DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 641

RIN 1205–AB28

Senior Community Service Employment Program

AGENCY: Employment and Training Administration (ETA), Labor.

ACTION: Final rule.

SUMMARY: The Employment and Training Administration (ETA) of the Department of Labor (the Department) rescinds the regulations for the Senior Community Service Employment Program (SCSEP) and issues these new regulations to implement the 2000 amendments to title V of the Older Americans Act (OAA Amendments) (Pub. L. 106–501). These regulations provide administrative and programmatic guidance and requirements for the implementation of the SCSEP.

The Final Rule contains some modifications to the Proposed Rule in response to public comments received during the comment period. The comments were thoroughly evaluated and are discussed in the Preamble to the Final Rule to clarify ETA's interpretation of the OAA Amendments through these final regulations and their application to some of the challenges that may arise during the OAA Amendments implementation. This Final Rule applies to all grantees and local project operators, including subgrantees that provide services under the SCSEP.

DATES: *Effective dates:* This Final Rule is effective May 10, 2004.

Compliance dates: Affected parties do not have to comply with the information and recordkeeping requirements in § 641.879 until the Department publishes in the **Federal Register** the control numbers assigned by the Office of Management and Budget (OMB) to these information collection requirements. Publication of the control numbers notifies the public that OMB has approved these information collection requirements under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Ms. Ria Moore Benedict, Chief, Division of Older Worker Programs. Telephone: (202) 693–3198 (this is not a toll-free number). E-mail: *benedict.ria@dol.gov.* Toll free to the ETA Help Line: 1–877–US2–JOBS. TTY: 1–877–889–5627. Copies of the Final Rule are available in the following formats: electronic file on computer disk and audio tape. They may be obtained at the above office.

SUPPLEMENTARY INFORMATION: This document is divided into four sections. Section I provides general background information. Section II discusses the major changes implemented by the Older Americans Act Amendments of 2000. Section III summarizes and responds to the comments received in response to the Notice of Proposed Rulemaking (NPRM) during the comment period and provides the Final Rule. Section IV discusses miscellaneous administrative requirements, such as Paperwork Reduction Act requirements.

I. Background

The Senior Community Service Employment Program (SCSEP) was originally authorized in 1965 by the Economic Opportunity Act (EOA), Public Law 89–73. Under the EOA, the Department established the SCSEP in 1973. As authorized by title V of the Older Americans Act Amendments of 2000 (OAA Amendments or 2000 Amendments) (42 U.S.C. 3056, *et. seq.*), the SCSEP fosters and promotes useful part-time opportunities in community service activities for persons with low incomes who are 55 years of age or older and assists older workers in transitioning to unsubsidized employment.

The OAA Amendments expand the program's purpose to include increasing participants' economic self-sufficiency and increasing the number of persons who may benefit from unsubsidized employment. The Employment and Training Administration of the Department of Labor administers the program by means of grant agreements with eligible organizations, such as governmental entities, and public and private agencies and organizations.

The SCSEP regulations were last revised in 1995 (20 CFR part 641, 60 FR 26574 (May 17, 1995)). The 2000 Amendments are the first major legislative changes to the SCSEP since 1995.

On April 28, 2003, the Department published in the **Federal Register** (68 FR 22520) an NPRM implementing the OAA Amendments and requested comments. The comments submitted in response to the NPRM have been fully considered in drafting this Final Rule. This document issues the Final Rule to conform to the OAA Amendments and to make technical changes based on the Department's experience in administering the SCSEP.

II. Changes Implemented by the OAA Amendments of 2000

Congress amended the SCSEP to combine requirements that were formerly in the SCSEP legislation as last amended in 1992 by Public Law 102–375, the accompanying regulations at 60 FR 26574 (May 17, 1995) (codified at 20 CFR part 641), and SCSEP program administration materials provided to the grantee community as bulletins, or training and employment information notices. New provisions of the OAA include requirements for: Greater coordination with the Workforce Investment Act (WIA); a greater proportion of funds for States when appropriations exceed current funding levels; the submission of State plans; grants for a period up to 3 years; new performance measures; and corrective action and sanctions for poor performance.

With the enactment of the Workforce Investment Act of 1998 (Public Law 105–220), the SCSEP became a required partner in the workforce investment system. As a result, Congress amended the SCSEP to require greater coordination with the One-Stop Delivery System, including reciprocal use of Individual Employment Plans and other assessment mechanisms.

Under both WIA and the OAA, any grantee operating an SCSEP project in a local area must now negotiate a Memorandum of Understanding (MOU) with the Local Workforce Investment Board (Local Board), which details the SCSEP's involvement in the One-Stop Delivery System. Further, because of the SCSEP's closer coordination with the One-Stop Delivery System, the "joint program'' language contained in section 510 of the 1992 amendments to the OAA, Public Law 102–375 (1992), and section 203 of the Job Training Partnership Act, Public Law 97–300 (1982) (29 U.S.C. 1603 *et seq.*) for "automatically'' qualifying participants for training or intensive services has been replaced with language that permits Local Boards to deem SCSEP participants eligible for those services.

The 2000 Amendments require a different distribution of funding between State and national SCSEP grantees if the SCSEP appropriation increases. The legislation requires the Department to reserve amounts for section 502(e) (authorizing second career training projects), the territories, and the Indian and Asian Pacific aging organizations before funds are distributed between the State and national SCSEP grantees. From the amounts remaining after the reservation, the legislation holds grantees harmless

at the 2000 level of activity, which requires the Department to allocate 22 percent of funding to State grantees and 78 percent of funding to national grantees. Funding in excess of the Fiscal Year 2000 level of activity distribution must be divided as follows: Up to $35 million will be divided to provide 75 percent to the States and 25 percent to the national grantees. Amounts over $35 million will be divided 50 percent to the States and 50 percent to the national grantees.

The 2000 Amendments require Governors to submit an annual plan that discusses the number and distribution of eligible individuals in the State, the employment opportunities, the skills of the local eligible population, the locations and populations for which community service projects are most needed, and plans for coordinating with WIA. As part of the planning process, the legislation requires the Governor to obtain the advice of title V stakeholders in developing a plan that addresses the equitable distribution of positions in each State. The legislation also allows the Governor to make recommendations on grant proposals to the Department related to the proposed distribution of positions within the State.

Another new provision of the legislation is the establishment of performance measures. The performance measures are designed to monitor the performance of each grantee and provide a mechanism to assist those grantees that need technical assistance to perform better. The performance measures are based on the required indicators listed in section 513(b) of the OAA. For grantees that do not meet the established performance measures, section 514 of the OAA provides for corrective action and sanctions. Section 514 of the OAA also codifies prior regulatory eligibility and responsibility criteria that grantees must meet before receiving SCSEP funds. Finally, section 514 authorizes the Department to fund grants for up to 3 years after the establishment of the regulations and performance measures.

III. Summary and Explanation of the Final Rule

As this legislation has many new provisions, the Department has drafted regulations that respond both to the SCSEP community's concerns and to the Department's interpretation of the statute.

Developing the Final Rule was a multi-stage process that included the creation of a Proposed Rule and a request for comments. To assist in the development of the Proposed Rule, the Department obtained viewpoints of the public, including individuals and members of the grantee community, on the new SCSEP provisions, as well as existing SCSEP provisions, regulations, or policies. Five work groups were established that included representatives from the national grantee organizations and several States. The work groups addressed the following areas: Performance accountability; operational and policy issues; grant and administrative issues; the State Senior Employment Services Coordination Plan; and technical assistance and consultation. These work groups provided the Department with issue papers and recommendations. Further, the Department held a series of Town Hall Meetings and requested comments through **Federal Register** notices to ensure that the regulations take the ideas of interested individuals into account.

During the public comment period for the Proposed Rule, the Department received a number of suggestions. The comments were thoroughly evaluated and are discussed below to clarify the Department's interpretation of the OAA Amendments through this Final Rule and to address some of the challenges that may arise during the implementation of the OAA Amendments. Every effort was made to incorporate these suggestions into the drafting of the Final Rule to the greatest extent practicable and consistent with applicable statutory requirements. The following discussion presents a section-by-section summary of the comments and the Department's responses to them. For those sections of the NPRM on which we received no comments and on which we made no substantive changes, there is no commentary following the listing of the section. We also have made some minor editorial changes which are not intended to change the meaning of the regulations and which are not discussed in the commentary below. WIA's authorization expired on September 30, 2003 but continues to operate through continuing appropriations. Since WIA may be reauthorized and its regulations may change, citations to the WIA regulations may change.

When publishing a Final Rule following a comment period it is customary to publish only changes made to the rule. However, in order to be more user friendly, we are publishing the entire rule, including those parts that have not been changed. This means that you can consult one document which contains all of the regulations and commentary, rather than needing to compare various documents.

Subpart A—Purpose and Definitions

What Part Does This Cover? (§ 641.100)

What Is the SCSEP? (§ 641.110)

What Are the Purposes of the SCSEP? (§ 641.120)

This section listed the SCSEP's purpose, including providing employment and self-sufficiency for older Americans.

The Department received numerous comments on this section. Most of them requested that the term ''underemployment'' either be added or substituted for the term ''unemployment.'' Additionally, another comment noted that ''persons 'who have poor employment prospects' were excluded.'' One commenter simply disliked any references to unemployment or underemployment because they indicate a shift in the SCSEP program away from community service and toward unsubsidized employment. Another commenter echoed this concern and asserted that unsubsidized employment is counterproductive to State agencies that rely on community service programs for participants in rural areas. One commenter supported the statutory language, and requested that this definition be cross-referenced in §§ 641.400 and 641.500.

The Department has no authority to expand the statutory SCSEP purpose to include underemployed persons. The commenters were correct, however, in pointing out that the statutory statement of purpose, in section 502(a)(1), does include persons who have poor employment prospects. We have revised the rule accordingly. We note, however, that having poor employment prospects is not an alternative criterion to being unemployed and low income; rather, it is an additional condition. Thus, revised § 641.120 tracks the language of section 502(a)(1) of the OAA Amendments. Even with the more narrow statutory purpose, the number of persons eligible for the program far exceeds the number of available positions. (*See* subpart G).

As for the comments that indicate a shift away from community service towards the unsubsidized goal, the Department recognizes that the 2000 Amendments do, in fact, represent a shift in emphasis for the SCSEP. In the 2000 Amendments, Congress has significantly increased the program's emphasis on placements into unsubsidized employment recognizing that more individuals age 55 and over are seeking employment opportunities. Rather than viewing this new focus as counterproductive, the Department encourages grantees to view the focus

on unsubsidized employment as a means to assist individuals age 55 and over in their pursuit of self-sufficiency. Encouraging unsubsidized placements also increases the number of individuals the program is able to serve. While this change in emphasis may require some grantees to change the way they administer the program, the Department believes that ultimately these changes will provide for better service to older workers.

What Is the Scope of This Part? (§ 641.130)

What Definitions Apply to This Part? (§ 641.140)

This section provided specific or contextual definitions for the terms used in this part.

The Department received numerous comments on this section with suggestions on how to better define, amend, or clarify twelve (12) definitions. They were the definitions of community service, comprehensive One-Stop, equitable distribution report, greatest social need, host agency, other participant (enrollee) cost, participant, placement into public or private unsubsidized employment, poor employment prospects, retention in public or private unsubsidized employment, subgrantee, and training services.

Generally, commenters were concerned about whether community service is considered employment. Commenters discussed whether:

- SCSEP mandatory partners need to maintain a physical presence at comprehensive One-Stops;
- Equitable distribution reports address underserved counties or States;
- The term greatest social need includes isolation caused by racial or ethnic status;
- Host agencies can include faith-based organizations and SCSEP grantees;
- Other participant (enrollee) costs include costs associated with a community service assignment;
- Participants are those who receive only services as opposed to services and wages;
- The phrase "placement into public or private unsubsidized employment'' should consider certain wage rates;
- Poor employment prospects includes limited or a lack of transportation; whether the phrase "retention in public or private unsubsidized employment'' is calculated more in accord with the Workforce Investment Act or the Older Americans Act;
- The definition of subgrantee should include technical changes; and
- Training services should be limited to the Workforce Investment Act parameters or expanded.

Regarding the definition of "Community service,'' the Department has decided not to add a statement here on participant employment status. The definition indicates the kinds of activities that are considered community services and thus, is not the proper place to address other issues.

Regarding the definition of "Comprehensive One-Stop Center,'' because the regulation does not use the term "Comprehensive One-Stop Center,'' the Department agrees that the defined term should be changed to "One-Stop Center.'' Under WIA's program design, One-Stop Centers may be organized in a variety of different ways. All One-Stop systems must, however, have at least one comprehensive One-Stop Center through which all One-Stop partners must provide applicable core services. We have revised the definition to read, "One-Stop Center means the One-Stop center system in a WIA Local Area that must include a comprehensive One-Stop Center through which One-Stop partners provide applicable core services and which provides access to other programs and services carried out by the One-Stop partners.''

Additionally, any SCSEP required One-Stop partner need not maintain a physical presence at a comprehensive One-Stop Center. Under WIA, all required partners must provide WIA core services, use a portion of their funds (not inconsistent with Federal law) to help maintain the One-Stop Delivery System, enter into the appropriate MOU, and participate in the One-Stop system consistent with the MOU. However, these services may be made available by the provision of appropriate technology, by collocating personnel, through cross-training staff, or other arrangements, as described in the MOU. See WIA Final Rule at 20 CFR 662.200 through 662.310 for the specific partner requirements.

Regarding the definition of "Equitable distribution report,'' the Department accepts the commenters' suggestion and clarifies that the definition applies to underserved counties.

Regarding the definition of "Greatest social need,'' the Department will retain the definition as it is based on section 101(28) of the OAA. As the use of the word "include'' in the definition makes clear, the factors listed in the definition are not exclusive. Grantees may use other reasonable factors in determining if an individual meets this criterion. The Department realizes that it is difficult to quantify "greatest social need'' as defined for reporting purposes. The Department plans to provide further clarification on how to capture these individuals through reporting instructions.

Regarding the definition of "Host agency,'' the Department agrees that, in appropriate circumstances, SCSEP grantees may serve as host agencies. SCSEP grantees may be host agencies as long as they meet the criteria (*i.e.,* public agency or private non-profit organization exempt from taxation under the provisions of section 501(c)(3) of the Internal Revenue Code of 1986) already established in the definition. Therefore, the Department sees no need to amend the definition to specifically include SCSEP grantees as host agencies. Due to the wording in the Proposed Rule some commenters were confused about whether faith-based organizations could be host agencies. Faith-based organizations may be host agencies, as long as the work of the participant does not involve the construction, operation, or maintenance of any facility used or to be used as a place for religious worship (OAA section 502(b)(1)(C) . The regulation has been amended to more closely track the statutory language in order to clear up the confusion. Following the phrase "political party'' we have added the phrase: "and projects involving the construction, operation, or maintenance of any facility used or to be used as a place for sectarian religious instruction or worship.''

Regarding the definition of "Other participant (enrollee) cost,'' the Department agrees with the comments. The phrase "or in conjunction with a community service assignment'' is added after "and which may be provided on the job'' and the phrase "the cost of'' is inserted after the word "means.''

Regarding the definition of "Participant,'' the Department disagrees with those commenters who suggested that a participant should be defined as an individual who receives any services. The Department believes that an SCSEP participant is an individual who receives services as outlined in subpart E. Thus, a participant may only be an individual who is enrolled in the program under subpart E (*i.e.,* has been assessed and has been assigned to a community service position, etc.) and is legally filling an authorized position. This definition is consistent with previous regulations and program policy that require an individual to be enrolled in a community service position to be considered a participant.

Regarding the definition of "Placement into public or private unsubsidized employment,'' one

commenter asked for clarification about whether an individual who worked 20 days at a certain wage rate that would exceed $5.15 per hour for 20 hours per week would be considered an unsubsidized placement. The Department emphasizes that such a situation would not be an unsubsidized placement. The 2000 Amendments clearly require employment for ''30 days within a 90 day period'' to qualify as a placement in public or private unsubsidized employment. (OAA section 513(c)(2)(A))

A commenter also asked whether participants should be able to accept private sector employment for less than 20 hours if they are economically better off and the hours fit their individual needs. Grantees are permitted to place participants in unsubsidized positions for less than 20 hours per week. The figure of 20 hours is only used at OAA sec. 515(a)(2) for budgeting purposes. The Department will make this position clear in the administrative guidance on performance measures.

Regarding the definition of ''Poor employment prospects,'' the Department notes that this definition uses the language ''include, but are not limited to.'' This means that the list in the definition is not exclusive and that grantees may use other relevant factors in determining whether an individual meets this criterion. The Department will provide further guidance on this issue in performance reporting instructions. We see no need to revise the definition to include other suggested factors.

Regarding the definition of ''Retention in public or private unsubsidized employment,'' the regulatory definition mirrors the statutory definition (OAA section 513(c)(2)(B)). The Department interprets this definition to allow for brief periods of inactivity or unemployment. The Department will provide further guidance on this issue in performance reporting instructions.

Regarding the definition of ''Subgrantee,'' the Department deletes the word ''which'' after the term ''subcontract.''

Regarding the definition of ''Training services,'' the Department's definition reflects those services authorized by section 134(d)(4) of the Workforce Investment Act. This WIA definition, however, is very broad. The list of services referenced at section 134(d)(4) of the WIA is not intended to be exhaustive. Rather, it only enumerates examples of authorized training services. Therefore, SCSEP community service assignments and those available through work experience at host agencies, are included in the definition and as discussed in subpart E.

The Department also received several suggestions to add definitions of certain terms. These terms included Disability, Dual eligibility, Residence, Pre-registration (as it appears in § 641.710(9)), Permissible information collection methods, and Part-time.

The Department agrees that it is appropriate to add some definitions that were not included in the Proposed Rule. Consequently, we have added certain definitions in the Final Rule, namely Co-enrollment, Disability, and Residence.

The term ''Disability'' is defined at section 101(8) of the OAA as follows: a disability attributable to mental or physical impairment, or a combination of mental and physical impairments, that results in substantial functional limitations in one or more of the following areas of major life activity: (A) Self-care, (B) receptive and expressive language, (C) learning, (D) mobility, (E) self-direction, (F) capacity for independent living, (G) economic self-sufficiency, (H) cognitive functioning, and (I) emotional adjustment.

