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## SMALL BUSINESS ADMINISTRATION

13 CFR Part 125

RIN 3245-AG85

Ownership and Control of Service-Disabled Veteran-Owned Small Business Concerns

AGENCY: U.S. Small Business Administration

ACTION: Proposed rule.

SUMMARY: The U.S. Small Business Administration (SBA or Agency) proposes to amend its regulations to implement provisions of The National Defense Authorization Act for Fiscal Year 2017 (NDAA 2017). The NDAA 2017 placed the responsibility for issuing regulations relating to ownership and control for the Department of Veterans Affairs verification of Veteran-Owned (VO) and Service-Disabled Veteran-Owned (SDVO) Small Business Concern (SBC) with the SBA. Pursuant to NDAA 2017, there will be one definition of ownership and control for these concerns, which will apply to the Department of Veterans Affairs in its verification and Vets First Contracting Program procurements, and all other government acquisitions which require self-certification. The legislation also provides that in certain circumstances a firm can qualify as VO or SDVO when there is a surviving spouse or an employee stock ownership plan (ESOP).

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN 3245-AG85, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- For mail, paper, disk, or CD-ROM submissions: Brenda Fernandez, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street, SW, 8<sup>th</sup> Floor, Washington, DC 20416.
- Hand Delivery/Courier: Brenda Fernandez, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street, SW, 8<sup>th</sup> Floor, Washington, DC 20416.

SBA will post all comments on [www.regulations.gov](http://www.regulations.gov). If you wish to submit confidential business information (CBI) as defined in the User Notice at [www.regulations.gov](http://www.regulations.gov), please submit the information to Brenda Fernandez, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street, SW, 8<sup>th</sup> Floor, Washington, DC 20416, or send an email to [brenda.fernandez@sba.gov](mailto:brenda.fernandez@sba.gov). Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination on whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: Brenda Fernandez, Office of Policy, Planning and Liaison, 409 Third Street SW, Washington, DC 20416; (202) 205-7337;

[brenda.fernandez@sba.gov](mailto:brenda.fernandez@sba.gov).

SUPPLEMENTARY INFORMATION: The Vets First Contracting Program within the Department of Veterans Affairs (VA) was created under the Veterans Benefits, Health Care, and Information Technology Act of 2006 (Public Law, P.L. 109-461). This contracting program was created for Veteran-Owned Small Businesses and expanded the Service-Disabled Veteran-Owned contracting program for VA procurements. Approved firms are eligible to participate in Veteran-Owned Small Business (VOSB) and Service-Disabled Veteran-Owned Small Business (SDVOSB) set-asides issued by VA. More information regarding the Vets First Contracting

Program can be found on the Department of Veterans Affairs website at <https://www.va.gov/osdbu/faqs/109461.asp>.

The National Defense Authorization Act of 2017 (Public Law 114-328), section 1832, amended section 3(q) of the Small Business Act (15 U.S.C. 632(q)) and section 8127 of title 38, United States Code, to standardize definitions for VOSBs and SDVOSBs. This section also requires the Secretary of Veterans Affairs to use the regulations established by the Small Business Administration (SBA) for establishing ownership and control of VOSBs and SDVOSBs. The Secretary would continue to determine whether individuals are veterans or service-disabled veterans and would be responsible for verification of applicant firms. Challenges to the status of a VOSB or SDVOSB based upon issues of ownership or control would be decided by the administrative judges at the SBA's Office of Hearings and Appeals (OHA).

In drafting this proposed rule, SBA consulted with VA in order to properly understand VA's positions and implement the statutory requirements in a way that is consistent with both SBA's and VA's interpretations.

