TRADE ADJUSTMENT ASSISTANCE FOR FIRMS AND INDUSTRIES

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1. **Introduction**

At the end of World War II the United States began a decades-long effort to reduce tariffs and other barriers to international trade. Many experts thought that high tariffs had contributed significantly to the economic and political problems which led to World War II. It was hoped that reducing trade barriers, through such arrangements as the General Agreement on Tariffs and Trade (GATT), would create a more interdependent and prosperous world less likely to venture again into global warfare.

Starting in the 1940s, the increased flow of imports into the United States as a result of this policy began to create difficult adjustment problems for certain American industries. The concept of "trade adjustment assistance" was developed as one of the ways to ease the impact of these new imports. Trade Adjustment Assistance programs provide financial, technical and training assistance to workers, firms and industries adversely affected by imported goods. The Trade Adjustment Assistance program for workers is large and generally well known by those involved in trade and labor activities. Although it raises similar legal and policy issues, the Trade Adjustment Assistance program for firms and industries is small and generally less well known, even by trade lawyers.

This article describes the historical development of trade adjustment assistance for firms and industries. It then describes the basic legal structure of the program and analyzes the significant legal and policy issues that have arisen over the twenty-five-year history of the program. The article concludes with a critical evaluation of the program from a legal perspective.

2. **Historical Overview**

2.1. The Problem of Adjusting to Imports

In response to early, post-World War II requests for protection by American business and labor, a "border" mechanism was developed to provide relief from negotiated tariff reductions which injured American industry. This mechanism appears as Article XIX of the GATT ("Emergency Action on Imports of Particular Products"), which permits temporary withdrawal of tariff concessions that cause or threaten serious injury to domestic producers due to unforeseen circumstances.\(^1\)

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3. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947,
Similar mechanisms, known as "escape" or "safeguard" clauses, were inserted in all trade bills beginning in 1947. However, many realized that direct relief from negotiated tariff concessions was counterproductive in the long run and would only delay our ability to reach a healthy multilateral trading environment. Therefore, almost as soon as the concept of the escape clause was developed, the search began for a less protectionist response to the inevitable problems which trade liberalization brought.

The first well-publicized mention of the concept which is now called Trade Adjustment Assistance came in the report of the Randall Commission in 1954. In the amendments to the Trade Agreements Act in 1953, Congress had required that the President establish a Commission on Foreign Economic Policy. This commission was headed by Clarance B. Randall of Inland Steel Company and is frequently referred to by his name. Its final report contained a dissenting proposal, submitted by David J. McDonald of the United Steelworkers' Union, which was rejected by the Commission majority and excluded from its recommendations. Mr. McDonald proposed affirmative assistance to companies, communities, and workers who were injured by imports as an alternative to continued reliance on temporary or permanent tariffs. Mr. McDonald's proposal specifically included technical assistance, in the form of grants for consulting contracts, to companies; financial assistance, in the form of loans, to companies; accelerated tax amortization on plants and equipment; a national industrial development corporation; extended unemployment compensation; retraining and relocation benefits; and an intensive counseling and placement program. Although not adopted at the time by either the Randall Commission or Congress, Mr. McDonald's proposal grew into the Trade Adjustment Assistance program eight years later.

7 Randall Commission Report 54-61 (1954) (statement of Mr. McDonald on adjustment in cases of injury caused by increased imports).
2.2. The Trade Expansion Act of 1962

After some unsuccessful attempts, including several bills by Senator John F. Kennedy, to codify McDonald's ideas, Trade Adjustment Assistance was finally passed into law as part of the Trade Expansion Act of 1962.8 When John F. Kennedy as President proposed the Trade Expansion Act to Congress, he described the purpose of Trade Adjustment Assistance in the following manner:

When considerations of national policy make it desirable to avoid higher tariffs, those injured by that competition should not be required to bear the full brunt of the impact. Rather, the burden of economic adjustment should be borne in part by the Federal Government. . . . This cannot be and will not be a subsidy program of government paternalism. It is instead a program to afford time for American initiative, American adaptability and American resiliency to assert themselves. . . . Accordingly, trade adjustment assistance, like the other provisions of the Trade Expansion Act of 1962, is designed to strengthen the efficiency of our economy, not to protect inefficiencies.9

Under the Trade Expansion Act, there were two routes through which firms could receive Trade Adjustment Assistance: first, as a result of a direct petition for assistance, and second, as alternative relief resulting from an escape clause or "tariff adjustment" petition. The direct route required that the firm petition the Tariff Commission (the predecessor of the International Trade Commission) for a certification of eligibility to apply for assistance.10 The Tariff Commission would determine whether, as a result "in major part" of concessions granted under trade agreements, increased imports caused or threatened to cause serious injury to the firm.11 The Tariff Commission would report

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its determination to the President.\textsuperscript{12} If the report contained an affirmative determination, the President could certify the firm.\textsuperscript{13} Then, within two years the firm could file an application for adjustment assistance with the Department of Commerce ("Commerce" or the "Department"), including, within a reasonable period, a proposal for the firm's economic adjustment.\textsuperscript{14} The firm could ask for one of the following forms of assistance:

1. tax assistance consisting of an increase in the net loss carry-back period from three to five years;
2. technical assistance contributing to the economic adjustment of the firm; or
3. financial assistance in the form of loans and loan guarantees for fixed assets and working capital.\textsuperscript{15}

The second route required that a firm, trade association, union or other industry representative file an escape clause or "tariff adjustment" petition.\textsuperscript{16} The Tariff Commission then determined whether, as a result "in major part" of prior tariff concessions, increased imports had caused or threatened to cause serious injury to the domestic industry.\textsuperscript{17} The Tariff Commission would report its determination to the President.\textsuperscript{18} If the report contained an affirmative determination, the President could grant tariff adjustments (the usual escape clause relief) or, in addition or in the alternative, provide that firms in the industry may request certifications of eligibility for adjustment assistance from the Secretary of Commerce.\textsuperscript{19} The Secretary of Commerce would then certify any firm in the industry which demonstrated that it had suffered serious injury as a result of increased imports.\textsuperscript{20} From this point on, the Trade Adjustment Assistance process was substantially the same for
firms proceeding under either the direct or escape clause route.

From 1962 through 1969 no petitions for adjustment assistance for firms were approved, no firms were certified, and, therefore, none received any assistance. In 1969 the, U.S. Tariff Commission reinterpreted the eligibility rules in a way which made it easier for firms to be certified. But even with this change, from 1969 through 1974 only 39 firms were certified and only 28 firms received assistance totalling $45.3 million. Of the firms which were assisted, 16 received loans and loan guarantees amounting to $32.5 million. The remaining firms received various amounts of technical and tax assistance.

2.3. The Trade Act of 1974

Because of Congressional dissatisfaction with the small volume of assistance being delivered, the program underwent significant revision in the Trade Act of 1974 (the Trade Act). This revision created the basic program in operation today. All subsequent analyses and statistics in this article will focus on this variation of Trade Adjustment Assistance for firms.

Several key elements of the program were directly changed by the Trade Act. First, the Tariff Commission no longer had a role in determining the eligibility of firms applying for assistance through the direct route. A firm that wanted to be certified as eligible now had to deal

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24 For statistics on assistance under the Trade Expansion Act through May 1, 1973, see Bratt, Assisting the Economic Recovery of Import Injured Firms, 6 L. & Pol'y in Int'l. Bus. 1, 14-17 (1974). This article contains the best general discussion known to the authors of the operation of the Trade Adjustment Assistance program under the Trade Expansion Act.
only with the Department of Commerce. Second, the standards for eligibility through the direct route were eased. A firm now needed only to show that a significant number or proportion of its workers had been or were threatened with being wholly or partially laid off, that its sales or production had decreased absolutely, and that increases in imports of competitive goods had "contributed importantly" to the layoffs and the decline in sales or production. Third, the Trade Act dropped the little-used concept of tax assistance. Fourth, the Trade Act added the concept of Trade Adjustment Assistance for communities.

The Trade Act also changed the escape clause route for obtaining Trade Adjustment Assistance. The first important change involved elimination of the requirement that the increased imports be a result of prior tariff concessions. The second important change made the "injury test" easier to meet by requiring only that the increased imports be a "substantial cause" of the injury to the industry, not the "major factor" previously required by the Trade Expansion Act. However, the most significant changes resulted from the effective elimination of any link between a finding of injury to an industry and a firm's ability to become certified. Although a determination of injury to an industry can result in expedited consideration of petitions for certification by firms in the industry, the certification procedure for these firms is the same as that for other firms. In effect, all petitions for certification are now under the direct route and all determinations regarding the certification of an individual firm are made by the Department.

During the initial years of operation under the Trade Act of 1974, two other significant changes to the Trade Adjustment Assistance program were made through administrative discretion. First, Commerce
developed the concept of assistance to entire industries in 1977.\textsuperscript{33} Initially, assistance was provided to the footwear industry. Later textile and other industries were added. The early development of this concept was implemented using non-Trade Act authority.\textsuperscript{34} The authority of the Department to provide such assistance through the Trade Act of 1974 was not clarified by Congress until 1981 as discussed below.

In 1978 Commerce also developed a new delivery mechanism for Trade Adjustment Assistance to firms. Instead of providing assistance directly or through consultants on contract, the Department began to use its grant authority to establish non-profit Trade Adjustment Assistance Centers (TAACs) around the country to help firms apply for Trade Adjustment Assistance and to deliver technical assistance. This concept was initially implemented using non-Trade Act authority.\textsuperscript{35} Reference to this delivery mechanism was added to the Trade Act in 1981 as discussed below.

2.4. Legislative Activity from 1981 to the Present

In 1981, Congress made its first substantive changes to the Trade Adjustment Assistance program for firms since the Trade Act of 1974. The legislature created explicit authority within the Trade Act for the concepts of industry assistance and the TAACs, both created administratively in the late 1970s.\textsuperscript{36} Second, Congress provided that technical assistance be made available to firms to assist in the preparation of their petitions for certification.\textsuperscript{37} Previously, technical assistance had been available only for developing and implementing proposals for economic adjustment. Third, Congress made several changes to the financial assistance program, reflecting the increasing volume and sophistication of this aspect of trade adjustment. For example, Congress provided that the validity of any guarantee agreement would be incontestable (except in certain cases of fraud or misrepresentation),\textsuperscript{38} that loans could be evidenced by multiple obligations for guaranteed and non-guaranteed portions,\textsuperscript{39} and that loans for fixed assets should ordinarily be secured by a first lien on the assets to be financed.\textsuperscript{40}

The next substantive amendment to the Trade Adjustment pro-

\textsuperscript{33}OTA REPORT, supra note 21, at 32.
\textsuperscript{34}42 U.S.C.A. §§ 3121-3245 (1988).
\textsuperscript{35}Id.
\textsuperscript{36}19 U.S.C.A. §§ 2343(b)(1), 2355 (1988) (relating to TAACs and to industry assistance, respectively).
\textsuperscript{40}19 U.S.C.A. § 2347(e) (1988).
gram occurred in 1983, when a preference for firms with employee stock ownership plans was added to the Trade Act. In practice, however, the preference established by this amendment has never been requested by an applicant firm. Nor has the government yet come upon a case where the preference was needed to break a "tie" between applicant firms.

In 1984 the Trade Act was further amended to provide that industry-wide assistance could be funded at $10 million annually per industry, a significant increase from the previous level of $2 million. Also, industry assistance could now be delivered by grants, contracts, or cooperative agreements through non-profit organizations representing industries in which a substantial number of workers had been certified as eligible to receive adjustment assistance. Before this amendment the non-profit organization had to represent an industry in which a substantial number of firms had been certified.

In 1985 the primary legislative event was the lapse, perhaps inadvertent, of the entire trade adjustment assistance program for firms on December 19. This occurred because Congress had not passed a bill reauthorizing the Trade Adjustment Assistance program which was scheduled to expire on September 30, 1985. The program previously had been extended in 1981 and 1983. After four temporary extensions that preserved the program until December 19, 1985, Congress failed to take any further action until April 7, 1986. This inaction left the program without operating authority for four months during which Commerce began phasing out operations.

On April 7, 1986, the President finally signed the Consolidated Omnibus Budget Reconciliation Act of 1985, which reauthorized the Trade Adjustment Assistance program for firms and industries. This act, however, provided that no loans or loan guarantees could be made after April 7, 1986, and no technical assistance could be provided after September 30, 1991. Those parts of the program which were ex-

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42 Comments on use of ESOP preference are based on the personal experience of the authors.


tended (certification, technical assistance to firms, and industry-wide assistance) were reauthorized retroactive to December 18, 1985. In addition, Congress made several other changes to the program, the most significant of which were a broadening of the certification criteria and a clarification that agricultural firms were eligible for assistance.

The most recent changes to the trade adjustment assistance program were made by the Omnibus Trade and Competitiveness Act of 1988 (the "Omnibus Trade Act"). That Act extended the program's authorization through 1993. It also amended the certification provisions of the Trade Act of 1974 in two ways. First, the Omnibus Trade Act provided that any firm which engages in exploration or drilling for oil or natural gas shall be considered a firm "producing" oil or natural gas and producing articles directly competitive with oil or natural gas. Under former interpretations of the certification provisions of the program, firms engaged in exploration or drilling were not necessarily considered to be producers, and only firms actually producing the articles in direct competition with the imports could be certified. Second, the Omnibus Trade Act provided for the certification of firms which provided "essential goods or services", i.e., components for articles with which increased imports were directly competitive or were like. Again, in the past only actual producers of the competitive articles could be certified.

The Omnibus Trade Act also established a new trust fund for all trade adjustment assistance programs, including that for workers, and a new fee on imports of not more than 0.15% to finance the programs. The actual imposition of the import fee is contingent on several statutory events. The President must first undertake negotiations to obtain GATT approval of the fee and consent to the fee by any country which has entered into a free trade agreement with the United States. If GATT approval is obtained, the fee must be imposed thirty days after the President submits a statement to Congress certifying the GATT approval. If GATT approval is not obtained, the fee will be imposed in 1990 anyway unless the President determines the imposition of the fee.

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51 19 U.S.C.A. § 2272 (1988). This provision on components does not become effective until one year after the import fee cited in note 54 infra goes into effect. 19 U.S.C.A. § 2396 (1988). Presumably, this is because this change in certification rules will greatly increase the number of firms eligible for assistance and Congress did not think such a program increase could be funded without the import fee.
would not be in our national interest. Congress has the authority, however, to override the President’s determination through a joint resolution. The fee, when effective, will not apply to products from any country which has entered into a free trade agreement with the United States unless the President submits to the Congress a statement certifying consent by the country to the fee.

2.5. General Comments on Recent Administration of the Program

For the first seven years of operation under the Trade Act, the Trade Adjustment Assistance program for firms was administered by the Economic Development Administration (EDA), a bureau of the Department of Commerce, whose regulations outlined its basic interpretation of the program. When the Reagan Administration arrived in 1981, the program was transferred to the International Trade Administration (ITA), another bureau within Commerce. After analyzing the program’s history and operations, the new Administration decided that Trade Adjustment Assistance for firms and industries should be terminated. Beginning in 1982, the Administration several times asked Congress to rescind funding for the program, and, when relevant, not to reauthorize the underlying statutory authority. Although ITA published proposed regulations in 1984 to explain its operation of the program, as contrasted with EDA’s, these regulations have never been made effective because of the Reagan Administration’s continuing expectation that Trade Adjustment Assistance could and would be eliminated.

During these rescission exercises as well as during the lapse of reauthorization discussed in Part 2.4 above, the Trade Adjustment Assistance program for firms and industries obviously has been operating at much less than full throttle. This makes evaluation of the program’s success difficult. However, an evaluation seems worth the effort since every recent Congress has rebuffed efforts to eliminate the program permanently.