The Department has decided not to define Dual eligibility. However, we have added a roughly synonymous term, Co-enrollment. Co-enrollment applies to any individual who meets the qualifications for SCSEP participation as well as the qualifications for any other relevant program as defined in the Individual Employment Plan. The Department will provide guidance on reporting for dual enrolled participants in performance reporting instructions.

As used in § 641.710(b)(9), the term ''Pre-registration,'' is intended to refer to the value of a participant's earnings before his/her enrollment in the SCSEP. We did not add this definition to the Final Rule because the subject will be covered in performance reporting instructions.

The Department has decided not to define Part-time in this rule; however, grantees should note that ''Part-time'' is defined at section 515(a)(2) of the OAA as a work week of at least 20 hours. We suggest that grantees use this statutory definition for budgeting purposes when assigning individuals to community service, which is consistent with its use in the statute.

We decided not to include a definition of the term ''Permissible information collection methods'' in the Final Rule because the Department will provide guidance through performance reporting instructions.

The term ''Residence'' is defined as an individual's declared dwelling place or address, as demonstrated by appropriate documentation. No requirement for length of residence prior to enrollment is imposed. (See also subpart E, § 641.500 and discussion of State agreements pertaining to ''cross-border registrations.'')

Subpart B—Coordination With the Workforce Investment Act

What Is the Relationship Between the SCSEP and WIA? (§ 641.200)

This section specified that SCSEP grantees are required to follow all applicable rules under WIA and its regulations and must ensure that they are familiar with the WIA statutory and regulatory provisions, especially WIA section 121(b)(1)(B)(vi) (29 U.S.C. 2841(b)(1)(B)(vi) and 29 CFR part 662 subpart B (§§ 662.200 through 662.280). The WIA operational requirements generally do not apply to SCSEP operations. As required partners under WIA, grantees are obligated to be familiar with the WIA requirements when they are acting as a WIA/One-Stop partner.

Several commenters stated that One-Stop Centers are not equipped for or interested in meeting the needs of older job seekers, particularly those 60 and over. For example, a commenter noted that One-Stop Centers are not equipped to address issues such as care giving, medication needs, and other health issues often faced by older adults. Commenters noted that older individuals often seek part-time employment, which would negatively affect One-Stop performance measures. One commenter noted the differences between the SCSEP and WIA programs, stating that the SCSEP requires a close working relationship with the individual, while WIA relies more on the initiative of the job seeker. Similarly, a commenter stated that Area Agencies on Aging operate on a more encompassing philosophy that meets all the needs of the person. Another commenter stated that the title V program must maintain individuality in order to best serve older workers and should be a part of a focused network of social and community support. One commenter noted the importance of educating Local Boards to the needs of older populations.

A few commenters discussed reciprocity between the SCSEP and WIA, asking that the Department make WIA aware of the provisions of the SCSEP. One commenter specifically discussed the eligibility reciprocity between the two programs, noting that the workers in the Dislocated Worker Program were not eligible for the SCSEP because of the six-month and 12-month

look back periods for determining income eligibility. Another requested that a mechanism be developed to resolve conflicts between the SCSEP and WIA regulations. One commenter noted that this section does not properly distinguish the SCSEP mission and participants from those of WIA and urged the Department to specify which WIA rules apply to the SCSEP. Two commenters stated that the expectation of familiarity with WIA statutory and regulatory requirements is excessive.

One commenter suggested that we specify that a One-Stop's failure to negotiate MOUs must be presented to the Department for appropriate action. Another stated that a title V grantee has no authority to require cooperation of the One-Stop system to provide appropriate services, to serve the title V priority groups, or to work with community service programs. The commenter argued that title V cannot be held accountable if the One-Stop system fails to meet expectations for older workers.

The SCSEP is a required WIA partner, as provided in 20 CFR 662.200 of the WIA regulations. Partner coordination requirements for One-Stops are articulated at 20 CFR 662.310(b)–(c) of the WIA regulations. The Department acknowledges that there have been substantial differences in the degree to which such partnerships have been established in the past, and is actively exploring strategies to have One-Stops form more inclusive relationships with SCSEP grantees. Failure to coordinate with One-Stops may lead to a finding of ineligibility (OAA section 514(c)(5)). Other consequences for failure to coordinate are established at 20 CFR 662.310(b)–(c).

The comments appear to reflect a concern that the coordination requirements of the 2000 Amendments will have the effect of diluting or undercutting the focus and mission of the SCSEP. The Department does not believe this is true and does not intend the regulations to convey this message. WIA envisions a coordinated workforce development system in which a variety of programs work more closely together to make access to workforce development services easier and more efficient. WIA includes as required partners a number of programs that serve special populations and is very careful to assure that program boundaries are respected. The Department intends that these regulations will enable grantees and subgrantees to concentrate better on the core missions of the SCSEP, providing community service assignments and unsubsidized placements to hard to serve older individuals. The Department intends that the One-Stop system be used to provide services both to older individuals who are not eligible for the SCSEP and to those who are eligible but need the intensive services that the SCSEP is unable to provide. The kinds of partnerships that the regulations envision will enable SCSEP grantees and subgrantees to focus more of their efforts on the core population that the SCSEP is intended to serve.

As discussed in more detail elsewhere, nothing in WIA or the OAA precludes grantees from negotiating MOUs that recognize and use their expertise in serving older workers as part of the One-Stop system. Thus, grantees are encouraged to negotiate such arrangements in their MOU with the One-Stops so that it counts toward their contribution to the One-Stop.

Required partnerships with the One-Stop Delivery System do not preclude voluntary relationships with other partners such as Area Agencies on Aging. The Department actively encourages such additional partnerships.

The Department does not think that the requirement that SCSEP grantees follow applicable WIA rules is excessive. In order to effectively play their role as required partners and participants in the One-Stop system, SCSEP grantees will have to operate under those WIA rules which apply to those WIA partners and to the operation of the One-Stops. In order to be able to fully use the WIA system as a source for additional services, grantees will have to know how the system works. The comments appear to reflect a desire for a more productive relationship between the SCSEP and WIA and a desire to make the WIA system more responsive to the needs of older workers. The Department believes that this goal can best be accomplished if SCSEP grantees become knowledgeable about how the WIA system operates.

There were several funding-related comments. Some questioned whether SCSEP funds could be used to support One-Stop operations. One commenter stated that the SCSEP should provide for essential contributions to WIA, suggesting that the Department make SCSEP funds specifically available for WIA through the regular funding process or allow the match that grantees provide to be used to support WIA activities.

SCSEP grantees are required One-Stop partners and therefore have certain responsibilities as One-Stop Partners. As explained in the WIA regulations, at 29 CFR 662.230, SCSEP grantees must assist in creating and maintaining the One-Stop Delivery System. This requires negotiating financial arrangements, including in-kind contributions when possible, in the MOU with their WIA Local Board. Because coordination with the WIA system is an SCSEP requirement, grantees are authorized to use grant funds for that purpose. However, grantees also may use their non-Federal resources or cash to support WIA activities as well as a portion of their grant funds. The WIA regulations, at 29 CFR 662.230, explain these and other responsibilities of required One-Stop partners. The extent to which grant funds or in-kind contributions are needed to fund the SCSEP partner's share of One-Stop support will depend on the MOU and the services that each party provides in the One-Stop setting. With regard to the development of MOUs, the Department will follow the larger WIA system which makes the development of MOUs a local decision.

One commenter requested that the Department specify that title V host agencies do not need to be co-located to meet the definition of a One-Stop partner.

There is no requirement that grantees, subgrantees or host agencies be co-located in the One-Stop. That is a matter to be negotiated in the MOU, although the Department believes it is a good practice. SCSEP grantees are required to do no more and no less than other required One-Stop partners. Section 134(c) of WIA requires that core services be provided, at a minimum, at one comprehensive physical One-Stop Center. The WIA regulations at § 662.250 require that core services applicable to a partner's program must be made available by each partner at that comprehensive One-Stop Center. As explained in the Preamble to the WIA regulations, at 65 FR 49309 (August 11, 2000), in order to avoid duplication of services traditionally provided under the Wagner-Peyser Act, this requirement is limited to those applicable core services that are in addition to the basic labor exchange services traditionally provided in the local area under the Wagner-Peyser program. Furthermore, 29 CFR 662.250(c) also provides significant flexibility about how the core services are made available at the One-Stop Center by allowing for services to be provided through appropriate technology at the center, through co-location of personnel, cross-training of staff, or through contractual or other arrangements between the partner and the service providers at the center.

What Services, in Addition to the Applicable Core Services, Must SCSEP Grantees Provide Through the One-Stop Delivery System? (§ 641.210)

Section 641.210 provided that SCSEP grantees must provide their participants, eligible individuals the grantees are unable to serve, and other SCSEP ineligible individuals, with access to services, activities, and programs carried out by other One-Stop partners.

Several commenters stated that it is not practical to make such arrangements because One-Stop services are not accessible for all individuals in all locations, particularly those in rural areas. Another commenter asked that the Department clarify to what extent such arrangements need to be made. One commenter asked that the language be changed to state "a referral to access other activities and programs * * *.'' Another commenter argued that the Department should promote coordination between the SCSEP and local community-based and faith-based organizations, not only with the One-Stop Centers.

The Department acknowledges that rural locations may present particular challenges and encourages coordination with other organizations in addition to One-Stops that may be more accessible and/or appropriate. Coordination with One-Stops is essential to ensuring a seamless, comprehensive workforce development system that identifies the service options available to individuals and takes the critical next step of facilitating access to these services.

This provision is simply a reminder of a basic premise of the WIA One-Stop system: the broadening of customers' access to a wide variety of services. The regulation implements the "no wrong door'' approach of the One-Stop system by reminding grantees and subgrantees that they must be part of the One-Stop system and must participate in providing access to the other services that the One-Stop partners offer. The regulation requires that grantees make arrangements to provide "access'' to services; it does not require that the person referred be able in every case to use the services. To make it clear that the regulation imposes no more than the obligation to be a part of the One-Stop system and to participate in its efforts to make services more widely accessible to customers, we have added the words "through the One-Stop Delivery System'' to the regulation. Of course, the regulation does not preclude grantees and subgrantees from establishing other partnerships, which will help eligible and ineligible individuals access needed services.

Two commenters questioned the manner in which entities receive credit for job placement services. One suggested that referrals be tracked so agencies may receive appropriate recognition.

The allocation of placement credit will be addressed in administrative guidance as the performance accountability system is further refined.

One commenter recommended that title V programs be encouraged to offer core services through the One-Stop.

SCSEP grantees are free to negotiate the services to be provided by and through the One-Stop Delivery System in their MOU, as described at 29 CFR 662.300 of the WIA regulations. The Department agrees that grantees are required to offer core services applicable to SCSEP through the One-Stop; but grantees also may decide whether to offer core services in other ways. As to other services, grantees must decide which of the One-Stop's services to use and how to use them. The Department believes that the One-Stop system can provide additional services not otherwise available to the SCSEP because of funding constraints and agrees that grantees should be encouraged to make use of the One-Stop system and other available sources of services.

Does Title I of WIA Require the SCSEP To Use OAA Funds for Individuals Who Are Not Eligible for SCSEP Services or for Services That Are Not Authorized Under the OAA? (§ 641.220)

Section 641.220 provided that grantees should refer individuals who are ineligible for the SCSEP to the One-Stop system and to the WIA partner programs for services, as agreed to in the MOU.

Several commenters addressed perceived problems associated with the inability of title V to provide funds for ineligible individuals. One commenter noted that WIA does not provide services for older workers and that only limited WIA funds are available. The commenter also stated that the section does not address how ineligible individuals will receive services from WIA, if the SCSEP cannot use its resources as a full partner. Another commenter recommended that all grantees operating in a One-Stop share the responsibility of meeting core services, as well as providing for any cash contribution to the One-Stop system. Another commenter asked whether SCSEP funds will be allocated for the cost of providing ineligible individuals with access to other activities and programs.

Title V resources may only be used to provide title V services to title V-eligible individuals. Although not considered a "service,'' title V resources may also be used to determine if an individual is eligible to participate in the SCSEP program and to a limited extent, to provide the individual with referrals or access to other services. Such expenditures are considered allowable costs. SCSEP grantees are responsible for negotiating services to be provided by the One Stop Delivery System to both SCSEP-eligible and SCSEP-ineligible individuals in their MOU, as described at 20 CFR 662.300 of the WIA regulations. The underlying notion of the One-Stop is the coordination of programs, services and governance structures so that the customer has access to a seamless system of workforce investment services. The success of the reformed workforce investment system is dependent on the development of true partnerships and honest collaboration at all levels and among all stakeholders.

One commenter recommended that the SCSEP serve all older job seekers, stating that many Area Agencies on Aging have established the necessary local infrastructure to place SCSEP-ineligible older job seekers in unsubsidized jobs.

The regulation is not intended to govern any services that Area Agencies on Aging or similar multi-function groups may provide other than SCSEP-funded activities. Area Agencies on Aging remain free to provide other services to the elderly and to refer SCSEP-ineligible individuals to those services. It would be most beneficial to these agencies and to the One-Stop system if this referral system were included in the MOU.

Some commenters suggested that the Department clarify that SCSEP participants assigned to work in a One-Stop are not prohibited from serving non-SCSEP eligible individuals who are seeking appropriate One-Stop services.

Naturally, SCSEP participants assigned to work in a One-Stop are allowed to serve non-SCSEP eligible individuals who are seeking appropriate One-Stop services. In such an instance, the One-Stop simply acts as a host agency and the participants simply provide the services ordinarily provided by the host agency.

Must the Individual Assessment Conducted by the SCSEP Grantee and the Assessment Performed by the One-Stop Delivery System Be Accepted for Use By Either Entity To Determine the Individual's Need for Services in the SCSEP and Adult Programs Under Title IB of WIA? (§ 641.230)

This section required that an assessment or Individual Employment Plan (IEP) completed by the SCSEP satisfies any condition for an assessment, service strategy, or IEP completed at the One-Stop and vice-versa (OAA sec. 502(b)(4)(A)). These reciprocal arrangements and contents of the SCSEP IEP and WIA IEP should be negotiated in the MOU.

One commenter suggested that the section state that both entities must coordinate on the IEP, not that one must be accepted by the other entity. Another commenter recommended that the Department clarify that we expect One-Stop operators to accept SCSEP IEPs and SCSEP grantees to accept One-Stop-originated IEPs.

Under section 502(b)(4) of the OAA and § 641.230 of the SCSEP regulations, SCSEP assessments and service strategies satisfy any condition for an assessment and service strategy or IEP for an adult participant under title IB of WIA, in order to determine whether such individual qualifies for intensive or training services. Similarly, WIA assessments must be accepted by SCSEP grantees. As noted in the Preamble to the SCSEP Proposed Rule, as a practical matter, this means that the SCSEP IEP and the WIA IEP must be sufficiently comprehensive to provide the information needed to place a participant who is eligible for both programs in the correct service mix. This may well require modifying existing SCSEP IEP and WIA IEP information collection practices, which should be negotiated during the development of the local MOU. For a more in-depth discussion of this issue, see the Preamble to the proposed SCSEP regulations at 65 FR 22522 (April 28, 2003).

Are SCSEP Participants Eligible for Intensive and Training Services Under Title I of WIA? (§ 641.240)

Section 641.240 provided that, although SCSEP participants are not automatically eligible for intensive and training services under title I of WIA, Local Boards may deem them as satisfying the requirements for receiving adult intensive and training services under title I of WIA. It also provided that an SCSEP assessment and IEP qualify as an intensive service under WIA and that SCSEP participants seeking unsubsidized employment may require training to meet their objective and may obtain such training through the SCSEP, the WIA program or a WIA partner, as negotiated in the MOU. Finally, the regulation provided that an SCSEP community service assignment is analogous to work experience assignments under WIA. The Preamble to the NPRM suggested that SCSEP stipends should not be considered income for WIA income eligibility purposes.

A few commenters recommended that a reciprocal arrangement be established between the SCSEP and title I of WIA. The commenters suggested that SCSEP-eligible participants who receive intensive and training services under title I of WIA, who are placed in unsubsidized employment, be counted as placements by the SCSEP.

The Department agrees that reciprocal arrangements for determining eligibility, as well as for establishing how services to older workers will be provided, is a good idea and encourages grantees and subgrantees to negotiate such arrangements in their MOUs. The Department is aware that there have been problems in some areas in providing services to older workers and recommends that grantees and subgrantees use the negotiation of MOUs to address those problems, either by negotiating for additional services through the One-Stop or by negotiating a greater role in providing services to older workers as a One-Stop partner.

Two commenters suggested that WIA performance measures be modified to address the special needs of older workers. Another commenter stated that the Department wrongly assumes that greater coordination with WIA One-Stop Centers will result in SCSEP participants being deemed eligible for service and having access to a broad range of intensive and training opportunities because of performance measures disincentives under WIA. We cannot address WIA performance measures in this rule, but the Department is aware of these concerns and is reviewing this issue.

One commenter stated that it is unreasonable that most low-income older job seekers with poor employment prospects are not automatically eligible for WIA intensive and training services.

The Department is constrained by the language of the statute, which provides that SCSEP participants "may be deemed'' eligible for WIA title I services. This is a change from the prior version of the statute, which required that SCSEP participants be deemed eligible. This change gives the discretion to the Local Board and emphasizes the importance of negotiating the MOU with the Local Board.

One commenter recommended that the Department clarify that title V funds can be used to pay wages during participant training. Another noted that wages paid to participants are included in their initial income if they later seek to enroll in WIA. The commenter argued that this makes it more difficult for WIA to meet performance goals.

The Department agrees that title V funds can be used to pay wages to SCSEP participants receiving intensive and training services under title I of WIA, provided that SCSEP participants are assigned to a community service assignment. The Department has amended § 641.240 accordingly. Training may be provided as part of the community service assignment or in addition to a community service assignment. A participant need not be performing the community service assignment when the training is provided, *i.e.*, the training may occur before the participant begins the community service assignment or the participant may take the training while assigned to a community service assignment. The Department's intent is to assure that SCSEP funds spent for participant training are spent on those participants who most need the services available through the SCSEP.

