EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM U.S. DEPARTMENT OF LABOR Washington, D.C. 20210	CLASSIFICATION TAA
	CORRESPONDENCE SYMBOL OTAA
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ADVISORY: **TRAINING AND EMPLOYMENT GUIDANCE LETTER NO. 10-11, Change 1**

TO: STATE WORKFORCE AGENCIES
STATE WORKFORCE LIAISONS
AMERICAN JOB CENTERS SYSTEM LEADS
STATE WORKFORCE ADMINISTRATORS
STATE AND LOCAL WORKFORCE BOARD CHAIRS AND DIRECTORS
STATE LABOR COMMISSIONERS

FROM: JANE OATES /s/
Assistant Secretary

SUBJECT: Change 1 to the Operating Instructions for Implementing the Amendments to the Trade Act of 1974 Enacted by the Trade Adjustment Assistance Extension Act of 2011 (TAAEA)

1. Purpose. To respond to questions from State Workforce Agencies (SWAs) or agencies designated by Governors as "Cooperating State Agencies" (CSAs) (also jointly referred to as "states") that administer the Trade Adjustment Assistance (TAA) Program, as amended by the TAAEA.

2. References.

- Chapter 2 of Title II of the Trade Act of 1974, as amended (Pub. L. No. 93-618) (1974 Act and, as amended, Trade Act);
- Trade Adjustment Assistance Reform Act of 2002, Division A, Title I, Subtitle A of the Trade Act of 2002 (Pub. L. No. 107-210) (2002 Amendments);
- Trade and Globalization Adjustment Assistance Act of 2009, Division B, Title I, Subtitle I of the American Recovery and Reinvestment Act of 2009 (Pub. L. No. 111-5) (2009 Amendments);
- Omnibus Trade Act of 2010 (Pub. L. No. 111-344) (Omnibus Trade Act);
- Trade Adjustment Assistance Extension Act of 2011 (Pub. L. No. 112-40) (2011 Amendments);
- 20 Code of Federal Regulations (CFR) Part 617;
- 20 CFR Part 618;
- 29 CFR Part 90;

RESCISSIONS None	EXPIRATION DATE Continuing

- Training and Employment Guidance Letter (TEGL) No. 11-02, Operating Instructions for Implementing the Amendments to the Trade Act of 1974 Enacted by the Trade Act of 2002, and its Changes 1, 2, and 3;
- TEGL No. 2-03, Interim Operating Instructions for Implementing the Alternative Trade Adjustment Assistance (ATAA) for Older Workers Program Established by the Trade Adjustment Assistance Reform Act of 2002, and its Changes;
- TEGL No. 22-08, Operating Instructions for Implementing the Amendments to the Trade Act of 1974 Enacted by the Trade and Globalization Adjustment Assistance Act of 2009, and its Changes;
- TEGL No. 16-10, Instructions for Phasing Out Changes to the Trade Act of 1974 Enacted by the Trade and Globalization Adjustment Assistance Act of 2009, and its Change 1;
- TEGL No. 15-10, Increasing Credential, Degree, and Certificate Attainment by Participants of the Public Workforce System;
- TEGL No. 08-11, Availability of Equitable Tolling of Deadlines for Workers Covered Under Trade Adjustment Assistance (TAA) Certifications; and
- TEGL No. 10-11, Operating Instructions for Implementing the Amendments to the Trade Act of 1974 Enacted by the Trade Adjustment Assistance Extension Act of 2011.

3. <u>Guidance</u>. The following questions and answers address issues that have been raised by the states in response to TEGL No. 10-11, Operating Instructions for Implementing the Amendments to the Trade Act of 1974 Enacted by the Trade Adjustment Assistance Extension Act of 2011.

A. Application of the 2011 Amendments
One-Time Choice Option, Section 231(a)(1)(B)(ii) of the TAAEA of 2011
Note: This section addresses issues on the election of 2011 Program benefits by workers certified before that program went into effect, as provided under section 231(a)(1)(B)(ii) of the TAAEA. The time for making the election has expired, although states continue to address issues raised by the election provision.

A1. Question: May an adversely affected worker file an appeal of decisions involving the one-time choice option of the TAAEA?

