EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM U.S. DEPARTMENT OF LABOR Washington, D.C. 20210	CLASSIFICATION TAA CORRESPONDENCE SYMBOL ONR DATE November 20, 2009

TRAINING AND EMPLOYMENT GUIDANCE LETTER NO. 22-08, Change 1

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

FROM: JANE OATES
Assistant Secretary

SUBJECT: Change 1 to the Operating Instructions for Implementing the Amendments to the Trade Act of 1974 Enacted by the Trade and Globalization Adjustment Assistance Act of 2009

1. **Purpose.** To provide a correction to the formula for calculating Reemployment Trade Adjustment Assistance (RTAA) payments and to respond to questions from State Workforce Agencies (SWAs) about administration of Trade Readjustment Allowances (TRA) and RTAA under the new Trade Adjustment Assistance (TAA) program, as amended in 2009.

2. **References.** The Trade and Globalization Adjustment Assistance Act of 2009 (the 2009 Amendments), 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); Trade Adjustment Assistance Reform Act of 2002 (P.L. No. 107-210); the Trade Act of 1974, as amended (P. L. No. 93-618, as amended); 20 CFR Part 617; 29 CFR Part 90; Training and Employment Guidance Letter (TEGL) No. 22-08.

3. **Guidance.** The following questions and answers address issues that have been raised by the SWAs in response to TEGL No. 22-08, the Operating Instructions for the new TAA Program.

RESCISSIONS	EXPIRATION DATE:
None	Continuing

A. RTAA, Section 246 of the Trade Act of 1974, as amended (the Trade Act)

A1. Question: Is the formula for computing the amount of RTAA payments for workers who received TRA (section H.5, page A-57, of TEGL No. 22-08) correct?

Answer: The description of the computation in TEGL No. 22-08 is correct; however, there is an error in the way the x and y variables are defined in the formula. In addition, the original formula in TEGL No. 22-08 consolidated steps, making the process confusing. The expanded two-step formula set forth below clearly demonstrates how the maximum amount of RTAA that may be paid decreases as the number of TRA weeks received increases. The following example demonstrates the computation of RTAA eligibility for a worker who has received 26 weeks of TRA. The formula used below would be adjusted for a worker who received a different number of weeks of TRA.

Determining Eligibility Period

104 Week Maximum		Weeks of TRA Received		Eligibility Period (x)
104	-	26	=	78

Determining Maximum RTAA Benefit

Factors	
x	Eligibility Period
y	104 Weeks
z	$12,000

Ratio		
x/y	=	Ratio

Formula		
(x/y) * z	=	RTAA Benefit
ratio * $12,000 = RTAA Benefits		

Example
(78/104) * $12,000 = $9,000

Applying the formula would result in an eligibility period of 78 weeks during which the participant could collect up to $9,000 of RTAA.

A2. Question: Is there a typo in section H, page A-56, of TEGL No. 22-08, in the first line of the second full paragraph?

Answer: Yes. The word "not" in that line should be removed so that the sentence reads: "The eligibility period for a worker who has received TRA is the two-year period (104 weeks) beginning with the date of reemployment, reduced by the number of weeks for which the worker received TRA."

A3. Question: Does the number of weeks for which the worker received Extended Benefits (EB) or Emergency Unemployment Compensation (EUC) reduce the number of weeks of eligibility for the RTAA benefit and therefore affect the application of the formula for RTAA in section H-5 on page A-57 of TEGL No. 22-08?

Answer: No. RTAA is reduced only by the number of weeks for which the worker received TRA. Receipt of Unemployment Compensation (UC), EB, or EUC is not considered in determining the amount of RTAA.

A4. Question: May an adversely affected worker receive RTAA if s/he enters military service?

Answer: Yes, providing that all the eligibility conditions are met for RTAA. Please note that RTAA is available only to workers who are 50 years of age or older which makes it unlikely that a worker who might qualify for RTAA would enter military service.

B. TRA Eligibility, Section 231(a) of the Trade Act

B1. Question: What is the first week of entitlement to TRA under the 2009 Amendments?

Answer: The 2009 Amendments eliminated the 60-day TRA waiting period that began with the filing date of the petition that was certified. This change allows workers to begin receiving TRA for claims filed under the 2009 Amendments beginning with the first week of unemployment that begins on or after the date of the certification, provided that all TRA requirements are met, including exhaustion of UC entitlement. However, no TRA payments may be made retroactively for weeks of unemployment that began before the certification was issued.

B2. Question: What are the definitions of a "week" and a "week of unemployment"?

