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DEPARTMENT OF LABOR

Veterans' Employment and Training Service

20 CFR Part 1001

RIN 1293-AA18

Uniform National Threshold Entered Employment Rate for Veterans

AGENCY: Veterans' Employment and Training Service, Labor.

ACTION: Final Rule.

SUMMARY: The purpose of this Final Rule is to establish the uniform national threshold entered employment rate (UNTEER) for veterans, as required of the Secretary in 38 U.S.C. 4102A(c)(3)(B), for use in evaluating States' performance in assisting veterans to meet their employment needs. The Final Rule also explains how the threshold will be used in the process of identifying those States to be reviewed by comparing the actual entered employment rate (EER) achieved for veterans with the threshold EER, and it identifies certain factors, in addition to the threshold, that will be included in the Department's review to determine whether an EER below the threshold reflects a deficiency in the State's performance, or is attributable to other factors beyond the State's control. Finally, in those cases in which a State's EER is determined to reflect a deficiency in a State's performance, this Final Rule identifies the procedure for the

submission and review of a corrective action plan (CAP), the delivery of technical assistance (TA), and the initiation of the necessary steps to implement corrective actions to improve the State's performance in assisting veterans to meet their employment needs.

DATES: Effective Date: The Final Rule will become effective on [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Ruth Samardick, Director, Office of National Programs, Veterans' Employment and Training Service, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S-1325, Washington, DC 20210, Samardick.Ruth.M@dol.gov, (202) 693-4700 (this is not a toll-free number) or (202) 693-4760 (TTY/TDD).

SUPPLEMENTARY INFORMATION: This preamble contains three sections. Section I provides general background information on the development of the Final Rule. Section II discusses the comments received on the Notice of Proposed Rulemaking (NPRM) and the related regulatory provisions included in the Final Rule. Section III addresses the administrative requirements for the Final Rule, as mandated by statute and executive order.

I. Background

On February 18, 2011, the Department published a Notice of Proposed Rulemaking (NPRM, 76 FR 9517) proposing a Rule to implement a uniform national threshold entered employment rate for veterans applicable to State employment service delivery systems. We undertook this Rulemaking in accordance with 38 U.S.C. 4102A(c)(3)(B)

(as enacted by the Jobs for Veterans Act) which requires the Department to establish that threshold rate by regulation. All comments received during the comment period were posted on www.regulations.gov.

The Jobs for Veterans Act (JVA), Public Law 107-288, was signed into law November 7, 2002. Section 4(a)(1) of the JVA amended 38 U.S.C. 4102A to require that the Secretary of Labor "establish, and update as appropriate, a comprehensive performance accountability system (as described in subsection (f)) and carry out annual performance reviews of veterans employment, training, and placement services provided through employment service delivery systems, including through Disabled Veterans' Outreach Program specialists and through Local Veterans' Employment Representatives in States receiving grants, contracts, or awards under this chapter." 38 U.S.C. 4102A(b)(7).

Section 4102A(f) requires the establishment of performance standards and outcome measures to measure the performance of State employment service delivery systems.

Section 4101(7) of the statute defines "employment service delivery system" to include "labor exchange services * * * offered in accordance with the Wagner-Peyser Act." We interpret this definition to include the services delivered through the Wagner-Peyser State Grants, funded by the Employment and Training Administration (ETA), as well as the services delivered through the Jobs for Veterans State Grants (JVSG), funded by the Veterans' Employment and Training Service (VETS). In addition, we interpret this definition to exclude the services funded through the Workforce Investment Act of 1998 (WIA) (Pub. L. 105-220).

Under section 4102A(f), the standards and measures used to assess performance of veterans' programs must be consistent with State performance measures applicable under section 136(b) of the WIA. 38 U.S.C. 4102A(f)(2)(A); see also WIA section 136(b) (codified at 29 U.S.C. 2871(b)). The basic standards and measures applied by the Department to measure performance under WIA are referred to in the State employment service delivery systems as "common measures." The current methods of calculating the common measures are specified in Training and Employment Guidance Letter (TEGL) No.17-05, issued on February 17, 2006. This TEGL can be accessed at <http://wdr.doleta.gov/directives/attach/TEGL17-05.pdf>. The common measures for adult workforce programs include a measure of the rate at which enrollees of State employment service delivery systems enter employment. This is referred to as the "entered employment rate" or EER. Under the common measures, there is a comparable EER specifically applicable to veterans and eligible persons. Application of that measure to all State employment service delivery systems is implemented each year through issuance of a Veterans' Program Letter (VPL), most recently VPL 03-11, issued on June 14, 2011, which established the reporting and performance measurement requirements for PY 2011. This VPL can be accessed at:

<http://www.dol.gov/vets/VPLS/VPLDirectory.html>.

In the NPRM it was explained that this regulation establishes a uniform national threshold only for the EER for veterans and eligible persons. If we revise the calculation of the standards and measures applied by the Department to measure performance under WIA or under a successor program to WIA through issuance of policy guidance, the Final Rule provides that the revised method of calculating the EER for veterans and

eligible persons will be used in calculating the uniform national threshold EER. The method of calculating the uniform national threshold EER for veterans and eligible persons will be specified to State employment service delivery systems in the annual VPL, as mentioned above, and in a companion annual Training and Employment Guidance Letter issued by ETA, such as TEGL No.29-10, “Negotiating Performance Goals for the Workforce Investment Act Title 1B Programs and Wagner-Peyser Act Funded Activities for Program Year (PY) 2011” issued on June 1, 2011.

As explained in the NPRM, in developing this regulation we also anticipated that there would be changes to the existing State workforce agency performance reporting system to accommodate reporting on the definition of “veteran” that applies to the priority of service provisions of the JVA. The priority of service definition includes any person who served in the military and was discharged under conditions other than dishonorable. Section 1001.162 of this Final Rule outlines how this definition will be phased into operation.

