EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM U.S. DEPARTMENT OF LABOR Washington, D.C. 20210	CLASSIFICATION TAA
	CORRESPONDENCE SYMBOL OTAA
	DATE July 2, 2010

ADVISORY: **TRAINING AND EMPLOYMENT GUIDANCE LETTER NO. 1-10**

TO: ALL STATE WORKFORCE LIAISONS
ALL STATE WORKFORCE AGENCIES
ALL ONE-STOP CENTER SYSTEM LEADS

FROM: JANE OATES
Assistant Secretary

SUBJECT: Promulgation of 20 CFR Part 618 Trade Adjustment Assistance: Merit Staffing of State Administration and Allocation of Training Funds to States

1. **Purpose**. To assist the State Workforce Agencies designated by the Governors as "cooperating state agencies" (CSAs) for administration of the Trade Adjustment Assistance (TAA) program in implementing the funding and merit staffing of state administration provisions of the new regulations at 20 CFR Part 618, published on April 2, 2010 (75 Fed. Reg. 16988 - 17002).

2. **References**. The Trade and Globalization Adjustment Assistance Act of 2009, Division B, Title I, Subtitle I of the American Recovery and Reinvestment Act of 2009, Public Law (P. L.) No. 111-5 (enacted February 17, 2009) (the TGAAA); the Trade Act of 1974, as amended (P. L. No. 93-618, as amended) (the Trade Act); 20 CFR Part 617; 29 CFR Part 90; 20 CFR Part 618; Training and Employment Guidance Letter (TEGL) No. 9-09, TEGL No. 22-08 and TEGL No. 4-08, Change 1.

3. **Background**. The TAA program, 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.

RESCISSIONS	EXPIRATION DATE
None	Continuing

The states provide benefits and services in the TAA program as agents of the United States. Each state does so through one or more state agencies designated as the CSA(s) 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 include the State Workforce Agency (if different from the agency that administers the unemployment insurance (UI) laws for the state) and other state or local agencies that cooperate in the administration of the TAA program, as provided in the Governor-Secretary Agreement.

4. **<u>New Regulatory Provisions</u>.** A Final Rule (63 FR 16988, April 2, 2010) added a new part 618 to 20 CFR to implement a new requirement that states merit staff the administration of their TAA programs. It also, as required by the TGAAA, provided the formula and methodology for the distribution to the states of TAA training funds. This Final Rule may be found at <http://www.gpo.gov/fdsys/pkg/FR-2010-04-02/pdf/2010-6697.pdf>. A subsequent rulemaking will expand part 618 to encompass all of the TAA program, as revised by the TGAAA. Specifically, the Final Rule adds a new section 618.890 of 20 CFR to provide that, after a transition period, a state must engage only state government personnel to perform TAA-funded functions undertaken to carry out the TAA program, 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.

However, a state whose Employment Service (ES) received an exemption from merit staffing requirements under the Wagner-Peyser Act will retain an exemption from the TAA merit staffing requirement. The ES exemption applies to state administration of TAA to the extent that the state provides TAA-funded services using staff of an agency that provides ES services. The exemption does not apply to the state's administration of TRA, which remains subject to the TAA merit staffing requirement. Further, the TAA merit staffing requirement does 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 Department of Labor (Department) guidance.

The OPM regulations specify the merit system standards required for certain Federal grant programs. These standards have always been required for personnel administering UI (section 303(a)(1) of the Social Security Act) and have also been required for Wagner-Peyser Act-funded ES programs in the states (20 CFR 652.215). They also were required for all personnel administering TAA from 1975 until 2005 under the Governor-Secretary Agreements.

OPM's merit system standards 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.

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. The new merit staffing provisions become applicable to TAA-funded positions on December 15, 2010, as codified in the new regulation at 20 CFR 618.890(b), to allow states sufficient time for transition.

The second new regulatory requirement in part 618 concerns the methodology by which the Department allocates training funds to the states. In addition to increasing the funds annually available under the training cap, the TGAAA prescribed a formula for allocating training funds to the states. As required by the TGAAA, and codified in the new regulation at 20 CFR 618.910(f), the initial allocation of training funds is determined by 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. A "hold harmless" provision, 20 CFR 618.910(c), 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.

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 (20 CFR 618.910(e)). 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 and codified at 20 CFR 618.910(a)).

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. This practice is now codified in the new regulation at 20 CFR 618.910(d).

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." The Act further requires that 90 percent of a fiscal year's training funds be distributed to the states by July 15 of that fiscal year. As provided in the new regulation at 20 CFR 618.930, the Department will consider requests for reserve funds received prior to June 1, before making a formula distribution to meet the 90 percent requirement.