#### Section-by-Section Analysis

##### Section 125.11

In response to the NDAA 2017 changes, SBA is proposing to amend the definitions in §125.11 by incorporating language from VA's regulations and also from SBA's 8(a) Business Development (BD) program regulations. SBA is proposing to define a surviving spouse and the requirements for a surviving spouse-owned SDVO SBC to maintain program eligibility. Further, SBA is proposing to add definitions for Daily Business Operations, Negative Control, Participant, and Unconditional Ownership. The added definitions are being adopted from SBA's

8(a) BD regulations found in part 124. SBA is adding a definition for Employee Stock Ownership Plan (ESOP). This definition is adopted from § 1832(a)(6). SBA is also proposing to replace the definitions of permanent caregiver, service-disabled veteran (SDV), and surviving spouse. SBA is adding a new definition for service-disabled veteran with a permanent and severe disability. These definitions are being updated in consultation with VA in an effort to ensure consistency across programs at both Agencies. SBA is also adding a definition for small business concerns. Concerns will need to meet all the requirements of part 121, including § 121.105(a)(1), which requires that the firm be 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.” This definition will address how to generally determine the size of a concern. VO and SDVO SBCs will still be required to meet size standards corresponding to the NAICS code assigned to each contract pursuant to §§ 125.14 and 125.15.

In addition, SBA is proposing to add a definition for “extraordinary circumstances” under which a service disabled veteran owner would not have full control over a firm’s decision-making process, but would not render the firm ineligible as a firm owned and controlled by one or more service disabled veterans. This definition will be used to identify discrete circumstances that SBA views as rare. The new definition will be used to allow minority equity holders to have negative control over these enumerated instances. SBA proposes five limited circumstances in which a service-disabled veteran owner will not have full control over the decision making process. Under the proposed rule, these five circumstances would be exclusive, and SBA would not recognize any other facts or circumstances that would allow negative control by individuals that are not service-disabled.

## Section 125.12

SBA is proposing to amend § 125.12(b), which pertains to the requirement for ownership of a partnership. SBA's current regulation requires service-disabled veterans to own at least 51% of each type of partnership interest. Therefore, if a partnership had general partners and limited partners it was required that the service disabled veteran be both a general and limited partner. SBA is proposing to change the requirement so that service-disabled veterans will need to own at least 51% of the aggregate voting interest in the partnership.

SBA is proposing to add §125.12(d). This proposed paragraph incorporates the new statutory language with regard to public companies and ownership. Specifically, it should be noted that this language does not include any equity held by an ESOP when determining ownership for a publicly owned business.

SBA is proposing to add a new § 125.12(g). This new paragraph and its subparagraphs would provide clarity with regard to requirements for dividends and distributions. SBA's existing regulations require that ownership must also entail all the privileges and benefits of ownership. This new paragraph is adopted from SBA's 8(a) BD regulations in part 124. In general, one's right to receive benefits, compensation, and the ultimate value of one's equity should be consistent with the purported amount of equity. For example, it is not consistent with SBA's regulations for a firm to state that a service-disabled veteran owns 60 percent of the equity but records show that he or she is entitled only to a smaller amount of the firm's profit, or that the residual value of that equity is less than 60 percent if the firm is sold.

SBA is proposing to add new §§ 125.12(h) and (i). Pursuant to proposed § 125.12(h), ownership decisions would be decided without regard to community property laws. This provision is similar to SBA's ownership regulations for women owned businesses. See 13 CFR

127.201. SBA is also adopting regulations to allow firms owned by surviving spouses of service-disabled veterans to remain eligible for the program, and § 125.12(i) provides the guidelines for this continued eligibility. Basically, this provision would allow the transfer of ownership in a SDVO SBC from a serviced-disabled veteran to his or her spouse upon the death of the service-disabled veteran without adversely affecting the firm's status as a SDVO SBC.

### Section 125.13

SBA is proposing to add several new paragraphs to § 125.13. These proposed paragraphs incorporate provisions from SBA's 8(a) BD program and VA's former ownership and control regulations. SBA has always used 8(a) BD program regulations for guidance on eligibility issues for SDVO SBCs, and SBA will continue to do so. SBA proposing to adopt some but not all of its 8(a) BD regulations should not be interpreted as SBA abandoning this position. SBA is adding these specific regulations to add clarity and consistency, but SBA will continue to rely on part 124 for guidance. Many of the newly incorporated regulations deal with control by non-service-disabled veterans. These changes are intended to provide more clarity about the roles that non-service-disabled veterans can serve without creating control issues that may affect the concern's eligibility.

SBA is proposing to add language to describe how to determine if an SDV controls the Board of Directors in § 125.13(e). This language is adopted from SBA's 8(a) BD regulations and is being added to provide more clarity.