For § 1001.162 in this Rule, we adopted the language proposed in the NPRM. The language explains that for purposes of this Rule, the definition of “veteran” will be implemented in two stages. Under § 1001.162(a), starting with the first Program Year that begins after [EFFECTIVE DATE OF THE FINAL RULE], we will implement this Rule using the definition of “veteran” that is consistent with the definition of “eligible veteran” that applies to VETS’ services provided under 38 U.S.C. chapter 41. An “eligible veteran” is defined as a person who served on active duty in the military for a period of more than 180 days and was discharged under conditions other than dishonorable. (The definition also includes some other smaller group of veterans, for

example, those who were released from active duty because of a service-connected disability.) Because of the requirement of more than 180 days of service, the NPRM referred to this definition as the “more restrictive” definition of “veteran.”

Then, as stated in § 1001.162(b), we will begin to use the less restrictive priority of service definition of “veteran” starting two Program Years after States are required to begin collecting data under the Priority of Service regulations. DOL will require States to begin collecting this data in PY 2012. Therefore, we will begin using the less restrictive definition of “veteran” for purposes of this Rule beginning PY 2014.

As explained in the NPRM, even when we begin using the less restrictive definition of “veteran” when implementing this Rule, States will be required to continue collecting data under the more restrictive definition in addition to collecting data under the Priority of Service regulations. This is because the Secretary is required by 38 U.S.C. 4107(c) to report annually to the Senate and House Veterans’ Affairs Committees on the employment and training services provided under 38 U.S.C. chapter 41, which are the services provided to “eligible veterans” as defined by the more restrictive definition.

Section 4102A(c)(3) of Title 38 states that “(A)(i) As a condition of a grant or contract under this section for a program year, in the case of a State that the Secretary determines has an entered employment rate for veterans that is deficient for the preceding program year, the State shall develop a Corrective Action Plan (CAP) to improve that rate for veterans in the State. (ii) The State shall submit the Corrective Action Plan to the Secretary for approval, and if approved, shall expeditiously implement the plan. (iii) If the Secretary does not approve a Corrective Action Plan submitted by the State under

clause (i), the Secretary shall take such steps as may be necessary to implement corrective actions in the State to improve the entered employment rate for veterans in that State. (B) To carry out subparagraph (A), the Secretary shall establish in regulations a uniform national threshold entered employment rate for veterans for a program year by which determinations of deficiency may be made under subparagraph (A). (C) In making a determination with respect to a deficiency under subparagraph (A), the Secretary shall take into account the applicable annual unemployment data for the State and consider other factors, such as prevailing economic conditions, that affect performance of individuals providing employment, training, and placement services in the State.”

Section 1001.164 of this Final Rule states that the uniform national threshold EER for a program year is equal to 90 percent of the national EER for veterans and eligible persons, which is defined in 20 CFR 1001.163(c).

In the process of establishing the uniform national threshold EER, before the issuance of the NPRM, we considered a variety of methodologies and used actual EER results from Program Years 2005 through 2009 in order to test the validity of the methodologies. Our goal was to establish a uniform national threshold that would meet five criteria: the threshold should produce reasonable results under varying economic conditions; the threshold should relate directly to the national EER because the national EER is the overall program performance measure related to entered employment rates; the threshold should identify State agencies whose EERs are demonstrably low; the threshold methodology should be easily explained and readily grasped; and the annual threshold-setting process should not conflict with or introduce confusion into the annual performance goal-setting process conducted between VETS and each State agency.

We first tried methodologies that essentially compared a State's current year veterans' EER results with prior years' results, using straightforward comparisons in one method and comparisons to prior year averages in another. Those methods involved relatively complex calculations, and empirical tests with State performance data from Program Years 2008 and 2009 demonstrated that those methodologies did not produce reasonable results under the conditions created by the economic recession experienced during that period.

We then looked at simpler designs for calculating and applying the uniform national threshold EER. One methodology used the national EER for the program year before the subject program year as the basis for calculating the threshold EER. The process would have involved simply setting the threshold at a particular percentage of the national EER from the prior year and comparing the State agencies' actual achievements in the subject program year to that threshold percentage. However, testing at several different percentage levels indicated that using the prior year's national EER as the basis for a threshold also produces unreasonable results in years when there are relatively unusual declines or upturns in economic conditions.

We then tested and selected a similar one-step methodology using the national EER for the subject program year as the basis for calculating the threshold EER. We chose to propose a 90 percent (of the national EER) level as the threshold for identifying each year those State agencies to be subject to a review triggered by the UNTEER because testing of that threshold level most completely satisfies the five criteria stated above. Testing of higher and lower threshold levels (e.g., 80 to 95 percent of the national EER) produced results that in one or more ways failed to satisfy those five criteria stated above. Setting

the threshold at the 80 or 85 percent (of the national EER) levels apparently would exempt virtually all of the subject State agencies from the review, year in and year out, despite their relatively low performance levels. That clearly is not an outcome compatible with the legislative intent. At the 95 percent level, more State agencies would be in the cohort subject to the review. But at that level, more so than at the 90 percent level, it also is more likely that the number of State agencies whose statistical under-performance was attributable primarily to economic factors in the subject program year, and thus not subject to corrective action planning, would be increased.

II. Discussion of the Comments and Regulatory Provisions

Summary of Comments

We received eight comments on the NPRM by the close of the comment period. All comments were carefully reviewed. Of the eight comments, seven were from organizations with an interest in veterans' employment services. Of the seven comments from organizations, six were from State Workforce Agencies, and one was from a State veterans' commission that is the Jobs for Veterans State grantee in that state. One of the eight comments was submitted by an individual in his personal capacity; that person also submitted a comment as an employee of a State Workforce Agency.