Answer: Yes. As with any TAA determination, a worker may appeal, in accordance with state law procedures, any state determination. States must ensure that they have enough documentation to establish that the one-time choice option was handled in accordance with the TAAEA requirements, and TEGL No. 10-11.

A2. Question: Did receipt of Unemployment Insurance (UI) by an adversely affected worker constitute "receiving a TAA benefit" for the one-time choice option of the TAAEA?

Answer: No. UI is not a TAA benefit. Therefore, an adversely affected worker who was receiving UI and was not receiving any of the TAA benefits listed in section A.2.4.1 of TEGL No. 10-11, was not eligible for the one-time choice option.

A3. Question: Section A.2.4.1 of TEGL No. 10-11 defines a worker who is "receiving TAA benefits" to include a worker who received a payment of either TRA or ATAA. For purposes of establishing entitlement to the one-time choice option of the TAAEA, a worker must have

received a TAA benefit or service on or before December 20, 2011. Did this include workers who were deemed eligible for these benefits but had not yet received them because they were still receiving UI in lieu of TRA?

Answer: No. Only workers receiving a TAA benefit and not merely those eligible for such a benefit could have exercised the one-time choice option when it was available. As mentioned above, receiving UI is not one of the categories of TAA benefits listed in TEGL No. 10-11. According to Section A.2.4.1 of the TEGL, workers "receiving benefits" includes workers in one of the following circumstances:

1. On a training waiver that is in effect on December 20, 2011;
2. Obtained an approved training program and is enrolled in training, participating in training or has completed a training program by December 20, 2011; or
3. Approved for a job search allowance or a relocation allowance, even if the payment has not yet occurred on or before December 20, 2011; or
4. Received a payment of TRA or ATAA for the week before or for the week that includes December 20, 2011.

A4. Question: Was a worker covered by a certification with a petition number in the 80,000-80,999 petition number series who obtained an employment offer, and was in the process of receiving relocation allowances, eligible for the one-time choice option of the TAAEA?

Answer: Yes. This worker was eligible to exercise the choice option on or before March 19, 2012, because the worker was approved for a job search allowance and did not need to have actually received a payment or begun new employment to be "receiving" the allowance.

A5. Question: A worker covered by a certification with a petition number in the 80,000-80,999 petition number series received a TAA waiver before December 20, 2011, had the waiver revoked after that date because of a failure to report as required for waiver reviews, and was considered to have exited from the TAA program as a result. The worker reapplied for and was determined eligible for TAA. Would the worker have been eligible for the one-time choice option?

Answer: Yes. The worker would have been eligible for the one-time choice option because the worker was on a waiver on or before December 20, 2011, even though that waiver was later revoked.

A6. Question: If a worker's training plan was approved under the 2002 Program and the worker exercised the choice option to move to the 2011 Program, should the state establish benchmarks to allow the worker to become eligible for Completion TRA under the 2011 Program?

Answer: Yes. States have the authority to modify an approved training plan when conditions warrant the modification. Completion TRA is only available under the 2011 Program, which applies to a worker who exercised the one-time choice option. Where appropriate for such a worker, the state must modify the worker's training plan to incorporate benchmarks that the worker must meet to be eligible for Completion TRA.

B. Group Eligibility, Section 222 of the Trade Act

B1. Question: Would workers under both a formal and informal telework agreement at a firm be covered by a certification that did not specifically mention teleworkers?

Answer: Yes. The Department considers that teleworkers may be members of the worker group even if they are not specifically mentioned within the determination document. Teleworkers do not have to be physically based at the location of the subject firm or in the city or state of that location that is identified on the determination document to be members of the certified worker group. However, the state, generally through the identification by the firm, must identify these workers as being part of the worker group before they may be eligible for TAA under the certification.

C. Changes to Trade Readjustment Allowances (TRA), Section 233 of the Trade Act

C1. Question: If a worker is separated several months before the TAA certification is issued, exhausts UI benefits, and receives several weeks of Extended Unemployment Compensation (EUC) benefits, may a state approve a 130-week training plan for this worker?

