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; Proposed Rule

AGENCY: Employment and Training Administration, Labor.

ACTION: Proposed Rule; request for comment.

SUMMARY: On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009, commonly called the Recovery Act, which reauthorized and significantly amended the Trade Adjustment Assistance for Workers (TAA) program under the Trade Act of 1974, as amended (Trade Act). In accordance with those amendments, the Employment and Training Administration (ETA) of the Department of Labor (Department) is issuing this notice to propose regulations addressing how the Department distributes TAA training funds to the States that administer the program as agents of the United States. The notice also proposes 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 applicable to personnel engaged in employment security administration.

DATES: Interested persons are invited to submit comments on this proposed rule. To ensure consideration, comments must be received on or before October 5, 2009. The Department will not consider any comments received after the above date.

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 1205–AB56, by any one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the Web site instructions for submitting comments.
- *Mail and hand delivery/courier:* Written comments, disk, and CD–ROM submissions may be mailed to Thomas M. Dowd, Administrator, Office of Policy Development and Research, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5641, Washington, DC 20210.

Instructions: Label all submissions with RIN 1205–AB56.

Please submit your comment by only one method. Please be advised that the Department will post all comments received on *http://www.regulations.gov* without making any change to the comments, or redacting any information. The *http://www.regulations.gov* Web site is the Federal e-rulemaking portal and all comments posted there are available and accessible to the public. Therefore, the Department recommends that commenters safeguard any personal information such as Social Security Numbers, personal addresses, telephone numbers, and e-mail addresses included in their comments as such information may become easily available to the public via the *http://www.regulations.gov* Web site. It is the responsibility of the commenter to safeguard any such personal information.

Also, please note that due to security concerns, postal mail delivery in Washington, DC may be delayed. Therefore, the Department encourages the public to submit comments on *http://www.regulations.gov.*

Docket: All comments on this proposed rule will be available on the *http://www.regulations.gov* Web site and can be found using RIN 1205–AB56. The Department also will make all the comments it receives available for public inspection by appointment during normal business hours at the above address. If you need assistance to review the comments, the Department will provide you with appropriate aids such as readers or print magnifiers. The Department will make copies of the rule available, upon request, in large print and electronic file on computer disk. The Department will consider providing the rule in other formats upon request. To schedule an appointment to review the comments and/or obtain the rule in an alternative format, contact the Office of Policy Development and Research at (202) 693–3700 (this is not a toll-free number). You may also contact this office at the address listed above.

FOR FURTHER INFORMATION CONTACT: Thomas M. Dowd, Administrator, Office of Policy Development and Research, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5641, Washington, DC 20210; telephone (202) 693–3700 (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 preamble to this proposed rule is organized as follows:

I. Background

The TAA program, under chapter 2 of title II of the Trade Act, provides adjustment assistance (including 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) for workers whose jobs have been adversely affected by international trade. 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. (The States administer the TAA program as agents of the United States. They do so through a State agency designated as the Cooperating State Agency (CSA) in an agreement between the Secretary of Labor (Secretary) and the Governor (the Governor-Secretary agreement), 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. 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 CSA for TAA benefits and services.

The Trade and Globalization Adjustment Assistance Act of 2009 (TGAAA), a part of the Recovery Act (Pub. L. 111–5, Div. B, Title I, Subtitle I), reauthorized and substantially amended the TAA program by amending the certification criteria to expand the types of workers who may be certified and by expanding the available program benefits. Section 1893 of the TGAAA provides that, for the most part, the TGAAA amendments will expire on December 31, 2010. The TGAAA amendments generally apply to 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 proposes creating a new 20 CFR part 618, which will implement the entirety of the TAA program, including the changes made by the TGAAA amendments.

This will be done through two rulemakings. This first rulemaking addresses the allocation of TAA training funds to the States and merit staffing of State administration of the program. (The TGAAA uses the term ''apportion'' when discussing the dividing of training funds among the States, but this proposed rule uses the term ''allocation'' to avoid confusion, since customarily the Office of Management and Budget ''apportions'' appropriated funds to the Department, which ''allocates'' them to the States.) The Department plans a second rulemaking that will implement the remainder of the TAA program.

The Department published two Notices of Proposed Rulemaking (NPRMs) in 2006 that were part of a rulemaking process to implement the amendments made by the Trade Adjustment Assistance Reform Act of 2002 (Pub. L. 107–210). The Department first published a NPRM covering TAA program benefits and administration (71 FR 50760, Aug. 25, 2006), and soon thereafter published a NPRM covering the Alternative Trade Adjustment Assistance for Older Workers (ATAA) program (71 FR 61618, Oct. 18, 2006). Then, Congress, in the Continuing Appropriations Resolution, 2007 (Pub. L. 110–5), the Consolidated Appropriations Act, 2008 (Pub. L. 110–161), and the Omnibus Appropriations Act, 2009 (Pub. L. 111–8), explicitly prohibited the Department from finalizing or implementing these proposed regulations until the Trade Act was reauthorized. However, the substantial amendments made by the TGAAA rendered the two 2006 NPRMs obsolete, and therefore the Department withdrew them on June 9, 2009 (74 FR 27262).

II. Rationale for the Proposed Rule

Merit Staffing

This rulemaking proposes that a State must, after a transition period, 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, 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, and have long 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). Under this proposed rule, TAA-funded personnel would be subject to the same State merit system requirements applicable to personnel administering the UI and ES programs in a State. The purpose of this proposed requirement is to promote consistency, efficiency, accountability, and transparency in the administration of the TAA program.

