

**List of Subjects in 33 CFR Part 165**

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

**PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS**

■ 1. The authority citation for part 165 continues to read as follows:

**Authority:** 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; and Department of Homeland Security Delegation No. 0170.1.

■ 2. Add a temporary § 165.T07–0731 to read as follows:

**§ 165.T07–0731 Safety Zone; Intracoastal Waterway, Biscayne Bay, Miami, FL.**

(a) *Location.* The following coordinates define the temporary safety zone located in Biscayne Bay, Miami, FL. All waters of Biscayne Bay contained within the following points: Commencing at 25°46′22″ N, 080°10′28″ W; thence southwest to 25°45′33″ N, 080°10′39″ W; thence northwest to 25°45′42″ N, 080°11′05″ W; then northeast to 25°46′34″ N, 080°10′49″ W; thence southeast along the shoreline to origin. All coordinates are North American Datum 1983.

(b) *Definition.* The term “designated representative” means Coast Guard Patrol Commanders, including Coast Guard coxswains, petty officers, and other officers operating Coast Guard vessels, and Federal, state, and local officers designated by or assisting the COTP in the enforcement of the regulated area.

(c) *Regulations.* (1) No person or vessel will be permitted to enter, transit, anchor, or remain within the regulated area unless authorized by COTP or a designated representative.

(2) Persons and vessels desiring to enter, transit, anchor, or remain within the regulated area may contact the COTP by telephone at 305–535–4313, or a designated representative via VHF radio on channel 16 to request authorization. If authorization is granted, all persons and vessels receiving such authorization must comply with the instructions of the COTP or a designated representative.

(d) *Enforcement period.* This rule will be enforced from 2:30 p.m. through 3 p.m., 4 p.m. through 4:30 p.m., and 5:30 through 6 p.m. on October 20, 2018, and 12:30 p.m. through 1 p.m., 2 p.m. through 2:30 p.m., and 3:30 p.m. through 4 p.m. on October 21, 2018.

Dated: September 18, 2018.

**M.M. Dean,**

*Captain, U.S. Coast Guard, Captain of the Port Miami.*

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**BILLING CODE 9110–04–P**

**DEPARTMENT OF VETERANS AFFAIRS****38 CFR Part 74**

**RIN 2900–AP97**

**VA Veteran-Owned Small Business (VOSB) Verification Guidelines**

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Final rule.

**SUMMARY:** The Department of Veterans Affairs (VA) is amending its regulations governing VA’s Veteran-Owned Small Business (VOSB) Verification Program. The National Defense Authorization Act for Fiscal Year 2017 (“the NDAA”), placed the responsibility for issuing regulations relating to ownership and control for the verification of VOSBs with the United States Small Business Administration (SBA). This regulation implements the NDAA by referencing SBA’s regulations governing ownership and control and adds and clarifies certain terms and references that are currently part of the verification process. The NDAA also provides that in certain circumstances a firm can qualify as VOSB or Service-Disabled Veteran-Owned Small Business (SDVOSB) when there is a surviving spouse or an employee stock ownership plan (ESOP).

**DATES:** This rule is effective on October 1, 2018.

**FOR FURTHER INFORMATION CONTACT:** Tom McGrath, Director, Center for Verification and Evaluation (00VE), Department of Veterans Affairs, 810 Vermont Ave. NW, Washington, DC 20420, (202) 461–4600. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** In Public Law 114–840, the NDAA designates the SBA as the Federal Agency responsible for creating regulations governing ownership and control. This rule amends VA’s verification regulations in order to implement the NDAA as regulations relating to and clarifying ownership and control are no longer the responsibility of VA.

On January 10, 2018, VA published in the *Federal Register* (83 FR 1203) a proposed rule to amend its regulations governing its VOSB Program. The proposed rule allowed for a comment period ending on March 12, 2018.

During the comment period, VA received several comments from 17 commenters.

**Summary of Comments and VA’s Response****A. General**

VA received several comments that described the commenters’ views and experiences without any reference to a proposed regulatory provision. VA is unable to respond to these comments as they did not address the proposed provisions at issue here. One commenter questions the VA’s authority with regards to the verification process and disagrees that the VA is authorized to issue regulations and make determinations of ownership and control. The commenter contends that VA’s function with respect to verification should be limited to verifying veteran and disability status, and maintaining the VA list of verified SDVOSBs and VOSBs. Although the authority to issue regulations setting forth the ownership and control criteria for SDVOSBs and VOSBs now rests with the Administrator of the SBA, the Secretary is still charged with verifying that each applicant complies with those regulatory provisions prior to granting verified status and including the applicant in the VA list of verified firms. As the Secretary still maintains this authority and responsibility, VA finds the commenter’s proposed limitation without merit. However, to eliminate any confusion as to whether the Secretary is attempting to regulate ownership and control requirements, VA will refer directly to SBA’s regulations where appropriate. This will additionally allow VA’s regulation to be immediately updated should SBA make regulatory changes related to ownership and control. Several other commenters discussed their personal difficulties with the verification process, how regulatory provisions are interpreted, and the manner by which the verification process is administered. As these comments do not address the proposed regulation, VA is unable to respond to these comments.

**B. Section 74.1**

For consistency, § 74.1 proposed removing all references to VetBiz and replacing the words Center for Verification and Evaluation, service-disabled veteran-owned small business, the Department of Veterans Affairs, Vendor Information Pages, and veteran-owned small business, and uses in their place the respective abbreviations—CVE, SDVOSB, VA, VIP, and VOSB in titles and the body of the regulation,

respectively. VA received no comments on this proposed change and is therefore adopting the abbreviations exactly as proposed. As these abbreviations are used through the proposed amendments, all such abbreviations as they appear will be adopted as proposed.

VA proposed amending § 74.1, which sets forth definitions important to the Vendor Information Pages (VIP) Verification Program, to remove six (6) definitions from § 74.1 that relate to and clarify ownership and control. Specifically, VA proposed removing the following definitions: day-to-day management, day-to-day operations, immediate family member, negative control, same or similar line of business, and unconditional ownership. VA proposed deleting one additional definition, Vet.Biz.gov, to account for changes to the location of the Vendor Information Pages (VIP) database. VA did not receive any comments on these proposed removals and is therefore adopting these removals as proposed.

VA additionally proposed amending § 74.1 to add three new definitions. Specifically, VA proposed to add a definition for “applicant” in order to clarify the use of the term throughout the regulation, a new definition “application days” in order to clarify how the time period in § 74.11(a) is computed, and a definition <http://www.va.gov/osdbu> is added to identify the hosting website as VA is replacing VetBiz.gov as the host of the VIP database. VA did not receive any comments regarding the new definition <http://www.va.gov/osdbu>. Therefore, VA is adopting that definition exactly as proposed. VA received one comment regarding the new definition “applicant” that it should be renamed participant since it is a benefit Veterans earn. In response, the definition of applicant refers to a business concern that applies for verified status, but has not yet completed the process and received an approval letter from CVE. Additionally, the regulations already set forth a unique definition for participant. Therefore, VA is not changing the definition of ‘applicant’ and will adopt the definition as proposed. VA received one comment on the proposed definition for “application days”. The comment requested additional clarity as to the period that would be counted as ‘application days’. Though not in direct response to the definition of application days, VA received additional comments concerning when the 90-day application period begins. In response to these comments, VA agrees that additional clarification is needed. Accordingly, the commenters’ recommendations are

accepted in part and VA is further revising the language of § 74.1 to add a new definition “register” to clarify when the 90-day application period begins to run.

VA additionally proposed amending § 74.1 the following sixteen (16) definitions: Center for Veterans Enterprise, joint venture, Office of Small and Disadvantaged Business Utilization, non-veteran, participant, primary industry classification, principal place of business, service-disabled veteran, service-disabled veteran-owned small business, small business concern, surviving spouse, vendor information pages, verification eligibility period, veteran, veterans affairs acquisition regulation, and veteran-owned small business.

