

Approved: February 15, 2017.

**Jeffrey Martin,**

*Office Program Manager, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.*

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## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Part 74

RIN 2900-AP93

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

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Interim final rule.

**SUMMARY:** This document implements a portion of the Veterans Benefits, Health Care, and Information Technology Act of 2006, which requires the Department of Veterans Affairs (VA) to verify ownership and control of veteran-owned small businesses (VOSB), including service-disabled veteran-owned small businesses (SDVOSB) in order for these firms to participate in VA acquisitions set-aside for SDVOSB/VOSBs. This interim final rule contains a minor revision to require re-verification of SDVOSB/VOSB status only every three years rather than biennially. The purpose of this change is to reduce the administrative burden on SDVOSB/VOSBs regarding participation in VA acquisitions set asides for these types of firms.

**DATES:**

*Effective Date:* February 21, 2017.

*Comment Date:* Comments must be received on or before April 24, 2017.

**ADDRESSES:** Written comments may be submitted by: Mail or hand-delivery to Director, Regulations Management (OOREG1), Department of Veterans Affairs, 810 Vermont Ave. NW., Room 1068, Washington, DC 20420; fax to (202) 273-9026; or email through <http://www.Regulations.gov>. Comments should indicate that they are submitted in response to "RIN 2900-AP93—VA Veteran-Owned Small Business Verification Guidelines." All comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 273-9515 for an appointment.

**FOR FURTHER INFORMATION CONTACT:** Thomas McGrath, Director, Center for Verification and Evaluation (00VE), Department of Veterans Affairs, 810

Vermont Ave. NW., Washington DC 20420, phone (202) 461-4300.

**SUPPLEMENTARY INFORMATION:** In a final rule published in the **Federal Register** on February 8, 2010, (73 FR 6098), VA established new 38 CFR part 74 setting forth a mechanism for verifying ownership and control of VOSBs, including SDVOSBs. At that time, with respect to 38 CFR 74.15, VA anticipated that annual examinations were necessary to ensure the integrity of the Verification Program. This was deemed consistent with the annual Federal size and status recertification requirement in the Central Contractor Registry. In June 2012, the period was extended to two years. Subsequently, VA has determined that a three-year eligibility period is warranted.

In administering this program since February 2010, VA has concluded that an annual examination is not necessary to adequately maintain the integrity of the program and proposes a 3-year eligibility period. This change is appropriate because VA conducts a robust examination of personal and company documentation to verify ownership and control by Veterans of applicant businesses. In addition to verifying individual owners' service-disabled veteran status or veteran status, in accordance with 38 CFR 74.20(b), VA reviews an applicant's financial statements; Federal personal and business tax returns; personal history statements; articles of incorporation/organization; corporate by-laws or operating agreements; organizational, annual and board/member meeting records; stock ledgers and certificates; State-issued certificates of good standing; contract, lease and loan agreements; payroll records; bank account signature cards; and licenses. Given the depth of this review, annual or biennial re-verification examinations have become an unnecessary administrative burden on both applicants/participants and VA.

Given this extensive initial examination, VA is confident that the integrity of the verification program will not be compromised by establishing a 3-year eligibility period. This is borne out by fiscal year 2016 data that shows that out of 1,109 reverification applications, only ten were denied. Therefore, only 0.9 percent of firms submitting reverification applications were found to be ineligible after two years. Other integrity aspects of the program remain adequate to oversee a 3-year eligibility period. Once verified, 38 CFR 74.15(a) mandates that the participant must maintain its eligibility during its tenure and, if ownership or control changes

occur, must inform VA's Center for Verification and Evaluation (CVE) of any changes that would adversely affect its eligibility. Moreover, in accordance with 38 CFR part 74.20(a), VA has the right to conduct random, unannounced site examinations of participants or to conduct a further examination upon receipt of specific and credible information that a participant is no longer eligible. Lastly, in the course of specific SDVOSB/VOSB set-aside acquisitions, VA contracting officers and also competing SDVOSB/VOSBs have the right to raise a SDVOSB/VOSB status protest to VA's Office of Small and Disadvantaged Business Utilization (OSDBU) if either has a reasonable basis upon which to challenge the SDVOSB/VOSB status of a verified firm.

