

January 5, 2016

VIA ELECTRONIC SUBMISSION

Director  
Regulation Policy and Management  
Department of Veterans Affairs  
810 Vermont Avenue, NW  
Room 1068  
Washington, DC 20420

Mr. Tom Leney  
Executive Director  
Office of Small and Disadvantaged  
Business Utilization (00VE)  
Department of Veterans Affairs  
810 Vermont Avenue, NW  
Washington, DC 20420

**Re: Proposed VA Veteran-Owned Small Business Verification Program Guidelines,  
80 Federal Register 68795, November 6, 2015, RIN 2900-AO63**

Dear Mr. Leney:

**Introduction**

The United States Department of Veterans Affairs (VA) is proposing to amend its current regulations governing the Veteran-Owned Small Business Verification Program. This program has been under review by the U.S. Government Accountability Office (GAO) and the VA's Office of Inspector General. Numerous congressional hearings have also been held regarding the implementation of the verification program.

On November 6, 2015, the Department of Veteran's Affairs (VA) published a proposed rule in the *Federal Register* designed to clarify the eligibility requirements for businesses to obtain "verified" status for the purposes of the "Veterans First" contracting program at VA.<sup>1</sup> The proposal would also:

- Add and revise definitions, reorder requirements, and redefine "control." It would implement revisions to community property restrictions, "unconditional" ownership and day- to- day management requirements, and remove and revise the current requirements for the full-time participation of veteran owners in the business.
- Create a new definition of permanent caregiver and remove the reference to personal caregiver in the current regulation.
- Amend the statutory definition for the Office of Small and Disadvantaged Business Utilization.

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<sup>1</sup> 80 Fed. Reg. 68795 (November 6, 2015).

Advocacy has been engaged with veteran-owned businesses (VOBs) and service-disabled veteran-owned small businesses (SDVOBs) for many years, especially with regard to their participation in the federal acquisition system. Advocacy staff has served in a research capacity for the Interagency Task Force on Veterans Small Business Development established pursuant to Executive Order 13540 and chaired by the Small Business Administration. Pursuant to Public Law 106-50, Advocacy has a continuing program of research, both in-house and on a contract basis, on veteran-owned firms and their owners and on their role in the nation's economy. Most recently, Advocacy participated in a roundtable held by veteran stakeholders to discuss the proposed regulation.

### **The Office of Advocacy**

Congress established Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA); as such the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),<sup>2</sup> as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),<sup>3</sup> gives small entities a voice in the Federal rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, Federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.<sup>4</sup> The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.<sup>5</sup>

### **Advocacy's comments on the VA's proposed rule**

While Advocacy believes that there are some provisions in the proposed rule that will help veteran small businesses, some important issues of longstanding concern still exist. Based on our review and the input from SDVOBs, Advocacy has the following three chief concerns that will have a significant economic impact on their ability to obtain contracts from the VA that form the basis for our comments to the VA:

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<sup>2</sup> 5 U.S.C. § 601 et seq.

<sup>3</sup> Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

<sup>4</sup> Small Business Jobs Act of 2010 (P.L. 111-240) § 1601.

<sup>5</sup> *Id.*

- 1) The VA has attempted to provide a certification of this proposed regulation under the RFA. The certification is without an adequate factual basis as is required by the statute.
- 2) The rule does not provide for due process in the verification and eligibility process for new applicants and current companies that have been previously verified.
- 3) The rule creates new definitions and processes without clear statutory or regulatory authority and is in conflict with existing laws and regulations.

**1. VA's RFA certification that this proposed rule will not have a significant impact on a substantial number of small entities is inadequate.**

Section 605 of the RFA provides that the promulgating agency may certify that the proposed rule will not have a significant impact on a substantial number of small entities as long as the certification is accompanied by a statement providing the factual basis for such certification.<sup>6</sup> If the agency cannot certify the rule under the RFA, then it is required to publish an Initial Regulatory Flexibility Analysis (IRFA), which analyzes the proposed rule's likely economic impact on small businesses and discusses any significant regulatory alternatives designed to lessen those impacts.<sup>7</sup>

Advocacy submits that the VA has provided an inadequate factual basis for its certification in the proposed rule. One of the most important provisions within the RFA requires that the promulgating agency give the public some idea of the number of small entities that any proposed rule will impact. The VA's proposed certification does not provide any indication of the number of small businesses that may be impacted by the proposed changes. Of equal importance is the VA's assertion that the proposed rule would merely seek to clarify and streamline the existing rule and would not add additional burdens or restrictions on applicants and participants.<sup>8</sup> Yet in the preamble to the rule, the VA cites numerous examples of new changes to the current regulation. For example, the term "daily business operations would replace day-to-day management, and a totally new term of permanent caregiver" would be added.<sup>9</sup> The VA also is proposing to increase the time frame that an applicant must wait to submit a new application after a previous denial from six months to twelve months.<sup>10</sup> Further, the VA projects that the cost of compliance to become verified is fewer than \$325.<sup>11</sup> The VA does not explain the basis of how this amount was derived, nor does it seem that the agency has taken into consideration the cost of compliance with the new proposed provisions. This is an important point as the stakeholders that Advocacy has discussed this rule with feel

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<sup>6</sup> 5 U.S.C. § 605.

<sup>7</sup> 5 U.S.C. §603.

