

**PART 380—RATES AND TERMS FOR CERTAIN ELIGIBLE NONSUBSCRIPTION TRANSMISSIONS, NEW SUBSCRIPTION SERVICES AND THE MAKING OF EPHEMERAL REPRODUCTIONS**

■ 1. The authority citation for part 380 of title 37 of the Code of Federal Regulations as follows:

**Authority:** 17 U.S.C. 112(e), 114(f), 804(b)(3).

■ 2. Section 380.3 is amended by revising paragraph (b) to read as follows:

**§ 380.3 Royalty fees for the public performance of sound recordings and for ephemeral recordings.**

\* \* \* \* \*

(b) *Minimum fee*—(1) *Commercial Webcasters*. Each Commercial Webcaster will pay an annual, nonrefundable minimum fee of \$500 for each calendar year or part of a calendar year of the period 2006–2010 during which it is a Licensee pursuant to 17 U.S.C. 112(e) or 114. This annual minimum fee is payable for each individual channel and each individual station maintained by Commercial Webcasters, and is also payable for each individual Side Channel maintained by Broadcasters who are Commercial Webcasters, provided that a Commercial Webcaster shall not be required to pay more than \$50,000 per calendar year in minimum fees in the aggregate (for 100 or more channels or stations). The minimum fee payable under 17 U.S.C. 112 is deemed to be included within the minimum fee payable under 17 U.S.C. 114. Upon payment of the minimum fee, the Commercial Webcaster will receive a credit in the amount of the minimum fee against any royalty fees payable in the same calendar year.

(2) *Noncommercial Webcasters*. Each Noncommercial Webcaster will pay an annual, nonrefundable minimum fee of \$500 for each calendar year or part of a calendar year of the license period during which they are Licensees pursuant to licenses under 17 U.S.C. 114. This annual minimum fee is payable for each individual channel and each individual station maintained by Noncommercial Webcasters and is also payable for each individual Side Channel maintained by Broadcasters who are Licensees. The minimum fee payable under 17 U.S.C. 112 is deemed to be included within the minimum fee payable under 17 U.S.C. 114. Upon payment of the minimum fee, the Licensee will receive a credit in the amount of the minimum fee against any additional royalty fees payable in the same calendar year.

Dated: February 2, 2010.

**James Scott Sledge,**

*Chief U.S. Copyright Royalty Judge.*

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**DEPARTMENT OF VETERANS AFFAIRS**

**38 CFR Part 74**

**RIN 2900–AM78**

**VA Veteran-Owned Small Business Verification Guidelines**

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Final rule with request for comments.

**SUMMARY:** This document affirms as final, with changes, an interim final rule that 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, including service-disabled veteran-owned small businesses. This final rule defines the eligibility requirements for businesses to obtain “verified” status, explains examination procedures, and establishes records retention and review processes. The final rule retains the interim final rule with changes based on the comments received. This document additionally implements new interim final requirements, that eligible owners work full-time in the business for which they have applied for acceptance in the Verification Program, changes the time period for issuance of reconsideration decisions from 30 to 60 days, and changes the distribution of profits for limited liability companies and employee stock ownership plans and solicits comments on these regulatory amendments only.

**DATES:** *Effective Date:* February 8, 2010.

*Comment Date:* Comments on the interim final amendments only must be received on or before March 10, 2010.

**ADDRESSES:** Written comments may be submitted through <http://www.Regulations.gov>; by mail or hand delivery to the Director, Regulations Management (02REG), 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 (this is not a toll-free number) for an appointment. In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at <http://www.Regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Ms. Gail Wegner, Acting Director, Center for Veterans Enterprise (00VE), Department of Veterans Affairs, 810 Vermont Ave., NW., Washington, DC 20420, phone (202) 303–3260 x5239.

