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Part II

Department of Labor

**Veterans' Employment and Training
Service**

**20 CFR Part 1001
Funding Formula for Grants to States;
Proposed Rule**

DEPARTMENT OF LABOR**Veterans' Employment and Training Service****20 CFR Part 1001**

RIN 1293-AA11

Funding Formula for Grants to States

AGENCY: Veterans' Employment and Training Service (VETS), Department of Labor.

ACTION: Notice of proposed rulemaking; request for comments.

SUMMARY: The Department of Labor is issuing a Notice of Proposed Rulemaking (NPRM) with a request for comments to implement section 4(a)(1) of the Jobs for Veterans Act (Act). This proposed rule closely adheres to the interim final rule (IFR) published June 30, 2003, which expires September 30, 2004. Like the IFR, this proposed rule establishes formula criteria for making funds available for veterans' employment services and the Transition Assistance Program (TAP). Minor changes to section 1001.151 of title 20 appear in this proposed rule to clarify funding issues related to TAP. This proposed rule adds a new subpart F to 20 CFR part 1001. This rule, once it becomes final, will replace the IFR that expires September 30, 2004.

DATES: To ensure consideration, comments must be received on or before September 7, 2004.

ADDRESSES: You may submit comments, identified by RIN number 1293-AA11, by any of the following methods: Federal Rulemaking Portal: <http://www.regulations.gov>.

Follow the instructions for submitting comments.

Comments may also be sent to Paul Robertson, Legislative Analysis Division, VETS. Electronic mail (e-mail) is the preferred method for submitting comments. Comments must be clearly identified as pertaining to this Notice of Proposed Rulemaking. E-mail may be sent to robertson.paul@dol.gov. Brief comments, limited to ten pages or fewer may be transmitted by facsimile (FAX) at (202) 693-4754 (this is not a toll free number). Individuals with hearing impairments may call (800) 670-7008 (TTY/TDD).

Where necessary, hard copies of comments also may be mailed or delivered to Paul Robertson, Legislative Analysis Division, VETS, U.S. Department of Labor, Room S-1325, 200 Constitution Avenue NW., Washington, DC 20210. Because of heightened security measures, mail in Washington,

DC is sometimes delayed. We will only consider comments postmarked on or before the deadline for comments.

Receipt of submissions, whether by e-mail, FAX transmittal, or U.S. Mail, will not be acknowledged; however, the sender may request confirmation that a submission has been received, by telephoning VETS at (202) 693-4714 (individuals with hearing impairments may call (800) 670-7008 (TTY/TDD)), or by making a request for confirmation (separate from the submission) via the above e-mail.

Comments will be available for public inspection during normal business hours at the above address. Persons who need assistance to review the comments will be provided with appropriate aids such as readers or print magnifiers. Copies of this Notice of Proposed Rulemaking will be made available in the following formats: large print, electronic file on computer disk, and audiotape. To schedule an appointment to review the comments and/or to obtain the Notice of Proposed Rulemaking in an alternate format, contact VETS at the e-mail address, telephone number, or mail address listed above.

FOR FURTHER INFORMATION: Contact Paul Robertson, Legislative Analysis Division, VETS, U.S. Department of Labor, Room S-1325, 200 Constitution Avenue NW., Washington, DC 20210, or by e-mail at robertson.paul@dol.gov or call 202-693-4714.

SUPPLEMENTARY INFORMATION: The Preamble to this Notice of Proposed Rulemaking is organized as follows:

- I. Background—provides a brief description of the development of the Notice of Proposed Rulemaking.
- II. Authority—cites the statutory provisions for the Notice of Proposed Rulemaking.
- III. Section-by-Section Review of the Rule—summarizes pertinent aspects of the regulatory text, describes its purposes and application, and summarizes and responds to comments received on the Interim Final Rule published June 30, 2003 (68 FR 39000).
- IV. Administrative Information—sets forth the applicable information as required by law.

