

**CONSISTENTLY INCONSISTENT: CHALLENGES FOR  
SERVICE-DISABLED VETERAN-OWNED SMALL  
BUSINESSES**

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**HEARING**

BEFORE THE

SUBCOMMITTEE ON CONTRACTING AND  
WORKFORCE

COMMITTEE ON SMALL BUSINESS

JOINT WITH THE

SUBCOMMITTEE ON OVERSIGHT AND  
INVESTIGATIONS

COMMITTEE ON VETERANS' AFFAIRS

UNITED STATES

HOUSE OF REPRESENTATIVES

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## **CONSISTENTLY INCONSISTENT: CHALLENGES FOR SERVICE-DISABLED VETERAN-OWNED SMALL BUSINESSES**

**TUESDAY, MARCH 19, 2013**

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON SMALL BUSINESS,  
SUBCOMMITTEE ON CONTRACTING AND WORKFORCE,  
JOINT WITH THE  
COMMITTEE ON VETERANS' AFFAIRS,  
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,  
*Washington, DC.*

The Subcommittees met, pursuant to call, at 2:00 p.m., in Room 2360, Rayburn House Office Building. Hon. Richard Hanna [chairman of the subcommittee on Contracting and Workforce] presiding.

Present from Subcommittee on Contracting and Workforce: Representatives Hanna, Tipton, Bentivolio, Herrera Beutler, Meng, Clarke, and Chu.

Present from Subcommittee on Oversight and Investigations: Coffman, Roe, Kirkpatrick, Takano, and Walz.

Chairman HANNA. The hearing will come to order. I want to thank Chairman Coffman for working with me today on this joint hearing, and thank you all for being with us today. Additionally, several of our witnesses today are veterans, and I want to thank you all for your service and for taking the time out of your busy schedules to be here.

The federal government has a goal of awarding 3 percent of all prime contracts to service-disabled veterans who own small businesses. Last year, this meant over \$12 billion in prime contracts went to those firms. In helping agencies meet the 3 percent goal, Congress created two contracting programs, one specifically for the Department of Veteran Affairs and government-wide programs run by the Small Business Administration.

Whenever we have small business contracting programs, the government faces certain tensions. First, we have an obligation to ensure that only qualifying firms are receiving and performing on these contracts. Second, we must ensure that the programs themselves do not become so burdensome that they keep small businesses from participating. The contracting programs for service-disabled veteran-owned small businesses highlight this tension.

The SBA program has not done enough to discourage fraud, while the VA program has itself become the problem for some of these firms. In some of cases, the differences between the two programs have led to opportunities for fraud and bureaucratic impedi-

ments to small business generation. For example, the surviving spouses of service-disabled veterans are allowed to maintain the business status for a period of time at the VA, but not at the SBA. In contrast, under the VA regulation, a service-disabled veteran in a community property state must convince their spouse to renounce any interest in the business in order to prove that the veteran controls the firm. SBA does not apply this restriction; instead, simply requiring that a firm updates its status when its ownership changes.

The bottom-line is a legitimate firm may qualify under one program but not under another. If we really want to help these firms, we need to give them one clear set of rules to live by. Recent GAO reports have highlighted the problems with both the VA and the SBA, and many believe that legislation is required to create programs that have clear requirements, efficient processes, and transparent appellate processes.

Over the course of this Congress, I plan to work alongside my colleagues on the Veterans Affairs Committee and with the representatives of service-disabled veterans on a solution that will improve the current processes by which both agencies operate. Small businesses have enough on their plate, and I hope today's hearing will provide some insight on how to best help disabled veterans owning small businesses deal with these additional burdens.

Again, I want to thank our witnesses for being here today and look forward to your testimony. I now yield to the chairman of the Subcommittee on Oversight and Investigations for Veterans Affairs, Mr. Coffman, for his opening remarks.

Chairman COFFMAN. Thank you, Chairman Hanna for yielding. And thank you also to your Subcommittee for holding this joint hearing.

The problems with VA's service-disabled veteran-owned small businesses, the certification program, sadly, these are not new. The Veterans' Affairs Committee had several Subcommittee hearings during the last Congress on the issue, but improvements within the program seem to be slow in coming. My Subcommittee continues to frequently hear from SDVOSBs and their advocates regarding what should be a straightforward process for veterans attempting to do business with the VA.

While the verification process at CVE has improved and helped weed out some bad actors, it is abundantly clear that there is still a long road ahead. One topic discussed at length in the 112th Congress was VA's definition of ownership and control of the small businesses. Despite the Committee's bringing this problem to VA's attention, VA's definitions retain some key differences from the Small Business Administration, and the effect of these differences has been a self-induced backlog of legitimate companies attempting to get certified through CVE and do business with the VA.

The fact the VA has a different interpretation of what constitutes ownership means that an individual could be recognized as a veteran small business owner with one government agency but not with the VA, and this should raise everyone's eyebrows. However, that is the reality that some veterans face today, including service-disabled veterans. SBA has had common sense requirements for what constitutes an SDVOSB in place for a long time.

While VA's intent may be in the right place, its regulatory and interpretative actions have put many eligible veterans at a disadvantage. We still need to get this right if we are going to enable our veterans, who sacrificed for this country, to do business with the Federal government. And if the VA is going to set the standard for recognizing the commitment of these same veterans, then a straightforward common sense process needs to be in place. It is my sincere hope that down the road we are not still discussing the same issues. The time for conversation has passed, and it is time to take action, fix the problem, and move on.

I understand that the system will never be perfect, nor is there one simple answer. However, after all the years that have passed since this program has been set up and the resources that have been added to CVE, it is reasonable to expect that we should be further along than we are today.

Mr. Chairman, I yield back.

Chairman HANNA. And I yield to our ranking member, Ms. Meng, for her opening statement.

Ms. MENG. Thank you, Chairman Hanna. Thank you to our witnesses for appearing before our Subcommittees today. And thank you to all the veterans, especially the ones in this room today for your wonderful service to our country.

Over the last century, brave Americans have fought in Afghanistan, Iraq, Vietnam, Korea, and Europe, for not only our freedom but for the freedom of others. Over 635,000 men and women have died in these and many other wars. The surviving 22 million veterans include 5.5 million who were disabled while in the service. These courageous individuals deserve not only our enduring gratitude but also the opportunity to build a new life after their many years of military service.

One of the most important tools we have to accomplish this mission is the Service-Disabled Veteran-Owned Small Business Procurement Program. In 2011, this initiative awarded more than 100,000 contracts worth over 11 billion to SDV small firms. However, these awards have accounted for only about 2.6 percent of all federal contracts, below the 3 percent statutory goal. Efforts have been made to increase this level but challenges still remain. Among the most pressing issues are the ongoing problems in verifying firms participating in this SDV program. Previously, GAO has found that non-SDV firms have won SDV contracts. This included front companies posing as veterans, pass-throughs, and outright fraud. As a result, millions of dollars were diverted away from legitimate service-disabled veteran-owned small businesses. To prevent these abuses, GAO recommended that a verification system be implemented, but given the overlapping roles of both the SBA and the VA in administering this program, this reality has been slow to materialize. Regardless, we have to continue to make every effort to ensure that non-SDV firms cannot continue to steal these opportunities from service-disabled veteran firms.

Given the recent sequester, it is now more important than ever to correct these flaws. This across-the-board cut will cause SDVs to lose out on more than 7,500 contracts worth more than \$1 billion, making it critical that only eligible firms compete for the remaining opportunities. Addressing these failings and ensuring SDV procure-

ment programs work as intended is long past due. With an unemployment rate of more than 11 percent for veterans of the wars in Iraq and Afghanistan, it is essential that all veterans' resources are properly managed and overseen. Given that entrepreneurship remains a viable career path for many of our men and women, programs like the one this hearing is on today are critical to reduce the high unemployment rate.

I think I can speak for all of our Subcommittee members here today in saying that we will do whatever it takes to help service-disabled veterans overcome the challenges they face in today's economy. As a result, I am glad that in addition to the federal agencies here with us today that we are hearing directly from our veterans' community. Thank you, and I yield back my time.

Chairman HANNA. Thank you.

I now yield to Ranking Member Ms. Kirkpatrick for her opening statement.

Ms. KIRKPATRICK. Thank you, Chairman Hanna. And I want to thank all of the veterans who are here today because you have already paid the price. We now must fight for you with all our might, and I want you to know that we know that and we appreciate your being here today.

In 1999, Congress required the Small Business administration to establish programs and services to help veterans make the transition from service member to small business owner by increasing federal contracting and subcontracting opportunities for veterans. As more veterans return home from Iraq and Afghanistan, our nation has the responsibility to help them re-enter civilian life. Some veterans may choose to go to school, work in the private and public sector, while others may choose to begin their business. Veterans bring with them self-discipline and a strong work ethic from their military service that we know will help them to succeed in any business.

As we encourage veterans to enter into business with the Federal government, we must have the right elements in place. It should not be overly difficult to do business with the Federal government, but it should not be so easy that fraud is rampant and these opportunities that are set aside for veterans are lost. In 2010, the VA alone improperly awarded veteran set aside contracts valued at \$500 million to ineligible businesses. The VA inspector general stated that it expects VA to improperly award \$2.5 billion in contracts over the next five years unless oversight and verification procedures are strengthened. In the end, what we should seek is a good balance of providing smart and worthwhile verification, but we should not make it so difficult as to prevent veterans from doing business with the VA and the rest of the Federal government.

Today's hearing will build upon the hearings from the last Congress as we seek to ensure that federal contracting is being done effectively and efficiently by the Small Business Administration and the Department of Veteran Affairs, particularly for service-disabled veterans small business owners. As we explore what the definition of ownership and control form VA and SBA, along with other concerns, we should not lose sight that each business is the life of

a veteran and the opportunity for a quality life for his or her family.

I look forward to the testimony this morning, and I want to thank all the witnesses for being here. And I yield back, Mr. Chairman.

Chairman HANNA. Thank you.

If additional members have any opening statements prepared I ask that they be submitted for the record. I would also like to take a moment to explain the timing to you. Five minutes. Four minutes, the yellow light comes on. Then the red light. But we will be lenient as possible. If you could try to respect that time limit as best as possible. But we do want to hear what you have to say.

With that, we have votes. I am going to adjourn this I would say for 20 minutes. We should be about that long and we will be right back and we will continue. Thank you.

[Recess]

Chairman HANNA. The Committee will reconvene.

In the interest of time I will read the witnesses and their short bios.

Our first witness today is Joe Wynn, who is testifying on behalf of VET-Force, a coalition of over 200 organizations and affiliates representing veterans nationwide. In addition to his work on Executive Committee of VET-Force, Mr. Wynn is the president of Vets Group, Inc., a nonprofit organization that provides entrepreneurial education, federal procurement training, employment assistance, and other supportive services primarily for veterans and people with disabilities or persons of limited means. He is also director and legislative liaison for the National Association for Black Veterans. A veteran himself, Mr. Wynn proudly served in the United States Air Force, and we thank you for your service, sir.

Our second witness today is Davy Leghorn, the assistant director for the Economic Division of American Legion. The American Legion Economic Division aims to ensure that veterans receive several opportunities for success upon exiting the military. Mr. Leghorn is a veteran, having proudly served in the United States Military. We thank you for your service and for being here today, Mr. Leghorn.

Our third witness is Mr. Marc Goldschmitt, founder and CEO of Goldschmitt and Associates, LLC, a service-disabled veteran-owned small business who has been involved with the CVE verification issue since its inception. Mr. Goldschmitt proudly served in the United States Navy. We thank you for your service and we thank you for your time today, Mr. Goldschmitt.

Ms. MENG. It is my pleasure to introduce Mr. Jonathan Williams. Mr. Williams is a partner with PilieroMazza here in D.C. where he counsels businesses on a range of federal contracting issues, including the various small and minority business procurement programs. He has successfully tried cases at both the GAO and the Court of Federal Claims. Additionally, Mr. Williams has brought and defended numerous SBA protests and appeals pertaining to program eligibility.

Welcome, Mr. Williams.

Chairman HANNA. You may begin, Mr. Wynn.

**STATEMENTS OF JOSEPH WYNN, SPECIAL ADVISOR, VET-FORCE; DAVY LEGHORN, ASSISTANT DIRECTOR, ECONOMIC DIVISION, THE AMERICAN LEGION; MARC GOLDSCHMITT, PMP, CEO, GOLDSCHMITT AND ASSOCIATES, LLC; JONATHAN T. WILLIAMS, PARTNER, PILIEROMAZZA, PLLC**

**STATEMENT OF JOSEPH WYNN**

Mr. WYNN. Thank you. Good afternoon, Chairman Hanna, Chairman Coffman, Ranking Members and Subcommittee Members, fellow veterans, and guests. On behalf of VBA National President, John Rowan, its officers and members, and thousands of veteran business owners we represent, I thank you for taking the time to convene this very important hearing.

In a recent report from the President's Interagency Task Force on Veterans Small Business Development, it was stated that "Two of America's greatest assets are the service of our returning veterans and the economic dynamism of our small businesses." We recognize that entrepreneurs and small businesses are the engines of American innovation and economic prosperity, but now that we have fallen over the "fiscal cliff" due to sequestration, federal agencies will be faced with significant budget cuts which will also impact the hiring of new employees, so we will have to turn to small businesses and corporate sectors to pick up the slack.

Veterans own about 2.4 million businesses or 9 percent of all of America's businesses. These businesses generate about 1.2 trillion in receipts and employ nearly 5.8 million Americans. As highly trained professionals and leaders with experience in challenging environments, veterans' potential for success for entrepreneurship and small business ownership will not be fully achieved if the VA's regulations for verifying them as veteran business owners is allowed to become the standard throughout the federal marketplace.

You would not think that the federal agency, the Department of Veterans Affairs, the very one created for "those who have borne the battle, their widows and their orphans," would be the very agency that creates the greatest barriers and obstacles for thousands of veterans and business owners. Since the end of the Vietnam War, the VA has wrongfully denied thousands of veterans their claims for compensation for their service-connected injuries, and now since 2008, the VA has once again been denying thousands of veteran business owners contracting opportunities due to their "consistently inconsistent" interpretation of VA and SBA contracting regulations.

Over the past two years, the VA has reported more than 20,000 veteran business owners have applied for verification. Just over 6,000 are now approved. First, many veteran service-disabled veteran business owners do not fully understand how they can be legally allowed to do business with other federal agencies but not with the VA.

Second, some applicants have problems with the CVE verification process, and that does not mean that they are ignorant. I help support veterans and work with veterans, business owners in going through the process, and it is still very lengthy to get through.

Third, veterans are subjected to multiple contracting program rules. Veterans, there is a self-certifying rule within the federal

marketplace where some of those same businesses when it comes to doing business with the VA they may be denied.

Fourth, an applicant may still be denied by the CVE reviewer based on their interpretation of sections of the regulations and/or the documents submitted by the application.

Here are some of the main reasons: unconditional ownership, quorum restrictions, right of first refusal, community property laws, weighted voting requirement, dependence with other entities, control of strategic policy, higher officer position, day-to-day management, managerial experience. Basically, a veteran must be the majority owner, majority board member, majority stockholder, highest paid, hold the highest office, have the experience to manage the daily operations, make all the long-term decisions, must devote full-time to the business, offer no right of first refusal, do not lease your office space or make loans from a non-vet, and by all means, do not live in a community property state.

Without absolutely proof of any one of these things, the veteran will likely be denied. In addition, not all veteran business owners are socially and economically disadvantaged, and definitely not all of them are women. So those two programs are statutorily different than the service-disabled vet program.

In concluding, I just would recommend that Congress should amend the regulation in such a way as to eliminate multiple interpretations of any sections. Congress should require that VA develop an appeals process that is independent of the same office that issued the denial. Congress should not consider extending the provisions to all federal agencies until a survey or study has been done, and Congress should direct that study on how many legitimate businesses would also be denied if they used the existing CVE interpretation.

This concludes my statement and I look forward to answering any questions.

Chairman HANNA. Thank you.

Mr. Leghorn.

#### **STATEMENT OF DAVY LEGHORN**

Mr. LEGHORN. A few months ago, 20 full-time employees were laid off in Wisconsin when a service-disabled veteran-owned construction firm lost \$1.7 million worth of work and the ability to bid on future contracts. This was due to VA's lengthy verification process. This is a real shame because the whole point of VA verification is to make these businesses eligible to compete for VA contracts.

Chairman Hanna, Chairman Coffman, Ranking Member Meng, and Members of the Subcommittees, on behalf of our national commander Jim Koutz, and the 2.4 million members of The American Legion, we thank you for this opportunity to testify at this joint hearing on the challenges facing veteran-owned and service-disabled veteran-owned small businesses.

The bottom-line is this. Many veterans find this process to be overly burdensome, distracting, and not worth the effort. The American Legion wants these businesses to be successful, not hand strung, which is why we passed an American Legion resolution titled Support Etherification Improvements for Veterans' Businesses with the Department of Affairs.

To be clear, The American Legion supports verification. Government contracting officers are risk-averse. They like certifications and they like it when a firm has been verified. The American Legion has been involved with VA verification since the program's inception. We participate in VA's Verification Assistance Counseling Program and we have worked with plenty of small business owners who have been denied verification. All too often we see businesses lose vital contracting opportunities due to the lengthy verification process. In some cases, businesses lose previously awarded contracts resulting in layoffs and furloughs of their employees.

The American Legion cannot stress enough how detrimental the current process can be to these veterans who lives and family incomes are tied to their small businesses. The main challenge with the verification program seems to be VA's inability to strike the appropriate balance between the requisite government oversight to protect the integrity of the program and the impact and costs to veteran small businesses. Currently, to root out bad actors who maliciously seek to defraud the Federal government, VA places a series of overzealous, bright-line rules to evaluate the applications. Most of these bright-line rules apply to unconditional ownership and control requirements, and VA has formulated extreme interpretations that are unrealistic.

The American Legion agrees with the U.S. Court of Federal Claims and their February 14, 2013 Miles ruling where the court applied the bankruptcy court's pragmatic definition that did not burden the veteran's ownership interest. We urge VA to adopt this pragmatic approach to evaluate ownership and control as practiced by the bankruptcy courts. Neglecting to adopt this approach, VA will continue to make this process punitive and burdensome to the majority of the firms seeking verification. The current backlog of initial applications and appeals will not diminish and veteran business owners will continue wasting large sums of money on attorney fees.

One of the unintended consequences of VA's overzealous verification process is that established small businesses are choosing not to participate because the process is too burdensome and diverts their focus from running their businesses. So what you end up with are nascent businesses getting verified because it is easier for them to contort their operating agreements and bylaws to suit the current requirements for verification. VA then complains that they end up with too many inexperienced veteran businesses to draw from. On the other hand, we identify an unfair advantage with the larger small businesses who have the personnel and resources to dedicate to the verification process. Should VA continue to deny the vast majority of the firms based on these control issues and permit the backlog to grow, The American Legion would certainly support a comprehensive and cooperative relationship between VA and SBA whereby SBA would be the final arbiter of appeals. Finally, as highlighted within our written testimony, we are adamantly opposed to the six-month penalty wait time.

In closing, The American Legion will continue to work with the SBA and VA to improve the verification process and to continue providing counseling service to our veteran entrepreneurs. I thank you again for the opportunity to bring the voice of veterans to this

Committee, and I am happy to answer any questions you might have.

Chairman HANNA. Thank you, Mr. Leghorn.  
Mr. Goldschmitt.

#### **STATEMENT OF MARC GOLDSCHMITT**

Mr. GOLDSCHMITT. Thank you. I wish to thank the Subcommittee Chairmen and the Ranking Members for holding this hearing today to address the statutory, regulatory, and interpretative differences between SBA's Service-Disabled Veteran-Owned Small Business Program and VA's Service-Disabled Veteran-Owned Small Business Program.

As a verification assistance counselor and the subject matter expert for VET-Force and the National Veterans Small Business Coalition, I have gained significant insights into CVE's issues. As a small business owner, I have tried to translate these issues into the cost and impact that they have on the veteran-owned business community.

As a small business providing services to the Federal government, the current environment provides significant challenges to profitability, growth, and survival. CVE's interpretations add additional arbitrary and unpredictable hurdles that make it more difficult for me to plan, finance, market, and operate my small business. These CVE interpretations tend to be more minimizing business reality and addressing more the extremes.

In business risk management, the fact that an event can happen is always accompanied by the probability of the occurrence and the impact of the occurrence, be it profit, growth, cost, or schedule. For CVE, these impacts represent ownership and control. When CVE theorizes that an event might happen, they do a disservice to the veteran community, to the VA and to the taxpayers, by failing to ask a very simple question, "So what?" The net impact of those interpretations is as follows:

Congress, through its laws passed for veterans, has had the intent to increase veteran business opportunities, is not served by depriving vets of everyday business practices and therefore putting them at competitive disadvantage. CVE's Risk Avoidance Program or approach has crippled legitimate veteran-owned businesses while doing little to prevent fraud. On VA's website, they have four businesses, one of which pled guilty, three of which were indictments over a two-year period. During that same two-year period I estimate about 4,500 companies were denied, which represents more than an average of 10 for each of your districts that were legitimate businesses that were denied.

The CVE verification program is becoming a de facto standard for other agencies. When I go to other agencies and I talk to them about small business, one of the first things they ask is, "Are you CVE verified?" When I say yes, it's, "Tell me more." When I watch businesses that say no, the almost immediate response is the body language that says, "How do I get out of this conversation and get onto somebody that I want to talk to?"

Lastly, the documentation required by CVE is often considered excessive. Sometimes it is incomplete, and it is potentially subject

to compromise. There are additional examples in my written testimony.

I would like to illustrate now from some examples CVE's findings that undermine business building and create veteran paranoia and distrust with the VA. These are recent cases. Some of the ones that I have in my testimony have been resolved.

For example, Bravo 1-9 Construction is a New Jersey-based construction business. The owner is a combat-wounded veteran rated 100 percent by the VA. On his 0877 application, he indicated that he was a veteran, not a service-disabled veteran, yet with his package he submitted his letter from VA of a determination and a rating. In spite of having clear proof that the individual was a service-disabled veteran, VA issued him with a veteran approval.

Clauss Construction. Clauss is a California-based remediation services company. They do large building demolition, including explosive building implosion and collapse, which requires a variety of NAICS codes to demonstrate compliance with environmental and other issues. Clauss is a small business with less than 100 employees. Its primary business NAICS code is a 500 employee standard. CVE denied Clauss based upon a separate NAICS code, which was arbitrarily picked as the primary NAICS code in the SAM was their 500 employee NAICS code. When this error was pointed out to CVE, who by the way had the payroll from the company and could have counted the number of employees, their response was to refer the company to SBA for a formal size determination.

As we look at these and other examples from my written testimony, we see that major corrective actions are interpretive and therefore can be immediately implemented. This will result in fewer denials and a significant reduction in effort and cost for both CVE and the veteran community. I provided some statutory, regulatory, and interpretive suggestions in my written testimony.

That concludes my oral testimony, and I look forward to questions.

Chairman HANNA. Thank you, Mr. Goldschmitt.  
Mr. Williams.

#### **STATEMENT OF JONATHAN T. WILLIAMS**

Mr. WILLIAMS. Good afternoon, Chairman Coffman, Chairman Hanna, other Distinguished Members of the Subcommittees. My name is Jonathan Williams. I am a partner with the law firm, PilieroMazza, which represents veterans in their dealings with the Small Business Administration and the VA. It is an honor to be here today to share my experiences representing SDVOSBs.

I am a strong proponent of the SDVOSB programs administered by the SBA and the VA, and I have seen firsthand how these programs have benefitted many veterans. However, I have also seen many veterans struggle to obtain the benefits of the programs for a variety of preventable reasons. My testimony will address those problems, which I believe stem from two primary causes.

First, the VA's application process is too long and cumbersome. Second, the rules governing the two SDVOSB programs are confusing and inconsistent.

Regarding the application process at the VA, the VA generally takes a "deny first, ask questions later" approach. As a result, most

veterans do not learn of problems with their application until they receive a denial letter. This approach forces veterans to fix the application errors and then file a request for reconsideration. Of the requests for reconsideration we have handled, more than half could have been avoided if the VA had notified the veteran of minor issues before denying the application. Not surprisingly, the VA has struggled to process requests for reconsideration due to volume.

The VA has acknowledged that the process needs improvement, and recently proposed an initial screening stage to help veterans address simple issues before their application is denied. The initial screening stage is a step in the right direction.

The VA could improve the application process further by providing all bases for denial in the initial denial letter. We have worked with a number of veterans who were initially denied for one reason, addressed that issue on reconsideration, only to then be denied again for new reasons the VA had not previously identified. Requiring veterans to endure multiple rounds of reconsideration is frustrating, not to mention very costly and time-consuming.

Many veterans perceive the application process at the VA to be adversarial. These veterans believe the VA personnel are looking for a reason to keep them out, rather than trying to help them to get in. Given that the VA's program was enacted to assist veterans in the transition from active duty to civilian life, making veterans feel more welcomed into the program should be a priority.

Turning to the second root cause of the challenges veterans have faced, the two SDVOSB programs are often inconsistent. The inconsistencies stem from the separate rules used by the SBA and the VA. Though similar, the two sets of rules differ in many respects and this has caused a lot of confusion amongst veterans, as well as government personnel.

For example, both agencies have interpreted their rules to prohibit restrictions on the transfers of the veteran's ownership in his company. Recently, the Court of Federal Claims rejected the VA's interpretation and held that the VA's rules permit commercially reasonable transfer restrictions. This was an important, business-friendly ruling because transfer restrictions make it easier for veterans to attract investors. However, the court's ruling only applies to the VA's program. The SBA should revisit its position on transfer restrictions to avoid inconsistency between the two agencies on this issue.

The two programs are also inconsistent regarding joint ventures. Joint ventures are a valuable tool through which small businesses can work together to access contracts they would not have been able to perform on their own. The SBA's rules make it easier for veterans to take advantage of joint ventures. The VA, on the other hand, requires veterans to go through a second application process for the joint venture. This practice requires additional time and resources that many veterans do not have, and it is arguably contrary to the VA's rules. If the VA handled joint ventures similar to the SBA, joint ventures would be a much more useful tool for veterans who work with the VA.

Another point of confusion is over which agency should decide small business status. The VA's statute indicates the definition of a small business comes from the Small Business Act, which the

SBA is entrusted to implement. Furthermore, the VA's Acquisition Regulation recognizes that all protests pertaining to the size of SDVOSBs should be sent to the SBA. Yet, the VA's rules permit the VA to deny an applicant based on size and affiliation concerns, even if the SBA has not been consulted. This trend should be stopped because it is inconsistent with the VA's statutory mandate and in-fringes on the SBA's role as the arbiter of small business status.

To solve some of the regulatory inconsistencies in the short term, the VA and the SBA could change their interpretations of the existing rules. However, the best long-term solution would be to consolidate the two programs into one, with one set of rules and one agency to interpret those rules. Though by no means an easy task, consolidation of the two programs would be much simpler and more efficient for veterans and the government.

That concludes my testimony. Thank you for the opportunity to appear before you here today.

Chairman HANNA. Thank you.

I understand that the VA appellate process takes about 147 days and is not heard by administrative judges, whereas the SBA's appeal process takes roughly 15 days and does result in a published decision from an administrative judge. Knowing that and knowing what we have heard today, and I know your opinion, Mr. Williams, I will ask the question that Mr. Williams just gave his opinion on. Do you believe that this should be consolidated into one program? And do you believe, all three of you, that that should be the SBA or do you have something else in mind?

Mr. GOLDSCHMITT. One of the recommendations I made is that the programs use a common adjudication of SBA's OHA to get a common set of rules or at least a common set of adjudication and case law that can be worked from. So yes, I would agree with that.

Mr. LEGHORN. The American Legion is a resolution-based organization. We currently do not have a resolution on this matter, but our resolution does state that we would like to streamline the process. And if it does take interference from SBA to be the final arbiter, we can get behind this.

Mr. WYNN. Just a follow-up comment on that. It is our opinion, too, that it is getting to the point where it seems like SBA would probably have more experience in handling the appeals process. There seems to be no real appeals process at the VA. As I mentioned in my testimony, the same folks that are doing the denial are also the ones you have to go back to if you have a problem. So an independent body, and perhaps with the SBA that may be the solution. Thank you.

Chairman HANNA. Thank you. Mr. Coffman?

Chairman COFFMAN. Thank you. Mr. Goldschmitt, VA says that they do \$3 billion in veteran-owned small business contracts, so why should they care about these issues?

Mr. GOLDSCHMITT. Mr. Coffman, I think that there are several reasons they should look at that. The issues that we are looking at that are the adjudications by CVE create inefficiencies that cause a lot of cost, a lot of heartache to some of the small businesses. The impact of that is that there are fewer small businesses that can compete for business within the VA. Recently, they have

had a number of denials of apparent awardees for contracts. These are the folk that made it through the contract program and were picked as the best, the best value to the government. And because of typically the rules that were discussed by Mr. Wynn and Mr. Leghorn about some of the simple things that could have been changed, they lost opportunities and VA lost the best of the best in those opportunities.

The other is a number of successful businesses, because of the hurdles that are there by VA, choose to do business in other locations or other agencies within the government. So consequently, the VA does not necessarily get all of the best. So they are artificially limiting competition within VA, not getting the results in some cases based upon their evaluations.

Chairman COFFMAN. Thank you.

Mr. Leghorn, given The Legion's own review of some of the issues regarding regulations, can you speak to CVE's lack of the use of 13 CFR 121 and its impact on their decisions?

Mr. LEGHORN. Currently, I think VA has not adopted or reconciled 38 CFR 74 with 13 CFR 121. If VA is going to move forward and make determinations on size eligibility, then they should adopt that section.

Chairman COFFMAN. Thank you.

Mr. Wynn, what are your recommendations for striking a balance between preventing continuing fraud and loosening the restrictions so SDVOSBs are not overburdened in the verification process?

Mr. WYNN. Well, we do not want a program that is going to allow companies that misrepresent themselves to participate in that program. We definitely do not agree with that. But again, we still do not want a program that is so overly burdensome and complex that it screens out thousands of legitimate owned businesses. So it may be necessary to be more vigilant on the backend. That means after a company is admitted into the program, to provide more oversight and monitoring on a constant basis. We have had reports where companies that have been identified as misrepresenting themselves were allowed to still get additional contracts later. So hopefully more could be done after companies are in the program as opposed to doing so much more to screen them out from getting in.

Chairman COFFMAN. Thank you. I yield back.

Chairman HANNA. Ms. Meng. Ranking Member Meng.

Ms. MENG. Mr. Leghorn, in your testimony you discuss how VA has said that 98 percent of businesses who are denied certification are not maliciously trying to defraud the government but rather there is an ignorance of the law. Do you believe that VA is doing enough to educate the businesses on the requirements for CVE verification? And how can the VA do a better job?

Mr. LEGHORN. Well, I think actually VA does a very good job with the counseling program and everything that they have on their website to get the information out. But it is just a matter of outreach. That has to be ramped up a lot more in order to get the veteran entrepreneurs to know about the common pitfalls and how they can avoid them.

Ms. MENG. Thank you. I yield back.

Chairman HANNA. Mr. Takano. Do you have any questions?

Mr. TAKANO. Thank you, Mr. Chairman.

Mr. Williams, I want to just review some of your testimony. You stated that there is a “deny first, ask questions later” policy that apparently is used by this VA program. And you are saying also that veteran business owners do not often know how to correct their applications if they were told in advance and then even after they make the correction they often find new reasons. How often does this occur? I mean, I want to get a sense of how widespread.

Mr. WILLIAMS. We see it very frequently. The “deny first, ask questions later” approach has been pretty consistent for the last year-and-a-half or so since the number of applications really shot up in mid-2011. I would say the vast majority of cases there was little or no dialogue between the VA and the applicant before the denial was issued. Now, we have seen some improvement in 2012, particularly with respect to requests for reconsideration, and some of those are handled by the VA’s Office of General Counsel. And we have had good success with those folks in dialoguing and having a back-and-forth about issues and trying to reach a common ground. But, for the most part, when a firm comes to us and they have been denied, they have not had any exchange with the VA to that point, so they are having to confront this issue for the first time having already been denied from the program.

And the second point you raised is that they do not necessarily have to tell you every reason they are denying you in that initial denial letter. So what we have started to do is to ask the veteran to send us all of their documents, the entire application, even if it was denied for one needle in the haystack, we ask them to send us everything. And then we do a full review to see what else they might be denied for three months from now, six months from now. And you can imagine that is a very time-consuming and costly exercise for veterans to go through, many of whom cannot afford to go through it. But that is a symptom of the fact that they do not have to tell you every reason upfront, and they will often times cite different reasons three or four months after you correct the initial reason.

Mr. TAKANO. None of you may be able to answer this question but I am trying to understand what might be the explanation for this stance. I mean, was there something in the history of the VA in this program where there were cases of fraud that may have caused this overly cautious behavior? I mean, is there any speculation?

Mr. WILLIAMS. I do not know if it is overly cautious so much as it is that they are not looking at everything before they issue the denial. I suspect that a lot of times what happens is you get to the first document and you see a problem and you put it in the “no” pile. And then they come back and they fix that but then you start to look at the rest of the application and you realize that there are other problems. I do not know that that is happening but I suspect that may have been part of the issue.

Mr. TAKANO. Is it a staffing issue or a staff training issue? Or is it just kind of a philosophy?

Mr. WILLIAMS. I do not know. I would imagine certainly there must be a resources or a staffing component to that that you look for the quickest way to move through some of the applications, and

if it can be denied based on one issue that you spot right off the bat, you go ahead and get it moving through the system.

The VA has recently indicated that they plan to institute an initial screening stage, so they will try to screen applications for these issues in corporate records that tend to trip people up and give the applicants an opportunity to correct those issues before their application is denied. And that is a really positive step. It is something that we have been hoping that they would do. You know, the proof will be the pudding in terms of how that works and whether or not it just becomes another hoop that the veterans have to jump through. But that should reduce the number of reconsideration requests and the amount of time it takes to get through the reconsideration process.

Mr. TAKANO. Mr. Chairman, I yield back. Thank you, Mr. Williams.

Chairman HANNA. The gentleman yields back.

Mr. Bentivolio.

Mr. BENTIVOLIO. Thank you, Chairman Hanna and Chairman Coffman. And thank you, witnesses, for being here today.

This holds some personal significance for me. I am a small business owner, or was before I came to Congress, and I am also a service-disabled veteran. So the policy we are discussing today affects me directly. And that said, of course, I come with no selfish intent but rather to serve the interests of my 2 million fellow service disabled veterans and their families. I am also a member of The American Legion and a life member of the VFW.

But I just recently got this this morning, so I have dealt with the VA. And this is the first time I have heard that the VA actually will help a small businessman. I am maybe naïve, and I have since this morning become very acquainted with this and some of the questions we are going to ask and some of your testimony I have read over. But help me walk through this system because I have dealt with the VA as a Vietnam veteran. I never wanted to go back. And then as a veteran from Iraq I found it was a whole different thing.

So I would like to ask you a question. Can you walk me through this as how I would go about or a fellow veteran in my district who wants to start his own business, his first step to going to VA, does he have to put together a business plan or is the application process similar to that in the format?

Mr. GOLDSCHMITT. The business plan is not a requirement of verification, but the business documentation that addresses governance, ownership, et cetera, is part of that process. So the documentation that I would put together if I am going through as a small business coming into the government would be all of the small business steps of registering with Dunn & Bradstreet, registering in SAM, putting my information in. And from a VA perspective I would be putting together my paperwork that addresses my service disability, which they probably have in their system, but I would be putting together all of the paperwork on my company, including all of the registration with the state; my operating agreement or bylaws; a variety of information, including licenses.

Mr. BENTIVOLIO. So let me see if I understand this. If I was a veteran I would not have to come in, give you a business plan

or a marketing plan addendum to that or give you what I project my next three years of income is or my expenditures; how I am going to do this business? I do not have to do that?

Mr. GOLDSCHMITT. No.

Mr. BENTIVOLIO. Okay. So the next thing is who are those people who actually review my application? Do they have any business experience or are they government clerks that determine that?

Mr. GOLDSCHMITT. I do not know what business experience they have but it is a mix of government and contractors. I think that would be a better question for Mr. Leney to talk about. But in my experience they have not been business owners or business managers.

Mr. BENTIVOLIO. Interesting. Okay. I yield back my time. Thank you very much.

Chairman HANNA. The gentleman yields back.

Mr. Walz.

Mr. WALZ. Thank you, Mr. Chairman. And thank you all for coming and helping us understand this.

These are important programs, and when they work I think they are important and they do work. When they do not, they are incredibly frustrating. This might give a heads up for that panel that is sitting behind you. I am going to get a little bit parochial here on this, but this is a letter I got last night. I am just going to ask you as you listen to this paragraph, do you think this is typical or an anomaly?

“We went through the recertification process last summer and sat through the six-week outage on the registration side. We then submitted the final documents immediately after the outage ended and we got notification that we had reached the determination stage. Then within a few short weeks we were shown on the website as certified SDVOSB. Problem solved. Then last Wednesday, we got the attached letter saying our certification expired and we are out of the program. At this point it appears they lost our materials and pushed us out of the database.”

Typical or anomaly in your opinion as you see this?

Mr. GOLDSCHMITT. I would not call that typical, but I would not call that an anomaly because I am seeing that with an increasing frequency.

Mr. WALZ. Have you heard of these types of things happening?

Mr. GOLDSCHMITT. Yes.

Mr. WALZ. Now, keep in mind, this is a 20-year-old business that has gone through this, been all there. Why are we wasting time on this? Nothing has changed. They went through the process. They followed it. They did it. And then you told them and they went ahead forward. It was the folks sitting behind you who are going to hear this. Why would they? This is the frustration I feel. I mean, if the process was working and they got certified, we should have been able to move on and now we are going to deal with this one. Do you hear these stories?

Mr. WILLIAMS. Yes, we do a lot. That e-mail sounded very similar.

Mr. WALZ. Yeah. In your opinion, why did this happen?

Mr. WILLIAMS. Well, they did have technological issues with the system last summer. We heard from a lot of folk who disappeared out of the Vet Biz database last year.

Mr. WALZ. Well, the folks sitting behind, I am going to come back after these votes. It is Windsor Software. Somebody might get on the phone. That would be good. But yeah. So we hear that?

Mr. WILLIAMS. Mm-hmm.

Mr. WALZ. So now I have a veteran small business service-disabled veteran following the rules, doing it, proud to have a symbol up on their website doing these things and they got booted out. What is their recourse now other than writing to me before they knew there was a hearing? What was their recourse to go back through and get back on again?

Mr. WILLIAMS. There is an appeal process. If their eligibility is rescinded, they could file an appeal with the Agency, with the VA. Ultimately, they could go to federal court.

Mr. WALZ. For a small business?

Mr. WILLIAMS. Right.

Mr. WALZ. Who was already certified?

Mr. WILLIAMS. Correct.

Mr. WALZ. Told they were. Kicked off.

So it seems to me, and I will yield back to the chairman here in just a second, it seems to me that I heard you, Mr. Goldschmitt, you made this point about it is, is that we do this all too often. That the proof always lays on the veteran. The assumption is they are wrong. We process it from that point of view and we ask them to prove they are right. So now I have got a small business doing everything right, going to have to go back through this process to prove that they have been certified 19 times in a row, and have to get recertified.

So the way to fix this? Anybody got a suggestion?

Mr. WILLIAMS. Well, they extended the amount of time that you are eligible from before you have to re-verify from one year to two years, so I am not sure where this particular company fell in that spectrum, but perhaps extending it further.

Mr. WALZ. Okay. Anybody else?

Mr. WYNN. I would just like to say there are far too many businesses that have been denied for various reasons, and the thing about it, as you mentioned a 20-year business, a company that had been doing business for 20 years, we have seen a number of businesses that are out here doing business with federal agencies, perfectly legitimate businesses, only to get denied to do business at the VA.

Mr. WALZ. Statistically, what is the chance that this is a fraudulent claim versus an error that was made on them? The chances are that this was an error. Am I correct? It could be a fraudulent claim. I do not know. I am going to find out from the folk behind you. But statistically, so everybody gets kicked out. Now they have to go back and prove that they are legitimate?

Mr. WYNN. Well, it has been stated by the VA Small Business director and even in some of the GAO reports that less than 2 percent of those companies that were denied were denied for reasons of fraud.

Mr. WALZ. Okay. I yield back. I will wait for the next panel, Mr. Chairman.

Chairman HANNA. The gentleman yields back.

If there are no further questions from any members of this panel, unfortunately, we have to go vote. So I will dismiss this panel. When we come back, Mr. Coffman will take over the gavel and handle the second panel.

So we are going to have votes. I will reconvene in probably 20 minutes. Thank you.

[Recess]

Chairman COFFMAN. The Committee is now called back to order.

Our first witness on the second panel is Bill Shear, director of the Financial Markets and Community Investment Team of the Government Accountability Office. Mr. Shear frequently comes before both Committees, and we look forward to hearing your testimony again today. You are now recognized for five minutes.

**STATEMENTS OF BILL SHEAR, DIRECTOR, FINANCIAL MARKETS AND COMMUNITY INVESTMENT; A. JOHN SHORAKA, ASSOCIATE ADMINISTRATOR, OFFICE OF GOVERNMENT CONTRACTING AND BUSINESS DEVELOPMENT, U.S. SMALL BUSINESS ADMINISTRATION; THOMAS J. LENEY, EXECUTIVE DIRECTOR, OFFICE OF SMALL AND DISADVANTAGED BUSINESS UTILIZATION, DEPARTMENT OF VETERANS AFFAIRS**

**STATEMENT OF BILL SHEAR**

Mr. SHEAR. Chairmen Coffman and Hanna, Ranking Members Meng and Kirkpatrick, and Members of the Subcommittees.

I am pleased to be here this afternoon to discuss the Department of Veterans Affairs' efforts to verify the eligibility of veteran-owned small businesses, including service-disabled veteran-owned small businesses to receive contracting preferences under VA's Veterans First Contracting program. This statement is based on our January 2013 report on VA's Verification Program.

Given the status of VA's verification procedures and operations, our work focused on issues related to planning for and designing the verification program, and on changes in the program's management and operations. My testimony today addresses first the progress that VA has made in ensuring that its program verifies eligibility on a timely and consistent basis, and second, key operational and policy issues that VA will have to address if its verification program is expanded to support the government-wide Service-Disabled Veteran-Owned Small Business Contracting Program.

In summary, the two key findings from our January 2013 report are:

First, VA has instituted a number of significant changes to its verification processes to improve and address program weaknesses but it continues to face challenges in its efforts to establish a stable and efficient program to verify firms on a timely and consistent basis. These challenges are directly related to shortcomings in strategic planning and data systems for the verification program.

Second, expanding VA's Verification Program to support the government-wide Service Disabled Veteran-Owned Small Business Contracting Program would require VA to improve its verification process and address a number of operational and policy issues.

To improve the management and oversight of VA's verification program, our January 2013 report made two recommendations addressing strategic planning and data system needs. VA concurred with the two recommendations and stated that it had actions underway that would address them.

Chairmen Hanna and Coffman and Ranking Members Meng and Kirkpatrick, this concludes my prepared statement. I would be happy to answer any questions you may have.

Chairman COFFMAN. Our next witness is John Shoraka, administrator of Government Contracting and Business Development at the Small Business Administration. In this capacity, he is responsible for ensuring maximum participation by small firms across the federal marketplace and overseeing all government contract programs benefitting small businesses. Thank you for being with us today, and you are now recognized.

#### **STATEMENT OF A. JOHN SHORAKA**

Mr. SHORAKA. Thank you, Chairman.

Chairmen Coffman and Hanna, Ranking Members Kirkpatrick and Meng, and Members of the Subcommittees, thank you for inviting me to testify before you today. The SBA plays a pivotal role in helping veteran-owned small businesses and service-disabled veteran-owned small businesses or SDVOs obtain access to federal contracts.

As you know, veteran-owned businesses are an integral part of our nation's economy and its ongoing recovery. Veterans own 2.4 million, or 9 percent, of U.S. businesses. These businesses generate about 1.2 trillion in receipts and employ nearly 6 million Americans. One key sector of the veterans small business economy is government contracting, where SBA and its SDVO program play a critical role.

Our SDVO provides Federal procuring agencies with the authority to set acquisitions aside for exclusive competition by SDVOs. The program also gives procuring agencies the authority to make sole source awards to SDVOs if certain conditions are met.

SBA's government-wide program, along with the VA's Veterans First contracting program, are intended to assist the Federal government in meeting the statutorily-established annual agency-wide goal of awarding at least 3 percent of the total value of contract dollars to SDVOs. In fiscal year 2011, over \$11.8 billion in contracts went to SDVOs, up by 3.8 percent over the previous year.

To qualify as an SDVO under SBA statutory guidelines, a firm must meet four conditions through a self-certification process. First, the firm must be at least 51 percent owned by one or more service-disabled veterans. Second, the firm's management must be controlled by one or more service-disabled veterans, or in the case of a veteran with a permanent and severe disability, by the spouse or the permanent caregiver of the disabled veteran. Third, the firm must meet the small business size standard for any federal con-

tract they bid on. And fourth, the firm must self-represent their disabled veteran status.

Currently, there are approximately 12,000 self-certified SDVOs in the System for Award Management, which is the government-wide contracting database.

In terms of a participant's status as a veteran with a service-connected disability, the owner-operator of an SDVO must be able to produce official documentation that he or she has a service-connected disability in the event of a "protest." A protest occurs when a competing bidder or other interested party challenges the winning firm's eligibility as an SDVO. The initial decision on a protest is made by my office. The determination of a protest may be appealed to SBA's Office of Hearings and Appeals (OHA).

OHA provides independent administrative appellate review of SBA program determinations, including the initial SDVO determinations made by my office. OHA decisions, in turn, may be appealed to the Federal courts. Currently, OHA is staffed by eight full-time employees, including two administrative judges, who decide appeals of the Office of Government Contracting's initial SDVO determinations. In fiscal year 2012, OHA decided eight SDVO appeals, roughly 20 percent of GCBD's 41 initial determinations that year.

