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Dated: June 29, 2009.

Matthew S. Borman,
Acting Assistant Secretary for Export
Administration.

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DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 21

RIN 2900-AM91

Vocational Rehabilitation and Employment Program—Duty To Assist

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the vocational rehabilitation and employment regulations of the Department of Veterans Affairs (VA) concerning VA's responsibility to provide notification regarding information or evidence needed for an individual to substantiate a claim for vocational rehabilitation benefits and services, and regarding applicable time periods. VA's duty to assist claimants in substantiating their claims for benefits was expanded by the Veterans Claims Assistance Act of 2000. This rulemaking incorporates those provisions in VA's regulations. Specifically, upon receipt of a substantially complete application for benefits, VA will make reasonable efforts to help the claimant obtain the evidence necessary to substantiate the claim. In addition, VA is making changes to improve readability and other clarifying changes that are nonsubstantive.

DATES: *Effective Date:* This final rule is effective August 5, 2009.

Applicability Date: For information concerning the date of applicability, see the Supplementary Information section of this document.

FOR FURTHER INFORMATION CONTACT: Alvin Bauman, Senior Policy Analyst, Vocational Rehabilitation and Employment Service (28), Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Ave., NW., Washington, DC 20420, (202) 461-9613.

SUPPLEMENTARY INFORMATION: In a document published in the **Federal Register** on July 1, 2008 (73 FR 37402), we proposed to amend regulations governing VA's responsibility to provide notification regarding information or evidence needed for an individual to substantiate a claim for vocational

rehabilitation benefits and services, and regarding applicable time periods. We provided a 60-day comment period that ended on September 2, 2008.

We received comments from one organization and one individual. With respect to the individual commenter, the submission stated "see the attached for proposed changes to this regulation," yet we did not receive an attachment or the commenter's contact information. Consequently, we make no changes based on the commenter's submission.

The organization commented with respect to the 30-day period in proposed 38 CFR 21.32(a)(3) and (d) after which VA may decide a claim if the claimant has not responded to the notification provided under proposed § 21.32(a) concerning information and evidence that is necessary to substantiate the claim. The commenter expressed the view that 30 days from the date of notice is not sufficient time for a claimant to respond. It asserted that after taking into account time after the date of the notice until receipt by the claimant, and time for mailing back to VA, the 30-day period "will effectively give most disabled veterans only about 15 days from receipt of your letter in which to digest its contents, obtain assistance and/or needed documentation, and prepare and mail a response to you." We do not agree with this comment and make no change in the 30-day period based on the comment.

We note that the commenter provided no evidence supporting its assertions as to the time that is involved prior to receipt of VA's notice and that is needed to allow for receipt by VA of the claimant's response. Even considering that there may be significantly less than the full 30 days to prepare a response, a claimant need not provide all the information and evidence within the 30-day period. A claimant may delay VA action beyond the 30 days by simply responding with a request that VA wait beyond the 30-day period. We believe that the 30-day time period referred to in proposed § 21.32(a)(3) and (d) is a reasonable time period for these claimants to respond. It is specifically supported by our experience in administering VA's vocational rehabilitation programs, and is the same time for response provided in other circumstances under those programs. Further, whether or not the claimant responds within 30 days, proposed § 21.32 provided a one-year time limit for receipt by VA of the information of evidence referred to in the notice, and for readjudication if VA had decided the claim prior to the one-year time period.

In addition, we note that the 30-day time period is supported by administrative concerns, and is intended to assure that a lack of response does not unnecessarily delay a VA decision on the claim.

With respect to proposed § 21.33(d), the commenter stated that it would be "unreasonable to expect that VA will be able to determine from a cursory review of a 'substantially complete application' that there is no reasonable possibility that any notice and/or assistance the VA would provide to the claimant would substantiate the claim." However, under proposed § 21.33(d), more than a cursory review would be involved before deciding to discontinue providing assistance. VA would be required to evaluate the application for benefits to determine whether any of the four circumstances under which VA will discontinue assistance exists. Further, the provision is consistent with principles relied upon throughout 38 CFR part 21. (See 38 CFR 21.1032(d) concerning VA's duty to assist claimants for VA education benefits.) We do not believe any change is warranted based on this comment.