Finally, because the OAA statute only provides authority for regulations governing the SCSEP program, these regulations cannot speak to whether SCSEP community service wages will be considered income for eligibility purposes in other programs. The Department will only address income in § 641.507.

Subpart C—The State Senior Employment Services Coordination Plan

This entire subpart represents a change from the current regulations, as the 2000 Amendments established a new, more thorough planning process for the SCSEP in each State.

What Is the State Plan? (§ 641.300)

Who Is Responsible for Developing and Submitting the State Plan? (§ 641.305)

In §§ 641.300 and 641.305, the Department reiterated the statutory requirement that the Governor is responsible for developing and submitting a State Plan to the Department.

One commenter noted that there is no discussion on what will happen to the Governor's recommendations and expressed particular concern that the

distribution of slots be balanced so as not to disadvantage rural areas. Another commenter asked who will be responsible for developing the State Plan and whether a forum or other method of development will be specified.

The concerns about review of the Governor's recommendations and allocation of slots are addressed in the 2000 Amendments, at section 503(a)(7), which notes that "each State shall make available for public comment its senior employment services coordination plan'' and that the Secretary may review "the distribution of projects and services * * * including the distribution between urban and rural areas within the State.''

The State Plan is to be developed by the Governor or his/her designee, in consultation with national grantees, State and Local Workforce Investment Boards, and the State and Area Agencies on Aging, as specified in § 641.315 and in the 2000 Amendments, at section 503(a)(2), in a manner specified by the Governor. The Department is not inclined to set rules to constrain the Governor's discretion in setting the procedures for this consultation. The Department may provide guidelines for the planning process in an administrative issuance. As noted in § 641.300, the purpose of the State Plan is to encourage coordination among SCSEP grantees and assist stakeholders to work together in furtherance of the SCSEP program's goals.

May the Governor Delegate Responsibility for Developing and Submitting the State Plan? (§ 641.310)

Section 641.310 specified that the Governor may delegate preparation of the State Plan and also described how this will be done. A commenter thought that the Department should define the time period during which the Governor should submit a signed statement indicating who will submit the State Plan on the Governor's behalf.

The Department will be issuing instructions about State Plans, which will address their administrative requirements, including time frames. Any State Plan submitted by a designee for whom a signed designation statement has not previously or simultaneously been submitted will be considered a non-submission.

Who Participates in Developing the State Plan? (§ 641.315)

Section 641.315 listed the parties from whom the Governor must seek advice on the State Plan. One commenter stated that national grantees should be required to designate a person to participate in the planning process of each State where they have slots, while another commenter suggested that the Department include all One-Stop partners in developing the State Plan to foster collaboration once the State Plan is implemented.

It is not clear whether the first commenter is suggesting that each national grantee designate one person to participate in the planning efforts of all States where that national grantee operates an SCSEP project or designate one particular person to participate in each State's planning process. However, without describing the individual who will take this role, section 503(a)(2)(B) of the 2000 Amendments requires "each grantee operating * * * in the State'' to be consulted as part of the planning process. Section 641.320 addresses the importance of national grantee participation in the planning process, and the Department anticipates that grantees will honor both the letter and the spirit of the law with respect to collaboration. The precise details of how each national grantee will fulfill this role are best left to the national grantee and the Governor involved.

One-Stop partners are included in the planning process through the required consultation with the State and Local Workforce Investment Boards (also known simply as State and Local Boards), which operate under the WIA. To make this relationship clearer, § 641.315(a)(2) has been amended to read "State and Local Boards under the Workforce Investment Act (WIA)'' to make this relationship clear.

Although the Department wishes to allow Governors wide latitude in designing the State's planning process, the Department agrees that the Governor must provide a reasonable time for consultation and comments.

Must All National Grantees Operating Within a State Participate in the State Planning Process? (§ 641.320)

Section 641.320 required all national grantees (except for those serving older American Indians) to participate in the planning process. One commenter commended this requirement, while another outlined how her agency would implement it. Two commenters addressed whether the participants need be physically present for these discussions, rather than communicate by correspondence or phone, and another commenter recommended that the Department require each Governor to provide "sufficient written notice of the state planning process to all national grantees operating in the state.''

Each Governor is responsible for setting the parameters of the planning process for his or her State, including time frames and methods of consultation. Nothing in the law or regulations states, however, that participants in this process must be physically present for these discussions.

As noted in the Preamble to the Proposed Rule, the Department believes that a coordinated planning process will benefit national grantees both in terms of the services they provide to older workers and in terms of the grantees' continuing eligibility to provide those services. Although the statute does not require grantees serving older American Indians to participate in the planning process, they are encouraged to do so. (*See also* § 641.315.)

What Information Must Be Provided in the State Plan? (§ 641.325)

Section 641.325 detailed the information that must be contained in the State Plan. Most of the commenters felt that the proposed requirements "entail a huge data collection effort and a significant administrative burden for SCSEP grantees' and requested that these requirements be simplified. Most of these commenters argued that the resources needed to collect this information would negatively impact their ability to provide services the to SCSEP participants.

Section 641.325 listed the minimum requirements of the State Plan consistent with section 503(a)(4) of the 2000 Amendments. This information includes data on the number and distribution of eligible individuals, as well as their employment situations and the locations and populations for which community service projects are needed. The State Plan also is to define how the activities of SCSEP grantees will be coordinated and how and when the planning process will proceed. Finally, the State Plan is to explain how disruptions to participants will be avoided.

Depending on the amount of information already available for preparation of the respective State Plans, some grantees may be asked to supply some of the data required by the statute. While such data collection may prove to be challenging, it will benefit the program as a whole through more equitable distribution of slots and greater coordination among the various parties providing services to older workers. The Department believes that most of the data required for the State Plan are available from generally available data sources, *e.g.,* census data. We anticipate that, to the extent the Governor will seek data from national grantees, the grantees will primarily be required to provide data on their actual

activities: Data that the grantees already possess and/or report.

How Should the State Plan Reflect Community Service Needs? (§ 641.330)

Section 641.330 described the requirements of the State Plans with respect to community services: What services are needed, and where they are most needed.

Some commenters thought the State Plan should reflect community service needs only in a very general way because specific needs often change and thus are best determined locally. The commenters pointed out that the SCSEP requires that community service opportunities be developed based upon participants' Individual Employment Plans, and the training and employment needs of the participants should come first. These commenters also noted that there is no established, uniform process for identifying and collecting information on community service needs, and they believe such effort would require substantial work and diminish staff time needed to implement the program. They also believe the law does not require collection of information on community service needs, but only the documentation of the locations and populations for which community service projects are most needed. Other commenters stated that local entities such as subgrantees are in a better position than the Governor to determine local needs.

The Department agrees that the needs of the participants must be fully considered in developing community service opportunities, and the inclusion of these factors in the State Plan is addressed in section 503(a)(4)(D). However, the OAA also specifically calls for identification of community service needs, as described in section 503(a)(4)(E). The Department anticipates that the State Plans will reflect a balance between these complementary factors. Identification of community service needs ultimately helps individual older workers target the specific skills needed for employment in their particular communities, thus affording them greater employability in the future.

With respect to the documentation issue, the Department does not believe that a separate data-collection effort will be necessary to obtain information about community service needs. As part of the application process, each national grantee will have identified these needs in the areas to be served and, through administering services, this information will be refined and modified over time. Also, given the variety of organizations involved in the SCSEP program, including State and Local Boards and Area Agencies on Aging as well as grantees and subgrantees, information should be available from a variety of sources. For example, national grantees will be able to use the experience of local subgrantees with respect to local needs as the grantees formulate their contributions to the State Plans. The Department believes that this kind of collaboration will lead to a better program, one that can address the specific needs of each State and locality.

How Should the Governor Address the Coordination of SCSEP Services With Activities Funded Under Title I of WIA? (§ 641.335)

Section 641.335 addressed the ways in which the Governor, the SCSEP, and WIA must work together. One commenter noted that collaborative efforts would foster best practices. Another suggested that obtaining this information may be difficult in States that have numerous national sponsors.

The Governor is responsible for consulting each national grantee that operates in the State, and all national grantees except those serving older American Indians are required to participate in this process. Such consultation is necessary to administer an effective program, provide services that are most needed and of the best possible quality, and avoid duplication of services. Moreover, the OAA Amendments, at section 503(a)(2), require the Governor to obtain advice and recommendations from a variety of parties, including the Area Agencies on Aging, in developing the State Plan. While obtaining information on coordination may be a bit more complicated where there are several national grantees in a State, we believe that if the Governor has set up a good consultation process, obtaining the information should not be difficult.

Must the Governor Submit a State Plan Each Year? (§ 641.340)

Proposed § 641.340 provided that the Governor need not submit a full Plan each year. However, at a minimum, the Governor must seek advice and recommendations about any needed changes from the individuals and organizations identified both at OAA Amendments section 503(a)(2) and § 641.315. The Governor must then publish the changes for comment and submit a Plan modification to the Department.

Two commenters agreed with this interpretation of the statute, stating that it allows the Governor to consult with interested parties and annually update the Plan as needed, and at the same time provides relief from unnecessary burdens.

What Are the Requirements for Modifying the State Plan? (§ 641.345)

How Should Public Comments Be Solicited and Collected? (§ 641.350)

Who May Comment on the State Plan? (§ 641.355)

How Does the State Plan Relate to the Equitable Distribution (ED) Report? (§ 641.360)

Section 641.360 addressed how the State Plan will use information provided in the equitable distribution (ED) report and how, in turn, the ED report will reflect the State Plan. One commenter observed that the States do not have enough authority under current legislation to truly modify the distribution of slots within the State. Another commenter stated that these documents are valuable planning tools that foster collaboration among the State and national grantees, but that they are not intended as mandates on either grantees or the Department regarding the ultimate allocation of positions.

The OAA Amendments strengthen the role of the Governors in the planning process. OAA Amendments section 503(a)(5)(B) and § 641.365 of this subpart specifically address inclusion of recommendations for redistribution of slots in State Plans, while OAA Amendments section 503(a)(7)(A) describes the process by which the Secretary of Labor will review and make decisions about the State Plan. The Department believes that this process will allow the States to modify distributions of slots as necessary, and that, given its oversight authority, the Department must in fact ensure that equitable distribution is occurring. As stated in § 641.365, the Department does not intend that slots be redistributed while they are encumbered because to do so would cause disruption. As slots become unencumbered, however, it is appropriate to redistribute them to provide equitable distribution.

Also, in accordance with its intent that the ED report and the State Plan work together to ensure that services are fairly distributed in the State, the Department agrees that these documents are valuable tools that foster collaboration among the State and national grantees. The process is an iterative one in that it allows for transfer of authorized positions from overserved to underserved areas over a period of time. These documents thus pave the way for efficient transition to the most effective use of resources. The Department will issue administrative guidance to clarify the relationship

between the ED report and the State Plan.

How Must the Equitable Distribution Provisions Be Reconciled With the Provision That Disruptions to Current Participants Should Be Avoided? (§ 641.365)

In § 641.365, the Department discussed how positions should be moved due to shifts in populations of eligible individuals. Two commenters stated that grantees should not trade or move slots without first consulting with the State agency responsible for preparing the State Plan and ED report. To do otherwise would undermine the purpose of those reports.

A third commenter stated that the Department, or the State, should ensure smooth transitions for participants where slots available from previous grantees decrease as new national grantees provide services for the program. Another commenter supported the statement that participants cannot choose to remain in the program indefinitely and recommended that this concept be reiterated in § 641.570 or some other appropriate section.

With respect to the first concern, language has been added to this section stating: "Grantees must submit, in writing, any proposed changes in distribution that occur after submissions of the equitable distribution report to the Federal Project Officer for approval. All grantees are strongly encouraged to coordinate any proposed changes in position distribution with the other grantees servicing in the State, including the State project director, prior to submitting the proposed changes to their Federal Project Officer for approval.''

With respect to the second concern, the Department has sponsored training sessions for new national grantees and consultations with grantees that are relinquishing slots in specific locations, to ensure smooth transitions for program participants. The Department will continue to provide technical assistance to grantees to ensure the smoothest transitions possible.

With respect to the third concern, the Department believes that § 641.570 sufficiently addresses the concept of time limitations for participants and we will not address it in this section. In addition, the Preamble to the Proposed Rule stated that although there is no time limit on participation in the SCSEP, most participants will receive services for no more than 24 to 36 months, and that a grantee may be authorized to set a maximum duration if it specifies how it will move participants into unsubsidized employment or other assistance before the time limit expires. We reiterate that position here.

Subpart D—Grant Application, Eligibility, and Award Requirements

What Entities Are Eligible To Apply to the Department for Funds To Administer SCSEP Community Service Projects? (§ 641.400)

Section 641.400 introduced a new eligibility requirement for national grantees that an entity must have the capacity to administer a multi-State program. The Department interprets this requirement to mean that the organization must have the capacity to operate in more than one State even if it only operates within one State. Eligible entities that may serve as national grantees are limited to nonprofit organizations, Federal public agencies, and Tribal organizations. States and political subdivisions are not eligible to apply. However, in addition to receiving their SCSEP funding through the formula process States are eligible to compete for funds forfeited by a poor performing national grantee in a State. (*See* subpart G.)

Several commenters expressed concern that allowing States to receive the funding of a poor performing national grantee within a State would disrupt the established 78/22 percent balance of funds between national grantees and States. Other commenters suggested that to alleviate this potential imbalance the Department should require the successful State grantee to redirect the funds to national grantees. Several commenters requested clarification as to whether a poor performing entity losing its funds would be allowed to compete for the funds it is losing. Another commenter supported the changes to the definitions. One commenter supported the requirement that an entity must have the capacity to administer a multi-state program even if it only operates within one State, but suggested adding the requirement of demonstrated effectiveness in serving the employment and training needs of SCSEP eligible adults.

Because the authorization for a State to compete for national grant funding when a national grantee has failed its performance standards in a State is statutory, the Department can neither forbid a State from competing nor require the state to subgrant with a national grantee. The Department believes that allowing a State to compete for and receive a poor performing national grantee's funding does not change the character of the source of the funding. The funding allocations will continue to be made based on the 78/22 percent split of Federal funds to the national grantees and the State grantees respectively. Thus, the State grantee that receives national grantee funding will continue to receive its formula allocation and will also receive a share of the national funding that is competed.

Regarding the suggestion to augment the requirement of eligible entities to administer multi-State programs with the additional requirement of "demonstrated effectiveness,'' the Department believes that this additional requirement is already addressed by the eligibility requirements under section 514 of the OAA. Further, § 641.420, discusses factors considered in full and open grantee competitions and specifically mentions "past performance in any prior Federal grants or contract for the past three years.'' The Department will list other factors that it deems appropriate in the Solicitation for Grant Application or similar instrument.

Although the regulation is clear that a poor performing national grantee in a State would not be permitted to compete for the funds it is losing, the Department believes that should be the extent of the penalty and that the national grantee in a State may still be allowed to compete for other available SCSEP funds. There are two reasons for this determination. First, poor performers within a State are not necessarily poor performers nationwide. Therefore, precluding such a poor performer from competing for other national grant Federal funds may be a disservice to the SCSEP. Second, poor performing national grantees in a State may be able to cure their shortcomings in time for any subsequent competitions.

With regard to State grantees, the agency that performed poorly would be excluded from the competition. As noted in the Preamble to the Proposed Rule, the State remains responsible for receiving the grant and for selecting an agent or subgrantee to operate the grant in accordance with its own procedures.

A commenter requested several language clarifications, including a clarification of the Preamble discussion of "positions that did not receive a proposal.'' The commenter noted that the reference in the same Preamble paragraph to "national in scope'' is a difficult concept. Finally, regarding the use of the phrase "subject of the competition,'' in § 641.400(b), the commenter observed that there is no previous mention of this concept and suggested that the regulation explain the context of this phrase as being a national competition for replacing the

original grantee, in whole or in part and replace the phrase "If the State's funds are competed'' with something else.

The use of the phrase "positions that did not receive a proposal'' in the Preamble to the Proposed Rule was intended to acknowledge the possibility that situations could arise in which applicants for national grants did not apply for all the existing positions that are available. Because the statute enjoins the Department to minimize disruption, the Department would have to negotiate with successful grantees to "take'' those slots. Similarly, the phrase "national in scope'' simply recognizes that a number of current national grantees are organizations that provide services to older individuals nationwide. The Department has revised the second sentence of § 641.400(b) to make clear that the poor performing grantee whose funds are competed is not eligible to compete for those funds.

How Does an Eligible Entity Apply? (§ 641.410)

Section 641.410 provided that the Department will provide application guidelines and instructions which all applicants must follow. Additionally, before submitting an application to the Department, national grant applicants also must submit their applications to the Governors of the States in which they intend to operate (except for those grantees serving older American Indians). The Preamble to the Proposed Rule encouraged grant applicants intending to serve older American Indians to consult with the Secretary of Labor in establishing service areas under § 641.320. States that submit an SCSEP grant application as part of its WIA Unified Plan must also address all of the application requirements published by the Department.

The Department received few comments on this section. One commenter disagreed that a national grantee should be required to submit its entire application to the Governor(s) of the State(s) in which the national grantee will operate when each Governor will only be able to comment on a limited portion of the entire application that relates to the slots in his/her State. The commenter asserted that the definition of "application'' should be restricted for purposes of a Governor's review and suggested that the Department provide any additional information to a Governor upon request. Another commenter indicated that the application should be limited to the SF–424 and slot allocation listing with a brief executive summary in order to limit the cost and time involved in providing these applications. Another commenter requested that the regulations mention that grantees serving older Indians must consult with the Secretary to establish service areas. Finally, one commenter suggested adding a statutory or regulatory reference to the specific WIA Unified Plan provision that applies to State applicants.

This section is consistent with the requirements of section 503(a)(5) of the OAA Amendments and accordingly requires grant applications be submitted to the Governor of each State in which a national grantee intends to operate. The Department is not convinced that there is any great benefit to be gained from submitting partial applications in various States, which may involve more work than simply copying the application several times.