3. Certification of Firms

3.1. The Basic Statutory Provisions

In order for a firm to become eligible to apply for adjustment assistance, it must petition the Department for a certification of eligibility. A firm may be certified only if the Department determines that the following conditions required under the Trade Act exist with respect to the firm:
1. a significant number or proportion of the workers in the firm have become totally or partially separated, or are threatened with becoming totally or partially separated;
2. sales or production, or both, of the firm have decreased absolutely, or sales or production, or both, of an article that accounted for not less than 25% of the total production or sales of the firm during the twelve-month period preceding the most recent twelve-month period for which data are available have decreased absolutely; and
3. increases of imports of articles like or directly competitive with articles produced by the firm contributed importantly to the total or partial separation, or threat thereof, and to the decline in sales or production.

The certification process consists mainly of an investigation by the Department to determine whether these conditions exist.

3.2. The Mechanics of Getting Certified

The Trade Act allows a petition for certification of a firm to be filed with the Department by the firm or through its representative. A petition is submitted in a format prescribed by the Department. The necessary forms and information needed in order to prepare a petition may be obtained from the Department or a TAAC. The information contained in a petition includes the following:
1. an identification and description of the firm including its legal form of organization, its economic history, its officers and directors, its production and sales facilities, the major ownership interests in the firm, and any subsidiaries or affiliates of the firm;
2. a description of the goods and services produced and sold by the firm;

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59 Trade Act § 251(c), 19 U.S.C. § 2341(c) (1982 & Supp. V 1987). An amendment to the Trade Act contained in the Omnibus Trade Act would also provide for certification of firms which provide essential goods and services for articles with which increased imports are like or directly competitive. See supra note 51 and accompanying text.

60 See supra notes 58-59 and accompanying text.
3. a description of the imported articles which are like or directly competitive with those produced by the firm;
4. data on the firm’s sales, production, and employment for the three most recent years;
5. copies of the firm’s financial statements for the three most recent years;
6. copies of the firm’s state unemployment insurance reports for the three most recent years;
7. information concerning the firm’s major customers and their purchases from the firm; and
8. other information which the Department may consider necessary in order to make a determination concerning the certification of the firm.\(^61\)

Upon receipt of an acceptable petition, the Department publishes a notice in the *Federal Register* that the petition has been received and that an investigation has been initiated.\(^62\) The notice identifies the petitioner and the nature of its business.\(^63\) The notice also invites written comments and gives notice of hearing rights and the right of any party to have notice of the final determination on the petition.\(^64\) The Department then begins an investigation to determine whether the petitioner meets the criteria for certification.\(^65\) A report of this investigation becomes part of the record upon which a determination concerning the petitioner’s eligibility is made.\(^66\)

The Department is required to provide for a public hearing on a petition at the request of a petitioner, or other party having a substantial interest, made not later than ten days after a notice of a petition is published in the *Federal Register*.\(^67\) A hearing format established by the Department includes provisions regarding requests for a hearing, appearance at a hearing, the presiding officer, witnesses, evidence, briefs, and transcripts.\(^68\) The hearing requirement has never been a significant factor in the certification process. On only one occasion since 1974 has a hearing on a petition been requested.

A determination on a petition must be made by the Department

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\(^{62}\) See supra notes 58-59 and accompanying text.


\(^{64}\) Id.

\(^{65}\) Id.

\(^{66}\) Id.

\(^{67}\) Id.

\(^{68}\) Id.

\(^{69}\) Trade Act § 251(b), 19 U.S.C.A. § 2341(b) (1988).

not later than sixty days after the date on which the petition is filed.\textsuperscript{69} The Department makes its determination based on the record as soon as possible after all the material constituting the record is available.\textsuperscript{70} The record consists of the petition, any supporting information submitted by the petitioner, the report of the investigation regarding the petition, and any information developed during the investigation or in connection with any public hearing held on the petition.\textsuperscript{71}

The Department will either certify the petitioner eligible to apply for adjustment assistance or deny its petition.\textsuperscript{72} In either case, the Department will promptly give notice of its decision to the petitioner.\textsuperscript{73} A notice to the petitioner of a denial of its petition will specify the reasons upon which the denial is based.\textsuperscript{74} If a petition is denied, normally the petitioner will not be entitled to resubmit its petition within one year from the date of denial.\textsuperscript{75} This restriction is imposed administratively in order to enable the Department to process its usually large backlog of petitions in an orderly manner and to avoid the necessity of making repeated determinations on the same petition. However, the Department may waive the one-year limitation where unusual circumstances exist which justify resubmission within a shorter period.\textsuperscript{76}

A petitioner may withdraw a petition if a request for withdrawal is received by the Department before it makes a determination as to certification or denial of certification.\textsuperscript{77} A new petition may then be submitted at any time thereafter.\textsuperscript{78} Normally, the Department will notify a petitioner when a denial of its petition appears likely, in order to give the petitioner an opportunity to withdraw the petition. Withdrawal of a petition enables a petitioner to submit a new petition without regard to the one-year limitation\textsuperscript{79} if the prospects for certification improve.

\textsuperscript{69} Trade Act § 251(d), 19 U.S.C.A. § 2341(d) (1988).
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
3.3. Appealing a Certification Decision

A provision for judicial review of final determinations on petitions for certification was added to the Trade Act by the Customs Court Act of 1980. The purpose of the provision was to conform the Trade Act to other provisions of the Customs Court Act which give the United States Court of International Trade exclusive jurisdiction over any civil action commenced to review a final determination by the Department with respect to the eligibility of firms for adjustment assistance under the Trade Act. Under the provision, a firm or its representative, or any other interested domestic party aggrieved by a final determination by the Department on a petition for certification may, within sixty days after notice of the determination, commence a civil action in the Court of International Trade for review of the determination. The Court of International Trade, for good cause, may remand the case to the Department to take further evidence, in which case the Department may make new or modified findings of fact and may modify its previous action. The Court of International Trade may also affirm the action of the Department or set the action aside in whole or in part. The judgment of the Court of International Trade is subject to review by the United States Court of Appeals for the Federal Circuit. The judgment of the Court of Appeals for the Federal Circuit is subject to review by the Supreme Court of the United States upon certiorari.

3.4. Termination or Loss of Certification

The certification of a firm must be terminated if the Department determines that the firm no longer requires adjustment assistance. Notice of the termination must be published in the Federal Register.

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82 Trade Act § 284, 19 U.S.C.A. § 2395 (1988). The Department of Commerce has also established an appeal mechanism under which a petitioner may appeal within the Department from a denial of certification. The appeal must be made within sixty days of the date the petitioner receives notice of the denial of its petition. The Department's decision on the appeal is the final determination on the petition within the Department. In the absence of an appeal, the original determination is also the final determination on the petition. Notice of the final determination is provided to the petitioner and to any parties who have requested notice. See 49 Fed. Reg. 44,907 (1984) (to be codified at 15 C.F.R. § 320.28) (proposed Nov. 13, 1984).
83 Id.
84 Id.
85 Id.
86 Id.
87 Id.
89 Id.
The notice requirement presents a somewhat anomalous situation insofar as notice of the termination of a certification must be published although no publication requirement exists with respect to the issuance of the certification. However, notification of a certification is available to parties requesting it. 89 The Department has established an administrative procedure under which the certification of a firm may also be terminated if the Department determines that there was no adequate statutory basis for the firm to be certified in the first place, or where the firm's certification was based on inaccurate, incomplete, false, or misleading information submitted in support of its petition for certification. 90 The procedure has not resulted in any terminations. However, it is needed in order to avoid having to consider assistance to firms which should not be eligible to receive it. The procedure allows a firm to submit any evidence or information that may support the continuation of its certification before a decision is made by the Department regarding termination. 91 It also provides for appeal from a termination within the Department and to the United States Court of International Trade, similar to the appeal available in the case of a denial of certification. 92 Notice of a final determination within the Department to terminate the certification of a firm under this procedure is also to be published in the Federal Register. 93

A firm may fail to obtain certain benefits of its certification, regardless of whether its certification is terminated, if it fails to act in a timely manner with regard to the various requirements for receiving assistance. 94 The procedure under which most assistance is provided requires a firm to submit an acceptable adjustment proposal within two years from the date of its certification. 95 A firm must also comply with various other time limitations applicable to the type of assistance it is

89 See supra text accompanying note 64. See also supra note 82.
91 Id.
92 Id. Section 284 of the Trade Act provides for appeal to the Court of International Trade from a final determination of the Department under section 251, but not under section 252. Termination of certification because a firm no longer requires assistance results from a determination under section 252. The Department considers termination for other reasons to result from the modification of a determination under section 251.
requesting. 96

3.5. Special Legal Issues

3.5.1. What Is a Firm?

The Trade Act contains the following definition for purposes of adjustment assistance for firms:

[T]he term "firm" includes an individual proprietorship, partnership, joint venture, association, corporation (including a development corporation), business trust, cooperative, trustee in bankruptcy, and receiver under decree of any court. A firm, together with any predecessor or successor firm, or any affiliated firm controlled or substantially beneficially owned by substantially the same persons, may be considered a single firm where necessary to prevent unjustifiable benefits. 97

The Department has taken the position that the definition is intended to cover various types of legal entities but would not include a branch, division, or other unit of a business that is not itself a legally recognized entity. 98 A subsidiary could be considered a firm. 99 However, the application of the above definition could cause or allow the subsidiary’s parent company or other affiliates of the subsidiary to be included as part of the “firm” for purposes of determinations regarding certification, if such inclusion is determined necessary to prevent unjustifiable benefits. 100 A similar combining of firms could occur with respect to any affiliated firms under common control and to separate firms which at different times have conducted the same operation.

The combining of various firms to determine the “firm” for purposes of certification does not appear to be mandatory and appears to be permissible only where necessary to prevent unjustifiable benefits. Presumably, the unjustifiable benefits would consist of assistance received by a firm which it should not be eligible to receive in view of the combined strength of the firm and its commonly controlled affiliates. Combined firms will be considered a single firm in determining

98 Office of the General Counsel of the United States Department of Commerce, Memorandum to the Acting Deputy Assistant Secretary for Trade Adjustment Assistance (November 12, 1985) (regarding certification under title II, chapter 3 of the Trade Act of 1974) [hereinafter Counsel’s Memorandum of November 1985].
whether the criteria for certification exist. If the combined firms are certified, assistance could be available to all the combined firms or to any combination of them.

The Department policy has been to determine at the certification stage which firms will be considered the “firm” and to apply that determination consistently throughout the certification process and during any period in which the firm is receiving assistance. This consistency in some ways simplifies the administration of the adjustment assistance program. However, it does not appear to be required under the above definition, since combining firms to avoid unjustifiable benefits may be permitted at any time, regardless of which firms were combined at the time of certification. The view of the “firm” taken at the time of certification could be different from that taken at a later time in making certain other determinations, such as those pertaining to the available resources of a firm or the maximum amount of assistance available to it. Such a different view could be particularly appropriate where an affiliate of a certified firm was not in existence at the time of the certification of the firm.

3.5.2. Can Certification Be Transferred?

A certified firm may not transfer its certification. The criteria for certification are based on the effect of imports on employment, sales, and production of the firm being certified. These criteria and the entire certification process would be meaningless if a firm could be certified and then transfer its certification to a firm which might be unable to meet the criteria. However, questions frequently arise in regard to the status of a firm’s certification in the event that the firm or its operation is transferred. The resolution of these questions usually requires an examination of the particular transfer involved.

Where the ownership of a certified firm is acquired by an uncertified firm, the acquiring firm does not succeed to the certification of the acquired firm and the acquiring firm is not considered certified. However, the certification of the acquired firm continues and the acquired firm is still eligible for assistance unless the Department determines that, due to the changed circumstances, its certification should be terminated because it no longer requires assistance.

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101 The determinations pertaining to available resources and maximum amount of assistance are discussed infra Parts 4 and 6.

102 See supra note 59 and accompanying text.

103 Counsel’s Memorandum of November 1985, supra note 98.

104 Id.

105 Id.
tion could be made where, after the acquisition, sufficient assistance is available to either firm from sources other than under the adjustment assistance program. An uncertified firm which acquired either the ownership or the assets and operation of a certified firm must itself become certified in order to be eligible to receive assistance.

Where the ownership of a certified firm is acquired, or where the assets and operation of the certified firm are acquired and the operation is continued by the acquiring firm, the employment, sales, and production history for the certified firm relating to the operation acquired may be considered in determining whether the acquiring firm can be certified. If the acquiring firm is then certified, the former certification is usually terminated in order to preclude the existence of two certifications based in part on the same operating data. The Department will normally obtain an agreement to the termination by the firm originally certified before terminating its certification and before certifying the acquiring firm.

3.5.3. When Is a Firm a Producer?

Questions frequently arise as to whether articles like or directly competitive with imports are “produced” by a firm seeking certification. The Department takes the position that the term “produce” includes only activity that causes the transformation of products into new and different articles. The performance of a service on an existing article is not considered to be the production of the article in the absence of any such transformation. This position is in accord with that taken by the Department of Labor in its interpretation of the worker certification provisions of the Trade Act and which has been consistently upheld by the United States Court of International Trade.

Under the Department interpretation of the requirement that articles be “produced” by a petitioning firm, a manufacturer of an article is normally considered to be a producer. A firm engaged only in the sale, repair, or servicing of an article is not a producer. A firm engaged in assembling the parts of an article or in making modifications to it is not a producer if it does not undertake the normal risks involved in the ownership, manufacture, and sale of the article. If it does undertake

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106 Id.
107 Id.
108 Id.
these risks, the firm will be considered a producer if its activity results in a new and different article. The Department interpretation is intended to assure that the firm most instrumental in causing the original entry of a new and different article into the stream of commerce will be considered the producer of the article.\textsuperscript{111}

3.5.4. What Is a "Significant Number or Proportion" of the Workers and When Are They "Threatened to Become Totally or Partially Separated"?

The Trade Act does not set forth any standards for determining whether there has been a total or partial separation of "a significant number or proportion" of the workers in a firm. The legislative reports on the Trade Act recommended that this determination be left to pragmatic application\textsuperscript{112} while indicating that in most cases a significant number or proportion should be found where the total or partial separation is the equivalent of the lesser of five percent of the workers or fifty workers of a firm.\textsuperscript{113} The reports also indicated an intent to allow an individual farmer to meet the criterion in the case of a sole proprietorship farm.\textsuperscript{114} The question of what constitutes partial separation was purposely left to be established by regulation.\textsuperscript{115}

Under criteria established by the Department, a significant number or proportion of workers means the equivalent of a total separation of five percent of a firm's work force or fifty workers, whichever is less.\textsuperscript{116} In computing the equivalent, partially separated workers are considered in proportion to their percentage of separation.\textsuperscript{117} The criteria may be met by a single farmer in the case of a sole proprietorship agricultural operation.\textsuperscript{118} A totally separated worker means an employee who has been laid off or whose employment has been terminated because of a lack of work.\textsuperscript{119} Partial separation means a reduction in an

\textsuperscript{111} A qualification to the Department's normal interpretation results from the amendment to the Trade Act contained in the Omnibus Trade Act which provides that any firm which engages in the exploration or drilling for oil or natural gas shall be considered to be a firm producing oil or natural gas. See \textit{supra} note 50 and accompanying text.

\textsuperscript{112} H.R. REP. NO. 571, 93d Cong., 1st Sess. 61 (1973) [hereinafter \textit{HOUSE REPORT}].

\textsuperscript{113} S. REP. NO. 1298, 93d Cong., 2d Sess. 145 (1974) [hereinafter \textit{SENATE REPORT}].

