

**DEPARTMENT OF LABOR****Employment and Training Administration****20 CFR Part 618**

RIN 1205-AB56

**Trade Adjustment Assistance; Merit Staffing of State Administration and Allocation of Training Funds to States**

AGENCY: Employment and Training Administration, Labor.

ACTION: Final rule.

**SUMMARY:** The Employment and Training Administration (ETA) of the Department of Labor (Department) issues this final rule to implement changes to the regulations for the Trade Adjustment Assistance for Workers (TAA) program under the Trade Act of 1974, as amended (Trade Act). This rule requires that personnel engaged in TAA-funded functions undertaken to carry out the worker adjustment assistance provisions must be State employees covered by a merit system of personnel administration. This rule also prescribes the system for allocating training funds to the States, as required by amendments to the Trade Act contained in the American Recovery and Reinvestment Act of 2009, commonly called the Recovery Act. The Recovery Act included provisions which reauthorized and significantly amended the TAA program.

**DATES:** *Effective Date:* This final rule is effective May 3, 2010.

**FOR FURTHER INFORMATION CONTACT:** Erin FitzGerald, Office of Trade Adjustment Assistance, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-5428, Washington, DC 20210; telephone (202) 693-3560 (this is not a toll-free number).

Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

**SUPPLEMENTARY INFORMATION:** The Department issued a notice of proposed rulemaking (NPRM) proposing these TAA regulations on August 5, 2009. This final rule takes into consideration all comments received on the NPRM. This rule creates a new 20 CFR part 618.

The preamble to this final rule is organized as follows:

- I. Background—provides a brief description of the development of the rule.
- II. Subpart-by-Subpart Review—summarizes and discusses comments on the TAA regulations.
- III. Administrative Information—sets forth the applicable regulatory requirements.

**I. Background**

The TAA program, authorized under Chapter 2 of Title II of the Trade Act (19 U.S.C. 2271 *et seq.*), provides adjustment assistance for workers whose jobs have been adversely affected by international trade. TAA assistance includes training, case management and reemployment services, income support, job search and relocation allowances, a wage supplement option for older workers, and eligibility for a health coverage tax credit. There are two steps for workers to obtain program benefits. A group of workers, or specified entities, must file with the Department and the State in which the jobs are located a petition for certification of eligibility to apply for TAA benefits and services. If the Department certifies the petition, based upon statutory criteria that test whether the group of workers was adversely affected by international trade, then the workers may individually apply with the Cooperating State Agency (CSA) for TAA benefits and services.

The States administer the provision of benefits and services in the TAA program as agents of the United States. Each State does so through a State agency designated as the CSA in a Governor-Secretary Agreement between the State's Governor and the United States Secretary of Labor (Secretary), as required under section 239 of the Trade Act. The CSA may also include the State Workforce Agency (if different) and other State or local agencies that cooperate in the administration of the TAA program, as provided in the Governor-Secretary Agreement.

The Trade and Globalization Adjustment Assistance Act of 2009 (TGAAA), part of the Recovery Act (Pub. L. 111-5, Div. B, Title I, Subtitle I, 123 Stat. 115), reauthorized and substantially amended the TAA program by revising the certification criteria to expand the types of workers who may be certified and by expanding the program benefits available to workers who are covered by a certification (adversely-affected workers or adversely-affected incumbent workers, referred to collectively in this notice as "adversely-affected workers"). The TGAAA amendments generally apply to adversely-affected workers covered under petitions for certification filed on or after May 18, 2009, and before January 1, 2011. To incorporate into regulations the substantial changes to the TAA program, the Department is creating a new 20 CFR part 618, which will implement the TAA program regulations that will succeed the current TAA program regulations in 20 CFR part

617. This rulemaking is relatively narrow in scope; it addresses only the staffing of TAA-funded functions and the allocation of TAA training funds to the States. A later NPRM will propose the remainder of 20 CFR part 618.

On August 5, 2009, the Department published an NPRM proposing two actions (74 FR 39198). The first was a requirement that, after a transition period, a State must engage only State government personnel to perform TAA-funded functions undertaken to carry out the worker adjustment assistance provisions of the Trade Act, and must apply to these personnel the standards for a merit system of personnel administration, in accordance with Office of Personnel Management (OPM) regulations at 5 CFR part 900, subpart F. These OPM regulations specify the merit system standards required for certain Federal grant programs. These standards have always been required for personnel administering Unemployment Insurance (UI) (section 303(a)(1) of the Social Security Act) and Wagner-Peyser Act—funded Employment Service (ES) programs in the States (20 CFR 652.215), and were required for personnel administering TAA from 1975 until 2005 under the Governor-Secretary Agreements.

The merit system standards contained in the OPM regulations at 5 CFR 900.603 are as follows:

- (a) Recruiting, selecting, and advancing employees on the basis of their relative ability, knowledge, and skills, including open consideration of qualified applicants for initial appointment.
- (b) Providing equitable and adequate compensation.
- (c) Training employees, as needed, to assure high quality performance.
- (d) Retaining employees on the basis of the adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected.
- (e) Assuring fair treatment of applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, national origin, sex, religious creed, age or handicap and with proper regard for their privacy and constitutional rights as citizens. This "fair treatment" principle includes compliance with the Federal equal employment opportunity and nondiscrimination laws.
- (f) Assuring that employees are protected against coercion for partisan political purposes and are prohibited from using their official authority for the purpose of interfering with or affecting the result of an election or a nomination for office.

In the NPRM, the Department stated that the purpose of requiring the application of these merit principles to State administration of the TAA program is to promote consistency,

efficiency, accountability, and transparency.

In addition to the merit staffing requirement, the second regulatory action proposed in the NPRM concerned the methodology by which the Department allocates training funds to the States. (The TGAAA uses the term “apportion” when discussing the dividing of training funds among the States. However, this final rule uses the term “allocation” to avoid confusion, since customarily the Office of Management and Budget (OMB) “apportions” appropriated funds to the Department, which then “allocates” them to the States.) Before fiscal year (FY) 2004, the Department allocated training funds through a request process on a first-come, first-served basis; all distributions of TAA training funds were made in response to a State’s request. This resulted in the Department distributing the majority of available TAA training funds early in the year, resulting in early exhaustion as TAA training funds are subject to a statutory maximum annual funding level, or “cap.” Later needs were addressed through National Emergency Grant funds, provided under Section 173 of the Workforce Investment Act of 1998 (WIA) (29 U.S.C. 2918). However, this process proved to be inefficient, lengthy, and cumbersome, because it did not provide States with a predictable level of funding.

Therefore, starting in fiscal year 2004, the Department issued annual guidance establishing a formula for distributing TAA training funds to the States. The Department initially allocated 75 percent of the year’s training funds, and held the remaining 25 percent in reserve, for later use by high-need States. The formula included a “hold harmless” feature, whereby the initial allocation to a State was at least 85 percent of the amount the State received in its initial allocation the prior fiscal year.

The formula instituted in 2004 had some limitations. Most significant was the relative inability of the Department to shift TAA training funds in response to changing economic conditions. This shortcoming was due in part to the 85 percent hold harmless feature, and in part to the details of the formula itself. This shortcoming was compounded by the fact that, under the Department’s annual appropriations acts, appropriated funds, including funds for TAA, must be obligated (and re-obligated) by the Department within the fiscal year in which the funds are appropriated; therefore, the Department has very limited authority to move money between States once the funds

are distributed. The Department is allowed to reclaim unexpended training funds from a given State, with the State’s agreement, and to re-obligate such funds to other States, if the obligation is carried out within the same fiscal year the funds were appropriated. As a result, if a State is allocated FY 2009 training funds, those funds may be returned to the Department and provided to another State only during FY 2009. After the end of the fiscal year, the Department has no authority to redistribute any unused funds. Since States have three fiscal years to expend the funds obligated in any fiscal year, it is often not apparent that a State does not need all of the funds obligated to it in the fiscal year in which the funds were allocated. Thus, TAA training funds that the Department obligates to States within a fiscal year but remain unexpended by the States after three years are returned directly to the U.S. Treasury.

Section 1828(a) of the TGAAA amended section 236(a)(2) of the Trade Act to establish an annual training funding cap of \$575 million, increased from \$220 million annually, for fiscal years 2009 and 2010 and \$143,750,000 for the period October 1, 2010 through December 31, 2010. The Conference Report on the Recovery Act makes clear that Congress increased the cap in part because the TGAAA amendments would result in more individuals being eligible for training benefits, and in part because in past times of high program participation, training funding was insufficient. H.R. Rep. No. 111–16, at 672 (2009) (Conf. Rep.).

The amended section 236(a)(2) also established a methodology for distributing TAA training funds based on a formula to be determined by the Department. The Trade Act now provides that the initial distribution of training funds must equal 65 percent of the training funds appropriated and that the remaining 35 percent will be held in reserve. The Department’s initial allocation formula must be based on four factors set forth in the statute.

Section 236(f)(1) of the Trade Act (added by Section 1828(c) of the TGAAA) directs the Department to issue “such regulations as may be necessary to carry out the [allocation] provisions” on or before February 17, 2010. This final rule fulfills that statutory requirement.