I. Background

The President signed the Jobs for Veterans Act (Pub. L. 107-288) into law on November 7, 2002. The Act amends title 38 of the United States Code to revise and improve employment, training, and placement services furnished to veterans. This rule implements the provisions of 38 U.S.C. 4102A(c) as amended by section 4 of the Act that establishes a new funding formula for making funds available to each State, with an approved State Plan,

to support the Disabled Veterans Outreach Program (DVOP) and the Local Veterans Employment Representative (LVER) programs. Additionally, funding will be made available to support TAP and respond to exigent circumstances.

On June 30, 2003, an Interim Final Rule with a request for comments during a 60-day comment period was published in the **Federal Register**, at 68 FR 39000 through 39003. We thoroughly reviewed every comment received during the comment period. These comments are summarized and responded to in section III of this Preamble.

Congress allowed for the phasing in of the new statutory funding formula "over the three fiscal-year period" beginning in fiscal year 2003, which started on October 1, 2002 (38 U.S.C. 4102A(c)(2)(B)(ii)). Because of the late enactment of the law, funding for year one of the phase-in had already occurred by the date of enactment. Congress intended that the formula be phased-in and fully implemented by the beginning of fiscal year 2006, which is October 1, 2005. The phase-in provision was not intended to delay the anticipated date of full implementation of the formula. In order to adhere to the implementation expectations of Congress, the phase-in process began in fiscal year 2004, through publication of an Interim Final Rule for one year. In order to ensure full public comment and adequate public notice of the new funding criteria applicable after fiscal year 2004, the Department issues this Notice of Proposed Rulemaking and requests comments.

II. Authority

The statutory authority for this Notice of Proposed Rulemaking is 38 U.S.C. 4102A(c)(2)(B), as amended by the Jobs for Veterans Act, enacted November 7, 2002, as Public Law 107-288.

III. Section-by-Section Review of the Rule**A. Funding Formula—Basic Grant**

The Act requires the Secretary to make funds available to each State, upon approval of an "application" (*i.e.*, a State Plan), to support the DVOP and LVER programs designed to provide employment services to veterans and transitioning servicemembers (38 U.S.C. 4102A(c)(2)(B)). The Act further allows the Secretary to use such criteria as the Secretary may establish in regulation, including civilian labor force and unemployment data in determining the funding levels (38 U.S.C. 4102A(c)(B)(i), as amended by the Act). The statute requires that the amount of funding

available to each State reflect the ratio of: (1) The total number of veterans residing in the State who are seeking employment; to (2) the total number of veterans seeking employment in all States (38 U.S.C. 4102A(c)(B)(i)(I) and (II)). Additionally, the Act permits the Secretary to establish minimum funding levels and hold harmless criteria, in order to mitigate the impact upon States whose funding levels may be significantly affected by the implementation of the new formula (38 U.S.C. 4102A(c)(B)(iii)).

The Act states that the use of this formula will be phased-in over the three fiscal-year period beginning October 1, 2002. Since the statute was not enacted until November 7, 2002, after the beginning of fiscal year 2003, we interpret this to mean that the first phase-in year for the funding formula will be fiscal year 2004, which began on October 1, 2003. This will only allow a two-year phase-in period, fiscal years 2004 and 2005, instead of the three years as contemplated by the statute. To give the States the maximum phase-in period possible, an Interim Final Rule was published on July 30, 2003, which expires September 30, 2004. Once this regulation becomes a Final Rule, it will replace the Interim Final Rule.

1. Basic Grant Funding Formula and Data and Methodology

We propose to use the same data sources as those used in the FY 2004 formula established by the IFR. The ratio of the number of veterans seeking employment in each State to the number of veterans seeking employment in all States is best determined using data collected through the Current Population Survey (CPS) and the Local Area Unemployment Statistics (LAUS), both of which are administered by the Bureau of Labor Statistics (BLS). We are using LAUS data to determine the number of unemployed persons in the civilian labor force because LAUS data are considered to be the most reliable data on the levels of general unemployment at the State level; and the Office of Management and Budget (OMB) requires Agencies allocating federal funds that include unemployment as a factor to use LAUS as the indicator of unemployment, unless the authorizing statute specifies otherwise (OMB Statistical Policy Directive 11). We are using the CPS data to determine the number of veterans in the civilian labor force because the CPS is considered to be the most reliable source of data on the levels of veteran participation in the civilian labor force at the State level. A subset of the CPS data on veterans in the civilian labor