VA appreciates the submissions in response to the proposed rule. For the reasons stated above and those in the notice of proposed rulemaking, the proposed rule is adopted as a final rule without change.

The preamble to the proposed rule provided notice of our intent that its provisions be applicable to claims filed on or after the effective date of the final rule. In accordance with that statement of our intent, VA will apply the provisions of this final rule to claims for vocational rehabilitation benefits and services filed on or after August 5, 2009.

Paperwork Reduction Act of 1995

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

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 year. This final rule would have no such effect on State, local, and tribal governments, or on the private sector.

Executive Order 12866

Executive Order 12866 directs agencies to assess all 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, and other advantages; distributive impacts; and equity). The Executive Order classifies a "significant regulatory action," requiring review by the Office of Management and Budget (OMB) unless OMB waives such review, 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 the Executive Order.

The economic, interagency, budgetary, legal, and policy implications of this final rule have been examined and it has been determined to be a significant regulatory action under Executive Order 12866 because it may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This final rule will not directly affect any small entities. Only individuals could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this final rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs that will be affected by this final rule are 64.116, Vocational Rehabilitation for Disabled Veterans, and 64.128, Vocational Training and Rehabilitation for Vietnam Veterans' Children with Spina Bifida or Other Covered Defects.

List of Subjects in 38 CFR Part 21

Administrative practice and procedure, Armed forces, Civil rights, Claims, Colleges and universities, Conflict of interests, Education, Employment, Grant programs—education, Grant programs—veterans, Health care, Loan programs—education, Loan programs—veterans, Manpower training programs, Reporting and recordkeeping requirements, Schools, Travel and transportation expenses, Veterans, Vocational education, Vocational rehabilitation.

Approved: June 29, 2009.

John R. Gingrich,

Chief of Staff, Department of Veterans Affairs.

■ For the reasons stated in the preamble, VA amends 38 CFR part 21 (subparts A and M) as follows:

PART 21—VOCATIONAL REHABILITATION AND EDUCATION

Subpart A—Vocational Rehabilitation and Employment Under 38 U.S.C. Chapter 31

■ 1. The authority citation for part 21, subpart A is revised to read as follows:

Authority: 38 U.S.C. 501(a), chs. 18, 31, and as noted in specific sections.

■ 2. The subpart A heading is revised as set forth above.

■ 3. Revise § 21.32 to read as follows:

§ 21.32 Notification by VA of necessary information or evidence when a claim is filed; time for claimant response and VA action.

The provisions of this section apply to claims that are governed by this subpart or subpart M of this part.

(a) *VA has a duty to notify claimants of necessary information or evidence.* Except when a claim cannot be substantiated because there is no legal basis for the claim, or undisputed facts render the claimant ineligible for the claimed benefit, when VA receives a complete or substantially complete application for vocational rehabilitation benefits and services provided under this subpart or subpart M of this part VA will:

(1) Notify the claimant of any information and evidence that is necessary to substantiate the claim;

(2) Inform the claimant which information and evidence, if any, the claimant is to provide to VA and which information and evidence, if any, VA will try to obtain for the claimant; and

(3) Inform the claimant of the time limit, as provided in paragraph (c) of this section, for responding to VA's notification, and of actions, as provided in paragraph (d) of this section, that VA

may take to decide the claim if the claimant does not respond to such notification within 30 days.

(b) *Definitions for purposes of §§ 21.32 and 21.33.* For purposes of this section and § 21.33:

(1) The term *application* does not include a notice of disagreement.

(2) The term *notification* means the notice described in paragraph (a) of this section.