Discussion of Comments

1. Three comments raised objections to the fact that the proposed uniform national threshold entered employment rate (UNTEER) would not include the performance data of all Workforce Investment Act-funded programs for veterans and other eligible persons. They said that WIA program services, especially WIA-funded training programs, are

integral to the workforce services provided to veterans in the States. The comments maintained that by excluding WIA performance data, the threshold will not accurately reflect a State's performance in serving veterans through its workforce system. Furthermore, one of the comments stated that the exclusion of WIA would cause the threshold to be less effective in improving a State's services to veterans. Another comment stated that in excluding WIA programs from the UNTEER, VETS would miss the opportunity to improve WIA program performance for veterans. Two of the comments also stated that not applying the threshold measure as a performance standard to the overall performance of the workforce services programs in a State would undermine the priority for veterans and other covered persons that is supposed to be given by all DOL-funded employment and training programs.

Response: As was proposed in the NPRM, the UNTEER in the Final Rule does not include WIA-funded services. Section 4102A(f)(1) of 38 U.S.C. requires that VETS establish performance standards to carry out performance reviews of veterans services provided through State employment service delivery systems, including services provided through JVSG staff. Section 4101 defines "employment service delivery system" to mean "a service delivery system at which or through which labor exchange services . . . are offered in accordance with the Wagner-Peyser Act." We have interpreted this definition to exclude WIA-funded services. Section 4102A(f)(2) states that these performance standards must be consistent with other performance standards and outcome measures related to services to veterans that are commonly applied to State Workforce agencies. The Department's common measures of State agency performance on behalf of veterans (including annual entered employment rates for each State) apply to the

outcomes of services provided by the veterans' specialists funded by Jobs for Veterans State Grants and the State agency staff who are supported by grants authorized by the Wagner-Peyser Act. Therefore it is appropriate that the UNTEER be calculated from a database that covers the performance of the JVSG and Wagner-Peyser grant-supported staff only.

Regarding the comments that questioned this Rule's effect on States' implementation of the priority of service requirements of 38 U.S.C. 4215, we believe that these comments have raised the broader issue of the need for performance standards for all DOL-funded programs subject to the priority of service for covered persons requirement. That issue is separate from the establishment of the uniform national threshold entered employment rate that is relevant exclusively to measuring the effectiveness of the services of State agencies that are recipients of Wagner-Peyser State Grants, and/or Jobs for Veterans State Grants. Furthermore, the Department currently is working to implement the requirement in Public Law 112-56, enacted in November 2011, to establish appropriate performance measures related to the priority of service advantage for veterans and other covered persons.

2. One commenter pointed out that because the proposed UNTEER can only be calculated at the end of a performance period, the number would not be known during the annual goal-setting negotiations that take place between VETS and the State JVSG recipients. The commenter stated that therefore the annual goal-setting process will be undermined, because the States would not know the appropriate performance target to set.

Response: We acknowledge the circumstances cited by the commenter, but do not believe that the annual goal-setting negotiations will be undermined by the existence of the UNTEER as it was proposed. The UNTEER is not intended to be a performance target; rather, it is a floor-level benchmark, meant to be used in the annual process of assessing the results of the services that were provided during the program year. We believe that States and the two DOL agencies involved, VETS and ETA, will continue to be able to use historical data, including the national EER and individual State EER data, to formulate and negotiate reasonable annual performance targets in the future. Furthermore, because the UNTEER is derived from the aggregate performance of all of the State employment service agencies, DOL expects it to be relatively consistent from year to year.

3. Two commenters said that VETS needs to clarify how the proposed UNTEER would correlate to other annual negotiated performance measures and numerical targets and the processes for putting those annual targets in place.

Response: We agree that VETS and ETA will need to provide some clarifying guidance to the States about how the UNTEER does or does not affect the annual goal-setting processes for the entered employment rate common measures required of all JVSG and Wagner-Peyser grantees. This guidance will be disseminated via administrative directives (such as Veterans Program Letters by VETS and Training and Employment Guidance Letters by ETA) and published by those agencies each year.

4. Two commenters stated that due to the data reporting system's lag time, under the NPRM, there would be no less than a two-year hiatus between the performance year after

which a State may be required to have a Corrective Action Plan (CAP) and the completion of the CAP itself, and that the lack of immediacy of the CAP remedy could be problematic. One of those commenters suggested that any State found deficient and subject to a CAP should therefore be exempt from the annual review for EER deficiency during the hiatus, until the CAP is completed. The other commenter questioned how the two-year time lag would impact the annual performance negotiations if a State was under a CAP.

Response: We have not made any changes to the Rule in response to these comments. While there will be lag time between the program year that gives rise to a CAP and the completion of the CAP, we believe that any challenges inherent in the proposed cycle of reviews, CAP development and imposition, and later determinations of the success of subject agencies in resolving their deficiencies can and will be overcome by good faith efforts of the grantor agencies and the State agencies in behalf of veterans. The review that follows a determination that a State failed to meet the UNTEER essentially will focus on whether or not the statistical performance was due to internal policy or operational flaws that may be correctable, or instead was due to economic and other external variables beyond a State's control. In the latter case, no CAP would be called for. The Department's view is that every situation that requires a Corrective Action Plan is unique, and therefore every CAP will be unique. Although unique in content, each CAP would include a diagnosis section that outlines the unique, specific State agency internal policy and/or operational flaws that existed in the subject performance year, and a plan section that outlines the specific corrective actions, with timetables, to remedy those flaws. It is likely that some corrective actions in each CAP may take place during

the period while the CAP is being developed, or at various times during the period while the approved CAP is in place, and thus the lag time between diagnosis and remedy would be reduced from the two-year time frame cited by the commenter for discrete parts of the corrective actions.