force does provide State level estimates of the number of unemployed veterans. However, because the sample size of veterans at the State level is so small, these estimates are subject to large sampling errors. Therefore, the funding levels would be subject to undue variability/volatility if that subset of the CPS data were used alone to determine the number of unemployed veterans at the State level.

Because LAUS data are based on the total unemployment level for a State, we concluded that LAUS data are the best available measure of persons who are seeking work. Accordingly, we concluded the number of unemployed veterans in each State can be best determined by using a ratio of the general unemployment level in each State compared to the general unemployment level in all States (LAUS for the individual States/LAUS for all States) and the number of veterans in the civilian labor force in each State compared to the number of veterans in the civilian labor force in all States (CPS for the individual States/CPS for all States). The result of these two ratios will be averaged and converted to a single ratio of the number of veterans seeking employment in each State compared to the number of veterans seeking employment in all States. Three-year averages of the CPS and LAUS data are used in calculating the funding formula to stabilize the effect of annual fluctuations in the data in order to avoid undue fluctuations in the annual amounts allocated to States.

We received seven comments on the use of these data sources in response to the issuance of the Interim Final Rule. One commenter expressed the concern that stakeholders were asked to comment on the rule without being given the data for analysis.

Response: CPS and LAUS data are in the public domain and can be obtained through information requests to the Bureau of Labor Statistics, Division of Local Area Unemployment Statistics, 2 Massachusetts Avenue, NE., Room 4675, Washington, DC 20212 or by e-mail request LAUSInfo@bls.gov.

We have determined that our choice of data sources provides the most meaningful and reliable data on veterans seeking employment, given the factors that are required by statute.

Three commenters objected to the use of LAUS data based on a concern that too many veterans who use employment services are excluded from the LAUS computation such as veterans who are either ineligible for or have exhausted their unemployment benefits. Additionally, three commenters requested the use of DOL's Employment

and Training Administration data from the ETA 9002 report rather than LAUS.

Response: The Jobs for Veterans Act mandates the use of State civilian labor force and unemployment data. See 38 U.S.C. 4102A(c)(2)(B)(i). The Office of Management and Budget requires Agencies allocating federal funds that include unemployment as a factor to use LAUS as the indicator of unemployment, unless the authorizing statute specifies otherwise (OMB Statistical Policy Directive 11). In addition, LAUS unemployment data includes all individuals who had no employment and had looked for work, whether or not they draw unemployment benefits.

We are not using data from the ETA 9002 report on labor exchange services provided to job seekers instead of LAUS data. The ETA 9002 would not provide a reliable measure of the unemployed in each State because many of those registering for those labor exchange services are employed. Our proposed analysis considers both unemployment statistics and civilian labor force data. The LAUS data are considered the most reliable source available for area unemployment statistics. For civilian labor force data, the CPS household survey is the official measure of the labor force for the nation. Annual average labor force data for all States and the District of Columbia are currently derived directly from the CPS. BLS has published detailed descriptions of the concepts and methodology used on their website at www.bls.gov. Based on the foregoing, we propose to make no change from the Interim Final Rule on this issue.

Two commenters expressed the concern that the new funding formula does not take into account States with large landmass. It was suggested that we include a provision providing extra funding for those States or that we identify such a situation as a per se exigent circumstance warranting additional funds from the monies set aside for exigent circumstances.