Establishment of a longer, 3-year eligibility period is consistent with other Federal set-aside programs. With respect to the Historically Underutilized Business Zone (HUBZone) small business certification program, U.S. Small Business Administration (SBA) regulations at 13 CFR 126.500 require that any qualified HUBZone small business concern seeking to remain on the HUBZone approved list must recertify every 3 years with SBA. With regard to SBA's Section 8(a) Business Development program, SBA authorizes a program term of up to 9 years in 13 CFR 124.2. For VA's SDVOSB/VOSB verification program, VA has now determined that a program term of 3 years is reasonable given the mandatory nature of VA's SDVOSB/VOSB set-aside authority in contrast to the discretionary nature of the HUBZone and Section 8(a) set-aside programs. In accordance with 38 U.S.C. 8127 and VA Acquisition Regulation, 48 CFR part 819, VA is required to set aside any open market procurement for SDVOSBs and then VOSBs, first and second respectively, if two or more such concerns are reasonably anticipated to submit offers at fair and reasonable pricing. Given the large volume of appropriated funds subject to these set-aside requirements, a 3-year eligibility period prior to re-examination is deemed reasonable to adequately balance the burden on SDVOSB/VOSBs and to protect the integrity of the program.

#### Administrative Procedure Act

The Secretary of Veterans Affairs finds good cause to issue this interim final rule prior to notice and comment procedures. The interim rule makes a minor modification to extend the eligibility period for SDVOSB/VOSBs after VA's initial robust verification examination and approval from 2 years to 3 years. The rule will reduce the

administrative burden on SDVOSB/VOSB participants by extending the re-verification submissions. The integrity of the program remains protected by the initial robust and detailed verification examination, the regulatory requirement of participants to report changes to ownership and control during their eligibility period, VA's authority to conduct random site examinations and to re-examine eligibility upon receipt of any reasonably credible information affecting SDVOSB/VOSB verified status, and, for individual acquisitions, the status protest process, where VA contracting officers or competing vendors can challenge the SDVOSB/VOSB status of offerors if a reasonable basis can be asserted to be decided by VA OSDDBU on SDVOSB/VOSB set-aside acquisitions.

For these reasons, the Secretary of Veterans Affairs is issuing this as an interim final rule. In view of the detrimental effects of continuing an unnecessary administrative burden on program participants and verifying officials, and to avoid delays in verification caused by repetitive biennial reviews, the Secretary finds it is impracticable, unnecessary, and contrary to public interest to delay the effective date of this regulation for the purpose of soliciting advance public comment. The Secretary of Veterans Affairs will consider and address comments that are received within 60 days of the date this interim final rule is published in the **Federal Register**.

For these same reasons, and because this interim final rule relieves a restriction, the Secretary finds that this rule will be effective on the date of publication.

#### **Regulatory Flexibility Act**

The Regulatory Flexibility Act, 5 U.S.C. 601–612, applies to this final rule. This interim final rule is generally neutral in its effect on small businesses because it relates only to small businesses applying for verified status in VA's SDVOSB/VOSB verified database. The overall impact of the rule will benefit small businesses owned by veterans or service-disabled veterans because it will reduce their administrative burden associated with maintaining verified status by extending the need for re-verification by VA from 2 years to 3 years. VA has estimated the cost to an individual business to be null. Increasing the verification period will decrease the frequency of any costs. On this basis, the Secretary certifies that the adoption of this interim final rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory

Flexibility Act, 5 U.S.C. 601–612. Therefore, under 5 U.S.C. 605(b), this regulation is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

#### **Executive Orders 12866 and 13563**

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a “significant regulatory action,” which requires review by the Office of Management and Budget (OMB), as “any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.”

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined and it has been determined not to be a significant regulatory action under Executive Order 12866.

VA has already established the SDVOSB/VOSB verification program in regulation at 38 CFR part 74, and the minor change in this interim final rule will modify the term of eligibility after initial verification from 2 years to 3 years before re-verification would be required.

#### **Unfunded Mandates**

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the

expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any given year. This interim final rule would have no such effect on State, local, and tribal governments, or on the private sector.

#### **Paperwork Reduction Act**

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

#### **Catalog of Federal Domestic Assistance**

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

#### **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 February 15, 2017 for publication.

#### **List of Subjects in 38 CFR Part 74**

Administrative practice and procedures, Privacy, Reporting and recordkeeping requirements, Small business, Veteran, Veteran-owned small business, Verification.

Approved: February 15, 2017.

#### **Jeffrey Martin,**

*Office Program Manager, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.*

For the reasons set out in the preamble, VA amends 38 CFR part 74 as follows:

#### **PART 74—VETERANS SMALL BUSINESS REGULATIONS**

- 1. The authority citation for part 74 continues to read as follows:

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

#### **§ 74.15 [Amended]**

- 2. Section 74.15(a) is amended by removing “2 years” and adding, in its place, “3 years”.

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