We use the protest process to help root out fraud, waste, and abuse in our small business programs by referring questionable firms to our General Counsel Debarment Official or SBA's Inspector General for further investigation. In fiscal year 2012, SBA suspended, proposed for debarment, or debarred 30 firms or individuals involved in procurement-related misconduct.

The SBA and VA mutually recognize the importance of the SDVO communities to the American economy. SBA and VA have collaborated to compare our programs in an effort to bring them into closer alignment and provide better service to the veterans' community. While there are similarities, there are also key differences. For instance, VA's Veteran First program is a certification program very similar to SBA's 8(a) Business Development Program, while the government-wide SDVO program uses self-certification. In order to meet the requirements of a certification program, a firm must provide more initial information and work through the certification process to meet eligibility requirements.

Another difference between the SBA and VA programs is in the timing of requests for documentation and review of documentation to demonstrate program eligibility. In a protest-based self-certification program, the requests for additional documentations are submitted in response to a protest that is filed after a firm has been identified as an apparent successful offeror. Once the documentation is received, a determination of eligibility is made. The VA certification process requires that documentation be submitted and a determination be made before an offer can be submitted or a contract be awarded.

Our collaboration with the VA has been productive in identifying other areas of potential coordination and best practice sharing. I would be happy to discuss these efforts or any of the topics the Subcommittees wish to explore during the question-and-answer portion of the hearing today.

Thank you once again for your support of our work in this area and for the opportunity for me to appear in front of you today.

Chairman COFFMAN. Our final witness is Tom Leney, executive director for Small and Veteran Business Programs within the Office of Small and Disadvantaged Business Utilization at the Department of Veterans Affairs. In this capacity he is responsible for promoting small business participation at VA with a particular focus on service-disabled veteran-owned small businesses and veteran-owned small disabled businesses. As we have noted several times today, many of our distinguished witnesses are veterans, including Mr. Leney, who proudly served in the United States Army. We thank you for your service and look forward to your testimony. You are now recognized for five minutes.

#### **STATEMENT OF THOMAS J. LENEY**

Mr. LENEY. Thank you, Mr. Chairman and Chairman Coffman, Members of the Subcommittee. Thank you for inviting me to testify.

Last year, the VA Veterans First Program enabled veteran-owned small businesses to receive contract awards totaling more than \$3.8 billion from the VA. Since its inception, the VA Verification Program has faced challenges balancing the need to prevent ineligible firms from taking improper advantage of the Veterans First program with our desire to make the process easier and faster for legitimate veteran-owned small businesses. The VA has made substantial progress on both fronts.

In the aftermath of reports in 2011 from the VA Inspector General and the Government Accountability Office, our imperative was to ensure that all firms in the program have been properly verified as meeting the standards laid out in 38 CFR 74. We have addressed all the recommendations in these reports. Indeed, in its latest report the GAO acknowledged, as Bill did here today, Mr. Shear did here today, improvements. As we improve the verification process, however, we realize that many of the remaining issues are associated with the rules themselves. Although the regulation that governs VA's Verification Program was derived from the SBA regulations that cover the government-wide SDVOSB program and the Section 8(a) Business Development Program, there has existed in the stakeholder community a widespread misconception that there are major differences between the VA and the SBA regulations.

To understand what differences truly exist, VA collaborated with the SBA over the last several months to conduct a thorough comparison of the ownership and control portions of our respective regulations. Our analysis revealed two statutory differences and two regulatory differences. We also compared VA's interpretation of the regulation to the SBA interpretations as reflected in the SBA status protests and in the OHA decisions over the past two years and found a single instance where our interpretation differed from the SBA's and we are changing our interpretation to match theirs.

Although VA seeks to align its interpretation with the SBA, we have determined that transfer restrictions on ownership that are part of normal commercial dealings, such as the right of first refusal, do not materially affect the ability of a veteran to uncondi-

tionally own or control the business. Therefore, VA will no longer interpret the current regulation to mean that such restrictions constitute a reason for denying eligibility.

Since many rule issues cannot be resolved by reinterpretation, VA has initiated a formal process to consider changes based on lessons learned and outreach to a broad range of veteran stakeholders. We received a number of recommendations worthy of consideration. However, in view of the current alignment with SBA rules, any consideration of changes to the VA Verification Program will involve coordination with the SBA. Our goal is to increase opportunities for veteran businesses. Our analysis has revealed that most applicants fail because they do not fully understand the regulations. To address this problem we will expand our Verification Assistance Program by adding pre-application workshops to the three existing elements, which consist of an online self-assessment tool that walks the veteran through every element of the regulation, verification assistance briefs, 11 of which are on our website and cover about 85 percent of the reasons for denial, and partnerships to provide counseling services to applicants. Three of our counselors were present in the first panel. Only one was not a counselor, we do not allow for-profit organizations to partner with us on counseling.

In May, we will adopt a practice of contacting an applicant with preliminary findings where there are issues of noncompliance that can be easily and quickly corrected. We will allow applicants to make corrections prior to initial determination. We are currently running some limited pilots to validate the process and to train the CVE staff.

The most recent GAO report found that the management information system supporting verification is woefully inadequate for our purposes. To solve this problem, VA has a Next Generation System under development. We expect to award a contract for the new system in May with an initial operational capability in October 2013.

In conclusion, we have overcome many of the challenges and vulnerabilities that were raised by the GAO and OIG reports and improved processes have reduced the average time to initial determination from more than 130 days during the summer of 2011 to fewer than 40 days for those applications that were completed last month. We continue to improve our processes and will revise our regulation in coordination with the SBA to achieve a program that enables real veterans to gain expanded access to real opportunities with the Department of Veteran Affairs.

Mr. Chairman, members of the Subcommittees, this concludes my statement. I am pleased to answer any questions you may have.

Chairman COFFMAN. Thank you.

Mr. Shoraka, how could the Veterans Administration better apply the interpretive standards of 121 to ensure they are in sync with the Small Business Administration?

Mr. SHORAKA. With regards to size, the SBA is the agency that makes determinations on size on any given one contract, on contract-specific determinations. So when there is a protest at a time when there is a contract being awarded, the SBA is the agency that

will make that determination. What we often find that happens, since the determination at the VA is made during the certification process, the primary NAICS code for that entity is used to determine size and their eligibility to the program. However, if it is contract specific, the contract NAICS code will be used and that is where you will have a divergence in an entity being found small at certification and potentially other than small in a protest situation.

Chairman HANNA. Mr. Shear, why was the Government Accounting Office able to determine whether the recent changes have been effective?

Mr. SHEAR. Part of the reason why we stepped back and looked at strategic planning is that we observed that there was not a stable process in place where we could do testing and evaluate how well the process was working. So the progress, or in this case the lack of progress at VA, affected very much what our audit work included. One of the things that we have recommended, which we think is very important going forward for VA, is that part of the strategic planning should include some type of a feedback mechanism and performance metrics—that is developing metrics based on its audits of its own determinations to see basically how good those verification determinations were. VA started collecting some information on the quality of its determinations last fall but really VA needs a system in place. And VA needs a system in place to try to test how well its process is working.

Chairman COFFMAN. So you do not have a feel right now as to whether or not they are working together as the program was intended?

Mr. SHEAR. We do not have evidence that the process is working as intended. And among other things, we have heard similar types of concerns raised by the first panel. We reached out to these constituencies that represent service-disabled veterans, and we know there are a lot of concerns out there and there is a lack of metrics to really evaluate how well VA's current process is working with the changes that have recently been made.

Chairman COFFMAN. We will do a second round of questions.

Mr. Shear, I suggest to you that we have plenty of evidence that it is not working. We had a panel just before that gave us a litany of examples, and I am sure they have many more.

Mr. SHORAKA, in the GAO report you discussed today you mentioned a statutory, procedural, and interpretive differences between the SBA and the VA programs. Just so we are all on the same page, can you explain what these perceived differences are specifically; the key differences in your interpretation rather than that more or less subjective phrase?

Mr. SHORAKA. Sure. I mean, when you compare the rules and the regulations, there are some specific minor differences. And I think Mr. Leney mentioned, or someone today mentioned with regards to spouses of deceased service-disabled service members being able to control and run the company after the passing. That is one difference. But where we see significant sort of divergence is not necessarily in the rules themselves but in the interpretations. The SBA does not have bright-line determinations or bright-line guidelines with respect to, as an example, board control. We

look at the entirety of the case to determine where control and ownership resides. If you look at board control as an example, state by state there's different rules and regulations around how the board determines quorum, et cetera. Those have to be taken into consideration to determine if indeed the veteran-owned small business or the veteran owns and controls the firm.

Another area I think that was mentioned was rights of transfer. That is not a bright-line for us. Depending on what the common business practice is, that has to be evaluated based on the totality of the circumstances to determine if it indeed affects ownership and control of the firm.

Chairman HANNA. Thank you.

Mr. LENEY, you run the Center for Veterans Enterprise and the Office of Small and Disadvantaged Business Utilization at the VA. Given that, section 15(k) of the Small Business act specifically directs that director of the Office of Small and Disadvantaged Business Utilization shall carry out exclusively the duties enumerated in this act and shall, while the director, not hold any other title, position, or responsibility, except as necessary to carry out responsibilities under section 15(k). How do you comply with that Small Business Act? Can you be the advocate for service-disabled veteran-owned small business at the same time your tasked with verification, with all due respect?

Mr. LENEY. Yes, sir. I can do both because the act of verifying veteran-owned small businesses enabled 5,400 veteran-owned small businesses to participate in a program that has distributed more than \$3.8 billion in procurement dollars to veteran-owned small businesses. So I think that this program that the VA has established has created a gold standard. In the Federal government, when people know that a firm has been verified by the VA, they can take it to the bank. And the results, this is real money to real vets, and it is a program that benefits veterans. And there are 5,400 firms in this program that get those benefits. So I personally do not have any issue with a conflict of interest because we are helping vets.

Chairman HANNA. Can you show us where in the statute it is permitted? Maybe you can get back to us.

Mr. LENEY. I think that is an important question and to give you a complete answer let me provide that for the record.

Chairman HANNA. Sure. I appreciate that.

Mr. Shoraka, has it ever occurred to you that beyond verification of the veterans you do not need the VA; that you are perfectly capable as the Small Business Administration of doing this as you do everywhere in the country?

Mr. SHORAKA. Sure.

Chairman HANNA. Well, I know you do not have the budget for it but the VA does; right? Thirty million dollars? What do you think of that.

Mr. SHORAKA. Well, statutorily the AV has an important program to make sure that a portion of their contracts, their Vet First contracts go specifically to the service-disabled community. I think that is an important program that has helped us meet our goals. Or I should not say meet our goals; get closer and closer to our goals over the years. As I mentioned, we had an improvement of

3.8 percent from 2010 to 2011. What I can say is that our self-certification program for the service-disabled community for the rest of the Federal government in our view has been effective in self-policing itself. Over the last three years we have had more suspensions and debarments than the previous decade. It has been a system where interested parties including other vendors or even the contracting officer can initiate a protest in which case we get involved to make sure the firm is indeed service-disabled.

Chairman HANNA. It just seems like so many of the problems are a function of disagreements and interpretation that if everything went in one place and when you look at the way you are organized and how much more efficient, relatively efficient you seem to be, at least historically, I hope you appreciate it is a fair question.

I yield back, Chairman.

Chairman COFFMAN. Mr. Walz, you have five minutes.

Mr. WALZ. Thank you, Mr. Chairman.

And I would like to first thank both the chairman and the ranking members on this. It is not often that we combine areas of jurisdiction together, and we will oftentimes sit in our Committee and criticize the lack of collaboration between agencies while we are not collaborating. They did not make that mistake when they brought you here, and I thank that.

Mr. Leney, I would also like to publicly thank you and your staff for addressing the concern of my constituent in a timely, professional manner that allows us to give an answer. And I am grateful for that. The next time I will just come to you so I do not have to do it publicly. So I appreciate it and apologize to you for that, but I am grateful for it.

Mr. Shear, maybe you can help me with this. It is not incompatible, is it, for us to figure out how to streamline this process and still keep the checks and balances on fraud in place? Would it be your opinion we can do both?

Mr. SHEAR. There is a tradeoff and the two have to be balanced. And I think VA is still searching for a balance in terms of its policies and procedures. When we look at internal controls, we look at whether there is reasonable assurance that only eligible firms will participate. And VA should come up with rules and procedures that can help to fight fraud while still allowing legitimate firms to participate in this marketplace.

Mr. WALZ. I was at that hearing in 2011. We did it. And I think we should acknowledge progress has been made. But I still think we are trying to fight this. And I struggle with this one always, whether it was the Department of Labor and vets jobs issues with the VA. I am somewhat biased where I tend to fall on the VA side of things as one stop shopping but I also recognize the expertise that is here. Does it make sense that these two agencies should partner in your opinion? Is that the best way to ensure delivery of services to these veteran-owned businesses and protect against fraud?

Mr. SHEAR. As to the collaboration and cooperation that we have observed recently between the two agencies, we view it in a very positive sense. We view it in a positive sense in the broader picture that the president has identified a crosscutting priority goal

to serve small businesses and entrepreneurs. We see it in that framework. We see it in a more detailed framework in terms of what these agencies can bring to each other. For example, SBA has been working for roughly the last two or three years in developing a new data system to manage its 8(a) and its HUBZone programs. And now there is starting to be some collaboration between the agencies to see how could this system could help inform or even directly help VA deal with what is a very huge challenge. That is, it has to have a data verification system that really can work for what its mission is.

Mr. WALZ. Mr. Leney, this is not a turf battle-type of thing, is it? You are trying to find the best balance on this. Is that the solution of working together, best practices, the two agencies? Because I recognize the two of you could go and do anything else anywhere else. You have chosen to be here for a reason. You believe in this program. You want to make it work. And if we do not get it right, the critics will be proven correct. And that means we can lose programs like this. So are we moving in the right direction your opinion?

Mr. LENEY. Congressman Walz, there is no turf battle here. I would be happy if the SBA were to take this burden on. It would save me about 30 hours a week mostly in the evening. I talk to veteran business people every night, so if John would like to take that task on, that's fine.

Mr. WALZ. But they need you, don't they? This idea of one-stop-shopping is my internal bias towards the VA on veterans issues I think comes out of practice and effectiveness.

Mr. LENEY. I think it is important to understand, Congressman, there is a fundamental difference here. Last year, we made determinations on 5,900 firms. The SBA did 37 status protests. We did 436 requests for reconsideration. They have two administrative judges in OHA. And I would note that our request for reconsideration is not an appeal process. If they need to appeal, they come to me and say, "We think a mistake has been made." Our Office of General Counsel makes a determination was a mistake made?

If we determine that there was no mistake, and in less than 2 percent of the cases was there a mistake, we then allow them to do what I call a Second Chance Program. Request for reconsideration is the ability to, if you were found noncompliant and you were truly noncompliant, you can correct it. We have worked very closely with the SBA. We are taking a leaf out of the 8(a) book where we have initiated; we are doing pilots as we speak. On 1 May we will be initiating the Predetermination Findings Program where prior to a determination we will be reaching out to the veteran. We will be giving them a preliminary finding of all the things we found wrong. And I will tell you, we try very hard to find it all the first time. I have eight pages of metrics and statistics. We track a lot of things. And one of the things we track is how many times do we have an incomplete determination. Nine percent. Nine percent of the time is the numbers that we have. So yes, we try to make those corrections, but we are doing this predetermination findings process so that we do not have to get to a denial determination. They get a chance to fix it. We are doing the same thing the 8(a) program has been doing, learning their lessons and adopt-

ing their best practice. Reaching out, having the conversation. As many of the people on the first panel mentioned, there has not been that kind of a dialogue. So we are trying to take advantage of things that other people are doing to make the progress better.

And I would note, we did 569 determinations in February. The average time was 34 days. The regulation gives us 60. In June of 2011 it was over 130 days. So I think we made some progress.

Mr. WALZ. And we certainly need to acknowledge it when we do that. There are a lot of folk working hard to make that happen. I yield back.

Chairman COFFMAN. Thank you, Mr. Walz.

Ms. Meng, from the State of New York.

Ms. MENG. Thank you, Mr. Chairman.

The VA has indicated that it wishes to collaborate with SBA in its efforts to develop a new data system. Mr. Shoraka, SBA has been developing a new data system to manage its 8(a) and HUBZone program. What attributes of the data system SBA is currently developing hold the most promise for providing a model for completion of a VA data system?

Mr. SHORAKA. Thank you, Congresswoman.

As Mr. Leney mentioned, we have been working together to share best practices, not only around processes and metrics but on systems as well. We are in the process and we have been over the last year in implementing what we call One Track, which will be the system for our 8(a) and our HUBZone program. The process is well on its way where at this point it would be difficult to adjust the system to accommodate the specific necessities or requirements of the veteran program. But what we have committed to do is share system requirements, to share statements of work, to make sure that the frontend level of work that the VA would have to go through in getting a new system up and running could be minimized as much as possible.

Ms. MENG. Thank you. I yield back.

Chairman COFFMAN. Thank you, Ms. Meng.

Let's see. Mr. Bentivolio.

Mr. BENTIVOLIO. Thank you very much, Mr. Chairman.

Let us see if I understand this correctly. Correct me if I am wrong. If I want to be certified VA, I go through SBA to get certified first and then go to him? Or go just to him? Is that right?

Mr. SHORAKA. So if you are a veteran-owned service-disabled small business and you want to work with the rest of the Federal government and not the VA, you can self-certify yourself in the system for award management.

Now, where the SBA gets involved in that process is if there is a protest on a specific bid that you may have bid on. Any interested party can protest that award. The VA system is a frontend certification program, very similar to our 8(a) program where the firm goes through a certification and documentation process which can take a period of time before any award is made. But that is when the firm is actually certified into the program. And in the case of the SDVOSB for the VA, that program is to do contracting with the Veterans Administration.

Mr. BENTIVOLIO. Okay. So I guess what I am leading to is when I came home from Iraq I was considering getting a govern-

ment job. I eventually got it but it was a different type than I expected. And the application process was very expensive. But when I applied for that government job there was a space where all I had to do was click that I was a veteran. And then I had to click another spot for the application if I was a disabled veteran.

Now, it would seem to me that you and you are both looking for, first of all, qualified contractors to do government work. You are specifically VA. But you have some of the same criteria he does except yours is you have to have a DD Form 214 prove that you are a veteran and I have to have certification that I have to submit from the VA to, well, to prove that I am a disabled veteran; correct? I understand there are some regulation differences, but would it not be simpler for me, as a veteran, just to come to you and say, hey, I need this certification; that I am a disabled veteran and I need a DD Form 214 sent to him, official copy, and you label me as a disabled veteran that owns a business with the other additional requirements—51 percent owned, one or more vets. And I missed number three. I did not understand here and I did not understand four.

Mr. SHORAKA. With regards to the documentation, in the case of a protest that documentation, which is either received from the VA, or the Department of Defense, or in some cases the Federal government or other agencies, that documentation is necessary for us as well but only in the case of a protest. Not on the frontend.

Mr. BENTIVOLIO. But it would seem to be less troublesome if I just went to the SBA and just handed you my—or you got an official copy. I mean, does that not make sense or am I missing something here?

Mr. LENEY. Congressman, it is always less troublesome to self-certify. It is always more troublesome when somebody checks. And at the VA, we check.

Mr. BENTIVOLIO. Well, you check that I am a disabled vet; right?

Mr. LENEY. We do.

Mr. BENTIVOLIO. And you check that I am a veteran. You have a copy of my DD Form 214; correct?

Mr. LENEY. Yes.

Mr. BENTIVOLIO. All right. So if I was applying for a government job and I have to verify that I have a college degree, I have to send an official transcript from my school. I do not, the school does, to an employer or another school for instance. Why cannot the same happen from you, a certified copy from VA goes directly to SBA?

Mr. LENEY. In fact, one of the things that we have been doing in this collaborative effort is looking at where we can have a single portal sharing information. As we looked at the technology platforms that support the 8(a) and the HUBZone programs and the technology platform that supports our Veterans First Program, that is one of the things we are looking at. Can we create a system whereby a person enters his data one time and it is used by multiple programs?

Mr. BENTIVOLIO. Yeah. And it seems to me that SBA has more experience in business and VA is more experienced in veterans. They could simply send over to you official documents to the VA

to meet these other requirements, you verify it, and it is done. Done deal. It seems rather simple to me.

Mr. SHORAKA. The only thing that I would add is that obviously statutorily the VA program is a full certification frontend program that certifies not only the status but also that the firm is indeed small, where our program, again, is a self-certification program that under protest we will determine status and size.

Mr. BENTIVOLIO. I understand. So we need to change the regulations. Okay, good. I will do what I can.

I yield back. Thank you.

Chairman COFFMAN. Ms. Chu, California. You have five minutes.

Ms. CHU. Thank you.

Mr. Leney, the GAO report released earlier this month noted that the VA had not shared their comprehensive long-term strategic plan with key stakeholders such as veteran-support organizations and congressional staff and committees. Moving forward I think there are many of us on the Small Business Committee that would like to be more engaged on this issue with the VA. What steps have you taken or are planning to take to ensure that key stakeholders are involved in the VA Verification Program's plans and priorities?

Mr. LENEY. That is an excellent question. We have reached out to many of the stakeholders. In fact, all the people on the first panel are part of our outreach effort, and I think particularly with respect to the rules, with respect to a long-range plan. When I came to the VA the secretary looked at me and he had a two-word mission statement, "Fix Verification." We had the kind of problems that did not need to be looking through a five-year crystal ball. The problems were in the trench with us.

Now that we have cleared many of those problems, we now have a five-year plan that has gone through a rigorous review process. The secretary last summer established a SES Review Taskforce to look at verification. That plan has been briefed to this taskforce. It will be briefed next month to the Office of the Secretary and then we will be sharing it with the stakeholder community and would be happy to share it with the members of this Committee. We have no secrets.

But when the enemy is in the trench with you, you deal with the enemy in the trench first because we had a lot of small businesses that were being tremendously disadvantaged when you have a process that takes 130 days on average. Now we are at a process that took 34 days last month, so we are in a position to think long term.

Ms. CHU. So all this outreach took place since the GAO report; is that what you are saying?

Mr. LENEY. No, ma'am. We have been conducting outreach since—I can speak personally—since April 2011.

Ms. CHU. And why is it that the GAO report said that there had not been the sharing?

Mr. LENEY. What they spoke about has not been the sharing of a five-year strategic plan. What their report referred to was a specific document, which is a five-year plan. We had strategic planning documents. Many of those issues have been shared with

stakeholders, but we did not have a comprehensive five-year plan. That is what they were referring to.

Ms. CHU. Well, I wanted to ask about the appeal process next. Mr. Shoraka, the appeal process in the SBA Office of Hearings and Appeals is about 15 days. Of course, the GAO report said 130 days but now you are saying 34 days as of last month. But nonetheless, the appeal process at SBA is still faster than what it is at the VA. So what more could the VA do to be similar to the SBA in speeding up the review process?

Mr. SHORAKA. With regard to the process at the SBA, as I mentioned earlier in my testimony, my office makes the initial determination with regard to status. The firm or entity has the opportunity to appeal it to the Office of Hearings and Appeals, which is an independent body which can make a determination as to the facts of the case. And that process helps to ensure consistency in the programs, having that outside review and determination. But it is an independent process that takes place at the SBA, separate and apart from my office.

Ms. CHU. Well, some on the earlier panel were suggesting that the SBA handle the appeals and I am wondering whether the SBA would have the capability of handling the appeals process for the VA.

Mr. SHORAKA. So, I know that that has been a discussion and we have heard that discussion. I think obviously it may have certain impacts that may not have been studied yet. I think the entirety of the various impacts that initiating an OHA appeal process for the VA determination or status determination process, there could be impacts to their program. There could be impacts to our program. Obviously, I think there is a resource question. As we have heard here today, they have a significant number of determinations they make every year. As I mentioned in my testimony, we are sort of resource-limited in our Office of Hearings and Appeals, so those types of things, the impacts and the resources, would certainly have to be studied before any sort of recommendation I think should be made.

Ms. CHU. Okay, thank you. I yield back.

Chairman COFFMAN. Thank you, Ms. Chu.

Mr. LENEY, CVE's effort to balance verification with fraud is due in part to our criticism over the past two years. But you swung hard in the opposite direction. Do you have a long-term strategic plan to find a balance in verification? GAO says you do not have a plan.

Mr. LENEY. Yes, sir. We have a long-term strategic plan. We did swing hard, in part in response to the urging of this panel and this Committee to make sure that no ineligible firm was able to take advantage of the program that you created for veteran-owned small businesses. So our first priority was to make sure that that did not happen. Our second priority was to make sure we then streamline the process in order that eligible firms and legitimate firms could get through the process quickly, and we have done that. Our third priority was to look at the rules. We had a mature rule. We had a mature set of interpretations. And now that we have looked at the process and we are now looking at the rule and we have made

changes. As I said, as of Friday, transfer restrictions are not an interpretation that will cause a firm to be ineligible.

But we had to do a lot of fixing. People have made comments about the staff of CVE. I will note that 60 percent of the staff of CVE have audit background, 33 percent have IG experience, 33 percent are lawyers, 53 percent have a business degree, and 40 percent are former small business owners. So we have brought a different staff together. That staff is almost entirely new over the last 14 months to make sure we put together the kind of expertise that enables us to have a program that meets the objectives that have been set for us.

Chairman COFFMAN. Mr. Leney, CVE has forgotten how to fulfill the advocacy role that was mandated. In lieu of verification, how will you find further balance there?

Mr. LENEY. That role has not been forgotten; as Chairman Hanna mentioned, it is part of the OSDDBU mission that remains part of my mission. We are pulling in a new program called VE Transfer, which is about capacity building for budding veteran entrepreneurs. It is just that the Center for Veteran Enterprise, its mission has changed. You are correct, sir, dramatically. Its full-time focus now is to ensure that firms can gain access to the Veteran First Program and to ensure that only eligible firms gain access.

Chairman COFFMAN. Mr. Leney, SBA's Office of Hearings and Appeals noted 14 size appeal decisions in connection with SDVO set asides that reflected poorly on CVE's determinations. Can you explain the use of the Office of General Counsel for CVE approval given this issue?

Mr. LENEY. First, it is important to note that we do not do size determinations in the VA. Our policy is all size determinations are referred to the SBA. CFR 121 is about the determination of size. We do not match up to 121 because we do not determine size. We defer to the SBA on that subject. I believe the statistic you are referring to in those cases, the Office of Hearings and Appeals determined that we should have made a size request to the SBA and we did not.

We look at ownership and control. If a firm is eligible in any of its NAICS codes, we do not deny their eligibility. If we believe the firm is a large business in all of the NAICS codes that it references, then we refer them to the SBA.

Chairman COFFMAN. Follow-up last question.

All SBA decisions can be appealed to the Office of Hearings and Appeals, which has independent administrative judges and is bound by precedent and publishes its decisions, but VA's OGC handles appeals for CVE. Is it VA's belief that their appeals process is as complete and transparent as SBA's?

Mr. LENEY. Just a point of fact. The Office of General Counsel does not handle appeals. The Office of General Counsel, we utilize in our request for reconsideration. And I want to be very clear that that is not an appeals process. That is a second chance process. Actually, appeals come to me. I have no objection to making the results of those appeals public. We have not in the past, but the issue that we found, sir, is not so much the need for appeal; it is the need for speedy action.

Chairman COFFMAN. Speedy action, but I really, boy, not making those results public, and then instead of calling it an appeal you call it a second chance, are the two different? I mean, that is just not a transparent process that could be deemed objective I think by any standard. Would you commit here today to make the process public?

Mr. LENEY. I have no objection to making the process public, sir.

Chairman COFFMAN. Very well. I will watch for that.

Mr. HANNA. Chairman Hanna.

Chairman HANNA. Thank you. It is my understanding that at one time the SBA and the VA discussed having SBA conduct verifications on VA's behalf. Where is that going? What have you done with those negotiations? Are they ongoing?

Mr. LENEY. We have not pursued it because it was too expensive. They wanted a million dollars to do 40. We do 5,600.

Chairman HANNA. So the 30 million you get would not help.

Mr. LENEY. The 30 million we get, if my multiplication is correct, would not get us to the 5,400. It would only get me to 1,200.

Chairman HANNA. Thank you. Would you like to comment on that, Mr. Shoraka?

Mr. SHORAKA. Yes. So I believe those discussions were held before my time at the agency. I am not necessarily aware of the quote of a million dollars, but what I will say is that obviously it is a resource question. Obviously, even when we talk about the process of OHA as the congresswoman mentioned with respect to the SBA taking over the OHA responsibilities for the VA and allowing an appeals process as a resource question. And as I mentioned again, the impact on the various programs. Statutorily, it is a full certification program. How would that impact those requirements and how can we study those impacts?

Chairman HANNA. Thank you. How much do you spend verifying the program? The 8(a) program?

Mr. SHORAKA. I do not know if I have the statistics on the 8(a) program. I can tell you that in our certification program, as you probably know, the 8(a) program is not just a contracting program. It is a business development program. It is a nine-year program where the firm receives technical assistance to be able after the nine years to be competitive on the free and open market. But what I would mention is that we have approximately 19 of our staff involved in the certification process at the SBA. I do not have an exact dollar number on what those 19 cost, but I can certainly get that information for you.

Chairman HANNA. We have perhaps as many as a million vets, many of whom will apply for this. Are you both prepared to handle that load? And it is going to increase. How is that?

Mr. SHORAKA. So our 8(a) program allows somewhere between 600 and 800 firms into the program annually. Our acceptance rate is somewhere between 50 and 60 percent. So you can imagine that we probably review about double that, 1,600–1,800 applications annually. Obviously, I think if you are looking at a certification frontend program, that has significant resource allocation questions.

Chairman HANNA. Thank you very much.

No further questions, Chairman.

Chairman COFFMAN. Our thanks to the panel. You are now excused. I yield to Chairman Hanna for his closing remarks.

Chairman HANNA. I want to join Chairman Coffman in extending my tanks to all of our witnesses. I think this hearing has helped us better understand the problems our service-disabled veterans are facing when they seek to do business with the Federal government. I look forward to working with my colleagues on the Veterans Affairs Committee to see how we can do a better job of serving all those who have served us so well.

I ask unanimous consent that the members have five legislative days to submit statements and supporting materials for the record. Without objection, so ordered.

Thank you. This hearing is now concluded.

[Whereupon, at 5:12 p.m., the Subcommittees were adjourned.]

**A P P E N D I X**

**Statement  
Presented on Behalf of  
Veterans Entrepreneurship Task Force  
(VET-Force)**



**by Joe Wynn, VET-Force Treasurer  
Special Advisor  
Vietnam Veterans of America**

**Before the**

**House Small Business Subcommittee on Contracting and the Workforce  
and the House Veterans Affairs Subcommittee on Oversight and  
Investigations**

**Regarding**

**"Challenges Facing Small Businesses Owned and Controlled by Service-  
Disabled Veterans Seeking Federal Contracts using both the SBA and  
VA contracting programs"**

**Tuesday, March 19, 2013  
Rayburn House Office Building  
Room 2360**

## EXECUTIVE SUMMARY

During these difficult economic times in our Nation, some of those most impacted have been our military veterans and their families. The unemployment rate among veterans is high and among younger veterans and those in the National Guard and Reserves since 9/11 it's higher than the national average. The U.S. Veterans Employment Initiative is an aggressive plan to put veterans back to work.

Over the next 5 years, over one million more service members are projected to leave the military. The goal of this initiative is to ensure that work is available, accessible and in demand for our veterans and that these service members leave the military with the proper training and preparation they need to transition back into the civilian workforce. But now that we have fallen over the 'fiscal cliff' due to sequestration, federal agencies will be faced with significant budget cuts which will also impact the hiring of new employees. So we will have to turn to the small business and corporate sectors to help pick up the slack.

In a recent report from the President's Interagency Taskforce on Veterans Small Business Development, it was stated that 'Two of America's greatest assets are the service of our returning veterans and the economic dynamism of our small businesses.' We recognize that entrepreneurs and small businesses are the engines of American innovation and economic prosperity. SBA reports that our nation's 28 million small firms employ 60 million Americans, or half of the private sector workforce, and they are responsible for creating 2 out of 3 net new private sector jobs across the country.

Already, veterans own about 2.4 million businesses or 9 percent of all of America's businesses. These businesses generate about \$1.2 trillion in receipts and employ nearly 5.8 million Americans. As highly trained professionals and leaders with experience in challenging environments, veterans' potential for successful entrepreneurship and small business ownership will not be fully achieved if the VA's regulations for verifying them as veteran business owners is allowed to become the standard throughout the federal marketplace.

You would not think that the federal agency, the Department of Veterans Affairs, the very one created for **'those who have borne the battle, their widows and their orphans,'** would be the very agency that creates the greatest barriers and obstacles for thousands of veterans and veteran business owners. Since the end of the Vietnam War, the VA has wrongfully denied thousands of veterans their claims for compensation for their service connected injuries and now since 2008, the VA has once again been denying thousands of veteran business owners contracting opportunities due to their **'Consistently Inconsistent'** interpretations of VA and SBA contracting regulations.

The Vietnam Veterans of America call on Congress to direct the VA's Secretary, Deputy Secretary and Chief of Staff to **STOP** administering regulations, policies and procedures that are overly

burdensome, far too restrictive, and discriminatory towards veteran and service disabled veteran business owners. Our Veterans deserve far better support for their service.

### **INTRO:**

Good morning, Chairman Hanna, (HSBC - SCW), Chairman Coffman (HVAC - SOI), members of the subcommittees, and fellow veterans. On behalf of VVA National President John Rowan and all of our officers and members we thank you for the opportunity for Vietnam Veterans of America (VVA) to appear before you today to share our views on the **“Challenges Facing Small Businesses Owners and Controlled by Service-Disabled Veterans Seeking Federal Contracts using both the SBA and VA contracting program.”** I ask that you enter our full statement in the record, and I will briefly summarize the most important points of our statement.

Though my time of service was many years ago, as a veteran of the US Air Force with the 66th Strategic Missile Squadron, I still have very vivid memories of my military experience. And having served as an Advisor to the Vietnam Veterans of America and Legislative Liaison for the National Association for Black Veterans for the past 12 years, I also remember quite well the history of the Veterans Federal Small Business Development Movement in America from 1999 to today.

We all know that Congress passed Public Law (PL) 109–461, the Veterans Benefits, Health Care, and Information Technology Act of 2006 which included Title V, Sections 502 and 503 that authorized a unique “Veterans First” approach to VA contracting. This approach changed the priorities for contracting preferences within the Department of Veterans Affairs (VA), by placing Service-Disabled Veteran Owned Small Businesses (SDVOSBs) and Veteran Owned Small Businesses (VOSBs) first and second, respectively, in satisfying VA’s acquisition requirements.

Those 2 sections of the law, which many if not all of our Veteran Service Organizations (VSOs) advocated for, has been hailed as a great accomplishment for the veteran community. But the subsequent regulation (38 CFR 74) that was published to guide implementation of the law has now adversely affected thousands of veterans business owners.

Over the past 2 years, the VA has reported that of the more than 20,000 veteran business owners that have applied for verification through CVE, only 5,520 are now approved. From previous Congressional hearings, GAO reports, and statements from the VA Small Business Director, we have been told that less than 2% of those denied were for reasons of fraud or intentional misrepresentation. Instead, the greatest percentage of denials were due to CVE’s narrow interpretation of the regulation’s sections pertaining to ownership and control.

### **History of the Movement**

It was Public Law 106–50, the Veterans Entrepreneurship and Small Business Development Act of 1999 that laid the foundation for veterans interested in starting or expanding their own small businesses to get federal assistance. Congress even stated in its findings of PL 106–50 that America had not done nearly enough to ‘assist veterans, particularly service-disabled veterans, in playing a greater role in the economy of the United States by forming and expanding small business enterprises.’

PL 106–50 called for the creation of new entities and the restructuring of existing ones in order to assist veterans in pursuit of entrepreneurship. Under this law, the Office of Veterans Business Development (under SBA), the Center for Veterans Enterprise (under VA), and the National Veterans Business Development Corporation (quasi independent), were created. It also established a 3% procurement goal for federal agencies and large Prime contractors to purchase goods and services from service-disabled veteran owned businesses. But agencies did not pay much attention until 2003 when Public Law 108–183 made the 3% minimum **MANDATORY**.

And even then, it took a Presidential Executive Order (13–360) in October 2004 to really get agencies to carry out the law. Under the Order, agencies were instructed to designate a senior-level official to be held accountable for submitting a strategic plan showing how and when they would achieve the 3% contracting goal for service-disabled veteran owned businesses. But with no oversight and penalties associated with non-compliance, after a few years the effort diminished.

So Congress took another direction in 2006 and passed Public Law 109–461 which authorized **ONLY** the VA to implement a unique “Veterans First” approach to VA contracting. This approach would change the priorities for contracting preferences within the Department of Veterans Affairs (VA), by placing Service-Disabled Veteran Owned Small Businesses (SDVOSBs) and Veteran Owned Small Businesses (VOSBs) first and second, respectively, in satisfying VA’s acquisition requirements.

Since federal agencies choose not to follow the guidance provided in EO 13–360, veterans advocates called upon leaders of the House Veterans Affairs Committee, to use the Dept. of Veteran Affairs as the model agency to show the rest of the federal government could really increase contracting opportunities to Veteran and Service Disabled Veteran Owned Businesses. Afterall, the VA is the primary federal agency created to provide support and assistance to veterans.

So Congress passed Public Law (PL) 109–461, the Veterans Benefits, Health Care, and Information Technology Act of 2006. While this legislation provided a number of benefits for veterans; what’s of particular importance for the purposes of this hearing today, is that Title V, Section 502 and 503 of this legislation, authorized a unique “Veterans First” approach to VA contracting. This approach changed the priorities for contracting preferences within the Department of Veterans Affairs (VA), by placing Service-Disabled Veteran Owned Small Businesses (SDVOSBs) and Veteran Owned

Small Businesses (VOSBs) first and second, respectively, in satisfying VA's acquisition requirements.

**Public Law (PL 109-461) was implemented in two regulations:**

(1) **48 Code of Federal Regulations** (CFR) Parts 802, 804, 808, 810, 813, 815, 817, 819, 828 and 852 amended on December 8, 2009 to define the acquisition rules for the program within the VA; and

(2) **38 Code of Federal Regulations** (CFR) Part 74, published on February 8, 2010 and clarified on January 19, 2011 to define the requirements for verification as a Veteran or Service Disabled Veteran Owned Business.

These regulations require that certain conditions must be met. All SDVOBs and VOSBs, must register in the VA's Vendor Information Pages (VIP), aka **Veterans Small Business Database**, available at [www.VetBiz.gov](http://www.VetBiz.gov), and be 'VERIFIED' by the VA's Center for Veterans Enterprise (CVE), to be eligible for award of a contract exclusively within the Department of Veterans Affairs. Once registered in the database, the veterans' status, ownership, and control would be verified and penalties would be assessed for misrepresentation.

Unfortunately, it's this regulation **38 CFR 74 and CVE's subsequent interpretations within their Verification Process established by the VA** that is being used to determine a Veteran's status, ownership and control of their company that is literally causing thousands of veteran and service-disabled veteran business owners to be deprived of millions of dollars in contracting opportunities that could benefit them, their families, veterans seeking employment and other members of our communities.

**HERE'S THE MAJOR ISSUES**

**First** many VOBs/SDVOBs do not fully understand how they can be legally allowed to do business with other federal agencies but not with the VA. Representatives of the VA have now taken the position that their VA regulations are nearly identical to the SBA's regulations. If that in fact is true, then VA's interpretation of the rules must be much different than SBA's or either SBA is not doing it right. In the past 3 years, no other small business preference program participants (8a, Hubzone, WOSB, SDB) have exhibited public dissatisfaction to the extent where there have been repeated Congressional hearings, GAO reports and IG investigations of those programs.

According to SBA regulations, a veteran owned business is allowed to 'Self Certify' as a VOB or SDVOB. However, such businesses must still be legally formed and the majority owner(s) must be veteran(s) or service disabled veteran(s). Owners of such businesses may be required to submit specific documentation to verify their status and ownership.

**Second**, some applicants have problems with the CVE verification process, but that doesn't mean they are ignorant. As a VA-CVE Volunteer Verification Assistance Counselor, I have been

participating in the verification process training workshops. And even though CVE has provided a great deal of information via its website on how to navigate the application process, it still requires an extensive amount of time to even review all of the preliminary information and sample scenarios. It is expected that those applicants who take the time to review all of the verification information, utilize the assistance of the veterans verification counselors, and are willing to make the necessary changes to their organizing documents are far more likely to be approved after 90 days.

**Third, Veterans are Subjected to Multiple Contracting Program Rules.** Both the SBA and the VA operate procurement programs for SDVOSBs. The SBA program applies to procurements at all agencies other than VA, whereas the VA program applies only to VA contracts. While both programs apply nearly identical statutory definitions of a SDVOSB, the same veteran business owner may be eligible to compete for contracts at other federal agencies except the VA. And now some federal agency departments are denying veteran business owners contracting opportunities if they have not been verified by the VA, which is contrary to the PL 108-183.

**Fourth,** an applicant may still be denied by the CVE reviewer based on their interpretation of sections of the regulation (38 CFR 74) and/or of the documents submitted by the applicant. I will identify the reasons for denial by the VA that have been most problematic below:

#### **I. The Verification Criteria - Determining Veteran Status, Ownership and Control**

**Veterans Status.** Verifying the status of the veteran seems to be the easiest part; particularly since the VA already maintains or has access to the records of veteran and service disabled veterans. The documents needed are to verify that the business owner is a veteran who was discharged under conditions other than dishonorable or is a service disabled veteran who possess either a disability rating letter issued by DOD or the VA.

Additional documents are needed to establish if the veteran(s) or service disabled veteran(s), or in the case of a veteran with a permanent or severe disability, the spouse or permanent caregiver of such veteran, meet the majority Ownership requirement, and that they have Control of the company and participate in the Day-to-Day operations.

**Verifying Ownership.** Verifying Ownership is somewhat more challenging because CVE must verify if the Ownership is direct and unconditional (74.3). Not hard to verify if the type of Ownership is that of a Partnership, Limited Liability Company, or a Corporation; and if stock is involve, it must verify the stock options' effect on the Ownership. But there's the matter of Transfer Restrictions and determining Ownership interests when an owner resides in any of the community property States or territories of the United States.

**Verifying Control (where the real issues come out).** According to **38 CFR 74.4 Control is not the same as Ownership,**

**even though both may reside in the same person.** Control means management of the Day-to-Day operations and long-term decision making authority. CVE must verify that the service disabled veteran or veteran business owner has both. But where this gets more involved, is when control is sometimes contingent on who has the expertise or licenses to run the operation. An owner who is a computer engineer may not be the best CEO. But according to CVE's verification requirements, the owner must hold the highest officer position in the company.

Then there is also the somewhat conflicting view that owners need not work in the company full-time but must show sustained and significant time invested in the business. There is also the requirement that one or more veteran or service disabled veterans who manage the company must devote full-time to the business during normal working hours. And even though the veteran owner has an unexercised right to cause a change in the management quickly or easily, use of a non-veteran manager may disqualify the company as being controlled by the majority veteran owner.

In addition, all of these control issues have to be verified in the context of the type of company - Partnership, Limited Liability Company, or Corporation. And it must be determined to what extent do non-veterans have the power to influence or control the company - either directly or indirectly via critical financial or bonding support, Board actions, office or equipment leases, or private loans, etc.

**II. Verification of Only One Company per Owner.** A number of veterans have questioned CVE's position to verify only one company per veteran business owner. This ruling is not clearly listed in 38 CFR Part 74. All throughout the Nation, there are people who own more than one company. It seems to be CVE's view that **verifying only one company per owner would prevent the VA from potential harm that could be caused by a veteran or service disabled veteran business under performing or defaulting on a contract.**

**III. Misperception of CVE's 'VERIFIED' status.** Many if not all federal agency contracting personnel believe that SDVOSBs and VOSBs must or soon will have to first be registered in the VA's Veteran Small Business Database and produce a document stamped with a "VERIFIED" seal of approval by CVE in order to be recognized as a genuine SDVOSB or VOSB. And it's not hard to determine how this misperception came about.

For several years now, CVE, other organizations, including the VET-Force, have been encouraging veteran business owners to register in the Veterans Small Business Database and for federal agencies and Large Primes to use the Veterans Small Business Database as the 'Authoritative Place' to locate capable and qualified veteran business owners. However, this was before PL 111-275 directed the VA through CVE to enhance their verification standards and procedures.

According to Public Law 108-183, the Veterans Federal Procurement Program, a veteran is only required to SELF-CERTIFY as a

SDVOSB, in order to do business under this small business preference group. There is no formal certification by SBA or any other entity required. However, under Public Law 109-461, in order to do business with the VA, a veteran or service disabled veteran owned business must successfully complete VA's verification process and register in the same database that's open for use by all federal agencies, Large Primes, and the public.

#### **IV. Community Property Rights Issue - Section 74.3f**

If a veteran business owner resides in any of the community property states, CVE considers applicable State community property laws. What this means to CVE is that all property or income acquired by either spouse during marriage is considered equally owned by both spouses for purposes of the division of the property **upon death or divorce** or for purposes of business transacted by either spouse. A transfer or relinquishment of interest by the non-veteran spouse may be necessary in some cases to establish eligibility.

So according to CVE, in the event of a divorce, a non-Veteran spouse would be entitled to half of the Veteran owner's interest in the company. Therefore, the veteran who is the majority business owner according to the business' organizing documents cannot pass the test of unconditional ownership. However, there is a work-around to this dilemma if the non-veteran spouse will agree to transfer at least 2% of their property rights to the veteran business owner. This solution is still contrary to CVE's view that the non-veteran spouse must transfer all of their property rights.