The merit system standards contained in 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.

From 1975, when the Department began administering the TAA program, until 2005, the Governor-Secretary agreements required that TAA-funded administrative functions be carried out exclusively by staff subject to these merit system standards. In 2005, the Governor-Secretary agreements were modified to exempt from the merit system standards personnel engaged in the administration of the TAA program, other than those personnel who also were engaged in administering the UI and ES programs. This proposed rule would restore what had been the long-standing practice of using merit staffed personnel to administer the TAA program.

Requiring the use of State merit staff is particularly appropriate given the nature of the TAA program. The TAA program is a complex entitlement program that requires that the States, acting as agents of the United States, make substantive determinations about the services and benefits that are to be provided to workers. Section 239 of the Trade Act specifically provides that the States are agents of the United States in administering TAA, which is distinct from the relationship under other Federally-funded workforce investment programs, such as Title I of the Workforce Investment Act of 1998 (WIA). Under these other programs, there is a grantor-grantee relationship under which the Department allocates funds to the States to perform public purposes, but the States have considerable discretion in how they carry out those purposes. In contrast, the Trade Act establishes a principal-agent relationship, under which the Department directs State program administration.

This principal-agent relationship is established because, unlike participants in WIA-funded workforce investment programs, workers under the TAA program are legally entitled to receive Federally-funded services and benefits if they meet exclusively Federal eligibility criteria. The wide range of benefits and services to which a worker may be entitled under the TAA program, each of which requires a separate determination based on distinct criteria, and are subject to continuing eligibility, includes the payment of income support (trade readjustment allowances (TRA)); the payment of wage supplements under ATAA and reemployment trade adjustment assistance (RTAA); the payment of job search and relocation allowances; and the approval of and enrollment in training and the issuance of waivers of the training requirement as a condition of TRA. The TGAAA added a requirement to provide employment and case management services to eligible TAA-certified workers, underscoring Congress' recognition that the proper provision of these services is essential to ensure that workers receive the full range of benefits and services to which they are entitled. The TGAAA also added the RTAA benefit, enhanced other benefits and services, and expanded group eligibility for the TAA program. These features add complexity and additional challenges to the administration of the TAA program.

The other major State entitlement program overseen by the Department is the UI program, which is administered by State merit staff, as required as a

condition of receipt of UI administrative grants under 42 U.S.C. 503(a)(1). The TAA and UI programs are integrally related. TRA, the Federally funded income support provided under the TAA program, 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. Indeed, the TRA weekly benefit amount is based on the State UI weekly benefit amount, and review of all determinations with respect to TAA entitlements (such as training, TRA and job search and relocation) must be conducted in the same manner and to the same extent as UI determinations under State law. The determination of an individual's entitlement to a publicly-funded benefit, such as TRA (a type of unemployment insurance), is an ''inherently governmental'' function, as defined in Office of Management and Budget (OMB) Circular No. A–76 (Revised) (68 FR 32134, May 29, 2003).

It is imperative that where individual entitlement to services and benefits exists, there be consistency in the application of eligibility criteria and the treatment of workers nationally, and where the TAA program permits variation based upon State law, that there be consistency statewide. The Department believes that statewide 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 (the Governor-Secretary agreements provide that a State must designate a lead agency, though other agencies may assist in the provision of TAA benefits and services) and receive the same guidance and are accountable to the same State agency or agencies. Non-merit staff personnel employed outside of the State agency, often by several different employers that are either local agencies or non-profits, are subject to varying procedures and work rules, as well as different and potentially conflicting obligations to their actual employers, which 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, rather than with personnel from a number of different entities and contractors with differing internal rules and practices, promotes efficiency and makes it easier to hold the State agencies accountable to address or remedy administrative issues that may arise. For example, a State agency is in a better position than a locally-based administrative structure to detail staff to areas in the State where their services are most needed in response to the layoff events that may trigger TAA eligibility and require services to large numbers of TAA workers. Focusing responsibility on State agencies also makes it easier for the public to know who administers the program and thereby further promotes accountability and transparency.

State personnel serving under a merit system are non-partisan public servants who are directly accountable to government entities. 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. The Department believes that these features of a State merit system are appropriate to apply to the statewide administration of the TAA program.

Under the amendments made by TGAAA, for the first time the TAA program will be able to devote its own funds to the provision of employment and case management services. The Department intends to ensure that these and other TAA-funded services are provided in a high quality and in-depth manner. TAA-certified workers currently receive many services, including supportive services and other wrap-around services that are funded and provided under other programs for which TAA-certified workers also qualify. The Department will continue to encourage the provision of services to TAA-certified workers by such other programs in order to supplement TAA-funded services. In fact, the Governor-Secretary agreements require coordination with activities carried out under WIA to help ensure that a comprehensive array of services is available to TAA-certified workers.

The proposed merit staffing requirement would apply only to TAA-funded functions undertaken to carry out the worker adjustment assistance provisions of the Trade Act. Thus, while the merit staffing requirement would apply to the approval of training, it would not extend to training providers. The requirement also would not prohibit a State from outsourcing ''non-inherently governmental'' functions ancillary to program administration, such as the provision of information technology support or janitorial services for State TAA staff. Unemployment Insurance Program Letter No. 12–01, *Outsourcing of Unemployment Compensation Administrative Functions* (Dec. 28, 2000), 66 FR 1696 (Jan. 9, 2001), and its Change 1 (Nov. 26, 2007) applies this principle to the outsourcing of State UI activities, and the proposed rule would apply this principle to the outsourcing of State TAA activities.