## II. Subpart-by-Subpart Review of the Final Rule

The Department issued a notice proposing these regulations on August 5, 2009, and received 42 comments. The Department read and carefully considered each comment in the process

of developing this final rule; the substantive issues raised by the comments that are germane to the rule are responded to below. Most significantly, the NPRM proposed that a State not already in compliance with the merit staffing requirement must comply with this requirement with respect to the personnel responsible for employment and case management services under section 235 of the Trade Act by October 1, 2010. All other TAA administrative activities would have had to have been merit staffed by July 1, 2010. The Department has decided, in response to concerns raised in the comments, to now apply a single, later transition period for the merit staffing of both administration and employment and case management services with a compliance deadline of December 15, 2010.

### *Subpart H—Administration by Applicable State Agencies*

As proposed, § 618.890, establishing the merit staffing requirement, contained four paragraphs. Paragraph (a) set forth the merit staffing requirement. Paragraph (b) detailed a transition period for States to come into compliance with this requirement. Paragraph (c) partially exempted from this merit staffing requirement those States whose employment service was exempted from the merit staffing requirement under Wagner-Peyser Act regulations. Paragraph (d) permitted a State to outsource TAA functions that are not inherently governmental, as defined in OMB Circular No. A–76 (Revised).

All 42 submissions received in response to the NPRM included comments on the proposed merit staffing requirement. As explained below, in response to several comments, the Department revised § 618.890(b) to reflect the adoption of a single transition deadline of December 15, 2010, for merit staffing of both administrative activities and employment and case management services.

### *Merit-Based State Personnel (§ 618.890(a))*

Paragraph (a) provides that States must engage only State government personnel to perform TAA-funded functions undertaken to carry out the worker adjustment assistance provisions of the Trade Act, and must apply to such personnel the standards for a merit system of personnel administration applicable to personnel covered under 5 CFR part 900, subpart F. Section 618.890(a) restores the longstanding practice of requiring State merit staffed personnel to administer the TAA

program. From 1975 through 2005, the Governor-Secretary Agreements under which the States administer the TAA program as agents of the United States required that all administrative functions performed by the States in carrying out the TAA program be performed exclusively by staff subject to the merit system standards at 5 CFR 900.603. In 2005, the Governor-Secretary Agreements were modified to provide that TAA program staff need not be merit staffed, except that employees who perform functions under both the TAA program and the UI and/or ES programs must be merit staffed. However, in 2009, the Department provided advance notice in the Governor-Secretary Agreements that it would address merit staffing in rulemaking. This rule reinstates, and codifies in regulation, what had been the Department's longstanding practice of requiring merit staffing by the States in administering the TAA program.

The Department presented several rationales in the NPRM for this requirement. The Department will address the comments made on each rationale.

#### Authority

In the NPRM, the Department found authority to promulgate this rule in section 239 of the Trade Act. The Department received several comments on this issue.

Some of the commenters questioning our authority asserted that requiring the use of merit staff runs counter to the clear intent of Congress in passing the TGAAA. A small number of these commenters simply pointed out their belief that the proposed rule runs counter to Congress' intent, while others argued that Congress' intent to exclude merit staffing is clear from the actions of the Conference Committee tasked with reconciling the House and Senate bills to reauthorize and amend the Trade Act. One commenter focused on the House-passed bill, the Senate bill introduced by Senator Max Baucus, and the actions of the Conference Committee as relevant legislative history. Another commenter cited the minority views of the House Committee Report from 2007 (H.R. Rep. No. 110-414, pt. 1, at 119-120) as relevant legislative history. One commenter asserted that "because Congress specifically considered and intentionally rejected [merit staffing] in passing the TGAAA," the Department does not now have the authority to promulgate such a rule. Another commenter argued that the actions of the Conference Committee "precludes an interpretation of section 239 of the Trade Act that would grant the

Department" the authority to enact this rule. One commenter suggested that if Congress had intended that certain TAA functions be provided by State merit staff, it would have included that provision in the TGAAA.

As an initial matter, the minority opinion in the House Committee Report is not indicative of Congressional intent. Regarding these commenters' broader arguments, the Department acknowledges that the TGAAA did not incorporate provisions that had been included in a bill passed by the House in the previous Congress during the previous Administration that would have statutorily mandated the use of merit staff in the TAA program, but the Conference Committee's failure to explain its actions precludes a finding that Congress clearly intended to prohibit the Department from enacting such a requirement through rulemaking. Courts have consistently stated as a general rule that Congressional intent cannot be clearly understood where actions taken by a committee in Congress, including the Conference Committee, are not explained. Because the Conference Report is silent on this matter, the legislative history cited by these commenters is insufficient to determine what Congress intended when it passed the TGAAA. Further weakening these commenters' assertions is the general rule that the opinion and understanding of a subsequent Congress is a poor indicator of what a previous Congress intended when it passed a specific provision of a bill. In the absence of any clear Congressional intent prohibiting it, the Department believes that promulgation of the merit staffing rule is within the discretionary authority delegated to it to interpret the Trade Act and administer the TAA program.

The Federal court opinion in *Michigan v. Herman*, 81 F.Supp.2d 840 (W.D. Mich. 1998), provides support for the Department's position. In that case the court upheld the Department's requirement that ES services be provided by merit staff under the Department's interpretation of the Wagner-Peyser Act. In its decision, the court noted that the Wagner-Peyser Act is silent on the issue, the legislative history is ambiguous on the matter, and that Congress' failure to alter the Department's longstanding interpretation of the Wagner-Peyser Act indicated that Congress intended to defer to the Department's interpretation of the Act. *Michigan*, 81 F.Supp.2d at 847-848. As in *Michigan*, the Trade Act does not directly address merit staffing; the legislative history is ambiguous, and for 30 years Congress did not expressly

repudiate the Department's longstanding interpretation of the Trade Act as requiring merit staffing in the face of silence in the statute and ambiguity in the legislative history; and Congress failed to alter the Department's State merit staffing requirement despite amending the Trade Act several times between 1975 and 2005 when the Governor-Secretary Agreement expressly required merit staffing. Accordingly, only a clear, unambiguous statement from Congress would be sufficient to prohibit the Department from exercising its discretion and requiring merit staffing through rulemaking.

A few commenters asserted that section 239 of the Trade Act does not provide the Department authority to require State use of merit staffing in implementing the TAA program. Some of these commenters generally asserted that the TGAAA does not require the use of merit staffing. As discussed above, the Department is acting within its discretion in requiring merit staffing. One of these commenters disagreed that sections 239(a)(4) (cooperation with the Secretary and other State and Federal agencies in providing payments and services), 239(f) (advising and interviewing adversely-affected workers), and 239(i) (control measures) of the Trade Act provided the authority for the Department to require merit staffing. This commenter asserted that Congress did not intend to provide authority to require merit staffing under section 239(a)(4), an assertion it supported by stating that "neither the statutory text itself nor the legislative history to section 239(a)(4)" provide the authority cited by the Department. The commenter asserted that "neither the statutory text itself nor the legislative history to section 239(f) says anything about merit staffing," and therefore the Department does not have the authority to issue such a rule. The commenter additionally asserted that section 239(i) cannot be used to support this rule as this section was added "at the insistence of Senate negotiators opposed to the imposition of a [S]tate merit staffing requirement."

The Conference Report on section 239 is silent on the issue of merit staffing, while these provisions in section 239 provide the Department with broad authority to prescribe rules to govern the efficient administration of the TAA program. In the face of legislative silence, the Department believes that these provisions in section 239 provide it with sufficient authority to ensure the effective administration of the TAA program in any manner that will meet the goal of efficient and effective

program administration. As explained throughout this preamble, the Department's promulgation of this rule is necessary for the most effective administration of the TAA program.

Finally, one commenter faulted the Department's reliance on "Congress' decision to require the provision of TAA-funded employment and case management services to TAA-eligible workers as a justification for imposing" the merit staffing requirement because "the agreement on this portion of the TGAAA Act was directly linked" to the compromise that included the dropping of the merit staffing provision from the House version of the bill. As with the assertions about sections 239(a)(4), (f), and (i), the commenter did not cite to any legislative history to support this contention, and the Department is aware of none.

#### *Principal-Agent Relationship*

In the NPRM, the Department discussed the principal-agent relationship, under which the Department directs the State administration of the TAA program, as support for the use of State merit staff to administer the TAA program. The Department explained that implementing the TAA program requires States to make determinations concerning the Federally-funded services and benefits to which adversely-affected workers are entitled.

The Department received a small number of comments on this discussion. One of the commenters agreed that the Department has "broad authority to ensure that the TAA program functions in a proper and efficient manner," including through implementation of a State merit staffing requirement for use of TAA funds, since States act as agents of the United States. Another commenter suggested that the principal-agent provisions have long been part of the Trade Act, so the Department may not use that longstanding relationship as a basis for implementing a new merit staffing requirement at this time. This commenter also asserted that the Department failed to identify any way in which the current method of providing services using non-merit staff has undermined the principal-agent relationship.