Regarding the suggestion to mention grantees serving American Indians consulting with the Secretary to establish service areas, the Department believes that the requirement that Indian-serving grantees submit their application to the Department adequately resolves the issue.

The Department agrees that a reference to the specific WIA Unified Plan provision would be useful. Therefore we have added a reference to WIA section 501. Grantees should note, however, that the Department has other guidance on the WIA Unified Plan that is not referenced here.

What Factors Will the Department Consider in Selecting Grantees? (§ 641.420)

Section 641.420 stated that the factors for selecting grantees are: (1) The criteria listed in the OAA at section 514(c)(1)–(7); (2) the responsibility tests addressed in OAA at section 514(d); (3) the rating criteria in any Solicitation for Grant Application or other instrument; and (4) an applicant's past performance in any prior Federal grants or contracts for the past 3 years.

Several commenters agreed with the Department's use of past performance as a consideration in a full and open competition. Two commenters indicated that past performance should be a heavily weighted factor.

The Department agrees that past performance is necessary to determine a potential grantee's ability to administer an SCSEP grant. The Department does not, however, believe that past performance should be given so much weight that it gives incumbent grantees an unfair competitive advantage.

One commenter suggested that past performance language in § 641.420 be amended to comport with or refer to § 641.400 which speaks to competitions for Federal SCSEP funds "when a national grantee in a State fails to meet its performance measures in the second and third year of failure.'' Another commenter suggested a technical change to move the first word "criteria'' from after the word "eligibility'' to after the word "review.''

The Department does not believe that a reference to § 641.400 is necessary for two reasons. First, under OAA section 514(e)(3), a poor performing national grantee in a State may, in the second year of failure, have its funding transferred to another organization. Second, the Department does not believe that further reference is necessary. The Department agrees with the technical suggestion and modifies the section accordingly.

What Are the Eligibility Criteria That Each Applicant Must Meet? (§ 641.430)

In § 641.430, the Department described what each applicant must demonstrate in order to be eligible to receive SCSEP funds. The requirements generally mirror the requirements established in the OAA Amendments at section 514(c). They are the ability to administer a program that: (1) Serves the greatest number of eligible individuals with an emphasis on those with the greatest economic need; (2) provides employment in communities in which eligible individuals reside or in nearby communities that contribute to the welfare of the community; (3) moves eligible individuals into unsubsidized employment; (4) moves individuals with multiple barriers to employment into unsubsidized employment; (5) coordinates with other organizations at the State and local levels; (6) effectively plans for the fiscal management of the Federal funds received; and (7) any additional criteria the Secretary deems appropriate to minimize disruption for current participants. Section 641.430(g) added a separate requirement that each applicant must demonstrate an ability to "minimize program disruption for current participants if there is a change in project sponsor and/or location'' as well as its plan for minimizing disruptions.

The Department received few comments on this section. Regarding the criteria that grant applicants coordinate "with other organizations at the State and local levels,'' one commenter questioned how a grantee can effectively coordinate with a One-Stop if the grantee was not geographically near a One-Stop. Other commenters suggested that the Proposed Rule provides no indication that a grantee operating a program that is part of a One-Stop

should comply with the requirements in 29 CFR part 37.

This regulation reflects the requirements of OAA section 512. The Department requires grantees located great distances from any One-Stop or One-Stop Delivery System to, at least, establish some sort of relationship or routine communication with the nearest One-Stop. That relation will usually be detailed in the MOU. Such activity may include the creation of a satellite One-Stop office in the grantee's office or linking of the grantee's office and the One-Stop through appropriate technology. Despite distances, such coordination can foster positive results on behalf of older workers.

The Department agrees that as partners in the One-Stop system, OAA grantees must adhere to the WIA regulations implementing the nondiscrimination and equal opportunity provisions of the Workforce Investment Act. The Final Rule specifically requires adherence to these requirements in § 641.827(b).

What Are the Responsibility Conditions That an Applicant Must Meet? (§ 641.440)

Section 641.440 addressed the 14 responsibility tests, such as exercising fiscal responsibility, that are found in section 514(d) of the OAA Amendments. SCSEP grant applicants must meet these tests in order to avoid being disqualified for Federal funds.

The Department received two comments on this section. The first comment suggested that the section was drafted poorly and appeared to require each applicant to engage in the listed wrongdoings to meet the responsibility conditions. Specifically, the comment referred to § 641.440(m) as making "no sense.'' The second comment requested that the lead sentence be changed to read "Each applicant must be able to meet the applicable responsibility tests by not having had any of the following apply to its operations.'' The second commenter also suggested, that in § 641.440(a) the "whether'' clause be replaced with "whether incurred by the applicant or one of its subgrantees or subcontractors.''

The Department acknowledges that the section does not read well and therefore accepts the recommendations to clarify the wording, namely the redrafting of the opening sentence. The opening sentence to the regulation is revised to read, "Each applicant must meet each of the listed responsibility 'tests' by not having committed any of the acts of misfeasance or malfeasance described in § 641.440(a)–(n) of this section.'' The Department has also revised § 641.440(a) as suggested. Otherwise, this section is consistent with the OAA Amendments and tracks the statutory language.

Are There Responsibility Conditions That Alone Will Disqualify an Applicant? (§ 641.450)

Section 641.450 provided that an applicant may be disqualified based solely on either of the first two responsibility conditions listed in § 641.440. Those conditions are: (1) The Department's inability to recover a debt from the applicant or an applicant's failure to comply with a debt repayment plan; and (2) significant fraud or criminal activity. The regulation explained that disqualification based on the other responsibility conditions listed in § 641.440 require persistent failure for two or more consecutive years.

The Department received several comments on this section. Four commenters expressed approval and commendation for the implementation of these responsibility tests and the increased accountability they will bring to the SCSEP program. These commenters also suggested, however, that failure to meet the fraud and criminal activity responsibility test should not be absolute (automatic disqualification) when an applicant has developed appropriate safeguards against fraud or criminal activity and "promptly reports an occurrence that does not indicate a significant weakness in internal controls.'' Other commenters suggested that the section is unclear; that it can be read to say that an applicant may be disqualified if it fails to have an unrecoverable debt or engage in fraud or criminal activity.

This section is clear and consistent with the requirements of section 514(d)(3) of the OAA. The purpose of this section is not to encourage grantees to report their own fiduciary or other responsibility failures, but to assure that grantees will be vigilant in keeping them from happening in the first place. The Department intends to take a much stricter approach than it has in the past in enforcing this provision. Therefore, the section has not been amended except to clarify that the Department will determine the existence of significant fraud or criminal activity and that typically such activities will include willful or grossly negligent disregard for the use, handling, or other fiduciary duties of Federal funding where a grantee has no effective systems, checks, or safeguards to detect or prevent fraud or criminal activity. Additionally, significant fraud or criminal activity will typically include coordinated patterns or behaviors that pervade a grantee's administration or are focused at the higher levels of a grantee's management and authority. To be consistent with the OAA section 514(d)(4)(B), this determination will be made on a case-by-case basis regardless of what party identifies the alleged fraud or criminal activity.

How Will the Department Examine the Responsibility of Eligible Entities? (§ 641.460)

In § 641.460, the Department described the general process for examining eligible entities' responsibility and listed some of the materials it will take into consideration.

The Department received one comment on this section. The commenter agreed with the assessment of applicants' responsibility and the use of various related records. The commenter also suggested, however, that the Department should specify what is intended by its possible use of any other relevant information and indicate whether that information may be reviewed by the applicant and whether "due process'' would allow the applicant to "challenge the information'' and if so, "by what rule.''

In examining an eligible entity's responsibility, the Department's use of "any other relevant information'' will vary on a case-by-case basis. Specifically, the OAA Amendments, at section 514(d)(2), allow the Department to consider any other information relevant to responsibility, including the applicant's history with managing other grant funds. In order to retain its discretion, the Department will not exactly define what these materials may be or how the Department may use them. To the extent these materials are of a confidential nature or proprietary to some other entity, such materials may not be available to the entity to which they pertain. In any event, an entity will be able to appropriately challenge the Department's actions through the grievance procedures in subpart I if the use of the information leads to any adverse action.

Under What Circumstances May the Department Reject an Application? (§ 641.465)

What Happens if an Applicant's Application Is Rejected? (§ 641.470)

The Department reserved § 641.470 to provide a rule and asked for comments on the remedies that should be available to a nonselected applicant that succeeds on appeal.

The Department received very few comments on this section. The

commenters suggested that if a grant applicant successfully appealed a Department decision to deny SCSEP funds, the applicant should be notified promptly, in writing, with an explanation of the basis of the decision. Further, the commenters suggested that the Department offer information as to what action the entity may take to correct deficiencies and improve its position for future competitions. Another commenter suggested that when an incumbent grantee loses its funding that it should be given notice of the deficiencies in its application and an opportunity to cure.

The Department agrees that any entity whose application is rejected should be provided appropriate and timely notice as well as an explanation of the Department's basis for the rejection. An explanation for the Department's rejection is consistent with current procedures, known as debriefings, which have been the Department's practice for many years. Incumbent grantees, however, will not be given an opportunity to cure in an open competition because that would defeat the purpose of the competitive process. An opportunity to cure would create an inequity in favor of incumbents, which may already have had opportunities to correct deficiencies through technical assistance provided by the Department. Consequently, in accordance with the OAA Amendments at section 514(d)(3) and 514(d)(5), entities whose applications are rejected will not be selected as grantees but will be offered an opportunity for a debriefing which will include an explanation of the Department's decision and suggestions as to how to improve the applicant's position for future competitions.

Under an SCSEP competition, grant applicants are not competing for a grant with which they will serve Older Americans nationwide or in defined areas. Instead, their proposals are specific and seek to provide services to Older Americans only in certain areas of the country that the applicant has chosen to serve and in some circumstances applicants seek to serve certain populations of Older Americans, such as Asian and Pacific Islanders or Indians. In order for SCSEP grant applicants to provide services where they are most able to provide quality services or to serve their target populations, their grant awards are tailored to reflect their specific proposals.

Because this system of awarding grants with disparate service areas tailored to the grantee's organization and abilities results in a patchwork of projects scattered widely across the country, the resulting competition is not for a single defined service area as it is in some other Department of Labor programs. An applicant usually competes against different applicants in different areas. The result of a protest or appeal that results in an Administrative Law Judge's (ALJ) decision to award funds to the appellant is that a number of different grantees in different areas might be displaced. Depending on the timing of the appeal decision, this may have a disruptive effect on current participants and more importantly on current grantees, which could lose so many slots that they cease to be able to operate a viable program. Both because of the nature of the population that the SCSEP serves and because of the services it provides, changing grantees must be handled carefully to minimize disruption to participants. The SCSEP competition is thus unlike the WIA Indian and Native American or Migrant and Seasonal Farmworker (MSFW) programs in which grantees compete for defined service areas and in which the replacement of one grantee with another is less likely to be disruptive because of the nature of the services offered. Because of these differences and the complexities involved, the Department has decided to provide a remedy that reflects the differences in the operations of SCSEP grants. If the Grant Officer decides not to make an award, in whole or in part, because of feasibility, the successful appellant may recover its bid preparation costs, either entirely, if there is no award or proportionately, if the decision not to award only involves a portion of the contested slots.

Section 641.470(c) provides that when an ALJ decides that an appellant should have been selected, in whole or in part, the matter must be remanded to the Grant Officer to decide, within 10 days, whether to award the contested slots to the successful appellant and the timing of the transition, if the Grant Officer decides to make an award. In making this decision, the Grant Officer must take into account the factors of disruption to participants, disruption to grantees, particularly whether the award will leave another grantee with so few slots that it becomes non-viable, and must balance these against the Department's intent to select the best available grantees. The Department has determined that a minimum of approximately 800 slots is necessary for viability; that is, the 800-slot level is necessary to have funding sufficient to properly perform the administrative functions of the grant. Thus, if the effect to an ALJ's decision would be to reduce a continuing grantee's award below the 800-slot level, the Grant Officer may refuse to award those slots to the successful appellant. This situation can occur because of the patchwork nature of the grants, discussed above, so that an appeal may only involve a portion of the slots awarded to a number of different grantees. The Grant Officer must also take into consideration the timing of the decision and assure that any transition minimizes disruption. The Grant Officer's decision will be immediately reviewable by the ALJ. In the event of an award after a successful appeal, the successful appellant is entitled only to the unspent funds remaining in the grant after operational and closeout costs of the prior grantee.

The Department has also added a new paragraph (d), similar to 20 CFR 667.825(c), that puts grantees on notice that the possibility of a successful appeal and a new award is a condition of the grant and that in case of a new award, the Grant Officer will issue transition and closeout instructions.

May the Governor Make Recommendations to the Department on Grant Applications? (§ 641.480)

Section 641.480 provided that each Governor must have a reasonable opportunity to provide comments on the anticipated effect of each grant applicant's proposal on the distribution of positions within the State and provide recommendations regarding the distribution of positions. A Governor's comments should be consistent with the State Plan. Further, the Governor may comment on all the proposals in noncompetitive conditions and may choose whether to comment on certain aspects of all the proposals in competitive conditions before the Department's rating process or afterward only on those proposals that have completed the Department's rating process.

The Department received a few comments on this section. The commenters suggested that the Department should create a clearly defined process for Governors to review and make recommendations on grant applications. Other comments echoed this suggestion by requesting a definition of the term "reasonable opportunity'' and wanted it made clear that the Governor's review of an application or proposal is limited to commenting on the proposal's distribution of positions within the State.

The OAA Amendments, at section 503(a)(5), afford Governors who will have SCSEP national grants operating in their States a reasonable opportunity to submit recommendations to the

Secretary. This section is consistent with the statutory requirement and appropriately limits the scope of the Governor's recommendations. The Department sees no need to create a formalized process in this Final Rule for the Governor to develop and submit recommendations. The process will be limited by the Department's timeline in reviewing applications and awarding grants in any given Program Year. The Department may, however, provide additional details in an administrative issuance at the time of any Solicitation for Grant Applications (SGA).

When May SCSEP Grants Be Awarded Competitively? (§ 641.490)

Section 641.490 provided that the Department must hold a competition, as required by OAA section 514, when a grantee fails to meet its performance measures, eligibility requirements, or responsibility tests. Other full and open competitions may occur before the beginning of a new grant period or if additional grantees are funded. The details of the competition will be provided in the Solicitation for Grant Applications announcing the competition.

The Department received many comments on this section. Several commenters disagreed with this section and asserted that, according to the OAA Amendments, the only times an incumbent grantee can lose its SCSEP funding is when it fails to meet the OAA Amendments' responsibility test or fails to meet specified performance goals after implementation of a corrective action plan and technical assistance from the Department. Another commenter indicated that the second portion of this section sounded too much like a policy statement rather than a regulation and suggested that it be eliminated.

The OAA Amendments prescribe a competition when a grantee fails to meet performance measures, but does not limit competitions to that case. The Department is also reserving its right to provide for a competition generally before the beginning of the grant period, and it is not prohibited under the statute from doing so. The Department appreciates the commenter that noted that this section sounded like a policy statement and suggested its elimination, but the Department believes that it is appropriate to discuss the extent of the Department's discretion to provide for competition. The Department favors full and open competition because it provides the Department with an opportunity to ensure that the best applicants are awarded grants and the program is administered to its full potential. It also allows new and different entities to become part of the grantee community and results in better services to the participants.

Another commenter recommended replacing the word "organization'' with the word "grantee'' in the Preamble and replacing the term "full and open competition'' with the term "competitive selection of (national) grantees.''

The Department disagrees that the term "full and open competition'' should be replaced with the term "competitive selection of (national) grantees.'' The Department retains this language because it is standard language to describe the competitive process. It is too late to amend the Preamble to the NPRM.

A commenter noted that "[a]lthough the Proposed Rule makes several references to a three-year grant, no information is provided in the Proposed Rule as to how, and under what circumstances, a three-year grant would be awarded'' and requested more information in this regard.

The Department does not believe that it is appropriate to have a regulation on when it will award grants for 3 year periods since the decision on the length of the grant is discretionary. Section 514(a) of the OAA provides that the Department may award grants not to exceed three years once regulations have been promulgated and performance measures are established. The Department reserves the right to determine whether it will award grants in excess of one Program Year and will make grantees aware of its decision at the appropriate time.

Subpart E—Services to Participants

Who Is Eligible To Participate in the SCSEP? (§ 641.500)

In § 641.500, the Department stipulated, in accordance with the 2000 Amendments (OAA sec. 516(2)), that anyone who is at least 55 years old and who is a member of a family with an income that is not more than 125 percent of the family income levels defined in the Federal poverty guidelines is eligible to participate in the SCSEP. The Department indicated that a person with a disability may be treated as a "family of one'' for income eligibility determination purposes.

There were several comments on this section. Several comments requested clarification of participant residence requirements for eligibility—*i.e.*, are participants still required to live in the State where they are enrolled since "border'' residents might be more easily served in a State adjacent to their resident State.

The regulation is based on the statutory eligibility criteria, which do not mention residence. However, the commenters have raised an issue about residence, which needs to be resolved. Because the formula for the distribution of funds among the States is based, in part, on the number of potentially eligible individuals in the State, the basic presumption must be that eligible individuals must be served in their State of residence. In the interests of customer service and in order to more closely align with the WIA system, however, the Department has revised the regulation to authorize States to enter into agreements between themselves to permit cross-border enrollment. Such agreements should cover both State grantee and national grantee slots and must be submitted to the Department.

One commenter noted that the distinction between "enrolled'' and "eligible for,'' although clear enough in regard to any specific individual, is not consistently clear in terms of the services that can be offered by SCSEP staff.

The differences in the services available to those enrolled and those eligible is discussed elsewhere in the regulations and in this Preamble, in particular in §§ 641.535 and 641.550.

Another commenter recommended that all applicants be considered a "family of one'' for eligibility purposes, as provided for disabled persons, since "many older persons experience a variety of disabilities as a result of the aging process.''