\textsuperscript{114} Id.

\textsuperscript{115} Id.

\textsuperscript{116} Id.

\textsuperscript{117} Id.

\textsuperscript{118} Id.

\textsuperscript{119} Id.
employee's weekly hours of work or earnings to eighty percent or less of the employee's average weekly hours or earnings during the year preceding the reduction.  

Workers are considered to be threatened with total or partial separation if there is reasonable evidence that their total or partial separation is imminent. Threatened workers are considered to be totally or partially separated in the same manner as workers who have already been separated for purposes of determining the equivalent total separation of a firm's workers. The relationship between trends in a firm's sales, inventory, production, profits, and wages and trends in imports will be considered in determining whether a threat of worker separation exists. The inclusion of threatened workers in the criteria established under the Trade Act enables the Department to consider assistance to a firm at a time when the firm's adverse situation can still be remedied.

3.5.5. What Is a "Like or Directly Competitive" Article?

Perhaps the most controversial of the certification criteria required under the Trade Act is that which requires a determination that there has been an increase of imports of articles "like or directly competitive" with those produced by a firm seeking certification. Under the Department interpretation of this requirement the terms "like" and "directly competitive" are not synonymous. "Like" articles are those which are substantially identical in inherent or intrinsic characteristics. "Directly competitive" articles are those which are not necessarily substantially identical in inherent or intrinsic characteristics, but are substantially equivalent for commercial purposes; that is, they are adapted to the same function or use and are essentially interchangeable. This interpretation has resulted in some firms not being eligible for certification even though they have been adversely affected by import competition, and the firms most affected by the interpretation have been manufacturers of components of an article of the type being imported.

The Department interpretation of the terms "like" and "directly competitive" is based in part on the language used in the legislative

120 Id.
121 Id.
122 See supra note 59 and accompanying text.
124 Id.
125 Id.
reports on the Trade Act. The reports, when describing the use of the terms in connection with the "escape clause" provisions of the Trade Act, explained these terms as used in previous legislation and trade agreements and indicated that the continued use of previous interpretations was intended for purposes of the Trade Act. The report of the Senate Committee on Finance also referred to a decision by the United States Court of Appeals for the District of Columbia Circuit that concluded that imported finished articles are not like or directly competitive with domestic component parts thereof.

The decision referred to by the Senate committee in its report concerned a petition on behalf of a group of workers for a determination of eligibility for worker adjustment assistance under the Trade Expansion Act. The Trade Expansion Act required a finding of increased importation of articles "like or directly competitive" with those produced by a firm for whose workers a petition had been filed. The petition had been filed by the United Shoe Workers of America on behalf of workers of a firm engaged in the production of counters, a component of women's shoes. The petitioner claimed that increased imports of wholly assembled women's shoes had severely reduced domestic production of shoes and consequently diminished the demand for shoe counters. The Court of Appeals affirmed a decision by the United States District Court for the District of Columbia upholding a determination by the United States Tariff Commission to reject the petition. In affirming the decision, the Court of Appeals concluded that a firm producing a component of a finished article, which is adversely affected by increased imports of the finished article, is not a firm producing an article like or directly competitive with the imported finished article. In reaching this conclusion, the Court of Appeals relied upon its review of the legislative history of the Trade Expansion Act and on the historical development of the terms "like or directly competitive" as used in other legislation.

Subsequent Court of Appeals and Court of International Trade decisions interpreting the terms "like" and "directly competitive" under

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127 HOUSE REPORT, supra note 112, at 45; SENATE REPORT, supra note 113, at 121.
129 SENATE REPORT, supra note 113, at 122.
the Trade Act, as applied to producers of components of various articles, have consistently followed the Court of Appeals' interpretation in the United Shoe Workers of America case.\textsuperscript{133} Although all these decisions have involved interpretations regarding the worker certification provisions of the Trade Act, the Department adheres to these interpretations in its determinations regarding the certification of firms. Thus, the Department would find a failure to meet the requirements for certification in situations which involved the comparison of yarn to sweaters, air conditioner parts to air conditioners, and automobile parts to automobiles. The Department position results from the legislative reports on the Trade Act, the similarities in the worker and firm provisions of the Trade Act regarding the "like or directly competitive" requirement, the judicial interpretations of the requirement, and the apparent legislative intent that the terms be applied uniformly throughout the Trade Act.

In view of the interpretation given to the "like or directly competitive" requirement, it appears that, in the absence of legislative changes, producers of only components of a finished article of the type being imported will not be eligible for adjustment assistance. Provisions which would allow for the certification of producers of components have occasionally been included in early versions of bills to amend the Trade Act. However, until the enactment of the Omnibus Trade Act, these provisions were always eliminated from the bills in conference or at an earlier stage of the legislative process.\textsuperscript{134}

Not all questions arising in connection with the terms "like" and "directly competitive" concern producers of components. Problems can also be encountered when comparing imported articles to domestic finished products. In determining whether articles are substantially identical in inherent or intrinsic characteristics and therefore "like" articles, the Department will examine the physical attributes of the articles, such as their appearance, material, texture, and quality. If there is any substantial difference between the articles, they will not be considered "like" articles. Articles will be considered "directly competitive" regardless of whether they are "like" where the purpose for which they are used is identical. Thus, a machine used to perform a process on an


\textsuperscript{134} At this writing it is not certain that the provision in the Omnibus Trade Act which would allow for certification of firms which provide essential goods and services for articles with which increased imports are like or directly competitive will ever become effective. See supra note 51 and accompanying text.
article will not be considered either like or directly competitive with an imported article on which the process has already been completed. However, the machine will be considered like or at least directly competitive with an imported machine that performs the same function.

The Trade Act also contains a provision which expands the normal "directly competitive" criteria. Under the provision, imported articles and domestic articles at different stages of processing are considered directly competitive if the importation of the imported article has an economic effect on producers of the domestic article which is comparable to the effect importation of articles in the same stage of processing as the domestic article would have on the domestic producers. An almost identical provision was contained in the Trade Expansion Act.

The stages of processing criteria were included in the Trade Expansion Act in reaction to the position which had been taken by the United States Tariff Commission. The Commission had strictly interpreted the term "like or directly competitive" under previous legislation in an investigation concerning the importing of cherries. Statements contained in the legislative reports on the Trade Expansion Act made clear that the intent of the specific stages of processing provision was to modify the normal "directly competitive" criteria as they pertain to articles at different stages of processing. The reports contained illustrations of the intended operation of the provision, explaining that zinc oxide would be considered zinc ore in a later stage of processing and that a raw cherry would be a glacé cherry in an earlier stage of processing.

The Trade Act appears to have simply carried over the stages of processing provision from the Trade Expansion Act. The legislative reports on the Trade Act do not provide any further explanation of the provision. Therefore, the Department interprets the provision in accordance with its indicated intent under the Trade Expansion Act. The Department has not had occasion to consider the stages of processing criteria other than in situations other than those involving petitions from agricultural firms.

135 Trade Act § 601(5), 19 U.S.C.A. § 2481(5) (1988). An unprocessed article is considered for purposes of the provision to be at an earlier stage of processing than a processed article.
3.5.6. What Is an "Import" and What Is an "Increase" in Imports?

The term "import" is not defined in the Trade Act or in the legislative reports on the Trade Act. In determining whether increases of imports of an article have occurred, the Department refers to the General Headnotes and Rules of Interpretation set forth in the Tariff Schedules of the United States and to information on imports compiled by the United States Customs Service. On this basis the Department considers imports to consist of articles which enter into the customs territory of the United States from outside the customs territory. The term "enter" refers to articles entering, or being withdrawn from warehouses, for consumption in the customs territory. The customs territory consists of the fifty states, the District of Columbia, and Puerto Rico.

The Department also regards the requirement of increases of imports to mean a total increase of imports into the entire customs territory. Therefore, a firm will not be certified on the basis of an increase of imports into a limited geographic area. Because import figures for specific areas are not available, there would be no workable system for certifying firms on a limited area basis. This can result in a firm being adversely affected by imports into a particular locality but unable to be certified because of the absence of an increase of imports into the entire customs territory. However, the Department rarely encounters situations having this effect.

The requirement of increases of imports is similar to that contained in the provisions of the Trade Act pertaining to adjustment assistance for workers and to the former provisions pertaining to assistance for communities. The requirement is met when the increase is either absolute or relative to domestic production. Increases of imports relative to domestic production, but not absolute increases, are typically found when imports and domestic production are both declining but imports are declining less rapidly than domestic production. In situations of this type, the increases of imports requirement for certification is met even though there is not an absolute increase. A proposed

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requirement which would have allowed for certification only on the basis of an absolute increase of imports was eliminated by the conference committee considering the Trade Act legislation.\textsuperscript{143}

3.5.7. When Do Imports "Contribute Importantly" to Separation of Workers or Declines in Sales or Production?

The Trade Act, in setting forth the requirement for certification that increases of imports contribute importantly to a firm's worker separation and decline in sales or production, provides that the term "contributed importantly" means a cause which is important but not necessarily more important than any other cause.\textsuperscript{144} Under Department regulations, imports may be considered to have contributed importantly to worker separation or declines in sales or production even where the imports were not the major contributing factor.\textsuperscript{145} Imports will not be considered to have contributed importantly if other factors were so dominant that the separation or declines would have been essentially the same irrespective of the influence of imports.\textsuperscript{146}

The Department regulations reflect the apparent intended application of the "contributed importantly" requirement as indicated in the legislative reports on the Trade Act. The reports, in discussing the requirement as it was intended to apply to the certification of workers or firms sections of the Trade Act, distinguished the "contributed importantly" standard from the "substantial cause" standard applicable to the import relief sections.\textsuperscript{147} The import relief sections provide for certain types of relief where imports are determined to be a substantial cause of injury and define "substantial cause" to mean a cause which is important and not less than any other cause.\textsuperscript{148} The reports explained that the "contributed importantly" standard is an easier one to meet than the "substantial cause" standard in that a cause may have contributed importantly even though it contributed less than another single cause.\textsuperscript{149} The reports also noted that the "contributed importantly" standard represents a departure from the standard under the Trade Expansion Act, which required increased imports to be the major factor

\textsuperscript{144} Trade Act § 251(c), 19 U.S.C.A. § 2341(c) (1988).
\textsuperscript{146} Id.
\textsuperscript{147} See House Report, supra note 112, at 53, 54, 61; Senate Report, supra note 113, at 133, 145.
\textsuperscript{148} Id.
\textsuperscript{149} See House Report, supra note 112, at 53-54; Senate Report, supra note 113, at 133, 145.
in causing injury to firms or unemployment to workers. However, the reports also made clear that a cause must be more than \textit{de minimis} to have contributed importantly and that imports will not have contributed importantly to worker separation or declines in sales or production which would have resulted from other causes alone.

The Department, in attempting to adhere to the apparent Congressional intent regarding the "contributed importantly" standard, considers the standard to be met in situations where it can be demonstrated that increased imports were a reasonably important factor in bringing about the worker separation and decline in sales or production experienced by a petitioning firm. In many of these situations, the more rigid standards of the Trade Expansion Act would not be met since imports are not always the major factor causing the adverse condition of the firm. Under the present standard as it has been applied, a firm able to show that increased imports have in any way contributed to its reduced employment and sales or production is likely to be certified. However, certification will be denied where it is obvious that the firm's condition would have resulted regardless of the effect of imports.

3.5.8. \textit{What Is the Effect of Imports by the Petitioner Itself?}

A recurring problem encountered by the Department in the certification process involves firms which have reduced their employment and production while increasing their own imports. The Department policy regarding these firms is that a firm will not be certified where it is seeking adjustment assistance to redress an injury it has caused to itself. However, the application of this policy is extremely difficult since certification may not be denied a firm which meets the basic criteria for certification. The fact that a petitioning firm has increased its own imports and reduced its employment and production does not necessarily prevent it from meeting these criteria. Denial of certification because of a firm's own imports must be based on an inability to determine that increases of imports contributed importantly to the firm's reductions.


\textsuperscript{151} See House Report, supra note 112, at 54; Senate Report, supra note 113, at 133.

\textsuperscript{152} Trade Act § 251(c), 19 U.S.C.A. § 2341(c) (1988).

\textsuperscript{153} Office of the General Counsel of the United States Department of Commerce, Memorandum to the Deputy Assistant Secretary for Trade Adjustment Assistance (January 29, 1987) (regarding certification policy for firms which import articles) \textit{hereinafter Counsel's Memorandum of January 1987}.
The Department will not deny certification on the basis of a firm’s importing activity where the increase of imports and the reduction of employment and production by the firm were reasonably necessary responses to market conditions resulting from imports by other firms. Thus, if because of increased imports a firm is no longer economically able to continue its production, the firm will not be denied certification solely for the reason that portions of its inventory are being imported. However, all reasonable economic alternatives available to a firm may be considered in determining whether increased imports contributed importantly to its worker separations and production decline. Such alternatives include those which would not have resulted in the firm increasing its imports and reducing its employment and production. Certification may be denied where it is determined that the choice made by a firm among these alternatives was the dominant factor in bringing about the firm’s reduced employment and production and that increased imports generally were of only minimal influence. A firm which has reduced its employment and production will not be able to attribute the reductions to imports generally in the absence of evidence that imports were in fact adversely affecting the firm’s former operation.

3.5.9. Can Non-Sales Revenues Be Considered in Analyzing a Firm’s Eligibility?

On several occasions the question has arisen as to whether revenue other than from sales should be considered in determining whether a firm may be certified. The total revenue of a firm may be derived from various sources such as income from services, rents, royalties, and the disposal of certain capital assets. The question is usually presented in connection with firms which have not had a decline in total revenue but have experienced a decrease in sales or production. These firms may be petitioning for certification in part on the basis of their decreased sales or production even though their overall condition is improving.

The Department has taken the position that other revenues should not be considered in determining whether a firm meets the requirement of decreased sales or production. For purposes of this requirement

154 Id.
155 Id.
156 Id.
157 Id.
158 Office of the General Counsel of the United States Department of Commerce, Memorandum to the Deputy Assistant Secretary for Trade Adjustment Assistance (May 14, 1986) (regarding certification requirement of decreasing sales or production)
the term "sales" is considered to mean sales of inventory items by a petitioning firm, and not other revenues of the firm, and the term "production" is considered to mean the production of articles for sale by a petitioning firm.\textsuperscript{169}

The Department regards its position to be consistent with the overall intent of Title II of the Trade Act, which is to provide relief from injury caused by import competition to industries, workers, and firms.\textsuperscript{160} A firm has sustained injury when its sales of inventory items or its production of articles for inventory have decreased because of increases of imports of articles like or directly competitive with those produced by the firm. The Department considers this injury to be the type targeted by the adjustment assistance provisions of the Trade Act, regardless of other revenues the firm may have received.\textsuperscript{161} Moreover, in many situations the other revenues of a firm will not be a source of relief to the adversely affected workers of the firm who were engaged in sales or production. The determinations regarding sales or production of a firm are therefore made without regard to the other revenues of the firm. The Department does not regard the certification process as a complete financial analysis of a firm, but only as a means of designating potential applicants for adjustment assistance on the basis of the specific criteria set forth in the Trade Act.