The principal-agent relationship, present in all Federal UC programs, invests the Department, as principal, with broad discretion to interpret the statute and to prescribe the operational and administrative details of the TAA program. This differs from the grantor-grantee relationship, found in programs like WIA, in which substantial operational and administrative

discretion reposes in the grantee. The Department's broad discretion as the principal provides it ample authority to prescribe administrative rules, including a merit staffing requirement. The fact that the principal-agent relationship is longstanding does not limit the role of the principal, just as it did not limit that role in 2005.

The TGAAA created additional entitlements to benefits within that relationship. The TGAAA created a requirement to provide employment and case management services to TAA-certified workers, almost tripled the training funding authorization to provide longer-term training to an expanded pool of certified workers, increased by 26 the number of weeks of income support for workers within a 91-week period, added the reemployment trade adjustment assistance (RTAA) benefit for older workers, enhanced other benefits and services, and expanded group eligibility. The Department anticipates the total funding for these features to virtually double, and of course these new features add complexity and additional challenges in administering the program. It is, therefore, appropriate at this time for the Department to reconsider the minimum requirements to which States, on behalf of the Department and the United States, must adhere in order to effectively administer the TAA program.

Further, the Department disagrees with the commenter's assertion that in order to promulgate this rule the Department must show how the past use of non-merit staff has undermined the principal-agent relationship. The principal-agent relationship, which existed before this rulemaking and was reinforced in the provisions of all of the Governor-Secretary Agreements on TAA program administration, provides the Department the authority to direct States as to the manner of administering the TAA program. The Department's authority as principal is reinforced by its authority to interpret and apply the statute as the agency designated by Congress to administer the TAA program.

#### *Complex Entitlement Program*

In the NPRM, the Department stated that the TAA program is a complex entitlement program, similar to the UI program which is also administered by State merit staff. The Department also noted that the TAA and UI programs are integrally related. For example, the TAA program's trade readjustment allowance (TRA) is a UI benefit payable after exhaustion of other forms of UI and is subject to many of the same or similar

requirements and procedures that apply to State UI programs.

The Department received several comments agreeing that the integral relationship between the TAA program and UI programs would benefit from the requirement that TAA program funds be administered by State merit staff. Some of these commenters cited the need for State merit staff especially because, in their experience, personnel who determine eligibility for TRA benefits must thoroughly understand UI eligibility requirements and program complexities.

A small number of commenters disagreed. One of these commenters asserted that WIA programs have equally complex requirements, yet those programs are often effectively administered by non-merit staff. Another of these commenters stated that the TAA program "is more closely aligned with the [WIA]-funded rapid response and dislocated worker programs," because both of these programs "address the training and reemployment needs of workers affected by a dislocation event \* \* \*," and therefore, the administration of the program should be designed to more closely coordinate with WIA, which can be done most effectively at the local level under the existing system. Similarly, another commenter averred that the responsibilities of TAA staff more closely resemble WIA staff activities than those of UI and ES program staff.

The Department recognizes that there are similarities between WIA and TAA, and requires coordination between the two programs. However, the structure of the TAA program, by operating within a principal-agent relationship, reflects greater Federal authority and responsibility than is present in the grantor-grantee relationship under which WIA operates. Unlike TAA, WIA participants are not entitled by law to program benefits, and any eligibility for UI payments that a WIA participant may have is not affected by determinations of eligibility to receive WIA services. In the TAA program, TRA eligibility is an extension of UI eligibility that takes into account State and Federal eligibility criteria. Maintaining eligibility for TRA requires continuing eligibility determinations, taking into account factors such as enrollment in training, length of training, employment decisions, and earnings. By adding employment and case management services as a required benefit of the program, Congress recognized that the proper provision of these services, including quality case management, is essential to the adjustment of adversely-

affected workers. For example, if a TAA case manager is not familiar with the requirements for enrollment in training in order to receive TRA, or does not possess a full understanding of the rules setting the amount of income an adversely-affected worker may earn while still receiving TRA, an adversely-affected worker may be incorrectly determined ineligible for TRA. By losing eligibility for TRA, the worker may lose eligibility for the health coverage tax credit, and find it difficult to continue training. As one commenter noted, "meeting these complicated requirements requires a very specialized, highly-trained workforce with expertise that cannot be easily outsourced or transferred to other organizations."

A few commenters encouraged the Department to let each State choose its own staffing strategy. According to these comments, the Department is imposing a "one size fits all" approach by requiring State merit staffing. The Department is promulgating this requirement because it has determined that nationwide consistency in the TAA program is of paramount importance. The Department has also determined that the State merit staffing requirement will promote program efficiency, accountability and transparency.

The important point is that adversely-affected workers now are entitled to receive a range of tailored services under the TAA program. The Department recognizes that many adversely-affected workers receive services under other programs for which they are also eligible, such as WIA, which are not delivered by State merit-staffed personnel. In contrast, since TAA is a complex entitlement program that requires States to make substantive determinations of benefit entitlement, as agents of the United States, the Department is requiring State merit-staffed administration of the TAA-funded services to which adversely-affected workers are entitled. However, while the Department expects the primary delivery of case management services for TAA participants will be through TAA-funded State merit staff, non-merit staff funded by partner programs may provide those services when, for example, TAA funds have been exhausted, when demand for services exceeds TAA-funded staff capacity to deliver those services, or when specific services have already been provided under another Federal program. In fact, section 235 of the Trade Act requires the Secretary to make employment and case management services available to adversely-affected workers directly or

through agreements with the States and section 235a makes provides funding for States to provide those services. Section 239(g)(5) of the Trade Act specifically requires States acting under such agreements to provide such services through other Federal programs in the event that allocated TAA funding for employment and case management services is insufficient to make these required services available to all adversely-affected workers in a State.

#### *Relationship With WIA*

Many commenters argued for the continuation of a structure involving co-enrollment and integration with WIA services. These commenters remarked that their State's integrated service delivery system is highly efficient, responsive, and consistent; has good coverage throughout the State; has worked well for many years; and provides the full range of "wrap-around" services and in-depth assessments. One commenter stated that a merit staff requirement is diametrically opposed to the Department's stated goal of program integration. One commenter added that having the WIA and TAA programs administered by two different entities and staff would result in a potential loss of co-enrollment opportunities. One commenter supported State practices that respect the principles of local governance, community-based service delivery, and system-wide accountability.

Some of these commenters noted that 27 States and Puerto Rico have opted to allow a variety of State and local government employees and contractors to provide services to TAA participants. These commenters noted that this has allowed for a high degree of integration of the services provided through TAA and the One-Stop delivery system. Along the same line, other commenters suggested that local workforce areas are better poised to assist participants with training choices and reemployment services than State merit staff because of awareness of demand occupations, local resources, and the local economic climate. One commenter added that in some local areas, non-merit staff currently providing TAA benefits show higher job retention rates and higher salaries than merit staff. Several commenters mentioned the requirement to provide case management, and expressed concern that the proposed rule would require States to establish redundant, costly, and disruptive public structures because the States would be prohibited from using existing local workplace resources.

The use of merit staff in the TAA program has not previously impeded,

and will not in the future impede, the provision of services to adversely-affected workers in the centers of the One-Stop delivery system (One-Stop centers) established under WIA. The TAA program will continue to be a One-Stop partner, as are other merit-staffed programs, including UI and the ES, which are integrally related to TAA. As the Governor-Secretary Agreement provides, the States will continue to use One-Stop centers as the main point of participant intake and delivery of TAA benefits and services.

Consistent with Trade Act section 239(g)(5), there is nothing in this rule prohibiting the delivery, in appropriate circumstances, of employment and case management services to adversely-affected workers by staff funded by WIA or other Federal programs through co-enrollment. As a partner in the One-Stop delivery system, the TAA program will continue to coordinate with the other partners in the system to ensure adversely-affected workers are provided access to a broad array of comprehensive services. In light of the current mix of merit staffed and non-merit staffed One-Stop partners already participating in the One-Stop delivery system, the restoration of the TAA merit-staffing requirement will not preclude effective coordination and integration within that system.

Under the amendments, the TAA program for the first time will be able to devote TAA funding to the provision of employment and case management services. These services were previously not allowable uses of funds under the TAA program. To the extent that adversely-affected workers received these services, they received them through other programs, generally WIA or the ES. Now, dedicated TAA funds will allow the TAA program to ensure that these services are provided to adversely-affected workers in a high-quality and in-depth manner. However, the WIA, ES and other resources and structures that were used to provide these services to adversely-affected workers in the past are not being eliminated or dismantled. They will continue to be available to provide services to the dislocated workers and adults who continue to be eligible for those programs, including adversely-affected workers, and the provision of these benefits should continue to be coordinated with the TAA program facilitated through the One-Stop delivery system established under WIA.