Answer: The 2009 Amendments did not redefine these terms. As they continue to be defined at Sections 247(13) and (14) of the Trade Act, the term "week" means a week as defined in applicable state law (that is, the UC law of the state that applies to the claim), and the term "week of unemployment" means a week of total, part-total, or partial unemployment as determined under the applicable state law or Federal UC law. (See 20 CFR 617.3(qq) & (rr)).

C. Enrollment in Training, Section 231(a)(5)(A) of the Trade Act

C1. Question: If a worker failed to meet the enrollment in training deadlines under the 2009 Amendments because the state failed to notify the worker, would a state law "good cause" waiver of deadlines apply?

Answer: Yes, the state will apply its "good cause" waiver under such circumstances as follows. First, Section 231(a)(5)(A) of the Act establishes alternative deadlines for enrollment in training as a condition of TRA. Section 231(a)(5)(A)(ii)(IV) allows the Secretary to establish a fourth deadline where a worker fails to enroll in training within any of the first three deadlines "due to the failure to provide the worker with timely information regarding" those three deadlines. Accordingly, the Secretary has established a deadline requiring that, under these circumstances, the worker must be enrolled in approved training or have obtained a waiver by the first Monday occurring 60 days after the worker was officially notified of the enrollment deadlines. Second, section 234(b) provides for the application to TRA and training of any state UC "law, regulation, policy, or practice . . . that allows for a waiver for good cause of any time limitation . . . ." Accordingly, if the worker does not enroll in training by the deadline established under section 231(a)(5)(A)(ii)(IV) (the first Monday occurring 60 days after notification), any state UC "good cause" waiver provision will apply to the section 231(a)(5)(A)(ii)(IV) deadline, thus potentially extending the period within which the worker must enroll in training.

C2. Question: By what date must a worker be enrolled in training after the waiver is revoked to remain eligible for TRA?

Answer: The worker must be enrolled in training by the Monday of the first week occurring 30 days after the date in which the waiver was revoked, as discussed in section C.3, page A-18, of TEGL No. 22-08.

D. Waiver of the Training Requirement, Section 231(c) of the Trade Act

D1. Question: Does possession of a postgraduate education degree automatically lead to a waiver of the training requirement under the "marketable skills" criteria?

Answer: No. The 2009 Amendments amended Section 231(c)(1)(B)(ii) of the Trade Act to provide that the term "marketable skills" "may" include a "postgraduate degree from an institution of higher education (as defined in section 102 of the Higher Education Act of 1965 (20 U.S.C. 1002), or an equivalent institution, or the possession of an equivalent postgraduate certification in a specialized field." The use of "may" means that the waiver is not automatic. Thus, in determining whether to grant a waiver, the state must consider whether the degree affords the worker "marketable skills" in an occupation for which there is a reasonable expectation of employment at equivalent wages in the foreseeable future.

D2. Question: May waivers of the enrollment in training requirement be extended beyond six months?

Answer: Yes. Consistent with prior guidance issued in TEGL No. 11-02, Change 1, a waiver may be extended beyond the six-month period to accommodate the worker's potential maximum entitlement to Basic TRA. (Note: A waiver is <u>not</u> allowed for Additional TRA.)

D3. Question: May waivers be issued before the deadline(s) by which they must be in place?

Answer: Yes. Note, however, that once a waiver is issued, it must initially be reviewed three months following the issuance of the waiver and on a monthly basis thereafter.

D4. Question: May the initial waiver review occur earlier than three months?

Answer: Yes. The goal of the program is to provide services to facilitate the worker's re-employment in suitable and sustainable employment as soon as possible, and the state agency may engage in earlier or more frequent interaction with the worker as needed. However, as mentioned above, the initial review must occur no later than three months after issuance.

E. Weekly Amounts of TRA, Section 232(a) of the Trade Act

E1. Question: How do we calculate the earnings disregard for a worker who is eligible to receive TRA under the 2009 Amendments?

Answer: Section 232(a)(2) of the Trade Act requires a reduction in the TRA amount payable for a week of unemployment of all income that is deductible from UC under the disqualifying income provisions of the applicable state or Federal UC law. However, where a worker is in approved training, the 2009 Amendments provide that no deduction is made for earnings for any week up to an amount equal to the most recent weekly benefit amount (WBA) of UC payable to the worker for a week of total unemployment preceding the worker's first exhaustion of UC following the worker's first qualifying separation. In practice, the "most recent WBA of UC payable to the worker for a week of total unemployment preceding the worker's first exhaustion of UC following the worker's first qualifying separation" is the same as the TRA WBA. Therefore, for ease of reading, this document uses "TRA WBA" as short-hand.