The requirement of decreased sales or production was modified in 1986 to provide that it can be met on the basis of a decrease in sales or production, during the most recent twelve-month period, of an article that accounted for 25% of the total sales or production of a firm during the previous twelve-month period.\textsuperscript{162} Previously, the requirement could be met only on the basis of total sales or production. The new criteria thereby allow for certification of a firm on the basis of a decrease in sales or production of a significant product line of the firm. However, the Department does not consider the new criteria to result in a revised concept of sales or production. Therefore, other revenues of a firm are also not considered in determinations under the new criteria.\textsuperscript{163}

The fact that a firm has experienced a decrease in sales or production will not in itself enable the firm to be certified. A firm must also establish the worker separation and the contribution by imports to its

\textsuperscript{159} See id.
\textsuperscript{161} See Counsel's Memorandum of May 1986, supra note 158.
\textsuperscript{163} See Counsel's Memorandum of May 1986, supra note 158.
worker separation and decline in sales or production, as required under the Trade Act.\textsuperscript{164} If, because of a firm's other revenues, there is not a significant real or threatened separation of workers of the firm, the firm cannot be certified. However, where the required worker separation, decline in sales or production, and contribution by imports is shown, other revenues of the firm will not preclude its certification.\textsuperscript{165}

The certification of a firm will not result in other revenues of the firm being disregarded for other purposes. Other revenues of a certified firm may be considered in determining whether the firm's certification should continue. The certification of a firm must be terminated upon a determination that the firm no longer requires adjustment assistance.\textsuperscript{166} If such a determination is made because of other revenues of a firm, the firm is not eligible to receive adjustment assistance after the required termination. The total revenues of a firm are also analyzed during the review of the firm's adjustment proposal and in determining the type and amount of assistance the firm may receive.\textsuperscript{167}

3.5.10. Can the Federal Government Continue to Certify Firms When There Are No Funds Available for Technical or Financial Assistance?

Severe limitations on funds available for firm adjustment assistance in recent years have raised questions as to whether the Department should continue to certify firms. The funds allocated for the Trade Adjustment Assistance program have generally not been sufficient to provide assistance to all of the firms certified. However, the Trade Act does not condition a firm's right to petition for certification on the basis of whether funds are available for assistance. Therefore, if a petitioning firm is eligible to be certified, the Department will certify the firm and enable it to request assistance even when the funds needed to provide the assistance are not available. If the firm submits an acceptable adjustment proposal within two years of being certified, it may remain eligible to receive assistance at the time funds become available.\textsuperscript{168} However, if funds are not available even for assistance in preparing petitions for certification or developing adjustment proposals,\textsuperscript{169} a firm must submit these without receiving assistance.

The amount of funds needed to assist certified firms is never cer-
tain since the type and amount of assistance provided varies with the circumstances of each firm. The amount of funds that will become available through future appropriations is also uncertain. A firm which does not receive assistance at a particular time because of the unavailability of necessary funds could be assisted at a later time. Assistance provided to many firms requires only relatively small amounts of funds which usually are available or become available within a reasonable time. Amounts required to assist other firms will often exceed anticipated available funds in which case only portions of the needed assistance can be provided. If the type of assistance needed can be arranged into a practicable chronological sequence, the early stages may be provided initially and subsequent ones provided if additional funds later become available.

3.5.11. Can a Firm be Recertified?

The Trade Act provides that a certified firm may, at any time within two years after the date of its certification, file an application for adjustment assistance and that the application shall include a proposal for the economic adjustment of the firm.\(^\text{170}\) These provisions of the Trade Act have raised questions of interpretation since adjustment assistance can be provided to a firm for assistance in preparing its petition for certification and in developing its adjustment proposal.\(^\text{171}\) Therefore, it does not appear that the provisions are intended to apply to all types of adjustment assistance.

Because the above provisions pertain only to certified firms, the Department does not apply them to applications for assistance in preparing petitions for certification, considered to be permitted at any time. The requirement that an application include an adjustment proposal is not applied to applications for assistance in preparing adjustment proposals since any request by a firm for this type of assistance would of necessity be made before the firm would submit its adjustment proposal. With these exceptions, the Department requires a firm seeking adjustment assistance to request assistance and submit its adjustment proposal within two years after its certification.\(^\text{172}\)

The failure by a certified firm to take the necessary action within the required two-year period can result in its losing the benefits of its certification.\(^\text{173}\) A question thus arises as to whether the firm can obtain

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\(^{172}\) See infra notes 200-221 and accompanying text.

\(^{173}\) See supra notes 94-96 and accompanying text.
a new certification and thereby begin a new two-year period in which to request assistance and submit its adjustment proposal. An additional question follows as to whether the firm could again meet the criteria for certification. These questions may pertain also to firms which have received assistance in the past and are seeking further assistance not contemplated in their previous adjustment proposals.

The Trade Act contains no restriction against a firm being certified more than once. Therefore, the fact that a firm has been certified does not preclude it from submitting a new petition for certification. The determination by the Department on the new petition is made on the basis of the firm's condition at the time of the new petition. In some cases, a firm will no longer meet the requirements for certification. If the requirements are met again, the firm can obtain a new certification and an additional two-year period.

3.6. Program Statistics

From the time the adjustment assistance program began operating under the Trade Act in 1975 through March 31, 1989, 4,670 petitions for certification were filed. Three thousand one hundred seven of the petitioning firms were certified. Nine hundred seventy-three petitions were denied or rejected. Five hundred sixty-two petitions were withdrawn. Decisions by the Department were pending on 28 petitions.

During the period in which the program operated under the Trade Expansion Act, comparatively few firms were certified or received any type of adjustment assistance.\textsuperscript{174} The increase in certification activity and adjustment assistance under the Trade Act has resulted from liberalized certification criteria,\textsuperscript{175} the efforts of the TAACs,\textsuperscript{176} and improved methods of delivering assistance.

4. Adjustment Proposals

4.1. Basic Requirements

After a firm seeking adjustment assistance is certified, it is required to submit an acceptable adjustment proposal to the Department. An adjustment proposal is a plan for the firm's economic adjustment which explains both the action the firm intends to take to adjust to the impact of imports and the type of assistance it is seeking. The purpose of an adjustment proposal is to focus the attention of the firm and the

\textsuperscript{174} See supra Part 2.2.
\textsuperscript{175} See supra Part 2.3.
\textsuperscript{176} The operation of the TAACs is described infra in Part 5.2.
Department on what the firm intends to do and why it should be considered capable of using adjustment assistance successfully. The adjustment proposal must be submitted within two years after the date of the firm’s certification\(^{177}\) and must contain information sufficient for the Department to determine that:

1. the proposal is reasonably calculated to materially contribute to the economic adjustment of the firm;
2. the proposal gives adequate consideration to the interests of the firm’s workers; and
3. the proposal demonstrates that the firm will make all reasonable efforts to use its own resources for economic development.\(^{178}\)

These requirements are virtually the same as those that existed under the Trade Expansion Act.\(^{179}\) A determination as to whether the adjustment proposal meets these requirements is made not later than sixty days after the proposal is submitted.\(^{180}\)

### 4.2. Preparation of Proposals

An acceptable adjustment proposal for a firm usually cannot be prepared unless an analysis is first made of the firm’s strengths, weaknesses, resources, and problems. The Department refers to this analysis as a “diagnostic survey” of the firm and normally considers it to be the first step in the preparation of an adjustment proposal.\(^{181}\) A diagnostic survey examines the difficulties that a firm must overcome in order to survive and evaluates the firm’s ability to overcome them. The survey therefore serves as the basis for the adjustment strategy contained in the firm’s adjustment proposal. Assistance in the preparation of a firm’s diagnostic survey and in the development of its adjustment proposal is available from the Department or from a TAAC.

An adjustment proposal can normally be prepared in a concise format and need not to contain all of the details regarding its implementation. However, it should contain information sufficient to satisfy the basic requirements for a proposal\(^{182}\) and to demonstrate its feasibility. Therefore certain information regarding the firm and the industry in which it is engaged must be included in the proposal.

\(^{177}\) See supra note 170 and accompanying text.

\(^{178}\) See supra note 178 and accompanying text.
A firm's adjustment proposal should set forth the basic facts regarding the firm, including information pertaining to the firm's form of organization, present status, owners, officers, management, products, and facilities. It should also contain the firm's financial data for the past several years, an analysis of the firm's debt structure, and a summary of the strengths, weaknesses, and problems of the firm as outlined in the diagnostic survey of the firm. Information regarding the firm's industry should describe the types of firms in the industry, the nature of the markets served by the industry and the trends in these markets, the extent to which the industry has been injured by imports, the manufacturing processes and technology used in the industry, the make-up of the industry's labor force, recent trends in the industry's manufacturing and energy costs, and the characteristics of successful firms in the industry.\textsuperscript{183}

An adjustment proposal should describe a firm's approach to capitalizing on its strengths, mitigating its weaknesses, and overcoming its problems, particularly that of import competition. The description should explain how the firm's approach takes into consideration the interests of the workers of the firm, and the extent to which the firm plans to use its own resources to carry out its strategy. The description should then set forth the specific actions proposed to implement the firm's approach, the anticipated timing of these actions, and the type, amount, and intended use of any adjustment assistance being requested.\textsuperscript{184}

After an adjustment proposal for a firm has been prepared, it is submitted to the Department for review. The diagnostic survey of the firm is also submitted with the proposal. The proposal can be submitted directly by the firm or through a TAAC.

4.3. Review and Approval of Proposals

The review of a firm's adjustment proposal by the Department is normally accomplished within two weeks after the proposal is submitted. The proposal is reviewed by representatives of various divisions of the Department concerned with trade adjustment assistance matters. On the basis of this review, a decision is made by the Department as to whether the proposal may be approved.

A firm's adjustment proposal is approved if the Department deter-
mines that the proposal meets the requirements of the Trade Act.\textsuperscript{185} If it is determined that additional supporting information is needed in order for the proposal to meet these requirements, the Department informs the firm of the information required. A final decision on the proposal is then deferred for two weeks from the time the firm is so informed. During this two-week period, the firm may submit any additional information it desires the Department to consider. The Department will not approve a proposal which it determines does not meet the necessary requirements. The firm is promptly notified of the Department's decision on the proposal.\textsuperscript{186}

Where a firm's adjustment proposal has been found unacceptable, the Department allows the firm thirty days to request a reconsideration of the proposal. During this period the firm may submit information for the purpose of amplification or clarification of its proposal. The Department will then reconsider the proposal with the additional information submitted and promptly notify the firm of the result of the reconsideration. However, if the firm submits a new proposal it must be received by the Department within two years of the firm's certification date.\textsuperscript{187} If this period has expired, the firm must be recertified in order to be eligible to have the Department consider a new proposal.

If a firm's adjustment proposal is approved, the firm is eligible to receive adjustment assistance consistent with the proposal during the period in which the proposal is being implemented.\textsuperscript{188} However, general approval of the proposal does not constitute approval of the specific assistance requested in the proposal. Normally, the Department requires additional information from the firm to support its request for assistance.\textsuperscript{189} This additional information, while relating to the specific assistance being requested, is not necessary to reach a decision on the firm's proposal. Thus, the firm is not required to provide this information until it is certain that its adjustment proposal is acceptable, but the information must normally be submitted within six months after approval of the proposal.\textsuperscript{190} The Department decides whether the assistance may be approved within sixty days after this information is submitted.\textsuperscript{191}

\begin{thebibliography}{1}
\bibitem{185} See \textit{supra} note 178 and accompanying text.
\bibitem{187} See \textit{supra} note 177 and accompanying text.
\bibitem{189} \textit{Id.}
\bibitem{190} \textit{Id.}
\bibitem{191} \textit{Id.}
\end{thebibliography}
4.4. Special Legal Issues

4.4.1. When Is an Adjustment Proposal "Reasonably Calculated to Materially Contribute to the Economic Adjustment" of a Firm?

In order for a firm’s adjustment proposal to be approved by the Department, the firm must demonstrate that the action contemplated by the proposal will be a constructive aid to the firm in establishing a competitive position in the industry in which the firm is engaged, or in a different industry. The proposal should explain how the firm will be capable of overcoming its difficulties and adjusting to the impact of foreign and domestic competition. If, for example, the firm’s sales and profits have decreased because of lower priced imports of competitive articles, the firm’s proposal should describe the changes in its sales strategy, product lines, or operating methods intended to restore the firm to a more profitable status. The proposal should take into consideration the nature of the competition, the likelihood that the competition will increase or decrease, and the firm’s ability to survive in its anticipated competitive environment. The firm’s financial position, marketing approach, management capability, facilities and equipment, product lines, price structure, and operating costs are all factors which should be considered in analyzing the firm’s prospects for arriving at a competitive position.

The Department makes its determination as to whether a firm’s adjustment proposal is reasonably calculated to contribute to the economic adjustment of the firm on the basis of the proposal’s treatment of the various factors bearing upon the firm’s successful adjustment. A thorough consideration of these factors is necessary to any proposal containing a strategy likely to succeed. The proposal will be considered adequate in this respect if the Department is reasonably convinced that the plan of action proposed by the firm is appropriate in view of the firm’s overall condition and the economic climate in which the plan is intended to be carried out.

4.4.2. What Is "Adequate Consideration to the Interests of the Workers"?

An acceptable adjustment proposal for a firm must give adequate consideration to the workers of the firm who are adversely affected as the result of the real or threatened decline in sales or production of the firm...
firm. The Department prefers that adjustment proposals provide for the rehiring of workers who have been laid off. Where this is not possible, a firm must still consider the interests of these workers and possibly assist them in finding other employment. The firm cannot simply ignore these workers. If a firm is going into a new line of business, consideration should be given to the possibility of retraining existing workers of the firm for positions expected to become available.

Where a firm's adjustment proposal provides for all of the workers of the firm either to maintain their employment or be offered comparable new employment, the Department normally considers the proposal to give adequate consideration to the firm's workers. In situations where not all of the workers are being offered comparable employment, the proposal should describe efforts directed toward assisting workers in securing other employment. In these situations the proposal may include relocation aid, training, employment counseling, and other forms of available assistance.

The Department's determination regarding adequate consideration to the interests of the workers of a firm is based on the extent to which the firm makes use of available opportunities to assist its adversely affected workers. Efforts by a firm to find new employment for laid off workers and to assist workers in obtaining available benefits are given considerable weight by the Department in evaluating a proposal. Normally, a firm's proposal will not be approved where the workers of the firm have been adversely affected as a result of increased imports by the firm itself, unless the proposal provides for the rehiring or new employment of a significant number of laid-off workers, as determined by the Department.

4.4.3. When Has a Firm Made "Reasonable Efforts to Use Its Own Resources"?

In order for a firm's adjustment proposal to satisfy the requirement concerning utilization of the firm's resources, the proposal must demonstrate that the firm will make maximum use of its resources and that any assistance being requested is not otherwise available to the firm. The Department considers this requirement to mean that all resources available to the firm are to be invested in the firm, or otherwise used to achieve the objectives of the proposal, and that no re-

193 Id. at § 320.53(a)(2).
194 Id. at § 320.53(d).
195 Id.
196 Id.
197 Id. at § 320.53(c).
sources are to be withdrawn or replaced because of the adjustment assistance being requested. Under certain circumstances, the Department will consider the firm’s resources to extend to the resources of related firms or, in the case of a closely held corporation, the personal resources of the firm’s major shareholders. 198

An adjustment proposal should demonstrate the manner in which a firm is using or planning to use its own resources in carrying out the plan contemplated by the proposal. The Department expects a firm to make all reasonably possible uses of its own resources in implementing its proposal. In addition to resources immediately available, a firm should examine the possibilities of additional investment or financing and of limitations on salaries, dividends, and other distributions of the firm’s assets.