The authority the Department relies upon in proposing the merit staffing requirement is found in section 239 of the Trade Act and is the same authority under which the Department establishes the requirements of and executes the Governor-Secretary agreements. Section 239 establishes the Department's role as principal in the principal-agent relationship with the States, sets a number of conditions that must be included in the Governor-Secretary agreements and grants the Secretary broad authority to assure the proper and efficient functioning of the TAA program. Section 239(a)(1) provides that the States are agents of the United States in operating the program. The Department has the responsibility to ensure that, as its agents, the States administer the program in the most effective, efficient, consistent and transparent manner possible. For the reasons stated in this section, the Department has concluded that these goals can best be accomplished through the use of State merit staff.

Other provisions in section 239 also provide authority for the Department's proposed rule. Section 239(a)(4) requires the States to ''cooperate with the Secretary and with other State and Federal agencies in providing payments and services'' under the program, which affords the Secretary authority to ensure that payments and services are administered in a consistent and efficient manner through State merit staff. Section 239(e) requires coordination of employment services between the TAA and WIA programs ''on such terms and conditions as are established by the Secretary,'' which affords the Secretary the authority to establish merit staffing as a requirement for TAA-funded employment and case management services and in the approval of training. Section 239(e) also instructs the Department to consult with the States on how to administer the provisions of sections 235 and 236 of the Trade Act and title I of the WIA. The Department has consulted with and continues to consult with the States on merit staffing of State TAA

administration. Finally, new section 239(i), added by the TGAAA, directs the Secretary to require each cooperating State and cooperating State agency ''to implement effective control measures and to effectively oversee the operation and administration'' of the TAA program, which the Department again has determined can be best carried out by requiring the use of State merit staff.

To facilitate the implementation of the State merit staffing requirement in an orderly manner, and to assure that the staffing changes proposed in this rule do not disrupt the provision of services to eligible workers, the proposed rule allows for a transition period. The proposed rule requires the use of merit staff to carry out functions other than employment and case management services by July 1, 2010. As explained below in the ''Allocation'' section of this preamble, the Department intends to issue a final rule on or before February 17, 2010. Thus, the States would have at least four and one-half months to meet this requirement after the promulgation of the final rule. Recognizing that employment and case management services are a newly funded TAA function and that such services may have been provided through arrangements with other programs in the past, the proposed rule provides a longer transition period for merit staffing such services and requires the use of merit staff to carry out those services beginning October 1, 2010.

The proposed rule permits the three States (Michigan, Colorado and Massachusetts) that are currently exempted from ES merit staffing requirements to continue to use non-State and non-merit staff authorized under those exemptions to administer functions under the TAA program, except that TRA must continue to be administered by State merit staff, as currently required under the Governor-Secretary Agreement. The Department proposes this exception because ES staff may administer TAA, which in turn can make it difficult for a State that does not use State merit staff for the ES program to also use State merit staff for the TAA program. This exception will prevent the complications that might arise in those States that are exempted from ES merit staffing requirements if they attempt to require both State merit staff and non-State or non-merit staff to perform similar functions within the same ES agency.

In sum, given the nature of the TAA program as a complex entitlement program administered by the States as agents of the Department, the objectives of ensuring consistency, efficiency, accountability and transparency in the administration of the program can best be achieved by restoring the requirement that the program be administered by State merit staff. In so doing, the proposed rule advances the ultimate goal of the TAA program to provide effective benefits and services that will help trade-impacted workers obtain reemployment.

Allocation of Training Funds to States

This proposed rule also provides for the Department's allocation of training funds to the States. Section 1828(a) of the TGAAA amended section 236(a)(2) of the Trade Act to increase the annual statutory ''cap'' on TAA training funds and to set forth the terms under which the Department distributes these funds to the States. Section 1828(c) of the TGAAA added a new section 236(g)(1) to the Trade Act directing the Department to issue ''such regulations as may be necessary to carry out the provisions of subsection (a)(2)'' on or before February 17, 2010. This NPRM proposes the regulations referred to in section 236(g)(1).

Before the TGAAA, the TAA program was most recently reauthorized in the Trade Adjustment Assistance Reform Act of 2002 (Pub. L. 107–210), which expanded program coverage and increased the training cap from $80 million to $220 million to provide training for the newly covered workers. The TGAAA amendments further increased the cap to $575 million for each of fiscal years (FY) 2009 and 2010, and provided a cap of $143,750,000 for the period from October 1 to December 31, 2010. The Conference Report on the Recovery Act, H.R. Rep. No. 111–16, entitled *Making Supplemental Appropriations for Job Preservation and Creation, Infrastructure Investment, Energy Efficiency and Science, Assistance to the Unemployed, and State and Local Fiscal Stabilization, for the Fiscal Year Ending September 30, 2009, and for Other Purposes* (Conference Report), made clear that Congress increased the cap on training funds not only because of the expanded program coverage but also because training funds have at times been insufficient. H.R. Rep. No. 111–16, p. 672.

