

ALERT

SBA Proposes Rule to Standardize VOSB and SDVOSB Eligibility Determinations

February 1, 2018

WHAT: The U.S. Small Business Administration (SBA) published a proposed rule that would standardize the regulations governing ownership and control of veteran-owned (VOSB) and service-disabled veteran-owned (SDVOSB) small businesses. The rule implements provisions of the National Defense Authorization Act for Fiscal Year 2017, which directed SBA to establish one definition of ownership and control for these concerns that will apply to the Department of Veterans Affairs (VA) in its verifications for Vets First Contracting Program procurements, and all other government acquisitions requiring self-certification.

The proposed rule incorporates language from existing VA regulations and SBA's 8(a) program regulations to define key terms, such as "small business concern," "surviving spouse," "permanent caregiver," and "unconditional ownership." Additionally, the rule establishes ownership requirements for partnerships and clarifies requirements related to equity allocations, dividends, distributions, and board control. It also identifies five "extraordinary circumstances" under which a service-disabled veteran does not have full control over a firm's decision-making, but would nevertheless remain an eligible owner. Notably, the proposed rule includes provisions that would protect a firm's status when ownership transfers to a surviving spouse upon a service-disabled veteran business owner's death, and when an owner in the reserves is recalled to active duty.

WHEN: The proposed rule was published on February 1. Comments are due by March 30, 2018.

Practice Areas

Government Contracts
Small Business Programs and
Nontraditional Defense Contractors

WHAT DOES IT MEAN FOR INDUSTRY: This proposed rule would resolve longstanding inconsistencies between SBA and VA regulations that have led to conflicting decisions about whether a company qualifies for contracts set-aside for VOSBs and SDVOSBs. This issue was recently highlighted in a case decided by the Court of Federal Claims, *Veterans Contracting Group, Inc. v. United States*, where the Court noted that the “complex and divergent regulatory framework” was “giving rise to harsh, even perverse, result[s].” This proposed rule would reconcile SBA’s and VA’s program regulations to avoid conflicting set-aside eligibility determinations. Once the new rules are finalized, the VA would use the SBA’s regulations for establishing ownership and control of VOSBs and SDVOSBs. The VA would continue to determine whether individuals are veterans or service-disabled veterans, and would be responsible for verification of applicant firms. Challenges to the status of a VOSB or SDVOSB based upon issues of ownership or control would be decided by SBA.