



DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 74

RIN 2900-AO63

VA Veteran-Owned Small Business Verification Guidelines

AGENCY: Department of Veterans Affairs.

ACTION: Withdrawal of proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) published a rule in the Federal Register on November 6, 2015, 80 FR 68795 that proposed amending its regulations governing the VA's Veteran-Owned Small Business (VOSB) Verification Program. The Verification Program has been the subject of reports from both the Government Accountability Office and VA's Office of Inspector General stating that despite VA's Verification Program, fraud still exists in the Veterans First Contracting Program. Some stakeholder feedback has been that the current regulation is too open to interpretation and is unnecessarily more rigorous than similar certification programs run by the United State Small Business Administration (SBA).

The proposed rule sought to clarify the eligibility requirements for businesses to obtain "verified" status, added and revised definitions, reordered requirements, redefined the definition of "control," and provided explanatory information on VA's examination and review processes and procedures. The proposed rule additionally sought to implement new changes to community property restrictions, unconditional ownership, and day-to-day requirements and full-time requirements. An exception for

majority, supermajority, unanimous, and other voting provisions for extraordinary business decisions were also proposed.

Comments to the proposed rule were to be provided to the Office of Small and Disadvantaged Business Utilization on or before January 5, 2016. Due to the nature of the adverse comments received, VA has determined not to pursue implementation of the rule as originally proposed. Accordingly, this document withdraws the proposed rule.

DATES: The proposed rule published on November 6, 2015, 80 FR 68795 is withdrawn as of [insert date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Tom Leney, Executive Director, Office of Small and Disadvantaged Business Utilization, Department of Veterans Affairs, 810 Vermont Ave., NW., Washington, DC 20420; (202) 462-4300. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:**

In the proposed rule published in the Federal Register on November 6, 2015, 80 FR 68795, VA sought to amend 38 CFR Part 74 to find an appropriate balance between preventing fraud in the Veterans First Contracting Program and providing a process that would make it easier for more VOSBs to become verified.

VA received 203 comments from 96 commenters. 134 of these comments were adverse to the proposed rule and VA's verification program in general. Of the 134 adverse comments, several were material comments which VA has accepted.

SBA, Office of Advocacy, objected to the proposed rule on various grounds including that it fails to provide an adequate basis in its Regulatory Flexibility Act (RFA) certification concerning the proposed rule's impact on small business entities. VA's RFA language provided that "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." In its comment, SBA stated that "[o]ne of the most important provisions with the RFA requires that the promulgating agency give the public some idea of the number of small entities that any proposed rule will impact. VA's proposed certification does not provide any indication of the number of small businesses that may be impacted by the proposed change." After considering this comment, VA procured a survey to better demonstrate that the proposed rule would not have a significant economic impact on a substantial number of small business entities.

SBA also objected to the proposed rule to the extent that it failed to provide statutory or other legal authority following each cited substantive provision. SBA, in its comment, stated that the proposed rule does not comply with 38 U.S.C. § 501 in that the proposed rule does not "contain citations to the particular section or sections of statutory law or other legal authority upon which such issuance is based." After considering the SBA's comment, VA seeks to withdraw the proposed rule and to

republish at a later date to ensure that each substantive revision is followed immediately by supporting statutory or other legal authority.

Fourteen comments spoke to potential violations of due process through the immediate removal of a company without allowing the company an opportunity to refute the allegations, such as owners accused of criminal offenses. The proposed amendment to 38 CFR § 74.2(b) provides that “[i]ndividuals having an ownership or control interest in VetBiz verified businesses must have good character. Concerns owned or controlled by a person(s) who is formally accused of a crime involving business integrity are ineligible for VetBiz VIP Verification. If, after verifying a participant’s eligibility the person(s) controlling the participant is found to lack good character, CVE will remove the participant from the VIP database immediately...” One commenter, SBA, commented that “Section 74.2(b) of the proposed regulation would seem to deny an applicant due process of law...[and]...would seem to indicate that if an applicant is formally accused of an offense, that person is not eligible for Vet Biz Verification.” Another commenter stated “I would...question if being 'formally accused' and not actually proven guilty of any crime, is proper.” After considering these and other similar comments, VA seeks to remove the portion of the proposed rule prescribing the immediate removal of companies, under certain circumstances, prior to allowing such affected company a chance to refute the allegations.

Six comments were lodged complaining that the increase of the waiting period following a denial of verification from 6 months to 12 months does not (i) benefit the Veteran, (ii) is unnecessarily long, and (iii) punitive in nature. One commenter stated that “extending the waiting period from six to 12 months does not “allow sufficient time

for ineligible concerns to address significant issues” any more than the current rule does. The current rule requires a *minimum* wait of six months – if issues require more time to address, the eligible veteran can make that determination and simply wait 12 months – or 16 months – to reapply. Second, the extended wait time will not incentivize applicants to avail themselves of CVE resources. In fact, lengthening the wait period will result in lost momentum and is described in the preamble as a form of punishment for veterans that do not use CVE resources. VA should not take this approach.

Finally, the program will be no more efficient in the long run with a 12 month waiting period. Applications from concerns that are denied or cancelled will not decrease, they will only be filed in 12 months rather than in six.” After considering these and other similar comments, VA seeks to withdraw the portion of the proposed rule that increases the waiting period from 6 to 12 months, following a denial of verification.

VA understands that in order to proceed forward without withdrawing the proposed rule and republishing, the proposed modifications to the proposed rule must be considered a logical outgrowth. Considering the extent of the revisions as outlined in this publication and that VA proposes to include additional modifications to the rule, it is unlikely that the proposed rule as modified would be considered a logical outgrowth. Because of the adverse comments received during the comment period, VA is withdrawing the proposed rule.

#### Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of

Veterans Affairs. Gina S. Farrisee, Deputy Chief of Staff, Department of Veterans Affairs, approved this document on June 23, 2017, for publication.

Approved: June 23, 2017 Jeffrey Martin  
Office Program Manager  
Office of Regulation Policy & Management  
Office of the Secretary  
Department of Veterans Affairs

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