As for the proposed exemption from the annual reviews to determine whether or not a CAP should be required, we do not intend to exempt any State from the reviews.

However, should a State agency that is already under a CAP fail again to attain the UNTEER our review will take into consideration the relevant facts including progress toward the goals in the CAP, and we will react appropriately. Later actions could include continuation of all portions of the original CAP, or modification of the existing CAP, or creation of an entirely new CAP. Each case would be unique.

5. One commenter proposed that the first year of application of the proposed UNTEER and subsequent deficiency reviews be a “hold harmless” year, in which the results would be computed but no remedial action would be required of any State agency, in order to establish a baseline for the UNTEER.

Response: We see no need for a “hold harmless” period. The databases in which the individual States’ entered employment rates reside and from which the UNTEER is calculated are mature, and the data sets are considered valid and reliable. In formulating the proposed UNTEER, we used these databases to predict the results of applying the UNTEER measure and found that applying the UNTEER as proposed will not lead to any extreme results. While it is true that the incorporation of the new definition of veteran into the system will have some impact on the veterans data, the change is expected to

have only a minor impact, not significant enough to de-stabilize or invalidate the databases.

6. Another commenter stated that the NPRM's allowance of a two-year delay for developing a data system to capture data on the less restrictive definition of "veteran" (as it is defined for purposes of priority of service) will likely cause confusion for program staff since certain veterans will count as veterans for one purpose (preference in job referrals), but not for the Federal entered employment performance measure until two years from now.

Response: We have made no changes to the Final Rule in response to this comment. We realize that at the service delivery level, there may be some program linkage problems due to the fact that Federal laws do not provide a uniform definition of the persons who are considered to be "veterans" for all employment and training related programs. Even when the less restrictive definition of "veteran" begins to apply for purposes of this Rule and for the Priority of Service requirements, States must continue to also collect data using the more restrictive definition of "eligible veteran" to fulfill the reporting requirements under 38 U.S.C. chapter 41. That issue can only be resolved by legislative changes. The reason for the two year time frame for the changeover to using the data collected under the new definition is to ensure that those data are accurate and reliable before applying them in the annual review process.

7. Two commenters addressed the status of the ETA/VETS data collection and data reporting systems, both encouraging ETA and VETS to collaborate to make changes necessary to incorporate the new definition of veteran into the data collection and

reporting systems. One of the two commenters also asked if the Department would provide funding support to the States for the changes that have to be made.

Response: VETS and ETA are collaborating on the data systems changes. States will be able to use Federal grant funds to pay for their costs of implementing the data systems changes.

8. One commenter stated that the potential impact of the proposed UNTEER would be greater on States with larger veteran populations. To mitigate this disparate impact, the commenter proposed that the numbers of certain categories of hard-to-serve veterans (e.g., incarcerated and homeless veterans) not be included in the entered employment rate calculations that will be done following implementation of the UNTEER and related deficiency review processes outlined in this Rule.

Response: We reject removal of any category of veterans or covered persons from the EER calculations performed under this Rule. There is no support in VETS' governing statutes for such exclusion, and no precedent for doing so. The Final Rule retains the single UNTEER to be applicable to evaluating the performance of States' provision of services to all veterans and covered persons in the State. However, we will evaluate State-specific factors during a review for deficiency under § 1001.166(b)(1) of this Rule.

9. One commenter proposed that the threshold be lowered from the proposed 90 percent of the national EER to 80 percent of the national EER, in order "to standardize reporting" with the Wagner-Peyser and WIA programs.

Response: The Uniform National Threshold Entered Employment Rate is not intended to be viewed or used as the annual "goal" or "target" entered employment rate for any

individual State. The UNTEER does not serve the same purpose as the ETA and the VETS agencies' EER goal-setting processes conducted annually with the State agencies, so there is no reason to make the percentages equal. We expect that State agencies in the future will continue to participate with VETS and ETA in negotiating performance goals based primarily on each State agency's history of performance and economic forecasts for the target year(s), and additionally, for veterans, the assumption that delivering priority of service will result in better outcomes for veterans.

10. Three commenters disagreed with the proposal to use the national EER for veterans as a benchmark embedded into the UNTEER formula, and suggested instead to use some methodology that would be more specific to the circumstances of each State, such as comparing performance to aggregated data derived from certain groupings (e.g., by size or by other attributes) of State agencies rather than to the national EER. The comments state that any process for determining whether or not a State agency's performance is deficient needs to take into consideration the specific circumstances of state and local economies and customers' needs.

Response: We agree that we must take into consideration pertinent information regarding unique circumstances related to any State agency's performance before making a determination that the State agency is deficient and must take corrective action on behalf of veterans. However, we disagree that the method of calculating the UNTEER must attempt to incorporate the multitude of factors that make each State agency unique. There are far too many unique factors among the State agencies affected by this regulation to quantify and integrate into a viable threshold formula. The Final Rule takes into account the unique factors related to a State agency's performance during the review process that

will take place for every State that fails to attain the simple uniform national threshold, as described at § 1001.166(b).

We formulated and tested many methodologies for the UNTEER that attempted to create a UNTEER along the lines suggested by these commenters. All were found to be seriously flawed in some way or another. For example, one commenter proposed revising the threshold calculation and subsequent deficiency determination process by dividing the States into three groups, Small, Medium, and Large (decided by the number of veteran participants in the State), then calculating at the end of each program year the EER collectively achieved by each of those three groups of State agencies. The resultant three group EERs would serve as the “uniform national EER for veterans” to identify the agencies within each group that would be reviewed.