(3) The term *substantially complete application* means, for an individual's first application for vocational rehabilitation benefits and services administered by VA, an application containing:

(i) The claimant's name;

(ii) His or her relationship to the veteran, if applicable;

(iii) Sufficient information for VA to verify the claimed service, if applicable; and

(iv) The benefit claimed.

(4) The term *information* means nonevidentiary facts, such as the claimant's Social Security number or address, or the name of the educational institution the claimant is attending.

(c) *Time limit.* Any information and evidence described in the notification as information and evidence that the claimant is to provide must be received by VA within one year from the date of the notification. If VA does not receive the information and evidence from the claimant within that time period, VA may adjudicate the claim based on the information and evidence in the file.

(d) *Actions VA may take after 30 days if no response from claimant.* If the claimant has not responded to the notification within 30 days, VA may decide the claim before the expiration of the one-year period, based on all the information and evidence in the file, including information and evidence it has obtained on behalf of the claimant. If VA does so, however, and the claimant subsequently provides the information and evidence specified in the notification within one year of the date of the notification, VA must readjudicate the claim. If VA's decision on a readjudication is favorable to the claimant, the award of vocational rehabilitation benefits and services shall take effect as if the prior decision by VA on the claim had not been made.

(e) *Incomplete applications.* If VA receives an incomplete application for benefits, it will notify the claimant of the information necessary to complete the application and will defer assistance until the claimant submits this information. If the information necessary to complete the application is not received by VA within one year from the date of such notice, VA cannot

pay or provide any benefits based on that application.

(f) *Who VA will notify.* For the purpose of this section, when VA seeks to notify a claimant, it will provide such notice to:

- (1) The claimant;
- (2) His or her fiduciary, if any; and
- (3) His or her representative, if any.

(Authority: 38 U.S.C. 5102, 5103, 5103A(a)(3))

■ 4. Immediately after § 21.32 and prior to the cross-reference, add § 21.33, to read as follows:

§ 21.33 VA has a duty to assist claimants in obtaining evidence.

The provisions of this section apply to claims that are governed by this subpart or subpart M of this part.

(a) *VA's duty to assist begins when VA receives a complete or substantially complete application.* (1) Except as provided in paragraph (d) of this section, upon receipt of a complete or substantially complete application for vocational rehabilitation benefits and services under this subpart or subpart M of this part, VA will:

(i) Make reasonable efforts to help a claimant obtain evidence necessary to substantiate the claim; and

(ii) Give the assistance described in paragraphs (b) and (c) of this section to an individual attempting to reopen a finally decided claim.

(2) VA will not pay any fees a custodian of records may charge to provide the records VA requests.

(Authority: 38 U.S.C. 5103A)

(b) *Obtaining records not in the custody of a Federal department or agency.* (1) VA will make reasonable efforts to obtain relevant records not in the custody of a Federal department or agency. These records include relevant records from:

- (i) State or local governments;
- (ii) Private medical care providers;
- (iii) Current or former employers; and
- (iv) Other non-Federal governmental sources.

(2) The reasonable efforts described in paragraph (b)(1) of this section will generally consist of an initial request for the records and, if VA does not receive the records, at least one follow-up request. The following are exceptions to this provision concerning the number of requests that VA generally will make:

(i) VA will not make a follow-up request if a response to the initial request indicates that the records sought do not exist or that a follow-up request for the records would be futile.

(ii) If VA receives information showing that subsequent requests to this or another custodian could result in

obtaining the records sought, reasonable efforts will include an initial request and, if VA does not receive the records, at least one follow-up request to the new source or an additional request to the original source.

(3) The claimant must cooperate fully with VA's reasonable efforts to obtain relevant records from non-Federal agency or department custodians. The claimant must provide enough information to identify and locate the existing records, including:

(i) The person, company, agency, or other custodian holding the records;

(ii) The approximate time frame covered by the records; and

(iii) In the case of medical treatment records, the condition for which treatment was provided.