The process by which training funds are allocated has also evolved over recent years. Before FY 2004, the Department allocated TAA training funds to the States entirely through a request process. States were not provided with any initial annual allocation of funds; instead, all distributions of TAA training funds were made in response to State requests. States would submit requests on an as-needed basis, but, because the requests typically far outstripped available training funds, the training funds regularly ran out early in the fiscal year. Once the TAA training funds were exhausted, States would request National Emergency Grant (NEG) funds under section 173 of the WIA to enable them to continue to enroll trade-affected workers in approved training. The uncertainty of the funding process made it difficult for the States to anticipate how much funding they would receive, and therefore made it difficult for the States to plan and manage resources. Thus, this process proved to be inefficient, protracted, and cumbersome.

To address these problems, beginning with FY 2004, the Department issued annual guidance establishing a formula for allocating TAA training funds to the States. The Department first issued a specific funding formula for TAA training funds in Training and Employment Guidance Letter (TEGL) No. 6–03 (Oct. 1, 2003), and after a change in the weighting of the factors used in the formula for FY 2005, the formula remained the same through the beginning of FY 2009. The Department's formula-based methodology for State TAA funding initially allocated 75 percent of the Department's appropriation of a fiscal year's training funds and held the remaining 25 percent in reserve. The reserve funds could be accessed by States that had expended at least 50 percent of their allocation, or otherwise demonstrated need. Each year, a TEGL described the formula for allocating the 75 percent initial distribution ($165 million) among the States. After FY 2005, the formula did not change from year to year, and the Department issued a TEGL each year as a reminder to the States and to indicate that the formula for that fiscal year would use data from the more current time periods. The TEGL on this topic for FY 2009 was TEGL No. 4–08 (Oct. 28, 2008).

Under the old formula, the Department allocated one-half of the funds based on accrued training expenditures, as reflected in the previous 2½ years' reported data, and allocated the other one-half based on the average number of training participants for the same reporting period. The Department calculated a State's percentage of total training expenditures by taking the State's average total expenditures over the previous 2½ years and dividing that number by the average national training expenditures during the same time period. Each State was assigned a weight representing each State's share of the national TAA activity. The weight was used to

determine a State's unadjusted base allocation for a fiscal year. This weight was calculated by using each of two factors as half of the total for the final weight each State receives. A State's unadjusted base allocation for a fiscal year was calculated by multiplying the State's weight against the training funds being allocated. Therefore, if a State represented 10 percent of the national participation and expenditures, the State weight would be 10 percent and the State would receive 10 percent of the $165 million as an unadjusted base allocation. If a State had an allocation of less than $100,000, the funds allocated for it were redistributed to the other States, and that State had to apply for reserve funding as needed.

The formula included a hold harmless feature, under which the initial allocation to a State was held to at least 85 percent of the amount the State received in its initial allocation for the prior fiscal year. TEGL No 6–03 introduced the hold harmless feature with the creation of the formula in order to minimize fluctuations in State funding from year to year which, as explained above, made it hard for States to plan and manage resources. Although the hold harmless feature was an attempt to ensure funding stability while States were becoming accustomed to the new methodology, it has proven to be problematic. In some instances, States have had atypically large layoffs one year, leading to high TAA training activity and expenditures that year and high initial allocations in the following fiscal year. Then, if a State's TAA activity decreased considerably the following fiscal year, the 85 percent hold harmless provision prevented the formula from properly adjusting the amount of funding needed by the State. Because these States were allocated more than they needed, other States could receive inadequate initial training allocations that they exhausted relatively early each fiscal year. The Trade Act, as amended by the TGAAA, still includes a hold harmless provision, but at a much lower level of 25 percent of the prior year's allocation, thus addressing the problem just described. Once the funds to make up the hold harmless amount are distributed, and the amounts from those States whose allocations were less than $100,000 are added back to the remaining pool of funds, the remaining funds are allocated among those States whose unadjusted allocation was at or above the hold harmless amount using the same formula.

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 State, with the State's agreement, and to redistribute those funds to other States only within a current fiscal year. This means that 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 received from a State. Training funds are available for State expenditure in the fiscal year in which they are obligated and in the two following fiscal years, per section 245(b) of the Trade Act. Training funds that are not expended by the end of the third fiscal year must be returned to the U.S. Treasury, as required by section 241(b) of the Trade Act.

The TGAAA prescribes a process for allocating training funds. Although the process described in the statute is similar in many respects to the process just described, it will require some significant changes to the Department's methodology.

The Omnibus Appropriations Act, 2009 (Pub. L. 111–8) provided increased TAA funding which will be used for a FY 2009 supplemental distribution to the States and other purposes. The Department issued a Change 1 to TEGL No. 04–08 to explain the formula methodology used to develop this supplemental distribution and describe the process for States to request additional TAA program reserve funds for training.

Section 236(a)(2)(B)–(E) of the Trade Act, as amended by the TGAAA, now establishes a methodology for distributing TAA training funds:

(B)(i) The Secretary shall, as soon as practicable after the beginning of each fiscal year, make an initial distribution of the funds made available to carry out this section, in accordance with the requirements of subparagraph (C).

(ii) The Secretary shall ensure that not less than 90 percent of the funds made available to carry out this section for a fiscal year are distributed to the States by not later than July 15 of that fiscal year.