#### **V. Top 10 Reasons for Denials at VA**

While the issues listed above are some of the major ones creating controversy about the VA's Veterans Verification Process, there are others considered to be equally as important. **Here's a list of the top 10 Reasons for Denial in Jan 2013:**

1. Quorum Restriction - Unconditional Ownership
2. Transfer Restriction - Unconditional Ownership
  - a. Right of First Refusal

Right of First Refusal - Should not prevent a veteran business owner from doing business with the VA. See recent US Court of Federal Claims recent decision in the case of Miles Construction wherein the judge found that the current VA rules do not prohibit transfer restrictions that are a "normal commercial practice."

- b. Community Property Laws (see narrative above)
3. Weighted Voting Requirement
4. Dependence with Other Entities
5. Control of Strategic Policy
6. 51% of Annual Distributions
7. Management of Daily Business -
8. Higher Officer Position

9. Day to Day Management

10. Managerial Experience

#### **VI. Not all Veteran Business Owners are Women or Socially and Economically Disadvantaged**

VA has now taken the position that its regulations used for verifying VOBs/SDVOBs are not much different from SBA's small business regulations. This appears to be true when looking at the regulations for SBA's 8(a) business development program and the Women Owned Small Business Program (WOSB). In fact, many of the sections of 38CFR74 for VA Veterans Small Business Verification are nearly identical to sections of SBA's 13CFR124 for Disadvantaged Small Businesses and 13CFR127 for the Women-Owned Small Business Federal Contract Assistance Procedures. However, it should be noted that the 8a and WOSB programs have different statutory purposes than the SDVOSB program administered by the VA.

#### **VII. 8(a) Business Development Program - Socially Disadvantaged and Economically Disadvantaged Based on Income**

In order to help small, disadvantaged businesses with limited income compete in the marketplace, the SBA created the 8(a) Business Development Program that offers a broad scope of assistance to firms that are owned and controlled at least 51% by socially and economically disadvantaged individuals.

The 8(a) Program is an essential instrument for helping socially and economically disadvantaged entrepreneurs gain access to the economic mainstream of American society. The program helps thousands of aspiring entrepreneurs to gain a foothold in government contracting.

The 8a Program, uses objective criteria to determine economic disadvantage based on personal income and total assets. Applicants to the program must demonstrate economic disadvantage based on the following criteria:

- **Adjusted Net Worth** must not exceed \$250,000 for initial eligibility or \$750,000 for continuing eligibility.
- **Personal Income** must not exceed \$250,000 (averaged over three years) for initial eligibility or \$350,000 for continuing eligibility.
- **Total Assets** must not exceed \$4 million for initial eligibility and \$6 million for continued eligibility (allows for growth during the 9-year term).

Other unique features of the 8a Program: (1) 9-year Limit of Participation; (2) Certain types of Joint Ventures without violating the Affiliation Rule; (3) Opportunity to participate in SBA Mentor-Protege Program.

**See comparative language from the 8a and VA's program regulations below:**

**Section 124.106:** Control is not the same as ownership, although both may reside in the same person. **SBA** 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.

**Section 74.4:** 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.

**Section 124.106:** An applicant or Participant's management and daily business operations must be conducted by one or more **disadvantaged** individuals.

**Section 74.4:** An applicant or Participant's management and daily business operations must be conducted by one or more **veterans or service disabled veterans**.

**Section 124.106: Disadvantaged** individuals managing the concern must have managerial experience of the extent and complexity needed to run the concern.

**Section 74.4: Veteran or service disabled veteran** individuals managing the concern must have managerial experience of the extent and complexity needed to run the concern.

**Section 124.106:** A **disadvantaged** individual 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.

**Section 74.4:** A **veteran or service disabled veteran** individual 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.

**Section 124.106:** However, where a critical license is held by a **non-disadvantaged** individual having an equity interest in the applicant or Participant firm, the non-disadvantaged individual may be found to control the firm.

**Section 74.4:** However, where a critical license is held by a **veteran or service disabled veteran** individual having an equity interest in the applicant or Participant firm, the non-veteran individual may be found to control the firm.

**Section 124.106:** An applicant or Participant must be managed on a full-time basis by one or more **disadvantaged** individuals who possess requisite management capabilities.

**Section 74.4:** An applicant or Participant must be managed on a full-time basis by one or more **veteran or service disabled veteran** individuals who possess requisite management capabilities.

**Section 124.106:** A **disadvantaged** full-time manager must hold the highest officer position (usually President or Chief Executive Officer) in the applicant or Participant.

**Section 74.4:** A **veteran or service disabled veteran** full-time manager must hold the highest officer position (usually President or Chief Executive Officer) in the applicant or Participant.

**Section 124.106:** One or more **disadvantaged** individuals 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. (**Note: Any outside employment will have to be approved by SBA prior to employment.**)

**Section 74.4:** One or more **veteran or service disabled veteran** individuals 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. (**Note: Any outside employment will have to be explained and justified to CVE.**)

### **VIII. Women Owned Small Business Program and Economically Disadvantaged Women Owned Small Business Program**

The WOSB Program is a program that authorizes contracting officers to specifically limit, or set aside, certain requirements for competition solely amongst women-owned small businesses (WOSBs) or economically disadvantaged women-owned small businesses (EDWOSBs).

#### **IX. Intent of the laws**

##### **(PL 109-461)**

To increase contracting opportunities for Veteran and Service Disabled Veteran Owned Businesses within the VA by granting VA contracting officials the authority to use contracting mechanisms to meet or exceed the VA Secretary's established contracting goals for these types of businesses.

It was not intended to discriminate against legitimate, capable and qualified veteran business owners nor to subject them to overly burdensome and excessive procedures in an attempt to prevent the VA from being embarrassed by approving one or two non-qualified business owners.

##### **(PL 108-183)**

PL 108-183 created a program to increase contracting opportunities for Service Disabled Veteran Owned Businesses within the federal marketplace by granting federal agency contracting officials the authority to use contracting mechanisms to meet or exceed the federal contracting goals for these types of businesses.

Neither of the laws that created contracting programs for veteran business owners in the VA nor the Federal Marketplace called for asset, net worth, or personal income limitations.

## **X. Recommendations to Address the Major Issues**

1. Congress should amend 38CFR74 in such a way that will eliminate multiple interpretations of any sections. Each section of the regulation should be explicit.

2. Veterans should not be denied the opportunity to participate in the Vets First Contracting program based on the following reasons:

- a. Failure to participate in the Day-to-Day Operations;
- b. Failure to devote full-time to the business;
- c. Majority owner, married and resident of a community property state;
- d. Failure to be the highest paid employee;
- e. Failure to have the requisite managerial experience;
- f. Making substantial loans from non-veterans;
- g. Utilizing equipment, property, or office space from a non-veteran

3. Stick to a verification process only and not certification. **Verify Veteran Status Only** and continue Self-Certification of Ownership as allowed under Public Laws 106-50 and PL 108-183. Once the status has been verified, it does not have to be re-verified ever. The status will likely not change.

4. Verification of Control should only be to the extent necessary to support the Ownership and to ensure that the company is not being used as a 'Rent-A-Vet' or a pass through company.

5. Allow the verification of more than one company owned by the same veteran(s). Entrepreneurship should not be stifled for the sake of convenience. Each company should be evaluated and verified on its own merit. Any agency will always have the right to determine the select criteria to satisfy contract requirements.

6. Immediately direct the SBA and the VA to conduct promotional campaigns to inform all federal agencies, including all military departments, Large Primes, and the public about the VA's Verification Process being exclusively for contracting with the VA.

7. Congress should not consider extending the provisions of 38CFR74 to all Federal agencies and the DOD military departments until a thorough comparative analysis has been done between all SBA small business certified programs, i.e. 8a, Hubzone, SDB, WOSB.

8. Congress should direct the VA to stop discriminating against Veteran Business Owners by imposing a different set of criteria on veteran owned businesses than is used to verify other types of small business owners. After determining the status of the owner as 8a, Hubzone, WOSB, SDB, etc, the rules regarding control should be applied the same to all small businesses.

9. Congress should direct a study to determine how many legitimate small businesses would be denied if they were all verified using CVE's interpretations of control as referenced in 38CFR74.

10. Congress should direct the VA to revise its overly burdensome and intrusive verification process.

This concludes my statement.

**VIETNAM VETERANS OF AMERICA**

**Funding Statement**

**March 7, 2013**

The national organization Vietnam Veterans of America (VVA) is a non-profit veterans' membership organization registered as a 501(c)(19) with the Internal Revenue Service. VVA is also appropriately registered with the Secretary of the Senate and the Clerk of the House of Representatives in compliance with the Lobbying Disclosure Act of 1995.

VVA is not currently in receipt of any federal grant or contract, other than the routine allocation of office space and associated resources in VA Regional Offices for outreach and direct services through its Veterans Benefits Program (Service Representatives). This is also true of the previous two fiscal year.

For Further Information, Contact:  
Executive Director for Policy and Government Affairs  
(301) 585-4000 extension 127



**STATEMENT OF  
DAVY LEGHORN, ASSISTANT DIRECTOR  
ECONOMIC DIVISION  
THE AMERICAN LEGION**

**BEFORE THE  
SUBCOMMITTEE ON CONTRACTING AND THE WORKFORCE  
COMMITTEE ON SMALL BUSINESS  
AND  
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS  
VETERANS' AFFAIRS COMMITTEE  
UNITED STATES HOUSE OF REPRESENTATIVES**

**ON**

**CHALLENGES FACING SERVICE-DISABLED VETERAN-OWNED  
SMALL BUSINESSES**

**MARCH 19, 2013**

STATEMENT OF  
DAVY LEGHORN, ASSISTANT DIRECTOR  
NATIONAL ECONOMIC COMMISSION  
THE AMERICAN LEGION  
BEFORE THE  
SUBCOMMITTEE ON CONTRACTING AND THE WORKFORCE  
COMMITTEE ON SMALL BUSINESS  
AND  
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS  
VETERANS' AFFAIRS COMMITTEE  
UNITED STATES HOUSE OF REPRESENTATIVES  
ON  
CHALLENGES FACING SERVICE-DISABLED VETERAN-OWNED  
SMALL BUSINESSES

March 19, 2013

A few months ago, twenty full time employees were laid off and had to receive unemployment benefits in Wisconsin when a service-disabled veteran owned construction firm lost \$1.7 million worth of work and the ability to bid on contracts, due to the lengthy verification appeals process.

Chairman Hanna and Chairman Coffman, Ranking Member Meng and Ranking Member Kirkpatrick and Members of the subcommittees:

On behalf of our National Commander, James E. Koutz, and the 2.4 million members of The American Legion, we thank you for this opportunity to testify at this joint hearing on the challenges facing small businesses owned and controlled by veteran owned and service-disabled veterans seeking federal contracts using the Department of Veterans Affairs' (VA) contracting program.

Many veterans find VA's Veterans First Contracting Program verification process to be overly burdensome, which is why The American Legion passed a resolution titled: *Support Verification Improvements for Veterans' Businesses within the Department of Veterans Affairs*.<sup>1</sup>

The American Legion believes that Public Law 106-50<sup>2</sup> made all federal agencies stakeholders in supporting veterans' entrepreneurship. A subsequent law passed in 2006<sup>3</sup> provides VA with the authority in setting higher agency standards for SDVOSB and VOSB set-asides. A new procurement hierarchy within VA was created, which places the highest priority with SDVOBs followed by VOSBs. VA refers to this program as the Veterans First Contracting Program (Vet First).

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<sup>1</sup> American Legion Resolution No. 108.

<sup>2</sup> The Veterans Entrepreneurship and Small Business Development Act of 1999.

<sup>3</sup> The Veterans Health Care, Benefits and Information Technology Act of 2006; PL 109-461.

The process of verification involves a review of a business' governance documentation and a determination as to whether the documentation is in compliance with VA's Center for Veteran's Enterprises' (CVE) legal requirements<sup>4</sup> for admittance into the Vet First Program. The main challenge with the program is striking the appropriate balance between the amount of government intrusion necessary to verify a business and the amount of government oversight necessary to protect the integrity of the program.

*Good Business Sense vs. CVE's Requisite Threshold:*

Access to capital, increased capacity for performance and attraction of investors are key elements of growth; this growth stems from good business management. VA's requirements for admittance into the Vet First Program often conflict with good governance. The American Legion believes that VA must reconcile requirements for the growth of small businesses with the requirements for obtaining verification status.

The goal of a small business is to grow and graduate from a federal small business set-aside program. However, some of CVE's 'unconditional control' requirements for verification stifle the growth of small businesses. For example, the veteran owner's control in the business must be so absolute for verification purposes that it wards off potential investors.

The current requirement of 'unconditional control' prevents partnerships and the hiring of those who have substantial knowledge, accreditation or certification in the relevant field of the contract. Though the veteran owner may be well suited at managing staff, developing long-term strategy and making investments decisions, CVE seemingly values an owner's capacity to execute the operational tasks above all else. The American Legion believes that an owner's lack of certification and accreditation should not be a bar to verification, as long as the owner can demonstrate that he manages members of his staff that have the certifications and accreditations.

A cornerstone of growing a company is also finding competent operational staff that does not need to be micromanaged. Because CVE values the execution of operational task above all else, veteran owners often find that they must demonstrate that they manage the day-to-day operations, the hiring, the business development and the flow of money in order to be verified. Though competent business owners should have all these things in their peripherals, the point of hiring competent experts that can work independently is so that the owner can develop long-term strategy, investment strategies and manage the employees. The American Legion believes that an owner's diminished involvement in the execution of operational tasks or reliance on competent operations staff should not bar the firm from verification.

Some strategies to consider in reconciling the difference between what is required for the growth of a small business and what is required to obtain verification status is the alignment of the regulations that guide VA's verification program<sup>5</sup> with the process and regulations that guide SBA's SDVOSB program,<sup>6</sup> and SBA's small business size regulations.<sup>7</sup> CVE should also consider the removal or alteration of regulations that restrict the growth of small business.

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<sup>4</sup> 38 CFR §74.

<sup>5</sup> Ibid.

<sup>6</sup> 13 CFR §125.

<sup>7</sup> 13 CFR §121.

*A Preponderance of Evidence:*

According to CVE, in instances where subjective matters play a role in a denial, the denial is based on the totality of circumstances. These instances where the 'preponderance of evidence' is in relative equipoise, reasonable doubt is supposed to be resolved in the veteran's favor. Though this is practiced by VA's Office of General Counsel (OGC), this is seemingly not common practice amongst the examiners and site-inspectors. The American Legion has reviewed cases from firms that have been denied based on subjective issues, where if the 'benefit of the doubt' had been adequately applied by the examiner, appeals could have been avoided.

The American Legion believes that a small business should obtain VA verification when the 'preponderance of evidence' is sufficient<sup>8</sup> to establish control, not when control has been established 'beyond a reasonable doubt.' In order to limit inconsistencies in the decisions rendered, The American Legion recommends that VA publish the decisions made by OGC. Further, in instances where applications are denied over subjective issues, OGC should have a heightened obligation to weigh the 'preponderance of evidence,' and explain why the 'benefit of the doubt' could not be resolved in the veteran's favor.

*Backlog's Effect on Small Business:*

There are severe lags in the time that is required for the initial verification application to get processed. It is currently just over 50 days for an initial decision and an additional 130 days for those cases that are appealed and go through 'request for reconsideration.' However, The American Legion would be remiss if we did not mention that CVE has significantly cut down the amount of time it takes for a small business owner to receive an initial decision. Back in October 2012, it took substantially longer; approximately 85 days for CVE to make a determination on an initial application. Though The American Legion recognizes the hard work and dedication of VA's CVE and OSDBU staff and all the ground they have covered since the summer of 2011, we must remain objective and critical of the shortcomings that still plague the process.

The American Legion has been involved with VA verification since the program's inception. Most notably, The American Legion is a participant in the Verification Assistance Counseling Program and we have worked with several small business owners who have been denied verification status. During the lengthy appeals process, these firms lose business; they lose the ability to bid on contracts and in many cases are forced to lay off employees. Hence, The American Legion cannot stress how grave the lengthy appeals process is to these small business owners whose lives and worldly investments are tied to their businesses.

SBA and VA needs to work closer together to minimize the inconsistencies in the decisions being made. Currently, VA's Office of General Counsel (OGC) makes the final determinations; OGC does not utilize SBA's case laws in their decisions nor do they publish their decision. SBA has the legal expertise, 60 years of long-standing experience, ample base of precedential case law that can be applied to future rulings. VA does not. Further, SBA's Office of Hearings and

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<sup>8</sup> When the evidence for demonstrating the veteran owner's control over his business is balanced.

Appeals (OHA) has a 15 day turnover rate for final decisions on appellate claims and OHA does so with substantially less resources. Comparatively, VA's OGC currently averages over 130 days for rendering decisions on appellate claims. In the realm of appeals, there is added value for VA to fall back on SBA's expertise and case laws. The American Legion would impress upon the Committee that increasing SBA's role in the appellate process would ensure more consistency in the final decisions being made.

On the matter of the six month waiting period for reapplication,<sup>9</sup> The American Legion questions why CVE places penalties for reapplication. Tom Leney, Executive Director of the Veterans and Small Business Programs for the Department of Veterans Affairs often says that 98 percent of the small businesses being denied are not maliciously trying to defraud the government and that the majority of the denials are fueled by ignorance of the law. If this is the case then, The American Legion believes that the punitive waiting period should be eliminated altogether.

*Differences between CVE and SBA:*

The American Legion supports Verification. Government contracting officers are risk averse; they like certifications and they like it when a firm has been verified by an agency. When a contract is awarded, a contracting officer can rest assured knowing that the recipient of the award has been vetted by a third party.

SBA's model and VA's model for verifying a small business follows similar regulations, except where SBA allows firms to self certify as SDVOSBs and VA does not. VA requires a firm to enter a rigorous process on the front end, where every issue that may arise from the present and the future would have to be resolved before a firm is verified. SBA's process of self certification polices itself through status protests from the small business community once a contract has been awarded. SBA would then subject the protested firm to rigorous scrutiny.

In order to root out bad actors that would seek to defraud the federal government, VA has taken cases heard by OHA and set those violations as bright-line rules and single points of failures in evaluating an application. However, despite the conjuring of numerous regulations and bright-line rules, fraudulent applicants will always find ways to skirt the legal process. The 'zero defect' mentality that VA is admirably trying to enforce, is not realistic in application. By doing so, VA has inadvertently made the process punitive and burdensome for the majority of firms seeking verification, which created the current backlog of initial applications and appellate claims.

8(a) is a business development program where SBA assists small businesses by ensuring that they stay eligible in the program. Comparatively, Vet First takes the form of a certification program, where CVE's role is the gatekeeper, determining who is eligible. The two programs may serve similar purposes, but they have different goals. There is no need for VA to align their regulations<sup>10</sup> with the regulations that govern the 8(a) programs.<sup>11</sup> Because in doing so, VA has created bright line rules that do not exist within SBA's SDVOSB program.

<sup>9</sup> Once a small business owner accepts a denial decision, VA stipulates that the firm must wait a period of six months before they can reapply.

<sup>10</sup> 38 CFR §74.

<sup>11</sup> 13 CFR §124.

The only thing VA should take away from SBA's 8(a) program is the underlining mentality of leniency and assistance in ensuring that small businesses that enter the program stay in the program. The American Legion advocates for more human interaction in the initial application process. VA's news release issued on March 5, 2013 allowing applicants the opportunity to correct minor deficiencies before an initial denial is a step in the right direction. However, until CVE changes their extreme interpretations of regulations and their 'zero defect' mentality, the initial denial rate will remain high.

The American Legion believes VA's rigid process of verifying ownership and control is overzealous and impractical. A rigid process on the front end stifles entrepreneurship. We reiterate that being vetted by an agency on the front end is good for small businesses; the 8(a) program is a good example of this. However, in order to become an effective and practical gatekeeper, VA needs to compromise on a reasonably positioned threshold for inclusion into the Vet First Program.

*Veterans' Community Perspective:*

Overall, the veteran community is not pleased with the way the Vet First Program has been managed by Department of Veterans Affairs' Center for Veteran Enterprise. Currently there are significantly more verification applications being denied than approved. The task of gathering and formatting the substantial amount of documentation that VA requires a small business owner to supply is both cumbersome and intrusive. Many small business owners are beginning to question CVE's reasoning that the requisite documentation actually establishes ownership and control.

The American Legion believes the current application of 38 CFR §74 and VA's verification process is overtly adversarial and assumes that a veteran owned small business is "guilty until proven innocent." There have been many instances where small business owners had to threaten CVE with a lawsuit in conjunction with soliciting congressional interest in order to overturn a denial and restore their SDVOSB/VOSB status.

*Growth of CVE:*

The American Legion is keenly aware that there are propositions being made that would in effect make the verification process government-wide. With the current state of the backlog and a process that has not been perfected, The American Legion does not believe that CVE could shoulder the responsibility of handling what GAO estimates as 16,400<sup>12</sup> more applications into an already strained verification program.

As of October 2012, VA's CVE verification program had 28 full-time equivalent federal employees and 174 contractors. This was an increase of about 3 full-time equivalent staff and 64 contractors since December 2011. The American Legion does not want the current verification process to grow any larger with more internal processes that would delay the final adjudication

<sup>12</sup> U.S. Government Accountability Office. *Veteran-Owned Small Businesses: Planning and Data System for VA's Verification Program Need Improvement*, GAO-13-95. Washington, DC: Government Accountability Office, 2013.

and add to the existing backlog. Further, we would not approve of expanding the program government wide in its current state.

Absent regulatory authority, the Federal Aviation Administration (FAA) has adopted VA Verification as a prerequisite for participating in their SDVOSB set asides. Further, the January 2013 GAO report on the Verification Program<sup>13</sup> did not mention that several states such as Maryland, Virginia, Illinois, Indiana and Pennsylvania, have adopted legislation streamlining VA verified SDVOSBs into state set-aside programs; these actions would inadvertently drive firms who never had interest in participating in the Vet First Program to seek verification status as well. It is not unreasonable to forecast that other states will follow suit. The verification program will continue to grow in the interim, regardless of whether or not government-wide expansion comes to pass and continue to place an unfair burden on veterans trying to compete in an already struggling economy.

*Conclusion:*

The American Legion will continue to work with the Small Business Administration and the Department of Veterans Affairs to improve the process, revise the verification program's regulations and to continue providing counseling services to our veteran entrepreneurs. Now is the time to fix the process and to find the compromise between the requirements for the growth of small business and the requisite threshold for obtaining verification status. The American Legion believes that the responsibility is upon all the stakeholders to ensure that we become better stewards of the verification program.

The American Legion appreciates the opportunity to testify today. Again, thank you Chairmen Hanna and Coffman, Ranking Members Meng and Kirkpatrick and Members of the respective subcommittees for allowing The American Legion to present its views on these very important issues.

For additional information regarding this testimony, please contact Mr. Jeffrey Steele at The American Legion's Legislative Division, 202-263-2987 or [jsteele@legion.org](mailto:jsteele@legion.org).

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<sup>13</sup> Ibid.

**BIOGRAPHY FOR  
DAVY LEGHORN  
ASSISTANT DIRECTOR  
NATIONAL ECONOMIC COMMISSION  
THE AMERICAN LEGION**

Davy Leghorn was appointed to the position of Assistant Director of the Economic Division of The American Legion in January, 2012. Mr. Leghorn oversees the employment and small business portfolios and administers The American Legion's National Veteran Hiring Initiative.

He previously worked as a National Appeals Representative for The American Legion at the Department of Veteran Affairs' Board of Veterans' Appeals, where he provided representation to veterans, their spouses and dependents in appellate hearings before the Veterans Law Judges.

Mr. Leghorn served as a mortar infantryman in the Army with the 2/72 Armored Battalion, 4/7 Cavalry and 3/15 Infantry, then as a Civil Affairs Specialist with 450<sup>th</sup> Civil Affairs Battalion.

He currently serves as Second Vice Commander for George Washington Post #1 in The American Legion Department of the District of Columbia.

List of attachments;

Attachment A: The American Legion Resolution No. 180

**Attachment A:**

**NINETY-THIRD NATIONAL CONVENTION  
OF  
THE AMERICAN LEGION  
Minneapolis, Minnesota  
August 30, 31, September 1, 2011**

**Resolution No. 108: Support Verification Improvements for Veterans' Businesses Within the Department of Veterans Affairs**  
**Origin: Convention Committee on Economic (Employment and Veterans Preference)**  
**Submitted by: Convention Committee on Economic (Employment and Veterans Preference)**

WHEREAS, The historical high unemployment rate of returning veterans and the current state of the economy present a career challenge for former military personnel, resulting in unemployment; and

WHEREAS, The military is downsizing, which means that thousands of former military personnel who have honorably served their country will be unemployed; and

WHEREAS, Small business development assistance to veterans who have honorably served this country is a veterans' benefit that dates back to the Servicemen's Readjustment Act of 1944; and

WHEREAS, Small business benefits specifically for veterans always have included assistance in creating and operating veteran-owned small businesses; and

WHEREAS, The Department of Veterans Affairs (VA) is authorized under the Veterans First program to enter into contracts first with Service-Disabled Veteran-Owned Small Businesses (SDVOSBs) and then with Veteran-Owned Small Businesses (VOSBs); and

WHEREAS, Congress has made findings that VA has entered into contracts pursuant to the Veterans First program with companies that were not legitimate SDVOSBs or VOSBs; and

WHEREAS, Pursuant to recent legislation, VA has implemented a formal verification process which companies must undergo prior to being found eligible to participate in the Veterans First contracting program; and

WHEREAS, Many veterans have found the verification process to be overly burdensome, lengthy and too troublesome to undergo; now, therefore, be it

**RESOLVED, By The American Legion in National Convention assembled in Minneapolis, Minnesota August 30, 31, September 1, 2011, That The American Legion recommend the simplification and streamlining of the Department of Veterans Affairs verification of Service-Disabled Veteran-Owned Businesses (SDVOSBs) and Veteran-Owned Small Businesses (VOSBs) interested in participating in the agency's Veterans First Contracting Program; and, be it finally**

**RESOLVED, That The American Legion endorses VA's efforts to ensure that contracts awarded pursuant to the Veterans First Program are awarded to companies that truly are entitled to receive these contracting benefits.**

**STATEMENT FOR THE RECORD: MARC GOLDSCHMITT, PMP, CEO GOLDSCHMITT AND ASSOCIATES LLC  
BEFORE THE SMALL BUSINESS SUBCOMMITTEE ON CONTRACTING AND THE WORKFORCE AND  
THE VETERANS' AFFAIRS SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS  
MARCH 19, 2013**

I wish to thank the subcommittee chairmen and ranking members for the opportunity to submit this statement for the record and for holding this hearing to address statutory, regulatory and interpretive differences in SBA and VA SDVOSB programs.

**Summary:**

As a Verification Assistance Counselor and the **verification Subject Matter Expert** for VET Force and the National Veterans Small Business Coalition, I have gained significant insights into the issues of CVE verification. As a small business owner, I have translated these issues to the impact and cost to the Veteran Small Business Community. These impacts and costs are the basis of my written and oral testimony. Key impacts and issues include:

- **CVE interpretations minimize business reality and favor extremes.** These extreme interpretations are major obstacles to increasing veteran small business opportunities.
- **Congress's intent to increase veteran business opportunities is not served by depriving vets of everyday business practices and therefore putting them at serious competitive disadvantage.** A common business adage is to hire employees that are smarter than you. Buy/Sell agreements are common business practices that protect the investments of all owners. These are among the common business practices that are frequent causes for denials.
- **CVE's "risk avoidance" approach has crippled legitimate veteran owned businesses while doing little to prevent fraud.** CVE's website lists four successful prosecutions over a two year period. My understanding is that these prosecutions resulted from veteran community self-policing, not CVE referrals. Over this same timeframe I estimate more than 4500 legitimate business have been denied. That's an average of **more than 10 companies in each of your districts that are legitimate businesses that have been denied.** I suspect that some of your districts may have 25, 50 or more than 100 such businesses.
- **CVE's verification is becoming a de facto credentialing program for prime contractors, other Government Agencies and state set-aside programs.** The existence of two Federal SDVOSB program standards is confusing, at best. Previously, as a small business, I could ignore verification if I was pursuing work anywhere other than VA. Now, one of the first questions I hear from prospective customers is "Are you CVE verified?" Watching their body language tells the story of how pervasive CVE's "second standard" has become.
- **The Documentation Required by CVE is excessive, incomplete and subject to compromise.** Personal Income taxes have little or no probative value in establishing either ownership or control. While CVE's systems do have access controls, my records can be viewed by anyone with access to the "library." The system lacks a control mechanism to allow access by only those with a need to know, and lacks an audit trail of who accessed my information and how it was used.
- **Major corrective actions are interpretive and can therefore be immediately implemented.** This would result in fewer denials and a significant reduction in effort and costs for both CVE and the veteran community.

### **The Impact of CVE's extreme interpretations**

As a small business providing services to the Federal Government, the current environment provides significant challenges to profitability, growth and survival. CVE's interpretations add arbitrary and unpredictable hurdles that make it more difficult for me to plan, finance, market and operate my business. These hurdles cause me, and other service disabled veteran and veteran owned small businesses to waste significant management time and emotional energy that could otherwise be invested in building my business' capability and capacity. While most of the following issues were eventually corrected, the impacts to all small businesses are severe and have long lasting effects.

#### **Unconditional Ownership**

The urban myth surrounding unconditional ownership is that "If I woke up this morning and decided to sell" any condition that would preclude, delay or limit this decision is cause for denial. This extreme interpretation ignores several business realities:

- If that's how I run my business there wouldn't be anything worth buying, and
- Buy/sell is a long involved process. It includes determining the value of the company, hiring a broker, finding a buyer and working through the buyer's due diligence. What is the likelihood of closing on the business sale if there is an uncooperative or hostile partner?

#### **Nagel Architects (Incorrect interpretations of state laws)**

Nagel Architects is a Wisconsin-based SDVOSB that is registered in Illinois as a Series LLC. Series LLC's are an emerging business model that provides enhanced liability protections. Nagel was the apparent awardee for a Million plus dollar Indefinite Delivery Indefinite Quantity (IDIQ) contract. Nagel's submission included documentation that Nagel is directly and unconditionally owned by an SDV. CVE ignored this documentation, improperly used Illinois state law and opined that the Series LLC is actually a holding company and therefore, denied Nagel. Nagel requested reconsideration and was again denied due to community property laws. Previously, Nagel had provided documentation from his attorney describing how, in accordance with Wisconsin law, Nagel met CVE's community property vesting requirements. CVE either ignored or improperly evaluated this documentation and again denied Nagel. The result was Nagel's loss of a significant IDIQ contract.

#### **An Ohio SDVOSB (Lack of Business reality)**

An Ohio SDVOSB was denied based upon a statement in the Operating Agreement that if a judge should render a judgment of bankruptcy, the bankrupt owner must surrender his ownership interest. The business reality is that as a small business owner, it is most likely the business that is the cause of the bankruptcy.

#### **A Texas SDVOSB (community property)**

A Texas SDVOSB 100% owner was denied because Texas is a community property state. The owner executed a property agreement with his wife providing him with 51% ownership and her with 49%. He submitted a request for reconsideration and was denied. His denial letter stated: *"This would support a finding that the service-disabled Veteran only owns 51 percent of the company rather than support CVE's finding that the service-disabled Veteran owns 100 percent."*

#### **XSIG (Lost Documentation, Incomplete documentation review, Threat of Prosecution)**

XSIG is a Maryland based security company. Organized as a "C-Corporation," XSIG has compliant By Laws as evidenced by its 8(a) certification. At the time of initial verification application, XSIG had a non-veteran minority owner. CVE demanded that XSIG submit an Operating Agreement which was neither required nor appropriate. After prolonged discussions, the owner downloaded an Operating Agreement

from the internet, which he submitted. Prior to CVE evaluation, the minority owner resigned all corporate offices and relinquished all ownership making the SDV a 100% owner. CVE was properly notified of the changes. CVE denied XSIG based upon the Operating Agreement even though the findings were no longer relevant based upon the ownership change. The owner sought CVE help in correcting this error and was told that he had to admit that the Operating Agreement that he submitted was incorrect. The owner was later notified, in writing, that he was lucky that he was not being prosecuted because he had submitted false information.

**Syncon (Incomplete review of documentation)**

Mark Lilly, a retired Navy SEAL Master Chief had successfully managed his Virginia-based construction business for two years when he applied for re-verification. Syncon was denied because his partner had more than 20 years' experience and he was, therefore, unduly dependent upon his partner. CVE's resume review totally ignored the Master Chief's more than 20 years of relevant management experience. A more detailed review of both resumes revealed that the Master Chief's Navy experience and business experience included military construction management while his partner's experience was only in residential construction.

**Clauss Construction (De Facto and Incorrect size determination)**

Clauss Construction is a California Based remediation services company. Large building demolition, including explosive building implosion and collapse, requires a range of NAICS codes expertise that includes environmental remediation, facilities management and broad construction expertise. With less than 100 employees, Clauss is a small business in its primary 500 employee based NAICS code, yet CVE arbitrarily selected a NAICS code and without due process removed Clauss from the VIP database as a verified SDVOSB. CVE collects payroll data information and could easily have counted the number of Clauss employees. When this error was pointed out to CVE, the response was to refer Clauss to the SBA for a formal size determination, again using an arbitrarily selected NAICS code in which Clauss is not small.

**VETS, Inc. (Lost documentation, Improper Removal from VIP)**

In November 2012, Veterans Enterprise Technology Solutions, Inc., a Virginia based LLC began its CVE re-verification process. They immediately uploaded all applicable, updated documents to the CVE web-site. The CVE acknowledged receipt and scheduled our CVE Site Visit in December 2012. On 1 March 2013, VETS Inc. received an email message advising that they had not yet started the re-verification process and needed to do so as soon as possible. VETS Inc. contacted the CVE Help Desk and was informed that the system shows no record of VETS, Inc. initiating the re-verification process, shows no record of the submitted documentation and no record of the CVE site visit conducted in December 2012.

**Bravo 1-9 Construction (Gotcha!!)**

Bravo 1-9 Construction is a New Jersey based Construction business. The owner, Edward Renshaw, is a combat wounded veteran rated at 100% by VA. On his 0877 application, Mr. Renshaw only checked the veteran status box. As part of his application, Mr. Renshaw submitted a copy of his VA rating determination letter showing his 100% disability. In spite of having clear proof of his status as a Service Disabled Veteran, CVE did not "Get to yes" and, instead reached a "Gotcha" determination.

I wish to thank the subcommittee chairmen and ranking members for the opportunity to submit this statement for the record and for holding this hearing to address statutory, regulatory and interpretive differences in SBA and VA SDVOSB programs.

My name is Marc Goldschmitt. I am a certified Program Management Professional (PMP), Verified SDVOSB Business Owner, VET Force Executive Committee Member, National Veteran Small Business Coalition Board Member, Vietnam Veterans of America Economic Opportunity Committee and a CVE Verification Assistance Counselor. Much of my business experience is in performing assessment and turnarounds involving people, process and technology. As the VET Force and National Veterans Small Business Coalition I am a Verification Assistance Counselor and **CVE verification Subject Matter Expert. Through roles, I have gained significant insight into just about every VA CVE verification issue.**

**Today, however, I comment as a Service Disabled Veteran Owned Small Business owner. In this capacity I, like so many of my fellow veterans, have been personally affected by CVE's handling of the Verification process. CVE extreme interpretations preclude use of best business practices and apply little or no business sense or reality.** By forcing me to align my business model with what they think is right, my ability as a small business to do what is right and what is needed to build capacity and capability is artificially limited. This reduces my competitiveness in non-VA

My comments are intended to address the outcomes and impact of CVE verification statute, regulation and interpretation on the daily life of a veteran small business owner. I make my comments through a series of simple observations and questions. These are not new issues or sudden revelations. Some have been on the table for more than five years. My overarching perspectives are:

### **My perspective**

**The Congress supports small businesses and knows that successful small businesses are essential building blocks for a strong, growing economy and a secure nation.**

All Government Agencies are stakeholders in building a Small Business and Service Disabled Veteran Owned Small Business industrial base and capability. Statutes such as PL 109-461 elevated the Department of Veterans Affairs to a leadership role in developing SDV industrial capacity and capability. Moreover:

- Verification is an essential tool in managing the integrity of VA's SDV initiatives
- Verification reviews corporate governance documentation and determines compliance with 38 CFR 74 requirements
- Perfect statutes, regulations, implementations and interpretations do not exist, and
- ***The issues that have the greatest negative impact on meeting PL 109-461's goal of increasing veteran opportunities are interpretive and can, therefore, be immediately implemented.***

### **Contrasting Perspectives**

CVE's personnel are highly committed and motivated. Many are veterans The verification program, however, is a business ownership program that is applicable to veterans. As a business owner, the issues I face with start-up, financing, regulations, payroll, benefits, accounting, business development, etc. are not issues that my military service prepared me for. . Although I appreciate the fact that many of the CVE staff have walked in my shoes as military members and now as

Veterans, they have not functioned as veteran business owners, and in many ways, are unable to identify with the requirements of the business world or the needs of small business owners such as myself. As I look at issues of ownership and control, I will contrast CVE's extreme interpretations to business realities.

### **The Business Governance Challenge**

*The Governance Challenge: Balancing what's good for business versus what's needed for verification*

Good governance is an essential ingredient to business success, because:

- It fuels growth and profitability
- It must be demonstrated to be eligible for obtaining affordable capital, bonding, etc.
- It is essential to effective contract performance, and it is
- The business equivalent of "Smart Government"

Governance documentation is required when a business is protested – while CVE verification activity is initiated by the veteran and the veteran can spend as much time as needed before hitting the submit button, in a protest situation the documentation must be submitted within five business days. Spending the time to develop the documentation and supporting processes to submit a verification application can be helpful, but when the CVE dictated business model requirements are contrary to best business practices, a program that was designed to help veterans becomes one that creates artificial barriers and reduces my ability to compete both in VA and all other Federal Agencies. These interpretive challenges can and must be immediately corrected. This is Smart Government and good business.

### **What constitutes "Control?"**

What actions, functions and decisions constitute control? Does an individual control operations or manage operations? Is control strategic, tactical, operational or some combination? My perspective is that control originates from majority ownership interest and involves the strategic direction of the company and the authority to allocate resources to implement that strategy. It may also include the ability to delegate the management of resources, usually subject to performance metrics. For me to exercise control, I do not have to make every decision, but I do have to delegate appropriate authority and constraints to allow those individuals that can contribute and help grow my business to realize their full potential which means I am growing the SDV industrial base and capability as envisioned by Congress in Small Business and Veteran Owned Business statutes. CVE must differentiate between control, management and operations and provide a concise definition of the functions, actions, decisions and authorities that constitute control of the company. This is an interpretive issue that can be immediately corrected.

### **Is CVE a "Get to Yes" or "Gotcha" Organization?**

CVE boasts that it is making positive strides in moving from a "Gotcha" mentality to a "Get to Yes" mentality. This was a constant theme during CVE's recent training session held on February 22, 2013. The VA's Office of General Counsel representative stated that CVE should be using a "Reasonable person" or preponderance of evidence standard. CVE's initiation, examination and evaluation teams provided the dose of reality and described a process with multiple redundant layers of checkers each of whom repeated that any ambiguity, conflicting information or uncertainty would result in denial.

Consequently CVE's criteria seem to exceed those for capital crimes of "beyond a reasonable doubt" and go to a new standard of "beyond any doubt." CVE must align priorities to in order to use the verification program to help increase opportunities for veteran owned small businesses rather than crippling veteran owned small businesses with excessive criteria and documentation submission requirements. Our challenge is to work collaboratively to change CVE from its historical "Gotcha" roots to a shining example of "Smart Government."

### **Public Law 109-461 isn't just Verification and Vets First**

A major portion of PL 109-461 deals with security and protection of Personal Health Information (PHI) and Personally Identifiable Information (PII). CVE addresses some of these requirements in 38 CFR 74 (Records Management Sections) and its System of Records Notifications (SORN).

CVE's website and instructions to applicants and on its web site and correspondence also address these requirements by providing guidance for redaction of PII. These instructions, however, raise several concerns:

- The need for redaction indicates CVE's concern about the ability to manage and control PII
- The CVE recommended process does not follow "De-Identification" guidance provided in VA's Privacy and Security Course. This interactive, web based course is an annual requirement for all VA Government and Contractor personnel.
- As a note, if applicants correctly redacted the documents they submit, these documents would not be usable by CVE to assess ownership and control.

### **OIG Report 10-02436, July 25, 2011 – Did VA Management swing the wrong pendulum?**

The referenced OIG report may not be a valid metric. There was an apparent problem with due diligence of VA's SDVOSB awardees' status. The implication is that all of these companies had been improperly verified and that, therefore, there are serious flaws in the CVE verification system. When the report says that 36 out of 42 were not qualified, it is silent on several key aspects:

- How many of the 42 had actually been CVE verified?
- How many of had applied for verification?
- What criteria did OIG use to determine if these companies met 38 CFR 74 requirements?
- Were the problems companies that slipped through the cracks, or lack of process or effort for CO due diligence?

CVE's "risk avoidance at any cost" has proven to be a costly, ineffective and harmful strategy. Based upon the referenced report, did VA management address the correct cause by directing Mr. Leney to implement this risk avoidance program or should they have focused on acquisition processes and issues?

### **Is CVE collecting the correct documentation?**

Antoine de Saint-Exupery said it best - *"Perfection is finally attained not when there is no longer anything to add but when there is no longer anything to take away.."*

- Are personal income taxes required for determination of ownership and control or are they superfluous?

- Resumes are often targeted to job search, technical or business development needs. Does collecting resumes from anyone other than the majority veteran owner serve any purpose other than to increase the cost and time of verifications?
- For LLC's many (if not most states) determine membership (ownership) interest by relative capital contributions, yet, to my knowledge, CVE has not asked for Balance Sheets from LLC's to verify the relative capital contributions. Corporate K-1's can be an indicator, as can the Operating Agreement, but the balance sheet is the only definitive measure.

### **Death, Taxes and Denial**

CVE requires excessive personal tax information. In our February 22 training session, CVE personnel stated that they require all Federal Income tax Schedules and W-2's for owners and their spouses. I'm not sure how my medical deductions, charitable donations, other personal deductions or anything on any of the IRS' personal income tax schedules impact my ownership or control. Corporate tax returns contain the required information about ownership through K-1's and distributions. If I'm a sole proprietor, how relevant is my Schedule C to assessing control? CVE must limit collection of tax information to corporate tax return K-1's and only request personal tax information if the Office of Inspector General concurs that the additional information is required to determine if further OIG investigations are warranted.

CVE also requires complete payroll information. When properly redacted this large stack of paper has zero probative value. That's a lot to review for what could be accomplished by a simple affidavit or letter of explanation followed up by a site visit or IG referral if there is sufficient cause for concern.

### **Is Affiliation a CVE issue or concern?**

Affiliations are issues with size and are defined in 13 CFR 121, an SBA regulation. During my re-verification, CVE noted W-2 income and distributions from another company – one that I previously had been a partner in – and they made strong requests for documentation that included the previous three years' corporate taxes and personal taxes of all of the other company owners. I avoided a protracted fight by submitting a redacted copy of the sales agreement. I note that 13 CFR 121's definition of affiliation by common ownership or management requires that the individual(s) control both entities so why CVE would deem it important to collect this information to determine if I control my "applicant" company?

***Change CVE from a "risk avoidance" mentality to a Smart Government approach of risk management and mitigation. CVE requires experienced business ownership experience and oversight to place each standard, presumption and conclusion in a realistic context. This will help CVE to assess the impact and unintended consequences of proposed CVE requests for information, requests for clarification and denials.***

### **Similar but Equal?**

SBA uses 13 CFR 125 to determine SDVOSB status. CVE uses 38 CFR 74. CVE has cross walked 38 CFR 74 with 13 CFR 125 and the 8(a) program's 13 CFR 124. From reviewing this crosswalk, there are few common items from 38 CFR 74 and 13 CFR 125. 13 CFR 124 and 38 CFR 74 are highly similar, but are they equal in the context of implementation and interpretation? The draft crosswalk that I was provided (current as of February 15, 2013) is not clear and convincing, and, in my opinion, falls far short of the "reasonable man" standard.

CVE is claiming that 38 CFR 74 aligns with SBA's regulations and interpretations. As a service disabled veteran owned small business, I do not have any issue with SBA's regulations and interpretations, nor am I aware of any veteran business owner who has expressed a concern with SBA's regulations. If SBA's regulations are good and correct and VA's regulations are aligned, then why is there a major push to change VA's regulation? Which is the case? , Is VA's regulation faulty and in need of correction or is it aligned with a regulation that has been effective and accepted for many years by SDVOSB's and the SB communities? ***If CVE's interpretations of existing regulations differ should they not immediately be brought into line with that which is correct within the law?***

### **CVE decisions lack accountability**

There is no accountability for CVE errors. Companies suffering from incorrect CVE decisions have lost contracts and opportunities and, short of expensive lawsuits, there is no remedy. VA and CVE have not published statistics on the number of apparent awardees who are denied and, therefore, have lost awards. Those of us who have been working with veterans and CVE have each experienced apparent awardees that have lost significant contracts due to erroneous denials. Verification cases that I have worked, both formally and informally, have been provided independently to the HVAC O&I Committee Staff Director and are not included here because the owners feared CVE or VA retribution. ***Legislation and/or Executive action is required to define who controls CVE, establish accountability for incorrect or arbitrary and capricious CVE decisions and to define reasonable remedies for companies and individuals who have been financially and professionally harmed.***

### **Do the math - How long does Verification Really Take?**

Veterans use elapsed days from when they pushed the button **until they get verification** as their metric. CVE uses processing days (with timeouts) **until a decision is rendered**. For approximately 60% of applicants, CVE's under 60 days metric can therefore translate to 90 days. Of the other 40%, approximately half must wait six months or more and the other half will wait more than a year. 3,000 legitimate companies each year pay a significant penalty while only a handful of bad actors have been prosecuted or debarred. SBA is required to complete an SDVOSB status determination within 15 business days using substantially fewer resources. With significantly larger volumes, CVE can realize economies of scale and implement production line concepts. ***What is preventing CVE from achieving the same metric as SBA at a lower cost per case?***

### **Verification is the middle of a long journey**

For many veterans this is just a step from active duty to fulfilling their business dream. There may be long periods of rehabilitation, then, after release from active duty, there's the gauntlet of Compensation and Pension Claims. For my generation, diagnoses may only recently have been accepted or may have been improperly coded for years. In my case, it was 35 years before I had a proper diagnosis. Currently, I'm at just over 8 years and one 1month in the compensation and pension system. Like CVE, I was initially denied, then, with the same records and evidence, I subsequently had several contentions granted. ***CVE and VA need to be sensitive to the total veteran experience and act with the proper deference.***

### **Verification isn't just for VA anymore**

Many prime contractors, other Federal Agencies and State Governments now use CVE verification as a means of separating the "real" SDVOSB's from the herd. Consequently, the impact of a CVE denial

already reaches well outside of VA. Denials artificially restrict legitimate SD/VOSB businesses from contracts and subcontracts in other venues.