VA received no comments on the proposed changes to the following four definitions: Center for Veterans Enterprise, non-veteran, vendor information pages, and Veterans Affairs acquisition regulation. Therefore, VA is adopting those definitions exactly as proposed.

VA did not receive any specific comments on the definitions participant and small business concern. However, the NDAA has removed the responsibility of issuing regulations governing ownership and control from VA and transferred the responsibility to the SBA. The SBA has issued proposed regulations governing ownership and control which includes definitions for participant and small business concern. To eliminate any confusion, VA will refer directly to SBA’s regulations when defining the terms participant and small business concern.

VA proposed amending the definition joint venture to conform to the amendments to 13 CFR part 125. VA received several comments from one commenter regarding this proposed change. The commenter expressed support of VA’s proposed definition, but expressed concern it would lead to VA and SBA having conflicting rules on the definition of joint venture. This concern appears to be based on an assumption that VA will not apply the applicable joint venture requirements, and exceptions, found in SBA’s regulations. However, this is not the case. Proposed § 74.5 would provide further guidance on joint ventures and refers to SBA’s regulations directly. Accordingly, VA and SBA will treat joint ventures the same way. Though the commenter expressed concern that the SBA’s regulations would, in certain circumstances, allow a large business to partner with a small business, the NDAA requires that VA and SBA create uniform eligibility criteria for SDVOSB

firms, which includes those firms structured as joint ventures. Accordingly, VA will not alter the definition of joint venture and is adopting it exactly as proposed. VA proposed amending the definition of Office of Small and Disadvantaged Business Utilization to more accurately reflect the role fulfilled by this office with respect to VOSB matters. The definition included a provision stating that “[t]he Executive Director, OSDBU, is the VA liaison with the SBA. Information copies of correspondence sent to the SBA seeking a certificate of competency determination must be concurrently provided to the Director, OSDBU.” VA received one comment that authorizations regarding certificates of competency should be removed or addressed as part of the VAAR. Though certificates of competency do relate to contracting matters, VA sought to create a definition that fully describes that functions of the Office of Small and Disadvantaged Business Utilization. In addition, due to the overlapping nature of the verification and acquisition programs, there will be occasions where the regulation speaks to issues relating to contracting as well as verification. Accordingly, VA will not alter the definition of Office of Small and Disadvantaged Business Utilization and is adopting it exactly as proposed. VA proposed amending the definition of primary industry classification to make a technical change to use the acronym NAICS as it has already been defined in a parenthetical earlier in the definition. VA received two comments on the definition primary industry classification. Both commenters stated the definition was unnecessary. VA responds that this definition was not a new addition, and the only proposed change was to make a technical change to utilize the acronym ‘NAICS’. Moreover, VA believes the definition is warranted as firms list their business type and associated NAICS codes on the firm’s business profile. Therefore, VA will not make any changes to this definition and is adopting it exactly as proposed.

VA proposed amending the definition of principal place of business to change day-to-day operations to daily business operations in order to match the wording in 13 CFR 125.13. VA received two comments to the definition principal place of business. Specifically, one commenter sought to expand the definition to refer not only to day-to-day operations but long-term operations as well. Another commenter questioned the need for the definition. VA responds that the proposed change was intended

to create uniformity between the VA and SBA regulations as SBA is now responsible for issuing regulations governing the ownership and control requirements for SDVOSBs.

Accordingly, the commenter's proposed expansion is outside of VA's authority to regulate and therefore VA is adopting the definition exactly as proposed.

VA proposed to amend the definitions for service-disabled veteran, service-disabled veteran owned small business, surviving spouse, veteran, and veteran owned small business to align with SBA's proposed definitions for these terms. Initially, VA proposed to amend these definitions by incorporating the exact language contained in the NDAA and utilized by SBA in its proposed rule. VA received numerous comments on the proposed revisions. One commenter expressed concern that SBA's definitions did not provide sufficient guidance. Several commenters requested that VA include clarifying language when referencing ESOPs within the definitions. Two other commenters requested VA clarify the term "permanent and severe" disability as used in the definitions. Numerous commenters recommended additional revisions to the proposed definition for surviving spouse, primarily requesting the VA expand the eligibility criteria for individuals attempting to qualify as a surviving spouse. VA responds that the NDAA transferred the authority from VA to the SBA to make such substantive changes to definitions that impact ownership and control of SDVOSBs. Rather, VA's charge is verifying that firms meet the ownership and control requirements promulgated by SBA. Accordingly, VA finds the revisions suggested by the commenters are outside the scope of the proposed rule. However, VA acknowledges the potential that SBA may in the future amend these regulatory requirements, either as a result of statutory changes or on its own. To account for these potential changes, and eliminate any confusion as to whether VA is attempting to create unique definitions, VA will alter the language of the above definitions to explicitly state the terms will have the same meaning as set forth in SBA's regulations.

VA proposed amending the definition of verification eligibility period to reflect the current eligibility period of 3 years, which was effectuated via publication in the **Federal Register** on July 12, 2017 at 82 FR 32137. VA received one comment regarding this proposed change. The commenter expressed concern that the eligibility period subjects verified concerns to onerous and expensive re-certifications.

VA responds that the proposed change is only a technical change to align the definition with the actual eligibility period that was made effective in a final rule published in the **Federal Register** on July 12, 2017 (82 FR 32137), which amended § 74.15 to reflect the current three-year eligibility period. Therefore, VA will not alter the language of the definition and is adopting it exactly as proposed.

#### C. Section 74.2

VA proposed amending § 74.2(a) to add the clause "submitted required supplemental documentation at <http://www.va.gov/osdbu>" to clearly explain the key steps necessary to submit an application and obtain verification. VA received one comment that the proposed additional language referencing "required supplemental documentation" is unnecessary. The provision providing for submitting supplemental documentation is not a new concept to the regulation. It is a recognized method for verifying applicants and was previously described in § 74.11. As the amendment is merely reordering the regulation to provide more clarity and the comment does not propose a substantive change, VA will adopt the language of § 74.2(a) exactly as proposed.

VA proposed amending § 74.2(b) to amend the title to reference the System for Award Management, to address the impact of criminal activity on eligibility, to grant the VA authority to exclude all principals of the concern, and to specify that the debarment of any individual will impact the concern's eligibility. VA received one general comment on all circumstances where there is an immediate removal and that any such removal should have an appeals process where no final action should not be taken until the appeal is resolved. VA additionally received several comments on § 74.2(b). One comment is that there are sufficient legal certifications, statutes and remedies that would render offerors ineligible. A second is that the terms are ambiguous and invite arbitrary and capricious judgement that can lead to denial of due process. Another commenter suggested that the definition be revised to be brought in line with the requirements for the SBA's 8(a) Program, to provide for reviewing criminal violations on a case-by-case basis. In response, the amendments to § 74.2(b), currently titled "good character" are merely to provide clarity to circumstances under which a company is currently subject to removal on the grounds of good character as opposed to cancellation. Persons found guilty of, or found to be involved in

criminally related matters or debarment proceedings have received due process through whatever administrative or criminal proceeding giving rise to the removal. VA is not an additional level of review, but merely acting on determinations issued by courts or other administrative bodies or processes. Additionally, VA has mirrored the causes for immediate removal on those set forth in FAR 9.4, which sets forth means by which concerns can be deemed ineligible to receive any federal contract. The concept of immediate removal has been an integral component of § 74.2 since 2010. It has been used as a streamlined method of removing companies found ineligible for VA's set aside procurement program. In both 2010 and 2012, GAO published reports tasking VA with reducing potential instances of fraud and abuse. VA has found in its administration of the verification program that the use of the procedures identified in § 74.2 protects VA acquisition integrity and diminishes ongoing exposure to fraud, waste, and abuse. The United States Court of Federal Claims in the case of *Veterans Contracting Group, Inc., v. United States*, No. 17-1015C, pg. 10 (Dec. 21, 2017) recognizes that immediate removal does not necessarily trigger a loss of due process protections. Finally, all examinations of business entities, concerning issues of criminality or otherwise, are conducted on a case-by-case basis and take into account all relevant facts. Amending the regulation to further mirror the SBA's 8(a) program regulations is unnecessary. As VA views the proposed amendments as merely adding clarity to the current process and that no other comments have been received on the other amendments to § 74.2(b), VA adopts the amendments exactly as proposed.