**SUPPLEMENTARY INFORMATION:**

In an interim final rule published in the **Federal Register** on May 19, 2008 (73 FR 29024), we established new 38 CFR part 74 setting forth a mechanism for verifying ownership and control of veteran-owned small businesses (VOSBs), including service-disabled veteran-owned small businesses (SDVOSBs). We provided a 60-day comment period which ended on July 18, 2008. We received comments from five commenters. The issues raised in the comments are discussed below. Based on the rationale set forth in the interim final rule and in this document, we are adopting the provisions of the interim final rule as a final rule with changes explained below. Due to the nature of the changes and for the convenience of the reader, the regulation text portion of this document restates all of revised part 74.

a. *Eligibility of surviving spouses.* One commenter expressed the opinion that a surviving spouse of a veteran who had any disability rating should be permitted to maintain a VOSB or a SDVOSB for as long as the spouse owns and controls the business.

The rule is consistent with Congress’s limitation set forth in 38 U.S.C. 8127(h)(3), which permits the surviving spouse to maintain the status of a VOSB or SDVOSB only if the veteran was rated as 100 percent disabled or the veteran dies as a result of a service-connected disability. VA does not have authority under section 8127 to expand VOSB or SDVOSB status as the commenter suggests. We will not make any changes to the rule based on the comment.

b. *Yearly verification.* One commenter suggested that an annual signed statement by the veteran business owner stating there are no changes in ownership or control should be sufficient to protect the Department’s interests. If ownership or control changes, it should be mandated that the business owner report it immediately to

the Center for Veterans Enterprise (CVE), and the CVE may determine it necessary to redo the verification application process entirely. 38 CFR 74.3(e) and 74.21(c)(10) established that a business has up to 60 days after a change of ownership to file a new VA Form 0877, VetBiz VIP Verification Program application. This timeframe was established with sensitivity to the needs of surviving spouses and others who may have significant demands due to health or medical challenges. 38 CFR 74.15 also establishes that eligibility is limited to 1 year. VA has determined that annual examinations are necessary to ensure the integrity of the Verification Program. This is consistent with the annual Federal size recertification requirement in the Central Contractor Registry.

c. Examination visits should concentrate on management and control of operations to establish that a company is truly independent and not a representative of a non-veteran-owned business employing the veteran on a commission or fee basis. Two commenters expressed concern about legitimate parties controlling veteran-owned small businesses. One commenter suggested that examination visits should examine the actual business relationship among the partners, to include: Individuals who control bank account number, terms, lines of credit, sale price of goods and services, contracts for purchase of goods and services, and acceptance of quotations from suppliers. This commenter also recommended reviewing records to establish that the eligible party and not the non-veteran is receiving funds from payments and distributing funds to employees and contractors and to ensure that there is no record of a payment, including a percentage or commission, to the eligible party from a non-veteran. The second commenter recommended that examination visits of pharmaceutical distributors include inspection of Pedigree or E-Pedigree filings, state-issued pharmaceutical licenses, and the product liability insurance policy to ensure that the business name and manager/owner signatures match and that insurance policies are current and have an aggregate value of 5 million dollars. We make no changes to the rule based on this comment. 38 CFR 74.3–4 address examples of ownership and control. 38 CFR 74.20(b) establishes that the scope of examination is not limited to the documents identified in that section. It only establishes that examiners shall review those documents as a minimum and provides the CVE

with the flexibility to examine other records. VA has determined for administrative purposes, it is not practical to have specific document review requirements for particular industries. The rule provides VA the discretion to review any pertinent documents necessary to satisfy Verification requirements.

d. *Site visits.* One commenter recommended that the Department conduct an on-site visit at the applicant's place of business for 100 percent of the applications found to be complete. The site visit must include attendance by the veteran owner(s) and executive management team (if applicable). The purpose of the visit would be to substantiate information on the application and to review business operations. Any conflicts would be subject to a second review. The site visit would be mandatory for the initial application and subsequent visits would occur every three years as part of the recertification process, or more frequently at the applicant's discretion. Such initial site visits would be performed within 60 days of receipt of the complete application package. The site visit would be at no cost to the business, and the government would agree that there would not be unscheduled site visits.