Two conditions must apply before the determining the earnings disregard:

1. In order to be eligible for TRA, a worker must have a "week of unemployment." This means that under the state law, the worker must be unemployed (total, part-total, or partial) for the applicable week. If, under the applicable state law, the worker is deemed not unemployed because, for example, the worker is employed for a number of hours during the week that meets the definition of full-time employment, the worker would not have a week of unemployment, and accordingly, no TRA is payable for that week. However, the State's definition of "unemployment" may not be applied to a worker in approved, full-time training in a manner that would make Trade Act section 232(a)(2) inoperable. That section clearly allows participants in full-time training the opportunity to earn an amount of wages equal to their TRA weekly benefit amount without any deduction from their weekly TRA benefit payment. Accordingly, any state definition of "week of unemployment" must, as applied to TRA, be interpreted to allow a worker in approved, full-time training to earn, without disqualification or deduction, an amount of wages up to the TRA WBA.

2. The worker must also be participating in approved full-time training for the week.

If these conditions are met, gross earnings from employment (as defined under state law) for the week that are equal to or less than the TRA WBA payable are not deductible. Moreover, state law governs the rounding of gross earnings when the worker earns less than an additional dollar over the TRA WBA. If the rounding is down to the TRA WBA payable, there is no earnings reduction. If the rounding is to the next dollar amount over the WBA, only one dollar ($1) of gross earnings is subject to the state law disqualifying income provisions. Any gross earnings over the TRA WBA are deducted from the TRA payment in accordance with the disqualifying income provisions of the applicable state law.

Examples:

The TRA WBA for a worker participating in TAA training is $200.

1. If the worker had gross earnings of up to $200 for the week, there would be no reduction under the applicable state law disqualifying income provisions.
2. If the worker had gross earnings of $200.25 for the week and the state rounds these earnings down to $200, there would be no reduction.
3. If the worker had gross earnings of $200.75 for the week and the state rounds these earnings to $201, the $1 amount would be subject to the state's disqualifying income provisions.
4. If the worker had gross earnings of $300 for the week, then $100 would be subject to the state's disqualifying income provisions.

E2. Question: Do the provisions of section 232(a)(2) of the Trade Act (i.e., earnings disregard) apply to a worker who is receiving UC?

Answer: No. The earnings disregard applies only to the determination of the amount of TRA for a week (and only to workers covered by petitions filed on or after May 18, 2009).

E3. Question: Pensions and severance payments are deductible income from the WBA payable under state law. Does the earnings (income) disregard apply to pensions and/or severance payments?

Answer: No. Section 232(a)(2) of the Trade Act states that "earnings from work" up to an amount equal to the TRA WBA are not subject to the

state's disqualifying income provisions. Thus, it does not apply to pension or severance payments, which must be deducted in accordance with state law.

E4. Question: According to TEGL No. 22-08 starting on page A-21, no deduction is to be made from earnings at or below the TRA WBA if the worker is "participating" in approved training. Does the term "participating" include the time period of up to 30 days before training when a worker is "enrolled" in training but classes have not yet actually begun?

Answer: Yes, but only for workers receiving Basic TRA, because enrollment in training meets the participation in training requirement for Basic TRA.

However, to qualify for Additional TRA, the worker must be actually "participating fully" in training. (See 20 CFR 617.15(b)(3)). Therefore, if the worker is only enrolled in training and is not actually participating fully in training, no benefit may be paid and thus the earnings disregard is not applicable.

Section 233(e) of the Trade Act makes an exception to the training requirement with respect to eligibility for both Basic TRA and Additional TRA by treating workers as participating in training during any week in which there is a scheduled break in training not exceeding 30 days if the worker was participating in training immediately before the beginning of the break and the break is provided under the training program. (See 20 CFR 617.15(d); TEGL No. 11-02 in section D.4). Accordingly, "participating" in approved training includes these breaks, during which the earnings disregard will apply.

F. Election of TRA or UC, Section 232(d) of the Trade Act

F1. Question: What constitutes part-time or short-term employment for the purpose of determining whether the worker is eligible to make an election between TRA and UC?

Answer: With respect to the definition of "part-time or short-term employment," section C.4.1 of TEGL No. 22-08 provided that "In practice, a worker who establishes a UC claim with a WBA that is less than the TRA benefit amount would meet this test [of "part-time or short-term employment] as the subsequent employment would not have been suitable long-term employment." This is because any employment

resulting in a worker being eligible for UC during the TRA eligibility period would be either short-term or part-time, since a worker could only qualify for UC by either working part-time or being laid off. Accordingly, where a worker establishes a UC claim with a WBA that is less than the TRA benefit amount, the definition of "part-time or short-term employment" has, in practice, been met. Because state law often does not define "short-term employment" and because we understand Congress to have intended that, in most cases where a second benefit year WBA would be less than the existing TRA WBA, a worker should have the opportunity to maintain the greater TRA WBA in order to more easily remain in training, we have defined "short-term employment" broadly.