However, we determined that the concept of lumping States together by that criterion, or by any other single criterion or group of criteria (e.g., geographic size, geographic region, number of independent Workforce Investment Boards, etc) and then creating several aggregate numerical benchmarks to serve as the threshold is as subject to criticism about the comparability or non-comparability of the subject agencies as is the more simple national UNTEER that is being adopted in this Final Rule. Also, 38 U.S.C. 4102A(c)(3)(B) calls for a uniform national threshold, so a methodology that effectively creates multiple different numerical thresholds in any given year is problematic in that respect.

We tested other methods of calculating unique “threshold” EERs for each State agency, including comparisons of year-to-year performance. One method divided the State

agencies into two groups based on comparing each State's EER to the national EER. The method then compared the State agencies' year-to-year performance, further dividing State agencies into two groups based on comparing the State's subject year performance to the average of the State's previous three years' EERs. Another method compared each agency's performance percentage of change from the previous year to the national percentage of change from the previous year. However, there are serious flaws in each of those relatively complicated methodologies. The empirical results of testing of each formula with the available, complete State agency data, i.e., from program years 2005 through 2009, showed that those formulae failed to produce reasonable results during periods of sharp economic change such as was experienced in 2008 and 2009.

We have chosen to implement 38 U.S.C. 4102A(c)(3)(B) by establishing a floor-level EER for veterans below which a State agency's performance will be subject to a Departmental review to determine whether that State should be required to take corrective action to improve its operations on behalf of veterans. We believe that a simple UNTEER methodology directly related to the aggregate national workforce services delivery system's actual achievement level is a reasonable and understandable measure that satisfies the legislation's requirement for a single measure intended to identify State agencies potentially in need of corrective action on behalf of veterans.

We also favor the relatively simple to understand UNTEER in this Final Rule because its simplicity lowers the potential for confusion and conflict with the annual program goal-setting processes carried on by both VETS and ETA with the States.

11. The same commenter who recommended creating the three group threshold approach discussed above also recommended changing the Final Rule to attach JVSG funding triggers to the results of the comparisons of the States' EERs to the threshold EER. The commenter proposed that any State agency that failed to attain the threshold number would automatically lose 1 – 3 percent of its JVSG funding, and those States that exceeded the number would automatically gain an additional 1 -3 percent of JVSG funding. The commenter argued that this Rule should not only focus on corrective action for under-performing State agencies, it should also provide tangible recognition and rewards for higher performing State agencies.

Response: We think that this suggestion goes far beyond what the JVA law intended or authorizes. Section 4102A(c)(3) requires that after a determination that takes into consideration internal and external factors that affect performance, State agencies found to be deficient for the preceding program year must engage in corrective action in order to receive the next-due JVS grant. The statute does not require or authorize the Department to adjust grant funding levels simply on the basis of attainment or non-attainment of the threshold number.

12. Two commenters said that more explanation needs to be given regarding the reviews that would be done by VETS following a finding that a State agency's EER is deficient in relation to the UNTEER. One asked specifically if there is, or will be, a model for analyzing the economic data during the review to determine whether or not a Corrective Action Plan is required. One asked if the impact of the new, broader definition of veteran will be considered. One asked if distinctions would be made between the EER for veterans and the disabled veterans' EER, and how VETS would consider veterans who

require intensive services. One also asked if additional reporting burdens will be imposed by the review process.

Response: We agree that we should provide to the State agencies more information regarding the review content and process, but not in federal regulations. We think that the details of the review process and content is best left to VETS, the DOL agency that will make the final determination, after consultation with ETA, whether or not a CAP should be imposed. Administrative details will be provided through the issuance of program guidance letters. The Rule gives wide latitude for any State that is subject to the review to provide information about its policies, operations, and performance level, but does not prescribe any additional reporting requirements.

Changes from the NPRM

For this Final Rule, we have mainly adopted the text as proposed in the NPRM. We made minor editorial changes to the text of section 1001.160, and the regulatory text now uses the acronym UNTEER to reference the Uniform National Threshold EER. We also made minor additions to the text of section 1001.166 to acknowledge that we will consult with ETA during the evaluation described in that section. Because section 1001.166 involves evaluating a State's employment service delivery system, which includes the Wagner-Peyser program that is administered by ETA, it is appropriate that VETS consider ETA's input during the review process.

III. Administrative Information

Regulatory Flexibility Analysis, Executive Order 13272, and Small

Business Regulatory Enforcement Fairness Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. Chapter 6, requires the Department to evaluate the economic impact of this Rule with regard to small entities. The RFA defines small entities to include small businesses, small organizations including not-for-profit organizations, and small governmental jurisdictions. We have determined, and have certified to the Chief Counsel for Advocacy, Small Business Administration, that this Rule does not impose a significant economic impact on a substantial number of such small entities, because this Rule would directly impact only States and the definition of small entities does not include States.

Executive Orders 12866 and 13563

Executive Orders (E.O.) 13563 and 12866 direct agencies to assess all costs and benefits of a rule and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity).

Executive Order 12866 requires that for each regulatory action we propose, we must conduct an assessment of the proposed regulatory action to determine whether the action is “significant” before publishing the regulation. A “significant regulatory action” is defined to include an action that will have an annual effect on the economy of \$100 million or more, and/or an action that raises a novel legal or policy issue. This Rule will not have an annual effect on the economy of \$100 million or more, and it does not raise novel legal or policy issues. Therefore, the Office of Management and Budget has designated this Final Rule as “not significant” under E.O. 12866.

E.O. 13563, issued after publication of the NPRM, directs agencies to identify, to the extent possible, the necessity of the regulation as well as the costs and benefits of the regulation.