Answer: Yes. The state may approve a training program for a worker as long as the six statutory criteria of section 236(a) have been met. Accordingly, a 130-week training plan may be approved as long as the state determines that the adversely affected worker has demonstrated an ability to pay living expenses after the exhaustion of income support in the form of UI, EUC, and even Additional TRA, and the other approval criteria have been met.

C2. Question: Partial earnings, up to the amount of the TRA Weekly Benefit Amount (WBA), may be disregarded while a worker receives Basic and Additional TRA. Is this the case with Completion TRA as well?

Answer: Yes. The 2011 Program restores all provisions of the 2009 Program unless otherwise noted under TEGL No. 10-11, and allows a worker to receive 13 more weeks of TRA needed to complete a training program ("Completion TRA"). The provisions of Section 232(d) of the Trade Act apply equally to Basic TRA, Additional TRA, and Completion TRA.

C3. Question: For certain workers who are participating in approved training and receiving Additional TRA, a partial payment for a week resulting from a reduction of the WBA due to deductible earnings counts as a week of benefits received. Does this apply to Completion TRA as well?

Answer: Yes. The statute provides for a set maximum number of weeks to be paid as Completion TRA as well as a set maximum number of weeks to be paid as Additional TRA. In neither case is the number of weeks dependent on the weekly amount payable. Therefore, a week of Completion TRA is considered to be payable even when there has been a reduction for that week in the amount of the WBA.

C4. Question: If an adversely affected worker, who is covered under an 80,000 series petition and the 2011 Program, misses the 8/16 week deadline to enroll in Training or to apply for a Training waiver as required and also misses the 26/26 week deadline, is there any way the worker could be found eligible to apply for TAA benefits under the 2011 Program?

Answer: Yes. In this narrow set of circumstances, the state must consider whether the standard for applying Federal Good Cause, as explained in section C.6 of TEGL No. 10-11, has been met to allow an extension of the 2011 Program benefit eligibility deadlines.

C5. Question: Are time limits associated with Federal Good Cause?

Answer: No. There are no set time limits when Federal Good Cause for missing a deadline may be found. Instead, the state must consider all the circumstances to decide whether the delay in applying for the benefit was reasonable.

C6. Question: How does the application of the doctrine of equitable tolling of TAA benefit deadlines affect TAA deadlines?

Answer: In TEGL No. 8-11, the Department discusses the narrow application of equitable tolling to TRA and other TAA benefit deadlines. The application of this doctrine is limited to situations where it would be manifestly unfair to deny a worker a TAA benefit, including TRA, eligibility based on the worker's failure to meet the statutory deadline for enrolling in training, or applying for Job Search Allowances or Relocation Allowances. To apply equitable tolling, the state must determine that the worker exercised due diligence to meet TAA benefit eligibility deadlines, even if the state did not provide timely notice. However, the worker's failure to meet a deadline may be excused for "good cause" under state law if the worker is covered by the 2009 Program, or for "good cause" under the federal standard described in TEGL No. 8-10 if the worker is covered under the 2011 Program. Either of these standards provides a broader basis for excusing a failure to meet a deadline than does the equitable tolling doctrine. Therefore, the Department does not expect that the doctrine will be invoked in connection with TAA benefit claims made under those programs.

C7. Question: Which section 231(c) waiver, if any, should a state issue in the event a worker's training is ready to be approved and the training is not scheduled to start for more than 30 days?

Answer: It may be appropriate for the state to issue a waiver of the training requirement for Basic TRA eligibility under section 231(c) of the Trade Act based on a finding that it is not feasible or appropriate for the worker to enroll in training because of the health of the worker, the enrollment in the approved training is unavailable, or the approved training is not available. Section 231(c)(1)(B) provides that the Enrollment Unavailable waiver is available when the worker's training is approved and the first available enrollment date for the approved training is within 60 days of the date of approval or later if "extenuating circumstances" are responsible for the delay in enrollment. Section D.2 of TEGL No. 11-02 provides guidelines for states to follow in determining whether to issue an Enrollment Unavailable waiver when the approved training is not scheduled to start for more than 60 days. However, if training has not been approved and the deadline for enrollment in training has passed, the state may not issue a waiver of the training

requirement, but must instead determine whether that deadline should be extended for Federal Good Cause, as described in TEGL No. 10-11 at section C.6, to allow that worker to continue to be individually eligible for Basic TRA.