VA proposed amending § 74.2(c) by adding the phrase "false statements or information" to reference the title and to provide further clarification on eligibility requirements. VA additionally proposed amending § 74.2(c) to clarify that removal is immediate and to remove the word "the" before CVE in the last sentence of the section. One commenter supports the amendment stating that submitting false statements should be stringently enforced. VA received a comment that submitting false statements is a felony and that an independent VA determination that a company made false statements can lead to denial of due process. VA received another comment that a determination by CVE as to whether false statements exists is redundant, ambiguous, could be

subjectively arbitrary, and is not authorized. In response, the amendments to § 74.2(c) are intended to clarify current interpretation and policy. The current language of § 74.2(c) has always been interpreted to allow for immediate removal upon a determination that a concern knowingly submitted false information. The proposed amendment adds the word immediate to remove any ambiguity. With respect to potential due process issues, VA offers the response provided in VA's response to comments made to § 74.2(b). As VA views the proposed amendments as merely adding clarity to the current process and that no other comments have been received on the other amendments to § 74.2(c), VA adopts the amendments as proposed.

VA proposed amending § 74.2(d) by including tax liens and unresolved debts owed to governmental entities outside of the Federal government as disqualifying an applicant. VA also proposed amending the title of the section to remove the word federal to reflect that both federal and local obligations may disqualify an applicant and to provide that participants that no longer qualify under § 74.2(d) will be removed in accordance with § 74.22. VA received one comment that expanding unresolved debts owed to government entities outside the Federal government is overreaching and outside the expertise of the VA. VA received another comment that including outstanding obligations of all state and local jurisdictions where a company does business is impractical, invites arbitrary and capricious determinations and can lead to a denial of due process. VA received two additional comments that the proposed language could potentially disqualify both a business entity that has either a legitimate tax dispute or a business entity that entered into a payment plan. Including unresolved debts owed to state and local governmental units is an appropriate amendment to the regulation considering the significant governmental benefits that a verified concern may become eligible. Furthermore, failure to qualify on the grounds of outstanding financial obligations is not an immediate disqualifying event which may trigger due process considerations. Specifically, in accordance with § 74.22, a business concern may provide any explanation deemed appropriate to explain the circumstances of any outstanding financial obligation, regardless of the jurisdiction. Thus, so long as the business entity provides an adequate response to a cancellation

proceeding, the business will not be removed from the VIP database. VA does not find that expanding the regulation to include unresolved debts owed to state and local governmental units as overly burdensome or that there is a potential due process violation. Therefore, as there are no other comments, VA is adopting § 74.2(d) as proposed.

VA proposed amending § 74.2(e) to clarify the consequences of SBA protest decisions and other negative findings and to amend the title of the section. VA received one comment that supports immediate removal on the basis of negative findings, but recommends that more examples should be provided because it is otherwise overly broad. VA received a second comment that there should be a clear process to determine ineligibility including during an appeal to prevent due process violations. VA received another comment that there is clear law and regulation on the ramifications of SBA protests decisions and negative findings. The proposed amendments to § 74.2(e) merely seek to clarify CVE's current process and to confirm that SBA decisions and other negative finding are subject to immediate removal as opposed to cancellation. Other than reordering the language and clarifying the treatment of status protests and other negative findings, § 74.2(e) does not propose any substantive changes. Treatment of negative findings is not a new concept in the regulation rather the proposed change is written to encompass all negative findings, regardless of origin. In addition, as immediate removal is not a new concept, the proposed change does not implicate any new due process issues. Moreover, the potential negative determinations would be the result of a proceeding in which the aggrieved party would have been given notice and an opportunity to be heard. As VA views the proposed amendments as merely adding clarity to the current process and that no other comments have been received on the other remaining amendments to § 74.2(e), VA adopts the amendments as proposed.

VA proposed amending § 74.2 to include paragraph (f) that specifically requires that all applicants for VIP verification must be registered in the System for Award Management (SAM). As VA did not receive any comments on this change, VA adopts the amendment as proposed.

#### *D. Section 74.3*

VA proposed amending § 74.3 to reflect that ownership is to be determined in accordance with 13 CFR part 125 as the result of the

requirements outlined in the NDAA. To put into effect this legislative change, VA proposed amending § 74.3(e) to redesignate it as § 74.3(b) to account for the removal of paragraphs (a)–(d). As VA did not receive any comments on this change, VA adopts the amendment as proposed.

VA proposed amending § 74.3(b)(1) and (3) by a technical change to replace “application” with “VA Form 0877” in order to clarify the requirement and conform language to the rest of the regulation. VA also proposed amending § 74.3(b)(1) to add a 30-day time period for submission of a new application after a change in ownership. This time period provides CVE the ability to definitively and accurately track changes of ownership. VA received one comment that recommends that the time a business should notify VA of a change in ownership should be clarified to begin on the date the concern finalizes the change within the business's corporate documents. VA understands the comment, but further clarification would not change the basic notification requirement. A business organization should provide notice of a change at the time it occurs. VA received additional comments on § 74.3 recommending that § 74.3(b)(2) and (3) be removed and addressed in the VAAR as these provisions relate to functions of contracting officers. In response, the amendment to § 74.3(b)(2) is merely a renumber of an existing regulation with no change in content. Additionally, while this provision may also implicate contracting issues, VA believes it is important for applicant firms to understand how future changes can impact eligibility. Similarly, § 74.3(b)(3) is nearly identical to the prior provision except for a technical change that indicates that a new application is filed with VA and not the contracting officer. VA sees no basis in making any additional amendments to the regulations based on the comments. As no other comments on the remaining proposed amendments to § 74.3(b) were received, VA is adopting the amendments exactly as proposed.

#### *E. Section 74.4*

VA proposed amending § 74.4(a) to state that control is determined in accordance with 13 CFR part 125 pursuant to the NDAA. VA also proposed removing paragraphs (b) through (i) upon that same basis. Although VA did not expressly note that it was removing the designation for paragraph (a), since there will not be any other paragraphs, VA proposes removing the designation for paragraph (a), as it is unnecessary. VA did not

receive any comments on the proposed amendment to § 74.4 other than as previously discussed. Therefore, VA is adopting the amendments as proposed.

#### *F. Section 74.5*

VA proposed amending § 74.5 to include joint ventures. The section is additionally reworded to clearly establish that 38 CFR part 74 does not supersede 13 CFR part 121 with respect to size determinations. VA adds paragraph (b) to specifically address eligibility of joint ventures. Paragraphs (b)(1) and (2) are added to provide notice of applicable requirements outlined elsewhere in VA regulation. VA did not receive any comments on the proposed amendment to § 74.5 other than as previously discussed and is therefore adopting the amendment as proposed.

#### *G. Section 74.10*

VA proposed amending § 74.10 to remove reference to the physical address for CVE so to allow address changes without the need for an amendment to the regulation. VA did not receive any comments on the proposed amendment to § 74.10 and is therefore adopting the amendment as proposed.

#### *H. Section 74.11*

VA proposed amending § 74.11(a) to outline its new application processing procedures and various editorial non-substantive conforming changes. Additionally, VA proposed amending § 74.11(a) to incorporate the term ‘application days’ and to increase the application processing time to 90 application days, when practicable. VA received comments that expressed a concern that the term registration as referenced in § 74.11(a) is unclear. VA provided a response above which addresses this concern. Specifically, VA agrees that that the regulation could be clearer, and has included a definition for the term register. VA believes the additional definition adequately addresses the commenter’s concerns, and therefore does not find any additional revision to § 74.11(a) to be necessary. VA proposed adding a new § 74.11(c) to address instances where CVE does not receive all requested documentation. In order to comply with VA’s statutory charge to verify applicants for the VIP database, VA requires documentation to demonstrate eligibility. VA received comments on § 74.11(a) and (c), respectively, that subjectivity should be removed from the meaning of “conforming documentation” and the meaning of “to adequately respond.” In response, there

is no one requirement for conforming documentation or providing adequate responses. Conforming documents are documents that respond to a specific request. Adequate responses are responses that provide answers to a specific inquiry. For example, if a request is to provide the last three years’ business income tax returns and only one year is provided, without providing the other two years or a letter of explanation, conforming documents have not been provided. It can also be said that the response was not adequate. VA sees no basis in making any additional amendments to the regulations based on the comments. As no other comments on the remaining proposed amendments to § 74.11(a) and (c) were received, VA is adopting the amendments exactly as proposed.