In the interim final rule, 38 CFR 74.20(a) provided that the Department reserves the right to conduct random verification examinations of applicants. Also, the interim final rule provided at 38 CFR 74.20(b) that VA could determine to conduct all or part of the verification examination at the applicant's offices. First, VA is revising 38 CFR 74.20(a) to clarify that its intent was that verification examinations, including site visits, may be random and unannounced. Next, in addressing the commenter, conducting 100 percent site visits upon receipt of complete applications is not in the best interests of the Department as many of the businesses that are seeking verification are brand new and have not yet applied for any Federal or VA contracts. Also VA finds that mandatory site visits could be an unnecessary burden to vendors when VA can adequately verify firms through other means, such as document review. The Department will monitor awards to companies in the Verification Program and make decisions on which companies to inspect using a combination of factors, including staffing and funding. VA does not have the resources to conduct 100 percent site visit for all applicant firms in the VIP database. We will not make any changes to the rule based on the comment.

e. Relationship between VA's Verification Program and the government-wide SDVOSB protest process under the Federal Acquisition Regulations (FAR), 48 CFR 19.302 and 19.307. One commenter sought clarification on the relationship between the Department's Verification Program and the protest procedures contained in the FAR. Specifically, a question was submitted regarding the Department's intended action when the Small Business Administration finds a firm ineligible due to a protest decision.

We agree with the commenter that clarification is needed, and § 74.2(e) has been added to include guidance in these cases. Any firm registered in the VA VetBiz VIP database that is found to be ineligible due to an SBA protest decision or other negative finding will be immediately removed from the VetBiz VIP database.

f. *Appeals of verification application denial or program cancellation decisions.* One respondent recommended that the Department establish an appeals process for matters limited to the Verification Program. Requests for reconsideration of application denial decisions are addressed in 38 CFR 74.13, "Can an applicant ask CVE to reconsider its initial decision to deny an application?" The language has been revised to add the mailing address for submission of requests for reconsideration. The Director, CVE, shall make the decision on requests for reconsideration of application denials, and 38 CFR 74.13(b) has been revised to reflect that the timeframe for the issuance of a decision has changed from 30 days to 60 days to allow for a thorough consideration of the applicant's request. The decision of the Director, CVE shall be final with no further appeal rights. This document additionally revises the interim final requirement, for the issuance of a decision from 30 days to 60 days, to allow for a more thorough consideration of the applicant's request and solicits comments on this regulatory amendment.

With regard to businesses that are already participants in the Verification program, the rule provides procedures for cancellation of verified status, as described in 38 CFR 74.22. The interim final rule provided that the Director, CVE would issue cancellation decisions. The final rule has been modified such that the Director, CVE issues a Notice of Verified Status Cancellation; however, a participant may appeal this notice to the Executive Director, Office of Small and Disadvantaged Business Utilization. Section 74.22(e) provides that the Executive Director, Office of Small and

Disadvantaged Business Utilization and Center for Veterans Enterprise shall render a decision on such an appeal within 60 days after receipt.

*g. Full-time control:* One commenter suggested that the Department revise 38 CFR 74.4(c)(1) to require the eligible party to work full-time in order to establish control of the firm. The commenter suggested that the original language which requires owners "show sustained and significant time invested in the business" is insufficient to protect the interests of the program and of the Department. The commenter offered alternate language that would "require the veteran to devote the majority of his/her time to managing the concern." This commenter further recommended "permitting the veteran to be engaged in outside employment/management activities only where he/she can show that doing so won't have a significant impact on his/her ability to run the VOSB or SDVOSB."

Based on this comment, we have revised § 74.4(c)(1) to clarify the issue of control of a VOSB and SDVOSB. In lieu of the commenter's suggested language, VA has revised the interim final rule to require an eligible owner have only one business in the program at one time and must work full-time in the business. VA has determined that this revision will ensure the integrity of the program. In addition, VA has defined "full-time" in 38 CFR 74.1. The public is invited to comment on the requirement for full-time work in the business.