The general rule in determining individual eligibility is to consider family income. The exception for considering a disabled individual a "family of one'' is one that is used in many government programs to recognize the barriers that disabled individuals face in the labor market. The Department does not believe it has the authority to extend that exception to all older workers.

Another commenter noted that the 125 percent of family income levels eligibility requirement was "excessively restrictive.''

The 125 percent limitation is provided in section 516(2) of the OAA. The Department does not have the authority to increase it.

When Is Eligibility Determined? (§ 641.505)

In § 641.505, the Department indicated that once individuals become SCSEP participants, the grantee/subgrantee is responsible for verifying their continued income eligibility at

least once every 12 months. The Department also noted that grantees may also verify an individual's eligibility as circumstances require.

There were a number of comments on this section. Most recommended that eligibility be re-verified once in a grant year rather than at the anniversary date of each participant. They indicated that this would permit all participants to be notified simultaneously, would lead to other streamlined procedures, and is supported by findings that only a miniscule number of participants are determined ineligible upon recertification. One commenter noted that this procedure is an enormous amount of extra work for a minimal number of changes.

The Department agrees with the commenters that recertifying eligibility once a grant year should be an option for those grantees that wish to use it. The Department believes that the language of the current regulation can be read to permit that option. In fact, the intent of this provision is to permit grantees to choose either to re-verify income on or near a participant's anniversary date or to re-verify all participants at one time during the grant period. Therefore, there will be no change to the regulation.

While there may be some validity in the comment that annual income verification is a lot of work for little result, it is important that the SCSEP serve the people for whom the program was designed: Low-income seniors with barriers to employment. Failing to re-verify income could mean that the program serves ineligibles for potentially long periods of time. The Department believes that the work involved in annual recertification of income is a necessary price to pay for keeping the program focused on providing services to eligible seniors.

What Types of Income Are Included and Excluded for Participant Eligibility Determinations? (§ 641.507)

The Department reserved § 641.507 and sought comments on the types of income that grantees must consider when determining a participant's eligibility. Older Worker (OW) Bulletin 95–5 lists the current inclusions and exclusions for determining a participant's income. The Department specifically sought comments on whether certain categories should be consolidated or eliminated, or if certain rules should be revised or eliminated,—*i.e.*, elimination of the exclusion of the first $500 of a participant's income for recertification purposes, limits on the amount of assets a participant may have to be eligible for the program, and limits on the amount of one-time unearned income that may be excluded.

The Department received many comments about the $500 exclusion. Some commenters said that they rarely used the $500 exclusion and that they did not oppose its elimination. However, the Department received many comments protesting the possibility that the exclusion of the first $500 of a participant's income for initial eligibility or recertification purposes might be eliminated. Many indicated that eliminating the $500 for current and re-enrolled participants would be counterproductive, if not punitive. They argued that the exclusion serves as an incentive for participants to exit the program for unsubsidized employment because it allows them to return if the employment is unsuccessful. Thus, they suggested that without the exclusion, fewer participants would leave the program, which would be contrary to the new emphasis on unsubsidized employment. A number of commenters suggested that if the exclusion is eliminated, that it only apply to new participants, and that current participants be "grandfathered'' in. Another commenter suggested more than a 30-day notice period for termination under these circumstances. Several commenters argued that the $500 exclusion permitted grantees to serve individuals who had serious multiple barriers to employment. They said that grantees needed the flexibility to meet the SCSEP's goal of serving those most in need. One commenter said that the $500 exclusion was needed because the area in which its program operated was a high cost area.

The law clearly states, at section 516(2), that the income threshold for SCSEP eligibility is not more than 125 percent of the poverty guidelines established by OMB. The Department must enforce the law as written. Nothing in the statute gives the Department the authority to waive the clear statutory income eligibility limit, no matter how arguably worthy the purpose of the waiver. This applies to current participants as well as new applicants.

The Department received many comments relating to the other inclusions and exclusions for determining eligibility. A number of commenters opposed the inclusion of one-time unearned income from the income eligibility criteria, indicating that it would penalize those who had taken lump sum annuities, had received modest inheritances, or had sold their lifelong residences. A number of commenters opposed including savings and assets. Many noted that older workers should not be penalized for having "nest egg'' income resulting from a lifetime of savings to cover burial or catastrophic situations. One commenter suggested that the Department should clarify what it considers assets, noting that depending upon the definition, a large number of people the program is supposed to serve could be excluded. There were also comments on the impact of government entitlement programs on income eligibility. A number of comments recommended that a work group of SCSEP practitioners be established to discuss issues related to income inclusions and exclusions.

The Department did not receive any comments proposing the use of established criteria for income eligibility. As specified in OAA section 516(2), eligible individuals are those who have an income not more that 125 percent of the poverty guidelines established by the Office of Management and Budget. The Department has decided to use the U.S. Census Bureau's Current Population Survey (CPS) as the standard for determining income eligibility for the SCSEP. The Department will issue administrative guidance detailing the definitions for the categories of income sources included in the CPS standard, and specifying which of these sources will be included and excluded for purposes of determining SCSEP eligibility.

The Department received a number of comments on the time period to be used to calculate income. All urged the Department to calculate income eligibility by counting applicant income for the most recent three-month period instead of six months. The basis for this recommendation was that this time period "recognizes the severe impact of recent economic conditions and allows the program to intervene before individuals become completely destitute.''

The Department will consider these comments as it develops the income guidance.

What Happens if a Grantee/Subgrantee Determines That a Participant Is No Longer Eligible for the SCSEP Due to an Increase in Family Income? (§ 641.510)

In § 641.510, the Department stipulated that upon determination of ineligibility, the participant must be given written notice within 30 days, and terminated within 30 days of receipt of the notice. The regulation further stated that such individuals must be referred to the One-Stop or other appropriate partner program and that they may file a grievance under the grantee's grievance procedure.

Some commenters related the requirement that grantees refer ineligibles to the One-Stop system to the coordination requirements in § 641.210 and suggested that more Department of Labor guidance to the WIA system on how to work with SCSEP grantees is needed to enable the systems to work together. One commenter suggested that the language be clarified to specify that the participant will not be terminated until 30 days after receiving the written notice consistent with § 641.580. Another commenter asked that the Department add "to the extent possible'' to the language for those areas that cannot be served by the One-Stop system. One commenter praised the Department for clarifying the former regulations on this issue.

Although the Department appreciates grantees' desire to provide good outcomes to all seniors with whom they come in contact, the funding and eligibility limitations on the SCSEP simply do not permit grantees to provide significant services to ineligible individuals. Thus, under this section, referral to the One-Stop system under which core services, including job referrals for those who are job ready, are available to all who seek them discharges the grantee's responsibility to the ineligible former participant. If grantees have other partnerships, for example, with Area Agencies on Aging, they may provide additional referrals as well.

The Department agrees that §§ 641.510 and 641.580 should provide the same rule. We have revised § 641.510 to read the same as § 641.580(b) and (c)—*i.e.*, "30 days after the participant receives the notice.'' To be sure that the regulation is entirely clear, we have added an exception requiring the immediate termination for those found ineligible for providing false information to § 641.510.

The Department acknowledges that referrals to the One-Stop system are more difficult if it is not located in their area, and encourages grantees to work as partners by establishing satellite services in areas without current One-Stop access and to establish other partnerships with organizations that may be able to provide services in the area to referred individuals.

How Must Grantees/Subgrantees Recruit and Select Eligible Individuals for Participation in the SCSEP? (§ 641.515)

In § 641.515, the Department required that grantees, to the extent feasible, seek to enroll individuals who are eligible minorities, limited English speakers, Indians, or who have greatest economic needs at least in proportion to the incidence in the population, taking into account their rates of poverty and unemployment. For the purposes of these regulations, these individuals are considered "preference'' applicants, consistent with the requirements of section 502(b)(1)(M) of the OAA. The Department views the "preferences'' as a way of assuring that certain groups which often face severe barriers to employment are served in proportion to their incidence in the population, taking into account their rates of poverty and unemployment. The requirement to serve preference individuals is not absolute. As made clear in § 641.530, grantees have discretion in selecting non-preference participants. The regulation further provided that grantees must notify the State Workforce Agency of all SCSEP community service opportunities, and must use the One-Stop Delivery System in the recruitment and selection of eligible individuals.

The Department received a number of comments on this section. Many commenters recommended that it is not appropriate to require grantees to notify the State Workforce Agency of all SCSEP community service opportunities because participants are selected based on priority and community service assignments are then developed to meet their needs, not the other way around. One commenter suggested that this requirement is more stringent than section 502(b)(1)(H) of the statute. Two commenters suggested clarification of the final sentence in § 641.515(a) by ending the sentence after the word "unemployment.'' The remaining comments objected to the mandatory use of the One-Stop system for recruitment, especially in rural areas, and suggested that the term "must'' be softened to "should.''

The Department believes the intent of the requirement is to list all community service assignments with the State Workforce Agency and all appropriate local offices and to assist with recruitment efforts in locations that have difficulty finding eligible participants. The Department has revised this section to more closely track the statute's requirements, specifically the requirements of section 502(b)(1)(H) of the OAA and more generally with the statute's emphasis on coordination with the One-Stop system. Grantees must bear in mind that the 2000 Amendments require much closer coordination with the WIA system than was previously the case. The nature of this coordination is, of course, subject to negotiation in MOUs. Beyond these requirements, grantees have a great deal of flexibility to determine how to recruit and select individuals and are encouraged to be as creative as possible, especially in rural areas. The Department has revised the final sentence in § 641.515(a) as recommended. We have retained the word "must'' in paragraph (b) because it is consistent with the coordination requirements of the Act.

Are There Any Priorities That Grantees/Subgrantees Must Use in Selecting Eligible Individuals for Participation in the SCSEP? (§ 641.520)

In § 641.520, the Department delineated the order of priorities that grantees must use in selecting eligible individuals consistent with the requirements of OAA section 516(2) and the Jobs for Veterans Act, Public Law 107–288 (2002).

The Department received several comments on this section. All were concerned about the interplay between these priorities and the preferences delineated at §§ 641.515 and 641.525. Some commenters recommended the elimination of priorities and preferences, stating that they were an administrative burden, that they discriminated against their primarily female (non-veteran) population, and that priority should be given to those having the greatest need, regardless of how they fit into particular categories. One commenter suggested that there may be situations in which non-veterans and/or 55-year olds who are not eligible for Federal benefits are needier than veterans and/or those who are 60 or older. Another commenter asked that the distinctions between priorities and preferences be more clearly defined. Other commenters asked for further guidance and clarification to help design application and information collection methodologies that might conflict with ADA requirements. The remaining commenters stated that the priority and preference requirements were contrary to the new unsubsidized employment performance measures.

These priorities are statutory requirements. Grantees must abide by them. Grantees must apply the preferences delineated in §§ 641.515 and 641.525, to the extent feasible, when selecting individuals within or outside the priority groups. The Department is providing grantees/subgrantees with the flexibility to exercise their judgment when they determine that a non-preference eligible individual should receive services over a preference eligible individual. Grantees concerned about the effect of the priorities and preferences on performance measures also should be aware that "the number of persons served, with particular consideration

given to those in the preference categories'' is also a mandatory performance measure. As will be discussed in more detail in subpart G, the Department intends to design the performance measures to take operational realities into account. In designing the performance measure, the Department will take into account the statutory instructions that preference groups be served ''at least in proportion to their numbers in the State'' and that in deciding how to serve these preference groups grantees ''take into consideration their rates of poverty and unemployment.''

Some commenters asked for more detailed guidance on the operation of the priorities and preferences. The Department believes that the operation of the priorities is fairly clear in the regulation, but will consider issuing administrative guidance on the operation of the preferences if needed.

Some guidance can be supplied in response to some specific comments. One commenter asked whether a person with a high priority gets served first even if the individual has no access to transportation, has little ''job interests'' or desire to comply with program requirements.

There is no absolute answer to this question. A grantee is not required to provide service to a person who cannot take advantage of the available service or who is not interested in receiving the service or who will not abide by the program's rules. On the other hand, the SCSEP, through the assessment and IEP process, focuses on helping individuals with barriers to employment to overcome those barriers. Transportation is a supportive service that grantees may provide to assist participants who live in remote places to participate in the program. In the process of developing a participant's IEP, a grantee should work with the participant to develop possible assignments to meet the participant's interests and to refine those interests. Similarly, the IEP process should clearly explain to a participant what the rules are and work with the participant to help him or her adhere to the rules.

Another commenter said that it served all individuals who sought service and that it has no waiting lists.

If the grantee is making reasonable outreach efforts to recruit those individuals who are in the eligible population and it provides services to all individuals who are eligible for the program, there is no need to apply the priorities and preferences.

Are There Any Other Groups of Individuals Who Should Be Given Special Consideration When Selecting SCSEP Participants? (§ 641.525)

In this section, the Department delineated categories of persons to whom special consideration must be given, to the extent feasible, in selecting eligible participants.

The Department received several comments on this section. Most asked for clarification of the term ''poor employment prospects.'' One comment noted that the first sentence of § 641.525 should be corrected to eliminate the word ''to'' immediately before ''special consideration.''

The Department provides a definition of ''poor employment prospects'' in § 641.140. The definition is derived from the prior regulation. The Department will issue administrative guidance on how to calculate the number of persons served with poor employment prospects for performance standards purposes. The Department has made the editorial correction in § 641.525. We also added a reference back to § 641.515 for ''preference'' individuals.

Must the Grantee/Subgrantee Always Select Priority or Preference Individuals? (§ 641.530)

This section provided that grantees must adhere to the priorities in § 641.520 and must apply the preferences in § 641.525 to the extent feasible but may in certain circumstances select a non-preference individual over a preference individual. The regulation also provides that the Department may ask for evidence that the grantee is adhering to the priorities and preferences when examining participant characteristics. There was one comment on this section that asserted that ''preferences to be applied within priority groups should not be qualified to the extent feasible,'' and that ''available community service employment opportunities'' should play no part in the application of preferences.

It is the Department's intent to provide grantees with the flexibility to exercise their judgment when they determine that a non-preference individual receives services over a preference individual, factoring in the characteristics of the individual and the availability of appropriate community service opportunities. The Department believes that the language of the regulation properly communicates the existence of and extent of the discretion available to grantees and has not changed the regulation as suggested. The phrase ''to the extent feasible'' comes from the statute. It is generally true that grantees should seek to create community service opportunities to meet the needs of eligible individuals. However, from a recruitment perspective, grantees may also seek to match the needs and abilities of eligible individuals to those community service opportunities that are available.

What Services Must Grantees/Subgrantees Provide to Participants? (§ 641.535)

In proposed § 641.535, the Department outlined the various services that grantees and subgrantees must provide to participants. The Department received a large number of comments on this section, which focused on the following three issues: Paragraph (a)(2), which proposed quarterly assessments by providers, and paragraph (a)(3), which proposed corresponding quarterly updates of participants' IEPs; paragraph (a)(14), which required follow-up with participants who have transitioned into unsubsidized employment to make sure they receive any needed follow-up services; and paragraph (c), which prohibited using SCSEP funds on stand-alone job clubs or job search activities.

In their comments on the paragraphs (a)(2) and (a)(3), the commenters were virtually unanimous in opposing quarterly assessments and updating of IEPs, though one commenter noted that it is an excellent objective. Various commenters stated that quarterly reviews will serve no practical purpose; they will not increase the quality of participant services; they will be more costly; and they will require more resources in staff and transportation time, especially where participants are scattered across wide geographical areas. One commenter stated that the logical time for assessments and updating of IEPs is at the beginning of the participant's enrollment and just before the job search begins in earnest. Several commenters stated that paragraph (a)(13), which requires assessment of the participant's progress in meeting the goals of the IEP as necessary, provides adequate regulatory guidance, eliminating the need for paragraphs (a)(2) and (a)(3).

A number of commenters stated that annual reviews at a minimum are adequate, and several suggested that the Department encourage periodic reviews as necessary when participant needs change, stating that this would provide needed flexibility to the process. As one commenter noted, ''Short term goals might require reassessment within a month, while longer term goals might

not be fulfilled for several months.'' Several other commenters suggested a six-month reevaluation, if closer spacing between evaluations is desired, and one commenter noted that developmental steps for many participants are often not completed in three months.

Several comments spoke to the differences between participants who only wish to stay in their community service assignments and those for whom unsubsidized employment is a goal. One commenter suggested that assessments and IEPs should be updated more frequently for participants whose goal is unsubsidized employment. Another said that specific language is needed with respect to whether community service is an acceptable IEP employment goal; if so, the commenter believed that there is no need for IEPs.

A commenter inquired about the purpose of quarterly assessments, and another stated the opinion that updating IEPs quarterly is based on standardizing the regulations with WIA. A commenter stated that quarterly updates are not in the best interests of the people served, and another expressed the view that time spent on quarterly assessments could be better spent on job development, recruitment and placement efforts. Another commenter stated that a requirement for quarterly assessments "increases pressure to simplify and shorten assessments in order to reduce the time and expense needed to administer them resulting in a reduction in overall quality and effectiveness'' and "increases pressure to eliminate assessment tools and services currently used, but too costly if done for each participant quarterly.''

The Department agrees with the commenters that an absolute requirement for a reassessment every quarter may be too costly and of little benefit. The Department remains concerned that the participant's IEP be a living document that is changed as the participant's needs and circumstances change and as the goals of the IEP are reached. We have, therefore, revised paragraphs (a)(2) and (a)(3) to make clear that grantees are expected to treat the assessment/IEP process as a living process and must conduct assessments and update the IEP as necessary but no less frequently than twice in a 12 month period. We have revised paragraph (a)(13) to more closely track OAA section 502(b)(1)(M)(iii). In addition, we strongly encourage the good practice of updating assessments as necessary, as a standard time for conducting an assessment may not meet the needs of certain individuals. More frequent assessments also foster better relationships with participants.

In § 641.535(a)(14), the Department proposed that grantees must follow up with participants placed into unsubsidized employment during the first six months of placement to ensure that they receive any necessary services.

Two commenters stated their appreciation at being able to spend program funds to foster job retention, while another noted that there are not sufficient funds in the program to do so. The latter commenter also expressed concern that some participants might consider the six-month time period an entitlement, whether the participant needed services or not. Finally, a commenter asked whether SCSEP funds could be expended to ensure that a participant is still employed at the six-month mark and that any identified services are being provided.