(C)(i) In making the initial distribution of funds pursuant to subparagraph (B)(i) for a fiscal year, the Secretary shall hold in reserve 35 percent of the funds made available to carry out this section for that fiscal year for additional distributions during the remainder of the fiscal year.

(ii) Subject to clause (iii), in determining how to apportion the initial distribution of funds pursuant to subparagraph (B)(i) in a fiscal year, the Secretary shall take into account, with respect to each State—

(I) The trend in the number of workers covered by certifications of eligibility under this chapter during the most recent 4 consecutive calendar quarters for which data are available;

(II) The trend in the number of workers participating in training under this section during the most recent 4 consecutive calendar quarters for which data are available;

(III) The number of workers estimated to be participating in training under this section during the fiscal year;

(IV) The amount of funding estimated to be necessary to provide training approved under this section to such workers during the fiscal year; and

(V) Such other factors as the Secretary considers appropriate relating to the provision of training under this section.

(iii) In no case may the amount of the initial distribution to a State pursuant to subparagraph (B)(i) in a fiscal year be less than 25 percent of the initial distribution to the State in the preceding fiscal year.

(D) The Secretary shall establish procedures for the distribution of the funds that remain available for the fiscal year after the initial distribution required under subparagraph (B)(i). Such procedures may include the distribution of funds pursuant to requests submitted by States in need of such funds.

(E) If, during a fiscal year, the Secretary estimates that the amount of funds necessary to pay the costs of training approved under this section will exceed the dollar amount limitation specified in subparagraph (A), the Secretary shall decide how the amount of funds made available to carry out this section that have not been distributed at the time of the estimate will be apportioned among the States for the remainder of the fiscal year.

Thus, the amended Trade Act requires the Secretary to make an initial distribution of training funds equal to 65 percent of the training cap, holding 35 percent in reserve to be distributed to States on an as-needed basis. Section 236(a)(2)(C)(ii) establishes four factors that the Secretary must take into account in allocating this initial distribution. These factors are: (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 TAA-approved training during the fiscal year; and (4) the amount of funding estimated to be necessary to provide approved training during the fiscal year. Section 236(a)(2)(C)(ii) also permits the Secretary to use ''such other factors as the Secretary considers appropriate relating to the provision of approved training.'' The Department has decided not to propose any new factors at this time but will revisit this issue in the future as it gains experience operating

the new formula. The proposed rule authorizes the Department to add factors at its discretion through administrative guidance published for comment.

The Department proposes to assign each of these factors an equal weight, but the proposed rule authorizes the Department to change the weights through administrative guidance published for comment. As under the old formula, the Department will determine the national total and each State's percentage of the national total for each factor. Using each State's percentage of each of these weighted factors, the Department will determine the unadjusted percentage that the State will receive of the amount available for base allocations. The percentages for all the States will total 100 percent of $373,750,000, which is 65 percent of the training cap.

The Department does not yet have experience using several of the statutory factors in the funding formula. Similarly, the Department cannot accurately predict how the TGAAA's expansion of program coverage to include workers in service industries and workers in firms producing component parts will have on the data that States provide, nor for the impact on their funding needs. Because the Department has little experience working with these four factors in the new funding formula, the Department has determined that, for the time being, it is best to weight each factor equally. The Department proposes to administer the program with equally weighted factors until the TGAAA amendments sunset on December 31, 2010 under section 1893 of the TGAAA. The Department believes that by the sunset of the TGAAA amendments, it will have had enough experience using the new funding formula to determine whether it is appropriate to change the weights of the existing four factors or to add factors. Any change to the weights of the four statutory factors or additions of factors will be made through administrative guidance published for comment.

The Trade Act, as amended by the TGAAA, includes a hold harmless feature, but at a much lower level than the Department has been using. While the initial allocation to a State has been at least 85 percent of the amount the State received in its initial distribution in 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 for the prior fiscal year. Considering the challenges with the 85 percent hold harmless feature noted earlier, the Department proposes to limit the hold harmless feature to the minimum statutory level of 25 percent.

It has been the Department's practice that, if a State's initial allocation is less than $100,000, that State's allocation is reapportioned to the other States. If a State has an initial allocation of less than $100,000, it may request reserve funds in order to obtain the limited TAA funding that the State requires. The proposed rule continues this practice, because it imposes no hardship. The Department is able to quickly process the relatively small requests for reserve funds made by these States.

The proposed rule provides that, after the unadjusted allocations are calculated, the allocations to States whose unadjusted allocations were less than their hold harmless amounts are adjusted to their hold harmless amount. The funds used for that adjustment are subtracted from the total funds available for distribution. Next, the funds that become available from those States whose unadjusted allocation is less than $100,000 are added back into the total funds available. The amount remaining after those subtractions and additions is distributed among the remaining States, the States whose unadjusted allocations were as much or more than their hold harmless amounts using the same formula to recalculate the allocations.

One alternative to the $100,000 threshold would be to provide each State a minimum initial allocation. For example, the Department could allocate to each State its hold harmless amount without applying a $100,000 threshold, and then subtract the sum total of those hold harmless amounts from the remaining initial allocation funds before running the calculations outlined above for those remaining funds. This would reduce the amount that is allocated proportionately according to State need while ensuring a few States would receive initial allocations that otherwise would not. Another alternative would be to set a certain minimum initial allocation, which would be the same dollar amount for all States, then increase to their hold harmless amounts the States whose hold harmless amounts are higher than the fixed minimum amount. The remaining initial allocation monies then would be allocated by formula. The Department welcomes public comments on its proposal and the suggested alternatives and any other alternatives commenters wish to suggest.