Response: The Jobs for Veterans Act mandates that the proportion of funding reflect the ratio between the total number of veterans residing in the State who are seeking employment to the total number of veterans seeking employment in all States (38 U.S.C. § 4102A(c)(2)(B)(i)). The authorization for setting criteria for the funding formula relates to how we determine the number of veterans seeking employment, not how or where they are served. Although we are sympathetic that coverage in a large geographical area can present unique challenges to States, we have not included this

criterion in the new Proposed Rule because we believe that, as written, the Proposed Rule complies with the law while maintaining much needed flexibility within the formula. Furthermore, we have not proposed to create a per se category for geographically large States in order to maintain flexibility and maximize the most effective use of limited resources. Exigent circumstances can vary from State to State and year to year; therefore we believe the best course is to review each situation on a case-by-case basis. Funds will be distributed based on need as supported by an approved State Plan or a modification to the State Plan.

Four commenters also articulated the concern that the formula would not include "underemployed" veterans, e.g., a veteran who is employed by necessity in a job that pays less than the veteran should receive based on his/her education, skills, and/or experience. Additionally, one commenter was concerned that neither survey asks the question "are you looking for work?" in the context of a veteran who is currently employed but seeking alternative employment.

Response: With respect to the question, "Are you looking for work?" not being asked of those who are employed, the commenter is correct that this question is not asked of those CPS survey respondents who are employed. The question, "Are you looking for work?" is only included in a series of questions asked of those respondents identified as "not employed" to determine those who are "unemployed." Furthermore, the comment applies to the LAUS data because the CPS survey is an important foundation of the LAUS data, which are derived by supplementing the CPS survey data with data from a variety of other sources.

While there is no direct measure of the underemployed, veterans or other workers, in the CPS or LAUS data, underemployed veterans are taken into account in the funding formula. Those veterans who are considered to be underemployed because they seek alternative employment while currently employed are counted among the employed veterans in the civilian labor force. Thus, they are included in the data used to determine the funding allocations.

2. Minimum Funding Levels and Hold Harmless Criteria

The Act authorizes the Secretary to establish hold harmless criteria and minimum funding levels (38 U.S.C. 4102A(c)(2)(B)(iii)). This Notice of Proposed Rulemaking establishes a hold

harmless rate of eighty percent for the second phase-in year (fiscal year 2005) to mitigate the impact of the most significant reductions to States' prior funding levels. This is the same rate as that set forth in the Interim Final Rule. With the eighty percent hold harmless during fiscal year 2005 each State will be provided no less than eighty percent of its previous year's allocation. The eighty percent hold harmless rate will allow the reduction of funding, to those States impacted, to be implemented incrementally. After the funding phase-in period is completed in fiscal year 2005, we propose that a ninety percent hold harmless rate be applied, ensuring each State will receive at least ninety percent of their previous year's allocation. This will align the hold harmless level with the hold harmless level established by Section 6 of the Wagner-Peyser Act (29 U.S.C. 49e(b)(2)). In addition to the hold harmless provisions in any year, a State minimum funding level of 0.28 percent (.0028) of the prior year's total funding level for all States will be applied, meaning that no State may receive less than that amount. This is the same percentage applied in Section 6 of the Wagner-Peyser Act (29 U.S.C. 49e(b)(3)).

One commenter requested that the hold harmless provision be applied to amounts actually received (e.g., including additional money received due to reallocation from another State) rather than the funds allocated.

Response: The existence of reallocated funds is usually due to unusual circumstances experienced by States such as hiring freezes that result in vacant positions, which, in turn, may lead to the reallocation of funds. If the hold harmless provision were applied to the larger amount, States would receive more than their fair share of funding since the allocation would no longer be based on the service population. Furthermore, such a scheme may result in penalizing a State that was unable to expend its full allocation due to unforeseen circumstances. No changes have been made on this basis.

B. Other Funding Criteria

In addition to requiring the Secretary to use civilian labor force and unemployment data in establishing States' funding levels, the Act states that the Secretary "shall make available to each State * * * an amount of funding * * * using such criteria as the Secretary may establish in regulation * * *" (38 U.S.C. 4102A(c)(2)(B)(i)). Accordingly, the proposed rule provides that in addition to the amount awarded based on the basic grant funding formula, described in section IV.A.1 of

this document, the Secretary may distribute up to four percent of the total amount available for allocation based on TAP workload and exigent circumstances (38 U.S.C. 4102, 4102A(b), and 10 U.S.C. 1141). These other funding criteria are discussed more fully below.