The Department recognizes that, given the funding limitations in the SCSEP, grantees will not be able to provide all needed supportive services, whether for current participants or for follow-up services, from grant funds. The Department does not view these services as a requirement or an entitlement. Rather, they are an important adjunct to obtaining successful results for participants. Grantees must be creative in using their connections to the One-Stop and to other programs to arrange for needed support or follow-up services. The issue of expending SCSEP funds to ensure that a participant is still employed at the six-month mark and that any identified services are being provided is addressed below in § 641.555.

In § 641.535(c), the Department proposed that "Grantees may not use SCSEP funds for individuals who only need job search assistance or job referral services.'' A number of commenters opposed this change, while two supported it.

Several commenters noted that it is difficult for seniors to look for work, due to such factors as depression, lack of self-confidence, and lack of motivation. On a practical note, a commenter asserted that it is hard to identify job-ready individuals before they are enrolled because they will not yet have been assessed. Two commenters stated that they do not favor requiring participants to take community service assignments just so they can obtain job club/job search services.

Two commenters stated that job clubs and soft skills training should be considered training since they include classroom instruction, lectures, and seminars. They argued that such soft skills training, which is tailored to seniors, is not provided by the One-Stops. Other commenters stated that often One-Stops depend on SCSEP to provide soft skills training to seniors, and that which entity provides such training in a given locale can be the subject of negotiations and the resulting MOU. Several commenters noted that the effects of not providing stand-alone job search/job referral assistance would be magnified in rural areas, where One-Stop services are often at great distances. One commenter recommended expansion of counseling and job readiness training.

With respect to interactions with potential employers, one commenter noted that networking and word-of-mouth are the sources of many referrals. This provision will "negatively impact our ability to help older workers obtain jobs and employers from obtaining suitable help.'' Another commenter stated that "[w]ith the emphasis on placing older workers into unsubsidized jobs, losing this valuable service would be not only detrimental to the participants, it would be counter to the goals'' of the SCSEP program. Another commenter noted that job search and job club activities provide the flexibility needed to bridge gaps between workers and employers.

One commenter stated that this provision should be removed or the unsubsidized placement goals for SCSEP should be lowered to reflect this change, while another recommended deletion of this provision because its inclusion makes the work of the grantees more challenging with respect to meeting performance measures and makes it impossible to meet unsubsidized placement goals, thus risking sanctions and loss of funds. Another commenter recommended that "DOL allow SCSEP, in some limited way, to provide job search and referral assistance and be able to count it.'' Another commenter stated that it would impair her agency's role as advocate of all older workers if it can't help all older workers get unsubsidized jobs and take credit for successes.

Of those who agreed with the proposal, one suggested "that the Department provide some latitude regarding this restriction,'' especially where One-Stops are geographically inaccessible. Another commenter recommended that the Department include in § 641.560 language similar to that in § 641.535(c).

The intent of this rule is to assure that grantees concentrate their efforts and limited funds on providing community service work assignments to those older workers who are most in need and who are enrolled in the program. The Department does not consider job search

and job referral activities to be training per se. Job search, job club, and job referral activities are available from a variety of sources in the One-Stop system. The Department sees no need for SCSEP grantees to duplicate those services.

A number of SCSEP providers are offering job search and job referral services to seniors based on agreements with One-Stops. As noted in the Preamble to the NPRM, SCSEP providers who are working within the One-Stop framework can continue providing the agreed-upon services, both to SCSEP participants and to those who are not enrolled in the SCSEP. Those SCSEP providers that wish to address services to rural populations in particular may wish to address this issue in their MOUs with the One-Stops. If SCSEP grantees take on these activities, particularly if they do so for older workers generally, they should make appropriate financial arrangements in the MOUs. They should be compensated for their services by reducing their contributions to the One-Stops.

Finally, grantees are not prohibited from conducting job club and job referral activities for enrolled participants. We have added a sentence to § 641.535(c) to make this clear. However, individuals who are not enrolled (*i.e.*, are not assigned to community service positions) cannot be counted as unsubsidized placements. This is because unsubsidized placements are based on authorized positions, which require legitimately enrolled individuals. This policy is a long-standing element of program operations.

With respect to the recommendation that the Department add language similar to that in § 641.535(c) to § 641.560, we believe that the language in § 641.535 is sufficient.

What Types of Training May Grantees/Subgrantees Provide to SCSEP Participants? (§ 641.540)

In proposed § 641.540, the Department outlined the kinds of training that may be provided to SCSEP participants. Commenters raised five main issues. The first issue was whether community service in and of itself is to be considered training.

Historically, grantees have framed community service in terms of training to encourage participants to look beyond community service assignments toward unsubsidized employment. That is a valid approach when feasible and is strongly encouraged. The training aspects of a community service assignment should be reflected in a participant's IEP. The kinds of training envisioned in this section, however, are those that occur outside of the community service assignment. For clarity, a second sentence has been added to paragraph (a): ''This section does not apply to training provided as part of a community service assignment.''

Several commenters raised a second issue. They recommended modifying the language of § 641.540(a) to say that training ''should, when feasible'' rather than ''must'' be provided, given limited resources and the difficulty of providing training in a rural location.

The Department believes that these commenters misunderstand the intent of the Proposed Rule. The rule requires that when grantees provide training, the training be ''realistic and consistent with the participants' IEP,'' not that grantees provide training in all cases. The rule is intended to reinforce the program's assessment and IEP requirements. We have added language in paragraph (a) to make clear that the rule applies when grantees are providing training to a participant.

Commenters suggested that training also be permitted as part of private employment, and not just community service, to allow for greater flexibility and better service to participants.

The Department is developing guidance on innovative ways to expand the permissible on-the-job training and work experience activities listed in the rule at § 641.540(c).

Commenters raised an issue about whether wages may be paid while participants are in training.

The answer to this question is yes. We have added the statement ''Participants may be paid wages while in training'' to paragraph (f).

Several commenters asked if participants are limited with respect to the number of hours they may engage in training.

There are no limitations on the number of hours in which participants may engage in training other than those that may be imposed by needs reflected in the IEP.

Finally, one commenter asked whether training provided by other sources than grantees or subgrantees could be considered required training, or whether that term must be reserved for training provided through the SCSEP.

Training provided by a One-Stop Center or any other source would be considered required training and § 641.540(e) encourages grantees to seek training from the One-Stop and other locally available resources. In addition, paragraph (h) allows for ''self development training available through other sources during hours when not assigned to community service activities.''

We also have substituted the word ''pay'' for ''reimburse'' in § 641.540(g) to make it clear that grantees are not expected to make participants initially pay the costs of travel or room and board themselves.

What Supportive Services May Grantees/Subgrantees Provide to Participants? (§ 641.545)

Proposed § 641.545 listed various supportive services that may be provided to participants. Commenters noted that funds for supportive services are quite limited and another noted that at least some of the specified services are quite expensive. One commenter also inquired to what extent a project is required to provide these services, and to what extent this decision should be made at the project level. Other commenters questioned how funds can be spent to support employees placed in unsubsidized employment and, more specifically, how auditors would view such expenditures.

To meet the needs of the seniors the SCSEP serves, grantees must make every effort to provide them the supportive services they need to be able to participate in their community service assignments. The Department recognizes that SCSEP grantees will not be able to provide all needed or desirable supportive services with grant funds. This regulation addresses this concern in two ways. First, it states that such supportive services may be provided. Secondly, paragraph (b) states that, where possible, grantees should use other resources to provide these services first. The Department agrees that the decision about what kind of supportive services to provide and how to provide them in a decision to be made on a case-by-case basis by the grantee or subgrantee. But the Department expects grantees and subgrantees to make every reasonable effort to provide participants with the supportive services provided for in their IEPs. To the extent that it is possible for a grantee to provide supportive services through other programs or resources, concerns about expenses and audits would not arise, as the costs would be borne by other organizations and thus no auditable SCSEP funds would be involved. As to funds spent by grantees for follow-up services, the statute permits such expenditures in section 502(c)(6)(A)(iv) as allowable services which should resolve any questions that auditors may raise. Grantees may provide follow-up for up to 6 months

after an unsubsidized placement, which allows grantees to ensure retention in the program as required in subpart G of this part.

What Responsibility Do Grantees/Subgrantees Have To Place Participants in Unsubsidized Employment? (§ 641.550)

In § 641.550, the Department proposed that grantees "make every reasonable effort to prepare participants who desire unsubsidized employment for such employment.''

Several commenters addressed this section. Two commenters stated that some participants will want to remain in community service assignments indefinitely, and one noted that participants may have barriers that will make unsubsidized employment difficult if not impossible to obtain. A commenter recommended that "[i]f participants can elect community service as their goal, they should not be factored into the placement goal population.''

Two commenters stated that the goal for all participants should be unsubsidized employment. One commenter noted the omission in the Proposed Rule of § 641.314 of the prior regulations, which states that "grantees shall employ reasonable means to place each enrollee into unsubsidized employment,'' and recommended that this language be inserted in the Proposed Rule.

As to the question of whether unsubsidized employment should always be a goal, it is the Department's view that the statute provides for the dual goals of community service and unsubsidized employment. While we acknowledge that some participants may desire to remain in community service placements indefinitely, the Department believes it to be the best practice to inform participants when they enter the program that the community service position is a not a job, but rather a training opportunity to obtain skills towards placement in an unsubsidized job. Should grantees wish to make unsubsidized employment a goal for each participant or move participants out of the program after a specified period of time, they must obtain the Department's approval as required in § 641.570.

As to whether participants whose goal is community service and participants whose goal is unsubsidized employment should be tracked separately for purposes of performance evaluation and time limitations in the program, the Department believes that it would be very difficult to maintain two tracking and reporting systems. Participants may well move from one group to the other, complicating record-keeping considerably.

A commenter asked whether participants without a goal of unsubsidized employment could be exempted from the time limit in § 641.570.

Since § 641.570 does not establish a time limit, but merely authorizes grantees to do so with the Department's approval, the Department sees no need to exempt participants from it.

A commenter observed that employer education and job development are crucial to placements in unsubsidized employment, and urged that the regulation further emphasize the need for collaboration with the One-Stop Center. Another commenter suggested that the proposed regulations "[p]romote the increase of coordination with employers and private businesses in the area to increase the ratio of applicants to jobs.''

The Department agrees that employer education and job development are crucial to placements in unsubsidized employment. We believe that the regulation adequately addresses this issue and have made no changes in the Final Rule.

The Department also is engaged in outreach activities to employers to make them aware of our program and the benefits of utilizing older workers.

What Responsibility Do Grantees Have to Participants Who Have Been Placed in Unsubsidized Employment? (§ 641.555)

Proposed § 641.555 required grantees to contact participants within the first six months of unsubsidized placement to ascertain if they need supportive services, and at the six-month mark to determine whether the participant is still employed.

One commenter commended the six-month follow up requirement. Two commenters stated that they consider this requirement an unfunded administrative burden, and another asked how program money (for supportive services) can be spent on individuals who have left the SCSEP program.

Two other commenters stated that this section is redundant and should be removed on the basis of their comments on §§ 641.140 and 641.525, which address the propriety of information collection and administrative burdens imposed by such requirements.

Two commenters noted the difficulty of obtaining information from employers. One commenter observed that "[i]f the grantees are going to be allowed to use wage records to verify continued employment, the reporting agencies should be mandated to provide this information to the grantees.''

With regard to the concern about administrative burden, the Department believes that the burden—which in most instances will consist of making one or two telephone calls—to be minimal. Neither of the comments discussing redundancy addresses the information that is the subject of this section. With respect to obtaining information from employers, the Department notes that no data collection beyond verification of unsubsidized employment is contemplated. We will provide additional guidance on how to determine retention in unsubsidized employment in the reporting instructions for the performance measures.

The Department also recognized that grantees may have other follow-up requirements deriving from the performance measures, such as the earnings increase measure, or other reporting requirements. Therefore, the Department has added the following sentence at § 641.555(c): "Grantees may have other follow-up requirements under subparts G and H.''

Supportive services, which are described in § 641.545, may be provided to individuals who have left the program. Section 502(c)(6)(A)(iv) of the OAA allows grantees to provide supportive services for follow-up activities. Also, the Department believes that the introduction of a 6-month retention performance measure provides the authority for grantees to spend grant funds to assist participants who have been placed in unsubsidized employment to retain that employment and to determine whether they meet the retention measure. Grantees may pay for these services through use of program funding under the "other participant costs'' category. Decisions to pay for such services should be made locally and on a case-by-case basis, depending on the needs of the participant. Since funds in this category will be limited, grantees should be judicious in their spending for this purpose and clear in their criteria for making such expenditures.

May Grantees Place Participants Directly Into Unsubsidized Employment? (§ 641.560)

In § 641.560, the Department proposed that participants who are ready for placement in unsubsidized employment be referred to One-Stop Centers for appropriate services. This provision furthers the regulations' overall emphasis on the SCSEP's mission to serve those who are most

difficult to place and to coordinate with the One-Stop System. Commenters raised a variety of issues that centered on the relative merits of One-Stops and SCSEP grantees with respect to older workers; customer service considerations with respect to both participants and employers; and performance measures.

With respect to the One-Stops, some commenters see them as variable in quality, and as not always considering service to seniors a priority, which results in the older workers having difficulty accessing the necessary services. A commenter noted that referring rural candidates to distant One-Stops would represent a hardship for the participants.

A commenter noted that in some cases the One-Stops refer seniors to the SCSEP program for services, as the SCSEP providers will have the "time, patience, and knowledge'' to provide the necessary services, and if the One-Stops are to fill this role, they will need education about the special characteristics and needs of seniors. Commenters suggested that referrals to One-Stops be made in situations where the SCSEP is unable to meet the needs of the participants.

Other commenters expressed the view that placement by the SCSEP in an unsubsidized slot would be quicker and represent better customer service for both the participant and the business than referral to a One-Stop, and that seeing such placements occur within the SCSEP program can also be a morale-booster for other participants. They noted that SCSEP providers often work hand-in-hand with potential employers to develop unsubsidized placements benefiting both parties as well as the participants in a complementary process that will be lost if this section is implemented. One commenter pointed out that referring participants to private sector jobs and counting the referrals as placements "makes good business sense, is cost effective, and gets results. This is good use of taxpayer dollars.''

Some commenters were concerned with the effect of the rule on performance results. They stated that the grantee should be able to take credit for those referrals as placements, especially given the emphasis on serving those most difficult to place. They cautioned that the emphasis on serving the hardest to serve would put grantees at a disadvantage in meeting performance standards, since the remaining participants would have the lowest skills and the greatest need for training.

One commenter suggested that dual enrollment might be used in some cases, allowing both the One-Stop and the SCSEP to take credit for the placement, and another suggested that credit be given under "other services provided.'' The commenter also stated that "this regulation could result in an increased workload for title V providers in that it seems to require a much more intensive intake process than normal just to determine initial eligibility and make appropriate referrals. Also, this regulation does not allow title V providers to work with participant (sic) who need training, but not community placements.''

The 2000 Amendments changed the SCSEP in a number of ways. One of the most important changes was the requirement for coordination between the SCSEP and the WIA and the One-Stop system. This requirement appears in several places in the OAA, in sections 502(b)(1)(O), 502(b)(4), 502(c)(4), 503(b)(2), 505(c)(1), 510, 512, and 515(c)(5). Section 641.560 acknowledges the coordination requirement. It also reemphasizes, as do several of the other provisions of this rule, the SCSEP's focus on serving those most in need. It is important to recognize that the SCSEP is not a general-purpose employment program for seniors. Rather, it is a program to place seniors who have serious barriers to employment in community service assignments which, combined with training and supportive services, may lead to unsubsidized employment.

For these reasons, the Department believes that § 641.560 places a proper emphasis on coordination and service to the intended beneficiaries of the SCSEP. It is important to note, however, that the regulation is not phrased in mandatory terms. It is intended to serve as a reminder to grantees and subgrantees of the need to coordinate with the One-Stop system and to assign each its proper role. The regulation does not forbid SCSEP grantees from providing placement services for participants. Because of the limited funding available for placement services, the regulation encourages grantees to use the services already available from the One-Stop to provide these services. The Department recommends that the assignment of placement responsibilities be set out in the MOU with the Local Board. As provided in § 641.220, however, grantees may not spend SCSEP grant funds to provide services, including placement services, to ineligible individuals.

A number of commenters were concerned about the effect of § 641.560 on performance measures. As discussed previously and in subpart G, the Department intends to design the performance measures to take into account any changes in grantee operations that the new statutory requirements may engender. Whether by providing dual credit for referrals, by defining the cohort of participants against whom the placement is measured, or by some other means, the Department intends to design the performance measures to reflect, as closely as possible, actual grantee experience and performance. However, the practice of counting the placement of ineligibles or individuals who have not been enrolled in SCSEP as placements will not be continued in the performance measures.

What Policies Govern the Provision of Wages and Fringe Benefits to Participants? (§ 641.565)

In § 641.565, the Department described the policies governing the payment of wages and the provision of fringe benefits in this section of the regulation.

The Department received several comments on this section. A number related to situations in which the State's minimum wage exceeds the Federal minimum wage. Some commenters commended the Department for acknowledging in the Preamble to the NPRM that grantees cannot fill the authorized level of positions allotted to them when their State minimum wage exceeds the Federal minimum wage and for stating that it would adjust performance measures to take that factor into account. Commenters suggested that the allocation of positions among the States be based on the State minimum wage in such instances or that additional funding be provided to States with higher minimum wages.

As stated in the Preamble to the NPRM, it is the Department's intent to take a higher State minimum wage into account when setting performance measures. The formula for allocating funds among the States is set in section 506 of the OAA and is based on the "cost per authorized position,'' which is defined by reference to the Federal minimum wage. Because of that definition, the Department cannot adjust the allotment of funds or positions among the States because of differing minimum wages. What it can do is take the higher minimum wage into account when setting the levels for performance measures. The Department appreciates commenters' support of the regulation on the uses of SCSEP funds for unemployment insurance or pension contributions.