- The Federal Aviation Administration (FAA) requires CVE verification for their SDVOSB set-asides
- Other Federal Agencies occasionally require CVE verification as a procurement eligibility requirement. These cases are usually brought to the OSDDBU's attention and quickly corrected.
- Other Federal Agency decision makers are asking "Are you CVE certified?" The perception, as reported to me by veterans, is that they are using CVE verification as a "Gatekeeper" function for either continued discussions or as a basis for requesting three quotes.
- States are jumping on the bandwagon and requiring CVE verification to compete for state SDVOSB set-asides including, among others, Illinois and Indiana.

***Legislation or Executive action is required to compel CVE to immediately correct CVE interpretive issues that are resulting in outcomes that are not compliant with PL 109-461 and are unnecessarily harming veteran owned businesses.***

## **Does 38 CFR 74 comport with the law?**

### **Letter**

Public Law 109-461 states multiple times that VA is to determine if a company is veteran owned. VA's verification regulation introduces a significant change to the law through the requirement for "unconditional" ownership. CVE's interpretations of unconditional ownership are the basis of many denials. Does CVE's addition of "unconditional" constitute an impermissible reading of the statute?

### **Intent**

**Public law 109-461 is clear in its intent: To increase opportunities for Veteran Owned Small Businesses and Service Disabled Veteran Owned Small Businesses.** PL 109-461 envisioned achieving this outcome through set-aside priorities (Veterans First) to facilitate access to procurements and Verification to assure that awards go to legitimate SDVOSB/VOSB companies. The expected outcome: an increase in the Veteran Owned Small Business industrial base: more companies, stronger capabilities, increased capacities.

VA has achieved unprecedented levels of contract dollars to Veteran Owned and Service Disabled Veteran Owned businesses. So, why is the veteran community concerned? If I were a conspiracy theorist, I would be having a field day. Extended times to receive a disability rating, extended times and high denial rates to become verified. Then when we think we have reached the peak, we see another mountain where through vehicles such as VA's Transformation Twenty-One Total Technology (T4) and awards through the Navy's Space and Naval Warfare Command (SPAWAR) many IT opportunities are "off limits" even to those incumbent SDVOSB contractors that are successfully meeting the requirement. To many of my veteran brothers and sisters, these create the perception that more dollars are going to fewer companies.

While these issues provide a brief background for the pervasive concern and distrust of VA from the Veteran Community, the issue of today's hearing is how has VA's verification program supported the goals of PL 109-461 and would it be beneficial to extend this program Government-wide?

Through verification, there are fewer SD/VOSB companies that are available to compete for VA procurements. The system is clearly broken. As a veteran business owner, I contend that the problem lies in interpretations and presumed standards for the current regulation. CVE believes that the root cause is the current regulation – which, in essence, states that the current regulation does not comport

with the law. To me, this says that there is a legal and moral obligation to fix the problem now, not through a protracted Regulatory revision that will continue the bleeding for another two years.

As a business owner, I need the shackles removed now so that I am on a level playing field and reasonably positioned to obtain capital, resources, partners and all of the necessary ingredients that I need to create meaningful jobs. It's not relevant to me if the fix is interpretive, regulatory or statutory – we are entering a challenging period and unreasonable constraints need to be removed now.

### **Ghosts of Verifications past**

From its inception, CVE verification has been a contentious program that has caused much confusion, disdain and discontent within the veteran community. Known perennially as a “black hole” process, CVE’s verifications program has stirred many veterans’ emotions and has created a deep distrust of all things VA. While there is some truth to comments that many veterans may not understand the program, attorneys who have been working with SBA’s 8(a) and HUBZone programs for more than 20 years and those of us who have been working with CVE and veterans for years remain baffled by many CVE decisions and standards.

### **Ghosts of Verifications Present**

CVE claims to be using 13 CFR 125, the SDVOSB regulation, as the baseline. A review of CVE’s comparative analysis shows that when both SBA regulations address an issue, CVE’s 38 CFR 74 language is most frequently verbatim from the 8(a) regulation. The 8(a) program is a Business Development Program that has documentation and business model requirements that go well beyond the business model requirements for the SDVOSB program. It is easy to say that these items need to be corrected in a Regulatory change, but, in my opinion, it is the interpretation of these requirements, not the existence, that are the root cause of problems in the verification program. This has been the mantra of the veteran community since the inception of the verification program.

These interpretations have affected my ability as a small business to capitalize on partners and sweat equity. When I had my attorney draft an Operating Agreement to bring on a partner, he stated that I was crazy – no one that is in their right mind would sign the agreement. He was right. With the right partner, I could have accelerated my growth and profitability.

### **Ghosts of Verifications Future**

My understanding is that it is the intent of this joint committee hearing is to assess the current state of CVE verification and, identify needed statutory, regulatory and interpretive changes. that are needed and, in some cases, long overdue. Perhaps recent GAO report and Court of Federal Claims cases such as Miles Construction will focus CVE interpretations on alignment with SBA interpretations and provide a dose of reality, allowing CVE to self-initiate required changes. My remaining comments will address recommended areas for change and strategies.

### Areas for Change

	Issues	Comments
<b>Interpretation</b> Near Term Potential	Unpredictable, Varies with SBA interpretations	Immediately fixing interpretive differences will resolve the verification induced obstacles that most negatively impact SD/VOSBs
<b>Implementation</b> Near – Mid term potential	Attitude. Lack of responsiveness. Terminology. Perception of "Gotcha." Requests for additional information perceived as hostile.	Changing culture takes longer but is necessary to restore confidence and trust
<b>Regulation</b> Long term	Use of 13 CFR 124 versus 13 CFR 125 as Baseline	Long term if the full 2-year revision cycle is used. Short term if mandated by legislation or executive order. .
<b>Statute</b>	Business status upon veteran death or need for caregiver	After a veteran business owner's death, a spouse can be CVE verified but the business will not be qualified under SBA's regulations. This is an interesting contrast to CVE's community property interpretations.

### Suggested Strategies

- **Statutory:**
  - Require that all CVE verification appeals be adjudicated by the Small Business Administration's Office of Hearings and Appeals (OHA)
- **Interpretive:**
  - Provide definitions (or CVE presumptions/standards/thresholds) for ALL Terms in 38 CFR 74. Some key examples include:
    - *Business benefits* versus *business interest (use Miles Construction COFC)*
    - *Great economic risk*
    - *Any term that is subjective or lacks a specified threshold*
  - Develop and publish a "CVE Bright Line" standard that documents the functions, decisions, actions and authorities that constitute control and differentiate control from management and operations.
- **Regulatory:**
  - Align Regulations (38 CFR 74, 13 CFR 125), SBA standards and CVE standards to allow Best Business and Governance Practices
  - Provide a detailed comparison of 38 CFR 74 with corresponding language from 13 CFR 125 and 13 CFR 121.

- Where 38 CFR 74 language is not in either 13 CFR 125 or 13 CFR 121, remove it unless there is a clear statutory, regulatory and business rationale that demonstrates the applicability to both the spirit and letter of Veterans First as envisioned in PL 109-461.
- Remove or modify 38 CFR 74 language that limits industrial base growth
- For language that is common to 38 CFR 74 and 13 CFR 125 (or 13 CFR 121) provide and compare VA's standards with SBA's standards/case law.
- Provide a Government wide "sunset" provision that allows the surviving spouse or heirs to maintain the VOSB or SDVOSB status of the business for a reasonable period of time
- **Create a VA CVE advisory board**, modeled after existing VA advisory boards, to report to the Secretary and provide independent assessment of CVE policies, processes and interpretations. The advisory board should consist of Veteran and Service Disabled Veteran Business owners and should include a mix of start-up, small business and mid-tier businesses.

**Testimony of Jonathan T. Williams<sup>1</sup>**  
**Partner, PilieroMazza PLLC**

**Before the Subcommittee on Contracting and Workforce and  
The Subcommittee on Oversight and Investigations**

**Committee on Small Business and  
Committee on Veterans' Affairs**

**U.S. House of Representatives  
March 19, 2013**

**SUMMARY**

SDVOSBs are confronting many challenges in attempting to take advantage of the two federal procurement programs for SDVOSBs. The challenges include:

- The two similar, but different, sets of rules cause confusion and lead to conflicting interpretations and inefficiency
- Non-business-friendly interpretations of existing rules decrease the usefulness of the programs for veterans
- "Deny first and ask questions later" approach to the SDVOSB verification process has led to many avoidable denials, as well as lengthy and expensive reconsideration requests
- Lack of visibility over the VA's application results
- Administrative errors in the verification process have caused many SDVOSBs to lose valuable contracts with no recourse

To address the challenges facing SDVOSBs, the VA and the SBA should take several steps, including:

- Adopt more business-friendly interpretations of the regulations, including by permitting reasonable transfer restrictions on veteran ownership and by not requiring SDVOSB joint ventures to be separately verified by CVE
- Engage in more back-and-forth with veteran applicants while their verification application is pending and institute an initial screening phase to address issues in the applicant's corporate records that can be easily corrected
- Confirm that the SBA should handle all size and affiliation inquiries
- Explore ways to minimize the unnecessary loss of contracts based on administrative errors and delays in the SDVOSB verification process
- Consolidate the two regulatory schemes into one with regulations and an appeal process similar to what is currently available through the SBA

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<sup>1</sup> This is Mr. Williams' final written testimony and replaces the previously submitted written testimony dated March 7, 2013.

## INTRODUCTION

Chairman Coffman, Chairman Hanna, and distinguished Members of the Subcommittees, I would like to express my sincere thanks for the invitation to submit testimony for this hearing of the House Committee on Small Business Subcommittee on Contracting and Workforce and the House Committee on Veterans' Affairs Subcommittee on Oversight and Investigations. I am honored to present my experiences and those of my law firm in representing small businesses that participate in the Department of Veterans Affairs ("VA") and Small Business Administration ("SBA") procurement programs for Service-Disabled Veteran-Owned Small Businesses ("SDVOSBs").

My name is Jonathan Williams. I am a partner with PilieroMazza PLLC, a woman-owned law firm based in Washington, DC. We work primarily with small and mid-sized government contractors regarding all manner of issues that arise when doing business with the federal government. One area of government contracting for which we are well known is our familiarity with the federal procurement programs for small businesses, including the SDVOSB programs and the SBA's Section 8(a) Business Development Program. I have practiced law for 12 years and nearly all of this time I have spent working with government contractors, including small businesses that utilize these programs.

I am testifying on behalf of myself as well as on behalf of my colleagues at PilieroMazza. My testimony is based on our experiences and knowledge of the VA and SBA SDVOSB programs, the differences and inconsistencies between the programs, the challenges SDVOSBs face in using the programs, and the ways that we believe the programs could be improved to operate more fairly and efficiently.

## TESTIMONY

My testimony will address several of the most common challenges that our SDVOSB clients have confronted when seeking to use the SDVOSB contracting programs. These challenges occur in the interpretation of the similar, but different, regulations governing both programs, the verification process for entrance into the VA's program, and the administration of both programs. I will also discuss how, based on our experiences, we believe the SDVOSB programs can be improved to lessen the challenges for SDVOSBs and improve efficiency and oversight for the government. The SDVOSB programs are well-intentioned and have helped many veterans, but changes are necessary to ensure that these important programs are more accessible, more efficient, and help more of our military veterans to "realize the American dream they fought to protect."

### **A. Challenges Facing SDVOSBs in Using the SDVOSB Programs**

#### **1. Difficulties with the CVE Verification Process**

The biggest challenge facing the SDVOSBs with which we work is to navigate the verification process through the VA's Center for Veterans Enterprise ("CVE"). The application process is generally lengthy and confusing, with requests for a lot of documents, many of which may be duplicative or foreign to veterans. We have heard from many SDVOSBs about the need to submit documents multiple times because the VA lost their information. Last summer, we

heard from many SDVOSBs whose profiles in [www.VetBiz.gov](http://www.VetBiz.gov) were apparently erased due to a technological issue within the VA.

There is also a lack of consistency in the application process and results. For example, many firms have been denied because of perceived problems in their corporate records, such as transfer restrictions<sup>2</sup> in the operating agreement or bylaws and issues regarding voting and quorum for the board of directors. Yet, we have worked with firms that have been accepted into the program even though they have some of the same issues in their corporate records. Similarly, some applications and requests for reconsideration have been resolved in a few months, while other applications and requests for reconsideration have taken more than a year.

Our clients often complain about the lack of feedback from the VA once the application is submitted. The VA generally sends emails to applicants to keep them updated on their progress through the system, but not all firms receive these messages. And even when received, the messages convey little more than the overall status of the application. Coupled with the fact that it is very difficult to get someone from CVE on the phone to talk to you about your application, the unknowns during the application process often make it frustrating for veterans.

Because there is little discussion between the VA and the applicant about the substance of the application while it is pending, the first time veterans learn of problems in their application is typically when the VA issues a denial letter. The “deny first and ask questions later” approach to the application process is one of its biggest problems, in our view. We have seen some improvement from the VA on this in the last year, in particular for reconsideration requests handled through the VA’s Office of General Counsel. That said, there is still not as much back-and-forth with applicants as there should be. The SBA does a better job of this in processing applications for the 8(a) Program; the SBA typically sends questions to applicants to ferret out potential denial issues before the application is actually denied. In our experience, the VA forces most applicants to file a reconsideration request to address problems in the application after the application has been denied.

The lack of communication between the VA and applicants is problematic for several reasons. First, it forces the SDVOSB to go through the time and expense of a reconsideration request, often to address issues that could have been easily corrected while the application was pending. Indeed, over 60% of the reconsideration requests we have handled since mid-2011 involved correcting issues the VA had found in the SDVOSB’s corporate records. Such issues include transfer restrictions on veteran ownership and quorum or voting provisions that do not make clear that the veteran is in total control of the company. All SDVOSBs are small businesses, and resources are often scarce. These firms tend to obtain their operating agreements from the internet and these generic documents regularly include boilerplate provisions that are not consistent with the requirements of the SDVOSB programs. Generally, the issues are not difficult to correct. In fact, in every one of the cases we handled involving problems with corporate records, we were able to correct the issues on reconsideration. A lot of time and expense could have been saved if the VA had raised the issue sooner and helped the veteran to understand and address the issue before the application was denied.

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<sup>2</sup> A common transfer restriction is a “right of first refusal” whereby the owners of the company agree that, in the event an owner has an offer to buy his interest in the company, he must first give the other owners a right of first refusal to buy his interest.

With so many firms ending up in the reconsideration process that do not need to be there, it is not surprising that the VA has been unable to keep up with the reconsideration case load. The VA's regulations envision a 60-day period for reconsideration. In our experience, the VA is generally running one to two months behind and we have had some reconsideration requests take more than a year. The SBA generally makes SDVOSB eligibility decisions much sooner than the VA. We believe this is in part because the SBA has had a significant head start in managing application and review processes and has already worked through many of the growing pains the VA is currently experiencing.

Another challenge of the reconsideration process is that the VA often finds new reasons to deny a firm after the firm successfully addresses the initial reasons for denial. This leads to multiple rounds of reconsideration requests for the same firm. It is very frustrating, not to mention costly and time consuming, for an SDVOSB to be told it was denied because of A, only to wait three or four months (or more) to be told that A has been resolved but now the firm is denied because of B, C, and D. This happens frequently and is a further indication that the initial denials often come too soon and without enough discussion with the applicants.

The VA application process also lacks sufficient administrative review. Beyond the reconsideration process, which essentially returns the application to the same decision-makers for a "do over," applicants who believe they did not get a fair shake must file a law suit in federal court. The high cost of federal court litigation is no doubt a barrier to entry for many SDVOSBs. The SBA's Office of Hearings and Appeals ("OHA") is a good example of an administrative appeal process that offers review at a level above the initial decision-makers, by an administrative law judge, but that is generally far less costly than federal court litigation. At OHA, small businesses (including SDVOSBs) can have an administrative law judge review whether the initial SBA decision-maker made a clear error of law or fact. This is a helpful tool for small businesses, many of whom are successful in overturning SBA decisions through appeals to OHA. The fact that OHA decisions are publicly available also benefits the small business community at large. Conversely, there is no publicly available database of VA reconsideration or appeal decisions, which keeps veterans and their representatives in the dark about the VA's interpretations and precedent.

## **2. Flaws in the Verification Process Cause Veterans to Lose Valuable Contracts**

The application and reconsideration challenges are more than simply frustrating. When the CVE makes a mistake in denying an application, or delays for months in deciding a reconsideration request, this can cause veterans to lose contracts worth millions of dollars. We have been contacted by many firms that lost contracts because of easily correctable issues in their corporate records or because of administrative errors. Currently, VA contracting officers are not required to wait for a decision on a pending reconsideration request or appeal before moving on from an initial award decision. Some SDVOSBs have been successful in preserving a contract award after an adverse eligibility ruling because they had the resources to file for an injunction or the contacts with the right people within the VA. But for too many SDVOSBs, the contract is lost. In our view, not enough is being done to ensure that the good actors do not lose valuable contracts because of mistakes or delays in the VA process.

### 3. Inconsistencies Between the VA and the SBA Programs Has Led to Confusion and Inefficiency for SDVOSBs and the Government

In our practice, we regularly encounter SDVOSBs and government procuring officials that are confused by the similar, but different, sets of rules that govern the VA and the SBA programs for SDVOSBs. For example, SDVOSBs have been forced to file bid protests with the U.S. Government Accountability Office because of procuring officials who have applied the VA's verification requirements to non-VA procurements. Contracting officers have sent SDVOSB protests on a non-VA contract to the VA, instead of the SBA. And VA contracting officers have failed to forward size protests to the SBA.

Contrary to the VA's view, there are many differences between the SBA and VA SDVOSB regulations. For example, there are several aspects of the VA's regulations (and how the agency interprets its rules) that are less business friendly than the SBA's SDVOSB regulations. The VA's regulations require the veteran to be the highest compensated, while the SBA's SDVOSB rules do not. The same is true for the VA's requirement to have a veteran as the full-time manager of the company, which is not found in the SBA's rules. The VA appears to have patterned its rules off the SBA's rules for both the SDVOSB and 8(a) programs, which has created confusion and different standards for admission into the VA's program.

Recently, the U.S. Court of Federal Claims issued a decision that underscores the inconsistencies between the two regulatory schemes. Both the SBA and the VA have interpreted their regulations as prohibiting transfer restrictions (such as a right of first refusal) on the veteran's ownership. In Miles Construction, LLC v. United States, No. 12-597C (Fed. Cl. 2013), the Court of Federal Claims found that the VA's rules do not permit the VA's prohibition on transfer restrictions. We believe the Court of Federal Claims reached the correct decision. In the past, we have had clients decline to pursue CVE verification because the owners were not able to agree on the lack of transfer restrictions. Miles Construction is an important, business-friendly ruling for veterans because reasonable transfer restrictions will help veterans to attract minority partners to help run and grow their businesses. And these restrictions do not impede the veteran's ownership and control of his company because the restrictions only come into play once the veteran has decided to sell his interest and leave the company.

If the Miles Construction decision stands, veterans will be able to institute reasonable transfer restrictions on their ownership and make their companies more attractive to minority investors. However, such flexibility would only be available at the VA. This is because OHA has issued several decisions finding that the SBA's SDVOSB regulations prohibit transfer restrictions. Miles Construction overruled the VA's interpretation, but not the SBA's interpretation. As a result, unless the SBA/OHA adopts the rationale of Miles Construction, there will likely be a lot of confusion between firms that operate in both programs, as they will be permitted to have transfer restrictions for one but not the other. In effect, this will greatly diminish the significance of Miles Construction as a business-friendly ruling for SDVOSBs that operate in both programs.

Another inconsistency between the two programs is in how they treat SDVOSB joint ventures. In our practice, joint ventures are a common and useful tool for small businesses hoping to perform larger projects that they would not be able to perform on their own. The SBA's rules permit a joint venture to be considered an SDVOSB for a procurement so long as

one of the joint venture partners is an SDVOSB. However, the VA only permits a joint venture to be considered an SDVOSB for a procurement if the joint venture itself goes through the CVE verification process. This is not an explicit regulatory requirement – it is a function of how the VA has interpreted its rules and could be altered with a new interpretation. The VA’s current interpretation creates inefficiencies because it requires a second verification process that is not necessary. If one of the joint venture partners has already been verified by CVE, the verification should be applied to the joint venture. Such an interpretation would be consistent with how the SBA approaches SDVOSB joint ventures and would make it easier for SDVOSBs to take advantage of joint ventures for VA procurements.

The VA and the SBA could change their interpretation of some of these rules, or modify their rules, to create more harmony between the two programs and thereby decrease SDVOSB confusion and increase government efficiency. But we question the utility of creating two identical sets of regulations for two distinct programs. As long as two programs exist, there will be an element of inefficiency that cannot be eliminated since there are two agencies essentially doing the same thing, but in different ways and with different interpretations.

#### **4. Several VA Rules Infringe the SBA’s Role as the Arbiter of Small Business Status**

The VA’s rules allow the VA to find that a veteran does not control his company if “[b]usiness 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.” 38 C.F.R. § 74.4(i)(4). There is no similar regulation for the SBA’s SDVOSB program. Recently, we have seen an increase in the number of cases where the VA has questioned an SDVOSB’s eligibility based on this regulation. The problem, in our view, is that the regulation draws on principles of affiliation and small business status that are the SBA’s exclusive purview under 13 C.F.R. § 121.103. In several cases, the VA has appeared to use concerns about affiliation to find that a veteran does not control his company. Affiliation concerns should be addressed by the SBA, not the VA.

In fact, OHA has found that the standard for veteran control under the SBA’s SDVOSB regulations is not the same as the standard for control under the SBA’s small business affiliation rules. In *DooleyMack Gov’t Contracting, LLC*, SBA No. VET-159 (2009), the SBA had concluded that a veteran did not control his company because “business relationships exist which cause such dependence that [the veteran] cannot exercise independent business judgment without economic risk.” This SBA conclusion, which OHA rejected, is nearly identical to the VA’s regulation at 38 C.F.R. § 74.4(i)(4). OHA overturned the SBA’s analysis because the judge found that the SBA had confused the affiliation control principles under 13 C.F.R. § 121.103 with the veteran control principles under 13 C.F.R. § 125.10. That same confusion is evidenced in 38 C.F.R. § 74.4(i)(4), which ostensibly addresses veteran control but reads like an SBA affiliation rule from 13 C.F.R. § 121.103.

The VA’s regulations also provide that the CVE will determine affiliation by applying the SBA’s affiliation rules (38 C.F.R. § 74.5). Another VA rule allows the CVE to deny an application if the CVE determines that a concern does not qualify as small, even if the SBA has not issued a size ruling for that firm (38 C.F.R. § 74.13(d)). Under this rule, a firm whose application is denied because of a size ruling by the CVE may subsequently request a formal size

determination from the SBA, but the firm would have to file a new application with the CVE after receiving a size determination from the SBA. In these ways, the CVE is able to perform size and affiliation analyses that should be left to the SBA.

Allowing the CVE to make size and affiliation determinations when reviewing an SDVOSB application appears to be inconsistent with the VA's statutory mandate, which indicates that small business status for the VA's SDVOSB program is determined based on the Small Business Act, which the SBA is entrusted to implement. Furthermore, the VA's Acquisition Regulation § 819.307(a) recognizes that all protests pertaining to the size of an SDVOSB must be sent to the SBA for a size determination. Since the VA understood that questions about size issues in a post-award protest should be sent to the SBA, it is unclear why the VA determined that it could decide size issues on its own for SDVOSB applications.

**B. Suggestions to Improve the SDVOSB Programs**

To improve the VA's verification process, the VA should engage in more back-and-forth with applicants, including sending them questions or concerns, so that potential denial issues could be flagged and corrected as early in the process as possible. An initial screening stage to notify veterans about potential issues with their corporate documents would likely avoid a significant number of reconsideration requests. The VA could put the application on hold for a certain amount of time while waiting for the applicant to respond to the concerns. The increased back-and-forth should be modeled on the SBA's processing of 8(a) applications, which generally results in more communication between the agency and the applicant while the application is pending. Recently, the VA proposed implementing steps very similar to these, which is a positive development and should improve the efficiency of the application process.

More back-and-forth with applicants would also help the VA to lessen the number of cases that require multiple reconsideration requests. The VA should strive to provide all bases for denial in the initial denial letter. And in the rare cases when this is not possible, the VA should consider providing an expedited review process for all reconsideration requests that may be necessary after the first one.

The application process would also improve with a philosophical shift toward being more applicant-friendly. Many veterans tell us they feel like the VA personnel are looking for a reason to keep them out, as opposed to trying to help them get in. A priority has rightfully been given to ferret out fronts, fraud, and abuse. But in the extreme, this leads to an approach toward applicants that can come across as hostile, which is counterproductive to the effective operation of the program. Standards that make it too difficult or costly for eligible firms to get into the program are no less problematic than standards that make it too easy for ineligible firms to get in. Although perhaps easier said than done, the goal should be to shift the pendulum closer to the middle.

More outreach to veterans, including workshops to help them understand the requirements for corporate documents and governance, would also improve the program. Again, the VA has recently indicated that it is moving in this direction, which is good news for the veteran community. However, without publicly-available appeal decisions, veterans will continue to be at a disadvantage in trying to understand how the VA is interpreting and applying its regulations. The SBA has published its standard operating procedures ("SOP") for the 8(a)

Program, which is a useful tool for firms and practitioners to understand the inner workings of the 8(a) Program. A similar SOP for the VA's SDVOSB program would help to lessen the confusion many firms experience in seeking to understand and use the program.

To address the regulatory challenges in the short term, the SBA and the VA can positively impact veterans by revisiting their interpretations of transfer restrictions, joint venture verification requirements, and related issues that could be interpreted in a more business-friendly way. Specifically, the VA should not appeal the Miles Construction decision and should instruct the CVE to begin allowing reasonable transfer restrictions on veteran ownership. OHA should revisit its prior decisions on transfer restrictions in light of Miles Construction. The VA should permit joint ventures to qualify as SDVOSBs without needing to undergo a second CVE verification application. The VA should send all questions about size and affiliation to the SBA for review.

As a longer-term goal, the regulatory inconsistencies and inefficiencies would be best resolved by consolidating the two sets of rules into one. The SBA's rules currently are more business friendly and may be the better starting point. There should also be an administrative appeal process like the current SBA OHA process. The SBA will continue to handle size issues, and it has already spent a number of years refining its application and protest processes, so it may be the more appropriate of the two agencies for the consolidation.

If the programs are consolidated with the SBA, there should be a government-wide prime contracting program for Veteran-Owned Small Businesses ("VOSBs"). The Small Business Act already contains subcontracting goals for VOSBs, and the VA's program has prime contract goals for VOSBs. A consolidated, government-wide program should have prime contract goals and set-aside procedures for VOSBs.

Some thought should be given to whether an upfront certification process is the most efficient way to get firms into the program and prevent fraud and abuse. If and when the two SDVOSB programs are consolidated, it may work better to pattern the new program after the Woman-Owned Small Business ("WOSB") Program. Rather than going through an upfront application process, WOSBs are required to upload documents verifying their eligibility to an online repository, to be checked in the event of a protest.

If the two SDVOSB programs were consolidated with the VA, we agree with the GAO's recent report that this should not happen until the VA is better able to handle its existing case load. Furthermore, there should be an interim rule that allows firms to self-certify while the changes are underway; otherwise, the VA-verified firms would have a significant advantage for SDVOSB contracts over those firms that currently self-certify their SDVOSB status and would then need to be verified before they could compete for SDVOSB contracts.

Finally, more should be done to expedite the protest and verification processes so that SDVOSBs will not lose valuable contract opportunities while waiting for an initial decision or to overturn an administrative error. Some form of temporary stay of contract award pending the outcome of an expedited protest and appeal process would be beneficial, similar to what is provided for in the SBA's rules. Recently, a proposal was issued to modify FAR § 19.302 to provide that, when a post-award appeal from an SBA protest determination is filed with OHA, the procuring agency's contracting officer shall consider suspending contract performance until

OHA decides the appeal. A similar provision in the VAAR would provide some protection against the loss of valuable contracts based on an administrative error in the CVE verification process. The VA could also implement an expedited reconsideration or appeal process in the event of a pending contract award so veterans awarded an SDVOSB contract would have a chance to contest an adverse eligibility determination before the VA withdraws the contract. In short, more can be done to balance the need to expeditiously move forward with new contracts against the importance of ensuring that eligible firms do not lose valuable contract awards due to administrative errors in the verification process.

#### **CONCLUSION**

PilieroMazza and I are strong supporters of veterans and the federal procurement programs for SDVOSBs. From working with many veteran-owned firms, we see first-hand the benefits that veterans can obtain from the SDVOSB programs offered through the VA and the SBA. We also see the areas in which these programs can be improved to make the verification process and regulations simpler and more efficient. With some changes, more of our veterans will be able to derive the benefits intended for them under the programs. "To care for him who shall have borne the battle," we owe our veterans that much.

Thank you again for the opportunity to submit this testimony.

United States Government Accountability Office

**GAO**

**Testimony**

Before the Subcommittee on Contracting and the Workforce, Committee on Small Business, and the Subcommittee on Oversight and Investigations, Committee on Veterans' Affairs, House of Representatives

For Release on Delivery  
Expected at 2:00 p.m. EDT  
Tuesday, March 19, 2013

**VETERAN-OWNED SMALL  
BUSINESSES**

**Planning and Data System  
for VA's Verification  
Program Need  
Improvement**

Statement of William B. Shear, Director  
Financial Markets and Community Investment



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Chairmen Hanna and Coffman, Ranking Members Meng and Kirkpatrick, and Members of the Subcommittees:

I am pleased to be here to discuss the Department of Veterans Affairs' (VA) efforts to verify the eligibility of veteran-owned small businesses (VOSB), including service-disabled veteran-owned small businesses (SDVOSB), to receive contracting preferences under VA's Veterans First Contracting program.<sup>1</sup> During fiscal year 2012, VA awarded \$3.8 billion in contracts to SDVOSBs and VOSBs, which underscores the importance of ensuring the eligibility of those firms to receive contracting preferences.<sup>2</sup> My statement is based on our January 2013 report on VA's verification program.<sup>3</sup> During the period covered by our study—February 2012 to January 2013—VA was introducing significant changes to its verification procedures and operations. As a result, we determined that evaluating VA's compliance with its past procedures would be of limited value and that testing the effectiveness of verification procedures that were still evolving would be premature. We focused instead on issues related to planning for and designing the verification program and on changes in the program's management and operations.

My testimony today addresses the (1) progress that VA has made in ensuring that its program verifies the eligibility of SDVOSBs and VOSBs on a timely and consistent basis, and (2) key operational and policy issues that VA will have to address if its verification program is expanded to support the government-wide SDVOSB contracting program. That

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<sup>1</sup>VA established the Veterans First Contracting program in response to the Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, § 502, 120 Stat. 3403, 3431 - 3435 (codified as amended at 38 U.S.C. § 8127). The act requires VA to give preference in its small business contracting to SDVOSBs and VOSBs. It also gives the agency unique authority to make noncompetitive (sole-source) awards to these firms and to restrict competition for awards to them (set-asides). Along with establishing VA's contracting preferences, the 2006 Act makes VA responsible for maintaining a database of SDVOSBs and other VOSBs. The act requires VA to verify that all firms entered in the database are actually owned and controlled by one or more veterans and to confirm the status of any owner who indicates a service-connected disability.

<sup>2</sup>Our analysis of fiscal year 2012 data reflects data input into the Federal Procurement Data System—Next Generation (FPDS-NG) as of February 2013. Because agencies enter and revise data in FPDS-NG on an ongoing basis, the results reported here may differ from the Small Business Administration's official fiscal year 2012 report on federal agencies' achievement of small business goals, which will be released later in fiscal year 2013.

<sup>3</sup>See GAO, *Veteran-Owned Small Businesses: Planning and Data System for VA's Verification Program Need Improvement*, GAO-13-95 (Washington, D.C.: Jan. 14, 2013).

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program, which is administered by the Small Business Administration (SBA), authorizes other federal agencies to award set-aside or sole-source contracts up to certain dollar thresholds to firms that self-certify as SDVOSBs.<sup>4</sup>

In summary, the two key findings from our January 2013 report are:

- VA has instituted a number of significant changes to its verification processes to improve and address program weaknesses but continues to face challenges in its efforts to establish a stable and efficient program to verify firms on a timely and consistent basis. These challenges are directly related to shortcomings in strategic planning and data systems for the verification program. Specifically, we noted that the plan lacked performance measures to assess whether the desired outcomes were being achieved and had a short-term focus not typically associated with a strategic plan. Additionally, we found that VA's data system did not collect important data and had limited reporting and workflow management capabilities.
- Expanding VA's verification program to support the government-wide SDVOSB contracting program would require VA to improve its verification process and address a number of operational and policy issues.

To improve the management and oversight of VA's SDVOSB and VOSB verification program, our January 2013 report made two recommendations addressing strategic planning and data system needs. VA concurred with the two recommendations and stated that it had actions under way that would address them.

For our January 2013 report, we reviewed relevant statutes, regulations, procedures, and planning and organizational documents. As we were completing our review in late October 2012, VA prepared an initial strategic planning document for the verification program in response to our inquiries. We compared that document to six leading practices

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<sup>4</sup>The Veterans Benefits Act of 2003, Pub. L. No. 108-183, § 308, 117 Stat. 2651, 2662 (codified at 15 U.S.C. § 657f).

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relevant to agencies' initial strategic planning efforts.<sup>5</sup> We also interviewed VA officials and representatives from three veteran service organizations and a technical assistance association that were participating in an outreach program VA had launched to assist applicant firms. We reviewed our prior work on the verification program and a report from VA's Office of Inspector General. We developed rough order-of-magnitude estimates of how many more SDVOSBs might seek verification if it were required government-wide beyond those firms that VA had already verified or was in the process of verifying as of September 30, 2012.<sup>6</sup> Further, because of SBA's role in administering the government-wide SDVOSB program, we reviewed SBA documents and interviewed SBA staff. Our work was performed in accordance with generally accepted government auditing standards.

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### **VA Has Made Changes to Improve Its Verification Program but Continues to Face Challenges in Its Strategic Planning and Information Technology Efforts**

Since December 2011, VA has instituted a number of significant changes that are designed to improve its operations and address program weaknesses. These changes include:

- revising its Standard Operating Procedures to help ensure greater consistency in its verification process and instituting a more robust quality assurance process;
- increasing the number of employees and contractors assigned to the verification process to about 28 full-time equivalent employees and 174 contractors as of October 2012;

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<sup>5</sup>We have reported in the past that, taken together, the strategic planning elements established under the Government Performance and Results Act of 1993 and associated Office of Management and Budget guidance, and practices identified by GAO provide a framework of leading practices in federal strategic planning. The six leading practices that have been identified as being the most relevant to VA's initial strategic planning efforts are (1) defining the mission and goals; (2) defining strategies that address management challenges and identifying resources needed to achieve goals; (3) ensuring leadership involvement and accountability; (4) involving stakeholders; (5) coordinating with other federal agencies; and (6) developing and using performance measures.

<sup>6</sup>Specifically, our estimation method relied on the number of SDVOSBs listed in the Central Contractor Registration database that had not been verified by VA and were not in the process of being verified. Next, we determined whether or not these self-certified SDVOSBs had received contracts from agencies other than VA in fiscal years 2010 or 2011 using FPDS-NG.

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- launching a new Verification Counseling program that trains partner organizations to provide counseling to firms interested in becoming verified;
  - extending the term of a firm's verification status from 1 to 2 years and introducing simplified procedures for reverifying firms that have already passed a full verification examination to mitigate an expected increase in its workload; and
  - forming a senior executive task force in June 2012 to review the verification program, determine whether it has sufficient resources and support, and present recommendations in the second quarter of fiscal year 2013.

Despite the steps that it has taken since December 2011, VA has consistently placed a higher priority on addressing immediate operational challenges than on developing a comprehensive, long-term strategic focus for the verification program—an approach that has contributed to programmatic inefficiencies. As of October 2012, when we were completing our review, VA had not created a formal strategic plan for the verification program. In response to our observations, VA initiated action in late October 2012 to compile a strategic planning document for the verification program. In this initial strategic planning effort, VA appears to have at least partially applied six key leading strategic planning practices. We believe that fully implementing these leading practices would make the plan more useful. Specifically, we noted that the plan identified goals and objectives, but some of these were worded so broadly that it would be difficult to assess whether they had been met. For example, one long-term objective is establishing and sustaining a “best in show” operation. But VA’s strategic plan does not define such an operation or provide any criteria or associated metrics to determine whether it has been achieved. Also, VA has not shared the plan with key stakeholders, such as veteran support organizations, business associations, and congressional staff and committees. As a result, VA has missed an opportunity to make the verification program’s plans and priorities transparent and to facilitate continued stakeholder involvement. Further, the plan lacks performance measures to assess whether the desired outcomes were being achieved and has a short-term focus of 2 to 3 years that is not typically associated with a strategic plan. Without a longer-term perspective, the current strategic plan serves more as a short-term management plan than as a forward-looking guide to help frame the verification program’s future needs and direction.

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Since the verification program began in 2008, VA has relied on data systems that it developed on an incremental, ad hoc basis in response to immediate needs, without an overarching plan or vision and without centralized oversight by VA's Office of Information and Technology.<sup>7</sup> As a result, the current system has shortcomings that have required VA to develop inefficient workarounds in order to operate and oversee the verification program. For example, because the data system does not meet VA's needs for assigning and monitoring the progress of applications, supervisors use separate spreadsheets to track the status of applications as their teams review them, increasing the risk that data will not be completely or accurately recorded across systems. Furthermore, the verification program's current data system lacks certain data fields and reporting capabilities needed to provide key information for program management. VA began formally planning in July 2012 to modify or replace the system, a process that the Office of Information and Technology will manage. But this planning effort had not been tied to broader long-term strategic planning to better ensure that the resulting system meets the verification program's long-term information needs and goals. Without tying that effort to long-term strategic planning, VA risks failing to meet the program's information needs going forward.

To improve the management and oversight of VA's SDVOSB and VOSB verification program, our January 2013 report recommended that VA

- continue to develop, refine, and implement a formal strategic plan to provide a comprehensive framework to guide, integrate, and monitor the verification program's activities over time (including incorporating longer-term goals, objectives, and outcome measures for the verification program and sharing the plan with key stakeholders); and
- integrate its efforts to modify or replace the verification program's data system with the broader programwide strategic planning effort to ensure that the new system not only addresses the short-term needs of the program but also can be readily adapted to meet long-term needs.

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<sup>7</sup>We have previously reported that an agency must have relevant, reliable information to run and control its operations. More specifically, we have noted that pertinent information should be identified, captured, and distributed to the right people in sufficient detail, in the right form, and at the appropriate time to enable them to carry out their duties and responsibilities efficiently and effectively. GAO, *Internal Control Management and Evaluation Tool*, GAO-01-1008G (Washington, D.C.: August 2001).

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VA concurred with the two recommendations and stated that it had actions under way that would address them. For example, VA indicated that it anticipated submitting a strategic plan for the verification program to the Office of the Secretary in fiscal year 2013 and would develop a schedule to brief VA senior leaders and other key stakeholders once the plan is approved. VA also noted that it had begun the process of replacing the verification program's data system.

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**Expanding Its  
Verification Program  
Government-wide  
Would Require VA to  
Make Further  
Improvements and  
Address Policy Issues**

Expanding VA's verification program to support the government-wide SDVOSB contracting program would require VA to increase the scale of its program to verify potentially thousands of additional firms.<sup>8</sup> Beyond those firms that VA has already verified or was in the process of verifying as of September 30, 2012, we estimated that between about 3,600 and 16,400 more self-certified SDVOSBs might seek verification under a government-wide program.<sup>9</sup> Thousands more existing but unverified and new SDVOSBs could eventually register and seek verification if it were required.

Because VA would face additional operational challenges in preparing to verify potentially thousands of additional firms, it needs to continue to address existing program weaknesses. For example, we reported in August 2012 that VA had taken some positive actions to enhance its fraud prevention efforts, such as formalizing a process for conducting

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<sup>8</sup>Considering the risk of awarding contracts under the government-wide SDVOSB program to self-certified firms that are ineligible or deliberately misrepresenting their SDVOSB status, in 2009 we suggested that Congress consider providing VA with the authority and resources necessary to expand its SDVOSB eligibility verification process to all contractors seeking to bid on SDVOSB contracts government-wide. GAO, *Service-Disabled Veteran-Owned Small Business Program: Case Studies Show Fraud and Abuse Allowed Ineligible Firms to Obtain Millions of Dollars in Contracts*, GAO-10-108 (Washington, D.C.: Oct. 23, 2009). For purposes of our January 2013 report, we were asked to consider steps necessary for VA to expand its verification program government-wide. Accordingly, we did not evaluate whether another agency, such as SBA, could or should assume responsibility for such a program. Also, we focused only on SDVOSBs (not all VOSBs), because they are the subject of government-wide contracting goals and preferences and because a recent legislative proposal for a government-wide verification program applied only to them.

<sup>9</sup>The estimate of 3,600 firms is based on the number of self-certified SDVOSBs that received contract obligations from agencies other than VA in fiscal years 2010 or 2011 (the last full fiscal year available), according to FPDS-NG. The estimate of 16,400 firms includes those 3,600 firms and another 12,800 self-certified SDVOSBs that did not receive contract obligations in fiscal years 2010 or 2011, according to FPDS-NG.

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unannounced site visits to firms identified as high risk during the verification process. However, VA has not fully implemented 7 of the 13 recommendations we made in October 2011, including providing regular fraud-awareness training to VA verification and contracting personnel and removing contracts from ineligible firms.<sup>10</sup> Without implementing these recommendations, VA's program for awarding contracts to service-disabled and other veteran-owned small businesses remains vulnerable to the fraud and abuse that could result in contracts being awarded to ineligible firms. In addition, VA has not determined whether recent operational changes have resulted in improved performance or whether its new methods for educating applicants have been effective. It has also, as noted earlier, not addressed limitations to its data system that hinder its ability to operate and oversee the program.

In our January 2013 report, we noted that VA had begun a process to revise the verification program's regulations that would likely serve as the starting point if VA were charged with implementing a government-wide verification program. VA officials said that they were planning to revise the regulations partly in response to applicants' and veterans' organizations' concerns about VA's eligibility standards. For example, two veterans' organizations that we interviewed questioned VA's requirement that veteran owners be able to transfer their ownership interest without restriction by nonveteran owners, effectively suggesting that VA's standard for establishing control of a firm is too strict. VA officials said that they would weigh this concern and others as they developed proposed revisions to the regulation.

However, as we concluded in our January 2013 report, any changes to VA's verification requirements could create or widen differences between the various government-wide small business contracting programs

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<sup>10</sup>GAO, *Service-Disabled Veteran-Owned Small Business Program: Vulnerability to Fraud and Abuse Remains*, GAO-12-697 (Washington, D.C.: Aug. 1, 2012). We are reviewing documentation that VA submitted on February 28, 2013, to determine if VA's actions taken to address some of our prior recommendations are sufficient to consider them implemented.

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requirements and VA's.<sup>11</sup> Some veterans' organizations and others with whom we spoke have cited perceived differences between VA's eligibility standards and SBA's standards for the government-wide SDVOSB program and the 8(a) program for economically disadvantaged small businesses, whose certification process is most similar to VA's verification program. Initially, VA and SBA officials told us that they had not found major differences in the programs' regulatory eligibility requirements, the agencies' interpretation of them, or the documentation requirements for verification. However, in commenting on a draft of our January 2013 report, SBA said that while the wording of the regulations pertaining to eligibility requirements was comparable, some key differences existed in the way the agencies interpreted them. SBA also noted that the agencies were consulting with one another to determine whether those differences could or should be resolved.<sup>12</sup>

Going forward, any unilateral changes to VA's verification policies and procedures could make aligning small business contracting programs more difficult. VA officials told us that the tension between competing calls for VA to ease its requirements and to be consistent with the government-wide SDVOSB and 8(a) programs would be a major consideration as VA continued making changes to its regulations, particularly in light of the potential for expanding VA's program government-wide. Accordingly, the officials said that they were consulting with SBA as they developed changes to VA's verification program regulation.

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<sup>11</sup>In addition to the government-wide SDVOSB program, federal contracting preference programs give federal agencies the authority to set aside contracts for small business concerns and specific types of small businesses: women-owned small businesses, businesses located in historically underutilized business zones (HUBZone), and socially and economically disadvantaged small businesses participating in SBA's 8(a) program. While the SDVOSB and women-owned small business programs allow firms to self-certify their eligibility, SBA reviews supporting documentation to certify HUBZone and 8(a) firms, with the 8(a) program requiring more extensive documentation similar to what is required under VA's verification program.

<sup>12</sup>SBA also noted a distinction regarding ownership by spouses of disabled veterans. By statute, firms owned and controlled by surviving spouses of deceased veterans may be eligible for verification by VA (38 U.S.C. § 8127(h)), but they are not eligible under SBA's regulations for the SDVOSB program.

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Chairmen Hanna and Coffman and Ranking Members Meng and Kirkpatrick, this concludes my prepared statement. I would be happy to answer any questions at this time.