Through the Jobs for Veterans State Grants program, VETS provides funding to States to support Disabled Veterans Outreach Program specialists and Local Veterans Employment Representatives in each State. These individuals provide employment services to veterans and eligible military spouses. Under 38 U.S.C. 4102A(c)(3)(A)(i), for a State to receive JVSG funding for a program year, if VETS determines that the State's entered-employment rate (EER) for veterans is deficient for the preceding program year, the State must develop a corrective action plan (CAP) to improve the EER for veterans in the State. Section 4102A(c)(3)(B) of title 38 requires VETS to "establish in regulations a uniform national threshold entered-employment rate for veterans for a program year by which [these] determinations of deficiency may be made." This Final Rule establishes a uniform national threshold, and explains how VETS will use the uniform national threshold in its review of States to determine whether an EER below the threshold reflects a deficiency in the State's performance. The Rule also explains the procedure for the submission and review of a CAP. This regulation is necessary for VETS to fulfill its statutory obligations to establish the uniform national threshold and to conduct reviews for deficiency under the JVSG program.

The costs of this Rule are minimal. VETS will calculate the uniform national threshold and will determine how a State's EER for veterans compares to the threshold using the data that VETS already routinely collects from States as part of the JVSG program. The Rule does not impose any new data collection requirements. If a State is determined

deficient and required to submit a CAP, VETS estimates that the costs specifically attributable to submitting and implementing the CAP would be about one percent of the State's annual JVS grant amount. If a State's JVSG funding is not adequate to cover the cost of developing and implementing a CAP, additional funds will be provided through VETS' routine reallocation procedure, which requires no additional appropriation and thus would have no net cost.

The benefits of this Rule far outweigh its minimal costs. By fulfilling VETS' statutory obligations to establish the uniform national threshold and conduct reviews for deficiency, the Rule will add another measure of accountability to the JVSG program. This will help ensure that veterans and eligible spouses are provided a maximum of employment and training opportunities, consistent with the purpose of VETS as stated in 38 U.S.C. 4102. Furthermore, this Rule provides States the necessary guidance on the procedure that VETS will follow when reviewing the States for deficiency, and the procedure that States must follow in submitting and implementing a CAP. The Rule also outlines how VETS will provide technical assistance to States that must develop and implement a CAP. These procedures will have the benefit of facilitating and improving States' employment services to veterans and eligible spouses under the JVSG program.

Paperwork Reduction Act

The purposes of the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 et seq., include minimizing the paperwork burden on affected entities. The PRA requires certain actions before an agency can adopt or revise the collection of information, including

publishing a summary of the collection of information and a brief description of the need for and proposed use of the information. This Rule will not require new or additional information collections, as defined in the Act, from the affected entities. We have determined that a State's obligation to develop and submit a CAP for approval does not qualify as a collection of information, as defined by 5 CFR 1320.3(c), because after receiving a determination of deficiency from VETS that excludes the systemic factors beyond the State's control, the State is required to develop and submit a CAP based on a self-diagnosis and prescription that addresses the unique set of deficiencies embodied in that State's policies and procedures. Therefore, a CAP does not qualify as a "collection of information" under 5 CFR 1320.3(c), because it does not result from identical questions nor is the content across multiple CAPs in any way identical. In addition, a CAP does not qualify as "information" under 5 CFR 1320.3(h) because the individuality of the information provided in each State's CAP is consistent with a response to a "request for facts or opinions addressed to a single person," which is excluded under 5 CFR 1320.3(h)(6).

Current reporting systems and requirements are not changed by this Rule. Therefore, this Rule does not impose on the State employment service delivery systems any new information collection that would require approval under the PRA.

Executive Order 13132

The Department reviewed this Rule in accordance with Executive Order 13132 regarding federalism and determined that it does not have "federalism implications." This Rule does not "have substantial direct effects on the States, on the relationship between the

national government and the States, or on the distribution of power and responsibilities among the various levels of government.” This Rule implements the uniform national threshold EER for veterans and eligible persons applicable to State employment service delivery systems. This Rule does nothing to alter either the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. Accordingly, this Rule does not have ”federalism implications.”

Unfunded Mandates Reform Act of 1995

For purposes of the Unfunded Mandates Reform Act (UMRA) of 1995, this Rule does not include any Federal mandate that may result in increased expenditures by State, local and Tribal governments, or by the private sector. As this Rule does not impose any unfunded Federal mandate, the UMRA is not implicated. As explained above, current reporting requirements on the States are not changed by this Rule. The Labor Exchange Reporting System (LERS) produces program year EER results for 52 of the 54 reporting employment service delivery systems and calculates the first step toward a national EER, based on inclusion of those 52 reporting units. For each program year, VETS will supplement the results available from the LERS by: (a) incorporating the program year EER results for the two States that are piloting a separate reporting system; and, (b) calculating the uniform national threshold EER based on inclusion of the results for all 54 reporting units. Therefore, this Rule does not impose any new reporting or calculation requirement upon the State employment service delivery systems. Some States may be required to institute corrective action plans under this Rule. However, such CAPs are required by statute. Moreover, the Department provides grant funds for the administration

of the JVSG program which may be used for any costs associated with the imposition of a CAP.

Executive Order 13045

Executive Order 13045 concerns the protection of children from environmental health risks and safety risks. This Rule implements the uniform national threshold EER for veterans and eligible persons applicable to State employment service delivery systems funded by the Department. This Rule has no impact on safety or health risks to children.

Executive Order 13175

Executive Order 13175 addresses the unique relationship between the Federal Government and Indian Tribal governments. The order requires Federal agencies to take certain actions when regulations have "Tribal implications." The order defines regulations as having "Tribal implications" when they have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. We have reviewed this Rule and concluded that it does not have Tribal implications for purposes of Executive Order 13175, as it does nothing to affect either the relationship or the distribution of power and responsibilities between the Federal Government and Indian Tribes.