The Department considers many factors relating to the availability of funds in arriving at its determination regarding a firm’s use of resources. These factors include the firm’s annual sales, retained earnings, working capital, operating expenses, cash flow, and distributions of earnings. Close attention is also given to payments made or received from parent companies and subsidiaries of the firm and the extent to which it appears that additional capital infusion is warranted. The amount of adjustment assistance provided to a firm by the Department is determined in part on the basis of what the firm needs to supplement its available resources. Typically, firms having substantial available resources will not be considered for assistance. 199

4.4.4. How Should the Two-Year Rule Be Applied to Cut Off Applications for Assistance?

The Trade Act provides that a certified firm may at any time within two years after the date of its certification file an application for adjustment assistance, and that the application should include a proposal for the economic adjustment of the firm. 200 Adjustment assistance may mean technical assistance consisting of one or more of the following:
1. assistance to a firm in preparing its petition for certification of eligibility to apply for adjustment assistance;
2. assistance to a certified firm in developing a proposal for its economic adjustment; and

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198 Id.
199 Factors considered by the Department relating to a firm’s use of its own resources are summarized in the TAA GUIDELINES, supra note 183.
200 See supra note 170 and accompanying text.
3. assistance to a certified firm in the implementation of a proposal for its economic adjustment.201

The Department may approve a firm's application only if the Department makes the required determination regarding the firm's adjustment proposal.202 A determination must be made not later than sixty days after an application is filed.203

The following problems have arisen in interpreting the provisions of the Trade Act regarding submission and approval of applications and adjustment proposals:

1. A firm must be certified under the Trade Act in order to apply for adjustment assistance.204 Therefore, a question exists as to how technical assistance can be provided to assist a firm in preparing its petition for certification.205

2. An application for adjustment assistance must include a proposal for the economic adjustment of the firm applying for assistance.206 Therefore, a question is raised as to how technical assistance can be provided to assist a firm in developing its proposal.207

3. There is uncertainty as to the amount of information a firm applying for adjustment assistance is required to submit within two years after the date of its certification.208

4. There is uncertainty as to what determination must be made within sixty days after an application is filed.209

Concerning the two-year and sixty-day requirements, the legislative reports on the Trade Act contain the following statements:

1. "Under the Committee bill, the Secretary of Commerce would be required to reach his decision on a firm's adjustment assistance proposal no later than sixty days after receiving the firm's application."210

2. "The Secretary of Commerce is required to reach his decision on a firm's adjustment assistance proposal no later than sixty days after receiving the firm's application."211

3. "It is not intended that the 2-year time limit would preclude a firm

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202 See supra note 180 and accompanying text.
203 Id.
210 Senate Report, supra note 113, at 28.
from revising or amending its initial proposal after the expiration of the 2-year period.\footnote{212}

The Department has developed a procedure which deals with the problems described above and which is intended to provide a consistent interpretation of the Trade Act and its legislative history. This procedure has been incorporated into the regulations for the adjustment assistance program and the Department believes that it provides for assistance in a manner most beneficial to the firms needing assistance while following Congressional intent. The procedure can be summarized as follows:

\begin{itemize}
  \item The Department will provide technical assistance to a firm to assist the firm in preparing its petition for certification.\footnote{213}
  \item After a firm is certified, the Department will provide technical assistance to assist the firm in developing its adjustment proposal provided the proposal can be submitted within two years after the date of the firm's certification.\footnote{214}
  \item An acceptable adjustment proposal must be submitted by a firm within two years after the date of the firm's certification.\footnote{215} Minor amendments to an approved adjustment proposal may be permitted after the expiration of the two-year period if determined reasonable and necessary by the Department.
  \item A determination regarding a firm's adjustment proposal is made by the Department not later than sixty days after the proposal is submitted, and the firm is promptly notified of the determination.\footnote{216}
  \item Within six months after a firm's adjustment proposal has been approved, or at such later time as the Department determines to be appropriate, the firm must submit any further documentation necessary in connection with its request for adjustment assistance consistent with its approved proposal.\footnote{217}
  \item A decision by the Department on a firm's request for adjustment assistance is made within sixty days after submission of the necessary documentation by the firm.\footnote{218}
\end{itemize}

\footnotesize{\textsuperscript{212} House Report, \textit{supra} note 112, at 61; Senate Report, \textit{supra} note 113, at 146.  
\textsuperscript{214} Id.  
\textsuperscript{218} Id.}
department to provide certain types of assistance upon receipt by the TAAC of the required documentation.

The above procedure places primary emphasis on a firm’s adjustment proposal and requires that the proposal be approved before any further adjustment assistance is considered. The procedure was instituted because experience in the adjustment assistance program had made it obvious that the development of a proposal must precede the detailed development of a specific adjustment assistance request. If an acceptable proposal cannot be developed, there is no basis for requiring a firm to prepare and submit the additional documentation that is required for further assistance. Portions of this documentation pertain only to the specific assistance being requested and are not needed for the Department to make its determination regarding a firm’s proposal. Moreover, until a proposal has been approved, it is not possible to determine all of the other information that will be needed to support a firm’s request for assistance.

Therefore, because of the necessity of requiring a firm and the Department to concentrate initially on the proposal, the two-year and sixty-day requirements of the Trade Act are applied to the proposal. To expedite the specific assistance needed to implement an approved proposal, the Department by regulation places limits on the time for submission of additional documentation relating to the assistance and on the time allowed for a decision by the Department on the assistance.

4.4.5. Is It Acceptable for a Firm’s Adjustment Proposal to Include Importing by the Firm?

The first stage at which the Department encounters the issue of adjustment assistance to firms which import articles is during the certification process. In reaching its determination on a petition for certification the Department considers the petitioning firm’s entire situation, and importing activity does not necessarily preclude certification of the firm. Similarly, at the adjustment proposal stage, importing activity included in a proposal does not in itself preclude approval of the proposal. A proposal will be approved if the Department makes the determi-

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219 See supra text accompanying notes 189-90.
222 See supra Part 3.5.8.
223 Id.
nations required for approval by the Trade Act.\textsuperscript{224}

The requirements for approval of adjustment proposals which include importing are the same as those for other proposals.\textsuperscript{225} The determinations by the Department regarding the economic adjustment of a firm\textsuperscript{226} and the use of a firm's resources\textsuperscript{227} normally do not involve any special considerations in the case of a proposal which contemplates importing. However, importing activity included in a firm's proposal raises special concerns for the Department as to whether the proposal gives adequate consideration to the interests of the workers of the firm.\textsuperscript{228} These concerns are somewhat similar to those addressed in regard to past importing by a firm at the time of the firm's petition for certification.\textsuperscript{229}

Where a firm's adjustment proposal contemplates an increase in the firm's imports and a resultant lessening of its production, the Department takes particular notice of the probable effect on the firm's workers of the proposed method of operation. In a situation of this type, the proposal should contain a clear explanation of the reasons for the firm's election to import rather than produce. This explanation is of considerable importance where a firm intends to import articles of a type for which it already has production capability.

Proposed importing activity will not normally preclude approval of a firm's adjustment proposal where the firm can demonstrate in the proposal that its employment will not decrease as a result of the activity and that any of its workers adversely affected by the activity will be offered employment equal to or more favorable than their previous employment. Where any of these workers are not being offered such comparable employment, the Department will examine the alternatives available to the firm, giving consideration to factors similar to those considered in the case of an importing firm petitioning for certification.\textsuperscript{230} The Department will also examine all other circumstances bearing on whether the firm's proposal gives adequate consideration to the interests of the workers of the firm.\textsuperscript{231} The Department will then base its determination on the reasonableness of the firm's proposed course of action and the efforts the firm intends to make on behalf of its workers.

\textsuperscript{224} See \textit{supra} text accompanying note 185.
\textsuperscript{225} See \textit{supra} note 178 and accompanying text.
\textsuperscript{226} See \textit{supra} Part 4.4.1.
\textsuperscript{227} See \textit{supra} Part 4.4.3.
\textsuperscript{228} See \textit{supra} Part 4.4.2.
\textsuperscript{229} See \textit{supra} Part 3.5.8.
\textsuperscript{230} Id.
\textsuperscript{231} See \textit{supra} Part 4.4.2.
4.5. Program Statistics

During the early years of operation of the adjustment assistance program under the Trade Act, adjustment proposals of firms were normally approved only as specific technical or financial assistance to implement the proposal was approved. From 1975 to the time of the transfer of the program from EDA to ITA in 1981, over 400 adjustment proposals were approved by the Department. Technical assistance was provided in the development of about half of these proposals. Most of this assistance was provided by the TAACs, which began operating in 1978.

Since the transfer of the program to ITA in 1981, over 900 adjustment proposals have been submitted. Technical assistance has been provided by the TAACs in the development of almost all of these proposals. Approximately 800 of these proposals have been approved.

5. Technical Assistance for Firms

5.1. Types and Purposes of Technical Assistance

The following three categories of technical assistance are available to a firm under the Adjustment Assistance program:
1. assistance in preparing the firm's petition for certification of eligibility under the program;
2. assistance in developing the firm's adjustment proposal; and
3. assistance in the implementation of the firm's adjustment proposal.

Technical assistance may be provided by the Department through existing agencies, private individuals, firms or institutions, or by grants to intermediary organizations. Usually the assistance is provided through the TAACs, operating under cooperative agreements with the Department.

The Department will provide any firm with assistance in preparing its petition for certification if the firm has a reasonable likelihood of becoming certified as eligible under the program. This assistance is normally obtained from a TAAC, and the firm is not required to pay any of the costs involved in providing it.

TAACs are familiar with the information needed by the Depart-

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232 See supra Part 2.5.
233 See supra Part 2.3.
234 See supra Part 2.5.
235 See supra Part 2.5.
238 See supra Part 2.3; see also infra note 284 and accompanying text.
ment regarding a petition and, in many situations, can expedite the petitioning process. When a petition is completed, it is submitted by the TAAC or the firm to the Department. Firms not in need of assistance in preparing their petitions, or not wishing to deal with a TAAC, may contact the Department directly to obtain the necessary information, forms, and assistance required for the filing of a petition.

After a firm is certified, it may receive assistance in developing its adjustment proposal. The assistance usually includes the preparation of a diagnostic survey. In order to receive this type of assistance, it must be possible for a firm to submit its adjustment proposal within two years after the date of its certification, and a firm receiving the assistance is required to pay at least 25% of the cost of providing the assistance. The Department may also determine that a greater amount of cost-sharing by the firm is appropriate. This determination is normally made on the basis of the firm’s ability to bear a part of the cost and the Department’s need to make the most effective use of its available technical assistance funds. As in the case of assistance in preparing petitions for certification, this assistance is normally, but not necessarily, obtained from a TAAC. The completed diagnostic survey and adjustment proposal are submitted by the TAAC or the firm to the Department.

After a firm’s adjustment proposal is approved, the firm may receive assistance in the implementation of the proposal. This assistance is normally, but not necessarily, obtained through a TAAC and is provided by TAACs and various types of consultants and contractors. The implementation assistance addresses the particular needs of the firm as evidenced by its diagnostic survey and adjustment proposal. Normally, such assistance consists of specific, consulting-type services designed to improve the productivity and management of the firm and to assist the firm in taking the actions recommended in its adjustment proposal. These services may include market studies, establishment of management controls, installation of new cost or inventory systems, designs for new products, and other activities directed toward helping the firm implement its proposal. The assistance is intended to help the

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238 See supra note 235 and accompanying text.
242 Id.
243 See supra Part 4.3.
244 See supra note 235 and accompanying text.
245 See supra note 184 and accompanying text; see generally Part 4.
firm improve and alter its operations to achieve maximum efficiency and to mitigate the effects of imports on the firm's profitability. The firm is required to share in the cost of this assistance to the same extent as in the case of assistance received in developing the adjustment proposal.\textsuperscript{246}

The Department is authorized to make grants to intermediary organizations in order to defray their administrative expenses in providing technical assistance to firms.\textsuperscript{247} This authority, and the authority to provide technical assistance by grants to intermediary organizations including TAACs,\textsuperscript{248} have been exercised by the Department through cooperative agreements between the Department and each of the TAACs.\textsuperscript{249} Under these agreements, the Department provides funds to the TAACs for their administrative expenses and for their portion of the cost of technical assistance provided to firms.

5.2. The Role of the Trade Adjustment Assistance Centers

Since their inception in 1978\textsuperscript{280} the TAACs have assumed an ever increasing role in the Adjustment Assistance program. Under their cooperative agreements with the Department they perform, directly or indirectly, virtually all of the technical assistance functions of the program. There are now twelve TAACs in operation, and each of them serves a particular area designated by the Department.\textsuperscript{251} For many firms, the TAACs are the only direct contact with the program, particularly since the termination of the financial assistance portion of the program.\textsuperscript{252}

The TAACs are responsible under their cooperative agreements for providing the various types of technical assistance to firms, either through the TAACs' own staffs or through contracts with outside consultants. TAAC staff members are generally professionals who have extensive private sector experience as well as specialized backgrounds in management, finance, marketing, production, and engineering. The TAACs are therefore generally well equipped to assist firms in devel-\textsuperscript{

\textsuperscript{246} See supra note 241 and accompanying text.
\textsuperscript{248} See supra note 236 and accompanying text.
\textsuperscript{249} See infra note 284 and accompanying text.
\textsuperscript{250} See supra Part 2.3.
\textsuperscript{251} Currently, TAACs are in operation in the states of California, Colorado, Georgia, Illinois, Massachusetts, Michigan, New Jersey, New York (2), Pennsylvania, Texas, and Washington. Each of the TAACs, other than those located in New York and New Jersey, serves a territory which includes several states.
\textsuperscript{252} Financial assistance has not been available under the program since April 7, 1986. See supra text accompanying note 45.
oping and implementing their adjustment proposals.

The establishment of the TAACs has made it possible for the Department to provide technical assistance to larger numbers of firms than was previously possible. 253 Cooperative agreements between the Department and the TAACs provide the framework for the TAACs' operations. These agreements require that assistance be provided and funds made available under the agreements be used in compliance with the Trade Act and various other requirements set forth in the agreements. 254 The Department monitors the performance of the TAACs under their agreements, and representatives of the Department make periodic visits to each of the TAACs. The Department also conducts semiannual meetings attended by representatives of all of the TAACs during which matters pertaining to the Adjustment Assistance program are discussed.

The TAACs' significant input into the Adjustment Assistance program has given them a great deal of influence on the direction of the program. In fact, their voices are the ones heard most frequently by the Administration and the Congress in regard to the program, resulting in increased program emphasis on issues of interest to the TAACs. In recent years, many of the legislative proposals pertaining to the program have been advanced by or on behalf of the TAACs rather than the firms which the program is intended to benefit. 255

Although the TAACs' interests often coincide with those of the firms in need of adjustment assistance, there have been occasions where these interests diverged. The most notable instance involved the 1986 amendments to the Trade Act. 256 Prior to these amendments, it appeared that the program was about to terminate. 257 The amendments eliminated the financial assistance part of the program, which had always been important to firms but which was not well regarded by the TAACs, who were concerned primarily with their own technical assistance function. 258 Moreover, the amendments extended the technical as-

253 See infra Part 4.5.
254 The agreements, in addition to setting forth the applicable federal requirements, including those under the Trade Act, contain numerous detailed provisions regarding the specific activities to be undertaken under the agreements.
255 The recent changes that have taken place in the program are described supra Part 2.4. These changes have resulted in increasing the role of the TAACs in the program while decreasing the variety of assistance available to firms.
256 See supra notes 45-47 and accompanying text.
257 The program did in fact terminate on December 19, 1985. See supra Part 2.4.
258 See supra note 45 and accompanying text. Prior to the amendments, virtually all technical assistance to firms under the program was provided by or through the TAACs. However, financial assistance was provided directly to firms by the Department.
sistance part of the program, which justifies and supports the existence of the TAACs, for a period of six years.259

5.3. The Mechanics of Getting Technical Assistance

A firm seeking technical assistance may contact the Department or a TAAC in order to obtain information about the necessary procedure. Normally, the Department refers a firm to its nearest TAAC. The TAAC then assists the firm in obtaining the assistance it needs. The firm must submit a written application for each phase of technical assistance requested.260

Where a firm needs assistance in preparing a petition for certification,261 the TAAC will provide the firm with the forms and assistance necessary to prepare a petition suitable for submission to the Department.262 Where a certified firm needs assistance in developing its adjustment proposal,263 the TAAC will normally prepare a diagnostic survey of the firm264 and will assist the firm in preparing a proposal suitable for submission to the Department.265 The TAAC will also assist a firm in assembling any additional information requested by the Department after a petition or adjustment proposal is submitted.