VA proposed redesignating § 74.11(c) as § 74.11(d) and adding the term “totality of circumstances” as the standard of review for reviewing an applicant’s eligibility. VA also proposed amending § 74.11(d) by referencing §§ 74.11(b) and (c) and 74.13(a) as exceptions to the totality of circumstances standard and to state that the burden of establishing VOSB status is on the applicant. VA received one comment on § 74.11(d) but it was mislabeled and should have been a comment to § 74.11(h). As VA did not receive any comments on the proposed amendment to § 74.11(d), VA is therefore adopting the amendment as proposed.

VA proposed redesignating § 74.11(d) as § 74.11(e) and proposed amending the first and second sentences by removing the word “adversely.” VA also proposed removing the third sentence as it refers to withdrawal or removal of verified status. This scenario is addressed in § 74.21 in cancellations, which specifically outlines participants can exit the VIP database. This proposed removal helps to eliminate redundancy and reduce the likelihood of confusion. VA also proposed adding new § 74.11(e)(1) to specifically address bankruptcy as a changed circumstance. As VA did not receive any comments on the proposed amendments to § 74.11(e), VA is therefore adopting the amendments as proposed.

VA proposed redesignating § 74.11(e) as § 74.11(f). Section 74.11(f) outlines the CVE Director’s options in issuing determination letters. VA received one comment on § 74.11(f) that voluntary withdrawals should be included as a third decision option. In response, other than redesignating the section numbering, § 74.11(f) does not propose any substantive changes. Furthermore, § 74.11(f) only speaks to decisions by

CVE. As a withdrawal would be the choice of the applicant, made available to applicants prior to a formal adverse decision being issued by CVE, VA does not believe it should be addressed in this subsection. As § 74.11(f) is only meant to speak to final determinations, no revisions will be made to § 74.11(f). VA is therefore adopting the amendments as proposed.

VA proposed redesignating § 74.11(f) and (g) as § 74.11(g) and (h), respectively. Section 74.11(h) outlines the methods for delivering determination letters. VA also proposed amending § 74.11(h) to add a second sentence requiring firms to update their contact information. VA received one comment on § 74.11(h) that VA should remove all reference to alternative means of transmitting decisions since the VA only uses electronic mail. In response, while it is true that VA routinely transmits decisions by email, alternate delivery options are always available and might be necessary to account for unforeseen circumstances. As no additional comments on the remaining proposed amendments to § 74.11(g) and (h) were received, VA is adopting the amendments exactly as proposed.

#### *I. Section 74.12*

VA proposed amending § 74.12 to expand the list of required documentation routinely requested by CVE. This list includes documents previously referenced in § 74.20(b). VA additionally proposed amending § 74.12 so that the term “electronic form” would be changed to “VA Form 0877” and the term “attachments” would be changed to “supplemental documentation.” VA also proposed amending § 74.12 by removing the last two sentences in the section. VA received several comments on the proposed revisions to § 74.12. However, none of the comments spoke to the proposed amendments. One comment questioned the need for the terms “principal place of business” and “primary place of business” in § 74.12. In response, the term “principal place of business” is used to identify the place where a complete copy of all supplemental documentation used in verification examinations is to be retained. The term “primary place of business” is not used in § 74.12. Another comment is that the required documents outlined in § 74.12 are not required for every set of circumstances and that the regulations do not provide for exceptions for unavailable or irrelevant documents. In response, VA understands that not all documents are available or required for every business

structure. In such cases, VA accepts letters of explanation. If the explanation reasonably explains the unavailability of the document or information, the document will not be required. For example, if a corporation does not have an operating agreement and an explanation is provided that operating agreements are not required for corporations, VA would accept that explanation. One commenter suggested that there should be an appeal process when an applicant believes that the document request is overreaching. In response, VA states that there is an appeals process. However, the process relates to final determinations made by CVE. Ultimately, a firm bears the burden of demonstrating eligibility with the verification requirements. If CVE does not receive sufficient documentation to allow the office to conclude the firm satisfies the verification requirements, it will deny the concern verified status. In accordance with the NDAA, appeals are to be filed with SBA's Office of Hearings and Appeals (OHA) in accordance with 13 CFR part 134. VA sees no basis to make any additional amendments or adjustments to the regulations based on the comments to § 74.12. Accordingly, VA is adopting the amendments exactly as proposed.

#### *J. Section 74.13*

VA proposed amending § 74.13 to modify the title and to remove references to the reconsideration process. In accordance with the NDAA, appeals of initial denials on the grounds of ownership and control will be adjudicated by SBA OHA. VA additionally proposed amending § 74.13(a) to refer to the appeal process set forth in 13 CFR part 134. VA additionally proposed redesignating § 74.13(e) as § 74.13(b), and removing existing paragraphs (b) through (d), (f) and (g) as they are no longer relevant. VA also proposed removing the phrase 'service-disabled veteran' as the term veteran would be used to refer to both veterans and service-disabled veterans. VA received one comment that the reconsideration process saves time and money. Effective October 1, 2018, in accordance with the NDAA, the VA post determination process will be transferred to SBA OHA. All appeals will be adjudicated in accordance with 13 CFR part 134. Therefore, VA will not alter the language of § 74.13 and is adopting the amendments exactly as proposed.

#### *K. Section 74.14*

VA proposed redesignating § 74.14 as § 74.14(a) and to remove references to requests for reconsideration. VA further

proposed amending the list of occurrences that the six-month waiting period applies before an applicant may submit a new application. These occurrences include notices of verified status cancellation and appeals filed with OHA that sustain initial denial letters and verified status cancellations issued by CVE. VA further proposed adding a new § 74.14(b) to clarify that a finding of ineligibility during a reapplication will result in the immediate removal of the participant. VA did not receive any comments on the proposed amendment to § 74.14 and is therefore adopting the amendments as proposed.

#### *L. Section 74.15*

VA proposed amending § 74.15(a) by splitting the paragraph into paragraphs (a), (b), and (c). VA proposed removing current § 74.15(b) because it deals with affiliation and is therefore addressed in § 74.5. VA proposed amending newly designated § 74.15(a) to improve specificity. VA proposed amending new designated § 74.15(b) to require participants to inform CVE within 30 days of changes affecting eligibility. VA proposed amending redesignated § 74.15(c) to include all situations in which the eligibility period may be shortened. VA proposed redesignating (c), (d), and (e) as (d), (e), and (f), respectively. VA further proposed amending the redesignated § 74.15(e) to reference immediate removals pursuant to § 74.2. VA received one comment that agrees with the process in § 74.15(b), requiring firms to inform VA within thirty days of changes affecting eligibility, but expressed a concern that VA should provide guidance on which changes would affect eligibility, since most firms would not be aware of which changes are material. In response, VA has published guidance on the OSDBU website. The same guidance which affects companies applying for the verification program would likewise apply to a company seeking to modify aspects of ownership and control in its business documents. In addition, VA has a list of trained verification counselors, who are available to assist with issues concerning a company's eligibility. VA received another comment that a company may lose its eligibility by no longer qualifying as a small business, but under an existing award, it remains eligible to perform a long-term contract. The fear is that the business would no longer appear as an eligible concern on the VIP database. In response, eligibility for a long-term contract is a contracting issue that should be managed through the contracting officer. Verification for the

VIP database speaks to current eligibility under existing standards. The regulations do not contain an exception for companies performing long-term contracts. Thus, VA sees no basis in making additional amendments to the regulations based on these comments. As there are no other comments to § 74.15(a) through (c) and (e), VA is adopting the amendments exactly as proposed.