Adversely-affected workers currently receive many services in addition to case management and employment services, including supportive services and other wrap-around services, which

are funded and provided under other programs for which adversely-affected workers also qualify. The Department will continue to encourage the provision of services to adversely-affected workers by such other programs in order to supplement TAA-funded services. In fact, section 239(g)(5) of the Trade Act specifically requires States to provide employment and case management services through other Federal programs, in the event that allocated TAA funding for employment and case management services is insufficient to make these required services available to all adversely-affected workers in a State. Moreover, the Governor-Secretary Agreements require coordination of the TAA program with activities carried out under WIA to help ensure that a comprehensive array of services is available to adversely-affected workers. The operating instructions to implement the TGAAA amendments (TEGL No. 22-08) also affirmed the desirability of co-enrollment of adversely-affected workers in WIA and other programs to ensure comprehensive services are available. The commenters have not explained how the merit-staffing requirement precludes co-enrollment in other programs or effective coordination by TAA with the other programs, including both merit staffed and non-merit staffed programs, which also are partners in the One-Stop delivery system under WIA. In sum, this rule does not undermine the feasibility or importance of the co-enrollment of adversely-affected workers in WIA and other Federal programs.

#### *State Merit System Advantages*

In the NPRM, the Department described various desirable features of State merit personnel systems. The Department stated that State merit staff employees are directly accountable to State government entities. Also, the Department noted that the standards for State merit staff performance and their determinations on the use of public funds require that decisions be made in the best interest of the public and of the population to be served.

The Department received several comments on this topic. Some commenters extolled the benefits of using State merit staff for the TAA program. One commenter expressed the opinion that it would be preferable to have TAA eligibility determinations made by public agency merit staff that are hired according to objective personnel standards and are insulated from political and other pressures. Another commenter claimed that if State merit staffing is required, then citizens and elected officials could more

easily locate the entity to hold accountable for TAA program issues.

In contrast, several commenters argued that non-merit staffing models are equally effective. These commenters argued that their experience with local TAA staff is that they have provided quality service to adversely-affected workers. For example, one commenter noted that local staff have correctly applied eligibility criteria and have effectively performed their TAA duties. One commenter noted that agreements between the States and local entities can, and have, addressed some of the features attributed to State merit staff such as strict government standards on the use of personal information. This commenter also remarked that the State is always responsible for administering TAA, regardless of how the program is staffed.

Other commenters contended that local staff who have been providing TAA services in recent years have become knowledgeable about the program and have gained valuable experience that benefits adversely-affected workers. These commenters cautioned that losing that background and expertise would harm the TAA program.

There are unique advantages to using the State merit personnel system for staffing the TAA program. State merit staff employees are hired into and operate within a publicly accountable organization with a State-wide perspective and are responsible to the general public. Some features of the State merit staffing model that add value to the TAA program are the objective nature of public personnel systems; the strict government standards governing the use of personal information; and that State agencies already address such issues as the impartial treatment of applicants to and beneficiaries of public programs, and operating with high standards of public transparency.

Further, the direct employer-employee relationship between State merit staff and the State agency (or agencies) responsible for delivery of TAA services makes it easier for adversely-affected workers to hold their State government accountable for the services to which they are entitled. Although it is certainly possible to hold local and/or non-merit staff and their employers accountable, the attenuated lines of authority between State agencies, local entities, contactors, *etc.*, creates a more amorphous web of relationships that can make it more difficult for adversely-affected workers to locate the source of TAA program responsibility.

The Department does not question that there are local staff who have effectively served the TAA program, and understands that some local staff have attained knowledge and experience. Indeed, this rule does nothing to disturb the local delivery of TAA services. State personnel may and do perform TAA functions at the local level. Further, States may hire persons who are knowledgeable about and experienced in delivering TAA services consistent with State merit standards. This rule simply requires that personnel engaged in TAA-funded functions, except as specified in § 618.890, must be employees covered by the State merit system of personnel administration, permitting non-merit staff to be converted to State employment, if accomplished in accordance with the merit principles.

#### *Consistency, Efficiency, Accountability and Transparency*

In the NPRM, the Department explained that its purpose in requiring State merit staffing of TAA-funded functions “is to promote consistency, efficiency, accountability, and transparency in the administration of the TAA program.” 74 FR 39199, Aug. 5, 2009. The Department received several comments about this purpose. Several of these agreed that requiring State merit staff personnel to administer the TAA program would ensure better consistency, efficiency, transparency, and accountability. Some of these commenters focused on the disadvantages of and inconsistencies in local implementation of the program.

One commenter expressed the belief that the proposed rule would help prevent a proliferation of different management practices and structures that make accountability and equal access more difficult to achieve. In addition, this commenter stated that One-Stop centers vary considerably with respect to size, capacity, and type of operator, and there is variation in services and quality depending on location. One commenter warned that the priorities of other local programs can sometimes take precedence over the TAA program. Another commenter observed that “the diversified WIA structure results in a degree of impenetrability for service recipients and policy makers,” and asserted that requiring State merit employees to perform TAA-funded functions would ensure that citizens and elected officials are able to “place accountability where it belongs.” One commenter noted that staff turnover combined with inconsistency of service from one local workforce board area to another is not

conducive to an efficient operation of the TAA program.

One commenter provided a detailed argument supporting the idea that Federal benefit entitlement programs must be carried out by State employees who are free from political pressures and the for-profit motives of private-sector contractors. According to this commenter, the TAA program should be operated at the State level by personnel who have been recruited, selected, compensated, and evaluated according to a merit system of personnel administration. This commenter asserted that local One-Stop centers have divergent policies, which sometimes result in significant variances in the treatment received by persons who have worked at the same workplace, depending on where they live. Moreover, the commenter explained that the speed and consistency by which workers are determined to be eligible for benefits and may actually begin receiving benefits can differ from worker to worker in the same One-Stop center. Another commenter described a situation where workers were denied eligibility for TAA benefits in a One-Stop center, but the workers travelled to another One-Stop center in a different area and were declared eligible for TAA benefits.

A commenter also expressed the opinion that State merit staff administration of the program would provide the flexibility to respond to layoffs regardless of where they occur in the State, and that well-trained "State-level" staff will bring stability and continuity to the provision of services. This commenter contended that the civil service system ensures hiring and promotions are based on competence, rather than nepotism, political connections, or favoritism. In addition, the commenter explained that public administration provides important due process protections for benefit recipients who might be subject to discrimination by private contractors who are subject to standards different from State merit staff.

Some commenters, however, disagreed with the Department's assertion that State merit staff would promote consistency, efficiency, transparency, and accountability in the TAA program. These commenters generally agreed that the TAA program should strive for consistency, efficiency, accountability, and transparency, but asserted that these goals were already being achieved through the locally-administered approach used in their jurisdiction.

For example, one commenter maintained that consistency can be accomplished by focusing on applying policies and procedures rather than on who delivers the service. Another commenter contended that State-wide training and monitoring of local staff can help to produce consistency. Another commenter suggested that technical assistance is a tool that can support consistency.

Other commenters stated that local delivery of TAA services is efficient. A few of these commenters argued that the local staff model is more flexible and can more nimbly respond to layoff events and training opportunities than a larger bureaucracy. Some of these commenters contended that it would be inefficient and potentially confusing to have merit staff TAA case managers because some recipients of TAA services also have WIA case managers. According to one commenter, TAA and other Federal programs have been effectively administered at the local level by professionals who have earned the trust of constituents.

A few commenters maintained that performance measures, oversight, and monitoring are tools through which local delivery entities may be held accountable. Another commenter averred that accountability is ensured by the separation of program administration and operations, regardless of whether State staff is merit-based.

Similarly, some commenters stated that local delivery options are transparent. A few commenters contended that strict government standards on the use of personal information and transparency have been addressed in data sharing agreements between the commenters' State and local areas. One commenter asserted that transparency is the product of frequent and thorough monitoring, and one commenter suggested that a merit staffing requirement be used as a corrective-action recourse based upon a finding of deficiencies in State performance. Another commenter stated that an adversely-affected worker should receive services required to return to work, no matter where he or she enters the system, and service administration should not be differentiated by whether or not the adversely-affected worker first makes contact with a merit staff employee.

It is clear that in many areas using local delivery options, significant effort has been expended to achieve the goals of consistency, efficiency, accountability and transparency. The Department remains committed to the local delivery of services, which is in

fact how services in the Department's workforce programs—including State-administered programs such as TAA—are delivered. The merit staffing requirement ensures that the services provided locally to adversely-affected workers will be administered uniformly within States and across States. Accordingly, commenters should not be concerned that this rule will force a "dismantling" of a local service delivery system. In fact, the new funding stream provided under the TGAAA for case management and employment services allows resources under WIA and the ES that were previously used for that purpose for adversely-affected workers to be used to provide services to the many other dislocated workers and adults eligible for those programs who are not eligible to apply for TAA. TAA services will continue to be provided through the local One-Stop delivery system established under WIA.

The Department agrees with the comment that adversely-affected workers should receive services that will help them return to work even if their first contact in the system is not with a merit staff employee. As a result, co-enrollment of workers in both WIA and TAA programs will continue to be encouraged, as discussed more fully above.

The different approaches to consistency, efficiency, accountability and transparency described by the various commenters illustrate that the States are employing a patchwork approach that could lead to inconsistent service delivery. The Department believes that consistency in the application of eligibility criteria and the treatment of workers nationally is imperative. Consistency should be the overarching design of the service delivery system for services delivered with TAA funds, rather than a corrective action approach that could be used if performance goals are missed. Consistency is best achieved by administering the TAA program through merit staff who are hired, trained, and employed by one or two State agencies under the same merit system, operate under the same personnel rules, and are accountable to the same State agency or agencies. Non-merit staff personnel employed outside of the State agency, often by either local agencies or private entities, are subject to varying procedures and work rules, and different, and potentially conflicting, obligations to their actual employers. This structure is more likely to produce an inconsistent application of the eligibility criteria for the various TAA benefits and services.