*h. Ownership: Profits and distributions.* Two comments were received concerning 38 CFR 74.3. One respondent recommended revising 74.3(a) to adopt language from the Internal Revenue Code, 26 U.S.C. 1563(c)(2)(B), which states that stock in a corporation that is held by an employees' trust described in section 401(a) of the Code will be treated as "excluded stock" if 5 or fewer persons who are individuals, estates, or trusts own 50 percent or more of the total combined voting power of the corporation. Under this proposed language, if 4 individuals own 10 percent each and an Employee Stock Ownership Plan (ESOP) owns 60 percent, the stock held by the ESOP would be treated as excluded stock, and the four individuals would be treated as owning 100 percent of the outstanding stock. In this example, eligible parties would be required to own 51 percent or more of the outstanding stock (excluding the ESOP stock). Conversely, if there were 10 shareholders who own 9 percent each and an ESOP that owns 10 percent, the ESOP stock would be treated as outstanding stock. In this

case, eligible parties would be required to own 51 percent of all outstanding stock, including the ESOP stock.

The original text required that veterans own 51 percent of the outstanding stock (including employee stock ownership trusts). VA accepts this comment and has revised 38 CFR 74.3(a). The net effect of this change is that a company that is closely held by veterans would qualify regardless of the size of the ESOP. Alternatively, a firm that is not closely held by veterans will find it much more difficult to qualify for the Verification Program. This commenter noted that there are a number of government programs that are designed to encourage employee ownership as a technique to encourage teamwork, reduce employee turnover, and increase productivity. Adopting this change affects a small number of VOSBs and SDVOSBs that have adopted ESOPs and is consistent with the intent and spirit of public policy objectives.

The second commenter recommended expanding 38 CFR 74.3(d) to state that a veteran's ability to share in the profits of a concern should be commensurate with the extent of his/her ownership interest in that concern. Such revision would also cover limited liability companies (LLC) and partnership structures. For instance, if a VOSB owns 51 percent of an LLC, he/she would be entitled to receive 51 percent of the profits of that LLC.

VA accepts this comment and has revised 38 CFR 74.3(d)(3) to include a partnership or an LLC. Additionally, 38 CFR 74.3(d)(4) has been added to state that an eligible individual's ability to share in the profits of the concern should be commensurate with the extent of his/her ownership interest in that concern. This document additionally revises the interim final requirement for the evaluation of profits and distributions to determine ownership interest in ESOPs and LLCs and solicits comments on this regulatory amendment.

#### **Other Non-Substantive Changes to the Final Rule: The Changes Below Serve To Clarify Particular Items From the Interim Final Rule in This Final Rule**

The section headings of §§ 74.1, 74.11, 74.12, 74.15, and 74.21 have been revised to include the word "Program" following verification.

The definition of small business concern has been revised for purpose of consistency to refer to the FAR Part 2 definition of small business.

The definition of surviving spouse has been revised to add "or died as a direct result of a service-connected disability"

to be consistent with the statutory definition at 38 U.S.C. 8127(h)(3).

The term "in the line of duty" in the definition of veteran has been changed to "in line of duty" to be consistent with the term of art as used in title 38 of the United States Code.

The options for transmitting decisions on applications and requests for reconsideration have been clarified, as stated in 38 CFR 74.11(g) and 74.13(g), to include mail, commercial carrier, facsimile, or other electronic means.

VA has revised language in 38 CFR 74.14 to clarify the time period for reapplication for admission to the VA VetBiz VIP Verification Program. "Or participant" has been added to address those concerns whose verification status is cancelled.