VA received a comment on § 74.15(d) that firms should be informed of the nature and facts against them when VA initiates a verification examination upon receipt of credible evidence concerning its eligibility. In response, VA informs a participant concerning issues of eligibility when it initiates cancellation proceedings. Upon the issuance of a Notice of Proposed Cancellation, the concern receives notice of the nature and specific facts which VA considers to adversely impact the firm's eligibility and is provided an opportunity to provide a response. VA received another comment that there should be an appeals process if a company is removed from the VIP database on the grounds of ineligibility and the company should remain eligible in the database pending resolution of the appeal. VA responds that, in the event a participant is removed as the result of a verified status cancellation, it has a right of appeal. Specifically, in accordance with the NDAA, the VA post decision process will be transferred to SBA OHA. All appeals will be adjudicated in accordance with 13 CFR part 134. However, the regulation does not allow concerns to retain their eligibility during the appeal process. Upon a finding that a company no longer qualifies for the VIP database, it is removed immediately. VA sees no basis in making any additional amendments to the regulations based on these comments. As there are no other comments on § 74.15(d), VA is adopting the amendments exactly as proposed.

#### *M. Section 74.20*

VA proposed amending the first three sentences of § 74.20(b). In the first sentence, VA proposed removing the phrase "or parts of the program examination". In the second sentence, VA proposed changing "location" to "location(s)" and in the third sentence, VA proposed changing the word "[e]xaminers" to "CVE". As the proposed revisions to § 74.12 fully address the required documentation necessary for verification, VA proposed removing the list of documents from § 74.20. VA did not receive any comments on the proposed amendment

to § 74.20 and is therefore adopting the amendments as proposed.

#### *N. Section 74.21*

VA proposed amending § 74.21 to reorder changes made to other sections of this part. VA proposed amending § 74.21(a) to remove reference to the “‘verified’ status button” in order to reflect the current user interface of the VIP database. VA proposed amending § 74.21(c) by referencing the immediate removal provisions established in § 74.2. VA additionally proposed redesignating § 74.21(c) as § 74.21(d). VA received one comment on § 74.21(d)(4) that it is redundant and therefore irrelevant, since it is covered under § 74.21(d)(1) and (2). In response, VA agrees with the commenter that § 74.21(d)(4) may overlap with § 74.21(d)(1) and (2) to some degree. However, § 74.21(d)(4) contains a specific control requirement which is highlighted to ensure clarity. VA proposed removing § 74.21(c)(5) and (8) as involuntary exclusions are now addressed in § 74.2. VA also proposes redesignating § 74.21(c)(6), (7), and (10) and (d) as § 74.21(d)(5), (6), and (7) and (e), respectively. VA proposed adding § 74.21(d)(8) to notify the public that failure to report changed circumstances within 30 days is good cause to initiate cancellation proceedings. VA received one comment that § 74.21(d)(9) should provide for a cure period prior to the issuance of a Notice of Proposed Cancellation and that the regulations should take into consideration the varying nature of licenses. In response, the comment to § 74.21(d)(9) is not the subject of the proposed change to the regulation. Additionally, the cancellation proceedings provide the concern an opportunity to respond and refute the proposed bases for cancellation prior to any adverse action being taken. As it is each participant's obligation to remain eligible for the program in accordance with the applicable verification requirements, and the current procedures contain procedural safeguards, VA sees no need to create an additional cure period.

In addition, VA proposed removing the term “‘verified’ status button” to reflect the current user interface of the database and adding the phrase “or its agents” to clarify who may request documents. VA proposed deleting the words “a pattern of” to clarify the requirements necessary to remove a company for failure to provide requested information. VA also proposed removing the term “application” as VA Form 0877 reflects current program requirements. VA additionally proposed changing the

phrase ‘60 days’ to ‘30 days’ to conform with revised § 74.3(f)(1). Considering the comments received on § 74.21(d), VA sees no basis in making any additional amendments to the regulations based on these comments. As there are no other comments on § 74.21(d), VA is adopting the amendments exactly as proposed.

#### *O. Section 74.22*

VA proposed amending § 74.22(a) to note the beginning of the relevant 30-day time period as the date on which CVE sends notice of proposed cancellation of verified status. VA additionally proposed to amend § 74.22(e) to implement the new appeals procedure to OHA prescribed in the NDAA. VA did not receive any comments on the proposed amendment to § 74.22 and is therefore adopting the amendments as proposed.

#### *P. Sections 74.25 and 74.26*

VA proposed amending § 74.25 to replace “the Department” with “VA” and amending § 74.26 to add more specificity to the regulation concerning the information to be submitted for verification. VA received one comment on the proposed revision to § 74.26 which stated that it needed OMB authorization. In response, without more specific information, VA is unaware of the requirement for obtaining OMB authorization for § 74.26 other than the ordinary review process. Moreover, there are no material amendments to § 74.26 as the language is merely being refined. Therefore, VA sees no basis in making any additional amendments to the regulations based on the comment. As no other comments to §§ 74.25 and 74.26 were received, VA is adopting the amendments exactly as proposed.

#### *Q. Section 74.27*

VA amends § 74.27 to outline document storage requirements. VA received one comment on § 74.27 that it needed OMB authorization. In response, without more specific information, VA is unaware of the requirement for obtaining OMB authorization for the provisions contained § 74.27 other than the ordinary review process. Moreover, the amendment to § 74.27 is not substantive. There are no material amendments to § 74.27. VA proposed amending § 74.27 to reword the first sentence to specify that all documents submitted will be stored electronically. “Vendor Information Pages” is changed to “CVE” and the location reference is removed. The second sentence is revised to indicate that owner information will be compared to

available records. In addition, information is added regarding records management procedures and data breaches. Therefore, VA sees no basis in making any additional amendments to the regulations based on the comment. As no other comments on the amendments to § 74.27 were received, VA is adopting the amendments exactly as proposed.

#### *R. Sections 74.28 and 74.29*

VA proposed amending § 74.28 to replace ‘Department of Veterans Affairs’ and ‘Center for Veterans Enterprise’ with VA and CVE, respectively and § 74.29 to refer to VA’s records management procedures. VA did not receive any comments on the proposed amendments to §§ 74.28 and 74.29 and is therefore adopting the amendments as proposed.

#### **Effect of Rulemaking**

The Code of Federal Regulations, as proposed to be revised by this rulemaking, would represent the exclusive legal authority on this subject. No contrary rules or procedures would be authorized. All VA guidance would be read to conform with the rule finally adopted if possible or, if not possible, such guidance would be superseded.

#### **Justification for the October 1, 2018 Effective Date**

The Administrative Procedure Act (APA) requires that “publication or service of a substantive rule shall be made not less than 30 days before its effective date, except . . . as otherwise provided by the agency for good cause found and published with the rule.” 5 U.S.C. 553(d)(3). The purpose of the APA provision delaying the effective date of a rule for 30 days after publication is to provide interested and affected members of the public sufficient time to adjust their behavior before the rule takes effect. For the reasons set forth below, VA finds that good cause exists to make this final rule become effective on October 1, 2018, less than 30 days after it is published in the **Federal Register**.

As noted above, VA and the SBA have been working together to jointly implement the provisions of NDAA 2017. In doing so, VA and the SBA believe a single date on which all of the changes go into effect is the most effective path for implementation. VA and the SBA consider October 1, 2018 to be the best date for implementation of new unified rules for the programs. October 1, 2018 is the start of the new fiscal year, and is therefore the best date for separation of contract actions between different sets of regulations.



Having contract actions applying different regulations in the same fiscal year can often lead to confusion among contracting officials, and program participants. Procurements conducted in fiscal year 2018 will generally follow the old rules, while all new procurements in fiscal year 2019 will follow the new jointly developed regulations which VA believes will lead to less confusion.