1. Transition Assistance Program (TAP) Workload

The Act requires the Secretary to implement programs to ease the transition of servicemembers to civilian careers (38 U.S.C. 4102. See also 10 U.S.C. 1141). TAP workshops provide such employment services for transitioning servicemembers. Because active military personnel are not included in the CPS civilian labor force data, or in the LAUS unemployment data, the level of need for TAP workshops is not reflected in the funding formula for the basic grant. Therefore, supplemental funding is needed in order to ensure adequate funding is available to provide TAP workshops. In the proposed rule, the allocation to the States will be proportional to each State's TAP workload as identified in its State Plan. Policy guidance will be provided to States to assist them in determining the amounts needed for this additional workload, which will be calculated on a per workshop basis as identified in the State Plan.

We received two comments supporting the proposed funding formula, particularly the method for allocating TAP workshop funds. One comment requested clarification of whether overseas TAP workshops would be covered by the four percent set aside proposed.

Response: The set aside fund will be available to help support TAP workshops, including TAP workshops overseas. The Act requires the Secretary to implement programs to ease the transition of servicemembers to civilian careers. (38 U.S.C. 4102. See also 10 U.S.C. 1141). There are approximately 20,000 servicemembers and their spouses who are eligible to participate in TAP workshops at overseas locations annually. In order to clarify that the four percent funds may be available for TAP, we have changed the proposed language contained in § 1001.151 by deleting "to the States" from subsection (a). That section, as currently proposed in this Notice of Proposed Rulemaking, now reads "[f]our percent of the total amount available at the national level will be available based on Transition Assistance Program (TAP) workload and other exigencies." For similar reasons we propose to modify section (b) as follows:

“[f]unding for TAP workshops will be allocated on a per workshop basis. Funding to the States will be provided based on the workload shown in the approved State Plan”.

2. Exigent Circumstances

Supplemental funding will be made available for exigencies, including but not limited to, needs based on sharp or unanticipated fluctuations in State unemployment levels and services to transitioning servicemembers (as required by the Act). Economic and unemployment conditions projected at the time of the grant application may not reflect actual conditions. In such cases, program needs may warrant additional funding. These funds will be made available based on need.

IV. Administrative Information

Regulatory Flexibility and Regulatory Impact Analysis

The Regulatory Flexibility Act of 1980, as amended in 1996 (5 U.S.C. chapter 6), requires the Federal government to anticipate and minimize the impact of rules and paperwork requirements on small entities. “Small entities” are defined as small businesses (those with fewer than 500 employees, except where otherwise provided), small non-profit organizations (those with fewer than 500 employees, except where otherwise provided), and small governmental entities (those in areas with fewer than 50,000 residents). We have assessed the potential impact of this rule on small entities. This proposed rule implements reforms to the funding of the State operated veterans’ employment and training services and transitional assistance programs for separating servicemembers. Because the rule affects only the distribution of appropriated funds among the States, we have determined that the rule will not have a significant impact on a substantial number of small governments or other small entities. We are transmitting a copy of our certification to the Chief Counsel for Advocacy for the Small Business Administration. In addition, while these rules govern the distribution and administration of funds appropriated by Congress, the rules themselves do not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the

ability of United States-based enterprises. Accordingly, under the Small Business Regulatory Enforcement Fairness Act (SBREFA) (5 U.S.C. Chapter 8), the Department has determined that these are not “major rules,” as defined in 5 U.S.C. 804(2).

Paperwork Reduction Act

This proposed rule does not require any information to be collected, therefore is not subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

Executive Order 12866, Regulatory Planning and Review

The Department of Labor has determined that this proposed rule is a “significant regulatory action”. However, it is not an economically significant rule, therefore does not fall under Executive Order 12866. While this rule affects the distribution among States of funds appropriated by Congress, the rule itself will not materially alter the rights and obligations of the State recipients, particularly in light of the hold harmless provisions included in the rule. Furthermore, the rule itself will not: Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs; 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; create a serious inconsistency, or otherwise interfere with an action taken or planned by another agency; or raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in Executive Order 12866.