Although not a part of these new regulations, the Department will also, in accordance with the TGAAA and implementing guidance documents, such as TEGL No. 9-09 and TEGL No. 4-08, Change 1, provide to states that 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 funding provision is formally effective on May 3, 2010; however, consistent with the TGAAA, it has already been used to determine FY 2010 allocations to states, as described in TEGL No. 9-09.

5. Action Requested. CSAs are required to implement the requirements of 20 CFR Part 618 under the provisions of their respective Governor-Secretary Agreements by the dates specified in the regulation. Funding provisions are effective May 3, 2010; and merit staffing provisions for positions funded with TAA funds are effective December 15, 2010.

As provided under 20 CFR 618.930, CSAs should make any request for needed Reserve Funds by the June 1 regulatory deadline in writing to the appropriate Regional Office to ensure that they receive those funds before the July 15 allocations.

6. **Inquiries.** CSAs should direct all inquiries to the appropriate Employment and Training Administration Regional Office.

7. **Attachments.**

Attachment A: Trade Adjustment Assistance Final Rule on Merit Staffing of State Administration and Allocation of Training Funds to States — Fact Sheet

Attachment B: Trade Adjustment Assistance Final Rule on Merit Staffing of State Administration and Allocation of Training Funds to States — Questions and Answers

U.S. Department of Labor
Employment and Training Administration

Trade Adjustment Assistance Final Rule on Merit Staffing of State Administration and Allocation of Training Funds to States

Fact Sheet

In the first substantive rulemaking on the Trade Adjustment Assistance (TAA) program in over 15 years, the Department is issuing a regulation implementing changes to the TAA funding formula, as required by The Trade and Globalization Adjustment Assistance Act of 2009 (TGAAA) (P.L. No. 111-5). The TGAAA, which was part of the American Recovery and Reinvestment Act of 2009, reauthorized and substantially expanded the TAA program. The rule also requires (with exceptions) that TAA-funded personnel administering services and benefits to workers covered by certifications must be state employees covered by a merit system of personnel administration.

Formula for Allocation of Training Funds

The changes to the funding formula contained in this rule improve the way the Department provides TAA funding to states. The new formula, mandated by the TGAAA and explained in this regulation, provides states with a predictable level of funding at the start of a Fiscal Year, and allows for additional allocations of funds that respond more quickly to states' needs than the preceding formula the Department had used. This regulation describes the formula factors, and how they will be applied. Additionally, this regulation reflects the increase in training funds provided in the TGAAA – the Department may now provide states with $575 million in training funds in a fiscal year, rather than the previous limit of $220 million per year. A hold harmless provision requires that a state receive in the initial allocation at least 25 percent of that state's initial allocation in the prior fiscal year. Because the funding formula is set out in the statute, it was used to determine state funding allocations for Fiscal Year 2010.

Use of State Merit Staff

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 in an Agreement between the state's Governor and the United States Secretary of Labor. This regulation requires that, after a transition period, a state must (with exceptions) engage only state government personnel to perform TAA-funded functions undertaken to carry out the state's responsibilities under the Trade Act, and must apply to these personnel the standards for a merit system of personnel administration.

Effective Date

The Rule goes into effect May 3, 2010. In response to comments received on the proposed rule, the Department has adopted a longer transition period with a deadline of December 15, 2010, for states to comply with the merit staffing requirements.

June 2010

U.S. Department of Labor
Employment and Training Administration

Trade Adjustment Assistance Final Rule on Merit Staffing of State Administration and Allocation of Training Funds to States

Questions and Answers

What does this regulation do?

This rule prescribes the system for allocating Trade Adjustment Assistance (TAA) training funds to states, as required by the Trade and Globalization Adjustment Assistance Act (TGAAA) (P.L. No. 111-5). The TGAAA was included in the American Recovery and Reinvestment Act of 2009 and amends the Trade Act. The rule also requires that TAA-funded personnel providing services and benefits to workers covered by TAA certifications must be state employees covered by a merit system of personnel administration, with some exceptions discussed below.

What is the new funding methodology?

The changes to the funding methodology contained in this rule improve the way the Department provides TAA training funds to states. The new formula, mandated by the TGAAA and explained in this regulation, provides states with a predictable level of funding by formula at the start of a Fiscal Year, and allows for additional allocations of funds that respond more quickly to states' needs than the preceding formula the Department had used. The initial allocations to the states will be determined by the formula factors described below and will total 65 percent of the training funds appropriated—65 percent of $575 million, as specified in the TGAAA. The remaining 35 percent will be held in reserve. A "hold harmless" provision requires that a state receive in the initial allocation at least 25 percent of that state's initial allocation in the prior fiscal year.