Similarly, placing administrative responsibility with the merit-staffed personnel of one or two State agencies promotes efficiency and makes it easier to hold the State agencies accountable. For example, layoff events may trigger TAA certifications covering large numbers of workers who seek TAA at the same time. A State agency may quickly move funding and personnel to areas in the State where TAA services are most needed to advise these adversely-affected workers as soon as practicable of the TAA program benefits and services and the procedures and deadlines for applying for such benefits and services, as required by the Governor-Secretary Agreement. In contrast, funds allocated to local workforce boards and contractors are generally restricted to serve a specified area which impedes a State's ability to move funds as needs change. Focusing TAA administration in one or two State agencies also reduces the number of entities responsible across a State, thereby making it easier for the public to know who administers the program and promoting accountability and transparency.

On a related point, one commenter asserted that this rule will "likely inhibit the ability of [S]tates to comply with section 239(f)" requiring the coordination of services because it will lead to "duplicative staffing and increased inefficiency" in States currently using non-merit staff to provide services to both WIA and TAA participants. The Department disagrees that this rule will lead to duplicative staffing and inefficiencies in administering the program. As discussed throughout this preamble, the TAA program continues to be a required partner in the One-Stop delivery system, and co-enrollment with WIA is still encouraged. In the absence of any evidence suggesting otherwise, the Department reasonably believes that requiring States to use merit staffing will improve the administration of the TAA program.

State personnel serving under a merit system are non-partisan public officials who are directly accountable to elected officials. The standards for their performance and their determinations on the use of public funds require that decisions be made in the best interest of the public and of the population to be served. The use of a State merit system is further intended to ensure that the administrative personnel meet objective professional qualifications, provide fair treatment to participants, comply with strict government standards on the use of personal information, and perform in a setting where decisions are made in

accordance with high standards of public transparency. These features of a State merit system are appropriate to apply to State administration of the TAA program.

A few commenters questioned whether the Department has any data supporting the assertion that State merit staff is inherently better qualified to deliver TAA services than other providers. The Department is acting on the experience it has gained in overseeing the State administration of the TAA program under a merit staffing system that had been in place for approximately 30 years of the TAA program's 35-year existence. In addition, UI, a program similar to TAA and one that actually works in conjunction with TAA, is efficiently administered by State merit staff. ES also is efficiently administered by State merit staff and works in conjunction with TAA. Based on this experience and the similarities to other programs successfully staffed by State merit personnel, the Department believes a return to a State merit based system will help to promote consistency, efficiency, accountability, and transparency in the administration of the TAA program.

#### *Costs*

Various comments addressed the cost of the State merit staffing requirement. One commenter noted that, given the number of TAA petitions that are pending, requiring State merit staffing of TAA-funded functions would mean "the [S]tate would need significantly more \* \* \* merit staff [S]tatewide at an additional annual cost of at least \$10 Million." Other commenters opined more generally that the merit staffing requirement could result in a "substantial" cost increase. One commenter stated simply that it will be "more" costly for case management services to be provided by State merit staff. Another commenter stated that there would be "financial burdens attached to staffing and additional staffing needs." One commenter suggested that this rule would result in "a system backlog" because of an insufficient number of State merit staff. Finally, one commenter argued that the TAA funds provided by the Department will not be adequate to address "long term costs" of State personnel such as pension payments.

The TAA allocation provided to the States by the Department covers the costs of the program. TAA allocations include funding for employment and case management services and administrative costs. Under the TGAAA, significantly more funding is available for the TAA program. The training cap

for the program has increased from \$220 million to \$575 million, and an additional amount equal to 15 percent of the allocation to each State for training will be allocated to the State for TAA administration and employment and case management services, as well as an additional \$350,000 to each State specifically for employment and case management services. This will result in States having a considerably greater sum available for administration than under the lower training cap. And in fact, none of the commenters provided any empirical data to support the contention that the funding would be insufficient for this purpose.

The final rule requires States to use merit staff to perform TAA-funded functions. Such staff may be staff new to TAA, or they may be staff who have been providing TAA services in the past, including non-merit staff who are converted to State employment. Each State will comply with this rule's merit staffing requirement with the Federal funds allocated to that State for TAA administration and case management and employment services. In that way, any costs incurred in implementing this requirement will be funded by the TAA program. Commenters provided with no data that suggests that States cannot comply with this rule with the available funds, and the Department is aware of no such data. The Department is available to provide assistance to any State with questions about what costs are allowable charges to TAA funds.

#### *Transition Period (§ 618.890(b))*

As proposed, § 618.890(b) provided that States must comply with the merit staffing requirement by October 1, 2010 for employment and case management services under section 235 of the Trade Act, and by July 1, 2010 for all other TAA administrative activities that are required to be merit staffed. The Department received several comments on this provision. One commenter stated that the proposed transition period is reasonable and provides sufficient time for States to plan implementation. One commenter generally stated that the transition period would delay, not reduce, the costs and disruptions to States. Other commenters stated that the aggressive transition period for implementing the merit staff requirements would make it impossible for a State to hire and train an adequate number of qualified staff before the implementation date. One of these commenters specifically asserted that, assuming that this final rule publishes in mid-February 2010, the four and one-half month time frame to implement merit staffing for TAA



administrative functions by July 1 is “very aggressive.” This commenter argued that being unprepared at the implementation date would lead to a loss of consistency and effectiveness of the program. A couple of commenters noted that their States are currently subject to hiring restrictions that could impact the ability to hire and train staff by the implementation deadline. One of these commenters also noted that the rule would require States to move the delivery of employment and case management services to merit staff a mere three months before the TGAAA amendments expire.

The Department recognizes the concern raised by several commenters that, at least for their States, the transition period proposed in the NPRM was too short. Accordingly, the Department has decided to extend the transition period to allow States more time to effect this change. The deadline for implementing the merit staffing requirement for both employment and case management services and administrative services now is December 15, 2010. Thus, paragraph (b) of § 618.890 is revised to provide a new transition deadline of December 15, 2010.

As for the comments regarding State hiring freezes, the positions subject to the merit staffing requirement are Federally funded positions that should not be subject to State-imposed hiring freezes because merit staff are hired using those Federal funds provided. Unemployment Insurance Program Letter (UIPL) No. 18–09, titled “Application of State-Wide Personnel Actions, including Hiring Freezes, to the Unemployment Insurance Program” addresses precisely this issue. It provides that any State-wide personnel action that does not take into account the needs of the State UI program is not a “method of administration” under section 303(a)(1) of the Social Security Act for assuring the proper and prompt payment of UI. This principle, and thus the UIPL, applies equally to the TAA program under 20 CFR 617.50(f), requiring “[f]ull payment of TAA when due \* \* \* with the greatest promptness that is administratively feasible.” Also, consistent with Federal UI programs, States are required, through their agreements to administer the program as agents of the Department, to use the TAA funds provided by the Department consistent with the rules and regulations in effect for the program—including this rule. Therefore, if a State does not have merit staff it must hire merit staff using the funds allocated by the Federal Government.

The transition deadline falls 15 days before the expiration of the TGAAA amendments. The transition period was developed taking into account the need for a reasonable amount of time for implementation, weighed against the need to ensure program consistency, efficiency, accountability, and transparency as quickly as possible. The regulatory provision requiring merit staffing is not dependent on the program changes made by the TGAAA, or the expiration date it provided for those changes. The Department’s legal authority and rationales for requiring State merit staffing for TAA-funded functions are based on the Department’s responsibility for assuring that the TAA program is properly and efficiently administered. While the additional complexity and new entitlement created by the TGAAA provide additional support for the decision to require State merit staffing, the requirement does not depend solely on the TGAAA. We note that the President’s FY 2011 Budget supports extension of the TGAAA provisions.

In the NPRM, the Department proposed to title part 618 “Trade Adjustment Assistance under the Trade Act of 1974 For Workers Certified under Petitions Filed After May 17, 2009.” However, in response to the comment concerning the TGAAA’s sunset provision, and to avoid any confusion that the merit staffing requirement applies only with respect to workers certified under petitions filed after May 17 2009, the Department changes the title to “Trade Adjustment Assistance under the Trade Act of 1974, As Amended.” This change clarifies that part 618 will contain all the regulations for administering the program operated under the Trade Act, not just the regulations implementing amendments specific to the TGAAA—and that the merit staffing requirement applies with respect to all workers regardless of the date of the petition under which they were certified.

As mentioned above, there are different eligibility criteria for and different services available to adversely-affected workers, depending on the date on which their petition was filed. Workers covered by petitions filed before May 18, 2009 are subject to the requirements relating to benefits and services that were contained in the Trade Act prior to the TGAAA, while workers covered by petitions filed on or after May 18, 2009 are subject to the requirements added under the TGAAA. Such variances add to program complexity, as also noted above. However, the requirement of merit staffing transcends these programmatic

distinctions. Once a State has converted to merit staff as required by this rule, those staff members serve all workers, regardless of the date a petition was filed.