F2. Question: Must the employment giving rise to the new benefit year be different from the adversely affected employment in order for the worker to be eligible to make the election between TRA and UC?

Answer: Any employment, whether the same or different than the adversely affected employment, occurring after the most recent total qualifying separation from the adversely affected employment on which the TRA claim is based may be the employment upon which the new benefit year is based for purposes of the election.

F3. Question: On what basis does the worker elect either UC or TRA?

Answer: The state must advise the worker of potential entitlement for TRA (see 20 CFR 617.4) as well as any potential UC entitlement. The state must provide sufficient information to the worker so s/he is able to make an informed choice between the second UC benefit entitlement or continuing the TRA entitlement. The right choice for the worker will depend on the individual circumstances of the worker.

F4. Question: What procedures are necessary to provide for the election between UC and TRA?

Answer: Each state will need to establish appropriate procedures to ensure workers are advised that they have the option to receive UC or to continue receiving TRA whenever a worker has an entitlement to a second UC claim. This may occur when there is a change in the calendar quarter ("quarter change"). The state's procedures must ensure that workers are provided timely information that allows them to make an informed choice.

F5. Question: When are states required to offer workers the choice of TRA or UC – is it just a one-time election?

Answer: TEGL No. 22-08 contains no requirement that the state make the option to choose between UC and TRA available to the worker at any time other than when the second benefit year is established, or at any point afterwards when another UC claim could be established.

Therefore, there is no requirement to offer a choice beyond the point when the new claim is established, and any point afterwards where another new claim is established. The state must document that it gave the worker the necessary information to make an informed choice, and the election decision may be appealed if the worker believes they were not given adequate information to make the choice.

F6. Question: What if the worker does not choose or does not respond when given the opportunity to make an election of TRA or UC?

Answer: Since continued eligibility for either UC or TRA requires weekly/biweekly certification(s), states should advise workers that the certification must be for either TRA or UC, and that the TRA or UC certification will constitute the worker's election.

If the state also requests the worker to report to the agency or to contact the state and s/he does not do so, the state should follow state law in determining whether any eligibility issue(s) exist (including a "failure to report" or failure to contact the state as requested) and take appropriate action.

F7. Question: If a worker is receiving EUC (during which time TRA entitlement has been suspended) and s/he becomes eligible for a second UC benefit year, does the worker have the choice of electing the TRA claim if it is more advantageous than the new UC benefit year?

Answer: Yes. The worker may elect TRA if s/he becomes eligible for a second UC benefit year.

F8. Question: What happens to the EUC balance when the worker elects TRA?

Answer: If the worker is eligible, EUC payments may resume for any EUC balance that remains available to the worker after the worker exhausts her/his TRA entitlement and any other UC.

F9. Question: If the worker chooses TRA, what happens to the UC claim (i.e., the second UC benefit year)?

Answer: State law applies. If state law permits, any available UC entitlement may be paid after TRA is exhausted. In some states, claims can be withdrawn if no UC has been paid, and once the worker exhausts TRA s/he may file a new UC claim.

G. Limitations on TRA, Section 233 of the Trade Act

G1. Question: How many weeks of Additional TRA are available to workers covered under the 2009 Amendments?

Answer: A worker may receive 78 weeks of Additional TRA to complete an approved TAA training program. These weeks are payable in the period of 91 consecutive weeks that follow the last week of entitlement to Basic TRA or begins with the first week of approved training if the training begins after the last week of entitlement to Basic TRA.

G2. Question: Are workers eligible for an additional 26 weeks of TRA for pre-requisite education and an additional 26 weeks for remedial education?

Answer: No. A total of up to 26 weeks of Additional TRA is payable for a worker to participate in remedial and/or pre-requisite education.

H. Obtaining Worker Lists from Employers after TAA Certification

H1. Question: Do states have authority to issue subpoenas to obtain employee lists from firms?

Answer: Yes. The TAA regulations (20 CFR 617.53) provide that a State agency may issue subpoenas under its own State law, but "if a State court declines to enforce a subpoena issued under this section, the State agency may petition for an order requiring compliance with such subpoena to the United States District Court within the jurisdiction of which the relevant proceeding under this part 617 is conducted." States have an obligation under the TAA agreements to perform outreach and intake to covered workers, and to advise those workers of TAA benefits that may be available to them under this program. To do so, a State agency will need to issue a subpoena where doing so is necessary to obtain from a firm the names of workers potentially covered by a certification.

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

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