<sup>8</sup> 80 Fed. Reg. 68795 (November 6, 2015).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> 80 Fed. Reg. 68800 (November 6, 2015).

strongly that the \$325 estimate is too low and unrealistic. Advocacy suggests that it is this type of analysis that is contemplated by the RFA, and should be done within an IRFA.

Advocacy believes that in light of our concerns with the factual basis underlying the proposed rule's RFA certification, the VA should republish this rule along with a compliant IRFA. This would accomplish many RFA goals, including giving veteran owned small businesses an opportunity to comment on the potential impacts of the rule. Such a decision would also increase the rule's transparency, which is important given the GAO's recent suggestion that it was waiting to review this proposed rule before issuing its recommendations on the VA's verification plans. Advocacy cautions that a promulgating agency cannot publish a Final Regulatory Flexibility Analysis (FRFA) without having published an IRFA in the proposed rule. The failure to provide an adequate factual basis for a certification and the concomitant decision not to publish an IRFA is judicially reviewable.<sup>12</sup>

## **2. The rule does not provide for due process in the verification and eligibility process for small entities.**

Section 74.2(b) of the proposed regulation would seem to deny an applicant due process of the law. Advocacy is concerned that the proposed language in section 74.2(b) would seem to indicate that if an applicant is formally accused of an offense, then that person is not eligible to be in the program. The proposed rule states, "Concerns owned or controlled by a person who is formally accused of a crime involving business integrity are ineligible for Vet Biz Verification." The VA should do all that it can to protect against waste, fraud and abuse, but this should not be at the expense of due process. Applicants should be allowed to submit their supportive documentation to an independent review body.

Section 74.2(d) is yet another example of a provision within the rule that may result in applicant's being denied their due process rights. For example, this proposed section has been expanded from the current requirements in 38 CFR 74(d) to include finding an individual ineligible if he "fails to pay significant financial obligations, including unresolved tax liens and defaults on Federal loans or state government assisted financing, owed to the Federal government, the District of Columbia or any state, district, or territorial government of the United States." The proposed regulation lacks transparency in that it does not define these financial obligations. Moreover, the proposed regulation assumes ineligibility without providing the applicant with an opportunity to explain the financial conditions that resulted in such a determination by the VA. Individuals for whom this program is designed to assist may have financial obligations due to their military service or service-connected medical conditions. At a minimum, the terms of this proposed section should be more clearly defined and a due process opportunity should be provided to the applicant.

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<sup>12</sup> 80 Fed. Reg. 68802 (November 6, 2015).

**3. The rule creates new definitions and processes without clear statutory or regulatory authority and is in conflict with existing VA laws and regulations.**

The existing regulation, 38 CFR 74, which the current proposed rule would modify, is governed by 38 U.S.C. 501, which gives the VA Secretary authority to issue regulations. Note particularly section 501(b) which provides that:

Any rule, regulation, guideline, or other published interpretation or order (and any amendment thereto) issued pursuant to the authority granted by this section or any other provision of this title shall contain citations to the particular section or sections of statutory law or other legal authority upon which such issuance is based. The citation to the authority shall appear immediately following each substantive provision of the issuance.

The proposed regulation to amend 38 CFR 74 does not seem to comply with this requirement, and therefore the proposed regulation would appear to be in conflict with the VA's own regulatory construction requirements. Advocacy submits that there are two additional examples of what appears to be a conflict between the proposed regulation and existing VA laws and regulations:

- a. Section 74.1 of the proposed rule is a definition sub-section. Within that sub-section VA poses a question titled, "What Definitions are important for VetBiz Vendors Information Pages Verification Program?" The definition of the Office of Small and Disadvantaged Business Utilization provides that its Director is the VA liaison with the SBA, and that the Director must be provided with notice of the initiation of a request from the VA for an SBA Certificate of Competency (COC). The proposed regulation thus imposes a new requirement that is not in the existing Federal Acquisition Regulation Subpart 19.6 governing COCs. Although that part of the FAR provides for coordination with the OSDBU in the COC appeals process, no such concurrency is required for the initiation of a COC. Thus this proposed change is not in accordance with the FAR.
- b. Section 74.1 of the proposed regulation would also amend the definition of the Office of Small and Disadvantaged Business Utilization, but this office was statutorily established by Public law 95-507, and the VA has not provided the legal basis to support the proposed change.

**Recommendations**

1. Based on information obtained by Advocacy from discussions with the veteran procurement and small business community, the proposed regulation will have a significant economic impact on their ability to obtain contracts from the VA. This is in direct conflict with the VA's RFA certification. Accordingly, the VA should either provide an improved factual basis for the certification, or publish for public comment an IRFA. The comment period for this proposed rule should remain open to coincide with the comment period for the IRFA.

2. The new terminologies in the proposed regulation should have clear definitions that are consistent with normal business practices. Applicants should be afforded due process under the law.
3. The proposed regulatory changes to 38 CFR 74 should reflect clear statutory and/or regulatory authority.

### **Conclusion**

Advocacy urges the VA to give full consideration of and to adopt the above recommendations. If you have any questions or require additional information please contact me or Assistant Chief Counsel Major L. Clark, III at (202) 205-7150 or by email at [major.clark@sba.gov](mailto:major.clark@sba.gov).

Sincerely,



The Honorable Darryl L. DePriest  
Chief Counsel for Advocacy



Major L. Clark, III  
Assistant Chief Counsel for Advocacy

Copy to: The Honorable Howard Shelanski, Administrator  
Office of Information and Regulatory Affairs  
Office of Management and Budget