SBA is proposing language that will require firms to provide notification of supermajority voting requirements in § 125.13(f). This regulation will simplify the procedures for reviewing eligibility criteria related to super majority requirements.

Proposed §§ 125.13(h), (i), and (j) adopt policies and language from SBA's 8(a) BD program and VA's regulations. These provisions provide guidance on when SBA may find that a non-service-disabled veteran controls the firm. These regulations add more clarity and detail to specific issues such as quorum requirements and loan arrangements with non-service-disabled veterans.

SBA is proposing to add rebuttable presumptions § 125.13(k) and (l). Proposed § 125.13(k) would add a rebuttable presumption that a person not working for a firm regularly during normal working hours does not control the firm. This is not a full time devotion requirement. It just makes clear that this is a factor that SBA will consider, but is clearly rebuttable by providing evidence of control. Similarly, proposed § 125.13(l) would add a rebuttable presumption regarding place of work. In this case, it deals with an SDV owner who does not live or work nears the firm's headquarters or its worksites. SBA will assume that this indicates a lack of control. The main issue in these instances is over delegation of authority to non-SDV individuals who do work at the office and who are at the work sites. SBA's regulations require control over day to day operations and remote observation and over delegation is not the same as control. As noted in this proposed rule, this is a rebuttable presumption.

SBA is proposing to add § 125.13(m), an exception to the control requirements in "extraordinary circumstances." As noted above, SBA is proposing a new definition for extraordinary circumstances that includes a limited and exhaustive list of five circumstances. This proposed rule will allow an exception to the general requirement that SDVs control long term decision making.

SBA is proposing to add § 125.13(n), an exception to the control requirements when an individual in the reserves is recalled to active duty. SBA and VA do not think a firm owned by an SDV should lose its status due to the necessary military commitments of its owner when serving the nation.

#### Sections 125.22 and 125.23

SBA is proposing to make changes to §§ 125.22 and 125.23 to correct cross citations that were not updated when SBA renumbered its regulations. SBA is also proposing to update the values for sole source awards contained in §125.23 in order to be consistent with the inflationary adjustments made to those amounts in the Federal Acquisition Regulation (FAR).

#### Compliance with Executive Orders 12866, 12988, 13132, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601-612)

#### Executive Order 12866

OMB has determined that this rule does not constitute a "significant regulatory action" under Executive Order 12866. This rule is also not a major rule under the Congressional Review Act, 5 U.S.C. 800. This proposed rule would amend the rules concerning ownership and control of VO and SDVO SBCs. As such, the rule has no effect on the amount or dollar value of any Federal contract requirements or of any financial assistance provided through SBA or VA. Therefore, the rule is not likely to have an annual economic effect of \$100 million or more, result in a major increase in costs or prices, or have a significant adverse effect on competition or the United States economy. In addition, this rule does not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency, materially alter the budgetary impact of entitlements, grants, user fees, loan programs or the rights and obligations of

such recipients, nor raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

This rule is part of a joint effort by the VA and SBA to reduce the regulatory burden on the veteran business community. This rule will consolidate ownership and control requirements in one regulation thus eliminating duplicate functions. Prior to the enactment of this regulation business owners had the burden of complying with both regulations. This regulation will eliminate that burden. The single rule will help streamline the verification and certification processes which will save business owners time and money. This will also lead to less confusion.

#### Executive Order 12988

This action meets applicable standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

#### Executive Order 13132

This rule does not have Federalism implications as defined in Executive Order 13132. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in the Executive Order. As such it does not warrant the preparation of a Federalism Assessment.

#### Executive Order 13771

This proposed rule is expected to be an Executive Order 13771 deregulatory action. Details on the estimated cost savings of this proposed rule can be found in the rule's economic analysis. This rule is part of a joint effort by the VA and SBA to reduce the regulatory burden on

the veteran business community. This rule will consolidate ownership and control requirements in one regulation thus eliminating duplicate functions. Prior to the enactment of this regulation business owners had the burden of complying with both regulations. This regulation will eliminate that burden. The single rule will help streamline the verification and certification processes which will save business owners time and money. This will also lead to less confusion.