Environmental Impact Assessment

We have reviewed this Rule in accordance with the requirements of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 et seq.), the regulations of

the Council on Environmental Quality (40 CFR part 1500), and the Department's NEPA procedures (29 CFR part 11). The Rule will not have a significant impact on the quality of the human environment, and thus we have not prepared an environmental assessment or an environmental impact statement.

Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105-277, 112 Stat. 2681), requires the Department to assess the impact of this Rule on family well-being. A Rule that is determined to have a negative effect on families must be supported with an adequate rationale. We have assessed this Rule and determined that it will not have a negative effect on families.

Privacy Act

The Privacy Act of 1974 (5 U.S.C. 552a) provides safeguards to individuals for their personal information which the Government collects. The Act requires certain actions by an agency that collects information on individuals when that information contains personally identifying information such as Social Security Numbers or names. Because this Rule does not require a new collection of personally identifiable information, the Privacy Act does not apply in this instance.

Executive Order 12630

This Rule is not subject to Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, because it does not involve implementation of a policy with takings implications.

Executive Order 12988

This Rule has been drafted and reviewed in accordance with Executive Order 12988, Civil Justice Reform, and it will not unduly burden the Federal court system. The Final Rule has been written so as to minimize litigation and provide a clear legal standard for affected conduct, and has been reviewed carefully to eliminate drafting errors and ambiguities.

Executive Order 13211

This Rule is not subject to Executive Order 13211, because it will not have a significant adverse effect on the supply, distribution, or use of energy.

Plain Language

We drafted this Rule in plain language.

Catalog of Federal Domestic Assistance Number

State employment service delivery systems consist of three formula grant programs, operating within an integrated service delivery infrastructure. Each of these three programs has been assigned a Catalog of Federal Domestic Assistance (CFDA) Number. The three programs are the Employment Service/Wagner-Peyser Funded Activities (CFDA 17.207), the Disabled Veterans' Outreach Program (CFDA 17.801), and the Local Veterans' Employment Representative Program (CFDA 17.804).

List of Subjects in 20 CFR Part 1001

Employment, Grant programs--Labor, Veterans.

For reasons stated in the preamble, 20 CFR Chapter IX is amended as follows:

PART 1001--SERVICES FOR VETERANS

1. The authority citation for part 1001 continues to read as follows:

Authority: 29 U.S.C. 49k; 38 U.S.C. chapters 41 and 42.

2. Add subpart G, consisting of §§ 1001.160 through 1001.167, to read as follows:

Subpart G--Purpose and Definitions

Sec.

1001.160 What is the purpose and scope of this part?

1001.161 What definitions apply to this part?

1001.162 How does the Department define veteran for purposes of this subpart?

1001.163 What is the national entered employment rate (EER) and what is a State's program year EER for purposes of this part?

1001.164 What is the uniform national threshold EER, and how will it be calculated?

1001.165 When will the uniform national threshold EER be published?

1001.166 How will the uniform national threshold EER be used to evaluate whether a State will be required to submit a Corrective Action Plan (CAP)?

1001.167 In addition to the procedures specified in this part, will the Department be conducting any other monitoring of compliance regarding services to veterans?

Subpart G--Purpose and Definitions

§ 1001.160 What is the purpose and scope of this part?

(a) The purpose of this part is to fulfill the requirement of 38 U.S.C. 4102A(c)(3)(B) to establish a uniform national threshold entered employment rate (UNTEER) achieved for veterans and eligible persons by the State employment service delivery systems. We will use the UNTEER as part of the review process for determining whether a State's program year EER is deficient and a Corrective Action Plan (CAP) is required of that State employment service delivery system.

(b) This part is applicable to all State agencies that are recipients of Wagner-Peyser State Grants, and/or Jobs for Veterans State Grants.

§ 1001.161 What definitions apply to this part?

Department means the United States Department of Labor, including its agencies and organizational units and their representatives.

Eligible person, as defined at 38 U.S.C. 4101(5), means:

- (1) The spouse of any person who died of a service-connected disability;
- (2) The spouse of any member of the Armed Forces serving on active duty who, at the time of application for assistance under this chapter, is listed, pursuant to 37 U.S.C. 556

and regulations issued thereunder by the Secretary concerned, in one or more of the following categories and has been so listed for a total of more than ninety days:

(i) Missing in action,

(ii) Captured in line of duty by a hostile force, or

(iii) Forcibly detained or interned in line of duty by a foreign government or power; or

(3) The spouse of any person who has a total disability permanent in nature resulting from a service-connected disability or the spouse of a veteran who died while a disability so evaluated was in existence.

Employment service delivery system, as defined at 38 U.S.C. 4101(7), means a service delivery system at which or through which labor exchange services, including employment, training, and placement services, are offered in accordance with the Wagner-Peyser Act.

Jobs for Veterans Act (JVA) means Public Law 107-288, 116 Stat. 2033 (2002), codified at 38 U.S.C. chapters 41 and 42.

Jobs for Veterans State Grant (JVSG) means an award of Federal financial assistance by the Department to a State for the purposes of the Disabled Veterans' Outreach Program or the Local Veterans' Employment Representative Program.

Program year is the period from July 1 of a year through June 30 of the following year and is numbered according to the calendar year in which it begins.

§ 1001.162 How does the Department define veteran for purposes of this subpart?

The Department applies two definitions of veteran for the purposes of this subpart and has established two stages for the implementation of these definitions.