#### *Administrative Procedure Act*

Regarding the new interim final amendments published within this final rule at 38 CFR 74.1 and 74.4(c)(1), 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 and with the 30-day delayed effective date. Advance solicitation of comments on the additional interim final provisions would be impracticable and contrary to the public interest, as it could delay VA's examination and verification procedures. VA has good cause to publish the interim final provisions in light of the urgent need to ensure that business concerns are being properly characterized as VOSBs or SDVOSBs, which is accomplished through verification of ownership and control. Immediate implementation of these provisions is consistent with the prior interim final rule and permits VA to continue reviewing basic information necessary to the verification process. This information is necessary even if, as a result of any additional comments received after publication of this notice, VA needs to further revise any of the rules set forth herein. Accordingly, VA has found good cause for the additional interim final provisions to become effective upon publication.

#### **Regulatory Flexibility Act**

The Secretary hereby certifies that this 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 final rule would generally be small business neutral as it applies only to applying for verified status in the VetBiz.gov VIP database. The overall impact of the final rule will be of benefit to small businesses owned by veterans

or service-disabled veterans. VA estimates the cost to an individual business to be less than \$100.00 for 70–75 percent of the businesses seeking verification, and the average cost to the entire population of veterans seeking to become verified is less than \$325.00 on average. A related rule describes the effect that verified businesses will have in the Department's acquisition regulation. This impact is discussed in the proposed rule modifying the VA Acquisition Regulation which was published in the **Federal Register** at 73 FR 49141 on August 20, 2008. On this basis, the Secretary certifies that the adoption of this final rule would 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. Therefore, under 5 U.S.C. 605(b), this regulation 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 on the private sector.

#### Paperwork Reduction Act

This 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 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.

#### Catalog of Federal Domestic Assistance

This final rule affects the verification guidelines of veteran-owned small businesses, for which there is no Catalog of Federal Domestic Assistance program 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: October 5, 2009.

**John R. Gingrich,**

*Chief of Staff, Department of Veterans Affairs.*

■ Accordingly, the interim final rule adding 38 CFR Part 74, which was published in the **Federal Register** at 73 FR 29024, on May 19, 2008, is adopted as a final rule with changes, as follows:

### PART 74—VETERANS SMALL BUSINESS REGULATIONS

#### General Guidelines

Sec.

- 74.1 What definitions are important for VetBiz Vendor Information Pages (VIP) Verification Program?
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#### Records Management

- 74.25 What types of personally identifiable information will VA collect?
- 74.26 What types of business information will VA collect?
- 74.27 How will VA store information?
- 74.28 Who may examine records?
- 74.29 When will VA dispose of records?

**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 Program?

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.

*Full-time* means working at the business during the normal working hours, which equate to Monday through Friday, approximately 9 a.m. to 5 p.m.

*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 line of duty or while in training status also qualify.

*Small business concern* is—CVE applies the small business concern definition established by 48 CFR 2.101.

*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 or died as a direct result of a 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 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 Program?**

(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.

(e) *U.S. Small Business Administration (SBA) Protest Decisions.* Any firm registered in the VetBiz VIP database that is found to be ineligible due to an SBA protest decision or other negative finding will be immediately removed from the VetBiz VIP database. Until such time as CVE receives official notification that the firm has proven that it has successfully overcome the grounds for the determination or that the SBA decision is overturned on appeal, the firm will not be eligible to participate in the 38 U.S.C. 8127 program.

**§ 74.3 Who does the Center for Veterans 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 plans [ESOP]) 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. For employee stock ownership plans where 5 or fewer persons who are individuals, estates, or trusts own 50 percent or more of the total combined voting power of the corporation, the employee plan will be determined to be "excluded stock" and eligible parties must control 51 percent or more of the

combined voting power of the corporation. For employee stock ownership plans where greater than 5 persons who are individuals, estates, or trusts own 50 percent or more of the total stock, eligible parties must control 51 percent or more of the combined voting power of the corporation, including the ESOP stock.

(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, executive 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 to the owners of a corporate, partnership, or LLC 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, partnership, or LLC.

(4) An eligible individual's ability to share in the profits of the concern should be commensurate with the extent of his/her ownership interest in that concern.