A firm desiring assistance in implementing its adjustment proposal266 should request the assistance within six months after approval of the proposal by the Department.267 The TAAC will then arrange for the assistance to be provided to the firm either by the TAAC’s staff or through outside contractors. After the completion of the assistance, the TAAC submits to the Department annual reports on the firm’s progress for each of the next three years.268

Where a firm is required to pay a portion of the cost of the technical assistance provided to it,269 the firm’s payments for its share must be made in advance, or proportionately as the assistance progresses.270

260 See supra note 239. See also Dep’t of Commerce, Scope of Work, Trade Adjustment Assistance Center Awards, pt. IV (rev. ed. May 2, 1988) [hereinafter TAAC Awards].
261 See supra note 235 and accompanying text.
262 See supra Part 3.2.
263 See supra note 235 and accompanying text.
264 See supra Part 4.2.
265 Id.
266 See supra note 235 and accompanying text.
268 See TAAC Awards, supra note 260, pt. VI(B).
269 See supra note 241 and accompanying text.
270 See TAAC Awards, supra note 260, pt. V.
Failure to make these payments will result in the discontinuance of the assistance. A TAAC will not pay more than its share of the cost of any assistance provided.

Although technical assistance is normally provided through a TAAC, a firm is not limited to this method of receiving assistance. Assistance can be provided by the Department directly or through other agencies, individuals, firms, or institutions. However, because of the TAACs' experience with the Adjustment Assistance program, other arrangements for receiving assistance are usually more time-consuming than assistance provided through a TAAC.

5.4. Special Legal Issues

5.4.1. Who is Eligible to Receive Technical Assistance Grants?

The Trade Act authorizes the Department to provide technical assistance to a firm through existing agencies, private individuals, firms, or institutions or by grants to intermediary organizations, including TAACs. The Act also authorizes the Department to make grants to intermediary organizations in order to defray up to 100 percent of their administrative expenses incurred in providing technical assistance. The specific grant authority was added by the 1981 amendments to the Trade Act.

The legislative reports on the 1981 amendments to the Trade Act indicated a congressional intent to provide explicit authority for grants to organizations such as the TAACs and to continue the then-"current practice" of providing grants to the TAACs. The current practice referred to in the reports included grants by EDA to the TAACs which consisted of nonprofit organizations, universities, research institutions, and State or local government agencies. The grants had been provided under the Public Works and Economic Development Act of 1965 and under the Trade Act. These were the only technical ass-

271 See supra note 236 and accompanying text.
272 See generally supra Part 4.2.
273 See supra note 236 and accompanying text.
274 See supra note 237 and accompanying text.
278 Id.
279 Public Works and Economic Development Act of 1965, 42 U.S.C.A. §§ 3121-
sistance grants provided under the Trade Act.

The grants made by EDA to the TAACs were similar to those now made by the Department in that they provided for the administrative expenses of the TAACs and for the cost of providing technical assistance. The administrative expense portion was provided under authority other than the Trade Act. The 1981 amendments to the Trade Act were intended to provide specific authority to continue the existing practice and also to allow for all grants, including administrative expense portions, to be made under the Trade Act.

Under the Department's interpretation of the Trade Act, the Department may now provide technical assistance to firms through contracts with government agencies, private individuals, firms, or institutions. It may also provide technical assistance by grants to nonprofit organizations, universities, research institutes, and state or local government agencies. In recent years almost all technical assistance has been provided through cooperative agreements between the Department and the TAACs. Under these agreements, the TAACs provide or arrange for the technical assistance needed by individual firms.

5.4.2. How May Technical Assistance Grant Funds Be Used?

Technical assistance grant funds may be used to pay a grant recipient's costs incurred in providing assistance to firms in preparing petitions for certification and up to 75% of the costs of providing other

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283 See supra note 236 and accompanying text. The Department of Commerce does not regard the authority under the Trade Act to furnish assistance through various entities as being clearly sufficient to allow for grants to these entities. Indeed, this authority does not appear intended to create a means of providing assistance to such entities, but only to enable the Department to have them to perform a service for firms the Department is trying to assist. Therefore, in applying the principles of the Federal Grant and Cooperative Agreement Act, 31 U.S.C. §§ 6301-6308 (1982 & West Supp.), the Department of Commerce considers its proper relationship with these entities to be one of procurement rather than one of grant or cooperative agreement. However, some of these entities may be eligible to receive grants under the specific grant authority contained in the Trade Act. See infra text accompanying note 284.
284 These are the kinds of intermediary organizations that received grants under the "current practice." See supra notes 273-80 and accompanying text. The Department of Commerce regards the authority to provide grants as authority to enter into cooperative agreements when appropriate under the Federal Grant and Cooperative Agreement Act principles cited supra note 283. Requirements and procedures described herein as pertaining to grants also pertain to cooperative agreements.
technical assistance. Grant funds may also be used to pay the related administrative expenses of the recipient. The normal practice of the Department has been to provide for technical assistance costs and administrative expenses in a single grant.

The Department does not always contribute the maximum amount allowable toward the cost of assisting a firm. Under the terms of its technical assistance grants or cooperative agreements, assisted firms pay a larger portion of the cost as the amount of assistance increases. There are also situations in which the Department determines that the condition of a firm does not warrant the maximum amount.

The administrative expenses of a grant recipient which may be paid with the grant funds are determined largely on the basis of general federal cost principles promulgated by the Office of Management and Budget. These principles generally allow the type of administrative costs incurred by the TAACs and set forth standards for specific cost elements. All technical assistance grants are made subject to these standards. Normally a TAAC incurs expenses for staff salaries and the usual office operating expenses. A TAAC also incurs travel costs in connection with visiting the firms it is assisting and attending required meetings or conferences. Costs incurred by a TAAC are allowable under a grant if they are in accordance with the general cost principles and any other standards established by the Department.

The costs of providing technical assistance, which may be paid in part with grant funds, include the costs of engaging contractors to provide assistance to firms and the costs of any assistance which the TAAC itself provides. Costs of assistance provided by a TAAC will include a portion of the TAAC's administrative expenses, determined on the basis of a uniform charge rate required under each grant. This has the

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286 See supra note 247 and accompanying text.
287 See supra note 241. The Trade Act authorizes the Department of Commerce to provide technical assistance on the terms and conditions it determines to be appropriate. The Trade Act does not require that the maximum authorized amount of cost sharing be provided in all situations. See also supra note 285 and accompanying text. Therefore, the Department of Commerce will, in appropriate situations, provide a lesser amount than the maximum authorized.
289 See supra Part 5.2.
290 See infra text accompanying notes 292-95.
effect of reducing the amount of administrative expenses paid entirely with grant funds since firms assisted will pay portions of these costs.\textsuperscript{291}

Certain restrictions on the use of funds are usually contained in grants made by the Department. These restrictions are intended to fulfill the general administrative requirements applicable to a particular grant\textsuperscript{292} or to implement various requirements of the Department.\textsuperscript{293} The Department limits the amount of technical assistance which may be provided to an individual firm and also requires its prior approval of various types of expenditures.\textsuperscript{294} Restrictions on procurement by a recipient are also contained in each grant.\textsuperscript{295} These and other restrictions may affect the extent to which grant funds may be used. As a result, the allowable use of technical assistance grant funds is determined by the Department on the basis of various Federal and Departmental policies in addition to the basic legislative authority for the grant.

5.5. Program Statistics

Since the adjustment assistance program began operating under the Trade Act in 1975,\textsuperscript{296} over 3,500 firms have received technical assistance in preparing their petitions for certification. Approximately 1,500 have received assistance in developing their adjustment proposals, and 600 received assistance in implementing their proposals. Most of the firms receiving assistance received it after the establishment of the TAACs in 1978.\textsuperscript{297} Prior to that time, assistance in preparing petitions for certification was not provided,\textsuperscript{298} and very few firms had received assistance in developing or in implementing their adjustment proposals. Between 1978 and the time of the 1981 amendments to the Trade Act,\textsuperscript{299} over 1,000 firms received assistance in preparing petitions for certification. This assistance was received under authority other than

\textsuperscript{291}See TAAC AWARDS, supra note 260, pt. V.
\textsuperscript{292}The general administrative requirements are set forth in OFFICE OF MANAGEMENT & BUDGET, CIRCULAR No. A-102, GRANTS & COOPERATIVE AGREEMENTS WITH STATE & LOCAL GOVERNMENTS (rev. ed. Mar. 3, 1988), and in OFFICE OF MANAGEMENT & BUDGET, CIRCULAR No. A-110, GRANTS & AGREEMENTS WITH INSTITUTIONS OF HIGHER EDUCATION, HOSPITALS, & OTHER NONPROFIT ORGANIZATIONS, 41 Fed. Reg. 148 (1976), which are now in the process of being revised and will be reissued during the next year.
\textsuperscript{293}The requirements of the Department of Commerce include those imposed specifically by the Trade Act or by the Department in the exercise of its authority to administer the adjustment assistance program.
\textsuperscript{295}See TAAC AWARDS, supra note 260, pt. VIII (rev. May 2, 1988).
\textsuperscript{296}See supra text accompanying notes 25-35.
\textsuperscript{297}See supra text accompanying note 35.
\textsuperscript{298}See supra text accompanying notes 36-37.
\textsuperscript{299}See supra text accompanying note 35.
the Trade Act. Almost all other assistance has been received under the Trade Act. The establishment of the TAACs has resulted in greater emphasis on assistance in preparing petitions for certification and in developing adjustment proposals.

6. **Financial Assistance for Firms**

6.1. **Types and Characteristics of Financial Assistance**

As noted in Part 2.4 above, Congress prohibited financial assistance to firms under the Trade Adjustment Assistance program from being provided after April 7, 1986. However, because financial assistance was available for many years and because some members of Congress have discussed the reactivation of this aspect of Trade Adjustment Assistance, a brief outline of financial assistance is appropriate. Moreover, since the Trade Act still contains the provisions regarding financial assistance referred to in this Part, a discussion of these provisions and their implementation by Commerce appears to be warranted.

Until this aspect of the program was curtailed in 1986, there were two types of financial assistance available under the Trade Act of 1974: direct loans and guarantees of loans. A number of statutorily required conditions or characteristics apply to both types of financial assistance. First, the financial assistance must be expected to materially contribute to the economic adjustment of the firm receiving it. This requirement is interpreted in much the same way as similar language found in the statutory provision on adjustment proposals, discussed in Part 4.4.1. Second, financial assistance can be provided only if it is determined that funds are not available from the firm’s own resources. This language is interpreted in much the same way as the language regarding a firm’s resources found in the statutory provisions on adjustment proposals, discussed in Part 4.4.3. Third, the Department must determine the existence of a reasonable assurance of repayment of any loan made or guaranteed. This statutory requirement, discussed further in Part 6.3.1, frequently caused difficulty for the Trade Adjustment Assistance program. Fourth, in providing financial assistance, Commerce must give priority to firms deemed small within the meaning of the Small Business Act.

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302 Id.
305 Trade Act § 255(d)(1), 19 U.S.C.A. § 2345(d)(1) (1988). It was never neces-
Direct and guaranteed loans may be used either for fixed assets or working capital. Financial assistance for fixed assets may cover acquisition, construction, installation, modernization, development, conversion, or expansion of land, plant, buildings, equipment, facilities, or machinery or for certain energy conservation costs. Fixed assets loans may have a maturity no longer than twenty-five years or the useful life of the fixed assets for which the loan is made, whichever period was shorter. Working capital loans may be used for normal working capital needs and for research and development to be incurred within one year. These loans may have a maturity period of no more than ten years.

Several program requirements apply only to direct loans. For example, the outstanding aggregate amount of direct loans to any firm under Trade Adjustment Assistance may not exceed $1 million. The interest rate on direct loans is determined by a statutory formula which takes into consideration the current average market yield on comparable Treasury obligations plus the amount needed to cover administrative costs and probable losses under the Trade Adjustment Assistance loan program.

There are also several program requirements which apply only to guaranteed loans. The outstanding aggregate amount of loans guaranteed to any firm under Trade Adjustment Assistance to any firm may not exceed $3 million. The interest rate on a guaranteed loan is not to be excessive when compared to other similar loans bearing federal guarantees, and the interest on the loan may not be exempt from federal income taxation under section 103 of the Internal Revenue Code. No loan may be guaranteed for an amount exceeding ninety percent of the outstanding unpaid principal and interest on the loan.

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And, most importantly for private lenders involved in the guarantee program, the Trade Act provides that the validity of a guarantee agreement is incontestable, except in the case of fraud or misrepresentation by the holder of the obligation guaranteed.\textsuperscript{316}

6.2. \textit{The Mechanics of Getting Financial Assistance}

The current regulations for the Trade Adjustment Assistance Program do not provide much insight into the mechanics of obtaining financial assistance because, for the most part, they simply repeat the broad statutory parameters of the program as described in Part 6.1 above.\textsuperscript{317} The real functioning of the program is found in unpublished internal guidelines (generally made available to the public on request) and in unwritten internal practices and procedures with which the authors are familiar.\textsuperscript{318}

As a preliminary matter, it is important to remember that any applicant for financial assistance must already have been certified as an eligible firm and must already have an approved adjustment proposal. The firm may or may not have received technical assistance, although in the usual case it would have requested such assistance to prepare its adjustment proposal.

As the first step toward obtaining financial assistance, the firm generally requests a preapplication conference with a Commerce loan officer and, frequently, a representative from the local TAAC. The conference could be held in Washington or in the city where the firm is located. At the preapplication conference, the firm will describe in detail its financial needs, and the Commerce loan officer will describe in detail the loan application process and make available the relevant forms. The firm will be informed that technical assistance to help the firm complete its application is available from the local TAAC.

In the case of a direct loan, the application will be completed by the firm and the firm's attorney. Guaranteed loan application materials are generally completed and submitted by the proposed lender and its


\textsuperscript{318} In addition to the authors' experience, the principal source for the discussion of the mechanics of financial assistance in Part 6.2 is DEPARTMENT OF COMMERCE, OFFICE OF TRADE ADJUSTMENT ASSISTANCE, TRADE ADJUSTMENT ASSISTANCE GUIDELINES (1982 ed.) [hereinafter TAA GUIDELINES].

As a preliminary matter, it is important to remember that any applicant for financial assistance must already have been certified as an eligible firm and must already have had an approved adjustment proposal. The firm may or may not have received technical assistance, although in the usual case it would have requested such assistance to prepare its adjustment proposal.
attorney. If a guaranteed loan application is submitted by the firm, it must be accompanied by a letter from the lender approving the submission and indicating a willingness to make the loan. During the pre-application discussion it would have become clear to the firm that Commerce in recent years has evinced a preference for guaranteed loans. This preference probably originated because much of the work and some of the risk involved in such loans is borne by the private sector rather than by the federal government alone.

The following are typical documents and information required in connection with an application by a firm for financial assistance:319

1. A statement of the desired loan amount and the proposed plan for the use of the loan proceeds. If assets are to be purchased with the proceeds, the assets must be described in detail, their cost accurately estimated, and their relationship to the firm's adjustment proposal clearly indicated. If the funds are to be used for working capital, the need and the timing of the funding must be detailed. Generally, Commerce will not finance revolving lines of credit with this program.