Reserve funds will be distributed to the states on an as-needed basis. This will provide needed funds to states experiencing large, unexpected layoffs; to states that did not receive an initial allocation; and to states whose training needs were not met by their initial allocation. The rule also codifies the past practice of providing no initial allocation to states that would receive less than $100,000 under the formula. It also reflects the requirement in the TGAAA that at least 90 percent of the TAA training funds be distributed by July 15 each year. Taken together, these changes allow the distribution of TAA training funds to be more closely aligned with the states' actual needs.

U.S. Department of Labor
Employment and Training Administration

Trade Adjustment Assistance Final Rule on Merit Staffing of State Administration and Allocation of Training Funds to States

Questions and Answers

How does the funding formula in this rule differ from the formula used before the TGAAA?

The funding formula differences are detailed in the table below:

Old Funding Formula (used FY 2004-2008)	New Funding Formula (used in FY 2010)
Formula Factors (2)	**Formula Factors (4)**
1. Accrued training expenditures. 2. Average number of training participants.	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.
Hold Harmless (85%)*	**Hold Harmless (25%)**
Based on 12 Quarters of Data	**Based on 4 Quarters of Data**
75% of Available Funds Allocated in Initial Distribution	**65% of Available Funds Allocated in Initial Distribution**
25% Reserve Funding	**35% Reserve Funding**
	90% Fund Distribution by July 15

*Hold Harmless: A state will receive no less than the specified percent of the initial allocation that it received the previous year.

What does the merit staffing requirement do?

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 in an Agreement between the state's Governor and the United States Secretary of Labor. This regulation requires that, after a transition period, a state must (with exceptions described below) engage only state government personnel to perform TAA-funded functions undertaken to carry out the state's

responsibilities under the Trade Act, and must apply to these personnel the standards for a merit system of personnel administration.

What are the standards for a merit system of personnel administration?

The merit system standards, established by Office of Personnel Management regulation at 5 CFR 900.603, are:

(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.

Why is the Department mandating the use of state merit staff personnel to administer the program?

The state personnel working in the TAA program make complex determinations about the newly expanded federally-funded services and benefits which workers covered by TAA certifications may receive. Many of the benefits available under the TAA program are entitlements for eligible workers. As in other DOL programs involving entitlements, benefit decisions must be made by merit staffed state employees. State personnel serving under a merit system are unbiased, 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. By requiring merit staffing, the Department seeks to ensure that benefit decisions and services are provided in the most consistent, efficient, accountable, and transparent way.

Is the merit staffing requirement a new requirement for TAA?

No. Since the program began in 1975, states have administered the TAA program as agents of the United States. This relationship is established through agreements between Governors and the Secretary of Labor and is commonly referred to as the Governor-Secretary Agreement. From 1975, when the Department began administration of the TAA program, until 2005, the Governor-

Secretary Agreements required that TAA-funded administrative functions be carried out exclusively by staff subject to the merit standards. In 2005, the Governor-Secretary Agreements were modified to remove this requirement for all but the administration of trade readjustment allowances. By reinstating the requirement, this rule simply restores what had been the long-standing practice for the thirty years prior to 2005.

Are there exemptions to the use of merit staff?
There is a partial exemption from the use of merit staff for three states which have received an exemption from the Employment Service merit staffing requirements under the Wagner-Peyser Act. Those three states are Colorado, Massachusetts, and Michigan. The merit staffing requirement also does not prevent a state from outsourcing functions that are not inherently governmental, as defined by the Office of Management and Budget Circular number A-76. Non-inherently governmental functions are, generally, those that do not involve the exercise of discretion in program administration, such as janitorial and information technology services.

Will the merit staffing requirement apply to all TAA administration funds, or just funds that were appropriated after the enactment of the TGAAA?
The merit staff requirement applies to staff performing all TAA-funded administration and employment and case management service activities beginning on December 15, 2010, regardless of when the funds used were appropriated.

May Workforce Investment Act (WIA) staff provide services to TAA eligible participants?
Yes. The regulation permits the delivery of services to TAA participants for which they are eligible under partner programs, including WIA. Those services may be provided under the rules governing the program that funds them. The Department encourages co-enrollment of workers in both the WIA and TAA programs to ensure that adversely affected workers receive services to help them to return to work. States will need to coordinate and integrate partner programs through the One-Stop system to ensure workers covered by TAA certifications are provided an array of comprehensive services that will facilitate their transition back into the workforce.

When does this new regulation take effect?
The Rule goes into effect 30 days after it is published in the Federal Register. In response to comments received on the proposed rule, the Department has adopted a longer transition period with a deadline of December 15, 2010, for states to comply with the merit staffing requirements in the rule.

Will this be the only regulation for the TGAAA?
No. This rulemaking addresses only the staffing of TAA-funded functions and the allocation of TAA training funds to the states. A later NPRM will include the remaining aspects of the TGAAA, such as the expanded program coverage and increased benefits.