The revised title of part 618 also more accurately describes these regulations. Although certain provisions of the TGAAA only relate to petitions filed on or after May 18, 2009, not all provisions of the law relate to that filing date. Different provisions have different effective dates, including the provisions relating to the formula for distribution of the training funds, which went into effect on October 1, 2009. Therefore, “Trade Adjustment Assistance under the Trade Act of 1974, As Amended” is a more appropriate title.

*Exemptions for States With Employment Service Operation Exemptions (§ 618.890(c))*

Section 618.890(c) partially exempts from the TAA State merit staffing requirement those States that have received an exemption from the ES merit staffing requirements under the Wagner-Peyser Act. These States are Colorado, Massachusetts, and Michigan. The Department has concluded that allowing this limited exemption will prevent complications and confusion in these three States, thereby allowing the efficient administration of the TAA program. The paragraph (c) exemption does not apply to the administration of TRA, and also it applies in each of these States only in the same scope that the ES merit staffing exemption applies.

The Department received several comments on the issue of these exemptions. Several of these commenters expressed general support for permitting the States of Colorado, Massachusetts, and Michigan to continue to use non-State and non-merit personnel to administer the TAA program. One commenter argued that the challenges of implementing the merit staffing requirement are as great for its State, which is not exempted under paragraph (c), as they would be for the exempted States. One commenter stated that the Department does not possess the legal authority under TAA to relieve any State from the requirement of merit staffing. Another commenter urged the Department to add a particular State to the exemption; similarly, a small number of commenters suggested that the Department allow waivers from the merit staffing requirement.

The legal authority to exempt States under paragraph (c) is based on the Department’s authority to interpret the Trade Act and administer the TAA program, as explained more fully above.

The Department granted the ES exemptions as demonstrations under the Wagner-Peyser Act, and decided that no additional demonstrations or exemptions would be granted. *See* 20 CFR 652.215. The Department has considered the issue of additional TAA exemptions, but has decided that, because of the importance of merit staffing, declining to permit additional exemptions (or waivers) will better serve workers under the TAA program. And, whereas the ES exemptions would result in inconsistent service delivery to adversely-affected workers if the three exempt States were required to implement the TAA merit staffing requirement, it is fully consistent and reasonable for States with ES State merit staff to comply with this rule.

The Department makes no change to this paragraph as proposed.

*Exceptions for Non-Inherently Governmental Functions (§ 618.890(d))*

Proposed paragraph (d) provided that the merit staffing requirement would not prohibit a State from outsourcing TAA functions that are not inherently governmental, as defined by OMB Circular No. A-76 (Revised). The Department received no comments opposing this paragraph, but is changing this provision very slightly by adding “any supplemental OMB guidance or superseding authority, and in DOL guidance.” This addition acknowledges that the definition of “inherently governmental” in OMB Circular No. A-76 (Revised) could be expanded upon in subsequent guidance or superseded by subsequent authority and that DOL may issue an authoritative interpretation of OMB guidance for purposes of the TAA program.

*Subpart I—Allocation of Training Funds to States*

In the NPRM, the Department proposed subpart I to implement the funding provisions of the TGAAA. In addition to increasing the funds available under the training cap, the TGAAA prescribed a formula for allocating training funds to the States. As required by the TGAAA and proposed in § 618.910, the initial allocation of training funds is determined by the application of four factors: (1) The trend in the number of workers covered by certifications of eligibility during the most recent four consecutive calendar quarters for which data is available; (2) the trend in the number of workers participating in training during the most recent four consecutive calendar quarters for which data is available; (3) the number of workers estimated to be participating in

training during the fiscal year; and (4) the amount of funding estimated to be necessary to provide approved training during the fiscal year. At present, the Department will assign each of these factors an equal weight. However, proposed § 618.910(f)(4) provided that the Department may, after December 31, 2010, change the weighting of these factors after an opportunity for public comment.

For each of the four factors, the Department will determine the national total and each State’s percentage of the national total. Based on a State’s percentage of each of these factors, the Department will determine the percentage that the State will receive of the amount available for initial allocations, and will adjust that percentage to account for the hold harmless provision. The total initial allocations to the States will total 65 percent of the training funds appropriated, as mandated by section 236(a)(2)(C) of the Trade Act, as amended by the TGAAA.

The formula will still include a “hold harmless” feature, but at a much lower level than the Department has been using to date. Although the initial allocation to a State had been at least 85 percent of the amount the State received in its initial allocation the prior fiscal year, the statute now requires that a State’s initial allocation be at least 25 percent of the amount the State received in its initial allocation the prior fiscal year.

The Department’s practice has been that, if the formula would result in an initial allocation of less than \$100,000 to a State, then that State’s allocation was reallocated to the other States. Where a State had an initial allocation of less than \$100,000, it could request reserve funds in order to obtain the limited TAA funding that the State required. The NPRM proposed to codify that practice in regulations.

The TGAAA amended the Trade Act to require the Department to make the initial distribution to States “as soon as practicable after the beginning of each fiscal year,” and to require that 90 percent of a fiscal year’s training funds be distributed to the States by July 15 of that fiscal year. As stated above, the initial allocations will equal 65 percent of the funds available for training. In accordance with the amendments, the Department will also provide to States which receive training funds, either through an initial allocation or through a request for reserve funds, an additional 15 percent for TAA administration and employment and case management services, as well as an additional \$350,000 to each State

specifically for employment and case management services.

The 35 percent of the total training funds held in reserve is higher than the previous 25 percent reserve. Subject to the requirement in section 236(a)(2)(B)(ii) of the Act that 90 percent of the funds be distributed by July 15 of the fiscal year, these reserve funds will, as in the past, be available to be distributed to States on an as-needed basis to provide funding to States experiencing high activity levels that cannot be addressed with the funds received in the initial allocation.

The Department received several comments on the proposed rules governing the allocation of training funds to States. The majority of the comments were generally supportive of the allocation methodology, calling it “much improved over the current practice,” because it “faithfully executes the language of the TAA law” and because “the proposed funding distribution would bring funding levels to a more equitable level \* \* \* [and] will allow for a more accurate distribution of funds.” One commenter noted that the allocation portion of the rule “will look at each [S]tate’s recent TAA use, and will better allocate funding among [S]tates based on current realities, instead of using more stale data,” concluding that “[s]uch open-mindedness and ability to adapt will make for a better program.” The Department will address the comments by topic below.

*Annual Training Cap (§ 618.900)*

This section implements section 236(a)(2)(A) of the Trade Act which caps the amount of TAA training funds available in each fiscal year. The Department received no comments on, and makes no change to, this section as proposed.

*Distribution of the Initial Allocation of Training Funds (§ 618.910)*

This section implements the initial distribution of TAA training funds requirements in section 236(a)(2)(B) and section 236(a)(C)(ii) of the Trade Act. The Department received no comments on paragraphs (a) (initial allocation), (b) (timing of the distribution of the initial allocation), (d) (minimum initial allocation), or (e) (process of determining initial allocation) of this section.

The Department received one comment on paragraph (c) of § 618.910, implementing amended section 236(a)(2)(C)(iii) of the Trade Act. That section is the hold harmless provision, providing that the amount of the initial distribution to a State will not be less

than 25 percent of the State's prior year initial distribution. Paragraph (c) adopts the minimum hold harmless, 25 percent, permitted by the Trade Act. This commenter argued that reducing the hold harmless to 25 percent (from the 85 percent the Department previously used) "may create significant fluctuations in yearly allocations to States." The commenter noted that these fluctuations will extend to administrative funds as States' administrative allocations are a percentage of their total training allocations. The commenter suggested that instead, the Department set the hold harmless provision at 50 percent of the prior year's allocation.

The Department recognizes that the 25 percent hold harmless may result in a State receiving an initial allocation that is significantly lower than the State's initial allocation in the previous year. And, the commenter is correct that States' administrative allocations will fluctuate in sync with their initial training allocations. However, these fluctuations would occur because of an attendant fluctuation among the States' need for TAA training funds. It was Congress's clear intent that the hold harmless percentage be set at 25 percent. *See* Conf. Rep. at 672-73 ("[t]he provision addresses these problems by lowering the 'hold harmless' provision to 25 percent"). However, the Department will monitor the effects of the "hold harmless" and, if warranted, will modify it. Further, § 618.920 will permit a State to receive reserve funds should the initial allocation be insufficient to meet the State's training needs.

The Department received two comments on paragraph (f) of § 618.910 implementing section 236(a)(2)(C)(ii) of the Trade Act. That section establishes four factors that the Department must use in determining the amount of each State's initial allocation, and permits the Department to add "such other factors as [it] considers appropriate. \* \* \*" Paragraph (4) explains the steps the Department will follow in determining the initial allocation of training funds.