2. Audited financial statements updated to the most recent quarter.

3. Pro forma financial projections at least three years into the future.

4. A description of proposed collateral with at least one independent appraisal.

5. The names of proposed guarantors with statements of their net worth. Commerce ordinarily requires personal or corporate guarantees by those holding substantial interests in the firm and by related entities.

6. In the case of a guaranteed loan, an identification of the lender or lenders who will participate in the loan.

7. In the case of a direct loan, letters from at least two lending institutions indicating the terms, if any, under which they would make the requested loan.

8. A detailed description of all existing debt and leases (to the extent these are not described in detail in the audited financial statements).320

9. A description of other funds and sources of funds which will be used in the project for which assistance is being requested.

10. A statement of any desired special loan terms.

11. A disclosure of all fees and charges for accounting, legal engineer-

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319 The contents of this list are derived from TAA GUIDELINES, supra note 318, at 15-18 and from the authors' experience.

320 Commerce had several rules of thumb in connection with existing obligations: a) trade adjustment assistance could not be used to "bail out" existing creditors; b) balloon payments on existing debt would not be permitted if they were to come due before the end of the term on the trade adjustment assistance loan; and c) existing credit essential to the project had to be locked in for at least a two- to three-year period after the closing of the trade adjustment loan. TAA GUIDELINES, supra note 318, at 22-25.
ing, appraisal, packaging or servicing functions performed in connection with the application.

12. Information on the firm's management team, including senior executives and other key personnel, illustrating their experience and management skills.

13. A description of the firm's products, the products' current markets, and future sales projections. In some cases Commerce may require an independent market feasibility study.

14. Information on the credit history of the firm and its principal officers to the extent that such information is not revealed in the foregoing materials.

Once most of the above documentation has been submitted to Commerce, the loan officer will generally visit the project site at least once while the application materials are being processed. The Department's goal is to tell the firm, or proposed lender in the case of a guaranteed loan, whether or not the loan is approved within fifteen days of the submission of the completed application and the site visit. In practice, however, the determination as to whether or not an application will be approved is often the subject of extensive negotiations. In addition, the low level and uncertainty of staffing and funding for the Trade Adjustment Assistance program and the complications inherent in providing loan assistance to firms in financial difficulty have made for a lengthy loan processing cycle not normally found in the private sector. Because of these problems, the financial assistance aspect of the program may not be appropriate for a firm with an immediate need for loan funds.

If Commerce decides to make the loan or the loan guarantee, it will make a formal written offer of financial assistance to the firm or lender by certified mail. The recipient of the offer normally has fifteen to thirty days to respond to the offer. In the absence of a timely response, Commerce may withdraw the offer. The offer of assistance will typically include identification of the general or standard terms and conditions found in all loans or loan guarantees, as well as certain special terms and conditions which are unique to the particular case. Frequently, the firm or the lender will have problems with some of the terms and conditions, and these are often the subject of extensive negotiations. Once again, this process tends to take several months longer than the time required for normal private sector loans.

When the offer of assistance, with all its terms and conditions, is accepted, Commerce will begin making closing arrangements. These may include a scheduled preclosing conference, in person or by telephone. At this point the parties to the transaction reach agreement as to
the documentation needed to close the loan. Once this preclosing phase is completed, the final closing and disbursement of the loan can be scheduled. Commerce, the firm's attorney, or the lender's attorney may carry out the final preparation of particular closing documents, depending on financial industry custom, the types of documents involved, and agreement of the parties.

6.3. Special Legal Issues

6.3.1. When Is There "Reasonable Assurance of Repayment" of a Loan to a Firm?

The Trade Act requires that Commerce find "reasonable assurance of repayment of the loan" by the firm.321 The meaning of this requirement is defined neither in the statute nor in the legislative history. However, the legislative history indicates that Congress expected that the program would be in effect a lender of last resort for firms that were injured by imports.322 Therefore, it seems unlikely that Congress intended the "assurance of repayment" standard to be as strict as that applied by a private lender.

In practice, it has proved to be very difficult to draw the line between requiring "assurance of repayment" and assisting those companies that are in economic difficulty due to imports. The program has had a high default rate, as discussed further in Part 6.4. This default rate may indicate that the line has not been drawn successfully from the taxpayer's point of view, or defaults may simply be the inevitable consequence of carrying out the congressional intent to assist these types of firms.

In carrying out its mandate to analyze "reasonable assurance of repayment," the Department attempts to determine whether the following conditions exist with respect to a firm seeking financial assistance:323

1. The firm's management is capable of properly administering, operating, and maintaining the project;
2. the firm will be able to market its products successfully and meet its sales projections;
3. there is sufficient availability of raw materials, energy, and productive capacity to support the firm's projected operations;
4. the credit history of the firm and its principal officers warrants con-

323 TAA GUIDELINES, supra note 318, at 28-32a.
fidence that repayment of a debt to the United States will be viewed as a serious obligation; and
5. reasonable financial projections indicate that the firm will be able to repay all of its debts from future earnings.

The analysis of some of these items is based on input from independent sources such as accountants, credit rating agencies, and consultants hired to perform market feasibility studies or other services. However, much of the Department's analysis is based on information or assertions supplied by the firm. Although the financial analysis is generally similar to that which would be performed by a private lender or guarantor institution, the standards of the Trade Adjustment Assistance Program have in practice been more lenient. Rather than requiring assurance of repayment, or even "reasonable" assurance of repayment, it seems that in reality the program has required only "some" assurance of repayment in order to carry out its congressional mandate. However, a recent decline in the occurrence of new defaults on loans under the program indicates that the Department may have made progress in reconciling its mission to assist import-impacted firms with the requirement of reasonable assurance of repayment.

### 6.3.2. **What Was the Effect of Revised OMB Circular A-70 on Financial Assistance?**

In August 1984 the Office of Management and Budget (OMB) issued a revision of its Circular A-70 on Federal Credit Policy. The Circular, which had been last revised in 1965, contained guidelines for the administration of federal loan and loan guarantee programs. Several of the guidelines in the Circular set standards very different from the ones under which the financial assistance aspect of the Trade Adjustment Assistance Program had been operating. For example, the Circular required that loan guarantee programs charge guarantee fees comparable to those charged for similar guarantee or insurance coverage by private institutions. The fee level was required to be sufficient to cover the total administrative and servicing costs of the loan guarantee program and all the expected liabilities which would be incurred by defaults. Although the Trade Act explicitly authorizes Commerce to charge a guarantee fee in the program, the Department had never

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324 *See infra* Part 6.4.
327 *Trade Act § 253(g), 19 U.S.C.A. § 2345(g) (1988).*
charged such a fee, assuming that it would be passed on to the borrower. Since many of the borrowers in the program were in marginal financial circumstances, the Department felt that charging this fee would be counterproductive.

A second example of the discrepancy between OMB Circular A-70 and the then-existing operation of the financial assistance program is the Circular's requirement that in general loan guarantees should not be for more than 80% of the amount of the loan. The Trade Act authorized Commerce to issue guarantees up to 90% of the loan amount. In all cases known to the authors the Department had exercised its discretion to guarantee the maximum percentage in order to provide the most benefit to the borrowers.

A third, and perhaps in many ways the most important, difference between Circular A-70 and the operation of the financial assistance program came in the area of subordination of collateral. Circular A-70 provided that

[the government's claims on assets must not be subordinated to other lenders in the case of a borrower's default on either a direct loan or a guaranteed loan. Subordination increases the value of the direct or guaranteed loan to the borrower and may enable the borrower to raise additional amounts of credit on the strength of the borrower's collateral. Subordination increases the risk of loss to the Government, since other creditors have first claim on the borrowers assets. Therefore, the Government should have equal or superior standing with respect to all other lenders.]

Of all the provisions in the Circular, this one had the most devastating effect on the Trade Adjustment Assistance Program. The Trade Act clearly allowed the Department to accept a subordinated lien position. The Department had frequently exercised its discretion to do so in order to assist the many marginal borrowers in the program. In fact, almost every package of financial assistance with which the authors have worked has contained at least one second or further subordinated lien position for at least some of the collateral involved in the financing.

The Circular contained a provision for agencies to request that OMB waive its new policies. Those loans already in processing in

328 CIRCULAR A-70, supra note 325, at 7-8.
330 CIRCULAR A-70, supra note 325, at 8.
332 CIRCULAR A-70, supra note 325, at 9.
Fiscal Year 1984 were grandfathered in under the Department's previous practices. However, beginning with Fiscal Year 1985, the Department was led to believe that waivers would not be granted even if requested. This strict adherence to the policies of Circular A-70 brought the financial assistance part of the Trade Adjustment Assistance Program to a virtual halt. The prohibition on subordination proved almost impossible to comply with since most of the borrowers who came into the program had insufficient first lien positions to offer on valuable collateral.

Therefore, even before Congress officially discontinued financial assistance in April 1986, the credit policies of the Reagan Administration had reduced the volume of the program to almost nothing. To make the program effective, Congress needed to deal explicitly with the question of whether it is appropriate to impose high private lender standards and administrative requirements in a program which appears to be structured as a lender of last resort facility for import injured firms. In an era of a high budget deficit and many other pending complicated issues, Congress was not willing to undertake such an examination and simply eliminated any further financial assistance.

6.4. Program Statistics

During the period in which EDA operated the program (Fiscal Year 1975 to Fiscal Year 1981), financial assistance was delivered to 295 firms. This total assistance included $187.8 million in direct loans and $134 million in guaranteed loans.\(^{333}\) As of the mid-1980s, approximately 60 to 70% of this portfolio was in liquidation or more than 30 days delinquent.\(^{334}\) ITA administered the program for Commerce from Fiscal Year 1982 until the termination of financial assistance in mid-Fiscal Year 1986. During that time, financial assistance was delivered to 45 firms. This included $19.2 million in direct loans and $44.1 million in guaranteed loans.\(^{335}\) As of the writing of this article approximately 50% of the ITA portfolio is in a workout status or more than 30 days delinquent. However, about 30% of the loans in the ITA portfolio have been paid in full in advance of their due dates.\(^{336}\) Thus, there are indications that the default rate on loans made under the program might have continued to decrease had the program continued to operate under the improved origination standards put in place in recent years.

\(^{333}\) OTA REPORT, supra note 21, at 34 (table 5).

\(^{334}\) The authors' calculations are based on internal Commerce data.

\(^{335}\) OTA REPORT, supra note 21, at 34 (table 5).

\(^{336}\) The authors' calculations are based on internal Commerce data.
7. ASSISTANCE TO INDUSTRIES

7.1. The Basic Statutory Provisions

Under authority created in 1981, the Department may provide technical assistance for the establishment of industry-wide programs for new products development, new process development, export development, or other uses consistent with the purposes of the Adjustment Assistance program.\textsuperscript{337} This type of assistance may be provided to associations, unions, or other nonprofit industry organizations which are representative of industries in which a substantial number of firms or workers have been certified as eligible for adjustment assistance under the Trade Act.\textsuperscript{338} The aid may be provided through existing agencies, private individuals, firms, universities, or institutions, and by grants, contracts, or cooperative agreements.\textsuperscript{339}

The Department's practice has been to provide this type of assistance by cooperative agreements with organizations representing the industries being assisted. Expenditures for the assistance may be in an amount up to $10 million annually per industry.\textsuperscript{340}

7.2. The Mechanics of Getting Industry Assistance

Normally, an organization seeking industry assistance arranges a meeting with representatives of the Department in order to discuss the problems and needs of the industry and the activities for which assistance is contemplated.\textsuperscript{341} On the basis of the information obtained at the meeting, and any other information submitted by the organization, the Department makes a determination as to whether the organization and its proposed activities are eligible for assistance under the Trade Act criteria.\textsuperscript{342} If they are eligible, the Department provides the organization with appropriate application materials and with any counseling or assistance the organization needs in developing its application.\textsuperscript{343}

In its application for industry assistance, an organization should

\begin{itemize}
  \item \textsuperscript{337} Trade Act § 265(a), 19 U.S.C.A. § 2355(a) (1988).
  \item \textsuperscript{338} See id.
  \item \textsuperscript{339} Id.
  \item \textsuperscript{340} Trade Act § 265(b), 19 U.S.C.A. § 2355(b) (1988).
  \item \textsuperscript{341} See DEP'T OF COMMERCE, TRADE ADJUSTMENT GUIDELINES FOR INDUSTRY-WIDE ASSISTANCE PROGRAM (Nov. 1987), at 3 [hereinafter INDUSTRY ASSISTANCE GUIDELINES].
  \item \textsuperscript{342} This procedure is described in DEP'T OF COMMERCE, TRADE ADJUSTMENT ASSISTANCE INDUSTRY ASSISTANCE REVIEW PROCEDURE, at 1 [hereinafter REVIEW PROCEDURE]. This document is currently used by the Department in its analyses of industry assistance proposals.
\end{itemize}
describe the extent to which the industry for which assistance is sought has been injured by imports, the major problems facing the industry, and the specific work to be undertaken if assistance is received. This description should make clear why the proposed activities will assist the industry in becoming more competitive with imports. The application should also contain a detailed estimate of the cost of these activities and an outline of the proposed sources of funds for payment of the cost.

After an organization submits its application, the Department makes a determination as to whether the application will be approved. This determination is based primarily on the likelihood that the activities proposed in the application will contribute to the strengthening of the industry for which assistance is requested. However, the Department must also consider the amount of funds available to it for providing industry assistance and the number and quality of other applications the Department is reviewing.

If an application is approved, the Department transmits an offer of assistance to the organization, indicating the amount of funds that may be made available for the proposed activities and the terms under which the funds may be provided. If the amount and terms are acceptable to the organization, the Department provides for the disbursement of the funds in accordance with the accepted terms. The Department then monitors the performance of the organization and provides it with any advice and direction it may need in conducting the assisted activities.

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344 Industry Assistance Guidelines, supra note 341, at 1-2.
345 Id.
346 Id.
347 See Review Procedure, supra note 342, at 1-4.
348 Id.
349 The Department attempts to allocate its available funds in a manner which will provide the greatest possible benefit to industries adversely affected by imports. A project selection procedure is provided for in the Review Procedure, supra note 342, at 1-2.
350 The procedures for transmitting the offer of assistance by the Department, acceptance of the offer by the applying organization, disbursement of assistance funds, and monitoring the performance of the organization by the Department are described in the Review Procedure, supra note 342, at 4.
351 See id.
352 Id.
7.3. Special Legal Issues

7.3.1. What Is an Industry?

The authority of the Department to provide assistance to industries raises certain questions regarding the types of organization and industry for which this assistance is intended. It appears from the authorizing legislation that the type of organization intended to be assisted would be representative of a particular industry, not merely groups of firms or workers from unrelated industries.\(^{353}\) It also appears that, since a substantial number of the firms or workers in the industry represented would be eligible for adjustment assistance,\(^{354}\) the industry represented must be a manufacturing or other type of producing industry rather than a service, retail, or other non-producing industry.\(^{355}\)

In setting forth the authority to provide assistance to industries, the Trade Act does not provide any guidance as to how the term "industry" should be defined or limited. Firms or workers are certified on the basis of imports of articles like or directly competitive with those produced by the petitioning firms or the firms of the petitioning workers.\(^{356}\) The industry in which the petitioning firms or workers are considered to be engaged does not determine their eligibility for certification. Therefore, an organization representing a group of certified firms or workers is not necessarily representative of a particular industry. However, the authority of the Department to provide assistance to industries requires that the assistance provided be for industry-wide programs and that the assistance be limited to $10 million annually per industry.\(^{357}\) Therefore, it becomes necessary to determine the industry for which an organization is seeking assistance.