A commenter commended the Department's position on restrictions on using grant funds to pay the cost of unemployment insurance for participants or to contribute to retirement funds; another commenter asked for a complete prohibition against such uses of funds. The Department concurs with the comments relating to the use of grant funds to contribute to retirement funds, and has changed the rule to indicate that grant funds may not be used for this purpose under any circumstances. Given that the SCSEP is more focused on unsubsidized employment rather than long-term participation in community service, providing retirement benefits is inconsistent with the new goals of the program. In addition, the Department believes that the cost benefit ratio no longer favors this kind of expenditure with limited funds.

The Department does not have the authority to override State unemployment compensation laws and so cannot prohibit the use of grant funds for unemployment compensation in States that require coverage.

There were comments on § 641.565(b)(1)(ii)(A), relating to physical examinations for participants and compliance with the Health Insurance Portability and Accountability Act (HIPAA) requirements, and asking the Department to recognize that it was appropriate to ask a participant returning from worker's compensation to obtain a "fitness to work'' release from his or her personal physician.

SCSEP grantees would not be constrained by the requirements of HIPAA. The physical examination provision presents no issue concerning voluntary disclosures to grantees by participants. The results of the physical examination are to be reported to the participant and are not required to be disclosed to the grantee. Also, grantees are not HIPAA-covered entities.

The Department has no authority to require participants returning from workers' compensation to obtain a "fitness to work'' release. That is a matter to be resolved by grantees' and host agencies' policies, taking into account applicable antidiscrimination laws.

Is There a Time Limit for Participation in the Program? (§ 641.570)

Section 641.570 provided that, although there is no time limit on participation in SCSEP, grantees may establish one with the Department's approval. If the grantee chooses to establish a time limit, it must provide for a system to transition the participant into unsubsidized employment or other assistance before the end of the specified period. In the Preamble to proposed § 641.570, the Department stated that the regulation provides that there is no time limit for participation in the SCSEP program, but it anticipates that most participants will spend no longer than two to three years in the program.

The Department received a variety of comments, with several organizations opposing the Department having any expectations about time frames. One commenter thought that time limits are unreasonable because assistance other than unsubsidized employment is not likely to be forthcoming. Another thought that the two-to-three-year expectation should be removed because some individuals will never be able to move on to unsubsidized employment and it is not fair to treat differently those who can from those who cannot. Still another commenter was wary of stating expectations at all for fear they would be considered entitlements.

One commenter felt that an SCSEP provider would lose the respect of the participants if it imposed "arbitrary'' time frames and recommended that "[i]f time limits are truly beneficial, they should be mandatory. However, the time limit should be five to seven years rather than two or three years.'' Another advocated a time limit for those under 70 years old, but not for those older, since the older group faces discrimination barriers that the younger group does not.

Another commenter noted that some individuals are quite content with their subsidized placements and that a rotation system and time frame would be useful for those who are capable of moving into unsubsidized employment, with waivers available for those who need more time or who cannot make the transition. Another commenter suggested exemptions for participants who are assigned to work with/for the grantee itself.

Finally, one commenter noted that this provision does not address how much time must elapse before a former participant of one program may be "picked up'' by another SCSEP in the area.

The regulation is clear that there is no requirement for grantees to establish time limits on enrollment. Whether to establish time limits, and the duration of and conditions under which the time limits will be administered, is a matter for the grantee to determine. The Department must, however, approve any time limit policy. The "expectation'' stated in the Preamble to the NPRM is just a guideline. The Department believes that the language of this section provides sufficient flexibility for grantees to adopt or not adopt time limitations that fit their circumstances.

The regulation neither prohibits nor imposes any time limit for an SCSEP provider from picking up a former participant of another SCSEP provider in the same area.

May a Grantee Establish a Limit on the Amount of Time Its Participants May Spend at Each Host Agency? (§ 641.575)

In § 641.575, the Department proposed that a grantee may set limits on how long participants may remain at a host agency, as long as the Department approves and the limits are noted in participants' IEPs.

All but one commenter opposed this provision. The commenter that favored this provision stated that grantees must set a fair policy and participants should be made fully aware of the parameters before they begin participation.

One commenter stated that "[i]t would be better to establish separate tracks for participants choosing community service and for those choosing employment. Slots should be reserved (perhaps on a 50/50 basis) for each track and new enrollments would be based on the applicant's goal.'' This commenter also predicted that terminations of enrollment based on time frames would lead unemployment insurance costs to rise, and suggested funding that extends beyond the Program Year for this purpose.

Section 641.575 is simply an authorization for grantees to adopt a rotation policy; it is not a requirement. Several commenters who opposed this provision seem to have interpreted it more generally than intended, *i.e.*, as relating to participation in the SCSEP program as a whole, rather than to the amount of time spent at a particular host agency. Many grantees find that setting time limits at host agencies is advantageous because participants thus do not become comfortable in their community service assignments and do not view their community service assignments as an entitlement. Also, rotation to various host agencies may help an individual acquire new and/or marketable skills that will also lead to an unsubsidized placement. It also serves to prevent maintenance of effort violations with host agencies. As with the previous section, however, this provision represents an option, not a mandate. The Department does not believe that any changes to this section are needed. Grantees should take unemployment insurance costs into account in deciding whether to adopt a rotation policy.

Under What Circumstances May a Grantee Terminate a Participant? (§ 641.580)

This section delineated rules for terminating participants: (1) The bases for termination; (2) the procedures for informing the participant of the reasons for termination; (3) the requirement to be consistent with the Department's administrative guidelines, including appeal rights, and (4) the prohibition against termination solely on the basis of age.

We received several comments on this section. Several commenters recommended that additional examples be cited. Another suggested that the Department identify benchmarks (*i.e.*, specific numbers) to define the term "reasonable'' as applied to refusal of job offers. One commenter suggested that in the circumstances defined under § 641.580(a), the grantee or subgrantee must immediately terminate the participant.

Additional examples of circumstances that warrant termination will be provided in administrative guidance. The Department chooses to defer to the discretion of the grantee to determine what constitutes a "reasonable'' number for refusals of job offers. The Department has modified § 641.510 to provide that grantees or subgrantees must immediately terminate participants who provided false information for eligibility purposes and has added the word "immediately'' to § 641.580(a) as well.

Are Participants Employees of the Federal Government? (§ 641.585)

Proposed § 641.585 provided that SCSEP participants are not Federal employees, but that where a grantee or host agency is a Federal agency, § 641.590 applies. One commenter opposed this provision on the basis that the definition of employee status should derive from Federal law for the sake of uniformity.

The OAA, at section 504(a), clearly states that SCSEP participants are not to be considered Federal employees.

Are Participants Employees of the Grantee, the Local Project and/or the Host Agency? (§ 641.590)

Proposed § 641.590 provided that the grantee must consult with an attorney to determine whether its workers are employees of the grantee, the local project, or the host agency.

Commenters had a variety of objections to this provision. One commenter opposed classifying participants as employees of the grantee, since grantees cannot provide the level of supervision normally envisioned in an employer-employee relationship, and another opposed classifying participants as employees of either the grantee or the host agency. One commenter noted that participants are employees in some respects (*e.g.*, payroll matters) but not in other respects (*e.g.*, employment discrimination). Another commenter argued that, if participants are classified as employees, State employment laws may be brought to bear, and this perspective is not appropriate for SCSEP participants.

Two commenters stated that hiring attorneys is too costly and suggested that the Department obtain a blanket determination from the Internal Revenue Service (IRS) regarding whether SCSEP participants are employees. A commenter suggested that the Department make "an affirmative statement that enrollee participants are not employees of SCSEP grantees,'' and another commenter noted that in the past, appropriations language has addressed this ongoing issue.

The statute is silent on participants' status as employees, with the exception of stating that participants are not Federal employees. The Department's primary concern is to assure that participants are protected in cases of injury and potential tort liability for activities that occur within the scope of the participant's duties in a community service assignment. Generally, participants will be covered by the workers' compensation provision in section 504(b) of the OAA. Should participants become involved in work-related incidents that injure others, however, there is no similar provision for liability coverage. To the extent that a participant is considered an employee, either of the grantee or of the host agency, the participant will have that same liability coverage as other employees. It may be that the best solution is for grantees to adopt policies to assure that participants receive this kind of liability coverage, from whatever source, regardless of whether the participants are considered employees for other purposes.

As at least one commenter pointed out there are some indicia that participants are employees of the grantees and others that they are not. We believe this is a matter of State law and perhaps a matter best resolved in reauthorization. In the meantime, with respect to the question of liability in case of employee negligence while in a community service assignment, we do not have a single Federal answer. For this reason is it not possible for the Department to issue a blanket statement, as requested. Grantees will have to either adopt a policy to provide liability protection or determine the status of participants as employees. We have revised the Final Rule to delete the requirement to "consult with an attorney.''

Other Issues

The Department received several other comments on issues covered in subpart E and which were not discussed in the Proposed Rule. These comments concerned the average number of hours of work per week to be offered to participants and the maximum number of hours per grant year per participant.

The Department did not regulate the average number of hours per week to be offered to participants because there is a statutory definition at OAA section 515(2)(a) that defines part-time employment within a workweek as at least 20 hours. In addition, the Department thought that this was an area in which some flexibility could be provided to grantees, given that there will be a community service performance measure and because grantees will need to balance this measure with the unsubsidized placement performance measures, as discussed in Subpart G. That being said, grantees should ensure that participants work on a part-time basis and should monitor the hours so that they do not become full-time employees.

As to the issue of the maximum number of hours per year that a participant can work in a community service assignment, the Department chose to allow a reasonable level of flexibility. The prior 1300-hour requirement is still a benchmark and good practice that the Department strongly encourages grantees to follow.

Subpart F—Private Sector Training Projects Under Section 502(e) of the OAA

What Is the Purpose of the Private Sector Training Projects Authorized Under Section 502(e) of the OAA? (§ 641.600)

The section 502(e) program is required by the OAA, which authorizes the Department to reserve up to 1.5 percent of the total appropriation to place individuals into private sector job opportunities. In § 641.600, the Department proposed to provide more funding for the section 502(e) program and to select the grantees through a full and open competition for 502(e) funds. Before the enactment of the 2000 Amendments, SCSEP grantees had been allowed to routinely set aside a portion of their own funds to underwrite most 502(e) activities. There was a limited

competition among the grantees only for a small section 502(e) set-aside.

Many commenters protested that the elimination of the set-aside practice would impede their ability to meet placement performance measures. Many commenters objected to limiting 502(e) funds to the winners of a competition, some questioned the Department's authority to do so, and others questioned whether small grantees could fairly compete against national organizations. A number of commenters suggested a pro-rated equitable distribution of funds, providing for a recapture of refused funds that could be reallocated or competed. Several commenters said State budget cutbacks limited the ability of host agencies to provide unsubsidized placements to "compensate'' for the new 502(e) requirements. One commenter expressed concern for participants in current 502(e) projects who have not completed their training.

The practice of allowing 502(e) projects to be funded out of the general SCSEP grants is not permitted by the 2000 Amendments. Section 502(e) sets up a specific set aside program with different rules from "primary'' SCSEP grants.

To provide for maximum flexibility in the award of 502(e) funds in subsequent Program Years, however, the Department agrees to eliminate the phrase "through an open competition'' in § 641.600 of the Final Rule. This will enable the Department to explore other award mechanisms in any given Program Year. However, full and open competition is consistent with the intent of the OAA and Department policy, and ensures the selection of the best providers, thus contributing to the betterment of the SCSEP overall. It provides an opportunity for private business concerns to compete, as specified in the OAA. The Department also believes that competing this program strengthens the unsubsidized placement goals of the program as a whole.

Commenters expressed concern that awarding section 502(e) grants through competition will prevent their use of funds set aside under their grants to promote private sector placements. The Department believes that this concern can be addressed through innovative use of funds in their existing grants. Nothing in the statute forbids the use of funds in the "other participant costs'' cost category or in the "wages and fringe benefits'' cost category for appropriate training expenditures. However, grantees using SCSEP funds for such activities are not exempted from normal SCSEP requirements—*e.g.*, non-Federal share—as are actual 502(e) recipients. The Department will issue administrative guidance that expands on innovative ways to expand on permissible on-the-job training and work experience activities listed in the rule at § 641.540(c).

How Are Section 502(e) Activities Administered? (§ 641.610)

In this section, the Department described who may apply for section 502(e) projects, what private sector activities should be emphasized, and the need to coordinate 502(e) activities with WIA title I and SCSEP projects operating in the area whenever possible. In the past, private businesses were not permitted to apply for 502(e) projects.

There were several comments on paragraph (a) of this section, most of which were concerned about allowing private businesses to compete. The commenters were concerned that private businesses would be too narrowly focused in their implementation of the section 502(e) program—would only train for specific jobs they needed and would not meet the needs of many older workers for training in other kinds of jobs which might use their previous skills. Some commenters argued that existing grantees could do a better job of providing private sector placements because of their ability to focus on both the employer and the participant's needs. The commenters were also concerned that the regulations did not make clear that the priority requirements of the OAA applied to section 502(e) projects and that providing section 502(e) grants to private businesses would undermine the community service aims of the SCSEP.

One commenter suggested adding a paragraph (d): "Private sector grantees must coordinate section 502(e) training activities with SCSEP grantees operating in the service delivery area, with particular regard to participant recruitment and co-enrollment, and must adhere to the Governor's State Senior Employment Services Coordination Plan and equitable distribution.''

The Department believes that the inclusion of "private business concerns'' as entities with which the Department is authorized to enter into agreements is in accord with Congressional direction to include private businesses in the section 502(e) program. This is particularly clear when the language of section 502(e) is contrasted with the language of section 502(b)(1) which does not mention private businesses as potential grantees for primary SCSEP grants. Although the Department has not in the past included private businesses as grantees in the section 502(e) program, the Department thinks that their inclusion is more consistent with the statute, with Departmental polices favoring competition, and with the 2000 Amendments' increased emphasis on placements in unsubsidized employment.

The Department does not intend, nor does it believe, that enabling private business concerns to apply for 502(e) funds will necessarily disadvantage current grantees. If, as suggested by the comments, current grantees have good programs for training and placing older workers for placement in private sector jobs, there is no reason why their proposals to perform those services should not be successful in a 502(e) competition. The Department intends that the same standards for using innovative work modes and for emphasizing second career training will apply to all applicants.

The Department agrees that section 502(e) grantees should coordinate with the grantees in the areas in which they operate and that they are subject to the same requirements as other grantees. We think, however, that the regulations, especially §§ 641.610(c) and 641.660, already so provide.

How May an Organization Apply for Section 502(e) Funding? (§ 641.620)

We did not receive any comments on this section. Nevertheless, in light of our decision, discussed above, to retain flexibility in the method by which section 502(e) funds will be awarded, we have revised the rule to delete the reference to a Solicitation for Grant Applications and to remove the phrase "or other similar instrument'' at the end of the section. The section now provides that organizations may apply for section 502(e) grants by following instructions that the Department will publish in the **Federal Register** or in another appropriate medium.

What Private Sector Training Activities Are Allowable Under Section 502(e)? (§ 641.630)

This section listed the activities that are authorized for private sector training under section 502(e). In particular, paragraph (a)(7) indicated that job clubs or job search assistance are only allowable in combination with other listed services or in conjunction with the local One-Stop Delivery System.

Many commenters believed that grantees should have the flexibility to provide job clubs or job search assistance as stand-alone activities. Some suggested this restriction would

have a negative effect on achievement of unsubsidized placements.

One of the key priorities of the SCSEP is to serve the hardest-to-serve of the eligible population. Consistent with that focus and given the limited funds that are available, eligible individuals who are essentially job-ready should be referred to the One-Stop Delivery System. Section 502(e) funds, which are limited to no more than 1.5 percent of the appropriation, can then be targeted to prepare participants most in need for unsubsidized employment. Section 502(e) specifically focuses on providing ''second career training'' leading to placement in private sector jobs. The Department does not view stand-alone job clubs or job search activities, which are essentially aimed at individuals who are already job ready, as fitting within the type of training Congress envisioned for section 502(e) projects. Where job clubs or job search assistance are used to assist someone who has received or is receiving second career training to successfully find a job, they are allowable section 502(e) activities. The Department addresses this issue in more detail in § 641.535(c).

The Department acknowledges that focusing on the hardest-to-serve presents challenges. We address the negotiation and establishment of performance measures in Subpart G and later administrative issuances.

How Do Private Sector Training Activities Aauthorized Under Section 502(e) Differ From Other SCSEP Activities? (§ 641.640)

Section 641.640 listed the differences between activities under section 502(e) grants and other SCSEP activities. These differences include that section 502(e) projects are not required to have a community service component, that they focus solely on second career training leading to private sector employment, that non-Federal share is not required, and that private businesses are eligible for 502(e) grants.

The Department received several comments on this section. One commenter urged the Department to preserve the historical balance between unsubsidized employment and community service.

The purpose of the SCSEP is to provide both community service and unsubsidized employment opportunities. The Department views the section 502(e) program as being primarily related to the unsubsidized employment focus of the program. However, 502(e) participants must also be co-enrolled in a community service SCSEP project.

Another recommended that the 10 percent non-Federal share requirement apply to 502(e) activities as it does to regular SCSEP grants.

The Department is authorized to pay all of the costs of section 502(e) activities. The Department believes that Congress' authorization to pay the entire costs of section 502(e) grants and its expectation that section 502(e) grants will involve some activities unique to the SCSEP suggests an intent that the Department not impose a non-Federal share requirement. Thus, the Department will not require a non-Federal share from any section 502(e) grantee; but such recipients may choose to provide non-Federal share funds and are encouraged to do so. We have revised the regulation to include the option to provide a non-Federal share.

One commenter recommended that if the Department contracts directly with private businesses for section 502(e) projects, that it let the SCSEP grantees in the area know who the successful 502(e) applicant is so that they can refer eligible individuals for 502(e) services. This commenter further recommended that if a referral by an SCSEP grantee to a private business 502(e) grantee results in an unsubsidized placement, then that placement should also be counted for the SCSEP grantee.