The first comment on paragraph (f) was on paragraph (1)(iv), which describes the fourth initial allocation factor: the amount of funding estimated to be necessary to provide approved training during the fiscal year. This commenter expressed concern that the fourth factor fails to address job search and relocation expenditures, and that funds for those expenditures are not allocated elsewhere. To the extent that this commenter has suggested variance from the fourth statutory factor, the Department is without discretion to

change the factor prescribed in the Trade Act. To the extent that the commenter is discussing job search and relocation funding, the comment is outside the scope of this rulemaking but the process is described in TEGL No. 9-09. The allocation addressed in this rule is limited to TAA training funds.

The second comment requested that the Department consider "such other factors as National Emergency Grants, demographics of the affected workforce, technology requirements (such as new reporting and new IT system functionality), petition certification volume, and funds allocated under WIA." While additional factors to determine the initial allocation may be helpful at a later date, and are within the Department's discretion to adopt, for now, the Department will maintain only the four factors specified in the statute and laid out in the proposed rule. The Department needs to acquire experience with the four statutory factors before deciding whether to add other factors, and may seek public comment on potential additional factors in the future.

The Department makes no change to this section as proposed.

#### *Reserve Fund Distribution (§ 618.920)*

This section addresses the distribution of the funds that remain in reserve after the initial allocations to the States. As required by section 236(a)(2)(C)(i) of the Trade Act, this section provides that the remaining 35 percent of the total annual training funds will be held in reserve for later distribution in response to requests by States that can show need for additional training funds. The Department received one comment in favor of the reserve fund distribution.

The Department makes no change to this section as proposed.

#### *Second Distribution (§ 618.930)*

This section provides that at least 90 percent of the total training funds for a fiscal year will be distributed to the States by July 15 of that fiscal year, as required by section 236(a)(2)(B)(ii) of the Trade Act. The Department received no comments on this issue, and makes no change to this section as proposed.

#### *Insufficient Funds (§ 618.940)*

This section provides that if, in a given fiscal year, the Secretary estimates that the amount of funds necessary to pay for approved training will exceed the legislative cap, and therefore there will be insufficient funds to meet the needs of all States for the year, the Department will decide how the funds remaining in reserve at that time will be

allocated among the States, as provided by section 236(a)(2)(E) of the Trade Act. The Department received no comments on this issue, and makes no change to this section as proposed.

#### *Technical Corrections*

The Department is making two technical corrections to the rule. The first correction is in the title of Subpart I as it appeared in the table of contents in the NPRM. In the table of contents, the NPRM indicated that subpart I would be titled, "Apportionment of Training Funds to States." However, as explained above, the Department is using the word "allocation" to describe the distribution of training funds to the States. Accordingly, the table of contents in this final rule correctly reads, "Allocation of Training Funds to States."

The second correction is to the title of § 618.890(d). In the NPRM, the paragraph was titled, "Exemptions for Non-inherently Governmental Functions." The Department is correcting the title to the more technically accurate, "Exceptions for Non-inherently Governmental Functions."

### **III. Administrative Information**

#### *Regulatory Flexibility Analysis, Executive Order 13272, 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 final rule on small entities. The RFA defines small entities to include small businesses, small organizations, including not-for-profit organizations, and small governmental jurisdictions. The Department must determine whether the final rule imposes a significant economic impact on a substantial number of such small entities. The Department concludes that this rule directly regulates only States and does not directly regulate any small entities; any regulatory effect on small entities would be indirect. Accordingly, the Department has determined this rule will not have a significant economic impact on a substantial number of small entities within the meaning of the RFA.

The Department has also determined that this final rule is not a "major rule" for purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, as amended (SBREFA), Public Law 104-121, 110 Stat. 847. SBREFA requires agencies to take certain actions when a "major rule" is promulgated. SBREFA defines a "major rule" as one that will have an annual effect on the economy of \$100 million or more; that

will result in a major increase in costs or prices for, among others, State or local government agencies; or that will significantly and adversely affect the business climate.

This final rule will not result in a major increase in costs or prices for States or local government agencies. In this instance the States, acting as agents of the Federal Government, are administering TAA benefits and services to adversely-affected workers while the Federal Government provides appropriated funds to States to operate the program. Nor will this rule significantly and adversely affect the business climate. The opposite is true: the TAA program provides funds to train adversely-affected workers for employment in positions that are in economic demand, thereby assisting in meeting businesses' needs. Finally, the final rule will not have an annual effect on the economy of \$100 million or more.

For the foregoing reasons, the Department determines that the final rule is not a "major rule" for SBREFA purposes.

#### *Executive Order 12866*

Executive Order 12866 requires that for each "significant regulatory action" by the Department, the Department conduct an assessment of the regulatory action and provide OMB with the regulation and the requisite assessment prior to 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, as well as an action that raises a novel legal or policy issue. As discussed in the SBREFA analysis, this final rule will not have an annual effect on the economy of \$100 million or more. However, the rule does raise novel policy issues about the allocation of TAA training funds. Therefore, the Department submitted this final rule to OMB for review under Executive Order 12866.

#### *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 a 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 final rule does not require the collection of any new information. The data collection relevant to this rule, related to the Reserve Funding Request Form (ETA-

9117), is currently approved by OMB under control number 1205-0275 (expires February 28, 2013).

Because this final rule does not require the collection of any new information nor revises an existing collection of information, the PRA is not implicated.

#### *Unfunded Mandates Reform Act*

For purposes of the Unfunded Mandates Reform Act of 1995, this final rule does not include any Federal mandate that may result in increased expenditure by State, local, and Tribal governments in the aggregate of more than \$100 million, or increased expenditures by the private sector of more than \$100 million. State governments administer TAA as agents of the United States and are provided appropriated Federal funds for all TAA expenses.

#### *Executive Order 13132*

Executive Order 13132 at section 6 requires Federal agencies to consult with State entities when a regulation or policy may have a substantial direct effect on the States or the relationship between the National Government and the States, or the distribution of power and responsibilities among the various levels of government, within the meaning of the Executive Order. Section 3(b) of the Executive Order further provides that Federal agencies must implement regulations that have a substantial direct effect only if statutory authority permits the regulation and it is of national significance. Further, section 239(f) of the Trade Act requires consultation with the States in the coordination of the administration of the provisions for employment services, training, and supplemental assistance under sections 235 and 236 of the Trade Act and under title I of the WIA.

As the Department explained in the NPRM, 74 FR 39206, because a merit staffing requirement may fall within the requirements of Section 3(b), and because of the consultation requirement in section 239(f) of the Trade Act, the Department has consulted on a variety of issues arising from the TGAAA amendments. These consultations have been with the States both directly and through communication with the National Association of State Workforce Agencies, the National Association of Workforce Boards, and the National Governors Association, during the formation of the Governor-Secretary Agreements between the States and the Department. Additionally, the Department has consulted with the public at large through this rulemaking's notice and comment process.

In the NPRM, the Department recognized that there may be some costs to the States that have to convert some TAA-related staff to their merit staffing system. The Department received a small number of comments on this matter. These commenters thought that the Department should have gathered data on and better assessed the costs to States before proposing the merit staffing requirement.

The Department provides States with appropriated Federal funds for TAA employment and case management services, including staff, and for administration of the TAA program. These Federal funds are intended to cover the costs of the TAA program. And in fact, under the TGAAA, TAA funds (including funds for administration) have increased significantly. The Department expects that the amount of State dollars that will be required to fund this conversion to State merit staffing is insubstantial. None of the commenters provided any data to the contrary. As noted above, the TAA program operated successfully for years with merit staffing required in the Governor-Secretary Agreements, and with less funding, so there is no reason to believe that the costs will be substantial or will exceed the available amounts of administrative funds. Nevertheless, the Department is willing to work with those States that have to convert some of their TAA-related staff to their merit staffing system to ensure that these States are utilizing Federal funds to the fullest extent possible within allowable cost categories. In the end, though, States are responsible for staffing the TAA program in their State at a level commensurate with their Federal funding allocation.

#### *Executive Order 13045*

Executive Order 13045 concerns the protection of children from environmental health risks and safety risks. This final 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." Required actions include consulting with Tribal governments before promulgating a regulation with Tribal implications and preparing a Tribal impact statement. 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.

This final rule addresses how the Department will allocate to the States training funds under the Trade Act, and requires that personnel engaged in TAA-funded functions undertaken to carry out the worker adjustment assistance provisions must be State employees covered by the merit system of personnel administration. Accordingly, the Department concludes that this final rule does not have Tribal implications.

#### *Environmental Impact Assessment*

The Department has reviewed this final 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 final rule will not have a significant impact on the quality of the human environment, and, thus, the Department has 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 final rule on family well-being. A rule that is determined to have a negative effect on families must be supported with an adequate rationale.

The Department has assessed this final rule and determines that it will not have a negative effect on families.

#### *Executive Order 12630*

This final 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 final 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 final rule has been written 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 final 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*

The Department drafted this rule in plain language.

#### **List of Subjects in 20 CFR Part 618**

Administrative practice and procedure, Grant programs—Labor, Reporting and recordkeeping requirements, Trade adjustment assistance.

■ For the reasons discussed in the preamble, and under authority of 19 U.S.C. 2320, the Department of Labor adds 20 CFR part 618 to read as follows:

#### **PART 618—TRADE ADJUSTMENT ASSISTANCE UNDER THE TRADE ACT OF 1974, AS AMENDED**

##### **Subpart A—G [Reserved]**

##### **Subpart H—Administration by Applicable State Agencies**

Sec.  
618.890 Merit staffing.