#### Paperwork Reduction Act

The SBA has determined that this rule does not impose additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C. Chapter 35. However, this rule does include an information collection for the VA and the OMB approval number for this collection is 2900-0675.

#### Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601-612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. Small entities include small businesses, small not-for-profit organizations, and small governmental jurisdictions. Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

This proposed rule will merge SBA and VA regulations concerning ownership and control of VO and SDVO SBCs as directed by Congress. The proposed regulation is not attempting new regulation, but to streamline two already existing regulations into a single regulatory framework. While SBA does not anticipate that this proposed rule would have a

significant economic impact on any small business, we do welcome comments from any small business setting out how and to what degree this proposed rule would affect it economically.

There are approximately 21,000 firms registered as SDVO SBCs in SAM and approximately 13,000 firms that have been certified by the VA. To a large extent SBA's and the VA's ownership and control rules were substantially similar in terms of the regulatory language, and in many instances identical. Thus the vast majority of these firms will not be impacted by this rule. For example, this rule will not impact firms that are 100% owned and control by an SDV. To the extent there are differences in SBA's and the VA's ownership and control rules, this rule will reduce cost and positively impact all SDVO firms, because there will be one set of criteria to measure SDV ownership and control throughout the Federal government. Further, SBA's current rules do not ignore ESOPs when determining ownership, which means firms that are majority owned by ESOPs are not eligible for SDVO set-asides or sole source awards. We have no data on the number of firms that this rule will impact, but the number is very small. After consulting with industry representatives, many firms owned by ESOPs are entirely owned by the ESOP, especially those that operate in industries with employee based size standards. Those firms will still not qualify if this rule is finalized because there is still a 51% SDV ownership requirement of the remaining ownership interest, not including ESOPs. However, some firms that intend to institute an ESOP may do so in way that allows the firm to qualify under this rule, once it is finalized. With respect to surviving spouse, SBA's current rules do not recognize ownership or control by a surviving spouse. Although the VA does allow firms owned and controlled by surviving spouses to qualify under its certification program, the number of firms that qualify under the exception is extremely small. To the extent firms qualify under the surviving spouse exception the benefit will be positive, not negative. Firms that were previously

not eligible to continue as SDVO firms will be able to continue for a period of time, when and if this rule is finalized.

Therefore, the Administrator of SBA determines, under 5 U.S.C. 605(b), that this proposed rule would not have a significant economic impact on a substantial number of small entities.

#### List of Subjects in 13 CFR Part 125

Government contracts, Government procurement, Reporting and recordkeeping requirements, Small businesses, Technical assistance, Veterans.

Accordingly, for the reasons stated in the preamble, SBA proposes to amend 13 CFR part 125 as follows:

#### PART 125 – GOVERNMENT CONTRACTING PROGRAMS

1. The authority citation for part 125 is revised to read as follows:

Authority: 15 U.S.C. 632(p), (q), 634(b)(6), 637, 644, 657(f), 657q; and 657s; 38 U.S.C. 501 and 8127.

2. Revise §125.11 to read as follows:

#### § 125.11 What definitions are important in the Service-Disabled Veteran-Owned (SDVO) Small Business Concern (SBC) Program?

*Contracting officer* has the meaning given such term in section 27(f)(5) of the Office of Federal Procurement Policy Act (41 U.S.C. 423(f)(5)).

*Daily business operations* include, but are not limited to, the marketing, production, sales, and administrative functions of the firm, as well as the supervision of the executive team, the implementation of policies and the setting of the strategic direction of the firm.

*ESOP* has the meaning given the term “employee stock ownership plan” in section 4975(e)(7) of the Internal Revenue Code of 1986 (26 U.S.C. 4975(e)(7)).

*Extraordinary circumstances.* For purposes of this part, extraordinary circumstances are only the following:

- (1) Adding a new equity stakeholder;
- (2) Dissolution of the company;
- (3) Sale of the company;
- (4) The merger of the company; and
- (5) Company declaring bankruptcy.

*Negative control* has the same meaning as that set forth in § 121.103(a)(3) of this chapter.

*Participant* means a veteran-owned small business concern that has verified status in the Vendor Information Pages database, available at <https://www.vip.vetbiz.gov/>.