In addition to the joint effort in implementing these provisions of NDAA 2017, VA has in a related rule making process implemented Sections 1932 and 1833 of NDAA 2017. These sections dealt with the transition of certain protest and appeal functions from the VA to SBA's Office of Hearings and Appeals. The final rule implementing those sections also has an implementation date of October 1, 2018. 83 FR 13626.

VA and SBA believe that a uniform transition combining the programs ownership and control requirements is extremely important. As such, VA believes that an earlier effective date that aligns with the new fiscal year for contracting, and with the other changes implementing NDAA 2017 is the best course of action.

#### **Paperwork Reduction Act**

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

#### **Regulatory Flexibility Act**

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

This rule making has an average cost to the small business of \$803, and it would apply only to applying for verified status in the VIP database. The regulation merely clarifies and streamlines the existing rule and adds no additional burdens or restrictions on applicants or participants regarding VA's VOSB Verification Program. The overall impact of the rule is of benefit to small businesses owned by veterans or service-disabled veterans.

The overall impact of the rule will not affect small businesses owned and controlled by veterans and service-disabled veterans. The rule removes

ownership and control from 38 CFR part 74 which will be assumed under a separate set of regulations promulgated by SBA. The rule also refines and clarifies process steps and removes post examination review. Post examination review will also be assumed under a separate set of regulations.

Examination of businesses seeking verification as veteran-owned small businesses or service-disabled veteran-owned small businesses seeking VA set aside contract opportunities is through the examination model. The examination model revises the verification process by assigning dedicated case analysts and providing applicants with additional access to VA staffers during verification.

From December 2016 through February 2017, 352 small businesses that completed the process and received determination letters participated in a follow-up survey detailing their costs and the attribution of the costs. Seventy-three (73) percent of participating businesses had either \$0 costs or responded not applicable; 14 percent estimated costs between \$1 and \$1,000; 3 percent responded with a cost estimate between \$1,001 and \$2,000; 3 percent responded with a cost estimate between \$2,001 and \$3,000; 2 percent responded with a cost estimate between \$3,001 and \$4,000; 2 percent responded with a cost estimate between \$4,001 and \$5,000; and 4 percent responded with a cost estimate over \$5,000. The average cost of all businesses providing survey responses was \$803 per business. The largest cost categories were employee costs, attorney costs, travel/printing, consultants, and accountants. Currently, there are 14,560 verified companies in VA's database and approximately 2,100 companies with applications in process. In addition, no comments were received regarding RFA issues. Therefore, the Secretary certifies that the adoption of this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act. Therefore, under 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

#### **Executive Orders 12866, 13563, and 13771**

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's impact analysis can be found as a supporting document at <http://www.regulations.gov>, usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's website at <http://www.va.gov/orpm> by following the link for VA Regulations Published from FY 2004 through FYTD. This rule is not an E.O. 13771 regulatory action because this rule is not significant under E.O. 12866.

#### **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 one year. This rule will not have such effect on State, local, and tribal governments, or on the private sector.

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

This rule will affect the verification guidelines of veteran-owned small



businesses, for which there is no Catalog of Federal Domestic Assistance program number.

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

Administrative practice and procedure, Affiliation, Appeals, Application guidelines, Control requirements, Definitions, Eligibility requirements, Eligibility term, Ownership requirements, Procedures for cancellation, Reapplication, Records management, Request for reconsideration, Verification examination.

#### Signing Authority

The Secretary of Veterans Affairs 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. Robert L. Wilkie, Secretary, Department of Veterans Affairs, approved this document on September 12, 2018, for publication.

Dated: September 12, 2018.

**Jeffrey M. Martin,**

*Impact Analyst, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.*

For the reasons set forth in the preamble, we amend 38 CFR part 74 as follows:

#### PART 74—VETERANS SMALL BUSINESS REGULATIONS

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

**Authority:** 38 U.S.C. 501 and 513, unless otherwise noted.

- 2. Revise § 74.1 to read as follows:

##### § 74.1 What definitions are important for Vendor Information Pages (VIP) Verification Program?

For the purpose of this part, the following definitions apply:

*Applicant* means a firm applying for inclusion in the VIP database.

*Application days* means the time period from when a veteran registers for verification to the time of a determination, excluding any days in which CVE is waiting for the firm to submit information or documentation necessary for the office to continue processing the application.

*Center for Verification and Evaluation* (CVE) is an office within the U.S. Department of Veterans Affairs (VA) and is a subdivision of VA's Office of Small and Disadvantaged Business Utilization. CVE receives and reviews all applications for eligibility under this part and maintains the VIP database.

CVE assists VA contracting offices to identify veteran-owned small businesses and communicates with the Small Business Administration (SBA) with regard to small business status.

*Days* are calendar days unless otherwise specified. In computing any period of time described in this part, the day from which the period begins to run is not counted, and when the last day of the period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal holiday. Similarly, in circumstances where CVE is closed for all or part of the last day, the period extends to the next day on which the agency is open.

*Eligible individual* means a veteran, service-disabled veteran, or surviving spouse, as defined in the United States Code and the regulation promulgated by the SBA, currently 13 CFR part 125.

*Joint venture* is an association of two or more business concerns for which purpose they combine their efforts, property, money, skill, or knowledge in accordance with 13 CFR part 125. A joint venture must be comprised of at least one veteran-owned small business. For VA contracts, a joint venture must be in the form of a separate legal entity.

*Non-veteran* means any individual who does not claim veteran status, or upon whose status an applicant or participant does not rely in qualifying for the VIP Verification Program participation.

*Office of Small and Disadvantaged Business Utilization (OSDBU)* is the office within VA that establishes and monitors small business program goals at the prime and subcontract levels. OSDBU works with VA Acquisitions to ensure the creation and expansion of small businesses opportunities by promoting the use of set-aside contracting vehicles within VA procurement. OSDBU connects and enables veterans to gain access to these Federal procurement opportunities. The Executive Director, OSDBU, is the VA liaison with the SBA. Information copies of correspondence sent to the SBA seeking a certificate of competency determination must be concurrently provided to the Director, OSDBU. Before appealing a certificate of competency, the Head of Contracting Activity must seek concurrence from the Director, OSDBU.

*Participant* has the same meaning given to such term in 13 CFR part 125.

*Primary industry classification* means the six-digit North American Industry Classification System (NAICS) code designation which best describes the primary business activity of the participant. The NAICS code

designations are described in the NAICS Manual published by the U.S. Office of Management and Budget.

*Principal place of business* means the business location where the individuals who manage the concern's daily business operations spend most working hours and where top management's current business records are kept. If the office from which management is directed and where the current business records are kept are in different locations, CVE will determine the principal place of business for program purposes.

*Register* means the initiation of an application for verification or reverification by the business owner or a business representative.

*Service-disabled veteran* has the same meaning given to such term in 13 CFR part 125.

*Service-disabled veteran-owned small business concern* (SDVOSB) has the same meaning given to such term in 13 CFR part 125.

*Small business concern* (SBC) has the same meaning given to such term in 13 CFR part 125.

*Surviving spouse* has the same meaning given to such term in 13 CFR part 125.

VA is the U.S. Department of Veterans Affairs.

*Vendor Information Pages (VIP)* is a database of businesses eligible to participate in VA's Veteran-owned Small Business Program. The online database may be accessed at no charge via the internet at <https://www.va.gov/osdbu>.

*Verification eligibility period* is a 3-year period that begins on the date CVE issues its approval letter establishing verified status. The participant must submit a new application for each eligibility period to continue eligibility.

*Veteran* has the same meaning given to such term in 13 CFR part 125.

*Veteran-owned small business concern* (VOSB) has the same meaning given to such term in 13 CFR part 125.

*Veterans Affairs Acquisition Regulation (VAAR)* is the set of rules that specifically govern requirements exclusive to VA prime and subcontracting actions. The VAAR is chapter 8 of title 48, Code of Federal Regulations, and supplements the Federal Acquisition Regulation (FAR), which contains guidance applicable to most Federal agencies.