C8. Question: In order to be eligible to receive Basic TRA for the weeks before the enrollment in training deadline, must an adversely affected worker obtain a waiver of the training requirement?

Answer: No. As provided in Change 3 of TEGL No. 11-02, a waiver of the training requirement would only be necessary if the state determines that the worker will not be able to enroll in training before the enrollment in training deadline has passed.

C9. Question: Under what circumstances may a state issue a worker the Health waiver of training requirement?

Answer: The circumstances allowable for application of the Health waiver must relate to extending the worker's deadline to enroll in training in cases when the worker is temporarily unavailable because of a health condition. The Health waiver may preserve the worker's eligibility to receive Basic TRA. To receive Basic TRA under this waiver, however, the worker must still meet the "able and available for work" UI eligibility requirements as defined under Federal and state UI laws.

C10. Question: What deadlines, if any, apply to the issuance of a waiver of the training requirement for TRA eligibility?

Answer: A worker must be enrolled in training or under a waiver in order to preserve their eligibility to receive Basic TRA when the enrollment in training deadline is reached. Further, a state may not waive the enrollment in training requirement after the deadlines have passed, including deadlines that the state extended after finding good cause for an extension or, in the narrow circumstances where the state applied the doctrine of equitable tolling to the shorter deadlines of the 2002 Program.

D. Training, Section 236 of the Trade Act

D1. Question: On occasion, an adversely affected worker may enter the final semester in an approved training program with only one or two courses remaining to complete the training plan. May the worker's participation in training during this last term be treated as "full-time training" for purposes of TRA eligibility when this situation occurs?

Answer: Yes. As provided at 20 CFR 617.22(f)(4), "full-time" participation is determined by the training institution. There are situations in which the remaining course(s) to complete the approved training program during the final term may not meet the institution's usual definition of full-time. However, in these situations, states may consider the participation in training as full-time participation if the training provider provides documentation that no additional training or coursework is needed to complete the training program.

E. Job Search and Relocation Allowances, Section 237 and Section 238 of the Trade Act

E1. Question: May the agent state provide Job Search Allowances and Relocation Allowances from its own funding if the liable state does not make these benefits available for 2011 TAA Program participants?

Answer: No. The regulation at 20 CFR 617.26(a) provides that the liable state makes determinations on, and pays, Job Search Allowances and Relocation Allowances. Accordingly, the policy of the liable state on whether to make these allowances available governs. If the liable state chooses not to make these allowances available, workers are not eligible to receive Job Search Allowance and Relocation Allowance funds even if they apply for such benefits in a state that does make them available.

F. Employment and Case Management Services, Section 235 of the Trade Act

F1. Question: Under the 2011 Program, a state may spend no more than 10% of its total allocation for State Administration, and no less than 5% of its total allocation for employment and case management services. Does the Trade Act or the Department place any limit on the amount of its total funding that a state may spend on employment and case management services?

Answer: No. Under Section 235(a)(2) of the Trade Act, at least 5 percent of the funds received must be used to provide employment and case management services. Therefore, a state may use more than 5 percent of its allocation to provide employment and case management services if it determines that greater funds are needed to provide such services to adversely affected workers in its state. However, case management expenditures should be consistent with providing effective services to trade-affected workers and increase performance outcomes. The percentage of funds used for employment and case management services must be reasonable and proportional to the number of adversely affected workers served in the state.

F2. Question: Regarding the funding of employment and case management services, TEGL No. 10-11, Section G. states: "these services may be provided using TAA funds or through agreements with partner programs." Therefore, is it permissible to fund WIA non-merit staff to provide required employment and case management services with TAA funds?

Answer: No. The merit-staffing requirement, 20 CFR 618.890, does not allow WIA non-merit staff to provide employment and case management services funded by the TAA Program to TAA program participants, except for services that are not inherently governmental. Section 239(g)(5) of the Trade Act allows WIA non-merit staff to provide employment and case management services described in section 235 of the Trade Act to TAA Program participants as long as the non-merit staff are not funded by the TAA Program.