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**GAO Contacts and  
Staff  
Acknowledgments**

If you or your staff have any questions about this statement, please contact me at (202) 512-8678 or [shearw@gao.gov](mailto:shearw@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. Key contributors to this testimony include Harry Medina, Assistant Director; Emily Chalmers, Julianne Dieterich, Julia Kennon, and John McGrail.

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U.S SMALL BUSINESS ADMINISTRATION  
WASHINGTON, D.C. 20416

STATEMENT OF A. JOHN SHORAKA  
ASSOCIATE ADMINISTRATOR FOR GOVERNMENT CONTRACTING AND BUSINESS  
DEVELOPMENT, U.S. SMALL BUSINESS ADMINISTRATION

JOINT HEARING

HOUSE COMMITTEE ON VETERANS' AFFAIRS  
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS  
AND  
HOUSE COMMITTEE ON SMALL BUSINESS  
SUBCOMMITTEE ON CONTRACTING AND THE WORKFORCE

MARCH 19, 2013

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Chairmen Hoffman and Hanna, Ranking Members Kirkpatrick and Meng, and Members of the Subcommittees, thank you for inviting me to testify before you today. The Small Business Administration (SBA) plays a pivotal role in helping veteran owned small businesses (VOSBs) and service disabled veteran owned small businesses (SDVOSBs) obtain access to Federal contracts.

**Background**

As you know, veteran owned businesses are integral to our nation's economy and its ongoing recovery. Veterans own about 2.4 million—or nine percent—of all businesses, large and small, in the U.S. These businesses generate about \$1.2 trillion in receipts and employ nearly six million Americans.<sup>1</sup> One key sector of the veteran small business economy is government contracting, where SBA and its SDVOSB program play a critical role.

The SBA's SDVOSB Program provides Federal procuring agencies with the authority to set acquisitions aside for exclusive competition by SDVOSBs.<sup>2</sup> The program also gives procuring agencies the authority to make sole source awards to SDVOSBs if certain conditions are met.

SBA's government-wide program, along with VA's Veterans First contracting program, helps the Federal government meet the statutorily-established annual, agency-wide goal

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<sup>1</sup> U.S. Census Bureau: [http://www.census.gov/newsroom/releases/archives/business\\_ownership/cb11-88.html](http://www.census.gov/newsroom/releases/archives/business_ownership/cb11-88.html)

<sup>2</sup> The Department of Veterans Affairs (VA) has its own SDVOSB program, known as Veterans First, which governs all VA procurements. Veterans First was established in response to the Veterans Benefits, Health Care, and Information Technology Act of 2006 (2006 Act).

of awarding at least three percent of the total value of all awards to SDVOSBs. In Fiscal Year 2011, over \$11.8 billion in contracts went to SDVOSBs, up by 3.8 percent over the previous year.

#### **Activities to Promote SDVOSBs in Federal Contracting**

SBA, through our Office of Government Contracting and Business Development (GCBD), plays a critical role as a vocal advocate for VOSBs and SDVOSBs through myriad outreach efforts. SBA has a cadre of Procurement Center Representatives (PCRs) stationed at major Federal procuring centers throughout the country who are responsible for increasing small business opportunities in the Federal procurement process. These PCRs review proposed major procurements and recommend agency strategies that will maximize opportunity for all small businesses—including VOSBs and SDVOSBs. PCRs also review contract bundling requirements to determine if they are necessary and justified under SBA guidelines.

SBA also employs Commercial Marketing Representatives (CMRs) to ensure that small businesses receive a fair share of subcontracting opportunities from the large prime contractors utilized by Federal agencies. When awarded a contract valued at \$650,000 or higher for most contracts, or \$1.5 million for construction of a public facility, these large prime contractors are required to establish a subcontract plan for small business participation. Through its CMRs, the SBA—along with the procuring agency—evaluates the large prime contractor's effort against their subcontracting plan.

The White House is also playing a key role in helping veterans start, grow, and expand their small businesses. At the President's direction, the SBA is leading the Interagency Task Force on Veterans Small Business Development, which includes representation from seven Federal agencies and four leading veterans' organizations. The Task Force is focused on increasing the number of veteran-owned businesses and the number of Americans—including other veterans—that those businesses employ.

#### **SBA Requirements and Process**

To qualify as an SDVOSB under SBA's statutory guidelines, a firm must meet four conditions through a self-certification process:<sup>3</sup>

1. The firm must be least 51% owned by one or more service disabled veterans;
2. The firm's management must be controlled by one or more service disabled veterans or—in the case of a veteran with a permanent and severe disability—the spouse or permanent caregiver of the disabled veteran;
3. The firm must meet the small business size standard for their business and the size standard for any federal contract they bid on; and,
4. The firm must self-represent their disabled veteran status.

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<sup>3</sup> The 2006 Act required VA to register and verify all VOSBs and SDVOSBs that wish to participate in the Veterans First program. By contrast, SBA's government-wide SDVOSB program requires a self-certification by SDVOSBs.

Currently, there are approximately 12,000 self-certified SDVOSBs in the System for Award Management, the government-wide contracting database.

In terms of a participant's status as a veteran with a service-connected disability, the owner-operator of an SDVOSB must be able to produce official documentation that he or she has a service-connected disability in the event of a "protest."<sup>4</sup> A protest occurs when a competing bidder or other interested party challenges the winning firm's eligibility as an SDVOSB. The initial decision on a protest is made by my office, GCBD. The determination of a protest may be appealed to SBA's Office of Hearings and Appeals (OHA).

OHA provides independent, administrative appellate review of SBA program determinations, including the initial SDVOSB determinations made by GCBD. OHA decisions, in turn, may be appealed to the Federal courts. Currently, OHA is staffed by eight full-time employees, including two administrative judges who decide appeals of the Office of Government Contracting's initial SDVOSB determinations. In FY 2012, OHA decided eight SDVOSB appeals, roughly 20 percent of GCBD's 41 initial determinations that year.

One of our top priorities at SBA is to ensure that the benefits of our programs flow to their intended recipients. We have no tolerance for fraud, waste, and abuse and have therefore implemented a comprehensive three-pronged strategy to identify, prevent, and pursue non-compliance or fraud across all of our government contracting programs. The three prongs of our fraud, waste, and abuse strategy are as follows:

1. Effective certification processes: Clear and comprehensive eligibility screening ensures that only qualified, eligible firms participate in SBA programs;
2. Continued surveillance and monitoring: Targeted and thorough examinations, reviews, and site visits identify firms which commit fraud and no longer qualify; and,
3. Robust and timely enforcement: Prompt, proactive enforcement removes bad actors, deters wrongdoing, and reassures those eligible to participate in SBA's programs.

GCBD uses the protest process to help root out fraud, waste, and abuse in our small business contracting programs by referring questionable firms to our General Counsel Debarment Official or SBA's Inspector General for further investigation. In FY 2012, SBA suspended, proposed for debarment, or debarred approximately 28 firms or individuals involved in procurement-related misconduct.

#### **Differences between VA and SBA**

The SBA and VA mutually recognize the importance of the VOSB and SDVOSB communities to the American economy. SBA and VA have collaborated to compare our

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<sup>4</sup> SBA regulations require that documentation of a service-connected disability must come from the VA, Department of Defense, or the U.S. National Archives and Records Administration.

programs in an effort to bring them into closer alignment and provide better services to the veterans' community. The comparison contrasted the statutes, regulations, interpretations, business processes, and information technology support of the programs. Our comparison found many similarities between the "ownership and control" eligibility requirements for the VA and SBA programs, due in large part to the VA program drawing extensively from SBA regulations for the 8(a) and SDVOSB programs.

While there are similarities, there are also key differences, as I noted in my letter dated December 6, 2012, submitted in response to GAO Report 13-95. For instance, VA's Veterans First program is a certification program similar to SBA's 8(a) Business Development Program, while the government-wide SDVOSB program uses self-certification. In order to meet the requirements of a certification program, a firm must provide more initial information and work through the certification process to meet eligibility requirements. This process is inherently more labor-intensive than a protest-based self-certification program.

Another difference between the SBA and VA programs is in the timing of requests for documentation and review of documentation to demonstrate program eligibility. In a protest-based self-certification, the requests for additional documentation are submitted in response to a protest that is filed after a contract award. Once the documentation is reviewed, a determination of eligibility is made. The VA certification process requires that documentation be submitted and a determination made before a contract can be awarded.

Finally, although the regulations are similar, SBA's determinations are made on a case-by-case, fact-specific basis. Each application is reviewed on the totality of information presented by the applicant firm. Consequently, there are very few instances where there is only one factor contributing to the denial of a firm's program eligibility. As a result, it is inappropriate to presume there is only one clear bright line interpretation of a regulation as it applies to every potential applicant firm, and every potential set of factors.

Our collaboration with VA has been productive in identifying other areas of potential coordination and best practice sharing. I would be happy to discuss these efforts or any of the topics the Subcommittees wish to explore during the question-and-answer portion of the hearing today.

Thank you once again for your support of our work in this area, and for the opportunity to appear before you today.

**STATEMENT OF THOMAS J. LENEY  
EXECUTIVE DIRECTOR  
OFFICE OF SMALL AND DISADVANTAGED BUSINESS  
UTILIZATION (OSDBU)  
DEPARTMENT OF VETERANS AFFAIRS  
BEFORE THE  
HOUSE COMMITTEE ON SMALL BUSINESS  
SUBCOMMITTEE ON CONTRACTING AND THE  
WORKFORCE and  
HOUSE COMMITTEE ON VETERANS' AFFAIRS  
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS  
MARCH 19, 2013**

Chairman Hanna, Chairman Coffman, Ranking Member Meng, Ranking Member Kirkpatrick, and Members of the Subcommittees, thank you for inviting me to testify on statutory, regulatory and interpretive differences between the Small Business Administration (SBA) and Department of Veterans Affairs (VA) contracting programs for small businesses owned and controlled by service-disabled Veterans.

Overview

Since its inception, the VA Verification program has faced challenges balancing the need to prevent ineligible firms from taking improper advantage of VA's "Veterans First" program, while making it easier and faster for legitimate Veteran-owned small businesses (VOSB) and service-disabled Veteran-owned small businesses (SDVOSB) to gain greater access to VA procurement opportunities. VA has made substantial progress on both fronts in our effort to implement 38 Code of Federal Regulations (CFR) Part 74, the regulation governing verification. As we improved the verification process we realized that most of the remaining issues were associated with the rule itself. To better understand the regulatory issues, VA reached out to stakeholders and as a result of their feedback, VA has initiated a formal rule change process in accordance with the Regulatory Flexibility Act and Executive Order 13272 (Proper Consideration of Small Entities in Agency Rule-making).

In the aftermath of both VA's Office of the Inspector General (OIG) report dated July 25, 2011, and the Government Accountability Office (GAO) report dated October 26, 2011, our imperative was to ensure all firms listed as eligible in the VA program had been properly verified as meeting the standards laid out in 38 CFR Part 74. Both VA OIG and GAO made recommendations for improvement. We have addressed all of the recommendations identi-

fied in the 2011 reports. In its latest report, GAO-13-95 Planning and Data System for VA's Verification Program Need Improvement, January 14, 2013, GAO acknowledges improvement by stating: "Since December 2011, VA has instituted a number of significant operational changes, including revising standard operating procedures and enhancing quality assurance protocols." Based on the report recommendations, VA made changes to its verification processes and policies. These changes include increased fraud awareness training for all VA Center for Veterans Enterprise (CVE) staff as well as support contractors, the development of better education tools to help applicants through our Verification Assistance Program, and reduction of fraud risk through a post-verification audit process.

CVE initiated the post-verification audit process to ensure that verified companies continued to be in compliance with program eligibility rules throughout the tenure of their two-year verification term. This process chooses firms based on both random and risk basis. This process was launched in May 2012; CVE has performed 158 random audits and 112 risk-based audits in the fiscal year 2013 to date, resulting in ten cancellations.

#### Comparison of Rules Governing Verification Program

We believe the most significant difference between VA and SBA's programs lies in the volume of status determinations made by each program. By statute, a VOSB and an SDVOSB must provide documentation to VA to demonstrate its status and VA must verify this information before the firm can do business with VA as an SDVOSB. As SBA notes, this process is inherently more labor-intensive than a protest-based self-certification program. This statutory requirement resulted in VA making more than 4,500 status determinations in FY 2012 alone. Because SBA only determines SDVOSB status and only when a protest is filed, the SBA made only 40 status determinations over the past two fiscal years.

Despite this statutorily-driven difference in the way the programs are run, there has existed in the stakeholder community a widespread concern that there are major differences between the VA and SBA regulations, even though the regulation that governs VA's Verification program, 38 CFR Part 74, was derived in large part from the ownership and control portions of the SBA regulations that cover the Government-wide SDVOSB program in 13 CFR Part 125, as well as the regulation that covers the section 8(a) business development program, 13 CFR Part 124. In response to that concern, VA, in collaboration with SBA, conducted a thorough comparison of the ownership and control portions of the regulations. In addition to comparing regulatory language, we also looked at every SDVOSB status protest considered by SBA and all of the SBA Office of Hearings and Appeals decisions on SDVOSB cases for the last two fiscal years to identify any differences in interpretation.

While we are in the process of discussing our findings with SBA, our tentative conclusion is that there are only a few differences in the regulation and interpretation of them and we are fully com-

mitted to working with SBA and conducting stakeholder outreach to help address these differences.

There are two statutory differences between the programs due to the provisions of Public Law (P.L.) 109-461, as codified in 38 United States Code (U.S.C.) Sections 8127 and 8128. The two statutory differences are:

1. Application to Veteran-Owned Small Businesses: Section 8127(f) states: "Database of Veteran-Owned Businesses. - (1) Subject to paragraphs (2) through (6), the Secretary shall maintain a database of small business concerns owned and controlled by veterans and the veteran owners of such business concerns." VA's authority includes both SDVOSBs and VOSBs; whereas the government-wide SBA program only addresses SDVOSBs.

2. Surviving Spouse: Section 8127(h): "Treatment of Businesses After Death of Veteran-Owner. - (1) Subject to paragraph (3), if the death of a veteran causes a 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 concern shall, for the period described in paragraph (2), be treated as if the surviving spouse were that veteran for the purpose of maintaining the status of the small business concern as a small business concern owned and controlled by veterans." This currently applies to Veterans that were 100 percent service-disabled or who died as a result of a service-connected disability. SBA's program has no surviving spouse exception.

Since there were only two major statutory differences, VA derived its regulation mainly from 13 CFR Part 125, which implements the government-wide SDVOSB set-aside program established by 15 U.S.C. 657f, and 13 CFR Part 124.105 and 124.106. Where 13 CFR Part 125 was silent, VA considered language from 13 CFR Part 124. In addition, in our examination of SBA status protest decisions and SBA Office of Hearings and Appeals (OHA) decisions, as well as discussions directly with representatives from SBA, we found that in most cases where SBA's SDVOSB regulation is silent, SBA applies the provisions of the 8(a) regulation. For example, in its decision SBA No. VET-102 (2005), SBA OHA's decision states: "OHA has recognized that the regulations regarding control of 8(a) Business Development and Small Disadvantaged Business program participants can provide guidance in interpreting the control requirement of SDVO SBC eligibility."

Our comparison of the regulations revealed three differences between VA's Verification regulation and SBA's SDVOSB regulation.

1. VA added a requirement for a VOSB to notify the CVE of a change of ownership in 38 CFR 74.3(e). Although this requirement is noted in 13 CFR 124.105(i), this requirement is moot in the SBA SDVOSB regulation due to the self-certification nature of the program.

2. VA added a provision when the final rule was published, based on public comments, which is specific to Employee Stock Ownership Plans (ESOP) that does not appear in either the

SDVOSB or the 8(a) regulations. VA included a provision that would consider certain ESOP's to meet the requirements of direct ownership by the Veteran(s).

#### Differences in Interpretation

Once we determined what actual language differences existed between the regulations, we looked for differences in the interpretation of the rules. We compared VA's interpretations to the SBA status protests and OHA decisions rendered over the last two fiscal years to see where any differences occurred. While VA is not bound by the SBA decisions, due to the similarities of the SDVOSB programs, VA finds the SBA case law can be persuasive authority. We could find only two clear cases where the VA interpretation differed from the SBA interpretation.

In both 38 CFR 74.4(f) and 13 CFR 125.10(e)(1), the regulations state "[n]o 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."

If we look at a sample situation where two Veterans own at least 51 percent of the voting stock of a company and a non-Veteran also owns voting stock, VA interprets this language that a non-Veteran has the power to control the decision of the board of directors if the Veteran shareholders split their vote and the non-Veteran casts the deciding vote. The SBA interpretation of this situation is that the non-Veteran must vote with a Veteran to win the decision. VA is prepared to alter its interpretation to align with SBA in this case.

Although VA seeks to align its interpretations with SBA, based on stakeholder discussions and feedback, we have determined that transfer restrictions that are part of normal commercial dealings, such as the right of first refusal, do not materially affect the ability of a Veteran to unconditionally own or control the business. Therefore, effective March 6, 2013, VA will no longer interpret the current regulation to mean that such restrictions constitute a reason for denying eligibility.

#### Potential Rule Change

VA has initiated stakeholder outreach as part of a process to identify potential changes to the rules based on the lessons learned from the implementation of the current verification regulation. We have reached out informally to a broad range of stakeholders as part of this process, and received a number of recommendations worthy of consideration. As part of this process we expect to publish an Advanced Notice of Proposed Rule Making in the Federal Register that will provide all stakeholders a formal method of pro-

viding feedback and input that will be used to draft proposed rule changes governing VA VOSB Verification.

Given the current alignment with the SBA's programs, any consideration of changes to VA verification rules will involve discussion with the SBA as we work to keep the two programs aligned.

#### Process

In view of the long history of small business certification programs in the SBA, VA also reviewed the processes and metrics used in the SBA 8(a) certification program to determine lessons learned and best practices that we could apply to the VA verification program. As a result of this review, we have adopted two practices:

1. We noted that when SBA contacts an applicant, it uses emails followed up by a phone call to confirm receipt of the communication. CVE has added a phone call to confirm that an applicant received email communications where any type of documentation is requested, or if a firm receiving a Preliminary Findings letter has not responded to CVE within 48 hours.

2. We also noted that SBA followed a practice of contacting an applicant with preliminary findings where there are issues of non-compliance that can easily and quickly be corrected and allowing them to correct those issues prior to a determination. Through an analysis of the most frequent reasons for which firms are being denied, CVE identified a set of issues that will not require a full re-evaluation and can be quickly corrected. These issues occur in more than 50 percent of our current denials. Applicants that could be denied for these issues will be provided a Preliminary Findings letter extending the opportunity to make correction or withdraw, prior to a determination. For more complicated issues that would require a full re-evaluation, firms will be notified and will have the option to withdraw their application and re-submit without receiving a determination.

We are currently running a series of limited pilots to validate this proposed process and train CVE staff on procedures for engagement with applicants. The program is targeted for a full launch on May 1, 2013.

#### Program Improvements

One of the major findings of the recent GAO report was that the Management Information System that supports verification is woefully inadequate for our purposes. VA agrees that our current information system is the biggest obstacle to meeting our verification objectives, and we have taken steps to fix it. The next generation Verification Case Management System (VCMS) is currently under development, and we expect to award a contract for a new system in May 2013. This will be a phased program with initial operational capability expected in October 2013.

While we have been aggressively pursuing the development of a new system, we discovered that SBA is also developing a new system for their 8(a) program. We have reached out to SBA to compare technical requirements. We are currently determining if the new SBA system, which is further along in its development, could be applied to both programs.

GAO acknowledged that VA has made improvements to the program, and as a result of a number of process improvements, we have reduced the average time to initial determination from more than 130 days during the summer of 2011 to an average of 46 days for those applications completed last month. We still have a challenge in reducing the time for achieving final determinations in response to requests for reconsideration, a process that offers a “second chance” to firms found to be non-compliant. The process of reaching a final determination took an average of 128 days for firms receiving decisions in February 2013. While we are working to reduce the time required, we recognize that the best method to do so is to reduce the number of applications that are declared ineligible. Our analysis of initial denials revealed that most denials occur because the applicant does not understand the regulation or how it applies to their business model.

As a result, our efforts to reduce the time and difficulty of achieving eligibility have focused on educating applicants regarding the application of the regulation and helping them understand what their business model needs to be to fit the requirements of the program. Our Verification Assistance Program currently consists of three elements:

1. An online self assessment tool that takes a Veteran through each section of the regulation and all the required documents and explains how they relate to the regulation.
2. A series of 17 Verification Assistance Briefs that explain the requirements and give examples of why firms are denied. These briefs address issues that cause more than 70 percent of all denials.
3. Realizing some applicants need extra assistance, we established a counseling program in partnership with non-profit organizations to provide counseling services to Veterans preparing to apply for verification. The program was piloted in June 2012, and we continue to develop and improve it. All counselors now receive the exact same qualification training that our examiners, evaluators, and site visitors receive. To ensure transparency and consistency in interpretation, we have integrated our counselors into the same qualification training and testing that our examiners, evaluators and site visitors receive.

In addition to the current program elements we will launch a fourth dimension to the program with the pilot of our first Pre-Application workshop for Veterans on March 13, 2013, at an event hosted by the SDVOSB Council in Virginia. This workshop will outline what a Veteran needs to know and do to put together a successful verification application.

Conclusion

In conclusion, VA has made significant progress in its VOSB verification program. We have overcome many of the challenges and vulnerabilities that were raised by the GAO and OIG reports but we seek continuous improvement, and in coordination with SBA, we seek to revise our regulation to achieve balanced objectives.

Mr. Chairman and Members of the Subcommittees, this concludes my statement. I am pleased to answer any questions you may have.

**Subcommittee on Contracting and Workforce, Committee on Small Business**

**Subcommittee on Oversight and Investigations, Committee on Veterans' Affairs**

**Hearing: "Consistently Inconsistent: Challenges for Service-Disabled Veteran-owned Small Businesses," March 19, 2013.**

**Questions for the Record - Joe Wynn, VET-Force**

1. If you had to provide one particularly egregious example of VA failing to certify a firm, what would it be?

**Answer 1.** I spoke with a veteran business owner who reported that he was denied because of his age. He was told by a reviewer at CVE that he could not possibly manage the company because he was 92 years old. The veteran had to obtain a letter from his physician stating that he was in excellent health and fully aware of his faculties; and reference letters from staff and associates attesting to the fact that the veteran despite his age was fully in charge of commanding the operations of the company.

2. What suggestions for aligning regulations between VA and SBA are most necessary?

**Answer 2.** In my view, it appears that the regulations between the VA and SBA are nearly identical. I would also include in both, VA's rule on the surviving spouse of a service disabled veteran taking over the business. But what appears to be more of a concern is the apparent differences in how SBA and VA are interpreting the regulations when much of the wording is the same.

3. Do you think that VA should be relying, in part, on SBA's 8(a) regulations as the basis for its verification program?

**Answer 3.** I do not think that the VA should be relying on SBA's 8(a) regulations because not all VOBs and SDVOBs are socially and economically disadvantaged. While some veteran owned businesses may be just starting out in business and are struggling to increase capacity and gain contracting experience; may have been in business for years and some are even successful graduates of the 8a program.

By regulating all VOBs and SDVOBs from the perspective of the 8a program profile CVE reviewers tend to make the assumption that a veteran business owner does not possess the requisite skills and capabilities to do contracting on the federal level without supportive assistance.

4. One statutory difference between the VA and SBA program deals with the treatment of surviving spouses. If we were to try to reconcile these programs, how do you think we should address surviving spouses of service-disabled veterans?

**Answer 4.** Because under the SBA program the status of the veteran owned business ends when the veteran business owner dies, there may not be sufficient time to develop an appropriate exit strategy that will prevent the other owners, staff and/or family

members from suffering a severe adverse economic impact as a result. But under the VA program, the surviving spouse of a service disabled veteran business owner may continue the operation of the business for up to 10 years if the veteran owner was 100% service disabled and died as a result of their service connected condition.

The SBA rule should be the same as the VA rule. In addition, under both programs, the rule should be revised to allow 3 to 5 years of continual operations by the surviving spouse, caregiver, or next majority owner thereby giving sufficient time for the orderly termination of the business.

I think that we should be mindful of the fact that these preference programs for SDVOBs are a means to benefit not only the veteran, but the veterans family and their community. So we should not want to abruptly end the veterans family when the veteran dies.

5. I understand that being verified by VA is increasingly important—not only is it required for VA contracts, but other agencies seem to be placing importance on verification, even though the statute doesn't require it. For example, FAA's regulations now require VA verification, and an Air Force contract recently required VA verification. I understand that other agencies see it as a credential, and that prime contractors and states are now also requiring VA verification. Please address the challenge that poses to firms that operate under SBA's governmentwide program?

**Answer 5.** Veterans operating businesses in the federal marketplace are now facing unlawful discrimination as a result of the misperception by many agencies and large Primes that a veteran owned business is not legitimate if they have not been verified by the VA. Over the past few years, we are seeing more evidence of this occurrence. As a result, because of CVE's interpretation of the rules, many legitimate veteran owned businesses are being denied the opportunity to do business at the VA and with other agencies and/or large Primes as well.

In addition, CVE's interpretation and application of the rules places an additional burden on veteran business owners that is not placed on other non-veteran small business owners.

6. During the March 19 hearing, Tom Leney stated "I think that this program that the VA has established has created a gold standard." Do you believe this is correct? If not, in what sense is it incorrect?

**Answer 6.** The VA's program for verifying veteran small business owners should not be the gold standard because far too many legitimate veteran owned businesses are being denied. Just recently 60% of the firms applying for verification were denied. And Tom Leney, himself has admitted on several occasions that less than 2% of the denials were based on fraud or misrepresentation by the veteran business owner.

7. At the same time, Mr. Leney stated "In the federal government, when people know that a firm has been verified by the VA, they can take it to the bank. And the results, this is real money to real vets, and it is a program that benefits veterans." This seems

to suggest that VA expects its certification to be given deference at agencies other than VA, despite the fact that the government-wide program does not require VA certification. Is VA doing enough to make it clear to other agencies that the VA certification is to be used for VA contracts only?

**Answer 7.** Despite statements from VA and CVE personnel that its veteran small business verification program only applies to veterans seeking to do business with the VA, it's obvious that not enough is being done to dissuade other agencies and large Primes from thinking otherwise. And when the VA OSDBU makes public states that the VA's verification program for veteran small businesses is the Gold Standard for small business verification it only leads other agencies and large Primes to believe that they can do less due diligence of veteran business owners by simply relying on VA's results.

Unfortunately, contracting officers from other agencies have also been pushed in the direction of relying on VA's 'good seal of approval' of veteran businesses because of recent GAO and VA IG reports that identified some business owners in the federal marketplace who had misrepresented themselves as legitimate veteran business owners. Thus, agencies are looking for some other agency they can point to should they award a contract to an inappropriate veteran owned business.

8. What effect does the lengthy and inadequate appeals process currently in place at VA have on small businesses' ability to compete for contracts?

**Answer 8.** We are often hearing from veteran business owners who have stated that during the period of time (6 months to a year) that they have waited for VA approval that they have lost opportunities to do contracting with the VA. This delay also causes some veteran business owners to miss opportunities with other agencies too because some agencies look for veteran business owners to first be certified by the VA.

Actually, there is no fair and objective appeals process with the VA. When an applicant is denied, they have to wait a minimum of 6 months before they can reapply. In order to dispute the denial, a veteran business owner may only have the option to request reconsideration or to request a review from the VA or CVE Director. There is no independent body that handles appeals from veterans who have issues with their being denied by VA.

9. VA's request for reconsideration takes 147 days and isn't heard by administrative judges, whereas SBA's appeals process takes 15 days and does result in a published decision from an administrative judge. The following questions relate to that disparity:

- a. How do you think the appellate process should function?
- b. Would published decisions be an improvement?
- c. Is there a reason to use administrative judges who are independent of the verification process?

**Answer 9.** Because of the very reasons I referenced in my answer to questions #8, there needs to be an appellate process. That

process could be handled by administrative judges and those decisions should be published.

10. If 48 percent of VA's requests for reconsideration are granted, does that indicate a problem with the initial determination process?

**Answer 10.** In the past year or two, it has been reported that over 60% of all veterans applying for VA business verification were denied. So even if 48% of VA's requests for reconsideration are being granted, it still shows that far too many veterans are having to undergo additional reviews in order to obtain approval. CVE has reported that there are 10 major reasons why applications are denied. Hopefully, now under CVE's new pilot program to make a pre-determination of the applicant's information prior to the completion of the process will reduce the need for so many requests for reconsideration and reduce the number of denials.

11. When VA published the current rule governing verification, it stated "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." 76 Fed. Reg. 3022 (2011). Does that comport with your experience?

**Answer 11.** I'm not sure how the VA has determined the cost to an individual business to be less than \$100 to go through the verification process. I have received reports from business owners stating that the cost has been up to several thousands of dollars. While I'm sure that it does not cost that much for most businesses, it would surely cost more than \$100 if you just factored in the hourly rate for someone in the company to put together all of the required information.

12. VA recently announced that it would add a pilot pre-determination program that would occur before the initial verification program. While few would disagree that the program could stand streamlining, some have suggested that this will simply add a third hoop for our veterans to jump through. Is this a reasonable concern?

**Answer 12.** The pre-determination process does raise some concerns. At present, it has not been made clear as to how that process will be conducted differently from the initial review process. The only difference that I can see at the moment, is that after the initial review, items in the application that raise red flags or could lead to denial, will be sent back to the applicant so that they can make changes, additions and/or deletions to the information and re-submit.

The veteran, once notified of the preliminary findings by the CVE reviewer, will have only 5 days to resubmit corrected information. So depending on the extent of the changes required, it could take more than 5 days. If the applicant does not submit the new or additional information in 5 days, CVE will issue a determination letter which will probably be a denial. At that point, the applicant can request reconsideration and then we are right back where we

started with a 147 days or more wait time for the new information to be reviewed.

13. Each time VA reorganizes its verification process, it seems to add employees and spend more money, with little improvement for our veterans. Please provide your thoughts on what the pre-determination program will mean in terms of costs and staff.

**Answer 13.** Not sure if the pre-determination program will mean more staff and more costs. I'm sure it will create more processing time, more workload, and probably more confusion among staff and applicants.

14. There is consensus that contract intended for service-disabled veteran-owned small businesses should go only to service-disabled veteran-owned small businesses. The following questions address the prevention of fraud.

a. VA has said that of the firms found not to qualify; only about 2% are turned down for reasons of fraud. That means 98% are turned down for structural reasons. What does that say about the program?

b. SBA's self-certification model has been criticized for leaving the door open to fraud. Is that the case, and how can we improve that process?

c. Does the timing of VA's verification pose challenges? Specifically, since VA's program looks primarily at a company before the company is bidding on a contract, does it leave open the door to a verified company getting a contract, and then just passing the work through to another company?

**Answer 14.** If 98% of the firms are denied for structural reasons then it says to me that the requirements are far too strict. In an attempt to screen out fraud and misrepresentation, too many legitimate business owners are being denied. SBA's self certification model is obviously a more open process but it's the law. However, if businesses are required to attest to their legal status as a legitimate veteran or service disabled veteran owned business, and are later found to be fraudulent, then they should be prosecuted to the full extent of the law, penalized, and not be allowed to participate in the program again. With proper oversight and due diligence on the part of contracting officers, SBA, and other agency officials, firms committing fraud in any program will be detected.

For those firms that successfully complete the verification process must then market themselves to the VA for contracts. VA verified firms are not automatically awarded contracts simply because they have been verified. But for those that do receive contracts, agencies should still provide oversight and due diligence to ensure that a firm remains eligible for the program it was selected to participate in and that it does not violate any of the small business rules.

15. In your testimony you listed seven reasons you thought VA should stop using to deny companies verification. One of those was the instance where the service-disabled veteran isn't involved in the day to day operations. In such cases, how do we make sure that this isn't just a case of "rent-a-vet"?

**Answer 15.** The VA verification requirements should not be so stringent that legitimate veterans business owners are denied based solely on a business' profile and the assumption that they will be used as a 'rent-a-vet'. Owners that are not working full time in the business or participating in the day to day operations should be allowed to present sufficient documentation to demonstrate that they are in control of the company. Meeting minutes, organization charts, management reports, CEO memos and directives, are just some of the examples which can be used to demonstrate that the owner controls the company.

A veteran business owner should not be denied solely on the basis that they have others in the company with more experience than them or because they have partnerships with other companies that have more experience in the marketplace. VA - CVE should utilize some of its resources for oversight and follow up of veteran owned businesses where there is a perceived view that the firm is being overly reliant on non-veteran support. This in addition to unscheduled visits to the owners principal place of business and a review of contract actions of the business will help to identify companies that are misrepresenting themselves or abusing the program or breaking the law.

16. One of the biggest obstacles with VA's certification process is that it is ever changing. So much so that on this Tuesday March 5th, two days before this hearing was originally scheduled to take place, VA again changed its process. I have a few questions in regards to that.

a. With these latest changes, even in reading them the process seems cumbersome while certain parts discuss business days, other sections merely say hours. You'll be able to stop the clock, but need to get them know within 48 hours. If that 48 hours or 48 hours of business days. I foresee a lot of complications with this process; but as someone whose dealt with it before. What are your overall thoughts?

b. The letter changing the policy indicates that this will be a pilot run of a pre-determination process, and be fully initiated on May 1, 2013. Based on your experiences, how likely do you think VA is to keep this process intact?

c. More broadly, how often does VA make these sort of changes?

d. How do these changes affect service-disabled veteran small business owners ability to understand the process?

**Answer 16.** Please refer to my response to Question #12. In addition, I will say that the pre-determination process is something we have asked the VA to do for the past 2 years. What I do have a problem with is that (1) they practically had to be forced to do it; but (2) they are not allowing sufficient time for the applicant to resubmit the corrected information; (3) its probably still going to be difficult for an applicant to get a live person to assist them within that 5 day period; (4) to avoid getting caught up in the 5 day limit a veteran will have to withdraw their application and resubmit at a later time, thus going through the process again; and (5) this new process has already led to confusion because more applicant's are

now asking more questions about how to navigate the entire process.

There have been a number of changes to this VA - CVE verification process over the years. Another recent change is the allowance of transfer restrictions. That only came about after the recent court ruling in the Miles case. Other process changes have led to confusion and more time in the processing.

Then there is still that part of the process which calls for a visit to the applicant's principal place of business. From reports I have received, this part of the process is not consistent.

17. I understand that you and many others volunteer to help service-disabled veterans navigate the VA processes. While I thank you for your service, are you aware of any other contracting programs that require this level of outside assistance before a firm can be complete for contracts?

**Answer 17.** A few months ago, VA - CVE started a Veterans Assistance Partner Program whereby representatives from other organizations are supposed to be trained as VA Verification Counselors. At present, there are only a few organizations who volunteer their time assisting veterans with the verification process. I am one of them. But now the VA is directing more and more veterans to the volunteer counselors in order to reduce VA's workload. Some veterans now are being told that they must consult with a counselor first. As a result, some counselors are now charging a fee for their services and since some counselors are attorney's they are likely to charge fees as well.

VA - CVE adopted this model from the VA's use of Veteran Service Officers from Veteran Service Organizations to assist veterans with filing claims with the VA for compensation for service connected disabilities. This model has been in use for at least 20 years and has proven to be helpful for thousands of veterans. However, while its a good model to use for the VA verification assistance, it will take several years to perfect it for use on a national level.

18. Mr. Wynn, how should Congress amend 38 CFR § 74 to provide for clearer interpretation of the sections you find most convoluted?

**Answer 18.** At this time, I don't want to present myself as the expert on these matters and tell Congress what they should do. But what I will suggest, is that you or the House Small Business Committee convene a roundtable either formally or informally to discuss amendments to 38 CFR 74. I think it would be helpful as a follow up to the hearing to have some open discussion and brainstorming to try and come up with what may or may not work. I would like to participate in such a discussion and hope that the other witnesses from the hearing would be invited as well. However, I'm not sure if the VA's representatives are willing to offer recommendations for changes to the existing regulation.

I think the SBA should be a part of that discussion, and selected staffers from the House Veterans Affairs Subcommittee on Economic Opportunity. A comparative analysis should be made be-

tween SBA's and VA's interpretations of the regulations that use the same language yet produce different results.

**Conclusion:**

I hope that I have provided useful responses to all of your questions. And please do not hesitate to contact me if you require additional information regarding this matter.

Joe Wynn  
Nabvets Legislative Liaison  
VVA Special Advisor  
Member of VET-Force  
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**Davy Leghorn's Responses to Questions for the Record from Subcommittee on Contracting and Workforce, Committee on Small Business Subcommittee on Oversight and Investigations, Committee on Veterans' Affairs Hearing: "Consistently Inconsistent: Challenges for Service-Disabled Veteran-Owned Small Businesses," March 19, 2013. Submitted April 9, 2013.**

**1. If you had to provide one particularly egregious example of VA failing to certify a firm, what would it be?**

VA's stripping of SDVOSB status from the firm KWV Inc. has been the most egregious case by far. This was a clear example of how VA used an SBA OHA ruling set it as a brightline rule without looking at a totality of circumstances. The US Court of Federal Claims ruled in favor of KWV and VA restored the firm's status. The Court ruled that VA shall extend KWV's eligibility by 72 days to account for the days it was wrongfully removed. Hardly accounting for the awards and contracts they lost during that time.

**2. What suggestions for aligning regulations between VA and SBA are most necessary?**

Mr. Leney was right that there are few differences between 38 CFR 74 and 13 CFR 125. However, most of the differences come down to interpretive differences. Where VA sets bright line rulings and uses them to preclude companies; SBA looks at a totality of circumstances.

Mr. Leney was incorrect when he said VA was not making size determinations. We believe that when VA refers a case over to the SBA for a size determination and drops the firm in question from the vet-biz vendor list, they are making a size determination. When VA precludes a company from the Vet First program based off of a size restriction based off a firm's NAICS codes, they are in essence making a size determination as well. If VA is going to make these round-a-about size determinations, then they need to adopt 13 CFR 121 to give them the regulatory authority to do so correctly.

**3. Do you think that VA should be relying, in part, on SBA's 8(a) regulations as the basis for its verification program?**

No, the 8(a) program is a business development program, VA Verification is a certification program (closer to SBA's HubZone program). VA's partial adaptation of the 8(a) program is how they came up with a punitive 6 month waiting period. We know of not statutory requirements that forces VA to enforce this. SBA's 8(a) program is the only other place where we see this; SBA enforces a 12 month waiting period for reapplication on firms that have been denied. 13 CFR 121 and 13 CFR 125 are the only regulations VA needs to align 38 CFR 74 with.

**4. One statutory difference between the VA and SBA programs deals with the treatment of surviving spouses. If we**

**were to try to reconcile these programs, how do you think we should address surviving spouses of service-disabled veterans?**

The American Legion has a resolution on this specific issue. The American Legion advocates for regulatory changes that would in effect make it so that if any disabled veteran who owns a certified service-disabled veteran-owned business dies, (regardless of his/her disability at the time), their business inherited by their spouse/dependent will retain the service-disabled veteran-owned business status in conjunction with Public Law 109-461.

The American Legion supports that if any servicemember, to include those who were in the National Guard or Reserve, is killed in action and owns at least 51 percent of a business prior to his/her death, the business bequeathed to their spouse/dependents must be granted service-disabled veteran-owned business status for reason of preference in federal contracts.

The American Legion supports any administrative or legislative effort that will improve and increase the benefits bequeathed to the veteran's spouses or dependents upon a veteran business owner's death.

Attached is a copy of our resolution.

**5. I understand that being verified by VA is increasingly important—not only is it required for VA contracts, but other agencies seem to be placing importance on verification, even though the statute doesn't require it. For example, FAA's regulations now require VA verification, and an Air Force contract recently required VA verification. I understand that other agencies see it as a credential, and that prime contractors and states are now also requiring VA verification. Please address the challenge that poses to firms that operate under SBA's government-wide program?**

Because of the self-certifying nature of SBA's SDVOSB program, contracting officers from the various agencies are wary of awarding contracts to self-proclaimed SDVOSB. Entrance into the 8(a) program requires documentation of ownership and control on the front end, hence in the contracting officer's mind, there is less change that an 8(a) certified firm is a fraudulent firm. VA verification program was to provide this certification and assurance for the contracting officers. There are not enough resources at SBA for them to check first like VA is doing, but SBA's SDVOSB self-certification program is self policing through status protests. In the past, DOD and VA have been scrutinized by Congress and the press for the number of fraudulent SDVOSB firms they awarded contracts to, this is why with the advent of VA verification, agencies are starting asking if firms are verified by CVE.

**6. During the March 19 hearing, Tom Leney stated "I think that this program that the VA has established has created a gold standard." Do you believe this is correct? If not, in what sense is it incorrect?**

While The American Legion does not believe VA verification is the "gold standard" we understand why other agencies do. Con-

tracting officers are risk averse, their jobs are to award contracts to the lowest bidder with the capabilities to finish the job and meet SBA's small business goaling. When they give a fraudulent firm a contract, they have not done their jobs. A firm having gone through the verification process adds a level of security for the contracting officer. This is why and how the VA verification program has become a "gold standard."

**7. At the same time, Mr. Leney stated "In the federal government, when people know that a firm has been verified by the VA, they can take it to the bank. And the results, this is real money to real vets, and it is a program that benefits veterans." This seems to suggest that VA expects its certification to be given deference at agencies other than VA, despite the fact that the governmentwide program does not require VA certification. Is VA doing enough to make it clear to other agencies that the VA certification is to be used for VA contracts only?**

This is a common misconception held by many in the small business community that has been exacerbated by contracting officers in other agencies who ask if SDVOSB firms are VA verified. VA verification is not for ALL VA contracts, technically, VA verification are for those firms who are seeking to participate in VA's Vet First Program. A self-certified SDVOSB can still do business with VA outside of the Vet First Program.

VA is definitely not doing enough to let the agencies know about this. Two years ago at an American Legion Small Business Training Program, Mr. Leney stated that he authorized a memorandum telling the agencies not to require VA verification in SDVOSB set asides. Afterwards, when our SDVOSBs continue to run into the same problems with the agencies, we reached out to CVE for a copy of this memorandum so our SDVOSBs can provide a copy to the contracting officers. CVE refused to produce or share this memorandum and further refused to be quoted.

**8. What effect does the lengthy and inadequate appeals process currently in place at VA have on small businesses' ability to compete for contracts?**

Many times, VA comes in contact with SDVOSBs when they are subcontractors and identify them as small businesses that have the requisite experience and are likely candidates for set-aside contracts. The firms are encouraged to enter the verification process while simultaneously bidding for VA contracts. The lengthy process is most damaging for these firms who know they can walk onto some lucrative contract if only the timing was right and to firms that have their status stripped after an inspection. During the period that they are removed from the vetbiz vendor list, they cannot be awarded set-aside contracts, bid on set-aside contracts. If they attempt to do business with another agency, they'd have to explain how their status is in arbitration, which of course would be a cause of concern for any diligent contracting officer.

**9. VA's request for reconsideration takes 147 days and isn't heard by administrative judges, whereas SBA's appeals process takes 15 days and does result in a published deci-**

sion from an administrative judge. The following questions relate to that disparity:

- a. How do you think the appellate process should function?
- b. Would published decisions be an improvement?
- c. Is there a reason to use administrative judges who are independent of the verification process?

a) With any federal appellate process, there should be an unbiased body separate from the office that conducted the initial examination. Take Veterans' Benefits Administration's appellate process for example, a claim for benefits denied at the Regional Office is appealed to the Board of Veterans Appeals, where VA attorneys and Veterans Law Judges (VLJs) removed from the Regional Office make decisions based off a *de novo* review of the evidence of record. Right now, the same entity that conducts the examination also handles the R4R process. Again, we reiterate, we know R4R is not a formal appeal process, however, absent a real appeals process, this is as close as we get. So ideally, the model of VA's BVA is the way an administrative appellate process should function. We see SBA's OHA as a comparable body to VA's BVA. OHA has an outstanding track record, they have the expertise and their decisions are based off their case laws.

b) Published decisions hold the agency accountable. When decisions are made behind closed doors, the stakeholders have no oversight over the process or legal reasoning that went behind a denial. Published decisions at the administrative level are not precedence setting and decisions are made by a case-by-case basis, but having access to published decisions allows the stakeholders to better assist applicants and preemptively address issues the administrative Judges will latch on to.

c) Yes, an appellate process should require a *de novo* review of the evidence of record, having the same entity review their colleague's work defeats the purpose of a *de novo* review.

**10. If 48 percent of VA's requests for reconsideration are granted, does that indicate a problem with the initial determination process?**

The course of our testimony outlines what we believe to be wrong with the initial application process. The high percentage of grants from the R4R stems from the fact that veteran owners can still provide additional records and alter the evidence of record. The veteran is more willing to alter the business plan when he is faced with a six month bar from reapplication when he is forced to accept the denial at the end of R4R. R4R is not a formal appeals process; we merely refer to it as such because it is as close as VA got to having an actual appeals process. We believe the high initial denial rate is a better indicator of problems with the initial determination process.

**11. When VA published the current rule governing verification, it stated "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.” 76 Fed. Reg. 3022 (2011). Does that comport with your experience?**

From experience, it takes any given firm a minimum of 3–4 hours to collect the paperwork, save it and proceed with up loading documents on the Vetbiz website. Business executives that would be responsible for completing this process, according to the Bureau of Labor Statistics, earn at least \$95/hr. The American Legion fails to see how VA can claim that it takes less than \$100 for a firm to get verified unless the CEOs are earning \$25/hr on average.

The American Legion has not kept track of the general cost of veterans seeking to become verified. However, the veterans that we’ve had worked with that needed to have their bylaws scanned by a lawyer usually spends \$1200 (this is on the lower end). Again this is the price when a counselor has sat down and made most of the changes already and has submitted it back to the veteran and the veteran goes and seeks legal counsel for good measure. Many of the mid to large cap businesses we work with usually have legal counsel on retention. There’s no way we can accurately capture how much is being spent on verification for firms with legal counsel on retention. We can only state that for the small capacity business that have been denied and are going through a R4R or resubmitting their application, it is much more then what VA reports when legal fees are factored in. Further, The American Legion does not charge for verification counseling, but some of the other counselors do and they do charge more than \$100 to review documents.