*Permanent caregiver*, for purposes of this part, is the spouse, or an individual, 18 years of age or older, who is legally designated, in writing, to undertake responsibility for managing the well-being of the service-disabled veteran with a permanent and severe disability, as determined by Department of Veterans Affairs' Veterans Benefits Administration, to include housing, health and safety. A permanent caregiver may, but does not need to, reside in the same household as the service-disabled veteran with a permanent and severe disability. In the case of a service-disabled veteran with a permanent and severe disability lacking legal capacity, the permanent caregiver shall be a parent, guardian, or person having legal custody. There may be no more than one permanent caregiver per service-disabled veteran with a permanent and severe disability.

(1) A permanent caregiver may be appointed, in a number of ways, including:

- (i) By a court of competent jurisdiction;

(ii) By the Department of Veterans Affairs, National Caregiver Support Program, as the Primary Family Caregiver of a Veteran participating in the Program of Comprehensive Assistance for Family Caregivers (this designation is subject to the Veteran and the caregiver meeting other specific criteria as established by law and the Secretary and may be revoked if the eligibility criteria do not continue to be met); or

(iii) By a legal designation.

(2) Any appointment of a permanent caregiver must in all cases be accompanied by a written determination from the Department of Veterans Affairs that the veteran has a permanent and total service-connected disability as set forth in 38 CFR 3.340 for purposes of receiving disability compensation or a disability pension. The appointment must also delineate why the permanent caregiver is given the appointment, must include the consent of the veteran to the appointment and how the appointment would contribute to managing the veteran's well-being.

*Small business concern owned and controlled by service-disabled veterans (also known as a Service-Disabled Veteran-Owned SBC)* means any of the following:

(1) A small business concern--

(i) 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 (not including any stock owned by an ESOP) of which is owned by one or more service-disabled veterans; and

(ii) 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 permanent and severe disability, the spouse or permanent caregiver of such veteran;

(2) A small business concern--

(i) Not less than 51 percent of which is owned by one or more service-disabled veterans with a disability that is rated by the Secretary of Veterans Affairs as a permanent and total disability who are unable to manage the daily business operations of such concern; or

(ii) In the case of a publicly owned business, not less than 51 percent of the stock (not including any stock owned by an ESOP) of which is owned by one or more such veterans.

*Service-connected* has the meaning given that term in 38 U.S.C. 101(16).

*Service-disabled veteran* is a veteran who possesses either a valid disability rating letter issued by the Department of Veterans Affairs, establishing a service-connected rating between 0 and 100 percent, or a valid disability determination from the Department of Defense or is registered in the Beneficiary Identification and Records Locator Subsystem maintained by Department of Veterans Affairs' Veterans Benefits Administration as a service-disabled veteran. 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.

*Service-disabled veteran with a permanent and severe disability* means a veteran with a service-connected disability that has been determined by the Department of Veterans Affairs, in writing, to have a permanent and total service-connected disability as set forth in 38 CFR 3.340 for purposes of receiving disability compensation or a disability pension.

*Small business concern* means a concern that, with its affiliates, meets the size standard corresponding to the NAICS code for its primary industry, pursuant to part 121 of this chapter.

*Surviving spouse* has the meaning given the term in 38 U.S.C. 101(3).

*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.

*Veteran* has the meaning given the term in 38 U.S.C. 101(2). 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* means a small business concern:

(1) Not less than 51 percent of which is 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; and

(2) The management and daily business operations of which are controlled by one or more veterans. All of the provisions of Subpart B apply for purposes of determining ownership and control.

3. Amend §125.12 by:

- a. Revising the introductory text;
- b. Revising the first sentence in paragraph (b);
- c. Adding a sentence at the end of paragraph (d); and
- d. Adding paragraphs (g) through (i).

The revisions and additions read as follows:

§ 125.12 Who does SBA consider to own an SDVO SBC?

Generally, a concern must be at least 51% unconditionally and directly owned by one or more service-disabled veterans. More specifically:

\* \* \* \* \*

(b) \* \* \* In the case of a concern which is a partnership, at least 51% of aggregate voting interest must be unconditionally owned by one or more service-disabled veterans. \* \* \*

\* \* \* \* \*

(d) \* \* \* In the case of a publicly owned business, not less than 51 percent of the stock (not including any stock owned by an ESOP) must be unconditionally owned by one or more veterans.