G. Reemployment Trade Adjustment Assistance (RTAA) Provisions, Section 246 of the Trade Act

G1. Question: Is it permissible for an adversely affected worker to participate in an approved On-the-Job Training (OJT) program and receive RTAA benefits?

Answer: Yes. OJT is considered TAA training under Section 236 of The Trade Act. Therefore, workers in OJT are eligible for RTAA on the same terms and under the same conditions as workers in other approved TAA training.

Section 246(a)(3)(B)(iii) of the Trade Act prohibits a worker employed full-time and enrolled in training from qualifying for RTAA, but Section 246(a)(2)(C) of the Trade Act permits RTAA recipients to receive TAA-approved training. A worker who is in full-time OJT at the time of application for RTAA is both employed full-time and enrolled in training, and therefore may not be eligible for RTAA. However, a worker in part-time OJT at the time of application for RTAA may qualify for RTAA because Section 246(a)(3)(B)(iii)(II) provides that a worker who is employed less than full-time, but at least for 20 hours per week, and enrolled in training may be eligible for RTAA.

G2. Question: If a worker finds employment that does not meet the eligibility requirements for RTAA after separation from adversely affected employment, and later obtains employment that meets the RTAA eligibility criteria, may the worker establish RTAA eligibility based on this subsequent employment?

Answer: Yes. The first employment for this worker that meets the RTAA eligibility criteria would constitute "reemployment" for purposes of a Section 246 RTAA benefit determination.

G3. Question: Do the 2009 Program provisions that require reducing the RTAA benefit period by the number of weeks of TRA received before RTAA enrollment apply under the 2011 Program?

Answer: Yes. The 2011 Program restores all provisions of the 2009 Program unless otherwise noted under TEGL No. 10-11. Therefore, the requirement to reduce the RTAA period by the number of weeks of TRA received before RTAA enrollment applies only under the 2011 Program.

G4. Question: TEGL No. 10-11 provides: "For additional information on RTAA under the 2009 Amendments, see TEGL No. 11-02 Section H." Is that reference correct?

Answer: No. Section TEGL No. 11-02 describes the operation of ATAA under Section 246 of the Trade Act. The 2009 Amendments made major changes to Section 246 and renamed the benefit "RTAA." TEGL No. 22-08 and its Change 1 explained those changes and provided guidance on the operation of RTAA. Since the 2011 Program restores all provisions of the 2009 Program unless otherwise noted under TEGL No. 10-11, including the provisions of Section 246 of the Trade Act, this TEGL should refer instead to Section H, TEGL No. 22-08, and its Change 1 for additional information on RTAA.

H. State Operations

H1. Question: Do the 2011 Program sunset provisions include a reversion to the 2002 Program?

Answer: Yes. After December 31, 2013, the 2002 Amendments and some provisions of the 2011 Amendments will apply for new petitions. The provisions of the 2011 Amendments that will continue to apply to new petitions are:

1. The elimination of 2002 Program (and 2009 Program) waivers of the enrollment in training requirement based on recall, marketable skills, and retirement;
2. The elimination of the additional 26 weeks of Additional TRA payable to workers participating in prerequisite or remedial training, which will reduce the total maximum number of weeks of Additional TRA to 52 weeks; and
3. The authority for the Secretary to provide up to 13 weeks of Completion TRA for qualifying workers will cease, which will allow a total maximum number of 52 weeks of TRA payable after the Basic TRA eligibility period.

H2. Question: Have the 2009 Program overpayment waiver provisions been restored in the 2011 Program?