(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 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. With the exception of joint-venture agreements, an eligible owner may only have one business participating in the Verification Program at one time and must work full-time in the business as defined in § 74.1.

(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 veteran owners 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 super majority 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 part 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 requirements in this section under control number 2900-0675.)

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

(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, when practicable, 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, when practicable, 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.

(g) The decision may be sent by mail, commercial carrier, facsimile transmission, or other electronic means.

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

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

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 requirements 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. Submit requests for reconsideration to: Director, Center for Veterans Enterprise (00VE), U.S. Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420. A formal decision will be issued within 60 days after receipt.

(b) The Director, CVE, will issue a written decision within 60 days, when practicable, 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.

(g) The decision may be sent by mail, commercial carrier, facsimile transmission, or other electronic means.

**§ 74.14 Can an applicant or participant reapply for admission to the VetBiz VIP Verification Program?**

Once an application, a request for reconsideration, or an appeal to a cancellation notice, as applicable, has been denied, the applicant or participant shall be required to wait for

a period of 6 months before a new application will be processed by CVE.

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

(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, the procedures at § 74.22 will apply.

(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, unannounced 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 Program 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.

(e) *Appeals.* A participant may file an appeal with the Executive Director, Office of Small and Disadvantaged Business Utilization and Center for Veterans Enterprise, concerning the Notice of Verified Status Cancellation within 30 days of receipt of CVE’s cancellation 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. Submit appeals to: Executive Director, Office of Small and Disadvantaged Business Utilization and Center for Veterans Enterprise (00VE), U.S. Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420. A formal decision will be issued within 60 days after receipt. The decision on the appeal shall be final.

**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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**BILLING CODE P**

**POSTAL REGULATORY COMMISSION**

**39 CFR Part 3020**

[Docket Nos. MC2010-14 and CP2010-13; Order No. 376]

**New Postal Product**

**AGENCY:** Postal Regulatory Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commission is adding Canada Post-United States Postal Service Contractual Bilateral Agreement for Inbound Competitive Services to the Competitive Product List. This action is consistent with a postal reform law. Republication of the lists of market dominant and competitive products is also consistent with statutory requirements.

**DATES:** Effective February 8, 2010 and is applicable beginning December 30, 2009.

**FOR FURTHER INFORMATION CONTACT:** Stephen L. Sharfman, General Counsel, 202-789-6820 or [stephen.sharfman@prc.gov](mailto:stephen.sharfman@prc.gov).

**SUPPLEMENTARY INFORMATION:** *Regulatory History*, 74 FR 65169 (December 9, 2009).

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- II. Background
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**I. Introduction**

The Postal Service seeks to add a new product, Canada Post-United States Postal Service Contractual Bilateral Agreement for Inbound Competitive Services, to the Competitive Product List. For the reasons discussed below, the Commission approves the Request.

**II. Background**

On November 25, 2009, the Postal Service filed a formal request pursuant to 39 U.S.C. 3642 and 39 CFR 3020.30

*et seq.* to add the Canada Post-United States Postal Service Contractual Bilateral Agreement for Inbound Competitive Services (Bilateral Agreement or Agreement) to the Competitive Product List.<sup>1</sup> The Postal Service asserts that the Bilateral Agreement is a competitive product “not of general applicability” within the meaning of 39 U.S.C. 3632(b)(3). This Request has been assigned Docket No. MC2010-14.

The Postal Service contemporaneously filed notice, pursuant to 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5, that the Governors have established prices and classifications not of general applicability for inbound competitive services as reflected in the Bilateral Agreement. More specifically, the Bilateral Agreement, which has been assigned Docket No. CP2010-13, governs Inbound Parcel Post and Xpresspost-USA from Canada.