(4) If necessary, the claimant must authorize the release of existing records in a form acceptable to the person, company, agency, or other custodian holding the records.

(Authority: 38 U.S.C. 5103A)

(c) *Obtaining records in the custody of a Federal department or agency.* (1) Subject to paragraphs (c)(2) through (c)(4) of this section, VA will make as many requests as are necessary to obtain relevant records from a Federal department or agency. These records include but are not limited to:

(i) Military records;

(ii) Medical and other records from VA medical facilities;

(iii) Records from non-VA facilities providing examination or treatment at VA expense; and

(iv) Records from other Federal agencies.

(2) VA will cease its efforts to obtain records from a Federal department or agency only if VA concludes that the records sought do not exist or that further efforts to obtain those records would be futile. Cases in which VA may conclude that no further efforts are required include cases in which the Federal department or agency advises VA that the requested records do not exist or that the custodian of such records does not have them.

(3) The claimant must cooperate fully with VA's reasonable efforts to obtain relevant records from Federal department or agency custodians. At VA's request, the claimant must provide enough information to identify and locate the existing records, including:

(i) The custodian or agency holding the records;

(ii) The approximate time frame covered by the records; and

(iii) In the case of medical treatment records, the condition for which treatment was provided.

(4) If necessary, the claimant must authorize the release of existing records in a form acceptable to the custodian or agency holding the records.

(Authority: 38 U.S.C. 5103A)

(d) *Circumstances where VA will refrain from or discontinue providing assistance.* VA will refrain from providing assistance in obtaining evidence for a claim if the substantially complete or complete application for benefits indicates that there is no reasonable possibility that any assistance VA would provide to the claimant would substantiate the claim. VA will discontinue providing assistance in obtaining evidence for a claim if the evidence obtained indicates that there is no reasonable possibility that further assistance would substantiate the claim. Circumstances in which VA will refrain from or discontinue providing assistance in obtaining evidence include but are not limited to:

(1) The claimant's ineligibility for the benefit sought because of lack of qualifying service, lack of veteran status, or other lack of legal eligibility;

(2) Claims that are inherently not credible or clearly lack merit;

(3) An application requesting a benefit to which the claimant is not entitled as a matter of law; and

(4) The claimant's lack of cooperation in providing or requesting information or evidence necessary to substantiate the claim.

(Authority: 38 U.S.C. 5103A)

(e) *Duty to notify claimant of inability to obtain records.* (1) VA will notify the claimant either orally or in writing when VA:

(i) Has made reasonable efforts to obtain relevant non-Federal records, but is unable to obtain them; or

(ii) After continued efforts to obtain Federal records, concludes that it is reasonably certain they do not exist or that further efforts to obtain them would be futile.

(2) For non-Federal records requests, VA may provide the notice to the claimant at the same time it makes its final attempt to obtain the relevant records.

(3) VA will make a written record of any oral notice conveyed under this paragraph to the claimant.

(4) The notice to the claimant must contain the following information:

(i) The identity of the records VA was unable to obtain;

(ii) An explanation of the efforts VA made to obtain the records;

(iii) The fact described in paragraph (e)(1)(i) or (e)(1)(ii) of this section;

(iv) A description of any further action VA will take regarding the claim, including, but not limited to, notice that VA will decide the claim based on the evidence of record unless the claimant submits the records VA was unable to obtain; and

(v) A notice that the claimant is ultimately responsible for obtaining the evidence.

(5) If VA becomes aware of the existence of relevant records before deciding the claim, VA will notify the claimant of the existence of such records and ask that the claimant provide a release for the records. If the claimant does not provide any necessary release of the relevant records that VA is unable to obtain, VA will ask that the claimant obtain the records and provide them to VA.

(6) For the purpose of this section, if VA must notify the claimant, VA will provide notice to:

- (i) The claimant;
- (ii) His or her fiduciary, if any; and
- (iii) His or her representative, if any.