Answer: Yes. The 2011 provisions restore all provisions of the 2009 Program unless otherwise noted in TEGL No. 10-11. Therefore, the more generous standard, established in Section 1855 of the 2009 Amendments, applies to overpaid individuals who are without fault, are unable to repay their TAA overpayments, and must be granted a reasonable opportunity for waivers of overpayments. As such, the 2011 Amendments restore the requirement that recovery of the overpayment must be waived if it would "cause a financial hardship for the individual (or the individual's household, if applicable), when taking into consideration the income and resources reasonably available to the individual (or household) and other ordinary living expenses of the individual (or household)." This standard is more generous than the standard that 20 CFR 617.55(a)(2)(ii) establishes, which requires the CSA to consider whether repayment of the overpayment would, among other things, cause "extraordinary and lasting financial hardship..." Section 617.55(a)(2)(ii)(C)(1) defines that term as meaning that overpayment recovery would "result directly" in the "loss of or inability to obtain minimal necessities of food, medicine, and shelter for a substantial period of time" and "may be expected to endure for the foreseeable future." By including explicit statutory waiver criteria in the 2009 Act, Congress intended that overpaid individuals who are without fault and unable to repay their TAA overpayments must be granted a reasonable opportunity for waivers of overpayments.

H3. Question: States are required to conduct in-state monitoring of the TAA program in at least four different areas of the state administering the program. In some states, all determination and payment activities are handled only in the state office. How should monitoring of sub-state areas be conducted under such circumstances?

Answer: TEGL No. 22-08 requires states to conduct a quarterly audit of at least 20 cases and must include at least two certifications. The four quarterly samples within a calendar year should also cover at least four different areas of the State administering the program. If circumstances

preclude a state from meeting these criteria, the state should contact the ETA Regional Office to design a monitoring program that better suits the TAA program in that state.

H4. Question: If a worker in an approved training plan returns to work for another employer and is subsequently laid off, would that worker be allowed to return to the previously approved training plan, which the state had determined met the six criteria for training?

Answer: Yes. However, a reassessment must be conducted to verify that:

1. The worker's training plan continues to satisfy the six criteria for approval; and,
2. The worker has not completed the approved training plan attached to their certification, as only one training plan is allowed per certification.

As long as these conditions are met, the worker may be allowed to complete the training.

I. Health Coverage Tax Credit (HCTC)

I1. Question: What resources are available to states to assist adversely affected workers upon TAA certification when there is a delay in processing these workers for HCTC benefits?

Answer: HCTC National Emergency Grants (NEGs) are available to help address this need. NEG funds may be used to upgrade Management Information Systems to ensure the accurate reporting of eligible individuals to the IRS (infrastructure NEGs) and to administer and make payments, at the current reimbursement level authorized by the HCTC program, during the period between the state's determination of an individual's eligibility for HCTC and the IRS' first payment (gap-filler NEGs). Further information about HCTC NEGs and how to apply is available in TEGL No. 25-09. All existing HCTC NEGs have been modified to comply with the changes made to the HCTC program by the TAAEA, including the current reimbursement level.

I2. Question: How does reinstatement of the Special Rule for HCTC eligibility for adversely affected workers receiving UI affect a worker covered under the 2002 Program who: (a) missed a TRA deadline; or (b) was covered under a waiver under the 2002 Program that expired?

Answer: The TAAEA restored the Special Rule, as described in UIPL No. 21-09, which expanded the definition of an eligible TAA recipient for workers covered under the 2009 Program. These amendments apply to workers covered under the 2002 Program as well as the 2011 Program. Under the expanded definition, an eligible TAA recipient is a worker who:

1. Received TRA for any day of a month (and the next subsequent month);
2. Would have received TRA had they not exhausted their UI entitlement; or
3. Is potentially eligible for HCTC for that month.

The restored Special Rule expands that definition to also include:

1. A worker who is in a break in approved training that exceeds 30 days, and the break falls within the period for receiving TRA provided under the section 233 of the Trade Act; or,
2. A worker who is receiving UI for any day of such month and would be eligible to receive TRA (except that the worker has not exhausted UI) for such month, without regard to the enrollment in training requirements.

For all workers covered by a certification, states should apply the instructions in UIPL No. 21-09 for identifying eligible TAA recipients. In addition, the TAAEA restored the continued qualification of family members after certain events as provided under the 2009 Program. Finally, the TAAEA also restored Consolidated Omnibus Budget Reconciliation Act (COBRA) benefits for TAA eligible workers provided under the 2009 Program. Additional information may be found at: http://www.irs.gov/individuals/article/0,,id=187948,00.html.

4. Action Required. States must inform all appropriate staff of the contents of these instructions.

5. Inquiries. States should direct all inquiries to the appropriate ETA Regional Office.