Unfunded Mandates

Executive Order 12875—This proposed rule does not create an unfunded Federal Mandate upon any State, local, or tribal government.

Unfunded Mandate Reform Act of 1995—This proposed rule will not include any Federal mandate that may result in increased expenditures by State, local and tribal governments in the aggregate of \$100 million or more, or increased expenditures by the private sector of \$100 million or more.

Executive Order 13132, Federalism

We have assessed this proposed rule under Executive Order 13132 and found that it will not have substantial direct effects on the States or the relationship

between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, within the meaning of the Executive Order.

Executive Order 12988

This proposed rule has been drafted and reviewed in accordance with Executive Order 12988, Civil Justice Reform, and will not unduly burden the Federal court system. The 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.

List of Subjects in 20 CFR Part 1001

Employment, Grant programs, Labor, Reporting and recordkeeping requirements, Veterans.

For the reasons set forth in the preamble, 20 CFR chapter IX is amended as set forth below.

PART 1001—SERVICES FOR VETERANS

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

Authority: 29 U.S.C. 49k; 38 U.S.C. chapters 41 and 42. Subpart F is also issued under the authority of Sec. 4(a), Pub. L. 107–288, 38 U.S.C. 4102A.

2. Part 1001 is amended by adding subpart F to read as follows:

Subpart F—Formula for the Allocation of Grant Funds to State Agencies

Sec.

1001.150 Method of calculating State base grant awards.

1001.151 Other funding criteria.

1001.152 Hold harmless criteria and minimum funding level.

Subpart F—Formula for the Allocation of Grant Funds to State Agencies

§ 1001.150 Method of calculating State base grant awards.

(a) In determining the amount of funds available to each State, the ratio of the number of veterans seeking employment in the State to the number of veterans seeking employment in all States will be used.

(b) The number of veterans seeking employment will be determined based on the number of veterans in the civilian labor force and the number of unemployed persons. The civilian labor force data will be obtained from the Current Population Survey (CPS) and the unemployment data will be obtained from the Local Area Unemployment Statistics (LAUS), both of which are compiled by the Department of Labor’s Bureau of Labor Statistics.

(c) Each State's allocation will be determined by dividing the number of unemployed persons in each State by the number of unemployed persons across all States (LAUS for the individual States/LAUS for all States) and by dividing the number of veterans in the civilian labor force in each State by the number of veterans in the civilian labor force across all States (CPS for the individual States/CPS for all States). The result of these two ratios will be averaged and converted to a percentage of veterans seeking employment in the State compared to the percentage of veterans seeking employment in all States. Three-year averages of the CPS and LAUS data will be used in calculating the funding formula to stabilize the effect of annual fluctuations in the data in order to avoid

undue fluctuations in the annual amounts allocated to States.

§ 1001.151 Other funding criteria.

(a) Four percent of the total amount at the national level will be available based on Transition Assistance Program (TAP) workload and other exigencies.

(b) Funding for TAP workshops will be allocated on a per workshop basis. Funding to the States will be provided pursuant to the approved State Plan.

(c) Funds for exigent circumstances, such as unusually high levels of unemployment, surges in the demand for transitioning services, including the need for TAP workshops, will be allocated based on need.

§ 1001.152 Hold harmless criteria and minimum funding level.

(a) A hold harmless rate of 90 percent of the prior year's funding level will be

applied after the funding formula phase-in period is completed (beginning fiscal year 2006 and subsequent years).

(b) A hold harmless rate of 80 percent of the prior year's funding level will be applied for fiscal year 2005.

(c) A minimum funding level is established to ensure that in any year, no State will receive less than 0.28 percent (.0028) of the previous year's total funding for all States.

Signed at Washington, DC, this 29th day of June, 2004.

Frederico Juarbe Jr.,

Assistant Secretary for Veterans' Employment and Training.

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