(a) The first stage of implementation begins with application of this subpart G to the first program year following [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. As of that date, veteran is defined as it is in 38 U.S.C. 4211(4), as a person who:

(1) Served on active duty for a period of more than 180 days and was discharged or released therefrom with other than a dishonorable discharge;

(2) Was discharged or released from active duty because of a service-connected disability;

(3) As a member of a reserve component under an order to active duty pursuant to 10 U.S.C. 12301(a), (d), or (g), 12302, or 12304, served on active duty during a period of war or in a campaign or expedition for which a campaign badge is authorized and was discharged or released from such duty with other than a dishonorable discharge; or

(4) Was discharged or released from active duty by reason of a sole survivorship discharge (as that term is defined in 10 U.S.C.1174(i)).

(b) The second stage of implementation begins with the first day of the program year that begins two years after the first day of the program year that State grantees begin collecting and maintaining data as required by 20 CFR 1010.330(c). As of that date, veteran will be defined as it is in 20 CFR 1010.110:

(1) A person who served in the active military, naval, or air service, and who was discharged or released there from under conditions other than dishonorable, as specified in 38 U.S.C. 101(2).

(2) Active service includes full-time Federal service in the National Guard or a Reserve component, other than full-time duty for training purposes.

(c) During the second stage of implementation, any veteran who meets the definition specified in paragraph (a) of this section will be considered to meet the definition specified in paragraph (b) of this section.

(d) We will notify State grantees when they are required to begin implementing 20 CFR 1010.330(c).

§ 1001.163 What is the national entered employment rate (EER) and what is a State's program year EER for purposes of this part?

(a) For purposes of this part, we use the EER for veterans and eligible persons. This is the EER as applied to veterans (as defined in § 1001.162) and eligible persons (as defined in § 1001.161) who are participants in State employment service delivery systems.

(b) The EER for veterans and eligible persons measures the number of the participants described in paragraph (a) of this section who are employed after exiting an employment service delivery system compared to the total number of those participants who exited. We will issue policy guidance to establish the method of calculating the EER.

(c) The national EER for veterans and eligible persons is the EER achieved by the national State employment service delivery system for those veterans and eligible persons

who are participants in all of the State employment service delivery systems for the program year under review. The national EER resulting from this calculation is expressed as a percentage that is rounded to the nearest tenth of a percent.

(d) A State's program year EER is the EER for veterans and eligible persons (as calculated in paragraph (b) of this section) achieved by a single State's employment service delivery system for those veterans and eligible persons who are included in the EER measure for that State's employment service delivery system for the program year under review. The program year EER resulting from this calculation is expressed as a percentage that is rounded to the nearest tenth of a percent.

§ 1001.164 What is the uniform national threshold EER, and how will it be calculated?

(a) The uniform national threshold EER for a program year is equal to 90 percent of the national EER for veterans and eligible persons (as defined in § 1001.163(c)).

(b) The uniform national threshold EER resulting from this calculation is expressed as a percentage that is rounded to the nearest tenth of a percent.

§ 1001.165 When will the uniform national threshold EER be published?

When practicable, the Veterans' Employment and Training Service (VETS) will publish the uniform national threshold EER for a given program year by the end of December of the calendar year in which that program year ends.

§ 1001.166 How will the uniform national threshold EER be used to evaluate whether a State will be required to submit a Corrective Action Plan (CAP)?

(a) Comparison. Each State's program year EER will be compared to the uniform national threshold EER for that program year. State agencies that do not achieve a program year EER that equals or exceeds the uniform national threshold EER (90 percent of the national EER) for the year under review will be subject to a review by VETS, with input from the Employment and Training Administration (ETA), to determine whether the program year EER is deficient.

(b) Review. For each State whose program year EER is subject to review to determine deficiency, the review will consider the degree of difference between the State's program year EER and the uniform national threshold EER for that program year, as well as the annual unemployment data for the State as compiled by the Bureau of Labor Statistics.

(1) The review also may consider other relevant measures of prevailing economic conditions and regional economic conditions, as well as other measures of the performance of workforce programs and/or any information the State may submit.

(2) The review will include consultation with VETS and ETA field staff about findings from their on-site reviews and desk audits of State agency implementation of policies and procedures for services to veterans and also may include consultation with staff affiliated with other agencies of the Department, as appropriate.

(c) Requirement of a CAP. After review, a State whose program year EER is determined not to be deficient will be notified that a CAP will not be required; a State whose program year EER is determined to be deficient will be required to submit a CAP to improve the State's performance in assisting veterans to meet their employment needs as a condition of receiving its next-due JVSG.

(1) Any State whose program year EER has been determined to be deficient will be notified by March 31 of the year following the calendar year in which the program year under review ended.

(2) For any State that is required to submit a CAP, VETS will provide technical assistance (TA), with input from ETA, on the development of the CAP. The CAP must be submitted to the Grant Officer's Technical Representative by June 30 of the year following the calendar year in which the program year under review ended.

(3) We will review the CAP submitted by the State and determine, with input from ETA, whether to approve it or to provide additional TA to the State.

(i) If we approve the CAP, the State must expeditiously implement it.

(ii) If we do not approve the CAP, we will take such steps as are necessary to implement corrective actions to improve the State's EER for veterans and eligible persons.

(4) If a State fails to take the actions we impose under paragraph (c)(3)(ii) of this section, the Assistant Secretary for Veterans' Employment and Training may take any actions available to remedy non-compliance under 20 CFR 1001.130(a) (referring to the compliance measures discussed in 20 CFR part 658, subpart H).

§ 1001.167 In addition to the procedures specified in this part, will the Department be conducting any other monitoring of compliance regarding services to veterans?

Yes. We will continue to monitor compliance with the regulations on veterans' priority of service at 20 CFR 1010.240(b) jointly with the ETA. If a State's program year EER is

determined to be deficient for a given program year, that deficiency would constitute information to be considered in monitoring priority of service, since failure to fully implement priority of service could be one of the contributors to a deficient program year EER.

Keith Kelly

Assistant Secretary, Veterans' Employment and Training

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