\* \* \* \* \*

(g) *Dividends and distributions.* One or more 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 corporation, partnership, or limited liability company concern;

(2) 100 percent of the value of each share of stock owned by them in the event that the stock or member interest 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 or member interest owned in the event of dissolution of the corporation, partnership, or limited liability company.

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

(h) *Community property.* Ownership will be determined without regard to community property laws.

(i) *Surviving spouse.* (1) A small business concern owned and controlled by one or more service-disabled veterans immediately prior to the death of a service-disabled veteran who was

the owner of the concern, the death of whom causes the concern to be less than 51 percent owned by one or more service-disabled veterans, will continue to qualify as a small business concern owned and controlled by service-disabled veterans during the time period if:

(i) The surviving spouse of the deceased veteran acquires such veteran's ownership interest in such concern;

(ii) Such veteran had a service-connected disability (as defined in 38 U.S.C. 101(16)) rated as 100 percent disabling under the laws administered by the Secretary of Veterans Affairs or such veteran died as a result of a service-connected disability; and

(iii) For a participant, immediately prior to the death of such veteran, and during the period described in paragraph (i)(2) of this section, the small business concern is included in the database described in 38 U.S.C. 8127(f).

(2) The time period described in paragraph (i)(1)(iii) of this section is the time period beginning on the date of the veteran's death and ending on the earlier of--

(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; or

(iii) The date that is 10 years after the date of the death of the veteran.

4. Amend §125.13 by revising paragraph (e) and adding paragraphs (f) through (n) to read as follows:

§ 125.13 Who does SBA consider to control an SDVO SBC?

\* \* \* \* \*

(e) *Control over a corporation.* One or more service-disabled veterans (or in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran) must control the Board of Directors of the concern.

(1) SBA will deem service-disabled veteran individuals to control the Board of Directors where:

(i) A single service-disabled veteran individual owns 100% of all voting stock of an applicant or concern;

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

(iii) More than one service-disabled veteran shareholder seeks to qualify the concern (i.e., no one individual owns 51%), each such individual is on the Board of Directors, together they own at least 51% of all voting stock of the concern, no super majority voting requirements exist, and the service-disabled 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 super majority voting requirements, the service-disabled veteran shareholders must own at least that percentage of voting stock needed to overcome any such super majority ownership requirements. In the case of super majority ownership requirements, the service-disabled 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.

(2) Where an applicant or concern does not meet the requirements set forth in paragraph (e)(1) of this section, the service-disabled veteran individual(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 service-disabled veteran and one is not, the service-disabled veteran vote must be weighted—worth more than one vote—in order for the concern to be eligible). Where a concern seeks to comply with this paragraph:

(i) Provisions for the establishment of a quorum cannot permit non-service-disabled veteran Directors to control the Board of Directors, directly or indirectly;

(ii) Any Executive Committee of Directors must be controlled by service-disabled 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 service-disabled veteran individuals' 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.

(f) *Super majority requirements.* One or more service-disabled veterans must meet all super majority voting requirements. An applicant must inform the Department of Veterans Affairs, when applicable, of any super majority voting requirements provided for in its articles of incorporation, its by-laws, by state law, or otherwise. Similarly, after being verified, a

participant must inform the Department of Veterans Affairs of changes regarding super majority voting requirements.

(g) *Licenses.* A firm must obtain and keep current any and all required permits, licenses, and charters, required to operate the business.

(h) *Unexercised rights.* A service-disabled veteran owner's unexercised right to cause a change in the control or management of the applicant concern does not in itself constitute control and management, regardless of how quickly or easily the right could be exercised.

(i) *Control by non-service-disabled veterans.* Non-service-disabled veteran individuals or entities may not control the firm. Non-service-disabled veteran individuals or entities may be found to control or have the power to control a firm in any of the following circumstances, which are illustrative only and not inclusive:

(1) Be a former employer or a principal of a former employer, unless it is determined that the relationship between the former employer or principal and the eligible individual or concern does not give the former employer actual control over the concern and such relationship is in the best interests of the concern

(2) In circumstances where non-service-disabled veterans receive compensation from the firm in any form as directors, officers or employees, including dividends, that exceeds the compensation to be received by the highest officer (usually CEO or President). The highest ranking officer may elect to take a lower amount than the total compensation and distribution of profits that are received by a non-veteran only upon demonstrating that it helps the concern.