The amended Trade Act establishes the reserve level of funds at 35 percent of the total appropriated to the program, a higher level than the Department's previous 25 percent reserve. These funds will be held in reserve, as they have in the past, to be distributed to States on an as-needed basis and are designed to provide funding to those States that experience high activity levels that cannot be addressed with the funds received in the initial allocation.

The amended Trade Act requires the Department to make the initial distribution to States ''as soon as practicable after the beginning of each fiscal year,'' and requires that 90 percent of a fiscal year's training funds be distributed to the States by July 15 of that fiscal year. In order for the Department to meet the July 15 deadline, we propose to address any reserve requests received before June 1, and after all reserve requests are satisfied, to distribute the remaining training funds using the same process used for initial allocations. Any requests for reserve funds received after June 1 will be funded from the remaining (10 percent) reserve funds.

In accordance with section 235A of the Trade Act, the Department will also provide an additional 15 percent of the amount allocated for training 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.

III. Section-by-Section Review of the Proposed Rule

Subpart H—Administration by Applicable State Agencies

Merit Staffing (§ 618.890)

Paragraph (a) of proposed § 618.890 requires that a State apply to personnel engaged in TAA-funded functions undertaken to carry out the worker adjustment assistance provisions of the Trade Act the merit system of personnel administration applicable to personnel covered under 5 CFR part 900, subpart F, which applies to, among other agencies, State UI and ES agencies.

The Department recognizes that this requirement must be implemented in such a way as to minimize any disruption in services to trade-impacted workers. Accordingly, rather than an immediate conversion to merit staffing, proposed paragraphs (b)(1) and (b)(2) provide a transition period for States to transition to the merit system.

Proposed paragraph (b)(1) requires that activities related to employment and case management services be administered by merit-staffed State personnel no later than October 1, 2010. Proposed paragraph (b)(2) requires that the other TAA activities be administered by merit-staffed State personnel by July 1, 2010.

Paragraph (c) of proposed § 618.890 provides an exemption from the merit staffing requirement for the three States the Secretary has exempted from the ES merit staffing requirement: Colorado, Massachusetts, and Michigan. The exemption is, however, limited. The exemption would not apply to the State's administration of TRA, which would remain subject to the merit staffing requirement. Further, to the extent that these States provide TAA-funded services using staff of a State agency other than the ES, the ES exemption would not apply, and staff of these agencies would have to be merit staffed.

Proposed paragraph (d) provides that the requirements of paragraph (a) do not prohibit a State from outsourcing functions that are not inherently governmental, as defined in OMB Circular No. A–76 (Revised).

Subpart I—Allocation of Training Funds to States

Annual Training Cap (§ 618.900)

Proposed § 618.900 implements section 236(a)(2)(A) of the Trade Act which caps the amount of TAA training funds available in each fiscal year.

Proposed paragraph (a) states that training funds for fiscal years 2009 and 2010 are limited to $575 million annually. Proposed paragraph (b) states training funds for the period between October 1 and December 31, 2010 will not exceed $143.75 million.

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

Proposed § 618.910 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.

Proposed paragraph (a) provides that the initial allocation of training funds to the States will be 65 percent of the available training funds for a given fiscal year, as required by section 236(a)(2)(C)(i) of the Trade Act.

Proposed paragraph (b) provides that the Department will make an initial allocation of training funds to the States as soon as is practicable after the beginning of each fiscal year. The Department often does not have full budget authority at the beginning of each fiscal year and often operates under a continuing resolution for some period during the fiscal year. As a result, proposed paragraph (b) also provides that the full initial allocation for a State may not be available at the beginning of a particular fiscal year. The Department will announce the States' full initial allocation at the beginning of each fiscal year based on the applicable training cap, but the Department will not be able to distribute the full amount of the initial allocation until it receives a full year's appropriation. Finally, proposed paragraph (b) provides that should the full year's appropriated amount of training funds be less than the training cap, then the initial allocation will be based on the amount appropriated.

Proposed paragraph (c) implements the hold harmless provision, required by section 236(a)(2)(C)(iii) of the Trade Act. Congress set the TGAAA's hold harmless provision to require that a State receive no less than 25 percent of its previous fiscal year's initial allocation. This is lower than the Department's practice of using a hold harmless percentage of at least 85 percent. Congress wanted the allocation of these funds to be more responsive to economic conditions, which can change rapidly, even within a single fiscal year (H.R. Rep. No. 111–16, pp. 672–73). Although intended to help States better plan their training needs, the Department's higher hold harmless percentage led to inequitable distributions of training funds. The lower hold harmless percentage will allow the Department to more nimbly respond to the changing economic needs among the States. Proposed paragraph (c) proposes a hold harmless percentage of the statutory minimum, that is, 25 percent, except as provided in proposed paragraph (d) of proposed § 618.910, for States with very limited or no TAA needs.

Proposed paragraph (d) provides that a State whose unadjusted initial allocation is less than $100,000 will not receive an initial allocation, and its initial allocation amount will be allocated instead to other States. A State that does not receive an initial distribution may apply for reserve funds to obtain the training funding that it requires. Reserve funds will be distributed in accordance with proposed § 618.920(b). Proposed paragraph (d) reflects the Department's practice, and is based on a determination that TAA training fund use of less than $100,000 in any fiscal year represents only sporadic TAA activity within a State; it is best to serve States that need relatively small amounts of training funds with a reserve funding request.