**12. VA recently announced that it would add a pilot pre-determination program that would occur before the initial verification program. While few would disagree that the program could stand streamlining, some have suggested that this will simply add a third hoop for our veterans to jump through. Is this a reasonable concern?**

The American Legion and other VSOs have always advocated for more human interaction in the application process. VA has always responded that they do not have the staff and resources to contact every veteran if a problem occurs. So in the past we’ve used a “letter of explanation” system to provide the contextualization or human element in a process that is so document driven. However, as CVE continued to grow, they now have resources they can allocate for this interaction. We recognize that adding this may be a delay from getting an application through to the examination phase; however, this is one of those processes that has always been needed, there was just not enough resources in the past. By adding this process to the front end, we can hopefully alleviate some of the processes on the back end when a veteran decides to undergo a request for reconsideration.

**13. Each time VA reorganizes its verification process, it seems to add employees and spend more money, with little improvement for our veterans. Please provide your thoughts on what the pre-determination program will mean in terms of costs and staff.**

As previously stated we advocated for more human interaction. A significant amount of flexibility is necessary to allow entrepreneurship to occur. It is our hopes that veterans can explain and contextualize documents so their application can progress through the process without stoppages. What would really be helpful is if the person that is working with the veteran is the examiner or at least on the examination team as well that way they can mitigate some of the miscommunication problems with documentation and transferring of the veteran's intent from one team to the next. There is great hope in this new program to do what it intends to do. While we understand that direct communication could be a time consuming task, we're not sure what cost or whether new staff is necessary to accomplish this.

**14. There is consensus that contracts intended for service-disabled veteran-owned small businesses should go only to service-disabled veteran-owned small businesses. The following questions address the prevention of fraud.**

**a. VA has said that of the firms found not to qualify; only about 2% are turned down for reasons of fraud. That means 98% are turned down for structural reasons. What does that say about the program?**

**b. SBA's self-certification model has been criticized for leaving the door open to fraud. Is that the case, and how can we improve that process?**

**c. Does the timing of VA's verification pose challenges? Specifically, since VA's program looks primarily at a company before the company is bidding on a contract, does it leave open the door to a verified company getting a contract, and then just passing the work through to another company?**

a) The fact that 98 percent of the firms are turned down for structural reasons means that the requirements are too stringent. Why is it that general legal documents that make good business sense that you can pull off of the a website is not good enough for VA? It's because VA's regulatory control requirements do not make "good business sense" but this is the price for admittance into VA's Vet First Program. The large cap small businesses have legal counsel and contracting experts on hand to adjust their documents to get past the VA examiners, they go through the process swimmingly because they have the resources to obfuscate their real business model from VA examiners. The small cap small businesses who can't afford legal staff and pull their business documents off the web are the ones being denied. For the most part, these folks don't even understand quorums, board of directors or voting requirements.

b) SBA's self certification program does open the door to fraud but so does VA's document driven process as we previously mentioned. The veterans' small business community is very active and is self-policing via status protests. Though a fraudulent firm might abscond with a contract one time, it would be nearly impossible for them to do it again.

c) VA does not just look at a company before the company bids on a contract. There are scheduled and unannounced site-visits that should make a firm conform to the business model they submitted for verification purposes. In the coming year, VA will toe a hard line against those who fail inspection and who are currently on VA contracts and refer them for disbarment. CVE may not have the resources to conduct as many site-visits as they would like, but it is with the hope that the threat of site-visits will hold the firms in the vendor pages in check.

**15. Mr. Leghorn, I was interested to read in your testimony that you take issue with the six month waiting period required before a service-disabled veteran can reapply for verification at VA. Do you think this waiting period is intended to prevent fraud, or does it serve another purpose?**

There are no statutory provisions that require a punitive waiting period after a denial. The only place we see this is in the 8(a) program. We believe this is VA trying to create a hybrid using SBA's SDVOSB and 8(a) program. A 12 month waiting period was instituted in the 8(a) program because a company must be afforded a reasonable amount of time to restructure their business to resubmit their application. 12 months was set as an appropriate amount of time for non-compliant companies to work with counselors at the SBDCs to become compliant and stay in the 8(a) program. Again we believe VA should not be taking anything from 8(a) programs except the underlining attitude in the way the 8(a) program is administered. If 98 percent of the veterans trying to get in the Vet First Program are not malicious and are just ignorant of VA's stringent requirements, then we should not be punishing them with a 6 month penalty for corrections or deletions in their bylaws that takes a merely a day to accomplish. VA should allow these firms to resubmit as many times as they want until they get their business models right.

We understand that there is the R4R process that allows the owner to submit additional evidence and many do get verified after going through this process. However, the owner is faced with an 147 day wait to get through the R4R or he can accept the denial and wait 6 months (180 days). As it stands, there is no ways of maneuvering around a substantial waiting period created by VA. If the 6 month penalty is removed, then perhaps fewer applications will enter the R4R process, thereby relieving the backlog on the back end.

**16. Mr. Leghorn, your testimony also raised an interesting point about VA taking SBA decisions and turning them into bright line rules. Can you expound on that issue?**

VA has undergone a tremendous effort to root out fraud. They've reviewed OHA's decisions and set brightline rulings based off of OHA's denials. However, SBA's rulings incorporate into them a review of the totality of circumstances. VA claims that they do this but recent Federal Court of Claims decisions do not reflect that they do. Take *KWV Inc. v United States* for instance, VA ruled that a veteran owner removed from his business 6 months a year could not control his business. OHA had a similar case that set the prece-

dence. However, in the OHA case, time zones and the fact that the owner had two other businesses came into play. OHA went out of their way to discuss that distance alone was not the deciding factor. Again, SBA made their ruling based off of a totality of circumstances; whereas VA honed in on OHA's reason for denial but not the circumstances in their ruling against KWV. The veteran owner of KWV was able to demonstrate that he kept in constant communication with his project managers and that because he was in the same time zone he was able to communicate during business hours. The Federal Court overturned VA's decision and restored KWV's status.

**17. Mr. Leghorn, I understand that The American Legion is concerned with the growth of the Center for Veterans Entrepreneurship at VA. Would you give us some additional background on this, and talk about whether this has translated into better service for our veterans?**

The American Legion is very concerned with the growth of yet another VA claims process. As federal agencies, state government and even those in the private sector start asking for VA verification status, more and more small businesses are submitting applications to CVE. We do not want to see more internal processes grow out of the agency's guise of being more "thorough" or "streamlining the process." Good intentions can sometimes cause multiple lines where applications can get backlogged. The American Legion has seen this first hand with other VA claims processes. We do not wish this to happen to CVE and the verification process.

**18. As Congresswoman Herrera Beutler mentioned her opening statement, a copy of which is attached, there is a veteran business owner in her district who has been attempting to get certified with VA for almost four years. He has a ratings letter issued by the VA indicating he has a service connected disability, but is still not officially recognized by the Department of Veteran Affairs as a SDVOB. Then, after years of sending in information, he received a letter in January requesting more information on his operating agreement. The letter, in a very vague way, indicated the operating agreement between him and his partner was an issue, but gave no suggestions or guidance on how to correct the problem. I understand the VA has said of the firms founds not to qualify, only about 2% are turned down for reasons of fraud. That means 98% are turned down for structural reasons. What does that say about the program? Are you satisfied with the effectiveness, efficiency, and accuracy of the VA's certification process?**

While The American Legion understands that this is absolutely frustrating, we have to look at this from the Agency's perspective as well. There are major legal issues associated with employees of CVE give legal advice. They can alert veterans to where there might be problems, but they cannot be liable for giving legal advice. This is why VA began the verification assistance program which includes verification counseling from a third party. The American Legion has a counselor on staff, whose information is

listed on the Vetbiz website, who can help veterans amend their bylaws to get them compliant to the current interpretation of the regulations. The veterans should have been referred to a counselor.

MARC GOLDSCHMITT RESPONSES TO QUESTIONS FOR THE RECORD  
FROM  
SUBCOMMITTEE ON CONTRACTING AND WORKFORCE, COMMITTEE ON  
SMALL BUSINESS  
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS, COMMITTEE ON  
VETERANS' AFFAIRS  
HEARING: "CONSISTENTLY INCONSISTENT: CHALLENGES FOR  
SERVICE-DISABLED VETERAN-OWNED  
SMALL BUSINESSES," MARCH 19, 2013.  
SUBMITTED APRIL 6, 2013

**Questions for the Record - Marc Goldschmitt**

If you had to provide one particularly egregious example of VA failing to certify a firm, what would it be?

Picking the most egregious example of VA failing to verify a firm requires evaluation and weighting of factors including:

- The emotional cost to the veteran and family members
- The financial cost to the veteran and family members
- The financial cost, including lost opportunities, to the veteran's business
- The precedence and impact of the decision, action or lack of action on the veteran community and businesses.

My written testimony contained eight (8) examples of companies that, for different reasons, could qualify for this distinction. Of those eight, I consider XSIG the most egregious. XSIG's experience with the verification process included lost documentation, incomplete documentation review and, most significantly, a threat of prosecution.

XSIG is a Maryland based security company. Organized as a "C-Corporation," XSIG has compliant By Laws as evidenced by its 8(a) certification. At the time of initial verification application, XSIG had a non-veteran minority owner. CVE demanded that XSIG submit an Operating Agreement which was neither required nor appropriate. After prolonged discussions, the owner downloaded an Operating Agreement from the internet, which he submitted. Prior to CVE evaluation, the minority owner resigned all corporate offices and relinquished all ownership making the SDV a 100% owner. CVE was properly notified of the changes. CVE denied XSIG based upon the Operating Agreement even though the findings were no longer relevant based upon the ownership change. The owner sought CVE help in correcting this error and was told that he had to admit that the Operating Agreement that he submitted was incorrect. The owner was later notified, in writing, that he was lucky that he was not being prosecuted because he had submitted false information.

2. What suggestions for aligning regulations between VA and SBA are most necessary?

SBA interpretations recognize that many, if not all, standard have shades of gray. CVE is searching for a bright line for all standards where they can say there is a black and white yes or no. CVE's "bright line for everything" approach is unrealistic and ignores business reality, case law and unique "fact patterns" that differentiate and define a business' true ownership and control metrics. **VA must accept a "shades of gray" approach and work collaboratively with SBA** to minimize the band where there are shades of gray and to provide objective metrics and standards that are predictable and repeatable. This will provide a basis to realistically evaluate and align SBA and VA regulations.

3. Do you think that VA should be relying, in part, on SBA's 8(a) regulations as the basis for its verification program?

**No. VA should rely on SBA's SDVOSB regulations as the basis for its verification program.** The 8(a) program is a business development program and has requirements well beyond the scope of ownership and control. VA should eliminate the adjudicative costs incurred for reviewing the non-applicable sections of the 8(a) regulation and bring the verification program into a more affordable range for veterans and the taxpayers.

4. One statutory difference between the VA and SBA programs deals with the treatment of surviving spouses. If we were to try to reconcile these programs, how do you think we should address surviving spouses of service-disabled veterans?

**A more generalized approach of business continuity should be addressed.** The veteran's family and employees—frequently veterans themselves—should not be further traumatized by rendering the business unable to continue or compete. A reasonable period of between 3 and 5 years should be provided for the survivors to transition the business for sale, dissolution or continuance as a small business. This should include exercising of current contract options and continuation of veteran or service disabled veteran owned small business status.

5. I understand that being verified by VA is increasingly important—not only is it required for VA contracts, but other agencies seem to be placing importance on verification, even though the statute doesn't require it. For example, FAA's regulations now require VA verification, and an Air Force contract recently required VA verification. I understand that other agencies see it as a credential, and that prime contractors and states are now also requiring VA verification. Please address the challenge that poses to firms that operate under SBA's governmentwide program?

When VA began verification, firms that were verified received lapel pins and were authorized to display the Verified Logo. These firms began using verification as a differentiator Government-wide. This encouraged other Government agencies and large prime contractors to give unwarranted deference to VA verifications as a means of due diligence. The result has been that real veterans are unfairly being denied opportunities at other agencies as both prime and subcontractors.

6. During the March 19 hearing, Tom Leney stated “I think that this program that the VA has established has created a gold standard.” Do you believe this is correct? If not, in what sense is it incorrect?

**That is not correct.** A gold standard is a model of excellence; a paragon. It is the supreme example of something against which others are judged or measured. Key metrics for establishing a gold standard for an adjudication process would include timeliness, trust, confidence, cost effectiveness, program effectiveness, predictability, repeatability, risk management, risk mitigation and emulation by similar organizations. A “gold standard” program would be envied and copied by other organizations and should be a declaration by stakeholders and other organizations performing similar adjudication functions, not a self-certification process.

7. At the same time, Mr. Leney stated “In the federal government, when people know that a firm has been verified by the VA, they can take it to the bank. And the results, this is real money to real vets, and it is a program that benefits veterans.” This seems to suggest that VA expects its certification to be given deference at agencies other than VA, despite the fact that the government-wide program does not require VA certification. Is VA doing enough to make it clear to other agencies that the VA certification is to be used for VA contracts only?

**No. VA is not doing enough to make it clear to other agencies that verifications are for VA acquisitions only.** As noted in question 5, real veterans needlessly suffer real economic losses and impact. By continuing to use language such as “Gold Standard” and “Take it to the bank,” in public statements and forums, VA actively promotes and encourages the use of verification by outside agencies and prime contractors.

When VA began verification, firms that were verified received lapel pins and were authorized to display the Verified Logo. These firms began using verification as a differentiator Government-wide. This encouraged other Government agencies and large prime contractors to give unwarranted deference to VA verifications as a means of due diligence. The result has been that real veterans are unfairly being denied opportunities at other agencies as both prime and subcontractors.

8. What effect does the lengthy and inadequate appeals process currently in place at VA have on small businesses’ ability to compete for contracts?

**The lengthy appeals process delays the small businesses’ ability to bid and win proposals.** This has several lasting impacts:

- For small businesses with limited operating capital, the owner(s) may not have the economic capacity to continue operations. While the specific impact will vary by company this always means loss of jobs and income.
- Time to market will be delayed. This is a very subtle but major impact on the small business. As the business gains capacity and capability to bid, win and perform con-

tract work, it achieves growth. Delaying the start of this process results in **significant** reductions in total revenue. Due to Federal buying cycles, a 6 month delay can be the equivalent of moving out one fiscal year. Consequently a company that has successive years' revenues of \$100k, \$500K and \$1 Million would have total revenues of \$1.6 Million. A 6–12 month delay would result in total revenue over the same period of only \$600K—a \$1 Million dollar reduction. This revenue is un-recoverable and the company will see continued significant revenue reductions over the subsequent years. This is illustrated in the following graphic. The darker area (red) represents cumulative revenues after a 1 year delay. The lighter (blue) area represents the significant (\$1 Million) in increased revenue achieved with zero delay. It also represents lost revenue due to the delay in “Time to Market.”

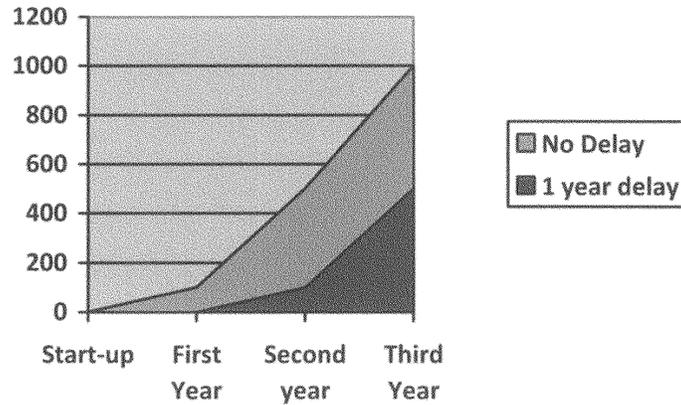


Figure 1 - Significant Lost Revenue Due to Delayed Market Entry

9. VA's request for reconsideration takes 147 days and isn't heard by administrative judges, whereas SBA's appeals process takes 15 days and does result in a published decision from an administrative judge. The following questions relate to that disparity:

a. How do you think the appellate process should function?

The appellate process should review the verification case file for errors in law or fact as adjudicated by VA. As noted in recent Court of Federal Claims cases, this would require that the administrative judge assure that VA findings are traceable to and properly reference regulation and that those interpretations are consistent with case law and published VA standards.

b. Would published decisions be an improvement?

**Yes. Published decisions are essential.** The Veteran community and stakeholders deserve the baseline of authority, traceability and acceptability of published decisions.

Traceability of findings to regulation and law is essential. Published decisions from Administrative Law Judges would provide that traceability and increase the veteran stakeholders' acceptance of and confidence in VA's verification program.

Currently, VA publishes "Verification Assistance Briefs (VAB)" that contain excerpts from denial letters. There are problems with some of these VABs. For example in the Joint Venture VAB, the first excerpt from a denial letter references terms in the findings that are not included in either 38 CFR 74 or 13 CFR 121 regarding SDVOSB JVs. One VAB introduces the new term "Full time Control" which does not have any regulatory reference or definition.

A disclaimer included in CVE's Verification Assistance Briefs further highlights the need for published administrative law decisions. This disclaimer is *"This information has been provided by CVE for general informational purposes and should not be construed as providing legal advice. You should contact your attorney to obtain advice with respect to any particular issue or problem. In addition, CVE makes no representation as to the accuracy or whether the above information is currently up-to-date. (emphasis added) All applicants must read the applicable regulations and determine how best to meet these requirements. The VAB's do not constitute legal notice or replace the regulations."*

c. Is there a reason to use administrative judges who are independent of the verification process?

Yes. The current process has unpredictable outcomes. Administrative judges who are independent of the verification process are essential to assuring that the verification standards and processes converge to repeatable, predictable outcomes that are consistent with statute and regulation(s).

10. If 48 percent of VA's requests for reconsideration are granted, does that indicate a problem with the initial determination process?

A 48 percent R4R approval rate indicates that there may be significant benefit to implementing and expanding the planned pre-determination process.

Of greater significance is the 52% denial rate of denial for R4R applicants. As described in question 14, the extremely low rate of fraudulent companies means that annually between 1200 and 1500 legitimate companies are being denied. VA should take on a proactive advocate role and redirect funds and effort to providing earlier assistance to companies seeking verification.

Currently non-profit Verification Assistance Partners (VAPs) support some of the efforts to assist companies prepare documentation for the verification process. Verification Assistance Counselors providing this assistance are doing so as a collateral duty. This limits the availability of support. **Providing grant funding to the**

**non-profits currently engaged as Verification Assistance Partners will allow those organizations to deploy full time verification assistance counselors which will result in higher initial verification rates, a significantly reduced CVE budget requirement and faster verification cycle times.**

11. When VA published the current rule governing verification, it stated “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.” 76 Fed. Reg. 3022 (2011). Does that comport with your experience?

**That does not comport with my experience.** Prior to implementation of PL 11–275, average costs for initial verification exceeded \$5,000.00 and \$7,500 if the company appealed. My experience is that, post PL 11–275 implementation that the costs to small businesses to prepare and submit verification paperwork is in the thousands or tens of thousands of dollars and that these costs are increasing. In addition the verification program has significant indirect and hidden costs to veteran businesses.

All small businesses working with the Federal Government face significant challenges for start-up, growth and, often, sustainment. Congress’ intent to increase opportunities for veteran businesses is undermined when excessive business resources are expended on non-value added exercises.

From the verification program’s inception, costs were frequently anecdotal. Identifying the true costs and benefits to businesses of VA’s verification program is important for Congress and the veteran community to measure the success of the Veterans First program. Quantification of true costs and benefits is also essential to determine how effectively VA is allocating resources for their verification processes. Question 15 addresses this issue in more detail.

In early CY 2011, Bob Hesser and I, for the VET Force, conducted a survey that included cost estimates from businesses that had completed the verification process. The survey sought to quantify costs that companies incurred in preparing and submitting documentation required by VA. Companies reported a wide variance of costs from under \$1000 to over \$50,000. We reviewed “outliers” such as the \$50,000 claim and determined them to be valid. These costs only included direct costs such as labor and legal fees. The average direct cost was in excess of \$5,000. For companies that requested reconsideration, the average cost was in excess of \$7,500.

Costs to the veteran community and VA for verification processing are rapidly increasing. Additional information is needed to quantify the efficacy of the evolving verification processes and provide feedback to VA to eliminate, or at least minimize, non-value added activities.

- Since the VET Force survey, the intensity and complexity of the verification process have grown significantly, which can dramatically increase the direct costs for verification and Requests for Reconsideration. I expect

these average costs to more than double with potential increases of an order of magnitude for many companies.

- Since implementation of PL 111-275 the lengthy verification processes have precluded companies from competing for Veterans First opportunities. This has associated direct and indirect cost implications.

- The “Fast Track” program had erroneous and/or avoidable denials that cost real veteran businesses, real dollars for real programs where they were the best value to the VA. The avoidable denials refer to businesses that had received incomplete findings and/or had been in the CVE “black hole” for as long as two years or more, during which time deficiencies could have been fully corrected.

**The most significant costs, however, are the costs of lost revenue due to “Time to Market” impacts as discussed in my response to question 8.**

12. VA recently announced that it would add a pilot pre-determination program that would occur before the initial verification program. While few would disagree that the program could stand streamlining, some have suggested that this will simply add a third hoop for our veterans to jump through. Is this a reasonable concern?

The pre-determination program moves the hoop for some companies that would otherwise be denied. For those companies, it replaces a 147 day Request for Reconsideration period with a five day process that will allow these companies to receive their verification decisions four to six months earlier. In these cases, companies that benefit from the pre-determination process will realize significant increased revenue potential due to the “Time to Market” impact addressed in responses to questions 8 and 12. This will ultimately result in significant benefit to the veteran community.

The overall impact to verification outcomes where approximately 20% to 25% of applicant companies are ultimately denied is unclear. These companies are provided a 30 day “second chance” window but are not successful in overcoming VA identified deficiencies. This low success rate in a 30 day window raises concerns for how effective the pre-determination process will be with its five day window.

Recent changes in VA interpretations such as Transfer Restrictions will skew statistics making it difficult to distinguish between improvements due to pre-determination and changes in interpretations. As VA moves forward with its pilot pre-determination, it will be beneficial to identify if pre-determination activities could be moved earlier in the process and if additional items could be included in the pre-determination process. More importantly, the pilot pre-determination program could provide important information for the value of shifting VA’s verification program from an adversarial “Gotcha” philosophy to a more collaborative “Get to Yes” approach.

13. Each time VA reorganizes its verification process, it seems to add employees and spend more money, with little improvement for

our veterans. Please provide your thoughts on what the pre-determination program will mean in terms of costs and staff.

The pre-determination program will increase workload demands and will therefore increase costs and staff requirements required for initial verifications. VA states that Requests for Reconsiderations (R4R) are handled through VA's Office of General Counsel, therefore, I assume, the probable decrease in the number of R4R's will have little or no impact on CVE costs and staffing. I estimate that CVE cost and staffing will increase by 5% to 10%. This presumes a continued rate of 5,900 cases per year with approximately 20% (1200 cases) eligible for pre-determination and use of CVE's current multiple level review processes for the pre-determination reviews. Using historical denial and final denial rates, this also means that each year, the veteran community will continue to experience final denials for approximately 1200 legitimate companies. Hopefully, the pilot pre-determination effort will demonstrate that structured dialog with applicant companies will result in:

- better understanding of the requirements,
- better understanding of the standards,
- fewer initial and final denials and
- evidence that earlier, more frequent dialogue and collaborative efforts will result in dramatically lower program costs and significantly improved outcomes.

14. There is consensus that contracts intended for service-disabled veteran-owned small businesses should go only to service-disabled veteran-owned small businesses. The following questions address the prevention of fraud.

- a. VA has said that of the firms found not to qualify; only about 2% are turned down for reasons of fraud. That means 98% are turned down for structural reasons. What does that say about the program?

**The 2% appears to be too high by several orders of magnitude. This implies that the program is using arbitrary statistics in an attempt to justify its significant program costs and extreme interpretations.**

According to recent testimony, in FY 2012, VA adjudicated 5,900 companies. An unspecified number of cases are referred to the Office of Inspector General (OIG) and VA has not provided statistics on the number of referred companies or the number of companies investigated and found to be fraudulent. The only available reference is from VA's website which lists only four identified cases that cover a two year period. This represents a statistic that is closer to 0.02% (two one hundredth's of one percent).

- b. SBA's self-certification model has been criticized for leaving the door open to fraud. Is that the case, and how can we improve that process?

Where there is money involved, there will be fraud. The Veteran Community has been "self-policing" since the beginning of the program and this has resulted in numerous successful protests, indictments and convictions. Many of

these “bad actors” continue to self-certify and may receive continued contract wins.

A simple solution is to have the “Service Disabled Veteran Owned Small Business” declaration field in the System for Awards Management (SAM) managed by SBA. Any firm found to be “Other than SDVOSB” by SBA would have its SDVOSB designation changed by SBA until the company could demonstrate that it is fully compliant with 13 CFR 125. This would capture the benefits of self-certification while eliminating many of the objections to self-certification.

c. Does the timing of VA’s verification pose challenges? Specifically, since VA’s program looks primarily at a company before the company is bidding on a contract, does it leave open the door to a verified company getting a contract, and then just passing the work through to another company?

The timing of VA’s verification may pose minor challenges. Typically, successful small businesses will invest resources in developing customer relationships at the Prime and Agency levels. This provides strategic visibility to the Agency and prime requirements, which would include sufficient lead-time to prepare for and receive VA verification.

Some businesses new to the Government space or new to VA may be in a position to participate in teams bidding near term opportunities. If the prime needs specific, unique corporate capabilities, the small business can still participate in the bid as a small business.

Challenges arise when Prime contractors are assembling teams 12–18 months before anticipated RFP release. Frequently, these primes will only accept companies that have already received verification and will solidify the team before an applicant can go through the verification process.

15. In your testimony, you refer to VA’s approach as risk-avoidance. Can you explain what you mean? If VA were to back away from this approach, it could mean that potentially unqualified firms would be verified. When do you consider this an acceptable risk?

**It is an acceptable risk now.**

Risk avoidance is a risk management technique that seeks to eliminate any possibility of risk through hazard prevention, or the discontinuation of activities determined to entail any level of risk. It is often used in extreme situations where the risk exposure creates an extraordinary liability potential.

In the context of VA verification, risk avoidance means that VA is willing to preclude any possibility of a non-veteran company at the potential expense of excluding many legitimate businesses. This carries a high cost to VA perform verification, a high cost to industry to prepare for verification, a high cost to industry in lost revenue and opportunities. The current verification process has not

identified sufficient numbers of fraudulent companies to justify the additional cost. This VA business model is not sustainable or affordable for either VA or industry.

Veteran community self-policing and penalties for misrepresentation will help reduce and minimize this risk. VA stakeholder feedback is required to validate the acceptability of this risk.

16. As a verification assistance counselor who helps aid service-disabled veteran small business owners through the VA verification process, can you explain the process to becoming a verification assistance counselor and why they are needed?

No. As a verification counselor, I review the company profile, ownership, governance, management and operations with business owners. The processes and rational for the processes is evolving and are not relevant to the role that the verification assistance counselor plays. A verification assistance counselor assists a company in preparing and evaluating documentation required for submission to CVE. This requires that the verification assistance counselor be knowledgeable of the standards and criteria that CVE uses to examine and evaluate documentation and address governance issues in the documentation that may not meet either regulatory requirements or CVE interpretations.

17. Further, in light of your training, you've become intimately acquainted with why the VA requires certain materials in order to get certified and your testimony brings out concerns you have with this, specifically that some of it may be unprotected or excessive. Can you elaborate on these concerns?

### **Excessive**

VA training for counselors focuses on the process steps and describes how documentation goes through multiple levels of review. The training does not discuss in sufficient detail how or why specific documents are required or used. Training briefly reviews how documentation is stored and accessed for review.

Training material refers to the documentation that is required. This information is published on the VA/CVE website at <https://www.vip.vetbiz.gov/Public/Register/DocumentList.aspx>. On this page, users can view CVE documentation requirements for six different types of business organizations. These lists contain excess documentation requirements. In addition, several of these lists are incorrect. Areas where the lists are incorrect overlap excessive documentation requests.

### **Examples of excessive requests**

- Limited Liability Companies, Sole Proprietorships, Limited Liability Partnerships and General partnerships
  - are precluded by state laws from issuing stock, yet CVE lists stock certificates and stock registers as requirements for documentation submission.
  - Do not have By Laws, they have Operating Agreements, yet CVE requires both Operating Agreements and ByLaws

- Cannot have shareholders and therefore cannot have shareholder agreements, yet CVE requires submission.
- Personal income taxes including 1040 and K-1's are redundant and invasive. Information required for determination of corporate distributions, an indicator of relative ownership percentages, is contained in the corporate return with its K-1's. For a sole proprietorship, all distributions are on Schedule C of the 1040 which by default would indicate that the veteran owns 100%. For purposes of determination and ownership
- Affiliation documentation. Affiliation is a size determination issue which is outside of the authority of PL 109-461. When CVE finds a possible "affiliation" CVE requires corporate income taxes and personal income tax documentation from all owners of all "affiliated companies. Affiliation through common ownership or management requires that an entity—in this case the veteran—control both companies. Lack of understanding of these SBA regulations and misapplication of the terminology and concept of affiliation has created excessive demands for documentation

#### **Examples of data protection issues**

- Continued concerns of lost documentation
- Lack of "Need to Know"
- Traceability to who accessed a document and how it was used.
- Availability of Payroll data. As we look at

18. Your testimony illuminates concerns that other agencies, although they are not supposed to; have begun using CVE certification as a standard. How often have you seen this occurring?

I have directly observed this at several small business conferences and matchmaking events. Daily, I read one or more postings on social collaboration sites and forums that address this concern.

19. Mr. Goldschmitt, you recommended have the Office of Hearings and Appeals hear all service-disabled veteran appeals. What do you think are the advantages of unifying the appeals process?

Unifying the appeals process will provide checks and balances similar to the separation of powers within the Executive, Legislative and Judicial branches. A unified appeals process will facilitate the convergence of interpretations of common SBA SDVOSB and VA verification requirements. It will provide an opportunity to utilize SBA's history of case law and the subtleties that occur with different "fact patterns." It will assist the Veteran Community in establishing viable business models that allow common business practices that support practical governance, investment, financing, human resources and other factors that foster growth and profitability.

20 Mr. Goldschmitt, you recommended aligning the regulations that SBA and VA rely upon. Even if we use exactly the same words, how would we insure that we have the same interpretations?

Interpretations are based upon statute, regulation, policy, knowledge and experience. The training and experience of VA adjudicators and SBA adjudicators will vary between agencies as well as within agencies. Using the same words, will provide a basis for establishing consistent interpretations. Common training and case law will facilitate the convergence of interpretations and provide an understanding of the nuances associates with different fact patterns.

**Subcommittee on Contracting and Workforce, Committee on Small Business**

**Subcommittee on Oversight and Investigations, Committee on Veterans' Affairs**

**Hearing: "Consistently Inconsistent: Challenges for Service-Disabled Veteran-Owned Small Businesses," March 19, 2013.**

**Questions for the Record - Jonathan Williams**

**1. If you had to provide one particularly egregious example of the VA failing to certify a firm, what would it be?**

We had one case that involved multiple rounds of denials, reconsideration requests, and back-and-forth with the VA OGC. The issues were not particularly complex, but it took over one year to resolve and several thousand dollars for the company.

**2. What suggestions for aligning regulations between the VA and the SBA are most necessary?**

- The VA and the SBA should permit reasonable transfer restrictions on veteran ownership
- The VA should not require SDVOSB joint ventures to be separately verified by the CVE—perhaps simply review the joint venture agreement within a certain amount of time prior to contract award, similar to how the SBA handles approval of 8(a) joint ventures. 8(a) firms do not have to go through a second 8(a) application process for the joint venture. They just submit the joint venture approval paperwork within 20 days of when the award is expected to be made.
- The VA's rules should be scrubbed to remove rights to decide affiliation/size issues without going to the SBA, and to remove the provision that allows the VA to use the principal of control through affiliation to find that a veteran does not control his business. The SBA's OHA found in its Dooley Mack decision that control in the context of affiliation is different than veteran control, and OHA specifically rejected the SBA's use of the precise language that is in the VA's regulations that mixes the two control concepts.
- The VA's regulations require the veteran to be the highest compensated, while the SBA's SDVOSB rules do not. The same is true for the VA's requirement to have a veteran as the full-time manager of the company, which is not found in the SBA's rules.
- The SBA has published its standard operating procedures ("SOP") for the 8(a) Program, which is a useful tool for firms and practitioners to understand the inner workings of the 8(a) Program. A similar SOP for the VA's SDVOSB program would help to lessen the confusion many firms experience in seeking to understand and use the program.
- The VA could offer an appeal process similar to what is currently available through the SBA, or the VA could simply use the SBA's appeal process as is envisioned in the VA's rules but has not been realized due to the lack of the interagency agreement

- The VA could specify a certain time period during which contract awards will not be terminated while the veteran has an opportunity to challenge an adverse finding as to his SDVOSB eligibility.

**3. Do you think that the VA should be relying, in part, on the SBA's 8(a) regulations as the basis for its verification program?**

I don't think it is necessarily wrong for the VA to pattern its rules after some of the 8(a) rules if the agency believes this is the best way to establish and enforce its views on program eligibility. I do not see a statutory conflict with the VA doing this. However, from a practical standpoint, the VA's cherry-picking of some regulations from the SBA's SDVOSB rules, and others from the SBA's 8(a) rules, has created a lot of confusion because it gives veterans two sets of similar, but different, rules with which to comply.

**4. One statutory difference between the VA and the SBA programs deals with the treatment of surviving spouses. If we were to try to reconcile these programs, how do you think we should address surviving spouses of service-disabled veterans?**

This seems like a nice benefit or advantage of the VA program, but I am not sure how often it is used. I never have seen it used.

**5. I understand that being verified by the VA is increasingly important—not only is it required for VA contracts, but other agencies seem to be placing importance on verification, even though the statute doesn't require it. For example, FAA's regulations now require VA verification, and an Air Force contract recently required VA verification. I understand that other agencies see it as a credential, and that prime contractors and states are now also requiring VA verification. Please address the challenge that poses to firms that operate under the SBA's government-wide program.**

Firms are forced to protest when these regulations are mistakenly put into RFPs, which costs them money, slows down the procurement process, and clogs the protest system. In addition, firms may lose out on work with primes that require CVE certification, when the primes could rely on self-certification.

**6. During the March 19 hearing, Tom Leney stated "I think that this program that the VA has established has created a gold standard." Do you believe this is correct? If not, in what sense is it incorrect?**

No, I do not believe this is correct. As our testimony and answers reflect, and as Mr. Leney acknowledged during his testimony, there continue to be a number of shortcomings in the program that are making it too difficult for legitimate SDVOSBs to benefit from the program as intended.

**7. At the same time, Mr. Leney stated "In the federal government, when people know that a firm has been verified by the VA, they can take it to the bank. And the results, this**

**is real money to real vets, and it is a program that benefits veterans.” This seems to suggest that the VA expects its certification to be given deference at agencies other than the VA, despite the fact that the government-wide program does not require VA certification. Is the VA doing enough to make it clear to other agencies that VA certification is to be used for VA contracts only?**

I do not know what the VA is doing in this regard, but the anecdotal evidence from my fellow panel members and my clients suggests that the VA is not doing enough. Many other agencies and prime contractors believe CVE verification is necessary when it is, in fact, inapplicable.

**8. What effect does the lengthy and inadequate appeals process currently in place at the VA have on small businesses’ ability to compete for contracts?**

While in limbo, small businesses lose or cannot win contracts, so this has a big impact. Many firms have lost contracts because of easily correctable issues in their corporate records or because of administrative errors. Currently, VA contracting officers are not required to wait for a decision on a pending reconsideration request or appeal before moving on from an initial award decision. Some SDVOSBs have been successful in preserving a contract award after an adverse eligibility ruling because they had the resources to file for an injunction or the contacts with the right people within the VA. But for too many SDVOSBs, the contract is lost.

**9. The VA’s request for reconsideration takes 147 days and isn’t heard by administrative judges, whereas the SBA’s appeals process takes 15 days and does result in a published decision from an administrative judge. The following questions relate to that disparity:**

**a. How do you think the appellate process should function?**

The appellate process should function similar to OHA—quicker, with a review by an Administrative Judge, and a public decision.

**b. Would published decisions be an improvement?**

Yes. Currently, in terms of the legal effect of the VA’s decisions, there is no precedential value to the VA’s rulings. And because the VA’s decisions are not publicized, there is no informational or instructive value, either. Conversely, OHA decisions can set precedent for the SBA and are instructive for firms in understanding how the SBA is applying its rules and how to maintain eligibility. If the VA published its decisions, veterans and their representatives would be much more knowledgeable about the VA’s interpretations, regulations, precedent, and guideposts.

**c. Is there a reason to use administrative judges who are independent of the verification process?**

Yes, the review is independent so, if nothing else, it gives the appearance of being unbiased and a fresh perspective.

**10. If 48 percent of the VA's requests for reconsideration are granted, does that indicate a problem with the initial determination process?**

Yes. This is a symptom of the "deny first, ask questions later" approach. Since 2011, over 60% of our reconsiderations were based on easily correctable issues in the veterans' corporate records.

**11. When the VA published the current rule governing verification, it stated "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." 76 Fed. Reg. 3022 (2011). Does that comport with your experience?**

No. The cost for an attorney to prepare the corporate records required to go through the VA's certification will vary depending on the complexity of the corporation, the number of owners, and what they are trying to accomplish. But in almost all cases, you are talking about an amount in the thousands of dollars, not hundreds.

**12. The VA recently announced that it would add a pilot pre-determination program that would occur before the initial verification program. While few would disagree that the program could stand streamlining, some have suggested that this will simply add a third hoop for our veterans to jump through. Is this a reasonable concern?**

This is a legitimate concern, and proof will be in the pudding, but on balance I like the idea of the pre-determination program because it has the potential to avoid unnecessary reconsideration requests, which should in turn speed up the reconsideration process. The sooner veterans can cut to the chase about perceived issues in the application and have change to correct them, the better.

**13. Each time the VA reorganizes its verification process, it seems to add employees and spend more money, with little improvement for our veterans. Please provide your thoughts on what the pre-determination program will mean in terms of costs and staff.**

I do not have any insights on this, other than I would imagine that to do it right, the pre-determination stage will require some additional costs. But I would think the VA could accomplish this with its existing workforce by having them devote more time up-front to flagging these issues.

**14. There is consensus that contracts intended for service-disabled veteran-owned small businesses should go only to service-disabled veteran-owned small businesses. The following questions address the prevention fraud.**

**a. The VA has said that, of the firms found not to qualify, only about 2% are turned down for reasons of fraud. That means 98% are turned down for structural reasons. What does that say about the program?**

That the pendulum has swung too far in the direction of creating barriers to entry, and we are too focused on keeping veterans out at the expense of trying to help them get in.

**b. The SBA's self-certification model has been criticized for leaving the door open to fraud. Is that the case, and how can we improve the process?**

That is the perception, but I am not sure it is reality. I am not sure a flawed application process is any better than self-certification at preventing fraud. Perhaps something like the WOSB program would be a more manageable middle ground. The WOSB program is neither a complete self-certification nor upfront verification program.

**c. Does the timing of the VA's verification pose challenges? Specifically, since the VA's program looks primarily at a company before the company is bidding on a contract, does it leave open the door to a verified company getting a contract, and then just passing the work through to another company?**

VAAR 852.219-10 specifies subcontract limitations similar to FAR/SBA rules. This is the mechanism through which the VA should hold firms accountable for performance of work requirements. Once the firm is verified, I think the focus shifts to the contracting departments since compliance with the limitations on subcontracting is a matter of contract administration. I have seen more performance of work audits on our clients' contracts, but this remains an area that generally does not seem to get much focus, at the VA and other agencies.

**15. The following questions relate to the recent Court of Federal Claims decision in *Miles Construction, LLC v. United States*, No. 12-597C (Fed. Cl. 2013). As I understand it, before *Miles*, the VA had a blanket prohibition on transfer restrictions, while the SBA's Office of Hearings and Appeals prohibited some transfer restrictions and allowed others depending on the wording of the agreements. When *Miles* challenged the VA's rule, the VA tried to argue the Office of Hearings and Appeals' cases, and the court rejected this argument. Now we have a case where the VA will have a blanket rule permitting transfer restrictions, while the SBA will still have its case-by-case basis for assessing these agreements.**

**a. First, can you think of cases where transfer restrictions should be found to lead to the loss of control?**

Yes, such as when the transfer restrictions give the minority partner too much control or are onerous or non-customary (e.g., the transfer restrictions at issue in the OHA decision, *International Logistics*, which gave the minority owners the right of first refusal to buy the veteran's stock at a price well below fair market value).

**b. Second, since the SBA's rules on transfer restrictions also apply to whether a firm is a small business, aren't we risking a situation where the VA will find that**

**a firm qualifies, only to potentially have the SBA find that the firm is no longer small?**

That seems like a somewhat remote possibility, but in theory, yes, you could have the SBA find affiliation based on a transfer restriction that gives a minority owner negative control, yet the VA would apparently no longer care about the transfer restriction in terms of SDVOSB eligibility.

**c. Third, does the Court of Federal Claims' decision illustrate the problem of using different statutory and regulatory schemes for these two programs?**

Yes, absolutely! Two inconsistent results.

**d. Finally, I believe the Miles case also speaks to the lack of due process provided to service-disabled veteran businesses under the Administrative Procedures Act. Could you address that as well?**

The VA's protest rules are very bare-boned and I do not think they were intended to last this long. They clearly envision that the SBA would handle all size and SDVOSB appeals, once an interagency agreement was reached. But we are still waiting for the interagency agreement. In the meantime, the VA's rules provide some basic provisions for handling SDVOSB eligibility protests, but they are not as well thought out as the SBA's rules. So, there are gaps such as the one that the judge discussed in Miles that led to due process concerns. If the VA is not going to turn over the protest handling to the SBA under the interagency agreement as envisioned, the VA's protest rules should be improved.

**16. In your testimony, you recommend that the SBA handle all size and affiliation inquiries. I think if you ask the VA, it will say that it is already deferring to the SBA on these issues. Do you think that is the case?**

Net in my experience, no. Their rules allow them to deny applications for size issues and to find the veteran does not control based on affiliation. A VA rule allows the CVE to deny an application if the CVE determines that a concern does not qualify as small, even if the SBA has not issued a size ruling for that firm (38 C.F.R. § 74.13(d)). Under this rule, a firm whose application is denied because of a size ruling by the CVE may subsequently request a formal size determination from the SBA, but the firm would have to file a new application with the CVE after receiving a size determination from the SBA. In this way, the CVE is able to perform size analyses that should be left to the SBA.

In fact, OHA has found that the standard for veteran control under the SBA's SDVOSB regulations is not the same as the standard for control under the SBA's small business affiliation rules. In DooleyMack Gov't Contracting, LLC, SBA No. VET-159 (2009), the SBA had concluded that a veteran did not control his company because "business relationships exist which cause such dependence that [the veteran] cannot exercise independent business judgment without economic risk." This SBA conclusion, which OHA rejected, is nearly identical to the VA's regulation at 38 C.F.R. § 74.4(i)(4).

OHA overturned the SBA's analysis because the judge found that the SBA had confused the affiliation control principles under 13 C.F.R. § 121.103 with the veteran control principles under 13 C.F.R. § 125.10. That same confusion is evidenced in 38 C.F.R. § 74.4(i)(4), which ostensibly addresses veteran control but reads like an SBA affiliation rule from 13 C.F.R. § 121.103.

**17. You also mentioned that the SBA and the VA treat joint ventures differently. Can you explain how that plays out, and why it matters?**

The SBA does not require approval of the joint venture, while the VA requires the joint venture to go through its own verification process. Joint ventures are not supposed to be ongoing entities; they are supposed to be limited ventures formed for a particular contract. This is almost impossible to do when you have to get the joint venture verified through the CVE since the process usually takes several months. By the time you get your joint venture through the CVE, the contract opportunity would have already come and gone. As a result, we have only ever handled one or two SDVOSB joint ventures at the VA, and in one case it was for an ongoing joint venture. The VA's approach forces firms to have ongoing joint ventures that are a potential ground for affiliation under the SBA's rules. And the VA's approach makes it too difficult to use a joint venture, so many veterans are missing out on this useful tool.

**18. In your testimony, you recommend consolidating the two regulatory schemes into one with regulations and appeal process similar to that which is currently available at the SBA. How would you envision that happening?**

I think you would look to merge the two sets of rules into one, keeping some parts of both, but using the SBA's rules as the starting point. The CVE could continue to verify firms using the new consolidated rules, at least until it could be figured out how to get the entire program under one roof. By using the SBA's rules as the starting point, there would be a clear appellate process for veterans.

**19. Mr. Williams, how can the VA streamline the application process through the Center for Veterans Enterprise (CVE) to make it less burdensome and duplicative for veterans?**

Try to issue only one denial letter covering all reasons for denial, so firms will not have to endure multiple rounds of reconsideration. Work more with veterans through steps like the new initial screening stage to allow the veterans to fix issues and become eligible without having to go back to square one. Figure out a better way to ensure that correspondence reaches veterans so they do not get terminated from the program without having an opportunity to respond. Extend the re-verification timeline by another year, or consider eliminating it all together. Once a firm gets into the 8(a) program, it must make some annual showings, but it is not required to essentially re-apply every year or two years like the VA's re-verification process. Firms are obligated to notify the VA about changes, so it is unclear why the VA forces firms to basically re-

apply every couple of years. Also, counsel the onsite investigators and the CVE reviewers not to make veterans feel like they are guilty until proven innocent.