- 3. Revise § 74.2 to read as follows:

##### § 74.2 What are the eligibility requirements a concern must meet for the VIP Verification Program?

(a) *Ownership and control.* A small business concern must be

unconditionally owned and controlled by one or more eligible veterans, service-disabled veterans or surviving spouses, have completed the online VIP database forms, submitted required supplemental documentation at <http://www.va.gov/osdbu>, and have been examined by VA's CVE. Such businesses appear in the VIP database as "verified".

(b) *Good character and exclusions in System for Award Management (SAM).* Individuals having an ownership or control interest in verified businesses must have good character. Debarred or suspended concerns or concerns owned or controlled by debarred or suspended persons are ineligible for VIP Verification. Concerns owned or controlled by a person(s) who is currently incarcerated, or on parole or probation (pursuant to a pre-trial diversion or following conviction for a felony or any crime involving business integrity) are ineligible for VIP Verification. Concerns owned or controlled by a person(s) who is formally convicted of a crime set forth in 48 CFR 9.406–2(b)(3) are ineligible for VIP Verification during the pendency of any subsequent legal proceedings. If, after verifying a participant's eligibility, the person(s) controlling the participant is found to lack good character, CVE will immediately remove the participant from the VIP database, notwithstanding the provisions of § 74.22.

(c) *False statements.* If, during the processing of an application, CVE determines, by a preponderance of the evidence standard, that an applicant has knowingly submitted false information, regardless of whether correct information would cause CVE to deny the application, and regardless of whether correct information was given to CVE in accompanying documents, CVE will deny the application. If, after verifying the participant's eligibility, CVE discovers that false statements or information have been submitted by a firm, CVE will remove the participant from the VIP database immediately, notwithstanding the provisions of § 74.22. Whenever CVE determines that the applicant submitted false information, the matter will be referred to the VA Office of Inspector General for review. In addition, CVE will request that debarment proceedings be initiated by the Department.

(d) *Financial obligations.* Neither an applicant firm nor any of its eligible individuals that fails to pay significant financial obligations, including unresolved tax liens and defaults on Federal loans or State or other government assisted financing, owed to

the federal government, the District of Columbia or any state, district, or territorial government of the United States, is eligible for VIP Verification. If after verifying the participant's eligibility CVE discovers that the participant no longer satisfies this requirement, CVE will remove the participant from the VIP database in accordance with § 74.22.

(e) *Protest Decisions or other negative findings.* Any firm verified in the VIP database that is found to be ineligible by a SDVOSB/VOSB status protest decision will be immediately removed from the VIP database, notwithstanding the provisions of § 74.22. Any firm verified in the VIP database that is found to be ineligible due to a U.S. Small Business Administration (SBA) protest decision or other negative finding may be immediately removed from the VIP database, notwithstanding the provisions of § 74.22. Until such time as CVE receives official notification that the firm has proven that it has successfully overcome the grounds for the determination, that the decision is overturned on appeal, or the firm applies for and receives verified status from CVE, the firm will not be eligible to participate in the 38 U.S.C. 8127 program.

(f) *System for Award Management (SAM) registration.* All applicants for VIP Verification must be registered in SAM at <http://www.sam.gov> prior to application submission.

■ 4. Revise § 74.3 to read as follows:

**§ 74.3 Who does CVE consider to own a veteran-owned small business?**

(a) *Ownership.* Ownership is determined in accordance with 13 CFR part 125. However, where 13 CFR part 125 is limited to SDVOSBs, CVE applies the same ownership criteria to firms seeking verified VOSB status.

(b) *Change of ownership.* (1) A participant may remain eligible after a change in its ownership or business structure, so long as one or more veterans own and control it after the change. The participant must file an updated VA Form 0877 and supporting documentation identifying the new veteran owners or the new business interest within 30 days of the change.

(2) 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 FAR subpart 42.12 to the contracting officer prior to the substitution or change of ownership for approval.

(3) 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 file an updated VA Form 0877 with 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.

(4) Continued eligibility of the participant with new ownership requires that CVE verify that all eligibility requirements are met by the concern and the new owners.

■ 5. Revise § 74.4 to read as follows:

**§ 74.4 Who does CVE consider to control a veteran-owned small business?**

Control is determined in accordance with 13 CFR part 125. However, where 13 CFR part 125 is limited to SDVOSBs, CVE applies the same control criteria to firms seeking verified VOSB status.

■ 6. Revise § 74.5 to read as follows:

**§ 74.5 How does CVE determine affiliation?**

(a) CVE does not determine affiliation. Affiliation is determined by the SBA in accordance with 13 CFR part 121.

(b) Joint ventures may apply for inclusion in the VIP Verification Program. To be eligible for inclusion in the VIP Verification Program, a joint venture must demonstrate that:

(1) The underlying VOSB upon which eligibility is based is verified in accordance with this part; and

(2) The joint venture agreement complies with the requirements set forth in 13 CFR part 125 for SDVOSBs. However, while 13 CFR part 125 is limited to SDVOSBs, CVE will apply the same requirements to joint venture firms seeking verified VOSB status.

■ 7. Revise § 74.10 to read as follows:

**§ 74.10 Where must an application be filed?**

An application for VIP Verification status must be electronically filed in the Vendor Information Pages database located on the CVE's Web portal, <http://www.va.gov/osdbu>. Guidelines and forms are located on the Web portal. Upon receipt of the applicant's electronic submission, an acknowledgment message will be dispatched to the concern containing estimated processing time and other information. Address information for CVE is also located on the Web portal.

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0675.)

■ 8. Revise § 74.11 to read as follows:

#### **§ 74.11 How does CVE process applications for VIP Verification Program?**

(a) The Director, CVE, is authorized to approve or deny applications for VIP Verification. CVE will receive, review, and examine all VIP Verification applications. Once an applicant registers, CVE will contact the applicant within 30 days to initiate the process. If CVE is unsuccessful in its attempts to contact the applicant, the application will be administratively removed. If CVE is successful in initiating contact with the applicant, CVE will advise the applicant of required documents and the timeline for submission. If the applicant would be unable to provide conforming documentation, the applicant will be given the option to withdraw its application. CVE will process an application for VIP Verification status within 90 application days, when practicable, of receipt of a registration. Incomplete application packages will not be processed.

(b) CVE, in its sole discretion, may request clarification of information relating to eligibility at any time in the eligibility determination process. CVE will take into account any clarifications made by an applicant in response to a request for such by CVE.

(c) CVE, in its sole discretion, may request additional documentation at any time in the eligibility determination process. Failure to adequately respond to the documentation request shall constitute grounds for a denial or administrative removal.

(d) An applicant's eligibility will be based on the totality of circumstances existing on the date of application, except where clarification is made pursuant to paragraph (b) of this section, additional documentation is submitted pursuant to paragraph (c) of this section, as provided in paragraph (e) of this section or in the case of amended documentation submitted pursuant to § 74.13(a). The applicant bears the burden to establish its status as a VOSB.

(e) Changed circumstances for an applicant occurring subsequent to its application and which affect eligibility will be considered and may constitute grounds for denial of the application. The applicant must inform CVE of any changed circumstances that could affect its eligibility for the program (*i.e.*, ownership or control changes) during its application review.

(1) *Bankruptcy*. Bankruptcy is a change in circumstance requiring additional protection for the agency. Should a VOSB enter into bankruptcy the participant must:

(i) Inform CVE of the filing event within 30 days;

(ii) Specify to CVE whether the concern has filed Chapter 7, 11, or 13 under U.S. Bankruptcy code; and

(iii) Any participant that is performing contracts must assure performance to the contracting officer(s) prior to any reorganization or change if necessary including such contracts in the debtor's estate and reorganization plan in the bankruptcy.

(2) [Reserved]

(f) The decision of the Director, CVE, to approve or deny an application will be in writing. A decision to deny verification status will state the specific reasons for denial and will inform the applicant of any appeal rights.

(g) If the Director, CVE, approves the application, the date of the approval letter is the date of participant verification for purposes of determining the participant's verification eligibility term.

(h) The decision may be sent by mail, commercial carrier, facsimile transmission, or other electronic means. It is the responsibility of the applicant to ensure all contact information is current in the applicant's profile.