Proposed paragraph (e) explains the process through which the initial allocation of training funds is made. In order for the Department to distribute the initial allocation properly it must factor in the hold harmless provision (proposed § 618.910(c)), the $100,000 threshold (proposed § 618.910(d)), and the initial allocation factors (proposed § 618.910(f)).

Proposed paragraph (e)(1) provides that the Department begins the process of determining each State's initial allocation by applying the four factors in proposed § 618.910(f), as required by section 236(a)(2)(C)(ii) of the Trade Act. Applying these factors results an unadjusted initial allocation for each State.

Proposed paragraph (e)(2) provides that the Department then applies to the unadjusted initial allocation the hold harmless provision of proposed § 618.910(c). Proposed paragraph (e)(2)(i) provides that a State whose unadjusted allocation is less than its hold harmless amount, but is $100,000 or more, will have its allocation adjusted upward to meet the hold harmless amount (25 percent of its last year's allocation). If a State's unadjusted allocation is less than $100,000, the State will receive no initial allocation. Those funds will be shared among other States. (States that receive no initial allocation may apply for reserve funds.)

Proposed paragraph (e)(2)(ii) provides that a State whose unadjusted allocation is no less than its hold harmless amount will receive its hold harmless amount and a recalculated share of remaining initial allocation funds.

Proposed paragraph (e)(3) provides that the initial allocation funds remaining after the adjusted initial allocations are made to those States receiving only their hold harmless amounts, will be distributed among the States with unadjusted initial allocation that were no less than their hold harmless amounts. The Department reallocates the remaining funds by applying the factors listed in proposed § 618.910(f) and by repeating the calculations in proposed paragraphs (c)–(e).

Proposed paragraph (f)(1) describes the four factors that the Department will use in determining the amount of the initial distribution to the States. The Trade Act requires the consideration of these four factors.

Proposed paragraphs (f)(1)(i) through (iv) list the four factors. Proposed paragraph (f)(1)(i) identifies as the first factor 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. The trend will be established by assigning a greater weight to the most recent quarters, giving those quarters a larger share of the factor. The Department, under TEGL No. 04–08, Change 1, assigns weights of 40 percent for the most recent quarter, 30 percent to the next most recent quarter, 20

percent to the third most recent quarter, and 10 percent to the oldest quarter. The Department proposes not to codify these weights in regulation because it needs flexibility to change these weights quickly as the Department gains experience.

Proposed paragraph (f)(1)(ii) identifies as the second factor the trend in the number of workers participating in training during the most recent four consecutive calendar quarters for which data is 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. The Department currently assigns weights by quarter for this factor in the same percentages as it does for the first factor.

Proposed paragraph (f)(1)(iii) identifies as the third factor the number of workers estimated to be participating in training during the fiscal year. This estimate will be calculated by dividing the weighted average number of training participants for the State determined in proposed paragraph (f)(1)(ii) 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.

Proposed paragraph (f)(1)(iv) identifies as the fourth factor the amount of funding estimated to be necessary to provide approved training during the fiscal year. This estimate will be calculated by multiplying the estimated number of participants in proposed paragraph (f)(1)(iii) 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.

Proposed paragraph (f)(2) provides that the Department may use such other factors as it considers appropriate related to the provision of training. At this time the Department does not propose to consider any additional factors other than those listed in § 618.910(f)(1)(i)–(iv). We invite the public to suggest additional factors and reasons for using them. The Department proposes to reserve the right to add additional factors in the future as described in paragraph (f)(4).

Proposed paragraph (f)(3) provides that the Department will assign an equal weight to each of the four factors listed in proposed § 618.910(f)(1). 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 unadjusted allocations. The percentages for all States will total 100 percent of the initial allocation of funds, 65 percent of the total training funds for a fiscal year.

Proposed paragraph (f)(4) provides the mechanism by which the Department will change the weights of the factors or add new factors to the funding formula. As the Department gains experience with the effects of the equally weighted four factors and with the effects of the TGAAA amendments on the patterns of fund use, it will be able to determine whether any adjustments to the formula are necessary. At that time, the Department may change the weights of the four factors or suggest additional factors to better serve the trade-impacted work force. Any changes will be made through administrative guidance published for comment.

Reserve Fund Distribution (§ 618.920)

Proposed § 618.920 addresses the distribution of the funds that remain after the initial distribution to the States, that is, the reserve funds.

Proposed paragraph (a) provides that the remaining 35 percent of the total annual training funds would be held in reserve for later distribution, as required by section 236(a)(2)(C)(i) of the Trade Act. The statute specifically provides that the procedures the Secretary is required to establish for the distribution of the funds held in reserve may include the distribution of such funds in response to requests made by States in need of additional training funds. Reserve funds are distributed to the States on an as-needed basis and are designed to provide funds to those States that experience large, unexpected layoffs that did not receive an initial allocation or otherwise have training needs that are not met by their initial allocation. Proposed paragraph (a) also provides that reserve funds are not available for administrative expenses or for employment and case management services. Rather, the Department will provide States an additional 15 percent of the amount provided for TAA training for administration and employment and case management services.