(Authority: 38 U.S.C. 5102, 5103(a), 5103A)

Subpart M—Vocational Training and Rehabilitation for Certain Children of Vietnam Veterans—Spina Bifida and Covered Birth Defects

■ 5. The authority citation for part 21, subpart M continues to read as follows:

Authority: 38 U.S.C. 101, 501, 512, 1151 note, ch. 18, 5112, and as noted in specific sections.

■ 6. Add § 21.8015 to read as follows:

§ 21.8015 Notification by VA of necessary information or evidence when a claim is filed; time for claimant response and VA action; and VA's duty to assist claimants in obtaining evidence.

The provisions of §§ 21.32 and 21.33 of subpart A of this part also apply to claims for benefits and services under this subpart.

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DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 64

[Docket ID FEMA-2008-0020; Internal Agency Docket No. FEMA-8081]

Suspension of Community Eligibility

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: This rule identifies communities, where the sale of flood insurance has been authorized under the National Flood Insurance Program (NFIP), that are scheduled for suspension on the effective dates listed within this rule because of noncompliance with the floodplain management requirements of the program. If the Federal Emergency Management Agency (FEMA) receives documentation that the community has adopted the required floodplain management measures prior to the effective suspension date given in this rule, the suspension will not occur and a notice of this will be provided by publication in the **Federal Register** on a subsequent date.

DATES: Effective Dates: The effective date of each community's scheduled suspension is the third date ("Susp.") listed in the third column of the following tables.

FOR FURTHER INFORMATION CONTACT: If you want to determine whether a particular community was suspended on the suspension date or for further information, contact David Stearrett, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646-2953.

SUPPLEMENTARY INFORMATION: The NFIP enables property owners to purchase flood insurance which is generally not otherwise available. In return, communities agree to adopt and administer local floodplain management aimed at protecting lives and new construction from future flooding. Section 1315 of the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits flood insurance coverage as authorized under the NFIP, 42 U.S.C. 4001 *et seq.*, unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed in this document no longer meet that statutory requirement for compliance with program regulations, 44 CFR part 59. Accordingly, the communities will be suspended on the effective date in the third column. As of that date, flood insurance will no longer be available in the community. However, some of these communities may adopt and submit the required documentation of legally enforceable floodplain management measures after this rule is published but prior to the actual suspension date. These communities will not be suspended and will continue their eligibility for the sale of insurance. A

notice withdrawing the suspension of the communities will be published in the **Federal Register**.

In addition, FEMA has identified the Special Flood Hazard Areas (SFHAs) in these communities by publishing a Flood Insurance Rate Map (FIRM). The date of the FIRM, if one has been published, is indicated in the fourth column of the table. No direct Federal financial assistance (except assistance pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act not in connection with a flood) may legally be provided for construction or acquisition of buildings in identified SFHAs for communities not participating in the NFIP and identified for more than a year on FEMA's initial flood insurance map of the community as having flood-prone areas (section 202(a) of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4106(a), as amended). This prohibition against certain types of Federal assistance becomes effective for the communities listed on the date shown in the last column. The Administrator finds that notice and public comment under 5 U.S.C. 553(b) are impracticable and unnecessary because communities listed in this final rule have been adequately notified.

Each community receives 6-month, 90-day, and 30-day notification letters addressed to the Chief Executive Officer stating that the community will be suspended unless the required floodplain management measures are met prior to the effective suspension date. Since these notifications were made, this final rule may take effect within less than 30 days.

National Environmental Policy Act. This rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Considerations. No environmental impact assessment has been prepared.

Regulatory Flexibility Act. The Administrator has determined that this rule is exempt from the requirements of the Regulatory Flexibility Act because the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits flood insurance coverage unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed no longer comply with the statutory requirements, and after the effective date, flood insurance will no longer be available in the communities unless remedial action takes place.

Regulatory Classification. This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30,