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900-0675.)

■ 9. Revise § 74.12 to read as follows:

#### **§ 74.12 What must a concern submit to apply for VIP Verification Program?**

Each VIP Verification applicant must submit VA Form 0877 and supplemental documentation as CVE requires. All electronic forms are available on the VIP database web pages. From the time the applicant dispatches the VA Form 0877, the applicant must also retain on file, at the principal place of business, a complete copy of all supplemental documentation required by, and provided to, CVE for use in verification examinations. The documentation to be submitted to CVE includes, but is not limited to: Articles of Incorporation/Organization; corporate by-laws or operating agreements; shareholder agreements; voting records and voting agreements; trust agreements; franchise 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; financial statements; Federal personal and business tax returns for up to 3 years; and licenses.

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900-0675.)

■ 10. Amend § 74.13 by revising the section heading and paragraphs (a) and (b) to read as follows

#### **§ 74.13 Can an applicant appeal CVE's initial decision to deny an application?**

(a) An applicant may appeal CVE's decision to deny an application by filing an appeal with the United States Small Business Administration (SBA) Office of Hearings and Appeals (OHA) after the applicant receives the denial in accordance with 13 CFR part 134. The filing party bears the risk that the delivery method chosen will not result in timely receipt by OHA.

(b) A denial decision that is based on the failure to meet any veteran eligibility criteria is not subject to appeal and is the final decision of CVE.

\* \* \* \* \*

■ 11. Revise § 74.14 to read as follows:

#### **§ 74.14 Can an applicant or participant reapply for admission to the VIP Verification Program?**

(a) Once an application, an appeal of a denial of an application, or an appeal of a verified status cancellation has been denied, or a verified status cancellation which was not appealed has been issued, the applicant or participant shall be required to wait for a period of 6 months before a new application will be processed by CVE.

(b) Participants may reapply prior to the termination of their eligibility period. If a participant is found to be ineligible, the participant will forfeit any time remaining on their eligibility period and will be immediately removed from the VIP Verification database. An applicant removed pursuant to this section may appeal the decision to OHA in accordance with § 74.13. The date of a new determination letter verifying an applicant will be the beginning of the next 3-year eligibility period.

■ 12. Revise § 74.15 to read as follows:

#### **§ 74.15 What length of time may a business participate in VIP Verification Program?**

(a) A participant receives an eligibility term of 3 years from the date of CVE's approval letter establishing verified status.

(b) The participant must maintain its eligibility during its tenure and must inform CVE of any changes that would affect its eligibility within 30 days.

(c) The eligibility term may be shortened by removal pursuant to § 74.2, application pursuant to § 74.14(b), voluntary withdrawal by the participant pursuant to § 74.21, or cancellation pursuant to § 74.22.

(d) CVE may initiate a verification examination whenever it receives

credible information concerning a participant's eligibility as a VOSB. Upon its completion of the examination, CVE will issue a written decision regarding the continued eligibility status of the questioned participant.

(e) If CVE finds that the participant does not qualify as a VOSB, the procedures at § 74.22 will apply, except as provided in § 74.2.

(f) If CVE finds that the participant continues to qualify as a VOSB, the original eligibility period remains in effect.

■ 13. Revise § 74.20 to read as follows:

**§ 74.20 What is a verification examination and what will CVE examine?**

(a) *General.* A verification examination is an investigation by CVE officials, which verifies the accuracy of any statement or information provided as part of the VIP Verification application process. Thus, examiners may verify that the concern currently meets the eligibility requirements, and that it met such requirements at the time of its application or its most recent size recertification. An examination may be conducted on a random, unannounced basis, or upon receipt of specific and credible information alleging that a participant no longer meets eligibility requirements.

(b) *Scope of examination.* CVE may conduct the examination at one or all of the participant's offices or work sites. CVE will determine the location(s) of the examination. CVE may review any information related to the concern's eligibility requirements including, but not limited to, documentation related to the legal structure, ownership, and control. Examiners may review any or all of the organizing documents, financial documents, and publicly available information as well as any information identified in § 74.12.

■ 14. Revise § 74.21 to read as follows:

**§ 74.21 What are the ways a business may exit VIP Verification Program status?**

A participant may:

(a) Voluntarily cancel its status by submitting a written request to CVE requesting that the concern be removed from public listing in the VIP database; or

(b) Delete its record entirely from the VIP database; or

(c) CVE may remove a participant immediately pursuant to § 74.2; or

(d) CVE may remove a participant from public listing in the VIP database for good cause upon formal notice to the participant in accordance with § 74.22. Examples of good cause include, but are not limited to, the following:

(1) Submission of false information in the participant's VIP Verification application.

(2) Failure by the participant to maintain its eligibility for program participation.

(3) Failure by the participant for any reason, including the death of an individual upon whom eligibility was based, to maintain ownership, management, and control by veterans, service-disabled veterans, or surviving spouses.

(4) Failure by the concern to disclose to CVE the extent to which non-veteran persons or firms participate in the management of the participant.

(5) Failure to make required submissions or responses to CVE or its agents, including a failure to make available financial statements, requested tax returns, reports, information requested by CVE or VA's Office of Inspector General, or other requested information or data within 30 days of the date of request.

(6) Cessation of the participant's business operations.

(7) Failure by the concern to provide an updated VA Form 0877 within 30 days of any change in ownership, except as provided in § 74.3(f)(3).

(8) Failure to inform CVE of any such changed circumstances, as outlined in paragraphs (c) and (d) of this section.

(9) Failure by the concern to obtain and keep current any and all required permits, licenses, and charters, including suspension or revocation of any professional license required to operate the business.

(e) The examples of good cause listed in paragraph (d) of this section are intended to be illustrative only. Other grounds for canceling a participant's verified status include any other cause of so serious or compelling a nature that it affects the present responsibility of the participant.

■ 15. Amend § 74.22 by revising paragraphs (a) and (e) to read as follows:

**§ 74.22 What are the procedures for cancellation?**

(a) *General.* When CVE believes that a participant's verified status should be cancelled prior to the expiration of its eligibility term, CVE will notify the participant in writing. The Notice of Proposed Cancellation Letter will set forth the specific facts and reasons for CVE's findings and will notify the participant that it has 30 days from the date CVE sent the notice to submit a written response to CVE explaining why the proposed ground(s) should not justify cancellation.

\* \* \* \* \*

(e) *Appeals.* A participant may file an appeal with OHA concerning the Notice of Verified Status Cancellation decision in accordance with 13 CFR part 134. The decision on the appeal shall be final.

■ 16. Revise § 74.25 to read as follows:

**§ 74.25 What types of personally identifiable information will VA collect?**

In order to establish owner eligibility, VA will collect individual names and Social Security numbers for veterans, service-disabled veterans, and surviving spouses who represent themselves as having ownership interests in a specific business seeking to obtain verified status.

■ 17. Revise § 74.26 to read as follows:

**§ 74.26 What types of business information will VA collect?**

VA will examine a variety of business records. See § 74.12, "What must a concern submit to apply for VIP Verification Program?"

■ 18. Revise § 74.27 to read as follows:

**§ 74.27 How will VA store information?**

VA stores records provided to CVE fully electronically on the VA's secure servers. CVE personnel will compare information provided concerning owners against any available records. Any records collected in association with the VIP verification program will be stored and fully secured in accordance with all VA records management procedures. Any data breaches will be addressed in accordance with the VA information security program.

■ 19. Revise § 74.28 to read as follows:

**§ 74.28 Who may examine records?**

Personnel from VA, CVE, and its agents, including personnel from the SBA, may examine records to ascertain the ownership and control of the applicant or participant.

■ 20. Revise § 74.29 to read as follows:

**§ 74.29 When will VA dispose of records?**

The records, including those pertaining to businesses not determined to be eligible for the program, will be kept intact and in good condition and retained in accordance with VA records management procedures following a program examination or the date of the last Notice of Verified Status Approval letter. Longer retention will not be required unless a written request is received from the Government Accountability Office not later than 30 days prior to the end of the retention period.

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