The Postal Service acknowledges an existing bilateral agreement with Canada Post for inbound competitive services, which is set to expire at the end of calendar year 2009. *Id.* at 3. The Postal Service asserts that the proposed MCS language in Docket No. MC2010-14 “resembles the language” for the existing bilateral agreement and that the differences “reflect changes to certain operational details” including a reclassification of Canada Post’s “Xpresspost-USA” product from a market dominant product to a competitive product. *Id.* The Commission reviewed and approved that bilateral agreement in Docket Nos. CP2009-9 and MC2009-8. The Commission had previously approved the “Xpresspost-USA” product as a market dominant product in Docket No. MC2009-7.<sup>2</sup> Qualifying that approval, however, the Commission noted that “Xpresspost exhibits characteristics of a competitive product.” *Id.* at 7.

In support of its Request, the Postal Service filed the following materials: (1) A redacted version of the Governors’ Decision including proposed MCS language, a management analysis of the Bilateral Agreement, certification of compliance with 39 U.S.C. 3633(a), and certification of the Governors’ vote;<sup>3</sup> (2) a Statement of Supporting Justification

<sup>1</sup> Request of United States Postal Service to Add Canada Post-United States Postal Service Contractual Bilateral Agreement for Inbound Competitive Services to the Competitive Product List and Notice of Filing (Under Seal) the Enabling Governors’ Decision and Agreement, November 25, 2009 (Request).

<sup>2</sup> Docket No. MC2009-7, Order Concerning Bilateral Agreement with Canada Post for Inbound Market Dominant Services, December 31, 2008 (Order No. 163).

<sup>3</sup> Attachment 1 to the Request.

as required by 39 CFR 3020.32;<sup>4</sup> (3) a redacted version of the agreement;<sup>5</sup> and (4) an application for non-public treatment of pricing and supporting documents filed under seal.<sup>6</sup> Request at 2.

The Bilateral Agreement covers parcels arriving in the United States by surface transportation rather than air. Governors’ Decision No. 09-16.<sup>7</sup> The Bilateral Agreement also covers Xpresspost, a Canadian service for documents, packets, and light-weight packages. *Id.* The Bilateral Agreement allows Canada Post to tender surface parcels and Xpresspost to the Postal Service at negotiated prices rather than the default prices set by the Universal Postal Union. *Id.* The Bilateral Agreement is effective January 1, 2010 and continues until December 31, 2011. *Id.*, Attachment 3, at 7.

In the Statement of Supporting Justification, Lea Emerson, Executive Director, International Postal Affairs, asserts that “[t]he addition of the [Bilateral] Agreement as a competitive product will enable the Commission to verify that the agreement covers its attributable costs and enables competitive products, as a whole, to make a positive contribution to coverage of institutional costs.” *Id.*, Attachment 2, at 2. Joseph Moeller, Manager, Regulatory Reporting and Cost Analysis, Finance Department, certifies that the contract complies with 39 U.S.C. 3633(a). *Id.*, Attachment 1, Attachment C. He observes that the Bilateral Agreement “should not impair the ability of competitive products on the whole to cover an appropriate share of institutional costs.” *Id.*

In Order No. 351, the Commission gave notice of the two dockets, appointed a public representative, and provided the public with an opportunity to comment.<sup>8</sup>

**III. Comments**

Comments were filed by the Public Representative.<sup>9</sup> No other interested

<sup>4</sup> Attachment 2 to the Request.

<sup>5</sup> Attachment 3 to the Request.

<sup>6</sup> Attachment 4 to the Request. The Postal Service erroneously noted in its Request that an Attachment 5 which contained the application for non-public treatment was filed. The application for non-public treatment is Attachment 4; there is no Attachment 5.

<sup>7</sup> See Attachment 1 to the Request.

<sup>8</sup> PRC Order No. 351, Notice and Order Concerning Bilateral Agreement with Canada Post for Inbound Competitive Services, December 1, 2009 (Order No. 351).

<sup>9</sup> Public Representative Comments in Response to United States Postal Service Request to Add Canada Post-United States Postal Service Contractual Bilateral Agreement for Competitive Services to the Competitive Products List, and Notice of Filing Agreement and Enabling Governors’ Decision