Proposed paragraph (b) provides the conditions under which reserve funds will be allocated. These conditions are: First, that a State must demonstrate either that at least 50 percent of its training funds has been expended, or that the it needs more funds to meet unusual and unexpected events; and second, that the State must provide a documented estimate of its expected funding needs for the remainder of the fiscal year.

Proposed paragraphs (b)(1) through (b)(3) set forth the minimum information that a State must include in its analysis of its remaining fiscal year funding needs. The Department requires this information in order to determine whether there is a real need for funding. The analysis must include the average cost of training in the State; the expected number of participants in training through the end of the fiscal year; and the remaining funds the State has available for training. Standard Form (SF) 424 (OMB Approval No. 4040–0004, expires March 31, 2012), Application for Federal Assistance, will continue to serve as the initial request for reserve funding, and must be sent to the appropriate regional office. The ETA 9117 (OMB Approval No. 1205–0275, expires January 31, 2010), TAA Program Reserve Funding Request Form, will continue to serve to provide the supporting information needed. Any change to those procedures will be communicated through administration guidance.

Second Distribution (§ 618.930)

Proposed § 618.930 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. In order to meet this threshold the Department will first meet all timely filed acceptable requests for reserve funds. To be timely, the Department must receive a reserve fund request before June 1. (Any reserve fund requests received on or after June 1 will be funded from the funds remaining after the July 15 distribution.) Any funds left over after all acceptable timely requests for reserve funds are satisfied will be distributed to those States which received an amount greater than the hold harmless amount according to the procedures established in proposed § 618.910.

Insufficient Funds (§ 618.940)

Proposed § 618.940 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 will communicate this decision through administrative notice.

IV. 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 proposed rule with regard to small entities. The RFA defines small entities to include small businesses, small organizations, including not-for-profit organizations, and small governmental jurisdictions. The Department must determine whether the rule imposes a significant economic impact on a substantial number of such small entities.

The Department has determined that this NPRM does not affect a substantial number of small entities. As this proposed rule merely describes how the Department will allocate to the States training funds under the Trade Act, the only entities affected are the States. Because the rule does not impact a substantial number of small entities, we need not determine whether its economic impact is significant.

This analysis is also applicable under Executive Order 13272; for those purposes as well the Department certifies that this proposed rule does not impose a significant economic impact on a substantial number of small entities.

The Department has also determined that this 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. 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 other things, State or local government agencies; or that will significantly and adversely affect the business climate.

The proposed rule will also not result in a major increase in costs or prices for States or local government agencies; just the opposite, in fact, as the rule governs the distribution of certain funds to the States. Finally, this proposed rule will not have an annual effect on the economy of $100 million or more.

Therefore, because none of the definitions of ''major rule'' apply, in this instance, we determine that this proposed rule is not a ''major rule'' for SBREFA purposes.

Executive Order 12866

Executive Order 12866 requires that for each ''significant regulatory action'' proposed by the Department, the Department conduct an assessment of the proposed regulatory action and provide OMB with the proposed 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 proposed 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 and State merit staffing. Therefore, the Department has submitted this proposed rule to OMB.

Paperwork Reduction Act

The purposes of the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* include minimizing the paperwork burden on affected entities. The PRA requires certain actions before an agency can adopt or revise the collection of information, including publishing a summary of the collection of information and a brief description of the need for and proposed use of the information. Because this proposed rule does not require the collection of any new information, the PRA is not implicated.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995, this NPRM 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, upon which the Department relies, in part, for its authority to impose merit staffing, 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.

Because a merit staffing requirement may fall within 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, including merit staffing, 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. The Department recognizes that there may be some costs to the States that have to convert some of their TAA-related staff to their merit staffing system. These costs will be primarily processing costs to take the steps necessary to establish the positions within the merit system and to hire staff into those positions. The Department does not have data on which to give a reasonable estimate of these costs but the Department is providing funds to the States specifically to cover the costs of these positions.

Executive Order 13045

Executive Order 13045 concerns the protection of children from environmental health risks and safety risks. This NPRM addresses TAA training funds and merit staffing, and 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 prior to 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.

Because this NPRM merely addresses how the Department distributes training funds to the States, we conclude that it does not have Tribal implications.

Environmental Impact Assessment

The Department has reviewed this NPRM 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 NPRM 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 proposed 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 NPRM and determines that it will not have a negative effect on families. Indeed, we believe the proposed rule would strengthen families by providing training funds for workers adversely affected by trade.

Executive Order 12630

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

Executive Order 13211

This NPRM 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, the Department of Labor proposes to add 20 CFR part 618 to read as follows:

Add part 618, reserving subparts A through G, and add subparts H and I to read as follows:

PART 618—TRADE ADJUSTMENT ASSISTANCE UNDER THE TRADE ACT OF 1974 FOR WORKERS CERTIFIED UNDER PETITIONS FILED AFTER MAY 17, 2009

Subpart A–G [Reserved]

Subpart H—Administration by Applicable State Agencies

Sec.
618.890 Merit staffing.

Subpart I—Apportionment 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.

§ 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 with this requirement with respect to the personnel responsible for:

(1) Employment and case management services under section 235 of the Trade Act by October 1, 2010; and

(2) All other TAA administrative activities, that are required to be merit staffed, by July 1, 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) *Exemptions 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 Circular No. A–76 (Revised).

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.

§ 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 29th day of July, 2009.

Jane Oates,

Assistant Secretary, Employment and Training Administration.

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