**20. Mr. Williams, in your testimony you state how the VA uses a “deny first and ask questions later” approach to the application process. In your experience, how many veterans would you say, approximately, become dejected and simply cease their pursuit of contracts they should rightfully have the opportunity to pursue?**

I worked with one firm that gave up on the process, one firm that almost gave up when their reconsideration requests dragged on for over one year, and I am currently working with a firm that is close to giving up based on some very poor experiences with an onsite investigator. Given these anecdotal experiences, I would have to assume there are a significant number of veterans who have abandoned the program and contract opportunities because it is too difficult to get into and stay in the program.



April 9, 2013

The Honorable Richard Hanna  
Chairman  
The Honorable Grace Meng  
Ranking Member  
Subcommittee on Contracting and Workforce  
Committee on Small Business  
House of Representatives

The Honorable Mike Coffman  
Chairman  
The Honorable Ann Kirkpatrick  
Ranking Member  
Subcommittee on Oversight and Investigations  
Committee on Veterans' Affairs  
House of Representatives

On March 19, 2013, I testified in the joint hearing on the Department of Veterans Affairs' verification program for veteran-owned small businesses before your committees.<sup>1</sup> This letter responds to your request that I provide answers to questions for the record from the hearing. The responses are primarily based on work associated with our January 2013 report on the verification program.<sup>2</sup> If you have any questions about this letter or need additional information, please contact me at (202) 512-8678 or [shearw@gao.gov](mailto:shearw@gao.gov).

William B. Shear  
Director  
Financial Markets and Community Investment

Enclosure

<sup>1</sup>GAO, *Veteran-Owned Small Businesses: Planning and Data System for VA's Verification Program Need Improvement*, GAO-13-425T (Washington, D.C.: Mar. 19, 2013).

<sup>2</sup>GAO, *Veteran-Owned Small Businesses: Planning and Data System for VA's Verification Program Need Improvement*, GAO-13-95 (Jan. 14, 2013).

Enclosure

**Subcommittee on Contracting and Workforce, Committee on Small Business**

**Subcommittee on Oversight and Investigations, Committee on Veterans' Affairs**

**Hearing: "Consistently Inconsistent: Challenges for Service-Disabled Veteran-Owned Small Businesses," March 19, 2013**

**Responses to Questions for the Record**

**William B. Shear, Director**

**Financial Markets and Community Investment,**

**Government Accountability Office**

**1. Your written statement focused on your January 14th report on the VA verification program. However, it's my understanding that the scope of this report changed over time. Can you tell us about that evolution, and why it was necessary?**

When we began our work in February 2012, we initially considered reviewing a sample of applications for verification to assess how consistently the Department of Veterans Affairs (VA) applied its guidelines and the timeliness of the verification process. However, because VA introduced significant changes to its procedures and operations in 2012, we determined that evaluating VA's compliance with its past procedures would be of limited value and that testing the effectiveness of verification procedures that were still evolving would be premature. We also found that the verification program's data system did not provide the information that we would need to analyze the timeliness of the verification process. As a result, we focused instead on issues related to planning for and designing the verification program and on changes in the program's management and operations.

**2. GAO stated that VA had 28 employees and 174 contractors assigned to verification. What have been the resulting challenges from relying so heavily on contractors?**

While we did not look specifically at the challenges from relying so heavily on contractors, our work identified three key issues facing the verification program related to its use of contractors. First, we reported in January 2013 that the verification program's data system did not meet VA's needs for assigning and monitoring the progress of applications.<sup>1</sup> As a result, the contractor that initially examines applications relied on a separate workflow management system, which is inefficient and increases the risk that data will not be completely or accurately recorded across systems. Second,

<sup>1</sup> GAO, *Veteran-Owned Small Businesses: Planning and Data System for VA's Verification Program Need Improvement*, GAO-13-95 (Jan. 14, 2013).

VA initially did not have a standardized approach to training verification program employees and contractors. To help address this challenge, VA began taking steps in December 2011 to improve training, such as hiring the first training officer for the verification program and revising the training program. VA's initial strategic plan for the verification program identified improving training as an ongoing focus for 2013. Third, while VA began taking some steps in 2012 to improve its oversight of the quality of the work produced by some its contractors, the agency lacked metrics that it could use to monitor the quality and consistency of work produced by the contractors that perform examinations and site visits.

**3. GAO stated that VA had made a number of changes intended to improve the verification program since December 2011. But it also stated that before VA could expand operations for a government-wide program, it would need to demonstrate that the recent changes have resulted in operational improvements and that its new efforts to educate applicants have been effective. Why weren't you able to determine whether the recent changes have been effective?**

During the period of our study—February 2012 to January 2013—the changes that VA introduced beginning in December 2011 were still being implemented or had not been in place long enough for us to evaluate their results. However, as we reported in January 2013, VA could strengthen its efforts to improve its management and oversight of its verification program by taking additional actions.<sup>2</sup> First, in its initial strategic plan, VA had not established quality and outcome measures that it could use to assess the verification program's performance over time. Second, the program's data system lacked data fields and reporting capabilities that VA needed to monitor program trends and staff performance. By developing performance measures and addressing the shortcomings in its data system, VA would be in a better position to assess the effectiveness of its recent changes to the verification process and to determine whether additional actions are needed.

**4. GAO has done previous reports on both SBA's and VA's certification and verification programs, and both indicated problems with fraud. Could you tell us more about the challenges you found?**

The Small Business Administration (SBA) and VA have taken various actions in response to deficiencies we identified in their certification and verification programs, but both continue to face challenges in establishing internal controls that provide reasonable assurance against program fraud and abuse. For example, in June 2008, we reported that the mechanisms SBA used to certify and monitor HUBZone firms provided limited assurance that only eligible firms participate in the program.<sup>3</sup> We found that SBA verified information reported by firms at application or during recertification only in limited instances. We also found that SBA was not

<sup>2</sup>GAO-13-95.

<sup>3</sup>GAO, *Small Business Administration: Additional Actions Are Needed to Certify and Monitor HUBZone Businesses and Assess Program Results*, GAO-08-643 (Washington, D.C.: June 17, 2008).

following its policy of recertifying all firms every 3 years. In a subsequent report, we noted that weaknesses in SBA's eligibility review process for the HUBZone program allowed bogus firms to be certified based on fraudulent information.<sup>4</sup> Specifically, our testing revealed that SBA did not adequately authenticate self-reported information—especially as it pertained to information regarding whether a firm's principal office location met program requirements.

We also identified weaknesses in SBA's 8(a) program and VA's service-disabled veteran-owned small business program that allowed ineligible firms to participate in those programs.<sup>5</sup> For example, we found that SBA relied heavily on self-reported information from 8(a) program applicants during the initial certification and annual reviews, particularly in evaluating an individual's adjusted net worth and total assets, with limited data validation performed after firms entered the program. As I noted in my March 2013 statement, VA has instituted a number of significant changes to its verification process to improve and address program weaknesses but continues to face challenges in its efforts to establish a stable and efficient program to verify firms on a timely and consistent basis.<sup>6</sup> These challenges are directly related to shortcomings in strategic planning and data systems for the verification program. One of the fundamental challenges that both SBA and VA face is balancing the inherent tension between the need to establish effective internal controls to prevent ineligible firms from participating in their programs and the goal of facilitating access to federal contracting opportunities for the intended targets of these programs.

**5. Mr. Shear, as we go forward, what aspects do you consider crucial to a successful verification program?**

Based on our evaluation of VA's verification program, we recommended that VA (1) continue to develop, refine, and implement a formal strategic plan to provide a comprehensive framework to guide, integrate, and monitor the verification program's activities over time (including incorporating longer-term goals, objectives, and outcome measures for the verification program and sharing the plan with key stakeholders); and (2) integrate its efforts to modify or replace the verification program's data system with the broader strategic planning effort to ensure that the new system not only addresses the short-term needs of the program but also can be readily adapted to meet long-term needs. In both our audit work and our recommendations, we focused on strategic planning because VA did not have a stable process in place that would have enabled the agency or us to test how well the process was working. Therefore, beyond taking actions to put a stable process in place—such as actions needed to obtain an effective data system, which is a major challenge itself—VA needs to develop effective ways to

<sup>4</sup> GAO, *Small Business Administration: Undercover Tests Show HUBZone Program Remains Vulnerable to Fraud and Abuse*, GAO-10-759 (Washington, D.C.: June 25, 2010).

<sup>5</sup> See, for example, GAO, *8(a) Program: Fourteen Ineligible Firms Received \$325 Million in Sole-Source and Set-Aside Contracts*, GAO-10-425 (Washington, D.C.: Mar. 30, 2010) and GAO, *Service-Disabled Veteran-Owned Small Business Program: Fraud Prevention Controls Needed to Improve Program Integrity*, GAO-10-740T (Washington, D.C.: May 24, 2010).

<sup>6</sup> GAO, *Veteran-Owned Small Businesses: Planning and Data System for VA's Verification Program Need Improvement*, GAO-13-425T (Mar. 19, 2013).

monitor the verification program's activities over time. In particular, VA will need to collect information that reflects the quality of verifications carried out by its staff and contractors so it can test how well a new process is working. In doing so, VA would put itself in a better position to manage any tradeoffs between providing reasonable assurance that only eligible firms are verified and that all eligible firms are verified on a timely and consistent basis.

**Subcommittee on Contracting and Workforce, Committee on  
Small Business**

**Subcommittee on Oversight and Investigations, Committee  
on Veterans' Affairs**

**Hearing: "Consistently Inconsistent: Challenges for Service-Disabled Veteran-Owned Small Businesses," March 19, 2013.**

**Questions for the Record - John Shoraka, Associate Administrator, Government Contracting and Business Development, U.S. Small Business Administration**

**1. In the letter from Mr. Shoraka included on page 56 of the Government Accountability Office (GAO) Report, Veteran-Owned Small Businesses: Planning and Data System for VA's Verification Program Need Improvement (2013) (GAO-13-95), Mr. Shoraka states that there are statutory, procedural and interpretive differences between the Small Business Administration (SBA) government wide contracting program for service-disabled veteran-owned small businesses (SDVOSBs) and the Department of Veterans Affairs (VA) SDVOSB program. Specifically, the letter cites the disparate treatment of surviving spouses as the statutory difference between the program; the protest process as the procedural difference between the programs; and concludes that "while it is true that the wording of the regulations is similar, there are some key differences in interpretations." Please enumerate and explain:**

**a. Any other statutory differences between the programs;**

A key statutory difference between the VA program and the SBA program is that the VA program is a statutorily required verification program, whereas the SBA program permits self-certification. Additional statutory differences include the VA allows eligibility for firms owned and controlled by surviving spouses and the VA has a VetFirst contracting preference.

**b. Any differences between 13 C.F.R. §§ 125.8-125.29 and 38 C.F.R. § 74;**

The differences between the rules are outlined in the attached chart.

**c. Any differences between 13 C.F.R. § 124 and 38 C.F.R. § 74;**

See above referenced chart.

**d. Any interpretative differences between the VA and SBA programs, including which differences SBA considers key.**

It is difficult to summarize the interpretive differences between the VA and SBA programs because we are not aware of situations where the exact same firm was found to be eligible

under one program and not eligible under the other program. Each case is different. An example of a known difference in interpretation is how the VA handles restrictions on sale and transfer of ownership. Prior to the Miles decision, the VA appeared to not allow any restrictions on sale or transfer. As a result of Miles, the VA may now allow any and all restrictions on sale and transfer. In contrast, SBA examines restrictions on sale and transfer as one component of control eligibility requirements, along with other factors. SBA makes a determination as to whether the Veteran owns and controls the firm based on a review of the totality of circumstances for the applicant firm. It is difficult to say which restrictions are allowed and which are not, because restrictions vary from case to case. Over time, SBA's decisions are reviewed on appeal and SBA has published appeal decisions that the public can use as guidance.

**2. GAO was told by SBA officials that there were not any major differences in the VA and SBA regulatory eligibility requirements or the interpretation of these regulations. However, in SBA's official comments, Mr. Shoraka stated that there were key differences in how the agencies interpreted the regulations. Does this highlight a disconnect between what is happening on the ground and what management sees as policy?**

The key difference between the SBA program and the VA program is the fact that the SBA program is a protest-based self-certification program and the VA program is a front-end certification program. This difference is significant from the perspective of the public, as the timing of documentation requests, eligibility process, and options for recourse are very different when the VA and SBA programs are compared. However, the regulations for each program are very similar. As we have already highlighted above, there are statutory differences (e.g., surviving spouse) and differences in interpretation in specific fact scenarios (e.g., restrictions on sale and transfer). Procedurally, at SBA a protest decision may be appealed to another office where an Administrative Judge reviews the decision on a clear error of fact or law standard.

**3. How could collaboration between SBA and VA prior to the implementation of VA's program aided the process and prevented the problems that currently exist?**

I cannot speak to the degree of collaboration between SBA and VA during the period VA was developing their program, as the program was established prior to my time at SBA. There can be differences in interpretation within the same agency. Certainly, there can be differences in interpretation between two agencies. The purpose of both programs is to ensure that the benefits of the programs flows to the intended beneficiaries.

**4. What does SBA believe are the advantages of SBA's appeal process to the Office of Hearings and Appeals?**

Key advantages of an independent appellate review process include: published opinions; established precedent; and a transparent process overseen by an impartial third party. These benefits lend

credibility not only to the appeal decision, but also the original decision.

**5. In his written testimony, Mr. Shoraka emphasized that SBA's cases are made on a case-by-case, fact-specific basis, so there is rarely one factor contributing to a firm's denial. What do you see as the advantages of such a system? Do you think VA is attempting to adopt "bright line" tests? Do you think such tests are in keeping with the SBA's rules and regulations interpreting the Small Business Act?**

The goal of both programs is to determine whether the Veteran owns and controls the firm. Making these determinations involves a thorough process that may require the analysis of voluminous documentation, which may include articles of incorporation, by-laws, tax returns, bank statements, loan arrangements, leases, financial statements, resumes, licenses, etc. It is difficult to draft rules to address each specific ownership and control scenario, which is SBA's basis for a case-by-case approach for determinations.

**6. What role did SBA play in the preparation and issuance of VA's VAB "Applicant Must Meet Small Business Definition?"**

I am not aware of any role as the program was established before my time at SBA. However, the VA recognizes that only SBA can determine size in connection with a specific government contract. SBA has authority to render size determinations in connection with another agency's programs (13 CFR 121.901).

**7. Both statutes state that a firm's status as a service-disabled veteran is to be determined by VA's definitions, but that whether a firm is a small business should be based on the Small Business Act. Thus, if the VA is applying SBA's rules differently than SBA, isn't VA usurping SBA's authority?**

Only SBA can determine size, absent specific statutory authority to the contrary. The VA recognizes that only SBA can determine size for a specific government contract. Only the VA can address whether it is issuing size decisions and denying access to its program based on size.

**8. What is the educational or professional background of the SBA employees who perform the program certification for the 8(a) program?**

The skills required to perform program certifications for the 8(a) program are broad based and include such abilities as critical thinking, financial analysis capability, strategic thinking, understanding of organizational structures, government contracts etc. These skills can be obtained in a variety of professions and are commonly found in business curriculums and legal curriculums at the higher education level, therefore the SBA employees that perform this function largely have legal and graduate level business backgrounds.

**9. In VA's verification program, the ratio of federal employees to contractors is as high as 1 to 24. How does VA's reliance on contractors compare with SBA's approach to verification in other programs?**

HUBZone: SBA does not currently rely on contractor support for the purposes related to the HUBZone certification process. SBA currently has a staff of 20 Federal employees that are responsible for initial certification and continuing eligibility reviews of HUBZone firms.

The HUBZone office had contractor support prior to FY2013. It is difficult to make comparisons of ratios of contractor staff to federal staff between the HUBZone program and the VA program, as we do not fully know the ways the VA contractor staff support the VA federal staff.

During the period of contractor support of the HUBZone office, the contractors specifically managed complex administrative functions and staffed a HelpDesk. In 2009, following a critical change in the business process of reviewing HUBZone initial applications, the HUBZone program hired contractors to assist with the processing of initial applications. These contractors were hired to supplement the existing federal staff in performing a more rigorous level of eligibility review to include full documentation. Additionally, the HUBZone program underwent a reengineering of their certification process. After the application process transitioned to the new workflow, the program discontinued use of contractors. In FY 2013, the HUBZone office increased the total number of Federal staff to 20 engaged in the review process. This was a direct result of cost savings analysis and in-source justification performed by the agency based on the use of contractors from 2009–2011.

8(a) Business Development: SBA does not rely on contractor support for the purposes related to the 8(a) eligibility review process. SBA currently has a staff of eighteen employees that are responsible for certification of new applicants into the 8(a) program.

**10. In order to reduce fraud and abuse in the system, Administrator Mills has previously testified that SBA would work with the VA to get an SDVOSB certification process in place for SBA's program. However, we have yet to see any concrete steps taken towards this goal. What steps the SBA has taken in process and when we can expect to see a credible certification process in place this program?**

In previous testimony, Administrator Mills referenced the collaboration between SBA and VA in several areas to improve alignment of the SBA and VA programs. The SBA has collaborated with VA to help identify best practices in mitigating fraud, waste and abuse in government contracting programs. We have provided VA with insight into our processes and procedures for mitigating fraud, waste, and abuse and have shared insight into the development of data systems that support programmatic efficiency.

**11. What steps has SBA taken to educate agencies government-wide about the differences between the VA's and SBA's**

**programs, specifically the difference of eligibility requirements for contract award?**

Contracting officers should understand that the SBA SDVOSB Program is intended for government-wide procurement from SDVOSBs, whereas the VA Program is intended for firms seeking to do business with the VA. SBA is collaborating with the Office of Federal Procurement Policy to issue reminders via an acquisition alert regarding the differences in the requirements of the programs. Additionally, SBA has created modules for contracting officers at SBA's online government contracting learning portal, the Government Contracting Classroom ([www.sba.gov/gcclassroom](http://www.sba.gov/gcclassroom)). We are seeking to cross post or incorporate these courses into the courses available to contracting officers via the Federal Acquisition Institute (FAI) and Defense Acquisition University (DAU).

**12. What steps has SBA taken to ensure that SDVOSB's are not prevented from competing on an SDVOSB contract outside of the VA solely because they are not certified through the CVE program?**

When SBA is alerted to this scenario, we inform the contracting officer that CVE certification is not required in order to compete for an SDVO set-aside under the Small Business Act. There are published OHA decisions which we share with agencies. The Federal Acquisition Regulation (FAR) is clear that the SDVO program is a self-certification program. See FAR 19.1307, 19.1403, 52.219-1, 52.219-27.

**13. If the underlying statutory differences between the SBA and VA program were resolved, would the program be able to function using the same regulations for eligibility purposes?**

Yes, but that does not mean the VA or SBA would not apply those regulations differently to a specific fact situation.

**14. At the hearing, Mr. Leney stated that SBA would charge VA \$1 million to verify 40 SDVOSBs. What was the basis of these numbers? Based on the costs of running the 8(a) Business Development Program and the HUBZone Program, what does SBA estimate it would cost to manage VA's verification program?**

I cannot speak for the basis of Mr. Leney's numbers, but negotiations between the SBA and VA focused on SBA processing protests and appeals, not certification. We would need additional information such as SBVOSBs application volume, recertification efforts and program size to forecast the cost to manage VA's verification program.

**15. At one time, SBA and VA negotiated to have SBA manage VA's verification process. What became of those negotiations?**

SBA and the VA entered into discussions pertaining to processing protests and appeals, not certification. The agencies were unable to reach agreement on compensation, and no further discussions are scheduled.

16. VA's procurement regulations (48 C.F.R. § 819.307) state that "For acquisitions under the authority of subpart 819.70, upon execution of an interagency agreement between VA and the SBA pursuant to the Economy Act (31 U.S.C. 1535), regarding service-disabled veteran-owned or veteran-owned small business status, contracting officers shall forward all status protests to the Director, Office of Government Contracting (D/GC), U.S. Small Business Administration (ATTN: VAAR Part 819 SDVOSB/VOSB Small Business Status Protests), 409 3rd Street, SW., Washington, DC 20416, for disposition." This regulation was promulgated December 8, 2009. However, it is clear based upon the recent Court of Federal Claims decisions that no such interagency agreement has been executed. What is the status of this interagency agreement?

See above response to question 15.

17. Likewise, 48 C.F.R. § 819.307 states that "Except for ownership and control issues to be determined in accordance with 38 CFR part 74, protests shall follow the procedures set forth in FAR 19.307 for both service-disabled veteran-owned and veteran-owned small business status." However, pursuant to Section 3(a)(1) of the Small Business Act, ownership and control are two of the three statutory requirements for qualifying as a small business ("a small business concern . . . shall be deemed to be one which is independently owned and operated and which is not dominant in its field of operation"). As Section 3(a)(2) states, standards and interpretations of these factors are vested in the Administrator for purposes of the Small Business Act or any other Act. Therefore, how is VA permitted to make independent determinations regarding ownership and control?

Ownership and control for size is different than ownership and control for status. When SBA conducts a formal size determination it is trying to determine whether a firm is affiliated with another firm and if that affiliation would render the firm in question other than small. When SBA reviews a firm for SDVO status, it is seeking to determine whether the Veteran owns and controls the firm. Consequently, a firm may be found to be ineligible under one program but eligible under the other.

18. When SBA admits a firm to the 8(a) program, SBA has verified that the firm is a small business owned and controlled by a socially and economically disadvantaged individual. In making that determination, does SBA look at whether the firm is itself a small business, or only whether the ownership and control of the firm is by a qualifying individual?

When making a determination of 8(a) BD program eligibility, SBA evaluates an applicant pursuant to the relevant provisions set forth in 13 CFR § 124. These regulations stipulate that to be eligible to participate in the 8(a) BD program the applicant concern must be small and must be at least 51% unconditionally owned and controlled by a socially and economically disadvantaged individual

or individuals. Therefore, in conducting its eligibility analysis SBA determines whether the applicant concern is a small business in the primary industry in which it is seeking certification and whether the concern is at least 51% unconditionally owned and controlled by socially and economically disadvantaged individuals. Additionally, an 8(a) participant's size can always be protested in connection with any competitive 8(a) set-aside or other competitive set-aside procurement.

**19. SBA's SDVOSB self-certification process has been criticized as leaving the door open for fraud. Please comment on this criticism, and on the relative merits of contract-specific protests versus general certifications. Is the SBA undertaking efforts to put additional checks and balances in place to make the SBA's SDVOB certification less vulnerable to fraud?**

There is a risk of fraud in any government contracting program, including those where certification is required. There are significant costs to certifying all firms that may be interested in winning a government contract versus reviewing the limited number of firms that have been awarded a government contract on a protest basis. This trade-off must be considered when making a determination as to whether funds and resources will be made available for a full certification program. Firms and individuals that misrepresent their status may be subject to civil and criminal penalties, as well as debarment and suspension from government contracting. SBA has debarred or suspended more firms from government contracting in the past 4 years than it did in the previous 10 years, and individuals have been convicted and sentenced to prison for misrepresentations in connection with SBA's programs.

**20. Please describe SBA's interactions with VA regarding SDVOSB verifications, and assess of how much the agency has contributed to progress made by VA in developing processes and a data system for verification.**

SBA and the VA have met to discuss the regulations for the various programs, and the differences in interpretation. SBA and the VA have also met to discuss the 8(a) Business Development Program's business processes, regulations and information about IT requirements. Most recently SBA involved VA in usability testing of some of the workflows supporting business processes associated with the 8(a) and HubZone programs.

**21. Please provide information on the staffing levels, costs, and caseloads associated with each of SBA's certification programs.**

- HUBZone:
  - FY13 HZ = 20 FTEs - of these 11 are 100% dedicated to evaluating initial and continuing eligibility actions; 2 provide Admin Support to the initial and continuing unit; 3 dedicate 75% of their time towards evaluations; and 1 provides 25% management support towards the evaluation unit. 3 provide program management and leadership guidance and to include

various infrastructure elements such as website, maps, marketing, etc.

- Annual case load averages approx. 5,000 actions (includes: initial apps, material changes, re-certifications, program examinations, protests, proposed decertification, and decertification actions)

- 8(a) Business Development

- FY13 BD = 27 Headquarter FTEs - of these 14 are 100% dedicated to evaluating initial and continuing eligibility determinations; 5 provide Admin Support and perform screenings for the initial application unit and the continuing eligibility unit; and 5 provide 100% management support, program management and leadership guidance to include various infrastructure elements such as website, marketing, etc. District Office staff are leveraged to perform annual reviews of program participants consistent with the Small Business Act.

- Annual case load averages approx. 11,500 actions (includes: initial apps, continuing eligibility reviews, early graduations, voluntary withdrawals, terminations, changes of ownership etc.)

**22. SBA uses a 3 year recertification cycle for HUBZone firms. How did SBA decide that three years was the appropriate time frame?**

In 2004, SBA amended 13 CFR 126.500 concerning continued eligibility in the HUBZone program. Before 2004, a qualified HUBZone SBC recertified annually. SBA believed that such an annual recertification was burdensome to SBCs and changed the timeframe to every three years. SBA considered that the program examination process and protest mechanism effectively eliminate concerns that SBCs are not eligible. SBA also believed that three years was a reasonable period of time to give effect to a HUBZone certification.

Additionally, HUBZone regulations and the FAR require that a firm must be a qualified HUBZone SBC both at the time of its initial offer and at the time of award in order to be eligible for a HUBZone contract. The HUBZone offeror must provide to the Contracting Officer a copy of notice required by 13 CFR 126.501 if material changes occur before contract award that could affect its HUBZone eligibility. In other words, the offeror for a HUBZone contract is required to notify the Contracting Officer if it is not in compliance with HUBZone eligibility criteria. The HUBZone regulations also provide a protest mechanism in connection with awards of HUBZone contracts (13 CFR Subpart H - Protests). Through a robust recertification process, requirements of notification of material changes, and the protest process, the HUBZone program mitigates instances of firms misrepresenting their status.

**23. Please explain the differences in the application process for the 8(a) program and the VA's SDVOSB program, with special emphasis on factors only required for one program or the other.**

While the processes for both certification programs are somewhat similar there are some noteworthy differences. The application process for VA's SDVOSB is comprised of five distinct phases, Initiation, Examination, Evaluation, Determination, and Reconsideration, while the SBA process has three phases, Screening, Processing and Reconsideration. The three phased approach by SBA is driven by statute. During the SBA's process applicants are allowed to provide additional supporting documents and/or explanations as the process is considered iterative while the SDVOSB application once submitted cannot be changed. When a reconsideration request is submitted as a part of the SDVOSB application process new information can be submitted by the applicant at that time. The 8(a) program incorporates administrative procedures where applicants can request review by an Administrative Law Judge when declined under certain conditions while the SDVOSB does not.

**24. While the recent Court of Federal Claims decision in Miles Construction, LLC v. United States, No. 12-597C (Fed. Cl. 2013) is not binding on SBA, it does speak to the SBA's position on transfer restrictions. Does SBA anticipate revisiting its regulations or policies in light of the Miles decision?**

Decisions of the Court of Federal Claims apply to the facts of those cases and do not bind other Judges on the Court of Federal Claims. While the Court discussed some of SBA's decisions, it did not rule on the merits of those decisions. The facts in the SBA decisions that the Court discussed are distinguishable from the facts in the Miles decision. SBA will continue to review each specific factual scenario when making its decisions, and does not intend to change its regulations based on Miles.

**25. Are the SBA and VA planning to align their certification processes to eliminate confusion for veterans when certifying as a SDVOB?**

Congress created two separate programs: a government-wide self-certification protest-based program based on the Small Business Act, and a VetFirst program specific to the VA that requires certification by the VA. The VA has tried to align its regulations to SBA's regulations to the extent possible. There will always be the potential for differences of interpretation based on specific factual scenarios, but both agencies attempt to ensure that the benefits of the programs flow to the intended beneficiaries.

**26. Mr. Shoraka, based upon your experience, what would you say the VA needs to do to improve the way it certifies veteran businesses?**

I believe that the VA's recent announcement of a screening process to assist applicants when they first submit materials will help veterans develop a better understanding of the VA verification process. Additionally, a transparent and independent appellate review process would provide firms with a clear path for recourse.

<p><b>38 CFR 74</b> <b>74.3 Ownership</b></p>	<p><b>13 CFR 125</b> <b>125.9 Ownership</b></p>	<p><b>13 CFR 124 [8(a) Business Development]</b> <b>124.105 [8(a) Ownership]</b></p>
<p>An applicant or participant must be at least 51 percent unconditionally and directly owned by one or more veterans or service-disabled veterans.</p>	<p>A concern must be at least 51% unconditionally and directly owned by one or more service-disabled veterans. More specifically, (see also OHA case law: VET-105 and VET-218)</p>	<p>An applicant or participant must be at least 51 percent unconditionally and directly owned by one or more socially and economically disadvantaged individuals who are citizens of the United States, except for concerns owned by Indian Tribes, Alaska Native Corporations, Native Hawaiian Organizations, or Community Development Corporations (CDCs).</p>
<p>(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 [ESOPs]) 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 grantor, a trustee, and the sole current beneficiary of the trust is the veteran or service-disabled veteran. (b) For employee stock ownership plans where 5 or fewer persons who are individuals own at least 50 percent of the total stock, the eligible parties must control 51 percent of the combined voting power of the corporation. The employee plan will be determined to be "excluded stock" if 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.</p>	<p>(a) Ownership must be direct. Ownership by one or more service-disabled veterans must be direct ownership. A concern owned principally by another business entity that is in turn owned and controlled by one or more service-disabled veterans does not meet this requirement. Ownership by a trust, such as a living trust, may be treated as the functional equivalent of ownership by a service-disabled veteran where the trust is revocable, and service-disabled veterans are the grantors, trustees, and the current beneficiaries of the trust.</p>	<p>(a) Ownership must be direct. Ownership by one or more disadvantaged individuals must be direct ownership. An applicant or participant owned principally by another business entity or by a trust (including employee stock ownership trusts) that is in turn owned and controlled by one or more disadvantaged individuals 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 disadvantaged individual where the trust is revocable, and the disadvantaged individual is the grantor, a trustee, and the sole current beneficiary of the trust.</p>
<p>(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, subsequent assignments, voting trusts, restrictions on assignments of voting rights, or other arrangements causing ownership benefits to go to another (other than after death or incapacity). The pledge or encumbrance of stock or other ownership interest will be determined to be "excluded stock" if the terms follow normal commercial practices and the owner retains control absent violations of the terms. In particular, CDE will evaluate ownership according to the following criteria for specific types of small business concerns.</p>	<p>(b) Ownership must be unconditional. Ownership by one or more service-disabled veterans must be unconditional ownership. Ownership must not be subject to conditions precedent, conditions subsequent, subsequent assignments, voting trusts, restrictions on assignments of voting rights, or other arrangements causing ownership benefits to go to another (other than after death or incapacity). The pledge or encumbrance of stock or other ownership interest will be determined to be "excluded stock" if the terms follow normal commercial practices and the owner retains control absent violations of the terms.</p>	<p>Unconditional ownership means ownership that is not subject to conditions precedent, conditions subsequent, subsequent assignments, voting trusts, restrictions on assignments of voting rights, or other arrangements causing ownership benefits to go to another (other than after death or incapacity). The pledge or encumbrance of stock or other ownership interest will be determined to be "excluded stock" if the terms follow normal commercial practices and the owner retains control absent violations of the terms.</p>
<p>(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. (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.</p>	<p>(b) Ownership of a partnership. In the case of a concern which is a partnership, at least 51% of every class of partnership interest must be unconditionally owned by one or more service-disabled veterans. The ownership must be reflected in the concern's partnership agreement. (c) Ownership of a limited liability company. In the case of a concern which is a limited liability company, at least 51% of each class of member interest must be unconditionally owned by one or more service-disabled veterans. (d) Ownership of a corporation. In the case of a concern which is a corporation, at least 51% of the aggregate of all stock outstanding and at least 51% of each class of voting stock outstanding must be unconditionally owned by one or more service-disabled veterans.</p>	<p>(b) Ownership of a partnership. In the case of a concern which is a partnership, at least 51 percent of every class of partnership interest must be unconditionally owned by one or more individuals determined by SBA to be socially and economically disadvantaged. The ownership must be reflected in the concern's partnership agreement. (c) Ownership of a limited liability company. In the case of a concern which is a limited liability company, at least 51 percent of each class of member interest must be unconditionally owned by one or more individuals determined by SBA to be socially and economically disadvantaged. (d) Ownership of a corporation. In the case of a concern which 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 individuals determined by SBA to be socially and economically disadvantaged.</p>

<p><b>38 CFR 74</b></p> <p>(f) Profits and distributions. One or more veterans or service-disabled veterans must be entitled to receive:</p> <p>(1) At least 51 percent of the annual distribution of profits paid to the owners of a corporate, partnership, or LLC applicant or participant.</p> <p>(2) At least 51 percent of the net profits earned by a joint venture in which the applicant or participant is the lead concern.</p> <p>(3) 100 percent of the value of each share of stock owned by them in the event that the stock is sold;</p> <p>(4) 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.</p> <p>(5) 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.</p>	<p><b>13 CFR 125</b></p> <p>SBA (representative) is consistent with 38 CFR 74.3(d).</p>	<p>(f) Dividends and distributions. One or more disadvantaged individuals must be entitled to receive:</p> <p>(1) At least 51 percent of the annual distribution of dividends paid on the stock of a corporate applicant concern;</p> <p>(2) 100 percent of the value of each share of stock owned by them in the event that the stock is sold; and</p> <p>(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.</p>
<p>(g) 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) held by non-veterans or service-disabled veterans will be treated as exercisable, except for any ownership interests which are held by investment companies licensed under part 107 of title 15, Code of Federal Regulations.</p>	<p>(e) Stock options' effect on ownership. In determining unconditional ownership, SBA will disregard any unexercised stock options or similar agreements held by service-disabled veterans. However, any unexercised stock options or similar agreements (including rights to convert non-voting stock) held by non-disabled veterans will be treated as exercisable, except for any ownership interests which are held by investment companies licensed under the Small Business Investment Act of 1958.</p>	<p>(e) Stock options' effect on ownership. In determining unconditional ownership, SBA will disregard any unexercised stock options or similar agreements (including rights to convert non-voting stock) held by non-disadvantaged individuals. However, any unexercised stock options or similar agreements which are held by investment companies licensed under the Small Business Investment Act of 1958.</p>
<p>(g) Change of ownership.</p> <p>(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.</p>	<p>(f) Change of ownership. A concern may change its ownership or business structure so long as one or more service disabled veterans own and control it after the change.</p>	<p>(f) Change of ownership. A Participant may change its ownership or business structure so long as one or more disadvantaged individuals own and control it after the change and SBA approves the transaction in writing prior to the change. The decision to approve or deny a Participant's request for a change in ownership or business structure will be made and communicated to the firm by the AA/BD. The decision of the AA/BD is the final decision of the Agency. The AA/BD will issue a decision within 60 days from receipt of a request containing all necessary documentation, or as soon thereafter as possible. If 60 days lapse without a decision from SBA, the Participant cannot presume that it can complete the change without SBA approval from SBA. A concern to deny a request for change of ownership or business structure may be grounds for program termination where the change is made nevertheless.</p>
<p>(h) 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 54a Subpart 42.12 to the contracting officer prior to the substitution or change of ownership for an eligible principal, prior approval is not required, but the concern must file a new application with the contracting officer and CVE within 60 days of the change. Existing contracts may be performed to the end of the instant term. However, no options may be exercised.</p> <p>(i) 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.</p>	<p>(g) This section is silent as these provisions do not apply to a self-liquidation program.</p>	<p>(1) Any participant that was awarded one or more 8(a) contracts may substitute one disadvantaged individual for another disadvantaged individual without requiring the termination of these contracts or a request for waiver under 24.124-3.2, as long as it receives SBA's approval prior to the change.</p> <p>(2) 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 notify SBA within 60 days.</p> <p>(3) Continued participation of the Participant with new ownership and the award of any new 8(a) contracts requires SBA's determination that all eligibility requirements are met by the concern and the new owners.</p> <p>(4) Where a Participant requests a change of ownership or business structure, and proceeds with the change prior to receiving SBA approval (or where a change of ownership results from the death or incapacity of a disadvantaged individual for which a request prior to the change in ownership could not occur), SBA will suspend the Participant from program benefits pending resolution of the request. If the change is approved, the length of the suspension will be restored to the Participant's program term in the case of death or incapacity, or if the firm requested prior approval and waited 60 days for SBA approval.</p> <p>(5) A change in ownership does not provide the new owner(s) with a new 8(b) BD program term. For example, if a participant is awarded a contract for 3 years when a change in ownership occurs, the new owner will have four years remaining until program graduation.</p>

38 CFR 74	13 CFR 125	13 CFR 124 [8(a) Business Development]
<p>(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.</p>	<p>(SBA applies 124.105(k) here.)</p>	<p>(k) 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 (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington and Wisconsin), SBA considers applicable state community property laws. If only one spouse claims disadvantaged status, that spouse's ownership interest will be considered unconditionally held only to the extent it is vested by the community property laws. A transfer or relinquishment of interest by the non-disadvantaged spouse may be necessary in some cases to establish eligibility.</p>
<p><b>74.4 Control</b></p>	<p><b>125.10 Control</b></p>	<p><b>124.106 8(a) Control</b></p>
<p>(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.</p>	<p>a) General. To be an eligible SDVO SBC, the management and daily business operations of the concern must be 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). Control by one or more service-disabled veterans means that both the long-term decisions making and the day-to-day management and administration of the business operations must be conducted 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).</p>	
<p>(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.</p>	<p>(b) Managerial position and experience. A service-disabled veteran (or in the case of a service-disabled veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran) must hold the highest officer position in the concern (usually President or Chief Executive Officer) and must have managerial experience of the extent and complexity needed to run the concern. The service-disabled veteran manager (or in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran) need not have the technical expertise or possess the required license to be found to control the concern if the service-disabled veteran can demonstrate that he or she has ultimate managerial and supervisory control over those who possess the required licenses or technical expertise.</p>	<p>Control is not the same as ownership, although both may reside in the same person. SBA 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 disadvantaged individuals, except for concerns owned by Indian tribes, ANCs, Native Hawaiian Organizations, or Community Development Corporations (CDCs). ( See §§124.109, 124.110, and 124.111, respectively, for the requirements for concerns owned by Indian tribes or ANCs, for concerns owned by Native Hawaiian Organizations, and for CDC-owned concerns.) Disadvantaged individuals managing the concern must have managerial experience of the extent and complexity needed to run the concern. A disadvantaged individual 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-disadvantaged individual having an equity interest in the applicant or Participant firm, the non-disadvantaged individual may be found to control the firm.</p>

38 CFR 74	13 CFR 125	13 CFR 124 (8)(a) Business Development!
<p>(c)(1) An applicant or participant must be controlled by one or more veterans or service-disabled veterans who possess requisite management capabilities. Owners need not work full time but must show sustained and significant time invested in the business. An owner engaged in employment or management outside the applicant concern must submit a written statement supplemental to the application which demonstrates that such activities will not have a significant impact on the owner's ability to manage and control the applicant concern. Applications from joint-ventures are exempt from the requirement to submit a supplemental written statement.</p> <p>(2) An eligible full-time manager must hold the highest officer position (usually President or Chief Executive Officer) in the applicant or participant.</p> <p>(3) One or more veterans or service-disabled veteran owners who manage the applicant or participant (B) One or more veterans or service-disabled veterans who manage the applicant or participant must devote full-time to the 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 (B) firm, and not to firms in which the disadvantaged individual has an ownership interest.</p> <p>(4) Except as provided in paragraph (f)(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.</p>	<p>SBA's regulations do not require full time devotion. However, SBA's regulations do require control of the daily business operations. While outside employment is not a bar to eligibility, excessive oversight or substantial delegation of control is not demonstrative of control of the daily business operations. Partner, SBA website 808 to 33CFR 124 (8)(a)(5) for guidance in determining whether a firm was controlled by service-disabled veterans.</p>	<p>(a) An applicant or participant must be managed on a full-time basis by one or more disadvantaged individuals who possess requisite management capabilities.</p> <p>(2) A disadvantaged full-time manager must hold the highest officer position (usually President or Chief Executive Officer) in the applicant or participant and be physically located in the United States.</p> <p>(3) One or more disadvantaged individuals 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 (B) firm, and not to firms in which the disadvantaged individual has an ownership interest.</p> <p>(4) Any disadvantaged manager who wishes to engage in outside employment must notify SBA of the nature and anticipated duration of the outside employment and obtain the prior written approval of SBA. SBA will deny a request for outside employment which could conflict with the management of the firm or could hinder it in achieving the purpose of its development program.</p> <p>(5) Excess or partial oversight or substantial delegation of control is not demonstrative of control of the daily business operations, regardless of how quickly or easily the right could be exercised.</p>
<p>(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.</p>	<p>(c) Control over a partnership. In the case of a partnership, 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 serve as general partners, with control over all partnership decisions.</p>	<p>(b) In the case of a partnership, one or more disadvantaged individuals must serve as general partners, with control over all partnership decisions. A partnership in which no disadvantaged individual is a general partner will be ineligible for participation.</p>
<p>(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.</p>	<p>(d) Control over a limited liability company. In the case of a limited liability company, one or more service-disabled veterans (or in the case of a veteran with permanent or severe disability, the spouse or permanent caregiver of such veteran) must serve as managing members, with control over all decisions of the limited liability company.</p>	<p>(c) In the case of a limited liability company, one or more disadvantaged individuals must serve as management members, with control over all decisions of the limited liability company.</p>
<p>(f) One or more veterans or service-disabled veterans must control the board of directors of a corporate applicant or participant.</p>	<p>(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. Service-disabled veterans are considered to control the board of directors when either:</p>	<p>(d) One or more disadvantaged individuals must control the Board of Directors of a corporate applicant or participant.</p>

<p><b>38 CFR 74</b></p> <p>(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; provided, the veteran is not a non-veteran director of the applicant or participant; or                      (ii) A single veteran owns at least 51 percent of all voting stock of an applicant or participant, the veteran is not a non-veteran director of the applicant or participant, and the veteran is the sole shareholder of the applicant or participant; 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, such 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 have made enforceable arrangements to permit one of them to vote the stock of all as a block without a supermajority voteable requirements.</p>	<p><b>13 CFR 125</b></p> <p>(1) One of more service-disabled veterans own at least 51% of all voting stock of the concern, are on the Board of Directors and have the percentage of voting stock necessary to overcome any super majority voting requirements.                      (2) Service-disabled veterans comprise the majority of voting directors through actual numbers or, where permitted by state law, through weighted voting.                      (3) A follows 134.106(f)(2) here, however, (f)(1) has precedence over (f)(2).                      (4) 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.</p>	<p><b>13 CFR 124.18(a) Business Development</b></p> <p>(1) SBA will deem disadvantaged individuals to control the Board of Directors where:                      (i) A single disadvantaged individual owns 100% of all voting stock of an applicant or Participant concern; the individual is on the Board of Directors and no super majority voting requirements exist for shareholders to approve incorporation actions. Where super majority voting requirements are provided for in the concern's articles of incorporation, by-laws, or by state law, the disadvantaged individual must own at least the percent of the voting stock needed to overcome any such super majority voting requirements; or                      (ii) More than one disadvantaged 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 for shareholders to approve incorporation actions, and the disadvantaged shareholders 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 disadvantaged shareholders must own at least that percentage of voting stock needed to overcome any such super majority ownership requirements.</p>
<p>(1) One of more service-disabled veterans own at least 51% of all voting stock of the concern, are on the Board of Directors and have the percentage of voting stock necessary to overcome any super majority voting requirements.                      (2) Service-disabled veterans comprise the majority of voting directors through actual numbers or, where permitted by state law, through weighted voting.                      (3) A follows 134.106(f)(2) here, however, (f)(1) has precedence over (f)(2).                      (4) 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.</p>	<p>(1) SBA will deem disadvantaged individuals to control the Board of Directors where:                      (i) A single disadvantaged individual owns 100% of all voting stock of an applicant or Participant concern; the individual is on the Board of Directors and no super majority voting requirements exist for shareholders to approve incorporation actions. Where super majority voting requirements are provided for in the concern's articles of incorporation, by-laws, or by state law, the disadvantaged individual must own at least the percent of the voting stock needed to overcome any such super majority voting requirements; or                      (ii) More than one disadvantaged 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 for shareholders to approve incorporation actions, and the disadvantaged shareholders 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 disadvantaged shareholders must own at least that percentage of voting stock needed to overcome any such super majority ownership requirements.</p>	<p>(2) Where an applicant or Participant does not meet the requirements set forth in paragraph (f)(1) of this section, the disadvantaged individuals 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 disadvantaged and the other is not, the disadvantaged individual must own at least 50% of the votes for the concern to be eligible for (f)(a) participation). 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.</p>
<p>(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.</p>	<p>(3) Non-voting, advisory, or honorary directors may be appointed without affecting disadvantaged 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.</p>	<p>(3) Non-voting, advisory, or honorary directors may be appointed without affecting disadvantaged 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.</p>
<p>(6) 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:</p>	<p>(6) Non-disadvantaged individuals may be involved in the management of an applicant or Participant, and may be stockholders, partners, limited liability members, officers, and/or directors of the applicant or Participant. However, no non-disadvantaged individual or immediate family member may:</p>	<p>(6) Non-disadvantaged individuals may be involved in the management of an applicant or Participant, and may be stockholders, partners, limited liability members, officers, and/or directors of the applicant or Participant. However, no non-disadvantaged individual or immediate family member may:</p>
<p>(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</p>	<p>(2) Be a former employer or a principal of a former employer of any disadvantaged owner of the applicant or Participant, unless it is determined by the AADBD that the relationship between the former employer or principal and the disadvantaged 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 8(a) (B) firm; or</p>	<p>(2) Be a former employer or a principal of a former employer of any disadvantaged owner of the applicant or Participant, unless it is determined by the AADBD that the relationship between the former employer or principal and the disadvantaged 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 8(a) (B) firm; or</p>

38 CFR 74	13 CFR 125	13 CFR 124 [8(a) Business Development]
<p>(b) 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.</p>	<p>(b) Non-disadvantaged individuals who transfer majority stock ownership or control of the firm to an immediate family member within two 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.</p>	<p>(f) Non-disadvantaged individuals 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:</p> <p>(1) Non-veterans control the board of directors of the applicant or participant, either directly through majority voting memberships, 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.</p> <p>(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.</p>
<p>(c) 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:</p> <p>(1) Non-veterans control the board of directors of the applicant or participant, either directly through majority voting memberships, 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.</p> <p>(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.</p>	<p>(g) Non-disadvantaged individuals 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:</p> <p>(1) In circumstances where an applicant or participant seeks to establish disadvantaged control of the Board of Directors through paragraph (d)(2) of this section, non-disadvantaged individuals control the Board of Directors of the applicant or participant, either directly through majority voting membership, or indirectly, where the by-laws allow non-disadvantaged individuals effectively to prevent a quorum or block actions proposed by the disadvantaged individuals.</p> <p>(2) A non-disadvantaged individual 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-disadvantaged individual significantly to influence business decisions of the Participant.</p>	<p>(g) Non-disadvantaged individuals 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:</p> <p>(1) In circumstances where an applicant or participant seeks to establish disadvantaged control of the Board of Directors through paragraph (d)(2) of this section, non-disadvantaged individuals control the Board of Directors of the applicant or participant, either directly through majority voting membership, or indirectly, where the by-laws allow non-disadvantaged individuals effectively to prevent a quorum or block actions proposed by the disadvantaged individuals.</p> <p>(2) A non-disadvantaged individual 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-disadvantaged individual significantly to influence business decisions of the Participant.</p>
<p>(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.</p>	<p>(3) A non-disadvantaged individual or entity controls the applicant or participant or an individual disadvantaged owner through loan arrangements. Providing a loan guaranty on commercially reasonable terms does not, by itself, give a non-disadvantaged individual or entity the power to control a firm.</p>	<p>(3) A non-disadvantaged individual or entity controls the applicant or participant or an individual disadvantaged owner through loan arrangements. Providing a loan guaranty on commercially reasonable terms does not, by itself, give a non-disadvantaged individual or entity the power to control a firm.</p>
<p>(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.</p>	<p>(4) Business relationships exist with non-disadvantaged individuals or entities which cause such dependence that the applicant or participant cannot exercise independent business judgment without great economic risk.</p>	<p>(4) Business relationships exist with non-disadvantaged individuals or entities which cause such dependence that the applicant or participant cannot exercise independent business judgment without great economic risk.</p>
<p>(5) 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:</p> <p>(1) Non-veterans control the board of directors of the applicant or participant, either directly through majority voting memberships, 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.</p> <p>(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.</p>	<p>(5) Non-disadvantaged individuals 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:</p> <p>(1) In circumstances where an applicant or participant seeks to establish disadvantaged control of the Board of Directors through paragraph (d)(2) of this section, non-disadvantaged individuals control the Board of Directors of the applicant or participant, either directly through majority voting membership, or indirectly, where the by-laws allow non-disadvantaged individuals effectively to prevent a quorum or block actions proposed by the disadvantaged individuals.</p> <p>(2) A non-disadvantaged individual 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-disadvantaged individual significantly to influence business decisions of the Participant.</p>	<p>(h) Notwithstanding the provisions of this section requiring a disadvantaged owner to control the daily business operations and long-term strategic planning of an 8(a) BD Participant, where a disadvantaged individual upon whom eligibility is based is a reserve component member in the United States military who has been called to active duty, the Participant may elect to designate one or more individuals to control the Participant on behalf of the disadvantaged individual during the active duty call-up period. If such an election is made, the Participant will continue to be treated as an eligible 8(a) Participant and no additional time will be added to its program term. Alternatively, the Participant may elect to suspend its 8(a) BD participation during the active duty call-up period pursuant to §§124.305(b)(1)-(4) and 124.305(h)(4).</p>

Subcommittee on Contracting and Workforce, Committee on Small Business  
Subcommittee on Oversight and Investigations, Committee on Veterans' Affairs  
Hearing: ***"Consistently Inconsistent: Challenges for Service-Disabled Veteran-  
Owned Small Businesses"***  
March 19, 2013

**Questions for the Record – Tom Leney, Department of Veterans Affairs**

1. **The Small Business Act defines a small business concern as “one which is independently owned and operated and which is not dominant in its field of operation” and the SBA Administrator is to use those factors to establish “detailed definitions or standards by which a business concern may be determined to be a small business concern for the purposes” of the Small Business Act or any other Act. This establishes that ownership and control are two of the three key concepts relevant to determining whether a firm is a small business. The third factor is addressed through the size standards. While the size standards themselves are simple enough to assess and know when they should be referred to SBA, the ownership and control issues are more difficult and go to the heart of all SBA determinations. However, Mr. Leney testified “we do not do size determinations in the VA. Our policy is all size determinations are referred to the SBA . . . we do not determine size. We look at ownership and control.” Does VA, as required by the Small Business Act, refer questions of ownership and control to SBA, or does VA make ownership and control determinations itself?**

**VA Response:** SBA size determinations primarily address the business revenue or number of employees of the concern consistent with the applicable small business size standard. SBA size determinations also can address affiliation. For example, if two concerns are affiliates of one another, that can lead to combining the revenues of the two firms for purposes of the size determination. Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists. 13 CFR § 121.103(a). Even SBA has a separate regulatory provision addressing ownership and control for service-disabled Veteran-owned small businesses (SDVOSB) status with respect to the government-wide SDVOSB program established by 15 U.S.C. § 657f. See 13 CFR § 125.9 and § 125.10. In accordance with 38 U.S.C. 8127(f)(4), the Department of Veterans Affairs (VA) is charged with maintaining a database of Veteran small businesses and determining whether the small business concern is owned and controlled by veterans or a veteran with a service-connected disability. VA's Center for Veterans Enterprise (CVE) examines a number of required documents to determine if an applicant is compliant with the ownership and control portions of 38 Code of Federal Regulations (C.F.R.) Part 74. A certain amount of overlap exists on the control issue. However, the simple fact

remains that SBA makes size determinations and VA makes veteran-owned small business status determinations. The two agencies may differ on a particular finding of control due to the vagaries of their respective regulations. SBA internally differs sometimes on a finding of control with respect to SDVOSB size and status determinations because of regulatory differences.