In determining the particular industry for which assistance is proposed, the Department considers the nature of the firms or workers

\(^{353}\) Assistance for the establishment of industrywide programs is authorized to associations, unions, or other nonprofit industry organizations in which a substantial number of firms or workers have been certified as eligible for adjustment assistance. See Trade Act § 265(b), 19 U.S.C.A. § 2355(b) (1988). The Department regards this authority as requiring an organization receiving assistance to be representative of a particular industry even though it may also be representative of firms or workers in other industries.


\(^{355}\) Firms and workers of firms are certified, in part, on the basis of increases of imports of articles like or directly competitive with articles produced by the firms. See Trade Act §§ 222, 251(c), 19 U.S.C.A. §§ 2272, 2341(c) (1988). This requirement may later be modified in regard to certification of firms and workers of firms, in the manner described regarding firms, supra note 51 and accompanying text.

\(^{356}\) See supra note 355.

\(^{357}\) See supra notes 337 & 340 and accompanying text.
represented by the organization seeking assistance and the extent to which the firms represented, or the firms of the workers represented, produce like or directly competitive articles. As a guide in arriving at its determination, the Department also makes use of the classifications contained in the Office of Management and Budget Standard Industrial Classification Manual ("SIC Manual"). In most instances, the Department's determination of a specific industry will correspond to the SIC Manual classification. In appropriate circumstances, the Department will allow for subdivision of classifications in accordance with the principles set forth in the SIC Manual. In all cases, the Department requires that the group of firms constituting the assisted industry include all substantially similar firms and be economically significant in the number of persons employed, the volume of business conducted, and other measures of economic activity.

7.3.2. What Are Eligible Purposes for Industry Assistance?

The authority to provide technical assistance for industry-wide programs consistent with the purposes of the Adjustment Assistance program enables the Department to provide this assistance for a broad range of activities. The Department, in its exercise of this authority, normally limits its assistance to those activities intended to benefit firms in the assisted industry in the near future. Assisted activities frequently involve the diagnosis of an industry's opportunities and problem areas, domestic and international marketing analyses, efforts to increase productivity and lower manufacturing costs, exploration of diversification possibilities, modification of product lines, and export promotion.

358 See Office of Management & Budget, Standard Industrial Classification Manual (1987) [hereinafter SIC Manual]. "The SIC is the statistical classification standard underlying all establishment-based Federal economic statistics classified by industry. [It] was developed for use [by the federal government and other organizations] in the classification of establishments by type of activity in which they are engaged . . . ." Id. at 3, 11. The SIC Manual is available for purchase from the National Technical Information Service within the Department.

359 The SIC Manual, supra note 358, at 12, provides that an agency may use additional subdivisions within specific industries in adopting classifications for its own use.

360 These requirements are consistent with the general principles of classification used in the SIC Manual, supra note 358. The Department regards these requirements as necessary to apply the limitations set forth in the Trade Act. See supra note 357 and accompanying text.

361 See supra note 337 and accompanying text.

The following are examples of activities for which assistance has been provided:
1. development of techniques to improve the quality and reduce the production costs of domestically manufactured steel castings;
2. development of a flexible automated manufacturing system for the U.S. furniture industry;
3. development for U.S. industry of a system of automated textile clothing manufacturing;
4. establishment of offices in Japan to assist the United States electronics, semiconductor, and automotive products industries in entering the Japanese market;
5. exploration of the potential of ductile iron as an alternative material for new industrial applications; and
6. establishment of a research foundation to develop new equipment for the United States textile and apparel industries.

The Department normally requires that an organization receiving assistance play an active role in carrying out the assisted activity. The organization, as well as firms within the assisted industry, is expected to be involved in the development and direction of the activity as needed to assure its beneficial results. The organization is required to designate a project director to manage the activity, supervise staff members engaged in the activity, and prepare any reports on the activity as required by the Department. The Department also normally requires that at least 50% of the total cost of the activity be paid from sources other than funds received by the organization under its cooperative agreement with the Department.

7.4. Program Statistics

Since the addition of the industry assistance authority to the Trade Act in 1981, the Department has, through cooperative agreements, provided assistance to organizations representing over forty industries. In most cases, the amount of assistance provided under a single cooperative agreement was not more than $1 million.

In the early stages of the industry assistance program, organizations representing the footwear and apparel industries were the principal recipients of assistance. However, organizations representing machinery manufacturers, heavy industries, and electronic manufacturers

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364 Id. at 1.
365 Id.
366 Id. at 2.
367 Id. at 1.
368 See supra note 36 and accompanying text.
later became the predominant organizations assisted. Because of severe funding limitations, the Department has not been able to provide industry assistance to all of the organizations seeking it. Therefore, the Department has attempted to direct its assistance to those activities most likely to enable U.S. industries to take the corrective measures needed to become more competitive in the world economy.

8. Evaluation of the Program


During the last decade there have been a number of evaluations prepared by or for government agencies which were reviewing the operation of the Trade Agreement Assistance program for firms and industries. The earliest attempt at a thorough analysis of the program as operated under the Trade Act was published in December 1977 by the General Accounting Office (GAO), the auditing arm of Congress. The GAO decided that the program was basically unsuccessful and offered the following observations:

The few firms that have received adjustment assistance benefits have not usually used them to become viable in their own or different industries. Consequently, the program is providing these firms with income maintenance, but is not providing for their long-term strength or competitiveness. Of 28 firms which had loans approved as of September 30, 1977, two of them had already gone out of business and eight others were delinquent on loan repayments on June 30, 1978. Perhaps it is unreasonable to expect a successful adjustment (one creating long-term viability) given the fact that firms are usually in a weakened financial condition when receiving their assistance, their adjustment proposals often do not address their problems, the loan amounts are not large enough for real adjustment, and the drawn out benefit-delivery process results in further financial deterioration.

The GAO noted that the adjustment assistance program was benefitting only a small fraction of the firms hurt by imports and they suggested that Commerce was not effectively publicizing the program, program literature did not adequately describe the program’s procedures,
and the program's criteria and benefits were complicated and relatively unattractive.\textsuperscript{371} GAO recommended that the Secretary of Commerce and the Congress undertake major improvements in the funding and administration of the program in order to help a larger number of firms have a more significant chance to achieve long-term viability.\textsuperscript{372} GAO also recommended that Congress consider specific authorization for assistance to industries.\textsuperscript{373} In fact, the administration of the program was adjusted in the late 1970s in an attempt to assist more firms and to experiment with the concept of industry assistance.


Revisions to the Trade Adjustment Assistance program were not totally satisfactory, as evidenced by the December 1981 report prepared by the Commerce Office of Inspector General.\textsuperscript{374} This report focused only on the financial assistance aspect of the program and found a number of serious deficiencies in loan origination and servicing. For example, the report noted that sales and profit projections and collateral values were often unverified; borrowers' adjustment plans were not realistic; borrowers used loan proceeds for purposes other than stated in the loan agreement; and neither EDA nor the private lenders were properly servicing the loans.\textsuperscript{375} The Inspector General expressed surprise that a loan program of this size would be operated without sufficient personnel or administrative funds to properly carry out the program at a professional level.\textsuperscript{376}

The report recommended that these deficiencies be corrected immediately and that corrected operational procedures be embodied in guidelines for the program.\textsuperscript{377} By the time this report was issued, the Reagan Administration had already decided to transfer the program from EDA to ITA. Immediately after the transfer, Commerce set in place a major revision of the program operation, particularly the loan origination aspects of financial assistance, in order to address the problems pointed out by the Inspector General.

\textsuperscript{371} Id. at 14-24.
\textsuperscript{372} Id. at 50-52.
\textsuperscript{373} Id. at 53.
\textsuperscript{375} Id. at 2-3 & passim.
\textsuperscript{376} Id. at 5.
\textsuperscript{377} Id. at 7-9.

The General Accounting Office completed another review of the financial assistance aspect of the Trade Adjustment Assistance Program in April 1982. The GAO undertook this review in order to help Congress decide whether to reauthorize the program, when it was due to expire. This report noted that, while many improvements had been made during the previous year or so, the program still had many problems. GAO observed that the program had assisted very few firms of the total that probably needed assistance; many of those firms that received assistance were the financially weakest and appeared the least likely to survive; the adjustment plans for the firms still did not identify why the firm was unable to compete and what difficulties it had to overcome; loan origination review still did not include such basic elements as site visits and proper analysis of financial ratios and projections; and loan servicing was still not structured so as to detect weaknesses early and provide quick corrective action. Although recognizing that Commerce was attempting to improve financial assistance, the report noted that Commerce had not allocated the resources needed to fully evaluate a firm's physical condition and its management capabilities before loan approval and to adequately service a firm's loan(s) after approval. The changes that have been made and are needed will not be free of cost. Unless the dollars made available to administer the program are commensurate with program dollars, their results will be limited.

8.4. Inspector General (1985)

The next report on the program was done by the Commerce Office of Inspector General in March 1985, three and a half years after the program had been transferred to ITA and had been operating under improved administrative procedures. The Inspector General concluded that there were still major deficiencies in the Trade Adjust-
ment Assistance program, such as the excessive time required to provide assistance and the very small number of firms assisted. Although the report concluded that some of these problems, such as timeliness of assistance, could be improved with procedural changes, it noted that the adverse economic environment may make it almost impossible to improve program effectiveness with further management or legislative action.\footnote{Id. at 4, at 12-14.} The Inspector General also commented that, of the firms that began in the program during 1982 and 1983, 96.4% either dropped out before receiving any assistance or failed to adjust economically despite the receipt of assistance. This occurred although the program expended $46.5 million during these fiscal years.\footnote{Id. at 4.} The report concluded:

In this period of huge budget deficits, a Federal subsidy program which successfully aids only 3.6% of clients requesting assistance—and has little likelihood of improving—cannot be justified. If the TAA program is eliminated, the government could save at least $25 million in annual appropriations.\footnote{Id. at 14.}

8.5. \textit{HCR (1985)}

While this latest Inspector General report was being prepared, the ITA had hired a private consultant, HCR, to prepare an evaluation of the adjustment of firms assisted by the program. HCR delivered its final report to ITA in May 1985.\footnote{HCR, \textit{Evaluation of the Adjustment of Firms Assisted by the Trade Adjustment Assistance Program: Economic Experience of Client Firms Since 1981 (1985)} (prepared under contract for the U.S. Department of Commerce, Office of Trade Adjustment Assistance) [hereinafter HCR Report].} HCR’s conclusions were more optimistic than the Inspector General's but still indicated a program having difficulty. HCR found that 78.7% of the firms that had entered the program were still in business and approximately 35% had achieved economic adjustment as of December 1984. HCR also found that the following types of firms tended to adjust better than others: larger firms; firms that had received financial aid (particularly direct loans); firms that had government contracts; and firms that had received assistance from TAACs in preparing their diagnostic surveys and adjustment proposals.\footnote{Id. at 1-2, 41-42.}

When the HCR report was made public, ITA questioned some of the statistical data which had been provided to its contractor by the TAACs. ITA noted in a letter dated June 1986 that many of the firms...
which HCR had been told were adjusted were in fact in severe financial difficulty. Therefore, it may be overly optimistic to conclude that approximately 35% of the firms that participated in the program were better off than they were before entering the program.

8.6. Office of Technology Assessment (1987)

The most recent study of the Trade Adjustment Assistance program of which the authors are aware was published in June 1987 by the Office of Technology Assessment, another evaluating arm of Congress. OTA reviewed both the history and current operation of the programs for both workers and firms. It also reviewed recent studies of the programs including the Inspector General’s report of March 1985 and the HCR report of May 1985 discussed above. OTA then concluded that previous analyses of the program were incomplete:

Evaluating TAA assistance to firms would mean analyzing the costs and benefits of the whole program, measuring the public expenditure (now about $16 million per year) against the social benefits of the businesses and jobs that are preserved. The dollar benefits to society include property and income taxes paid, and outlays for unemployment insurance, adjustment programs, and other social programs avoided. No one has evaluated the program in this way.

Although the authors of the OTA report appeared fully aware of the operational problems of trade adjustment assistance, they were somewhat optimistic that the program could be improved with “explicit Congressional direction.” They did note that Trade Adjustment Assistance was the “major Federal [sic] program providing sustained, in-depth technical assistance to small and medium-sized manufacturers,” a function which OTA appeared to regard as generally desirable.

9. Conclusions and Recommendations

When the Trade Adjustment Assistance program was introduced by President Kennedy and passed by Congress in 1962, it was intended to provide temporary assistance to firms hurt by imports. It was not intended to subsidize inefficient companies. The program was supposed

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387 Letter from August G. Fromuth, Deputy Assistant Secretary for Trade Adjustment Assistance, to Louise Woerner, President of HCR (June 30, 1986).
388 OTA REPORT, supra note 21.
389 Id. at 62.
390 Id. at 61.
391 Id.
to allow a fair and equitable recovery time for United States firms and thus forestall demands for withdrawal of tariff concessions and other trade expanding moves by the Federal government. This program has been in operation over twenty-five years. Has it satisfied these goals?

For the first twelve to thirteen years of the program there was little activity, mainly due to problems with the certification provisions of the Trade Expansion Act of 1962. With amendments to the certification provisions in the Trade Act of 1974 and subsequent administrative interpretations by Commerce, the certification aspect of the program has been operating smoothly and efficiently in recent years.

The authors have personally observed that the financial assistance aspect of the program, direct and guaranteed loans, was often the most popular part of the program from the firms' perspective. In fact, financial assistance was frequently the reason firms entered the Trade Adjustment Assistance Program in the first place. However, from the beginning financial assistance has been plagued with problems, particularly high default rates, which caused Congress to terminate that aspect of the program in 1986. Improved administrative procedures in recent years had helped. But adequate staff and other resources for performing the necessary loan origination and servicing functions were usually not made available. The discontinuance of the financial assistance portion of the program may not have resolved the problems with the program because without this portion Trade Adjustment Assistance appears significantly less attractive to the typical injured firm.

Management advice and other technical assistance to firms have always been basic elements of trade adjustment assistance. However, there have been few evaluative studies which focused on the costs and benefits of technical assistance, while there have been many which focused on the more troubled financial assistance aspect of the program. For example, not one study has ever analyzed alternate delivery systems for the program. Are the TAACs really a more efficient and effective delivery system than using Commerce offices in Washington and in the field? Since most of the program evaluations have used the TAACs as a principle source of data, issues like this have never been thoroughly probed.

Industry assistance is an aspect of the program that is particularly popular with trade associations. However, to the authors' knowledge, no evaluative study has ever mentioned, much less analyzed, this aspect of the program. The potential for leverage with industry-wide assistance grants is clearly much greater than with technical advice or financial assistance to individual firms. If this aspect of the program were large enough and run well enough, it might be able to deal with
one of the more serious criticisms of Trade Adjustment Assistance: it is simply not helping a sufficient number of the firms which are seriously affected by imports.

The Trade Adjustment Assistance program has limped along for over a quarter of a century, generally not well funded by Congress and not well administered by the executive branch. However, the evidence of recent years suggests that, if sufficient resources were provided for the competent operation of the program, it is possible that a revived Trade Adjustment Assistance Program could be administered successfully and could provide a needed service.

There is an immediate need for an up-to-date, thorough cost-benefit study of all aspects of the program with a commitment by the legislative and executive branches to carry out any recommended reforms. If neither Congress nor Commerce has the will to sponsor such a study and to carry out needed reforms, it is irresponsible to continue to fund a program which is neither as effective as it could be or as it should be.