General, or other requested information or data within 30 days of the date of request.

(7) Cessation of the participant's business operations.

(8) Failure by the concern to pay or repay significant financial obligations owed to the Federal Government.

(9) Failure by the concern to obtain and keep current any and all required permits, licenses, and charters, including suspension or revocation of any professional license required to operate the business.

(10) Failure by the concern to provide an updated application (VA Form 0877) within 60 days of any change in ownership.

(d) The examples of good cause listed in paragraph (c) of this section are intended to be illustrative only. Other grounds for canceling a participant's verified status include any other cause of so serious or compelling a nature that it affects the present responsibility of the participant.

§ 74.22 What are the procedures for cancellation?

(a) *General.* When CVE believes that a participant's verified status should be cancelled prior to the expiration of its eligibility term, CVE will notify the participant in writing. The Notice of Proposed Cancellation Letter will set forth the specific facts and reasons for CVE's findings, and will notify the participant that it has 30 days from the date it receives the letter to submit a written response to CVE explaining why the proposed ground(s) should not justify cancellation.

(b) *Recommendation and decision.* Following the 30-day response period, the Director, CVE, will consider any information submitted by the participant. Upon determining that cancellation is not warranted, the Director, CVE, will notify the participant in writing. If cancellation appears warranted, the Director, CVE, will make a decision whether to cancel the participant's verified status.

(c) *Notice requirements.* Upon deciding that cancellation is warranted, the Director, CVE, will issue a Notice of Verified Status Cancellation. The Notice will set forth the specific facts and reasons for the decision, and will advise the concern that it may re-apply after it has met all eligibility criteria.

(d) *Effect of verified status cancellation.* After the effective date of cancellation, a participant is no longer eligible to appear as "verified" in the VetBiz VIP database. However, such concern is obligated to perform previously awarded contracts to the completion of their existing term of performance.

Records Management

§ 74.25 What types of personally identifiable information will VA collect?

In order to establish owner eligibility, the Department will collect individual names and Social Security numbers for veterans, service-disabled veterans and surviving spouses who represent themselves as having ownership and control interests in a specific business seeking to obtain verified status.

§ 74.26 What types of business information will VA collect?

VA will examine a variety of business records. See § 74.12, “What is a verification examination and what will CVE examine?”

§ 74.27 How will VA store information?

VA intends to store records provided to complete the VetBiz Vendor Information Pages registration fully electronically on the Department’s secure servers. CVE personnel will compare information provided concerning owners who have veteran status, service-disabled veteran status or surviving spouse status against electronic records maintained by the

Department’s Veterans Benefits Administration. Records collected during examination visits will be scanned onto portable media and fully secured in the Center for Veterans Enterprise, located in Washington, DC.

§ 74.28 Who may examine records?

Personnel from the Department of Veterans Affairs, Center for Veterans Enterprise and its agents, including personnel from the Small Business Administration, may examine records to ascertain the ownership and control of the applicant or participant.

§ 74.29 When will VA dispose of records?

The records, including those pertaining to businesses not determined to be eligible for the program, will be kept intact and in good condition for seven years following a program examination or the date of the last Notice of Verified Status Approval letter. Longer retention will not be required unless a written request is received from the Government Accountability Office not later than 30 days prior to the end of the retention period.

(Authority: 38 U.S.C. 8127(f)).

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