2. **VA has compared its verification process with the SBA's 8(a) business development process. However, for SBA to certify a firm as an 8(a) participant, SBA must concurrently determine that the firm is a small business as part of the determination as to who owns and controls the firm, and whether the ownership and control are vested in a socially and economically disadvantaged individual. How does VA address this dual line of inquiries?**

**VA Response:** Unlike the 8(a) program, the VA verification program is not a business development program, so business development counseling is not a part of the process. However, the two programs share the same responsibility of determining ownership and control of the business. The VA verification program confirms that the owner is a Veteran or service-disabled Veteran and then confirms that the business is owned and controlled by the eligible Veteran. If VA's examination identifies that the applicant may not be a small business, the application is referred to SBA for a size determination. Before VA begins to examine the business for ownership and control, a determination is made on the Veteran status of all owners. This is done by checking the Beneficiary Identification and Records Locator Subsystem (BIRLS) to check that the owner is a Veteran, the character of service must be other than dishonorable, and if the Veteran has a service-connected disability, if claimed on the VA Form 0877 application. If the Veteran is not in the BIRLS system, CVE contacts the Veteran and asks for the DD-214 and the Department of Defense disability rating documentation, if Service-Disabled Veteran-Owned Small Business (SDVOSB) status is claimed.

When CVE examines the documentation for ownership and control, they also look at the company's financial information, as well as the Online Representations and Certifications Application profile to ensure that the firm is small in at least one of its listed North American Industry Classification System (NAICS) codes from the Vendor Information Pages (VIP) profile. If the firm's revenues indicate that the firm may be other than small in all of the listed NAICS codes, CVE makes a referral to SBA for a size determination.

3. **VA's procurement regulations (48 C.F.R. § 819.307) state that "For acquisitions under the authority of subpart 819.70, upon execution of an interagency agreement between VA and the SBA pursuant to the Economy Act (31 U.S.C. 1535), regarding service-disabled veteran-owned or veteran-owned small business status, contracting officers shall forward all status protests to the Director, Office of Government Contracting (D/GC), U.S. Small Business Administration (ATTN: VAAR Part 819 SDVOSB/VOSB**

**Small Business Status Protests), 409 3rd Street, SW., Washington, DC 20416, for disposition.” This regulation was promulgated December 8, 2009. What is the status of this interagency agreement?**

**VA Response:** VA and SBA drafted an interagency agreement in November 2010 for Veteran-Owned Small Business (VOSB)/SDVOSB status protests to be performed by SBA, but the agreement was never finalized due to a determination that using SBA would be more costly than performing the status protests within VA. At that time, VA was averaging about 40 protests per year. SBA gave VA a quote of \$1,049,308 to perform status protests for fiscal year (FY) 2011. In FY 2011, the Verification Act (Public Law 111-275, Section 104) had just been passed as an unfunded mandate. VA needed to implement the law in the most cost effective fashion and determined that continuing to process the 40 protests per year within VA would be more cost effective than paying SBA to do this work.

The cost of continuing the adjudicating of status protests within VA is approximately \$198,277 per year, based on 60 protests submitted each year.

- 4. The recent Court of Federal Claims decision in Miles Construction, LLC v. United States, No. 12-597C (Fed. Cl. 2013) found that the appeals process currently provided by VA to violate the Administrative Procedures Act. How does VA intend to address or modify its practices?**

**VA Response:** Going forward, VA shall provide the protested party the opportunity to respond to any issues independently raised by VA during a status protest prior to making a final determination.

- 5. While the Miles decision addressed appeals at the time of contract award, during the hearing Mr. Leney stated “our request for reconsideration is not an appeal process. If [SDVOSBs] need to appeal, they come to me and say, ‘We think a mistake has been made.’ Our Office of General Counsel makes a determination was a mistake made? If we determine, and in less than 2 percent of the cases was there a mistake, we then allow them to do what I call a Second Chance Program.” Mr. Leney later clarified that as “a point of fact. The Office of General Counsel does not handle appeals. The Office of General Counsel, we utilize in our request for reconsideration. And I want to be very clear that that is not an appeals process. That is a second chance process. Actually, appeals come to me.” If initial decisions and appeals are being made by the same body, does VA believe that this appellate process meets the requirements of the Administrative Procedures Act?**

**VA Response:** VA’s verification and status protest processes were promulgated pursuant to notice and comment rulemaking in the Federal Register; therefore, VA regulations meet the requirements of the Administrative Procedures Act. If the question is directed towards verification of initial determinations and Requests for

Reconsideration being decided by Director, CVE, this is similar to SBA's 8(a) Program. See 13 CFR § 124.204 and § 124.205.

- 6. Why does VA not publish its appellate decisions? Mr. Leney stated, "I have no objection to making the results of those appeals public." When will VA begin to make its appeals public?**

**VA Response:** As stated in question 5, the Request for Reconsideration is not an appeal, and there is no provision for appeals for VA VOSB status protests. Appeals occur only in response to a Notice of Verified Status Cancellation (38 CFR § 74.22(e)). VA has no objection to publishing the final administrative determination provided in response to request for consideration, subject to any restrictions associated with Federal information security and privacy laws and regulations, and will begin doing so as soon as practicable.

- 7. In Morton v. Ruiz, 415 U.S. 199 (1974), the Supreme Court stated that the "Administrative Procedure Act was adopted to provide, inter alia, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations." Does VA believe its current appellate process meets that requirement?**

**VA Response:** VA's verification and status protest regulations were promulgated pursuant to notice and comment rulemaking in the Federal Register. As set forth in that rulemaking, we believe the current process meets all APA requirements.

- 8. In the letter from John Shoraka included on page 56 of the Government Accountability Office (GAO) Report, Veteran-Owned Small Businesses: Planning and Data System for VA's Verification Program Need Improvement (2013) (GAO-13-95), SBA states that there are statutory, procedural and interpretive differences between the Small Business Administration (SBA) government wide contracting program for service-disabled veteran-owned small businesses and the Department of Veterans Affairs (VA) SDVOSB program. Specifically, the letter cites the disparate treatment of surviving spouses as the statutory difference between the programs; the protest process as the procedural difference between the programs; and concludes that "while it is true that the wording of the regulations is similar, there are some key differences in interpretations." First, do you agree with this assessment? Second, please enumerate and explain:**

- a. Any other statutory differences between the programs;
- b. Any differences between 13 C.F.R. §§ 125.8 – 125.29 and 38 C.F.R. § 74;
- c. Any differences between 13 C.F.R. § 124 and 38 C.F.R. § 74;

- d. Any interpretative differences between the VA and SBA programs, including which differences VA considers key; and
- e. Why SBA's Office of Hearings and Appeals believes that SBA would have decided the following cases differently than VA, and how these differences are being reconciled:
  - i. Size Appeal of Chu & Gassman, Inc., SBA No. SIZ-5394 (2012);
  - ii. Size Appeal of Chu & Gassman, Inc., SBA No. SIZ-5344 (2012);
  - iii. Size Appeal of EarthCare Solutions, Inc., SBA No. SIZ-5183 (2011);
  - iv. Size Appeal of Specialized Veterans, LLC, SBA No. SIZ-5138 (2010);
  - v. Size Appeal of A1 Procurement, LLC, SBA No. SIZ-5121 (2010);
  - vi. Size Appeal of J.M. Waller Associates, Inc., SBA No. SIZ-5108 (2010);
  - vii. Size Appeal of DooleyMack Government Contracting, LLC, SBA No. SIZ-5086 (2009);
  - viii. Size Appeal of DooleyMack Government Contracting, LLC, SBA No. SIZ-5085 (2009);
  - ix. Size Appeal of Blue Cord Construction, Inc., SBA No. SIZ-5077 (2009);
  - x. Size Appeal of Taylor Consultants, Inc., SBA No. SIZ-5049 (2009);
  - xi. Size Appeal of Heritage of America, LLC, SBA No. SIZ-5017 (2008);
  - xii. Size Appeal of Mission Solutions, Inc., SBA No. SIZ-4828 (2006);
  - xiii. Size Appeal of B & M Construction, Inc., SBA No. SIZ-4805 (2006); and
  - xiv. Size Appeal of Catapult Technology, Ltd., SBA No. SIZ-4795 (2006).

**VA Response:** VA largely follows equivalent interpretations of SBA SDVOSB status determinations with limited differences. A second statutory difference is that VA's 38 United States Code (U.S.C.) § 8127 program creates set-aside authority for VOSBs in addition to SDVOSBs. Also, VA's statute establishes priority for SDVOSBs and then VOSBs over other small business set-aside programs. With respect to the list of cases presented, these are all size appeals cases. Determinations of small business size are the exclusive province of the SBA, 15 U.S.C. § 632(a)(2), therefore, VA would not make a different determination since it refers all size determinations to the SBA.

9. Does VA recognize their SDVOB certification process is problematic? Are you concerned that because certification is so stringent, it is keeping legitimate businesses from being able to compete for VA contracts? Is it a priority of VA's to streamline and expedite this process, as well as make it more user-friendly?

**VA Response:** The rigorous nature of the program has greatly reduced the risk of ineligible firms taking advantage of an important benefit Congress created for VOSB, a concern expressed by the House Veterans' Affairs Committee, VA's Office of Inspector General, and the Government Accountability Office (GAO). To reduce processing times, VA thoroughly examined the verification process and made dramatic changes to streamline the process, decreasing initial application processing from over 130 days in July 2011 to fewer than 40 days in February 2013, against a regulatory processing target of 60 days. VA seeks continual improvement in the program to make it easier for VOSBs to become eligible while preventing ineligible firms from taking advantage of Veterans First contracts. Examples of this are the launch of the Pre-Determination Findings (PDF) program and the elimination of transfer restrictions as a reason for denial of an application. In addition, our Verification Assistance Program seeks to educate Veteran business owners on what is required in the regulation for their business to be compliant prior to the submission of an application. VA believes that a better prepared applicant, along with giving Veterans the opportunity to address issues with their documentation that would make their firm ineligible, prior to initial determination, will enable both reduced application times and a reduction in the number of applications denied. As the PDF program will not fully launch until May 1, VA does not have data to show its impact. To date, however, the VA Verification Assistance Program has increased the approval rate on initial applications from 58 percent at the end of FY 2012 to 72 percent in February 2013.

Currently, less than one-third of the verified firms in VIP do business with VA, yet VA spends more of its procurement dollars with VOSBs than the rest of the civilian agencies combined. In FY 2012, VA spent \$3.8 billion (22 percent) with VOSBs, and over 19 percent with SDVOSBs. A thorough analysis of the ownership and control portions of VA and SBA regulations found that VA's requirements are no more stringent than SBA's requirements. The biggest difference is that per statute, VA does an examination of the business rather than relying on self-certification.

**10. As Congresswoman Herrera Beutler mentioned her opening statement, a copy of which is attached, there is a veteran business owner in her district who has been attempting to get certified with VA for almost four years. He has a rating's letter issued by the VA indicating he has a service connected disability, but is still not officially recognized by the Department of Veteran Affairs as a SDVOB. Then, after years of sending in information, he received a letter in January requesting more information on his operating agreement. The letter, in a very vague way indicated the operating agreement between him and his partner was an issue, but gave no suggestions or guidance on how to correct the problem. I understand the VA has said of the firms found not to qualify, only about 2% are turned down for reasons of fraud. That means 98% are turned down for structural reasons. What does that say about the program? Are you satisfied with**

**the effectiveness, efficiency, and accuracy of the VA's certification process?**

**VA Response:** The fact that the vast majority of applicants that are denied are due to not being compliant with the regulation rather than fraud shows that fraud may not be as prevalent in the SDVOSB program as has been speculated in reports and the media. It also indicates that the program is having a desirable deterrent effect on those who would consider misrepresenting their status. Metrics on the verification process show that it has a high degree of effectiveness, efficiency, and accuracy. The hurdle remains that VA must implement the regulation that exists now, and that regulation is not compatible with all business types or practices. For example, the current regulation makes it very difficult for businesses to obtain equity funding. VA recognizes this and has begun a process to rewrite the regulation. The Notice of Proposed Rule Making was published in the Federal Register May 13, 2013. VA began its outreach to stakeholders in mid-FY 2012, and has collected many suggestions worth consideration for the new rule. VA's intention is to gather as much input as possible from stakeholders to consider when drafting the rule. VA also intends to work closely with SBA on the rule change, since the current rules are essentially the same concerning ownership and control. We, therefore, need to ensure that unintended differences do not occur.

**11. Are the SBA and VA planning to align their certification processes to eliminate confusion for veterans when certifying as a SDVOB?**

**VA Response:** VA and SBA have been collaborating on aligning determinations for consistency between the programs. As VA's verification program was instituted by statute, the only way that VA verification process and SBA SDVOSB processes could be completely aligned would be to create a statute for government-wide verification or certification for SDVOSBs.

**12. Most of the work at the Center for Veterans Enterprise (CVE) is performed by contractors. What kind of qualifications, in terms of educational background or past job experience, must these staffers have in order to be hired for this job?**

**VA Response:** It is important to note that the contractors supporting the verification program operate under the oversight and quality control of Federal employees during every phase of CVE operations. All determinations are made by Federal staff.

Our Federal staff have the following credentials:

Percent w/audit background	60%
Percent w/Inspector General experience	33%
Percent w/Law degree or legal experience	33%
Percent w/Business degree	53%

Percent who were/are business owners 40%

CVE has established contractor parameters that focus recruitment of contractors on those personnel with business and legal education and experience, as well as those with experience with bank examinations, financial audits, or previous Inspector General experience.

**13. The ratio of federal employees to contractors is as high as 1 to 24. In some departments such as verification special actions and legal subject matter expert, the system is completely reliant on contractors. With discretionary spending accounts being cut as a result of sequester, shouldn't VA become less reliant on their contractors?**

**VA Response:** Contractors supplement Federal staff. The use of contractors has enabled CVE to ramp up its operations and to reduce processing time significantly. Replacing contractors with Federal staff would result in a less flexible response to changes and increases in verification requirements. CVE focus has been on ensuring that the processes and standards are clear and that all staff are competent to perform their function, regardless of type of staff. VA is grateful for the work of the Administration and Congress that exempts VA from sequestration. Although we are exempt from sequestration, our everyday process of finding ways we can operate more effectively and efficiently continues so that we can get the most value out of every taxpayer dollar.

In order to process the volume of applications received in an efficient and accurate manner, VA must rely on the ability to quickly obtain the expertise for the work via contractors. This also allows VA the ability to increase or decrease certain skill sets as the program matures without the extended time it takes to bring on additional Federal staff, and then to eliminate Federal positions if that skill set is no longer needed.

**a. There have been questions raised by many whether contractors should even be performing work of this nature as some have deemed it to be inherently governmental or, at the very least, a conflict of interest. How do you justify VA's use of contractors?**

**VA Response:** All verification determinations are made by Federal employees, as these are inherently governmental in nature. Contractors are used to perform clerical duties, process applications, and make recommendations that are reviewed by Federal employees in making an agency determination.

**b. What controls do you have in place to ensure that there is no improper use of applicant information by the contractors?**

**VA Response:** Not only are all contractors screened per VA directives prior to working for VA, they also are required to sign a non-disclosure agreement. VA monitors the activities of contractors to ensure that there is no improper use of

applicant information. Any improper use of applicant information is grounds for immediate dismissal.

**c. How does VA's reliance on contractors compare with SBA's approach to verification in other programs?**

**VA Response:** Although similar in their roles, the verification program run by VA differs from SBA's approach in application. SBA verification teams are regionally distributed and review business cases in their respective geographic areas. VA conducts its operations from the VA headquarters location in Washington, DC. Because the numbers of cases evaluated by SBA are orders of magnitude smaller than processed by VA, SBA relies entirely on Federal employees to review businesses. With a significantly larger number of cases and correspondingly larger workforce required, VA utilizes contract employees under the oversight and quality control of Government employees to conduct its verification operations.

**14. Given the law it seems that VA is acting outside of their authority as defined in Public Law 109-461 in making decisions regarding affiliations and sizes as they relate to a totality of circumstances regarding control. Can you please explain this?**

**VA Response:** VA acts wholly within the parameters of Title 38 and all applicable laws. VA makes no final determinations of size as those determinations are the exclusive province of SBA. Affiliation is a concept associated with size determinations. See 13 CFR § 121.103. If during a verification examination an applicant firm's revenues indicate that the firm may be other than small in all of its listed NAICS codes, CVE makes a referral to SBA for a size determination.

**15. CVE has about twenty-eight full-time equivalent federal employees and one hundred seventy-four contractors, with between \$24 to \$33 million dollars in funding coming from the supply fund. Why has VA not formalized a more appropriate and transparent funding methodology for CVE?**

**VA Response:** Funding the Office of Small and Disadvantaged Business Utilization (OSDBU) through the Supply Fund has always been an appropriate use of the funding source. OSDBU activities, including the verification program, directly support VA acquisition programs. The Supply Fund is a self-supporting revolving fund. It recovers its operating expenses through fees on approximately 30 different products or services. The Fiscal Office is responsible for all elements of financial management of the Supply Fund, including financial reporting, budgeting, accounting operations and oversight, business line oversight, and financial services programs. The Supply Fund's inherent flexibility makes it possible to be responsive to increases in verification requirements. In addition, the Supply Fund has made it possible to quickly implement direction

received from VA senior leadership. The budget for CVE is transparent and VA has responded to all requests for information regarding budgets and spending.

**16. CVE collects a lot of information outside of its original mandate. How is it protecting this personally identifiable data?**

**VA Response:** CVE does not collect information outside of its mandate. Any information, including Personal Identifiable Information (PII) collected is for the purpose of verification. PII is maintained in the Office of Management and Budget approved system of records (VetBiz Registry). This system of records is managed by VA's Office of Information Technology in accordance with all Federal information security and privacy policies. Additionally, all PII and sensitive information is handled on a need to know basis.

**17. When will CVE's updated system be operational so as to provide relevant, reliable information to run and control its operations? Is CVE tying this effort to long range goals?**

**VA Response:** A contract award to provide design and development of the Veterans Enterprise Management System (VEMS), formerly Next Generation Verification Case Management System, is projected for May 2013. The first increment release is scheduled for deployment into operation in mid-November 2013. The upgrade is part of the OSDBU Strategic Plan.

**18. Given that GAO's report that stated "VA's guidance for applicants did not always adequately explain how they interpreted some of the subjective eligibility standards in its regulations, such as the requirements that owners have good character." Is this enough evidence for CVE to realize that they must use 13 C.F.R. § 121's interpretive language in Title 38?**

**VA Response:** 13 CFR Part 121 applies expressly to size determinations. By statute, SBA is the only agency authorized to make small business size determinations.

**19. Do you have mechanisms in place to ensure that errors in the application process with the Center for Veterans Enterprise (CVE) are identified?**

**VA Response:** CVE has robust and well-developed quality control mechanisms to identify errors within the application process. Under Federal employee supervision, a dedicated quality control team oversees every step of the application process and conducts monthly audits of policies and procedures to minimize error and identify anomalies. In addition, CVE has incorporated quality review check points throughout the verification process. Extensive metrics and measurements are analyzed to identify and highlight trends, process errors, or critical issues. These metrics, measurements, and trends are reviewed regularly by CVE and OSDBU leadership. Additionally, cases which present special

challenges, or where applicants request a reconsideration, are evaluated by VA's Office of General Counsel in order to provide a separate level of independent review.

**20. Why has the VA failed to implement a cohesive strategy when it comes to the verification program?**

**VA Response:** VA currently has a strategic plan for verification as part of the OSDBU strategic plan. This was recently culled from various strategic directives into a single document, and now expanded to cover a 5-year period. It is currently going through a concurrence process and will be publicly released once finalized and approved by VA senior leadership. VA has had a strategy for improving verification that established priorities and allocated resources to the immediate needs prior to longer term objectives. In order to respond to significant problems associated with the verification process and quality, the first steps in the strategy were to establish clearly defined procedures, put into place quality control checks, and add resources to meet immediate demand. Verification operations and processes were evaluated and completely overhauled to become efficient and accurate. With mission critical operations brought to a stable point, long-term planning for future contingencies has commenced.

**21. Mr. Leney stated during the hearing that he runs both the CVE and is the Director of the Office of Small and Disadvantaged Business Utilization (OSDBU) at VA. During the hearing, Chairman Hanna asked Mr. Leney how VA is complying with the Small Business Act, given that Section 15(k) of the Small Business Act specifically directs that the OSDBU Director "shall carry out exclusively the duties enumerated in this Act, and shall, while the Director, not hold any other title, position, or responsibility, except as necessary to carry out responsibilities under" Section 15(k). He further inquired as to how Mr. Leney may be the advocate for service-disabled veteran-owned small businesses at the same time that he is tasked with verification. Mr. Leney responded: "I can do both because the act of verifying veteran-owned small businesses enabled 5,400 veteran-owned small businesses to participate in a program that has distributed more than \$3.8 billion in procurement dollars to veteran-owned small businesses. So I think that this program that the VA has established has created a gold standard. In the federal government, when people know that a firm has been verified by the VA, they can take it to the bank. And the results, this is real money to real vets, and it is a program that benefits veterans. And there are 5,400 firms in this program that get those benefits. So I personally do not have any issue with a conflict of interest because we are helping vets." Chairman Hanna then asked Mr. Leney to show the Committees where in the statute it is permitted, and Mr. Leney committed to provide a complete answer for the record. Therefore:**

**a. Please provide any statutory language that permits the VA OSDBU Director to also serve as the manager of the CVE.**

**VA Response:** VA has unique legislation in support of meeting VOSB and SDVOSB procurement goals as required under section 644(a) and (g) of title 15. This legislation is found in section 8127 of title 38. CVE is one component of OSDBU. The Executive Director is not the manager of CVE. CVE is managed by the Director, CVE, a GS-15 supervisory position, who reports to Executive Director, Office of Small and Disadvantaged Business Utilization, SES position.

The Executive Director, OSDBU, implements and executes all of the functions and duties of the office under section 644 and 637 of title 15 of the United States Code with respect to VA. Included in these duties are: developing strategies to assure that a fair proportion of the total purchases and contracts for property and services for VA in each industry category are placed with small-business concerns pursuant to sections 637(d)(1) and 644(a)(3), reporting on goal achievement for all socio-economic categories, contract bundling reviews, subcontracting plan reviews, training for small business owners and acquisition professionals, as well as small business support functions as directed in Public Law 106-50. One avenue to increase the number of awards to small businesses, specifically SDVOSB/VOSBs, is the verification program established by 38 U.S.C. § 8127.

**b. Please explain why Mr. Leney is capable of managing the day to day operations of two different enterprises, but CVE will not allow SDVs to own and control two SDVOSBs.**

**VA Response:** Mr. Leney manages a single office: OSDBU. CVE is an organization within OSDBU. The Director, CVE, manages the day to day operations of CVE. The placement of CVE within OSDBU is not a conflict of interest, in that VA verification provides firms with access to opportunities that would not be available to them if they were not verified. As such, this is an avenue that VA uses to increase awards to VOSBs that is borne out in VA's contracting accomplishments. VA awards more contract dollars to SDVOSBs than the rest of the civilian agencies combined.

When the final rule for verification was published on January 19, 2011, the requirement that a Veteran could have only a single business verified at a time was eliminated. There is no restriction on owning multiple VOSBs.

**c. By stating that "when people know that a firm has been verified by the VA, they can take it to the bank," is Mr. Leney suggesting that agencies other than VA should be relying on VA verification?**

**VA Response:** Mr. Leney was not suggesting that agencies other than VA should be relying on VA SDVOSB Verification. He was addressing the quality of the verification process at VA and referring to anecdotal evidence that shows that

contracting officers feel that VA SDVOSB verification is a factor in reducing the risk of contracting with SDVOSB.

**22. During the hearing, Mr. Leney stated that SBA would charge VA \$1 million to verify 40 SDVOSBs. Please provide the basis for this amount, including any communications from SBA reflecting this proposal.**

**VA Response:** The basis for the \$1 million charge was the quote received from SBA to process VOSB status protests for FY 2011. That charge was based on an estimated 40 status protests per year. When VA processes a status protest, they use the same examination procedures as a verification examination. In essence, 40 status protests are equivalent to 40 verification examinations.

**23. Does VA agree with the characterization of its verification processes as “bright line” tests versus SBA’s fact specific findings?**

**VA Response:** VA reviews the specific facts associated with each case, as does SBA. It also seeks to ensure consistency in its determinations by establishing clear parameters for eligibility that can be followed by all evaluators. Due to the large volume of applications processed each year, it is important to keep determinations consistent and eliminate as much subjectivity as possible. However, that does not diminish the requirement in the VA program to examine the specific facts of each individual application.

**24. Mr. Leney mentioned in his testimony that VA has tried to assist veterans by creation of the veterans self assessment tool and the verification assistance briefs (VABs).**

- a. Mr. Leney stated that there are 17 VABs on the VA’s website. However, a screenshot of the VA’s website (attached) lists only 15 VABs. Please provide copies of the other two VABs and instructions on where they are located on the VA website.**

**VA Response:** Mr. Leney misstated the number. He meant to say 15 VABs.

- b. In the Miles decision, the government argued that the court should not rely on the VABs since OSDBU did not rely upon the VABs. However, in the statement to the Committee, VA appears to be stating that SDVOSBs should rely upon the VABs. Does VA see these statements as confusing to SDVOSBs, or in any way contradictory?**

**VA Response:** As the VA’s Web site states, VABs have been provided “to assist applicants in obtaining verification for the Veterans First Program.” More specifically, the VABs were developed in response to stakeholder requests that VA

provide assistance to applicants in understanding the regulation. They do not replace the regulation.

**c. What role did SBA play in the preparation and issuance of VA's VAB "Applicant Must Meet Small Business Definition?"**

**VA Response:** None. SBA has sole jurisdiction in determining size. VA refers applicants to SBA on size issues.

**25. When VA published the final rule governing verification, it stated, "This final rule would generally be small business neutral as it applies only to applying for verified status in the VetBiz.gov Vendor Information Pages (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 hereby certifies that the adoption of 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. 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." 76 Fed. Reg. 3022 (2011). The following questions apply to that statement.**

**a. How did VA determine that the cost to an individual business applying for verification to be less than \$100? Does VA still believe this statement is correct?**

**VA Response:** The rules referred to in the question were both published prior to the passage of the Verification Act. At that time, the application submission requirements for verification were only the VA Form 0877 and to keep certain required business documents listed in the regulation on file in the company's office. The verification examination was generally comprised of verifying the Veteran's status in BIRLS, ensuring that the company or individual owners were not on the Excluded Parties List and the examination of publicly available documentation, such as business licenses and other documents filed with the state. VA did not examine the required documentation unless the publicly available documentation was insufficient to make a determination (VA made the assumption at that time that the required documentation supported Veteran's claim that the firm is in compliance with the regulation).

The cost estimate was based on the fact that VA believed that any business competing for Federal contracts would be an established business with its paperwork in order, and that there would be virtually no cost associated with applying.

There is no cost to apply for verification. VA has developed partnerships with Veterans Service Organizations (VSO) and other non-profits to provide counseling services for Veterans applying for verification. VA understands that some of these organizations are charging a fee to recoup their costs for providing this service. Veterans who choose to use a private attorney or a for-profit organization to ensure that their documentation is compliant with the regulation may have substantially higher costs associated with preparing their application.

- b. How did VA determine that the average cost to the entire population of veterans seeking to become verified is less than \$325.00 on average? Does VA still believe this statement is correct?**

**VA Response:**

VA does not charge a fee for verification. VA only requests documents that already exist in a business. Under these parameters, VA has no reason to believe that costs to apply exceed \$325. VA has developed partnerships with VSOs and other non-profits to provide counseling services for Veterans applying for verification. VA understands that some of these organizations are charging a fee to recoup their costs for providing this service. Veterans who choose to use a private attorney or a for-profit organization to ensure that their documentation is compliant with the regulation may have substantially higher costs associated with preparing their application. Use of counselors or attorneys is not required to become verified, and thousands of firms have been successfully verified without such assistance. The use of VABs and the self-assessment tool are at no cost to the applicant.

- c. VA has stated that it is revisiting the verification regulations. Considering that all affected entities are small businesses, even if most small businesses are not veteran-owned, will VA agree to honor the spirit of the Regulatory Flexibility Act (RFA) and conduct initial and final regulatory analyses?**

**VA Response:** VA will adhere to all applicable legal requirements with respect to promulgation of regulations.

- d. Rather than issuing VABs, will VA issue a small entity compliance guide, as these guides would give legal protections to small businesses that rely upon them?**

**VA Response:** The VABs are only one facet of the larger Verification Assistance Program. This program also consists of a Pre-application workshop, a self-assessment tool on the VetBiz.gov Web site, and a partnership with several non-profit organizations to provide counseling services to Veterans applying for verification. VA cannot answer the question without a detailed analysis of the utilization of a "small entity compliance guide."

**26. What feedback have you received from applicants and veterans groups, to what extent do you track the feedback, and how have you used the feedback to make improvements in your procedures?**

**VA Response:** VA has received extensive feedback from stakeholders concerning our procedures. Stakeholder feedback has been used to identify and make changes to the verification process. These changes have reduced average processing time from more than 130 days to less than 40 days for initial applications, without compromising the quality or accuracy of the determinations. VA has also received many suggestions for changes to the regulation as part of our outreach efforts. VA has used this feedback to consider changes to the regulation, but has initiated a formal rule change process to ensure that all legal requirements of changing a Federal regulation are followed.

**27. As VA continues to collaborate with SBA in its efforts to develop a new data system, what attributes of the data system SBA is currently developing hold the most promise for providing a model for completion of a VA data system? Could SBA's data system largely serve VA's verification needs?**

**VA Response:** OSDBU requested an Information Exchange Meeting (IEM) with SBA to understand what level of collaboration will be most effective. OSDBU sent SBA an agenda for the IEM and is waiting for SBA to confirm the date, time, and location.

**28. The Secretary of the Department of Veterans Affairs created a task force to examine VA's verification program in June 2012, and it was initially charged with reporting back within 60 days. When can we expect to see a final report from the Task Force? What is delaying its completion? On a related note, GAO stated that you did not provide an initial strategic planning document until late October 2012 – Would you attribute completion of this initial strategic planning document to the demands of the Task Force? In other words, would you be even further behind if the Task Force had not been created to intervene in the process?**

**VA Response:** The Task Force briefed its initial report to the Office of the Secretary in November 2012. In response to that, the Office of the Secretary recommended that the Task Force continue to monitor the verification program and to review the revised strategic plan. Recommendations from the Task Force

report were incorporated into the OSDBU Strategic Plan, and the Task Force has reviewed the revised plan, and its recommendations have been incorporated into the plan being submitted to the Office of the Secretary.

OSDBU did not have a consolidated, long-term strategic plan that addressed a 5- year outlook prior to the interactions with GAO. However, strategic planning documents have existed since July 2011. These strategic planning documents were merged and used as the basis for a comprehensive strategic plan. The new strategic plan was supplemented with the recommendations from the Task Force.

The continued development of the OSDBU strategic plan cannot be attributed to the Task Force. The extension of the strategic plan from 2 years to 5 years resulted both from interactions with GAO, and improvements in the ability to address the short-term requirements. The various activities performed by OSDBU, including verification, are so closely linked that it would be impractical to create a strategic plan for verification only, without consideration of the other activities within OSDBU.

**Opening Statement of Congresswoman Herrera Beutler****Consistently Inconsistent: Challenges for Service-Disabled Veteran-Owned Small Businesses****Tuesday, March 19**Statement

I think we all agree we need to prevent contracts intended for service-disabled veteran-owned small businesses (SDVOSB) from going to firms that don't qualify for the program. However, both the VA and SBA SDVOSB certification processes are flawed. SBA's self-certification is quick and has the advantage of allowing nearly 13,000 SDVOSBs to almost immediately begin competing for contracts. It also provides for a timely and transparent process for stakeholders to protest if they believe the firm does not qualify for the program. While it is an efficient program, it may not be as effective as the VA at preventing fraudulent companies from taking advantage of the program.

On the other hand, VA's verification process takes an average of 85 days for the initial verification process and 147 days on appeal. In addition, VA's SDVOSB program has 4,102 SDVOSB currently certified, but VA uses over 200 FTEs and spends \$33 million per year to run the program. It's not clear that adding more employees and providing additional funding are the answers—but it's clear that a fix is needed.

Unfortunately, both of these programs are vulnerable to fraud. This is a shame, because our nation needs this program to assist our veteran business owners. I am pleased this hearing is addressing this important issue today.

I have heard from a number of Service-Disabled Veteran Owned Small Businesses in my district on this issue. They are frustrated with the overly-burdensome VA certification process. Some are also confused by the inconsistency between the two program; they are certified as a SDVOSB through SBA, but not through VA. Often, it is not until they are interested in competing for a VA contract, they realize they are ineligible.

What complicates this matter is that small businesses are working with limited resources. One veteran owned business in my district began the process to get certified by VA almost four years ago. He has completed many transactions while growing this business—he's taken out many loans, a million dollar credit line, 5 to 10 million in bonding aggregate, etc. Never before has he had to go through the time- and resource-consuming process of providing this level of detail about his financial status and personal information. He has been forced to start the entire registration process over multiple times to address minor problems, and has repeatedly been forced to provide additional information. There is no leeway on timing and if he has questions, he's received little to no guidance or assistance.

I am very pleased VA is taking a real serious stance in order to stop companies from illegally obtaining contracts by falsely claiming the SDVOB status. I support accountability measures and hope there are severe repercussions for those who are caught abusing the system. On the other hand, however, the process for certifying with the VA must be streamlined and shortened. While the process should be effectively keeping out fraudulent applicants, unfortunately in its current form it is keeping out legitimate Service-Disabled Veteran Owned Small Businesses. This needs to change.

**NINETY-FOURTH NATIONAL CONVENTION  
OF  
THE AMERICAN LEGION  
Indianapolis, Indiana  
August 28, 29, 30, 2012**

**Resolution No. 323: The Status of Service-Disabled Veteran-Owned Business after the Death of the Veteran Owner**

**Origin: Convention Committee on Other Economic Matters**

**Submitted by: Convention Committee on Other Economic Matters**

WHEREAS, Public Law No. 109–461 passed in December 2006 created additional benefits for surviving spouses who inherit service-disabled veteran-owned businesses; and

WHEREAS, The intent of the law was to ensure that a business owned by a veteran that received contracts based on the service-disabled veteran-owned business status did not suffer because the veteran died; and

WHEREAS, Spouses are able to retain the service-disabled veteran-owned business status for up to 10 years if the veteran owned at least 51 percent of the company before their death; and

WHEREAS, The law passed in December 2006 only took into account the veteran who returned disabled; consequently, it left a large gap in those servicemembers who owned businesses who were killed in the line of duty; and

WHEREAS, Public Law 109–461, in its treatment of businesses after death of veteran-owner, neglected to take into account Reservists and National Guard members who owned businesses before their activation; and

WHEREAS, Public Law 109–461 only transfers service-disabled veteran-owned business status to the surviving spouse of a veteran who acquires ownership rights in a small business if the death of a veteran causes a small business to be less than 51 percent-owned by one or more veterans; and

WHEREAS, The transfer of status in the period beginning on the date on which the veteran dies, only applies to a surviving spouse of a veteran with a service-connected disability rated as 100 percent disabling or a surviving spouse of a veteran who dies as a result of a service-connected disability; now, therefore, be it

**RESOLVED, By The American Legion in National Convention assembled in Indianapolis, Indiana, August 28, 29, 30, 2012, That The American Legion support amending Public Law 109–461 to read that if any disabled veteran who owns a certified service-disabled veteran-owned business dies, (regardless of his/her disability at the time), their business inherited by their spouse/dependent will retain the service-**

**disabled veteran-owned business status in conjunction with Public Law 109-461; and, be it further**

**RESOLVED, That The American Legion supports that if any servicemember, to include those who were mobilized in the National Guard or Reserve, is killed in action and owns at least 51 percent of a business prior to his/her death, the business bequeathed to their spouses/dependents must be granted service-disabled veteran-owned business status for reason of preference in federal contracts; and, be it finally**

**RESOLVED, That The American Legion supports any administrative or legislative effort that will improve and increase the benefits bequeathed to the veteran's spouses or dependents upon a veteran business owner's death.**

## OPENING STATEMENT

CHAIRMAN MIKE COFFMAN

## SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

“CONSISTENTLY INCONSISTENT: CHALLENGES FOR SERVICE-DISABLED  
VETERAN-OWNED SMALL BUSINESSES”

MARCH 19, 2013

Thank You, Chairman Hanna, for yielding, and thank you also to your subcommittee for holding this joint hearing.

The problems with VA’s SDVOSB certification program are, sadly, not new ones. The Veterans’ Affairs Committee had several subcommittee hearings during the last Congress on the issue, but improvements within the program seem to be slow in coming.

My subcommittee continues to frequently hear from SDVOSBs and their advocates regarding what should be a straightforward process for veterans attempting to do business with VA. While the verification process at CVE has improved and helped weed out some bad actors, it is abundantly clear that there’s still a long road ahead.

One topic discussed at length in the 112th Congress was VA’s definition of ownership and control of a small business. Despite the Committee’s bringing this problem to VA’s attention, VA’s definitions retain some key differences from the Small Business Administration, and the effect of these differences has been a self-induced backlog of legitimate companies attempting to get certified through CVE and do business with VA.

The fact that VA’s different interpretations of what constitutes ownership mean that an individual could be recognized as a veteran small business owner with one government agency but not with VA should raise everyone’s eyebrows. However, that’s the reality that some veterans face today, including service-disabled veterans. SBA has had commonsense requirements for what constitutes an SDVOSB in place for a long time. While VA’s intent may be in the right place, its regulatory and interpretive actions have put many eligible veterans at a *disadvantage*.

We still need to get this right. If we are going to enable our veterans who sacrificed for this country to do business with the federal government, and if VA is going to set the standard for recognizing the commitment of these same veterans, then a straightforward, common-sense process needs to be in place.

It is my sincere hope that, down the road, we are not still discussing the same issues. The time for conversation is past, and it is time to take action, fix the problems, and move on. I understand that the system will never be perfect, nor is there one simple answer. However, after all the years that have passed since this program was set up, and the resources that have been added to CVE, it is reasonable to expect that we would be further along than we are today.

I yield back.

**Honorable Jackie Walorski**

**HVAC ONI Hearing - "Consistently Inconsistent: Challenges for Service-Disabled Veteran-Owned Small Businesses"**

**Mr. Chairman, it's an honor to serve on this committee.**

**I thank you for holding this hearing on such an important issue for our veterans. As our service members transition into civilian life, we must remain steadfast in our commitment to provide these soldiers with the necessary skills for employment. For the entrepreneurial-minded soldiers, we must work to remove redundant and archaic bureaucratic barriers.**

**Members of the military are disciplined, determined, and are known for their ability to lead. These attributes are critical in the world of business, and, as a result, it is not surprising that veterans operated over 2.4 million nonfarm businesses accounting for 9.0 percent of all nonfarm businesses in the United States in 2007.<sup>1</sup> Hoosier veterans owned approximately 46,000 firms in this same period.<sup>2</sup>**

**We know what veterans are capable of, but that is not why we are here today. The Veterans Administration has done great work in improving its ability to assist and equip veterans in terms of establishing and growing a business; however, there is still room for improvement.**

**I look forward to working with my colleagues and our panelists, today, to identify the issues which confront service-disabled veteran-owned small businesses.**

**Thank you.**



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<sup>1</sup>U.S. Small Business Administration, *2007 Survey of Business Owners - Veteran-Owned Firms*, <http://www.census.gov/econ/sbo/getsof.html?07veteran>

<sup>2</sup>U.S. Small Business Administration, *Summary Statistics for Veteran-Owned Firms by State: 2007*, [http://www2.census.gov/econ/sbo/07/final/tables/vet\\_table1.pdf](http://www2.census.gov/econ/sbo/07/final/tables/vet_table1.pdf)