##### **Subpart I—Allocation of Training Funds to States**

618.900 Annual training cap.  
618.910 Distribution of initial allocation of training funds.  
618.920 Reserve fund distributions.  
618.930 Second distribution.  
618.940 Insufficient funds.

##### **Subpart A—G [Reserved]**

##### **Subpart H—Administration by Applicable State Agencies**

**Authority:** 19 U.S.C. 2320; Secretary's Order No. 03-2009, 74 FR 2279, Jan. 14, 2009.

##### **§ 618.890 Merit staffing**

(a) *Merit-based State personnel.* The State must, subject to the transition period in paragraph (b) of this section, engage only State government personnel to perform Trade Adjustment Assistance (TAA)-funded functions undertaken to carry out the worker adjustment assistance provisions of the Trade Act of 1974, as amended, and must apply to such personnel the standards for a merit system of personnel administration applicable to personnel covered under 5 CFR part 900, subpart F.

(b) *Transition period.* A State not already in compliance with the merit system requirement of paragraph (a) of

this section must comply by December 15, 2010.

(c) *Exemptions for States with employment service operation exemptions.* A State whose employment service received an exemption from merit staffing requirements from the Secretary of Labor (Secretary) under the Wagner-Peyser Act will retain an exemption from the requirements of paragraph (a) of this section. The exemption does not apply to the State's administration of trade readjustment allowances which remain subject to the requirements of paragraph (a) of this section. To the extent that a State with an authorized ES exemption provides TAA-funded services using staff not funded under the Wagner-Peyser Act, the exemption in this paragraph does not apply, and they remain subject to the requirements of paragraph (a) of this section.

(d) *Exceptions for non-inherently governmental functions.* The requirements of paragraph (a) of this section do not prohibit a State from outsourcing functions that are not inherently governmental, as defined in Office of Management and Budget (OMB) Circular No. A-76 (Revised), in any supplemental OMB guidance or superseding authority, and in DOL guidance.

##### **Subpart I—Allocation of Training Funds to States**

**Authority:** 19 U.S.C. 2320; 19 U.S.C. 2296(g); Secretary's Order No. 03-2009, 74 FR 2279, Jan. 14, 2009.

##### **§ 618.900 Annual training cap.**

The total amount of payments that may be made for the costs of training will not exceed the cap established under section 236(a)(2)(A) of the Trade Act.

(a) For each of the fiscal years 2009 and 2010, this cap is \$575,000,000; and

(b) For the period beginning October 1, 2010, and ending December 31, 2010, this cap is \$143,750,000.

##### **§ 618.910 Distribution of initial allocation of training funds.**

(a) *Initial allocation.* The initial allocation for a fiscal year will total 65 percent of the training funds available for that fiscal year. The Department of Labor (Department) will announce the amount of each State's initial allocation of funds in accordance with the requirements of this section at the beginning of each fiscal year. The Department will determine this initial allocation on the basis of the full amount of the training cap for that year, even if the full amount has not been

appropriated to the Department at that time.

(b) *Timing of the distribution of the initial allocation.* The Department will, as soon as practical after the beginning of each fiscal year, distribute the initial allocation announced under paragraph (a) of this section. However, the Department will not distribute the full amount of the initial allocation until it receives the entire fiscal year's appropriation of training funds. If the full year's appropriated amount of training funds is less than the training cap, then the Department will distribute 65 percent of the amount appropriated.

(c) *Hold harmless provision.* Except as provided in paragraph (d) of this section, in no case will the amount of the initial allocation to a State in a fiscal year be less than 25 percent of the initial allocation to that State in the preceding fiscal year.

(d) *Minimum initial allocation.* If a State has an adjusted initial allocation of less than \$100,000, as calculated in accordance with paragraph (e)(2) of this section, that State will not receive any initial allocation, and the funds that otherwise would have been allocated to that State instead will be allocated among the other States in accordance with this section. A State that does not receive an initial distribution may apply under § 618.920(b) for reserve funds to obtain the training funding that it requires.

(e) *Process of determining initial allocation.* (1) The Department will first apply the factors described in paragraph (f) of this section to determine an unadjusted initial allocation for each State.

(2) The Department will then apply the hold harmless provision of paragraph (c) of this section to the unadjusted initial allocation, as follows:

(i) A State whose unadjusted initial allocation is less than its hold harmless amount but is \$100,000 or more, will have its initial allocation adjusted up to its hold harmless amount. If a State's unadjusted allocation is less than \$100,000, the State will receive no initial allocation, in accordance with paragraph (d) of this section. Those funds will be shared among other States as provided in paragraph (e)(3) of this section.

(ii) A State whose unadjusted initial allocation is no less than its hold harmless threshold will receive its hold harmless amount and will also receive an adjustment equal to the State's share of the remaining initial allocation funds, as provided in paragraph (e)(3) of this section.

(3) The initial allocation funds remaining after the adjusted initial

allocations are made to those States receiving only their hold harmless amounts, as described in paragraph (e)(2)(i) of this section, will be distributed among the States with unadjusted initial allocations that were no less than their hold harmless amounts, as described in paragraph (e)(2)(ii) of this section (the remaining States). The distribution of the remaining initial allocation funds among the remaining States will be made by reapplying the calculation in paragraph (f) of this section. This recalculation will disregard States receiving only their hold harmless amount under paragraph (e)(2)(i) of this section, so that the combined percentages of the remaining States total 100 percent.

(f) *Initial allocation factors.* (1) In determining how to make the initial allocation of training funds, the Department will apply, as provided in paragraph (f)(3) of this section, the following factors with respect to each State:

(i) The trend in the number of workers covered by certifications of eligibility during the most recent four consecutive calendar quarters for which data are available. The trend will be established by assigning a greater weight to the most recent quarters, giving those quarters a larger share of the factor;

(ii) The trend in the number of workers participating in training during the most recent four consecutive calendar quarters for which data are available. The trend will be established by assigning a greater weight to the most recent quarters, giving those quarters a larger share of the factor;

(iii) The number of workers estimated to be participating in training during the fiscal year. The estimate will be calculated by dividing the weighted average number of training participants for the State determined in paragraph (f)(1)(ii) of this section by the sum of the weighted averages for all States and multiplying the resulting ratio by the projected national average of training participants for the fiscal year, using the estimates underlying the Department's most recent budget submission or update; and

(iv) The amount of funding estimated to be necessary to provide approved training to such workers during the fiscal year. The estimate will be calculated by multiplying the estimated number of participants in paragraph (f)(1)(iii) of this section by the average training cost for the State. The average training cost will be calculated by dividing total training expenditures for the most recent four quarters by the

average number of training participants for the same time period.

(2) The Department may use such other factors that it considers appropriate.

(3) The Department will assign each of the factors listed in paragraphs (f)(1)(i) through (f)(1)(iv) of this section an equal weight. For each of these weighted factors, the Department will determine the national total and each State's percentage of the national total. Based on a State's percentage of each of these weighted factors, the Department will determine the percentage that the State will receive of the amount available for initial allocations. The percentages of initial allocation amounts calculated for all States combined will total 100 percent of initial allocation funds.

(4) The Department may, by administrative guidance published for comment, change the weights provided in paragraphs (f)(1) and (f)(3) of this section, or add additional factors. No such changes or additions will take effect before December 31, 2010.

#### § 618.920 Reserve fund distributions.

(a) The remaining 35 percent of the training funds for a fiscal year will be held by the Department as a reserve. Reserve funds will be used, as needed, for additional distributions during the remainder of the fiscal year and for those States that do not receive an initial distribution. States may not receive reserve funds for TAA administration or employment and case management services without a request for training funds.

(b) A State requesting reserve funds must demonstrate that at least 50 percent of its training funds have been expended, or that it needs more funds to meet unusual and unexpected events. A State requesting reserve funds also must provide a documented estimate of expected funding needs through the end of the fiscal year. That estimate must be based on an analysis that includes at least the following:

(1) The average cost of training in the State;

(2) The expected number of participants in training through the end of the fiscal year; and

(3) The remaining funds the State has available for training.

#### § 618.930 Second distribution.

The Department will distribute at least 90 percent of the total training funds for a fiscal year to the States no later than July 15 of that fiscal year. The Department will first fund all acceptable requests for reserve funds filed before June 1. If there are any funds remaining

to be distributed after these reserve fund requests are satisfied, those funds will be distributed to those States that received an initial allocation in an amount greater than their hold harmless amount, using the methodology described in § 618.910.

**§ 618.940 Insufficient funds.**

If, during a fiscal year, the Department estimates that the amount of funds necessary to pay the costs of approved training will exceed the training cap under § 618.900, the Department will decide how the amount of available training funds that have not been distributed at the time of the estimate will be allocated among the States for

the remainder of the fiscal year. That decision will be communicated through administrative notice.

Signed at Washington, DC, this 22nd day of March 2010.

**Jane Oates,**

*Assistant Secretary, Employment and Training Administration.*

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