(3) In circumstances where the concern is co-located with another firm in the same or similar line of business, and that firm or an owner, director, officer, or manager, or a direct relative of an owner, director, officer, or manager of that firm owns an equity interest in the firm.

(4) In circumstances where the concern shares employees, resources, equipment, or any type of services, whether by oral or written agreement with another firm in the same or similar line of business, and that firm or an owner, director, officer, or manager, or a direct relative of an owner, director, officer, or manager of that firm owns an equity interest in the concern.

(5) A non-service-disabled veteran individual or entity, having an equity interest in the concern, provides critical financial or bonding support.

(6) In circumstances where a critical license is held by a non-service-disabled individual, or other entity, the non-service-disabled individual or entity may be found to control the firm. A critical license is considered any license that would normally be required of firms operating in the same field or industry, regardless of whether a specific license is required on a specific contract.

(7) Business relationships exist with non-service-disabled veteran individuals or entities which cause such dependence that the applicant or concern cannot exercise independent business judgment without great economic risk.

(j) *Critical financing.* A non-service-disabled veteran individual or entity may be found to control the concern through loan arrangements with the concern or the service-disabled veteran(s). Providing a loan or a loan guaranty on commercially reasonable terms does not, by itself, give a non-service-disabled veteran individual or entity the power to control a firm, but when taken into consideration with other factors may be used to find that a non-service-disabled firm or individual controls the concern.

(k) *Normal business hours.* There is a rebuttable presumption that a service-disabled veteran does not control the firm when the service-disabled veteran is not able to work for the firm during the normal working hours that businesses in that industry normally work. This may

include, but is not limited to, other full-time or part-time employment, being a full-time or part-time student, or any other activity or obligation that prevents the service-disabled veteran from actively working for the firm during normal business operating hours.

(l) *Close proximity.* There is rebuttable presumption that a service-disabled veteran does not control the firm if that individual is not located within a reasonable commute to firm's headquarters and/or job-sites locations, regardless of the firm's industry. The service-disabled veteran's ability to answer emails, communicate by telephone, or to communicate at a distance by other technological means, while delegating the responsibility of managing the concern to others is not by itself a reasonable rebuttal.

(m) *Exception for "extraordinary circumstances."* SBA will not find that a lack of control exists where a service-disabled veteran does not have the unilateral power and authority to make decisions in "extraordinary circumstances." The only circumstances in which this exception applies are those articulated in the definition.

(n) *Exception for reservists recalled to active duty.* Notwithstanding the provisions of this section requiring a service-disabled veteran to control the daily business operations and long-term strategic planning of a concern, where a service-disabled veteran individual upon whom eligibility is based is a reserve component member in the United States military who has been recalled to active duty, the concern may elect to designate in writing one or more individuals to control the concern on behalf of the service-disabled veteran during the period of active duty. The concern will not be considered ineligible based on the absence of the service-disabled veteran during the period of active duty. The concern must keep records evidencing the active duty and the written designation of control, and provide those documents to VA, and if requested to SBA.

5. Amend §125.22 by revising paragraph (a) to read as follows:

§ 125.22 When may a contracting officer set-aside a procurement for SDVO SBCs?

(a) The contracting officer first must review a requirement to determine whether it is excluded from SDVO contracting pursuant to §125.21.

\* \* \* \* \*

6. Amend § 125.23 by revising paragraphs (a) and (b) to read as follows:

§ 125.23 When may a contracting officer award sole source contracts to SDVO SBCs?

\* \* \* \* \*

(a) None of the provisions of § 125.21 or § 125.22 apply;

(b) The anticipated award price of the contract (including options) will not exceed \$6,500,000 in the case of a contract assigned a NAICS code for manufacturing, or \$4,000,000 in the case of any other contract opportunity;

\* \* \* \* \*

Dated: January 18, 2018.

Linda E. McMahon,  
*Administrator.*

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