The Department agrees to identify all section 502(e) awardees and will post the names and locations of all such awardees on the SCSEP website. The Department also agrees that a referral from an SCSEP grantee to a different 502(e) grantee that results in an unsubsidized placement will also be credited to the SCSEP grantee. We have added language in § 641.680 to indicate that placement credit for a referred participant may also be credited to the referring SCSEP grantee. However, if the SCSEP grantee is also a 502(e) grantee, the unsubsidized placement of the participant may only be counted once.

Does the Requirement That Not Less Than 75 Percent of the Funds Used To Pay Participant Wages and Fringe Benefits Apply to Section 502(e) Activities? (§ 641.650)

Section 641.650 provided that the requirement that not less than 75 percent of SCSEP grant funds be expended for wages and fringe benefits, either to the 502(e) grant if the grantee receives only a 502(e) grant or to the entire grant if the 502(e) grantee is also an SCSEP grantee.

The Department received several comments on this section. Commenters thought that the application of the 75 percent requirement to section 502(e) grants, as stand-alone grants was impractical. One commenter said that that it would make coordination between a 502(e) grantee and an SCSEP grantee more difficult since both programs would want to spend wage funding to meet the 75 percent requirement. Another commenter asked that the requirement for enrollee wages should be reduced to at least 65 percent to free up more funds for more intensive training that will help ensure a successful transition into unsubsidized employment. That commenter suggested that more 502(e) funds be awarded in the competitive process to those that already have SCSEP grants to mitigate the burden of the 75 percent requirement.

The Department interprets section 502(c)(6)(B) of the Act, which requires that ''[n]ot less than 75 percent of the funds made available through a grant under this title shall be used to pay wages and fringe benefits,'' to mean that when the 75 percent requirement applies to all grants made with title V funds, including section 502(e) grants. The Department will continue to permit SCSEP grantees receiving 502(e) funds to apply the 75 percent requirement to the combined total of its funds. While we recognize that the requirement may cause operational problems, there is no authority in the OAA to waive the 75 percent requirement for entities that only receive a 502(e) grant.

One commenter asked for more flexibility in 502(e) grants, suggesting that limiting placements to private business makes it too difficult for grantees to use the funds to best serve older workers.

Section 502(e) placements cannot be with public agencies or non-profits. Section 502(e) specifies that placements must be made with private business concerns. In addition to for-profit organizations, we interpret private business concerns to also include any for-profit component of a non-profit organization.

Who Is Eligible to Participate in Section 502(e) Private Sector Training Activities? (§ 641.660)

When Is Eligibility Determined? (§ 641.665)

May an Eligible Individual Be Enrolled Simultaneously in Section 502(e) Private Sector Training Activities Operated by One Grantee and a Community Service SCSEP Project Operated by a Different SCSEP Grantee? (§ 641.670)

This Proposed Rule provided that an eligible individual may be simultaneously enrolled in a section 502(e) and a community service SCSEP

project operated by two different SCSEP grantees. (All section 502(e) participants must also be co-enrolled in a community service SCSEP project, whether the projects are operated by a single grantee or by two different grantees.) Under these circumstances, the Department expects grantees to work together to ensure that they are providing complementary and not duplicative services.

The Department received two comments on this section, both of which commended it for this clarification. The regulation is unchanged.

How Should Grantees Report on Participants Who Are Co-Enrolled? (§ 641.680)

We have revised this section to reflect our earlier-stated agreement that credit for the placement of a referred SCSEP participant may be shared by both the section 502(e) grantee and the referring SCSEP grantee. However, if the SCSEP grantee is also the section 502(e) grantee, the placement of the participant may only be counted once.

How Is the Performance of Section 502(e) Grantees Measured? (§ 641.690)

Subpart G—Performance Accountability

What Performance Measures Apply to SCSEP Grantees? (§ 641.700)

Section 641.700 described the four SCSEP performance accountability indicators listed in section 513 of the OAA: Number of persons served; community services provided; placement into and retention in unsubsidized employment; and satisfaction of participants, employers, and host agencies. In addition, this section adds the new earnings increase common performance measure.

Several commenters had suggestions and questions about the structure, cost and burden, clarity, and removal of the performance measures.

Structure of Performance Indicators. Commenters addressed the structure of the proposed performance definitions. Although many commenters agreed that performance indicators are essential to ensure SCSEP grantee accountability, many commenters also believed that the indicators as defined will promote "creaming,'' by enrolling individuals who will be easier to serve and produce positive program outcomes. One commenter believed that changing the definition for unsubsidized placement and retention would increase the emphasis on these performance measures, effectively deterring the original intent of the program to serve those with the poorest employment prospects. Other commenters suggested that the definitions take into consideration the older population that the SCSEP is serving by including incentives for grantees to provide services to those participants most difficult to place. One commenter suggested that because the structure of the performance measures is an effort to closely align the SCSEP with the WIA system, the alignment of SCSEP and WIA definitions, and more specifically the definition for unsubsidized placement, would be a more accurate comparison of program performance.

One commenter urged that the rules not be implemented, unless approved by OMB for paperwork reduction requirements. Another commenter questioned the validity of the definitions carrying equal weight without taking into consideration the retention rates, wage increases, and unemployment rates in rural areas. Finally, one commenter believed applying common performance measures to the SCSEP will not appropriately measure the performance because of the dual purposes of the program, which are job training and employment, and community service.

Cost and Burden of Performance Indicators. Commenters addressed the issue of the cost and burden of implementing the performance measures. Some commenters believed the new responsibility that accompanies the change in performance measure definitions will increase the administrative cost for all SCSEP sponsors and employers. Another commenter was concerned about the impact of reporting and data collection requirements on staff time. One commenter suggested the Department provide forms or a software program and training. Three commenters suggested an increase in other enrollee costs and administrative funding. Commenters asked if grantees will be provided with alternative means of securing information in cases of non-cooperation. Finally, one commenter questioned the burden of asking an employer to fill out a satisfaction survey, especially when the employer has never heard of the agency or organization from which the survey came.

Clarification of Indicators. Commenters believed that the performance measure definitions, or portions of the definitions, needed clarification. Some commenters asked for further clarification of "total number of participants served'' under "the number of individuals served'' performance indicator. Another commenter asked for clarification of both the difference in the State's minimum wage as a factor in determining the number of persons served, and whether income on an initial application is compared to income at the point of unsubsidized job placement when determining earnings increase. Two commenters asked for an explanation of the difference between the proposed placement measure, participants placed to the total number of participants, and the current placement measure, participants placed to the authorized slots. Finally, with regard to "customer satisfaction of participants,'' one commenter asked when customer satisfaction surveys are to be completed and at what frequency should they be conducted.

Removal of Indicators. A few commenters believed that some performance measures, or portions of the measures, should be removed from the Final Rule. Most of these commenters urged the Department to reject the proposed definition comparing both the number of participants placed into and number of participants retained in unsubsidized employment to the total number of participants. Commenters asserted that the proposed placement and retention measure limits the options available to achieve goals that are inconsistent with the program goal of placing more participants, and that the end result will hurt the older workers, especially those with health limitations or who live in remote areas. Three commenters believed the six-month retention factor for unsubsidized employment is far too stringent for the population that the SCSEP serves. Some commenters believed the earnings increase indicator is not an accurate measure, because many individuals retire from full-time employment and seek part-time employment, which would cause the earnings increase to be negative. One commenter believed the employment entrance and retention measures are duplicative. Further, the commenter believed community service does not seem to apply to 502(e) grants, which are a required project activity for the regular SCSEP projects.

The measures listed in § 641.700(a) are statutory and cannot be changed. While the Department has some discretion about the adoption of the earnings increase measure in § 641.700(b), the Department has made a policy decision in consultation with OMB to implement the common measures to the extent possible in all Department-funded workforce development programs. As explained in the Preamble to the NPRM, the definitions for two of the common measures cannot be adopted because of

different definitions in OAA section 513(c)(2).

The Department recognizes that administering a performance measurement system will increase administrative costs for grantees. Since the statute limits the amount of administrative funds available to grantees, the Department cannot accede to requests to provide additional administrative funding beyond those limitations. The Department will, however, recognize that the increased costs occasioned by the performance measurement are a legitimate reason for requesting an increase in administrative funds to the 15 percent limit permitted by OAA section 502(c)(3)(B)(1). The Department will also make every effort to reduce the costs of administering the performance measurement system through the provision of technical assistance and training and through the development, in consultation with grantees and other stakeholders, of data collection and reporting methods that will reduce the costs of the performance measurement system to the extent possible. The Department will, of course, follow the requirements of the Paperwork Reduction Act before requiring the use of forms or other data collection methods.

The Department also recognizes that the implementation of a performance measurement system has the potential to change the way grantees operate. There may be, as some commenters suggested, a tendency toward "creaming'' occasioned by the placement and retention and participants served measures. On the other hand, the community service and greatest economic and social need measures emphasize the community service and service to those most in need goals of the SCSEP and will have some offsetting effect on any tendency to cream. Other provisions of these regulations, like the limitation on stand alone job clubs and job referral services, will also have the effect of reducing creaming. The Department intends to work with the SCSEP community to shape the performance measures in ways which will recognize and reward attainment of all of the SCSEP goals and will recognize the operational changes that the 2000 Amendments will require, and will issue more detailed administrative guidance.

How Are These Performance Indicators Defined? (§ 641.710)

OAA section 513(b) lists four performance indicators with multiple subparts for several of the indicators. The Proposed Rule clarified the indicators by severing many of the indicators. This section provides definitions for determining each of the measures along with the additional indicator of earnings increase.

The Department received a significant number of comments on these definitions. Many of the comments requested more details on the definitions and, in some cases, requested that the Department issue Older Worker Bulletins with more detailed information. Other commenters raised concerns that the performance measures recognize the differences in the population served by the SCSEP and the geographic isolation of some participants, particularly in rural areas.

The Department's intent in structuring the performance measurement regulations was to provide only basic definitions in the regulations. The details of the system's implementation will be developed in consultation with the SCSEP community and provided in an Older Worker Bulletin and/or **Federal Register** Notice. As stated elsewhere in this Preamble, the Department intends to work with the SCSEP community to make sure that the performance measures system accurately measures the actual operations of the program and that the system is administered in a way that recognizes and encourages the goals of the SCSEP.

Commenters raised specific issues on the definitions themselves. We address these comments below.

Number of Persons Served (§ 641.710(b)(1)). Several commenters agreed with the proposed definition and thanked the Department for its critical adjustment to the definition, which accounts for differences in the wage rates paid to participants as required by State law. The Department appreciates those comments.

Community Services Provided (§ 641.710(b)(3)). Some commenters raised concerns about whether the definition of community service includes particular kinds of activities, including administrative work and job development for the grantee or subgrantees and whether such activities would be counted in determining this measure.

The definition of community service at § 641.140 and at OAA section 516(1) is intended to be illustrative. The Department will resolve these issues as we consultatively develop the details of the performance measurement system.

Placement into Unsubsidized Employment (§ 641.710(b)(4)). A number of commenters disagreed with the proposed regulation's use of total number of participants as the denominator in the definition of the placement into unsubsidized employment measure. They pointed out that this definition differs from the current practice of measuring placements against the number of authorized positions (slots). Several commenters argued that the new definition would substantially reduce placement rates, bringing many grantees below the statutorily required 20 percent placement rate and substantially below the Department's 35 percent Government Performance and Results Act of 1993 (GPRA) goal. Commenters suggested either retaining the current definition or aligning the definition with WIA and measuring against total exiters.

The Department agrees and will collect data consistent with the current practice for calculating unsubsidized placements. Therefore, the language of § 641.710(b)(4) has been modified to replace "the total number of participants'' with "the total number of authorized positions.''

Retention in Unsubsidized Employment (§ 641.710(b)(5)). All comments received on this provision asserted that the measure of retention that makes sense is the number of participants still in unsubsidized employment divided by the number of participants placed in unsubsidized employment. Some commenters questioned how the rate of retention will be measured for participants placed in the second six months of the grant.

The Department agrees with the comments about the definition. The retention denominator has been changed to "those who are employed in the first quarter after exit''—i.e., the number placed.

Although grants are only for one year, the one-year grants may be extended for up to three years once this Final Rule is published. Thus, the program will continue, as will many grantees and subgrantees. The process of measuring retention rates will be ongoing and all placements will count toward the measure.

Earnings Increase (§ 641.610(b)(9)). The Department proposed to add the additional performance measure of earnings increase which measures the percentage change in earnings from pre-registration to post-program, and between the first and third quarters after exiting the program. Several comments addressed this proposed performance measure. Some commenters believed the earnings increase measure worked against the older population the SCSEP is meant to serve. Because the SCSEP is supposed to work with the hardest-to-serve and most-difficult-to-place, the commenters asserted that the earnings

increase measure is not feasible. One commenter believed the vast majority of participants who are attracted to community service remain satisfied with minimum wage and are highly unlikely to post significant earnings increases. Another commenter asserted that part-time workers frequently do not receive a salary increase until after 12 months of employment. Two commenters believed that many older workers need to work part-time because of health, transportation, and social service needs, and it would be difficult to measure benefits. One commenter believed gathering wage and benefit increase information could be a violation of privacy. Finally, one commenter suggested expanding the definition of earnings increase to include such non-wage factors as increases in fringe benefits and reduction in transportation costs.

OAA section 513(b)(5) authorizes the Secretary to add performance indicators. The Department has chosen to add earnings increase, one of the Common Measures, as an additional performance indicator. The Department will retain this measure consistent with its decision to implement the Common Measures across all employment and training programs. The Department recognizes that the commenters have raised legitimate concerns and will work with the SCSEP community to address them during the performance measures implementation process.

What Are the Common Performance Measures? (§ 641.715)

How Do the Common Performance Measures Affect Grantees and the OAA Performance Measures? (§ 641.720)

The SCSEP is part of the Department's common performance measures initiative. This initiative has identified performance indicators that will be applied across Federal job training programs and has a common set of definitions and data sets. Those common performance measures are "entered employment,'' "retention in employment,'' and "earnings increase.'' Some commenters thought the proposed measures were not feasible because of the dual purpose of SCSEP, job training and employment, and community service. The commenters also asserted that the unique population served by the SCSEP cannot be measured appropriately by the application of common performance standards, particularly by the earnings increase measure.

Several commenters highlighted a Government Accounting Office report that found older workers had different needs than other populations served by employment, and had different goals for career advancement. A few commenters believed the definitions for the performance measures, such as earnings increase, were too restrictive and hard to implement because they measure only one possible positive outcome from employment and, therefore, are not feasible. Several commenters recommended that the common performance measures be calculated in a more simplified manner and suggested using the definitions for placement into unsubsidized employment or retention in subsidized employment, as outlined in § 641.710. Some suggested that performance measurements be adjusted based on factors enumerated in the Proposed Rule, such as unemployment, poverty or welfare rates, and proportion of participants served. Finally, some commenters asked for guidance on methods to track and collect the data for common performance measures.

As discussed above, the Department is committed to adopting the Administration's new common performance measures initiative for employment and job training programs. In the case of the SCSEP, two of the measures, entered employment and retention in employment, are already required by the OAA, although the measures are defined slightly differently. The Department is committed to adopting the common performance measures' definitions for these two measures when the SCSEP is reauthorized. The common performance measures serve two useful purposes. They reduce the burden of data collection on workforce development program grantees and they permit a degree of comparison among various workforce development programs. The Department recognizes, however, that there are differences in the population served by the SCSEP, as there are in other workforce development programs, and will take these into account in administering the performance measurement system.

How Will the Department Set and Adjust Performance Levels? (§ 641.730)

The Department proposed to set levels of performance using a method similar to the WIA method of negotiating performance levels. The negotiations will occur before the beginning of each Program Year. The placement into unsubsidized employment measure has a statutory floor of 20 percent, and may be negotiated with the grantees to establish a higher level. In negotiating levels with grantees, the Department proposed to set baseline goals. Adjustments to these negotiated levels of performance may be made only if they are based on the factors described in section 513(a)(2)(B) of the OAA. Grantees may propose adjustments to those levels at the beginning of, and during, the Program Year.

Some commenters were concerned about how the performance levels would be set in negotiations. Some commenters suggested that the performance levels should not be set based on past performance because of the changes in the program. Some commenters thought that performance levels for all grantees should be set at the same level so as not to punish good performers. Many of the commenters were particularly concerned about the placement measure, and, in particular, the possibility that the Department might set the rate at more than 20 percent. These comments variously argued that the proposed prohibition on stand alone job clubs and job referral activities and the proposed change in the baseline for measuring the placement rate to total positions and in the allocation of section 502(e) funds would make it more difficult to attain even the 20 percent placement rate. Other commenters argued that the program's focus on the hardest to serve and the characteristics of the population served make it very difficult to place participants. Some commenters said that there were disincentives to accepting unsubsidized employment, including loss of other benefits, specifically citing HUD housing benefits.

One commenter believed the Department should look at the difference in participants' age and experience when comparing the performance measures of WIA to the SCSEP. The commenter believed that a higher placement goal, as proposed, would restrict the ability of the program to serve the population in rural areas and smaller communities, where sufficient employment opportunities do not exist. Some commenters believed that the SCSEP program mandate to target individuals who are elderly, low-income, and hardest to serve, makes setting performance levels difficult or impossible. In addition, barriers to employment and economic conditions should be taken into consideration. Finally, some commenters believed that an additional condition for performance level adjustment should be allowed for those States with a minimum wage higher than the Federal minimum wage, because the higher minimum wage in some States will limit the number of positions available and the placement targets may need to be adjusted.

The Department agrees that performance baselines will have to take into account the changes in the program wrought by the 2000 Amendments and these regulations, as well as the different challenges faced by different grantees in serving particular areas and populations. For that reason, the Department will ask grantees to collect data in Program Year, PY 2004, to serve as the basis for setting the initial performance levels in PY 2005. The Department also realizes that the performance measures are new and will consider this in negotiating performance levels in the early years of implementing the system.

While the Department appreciates the commenters' concerns about the difficulty of placing some SCSEP participants, the SCSEP community must realize that Congress, in the 2000 Amendments, required a new emphasis on placement into unsubsidized employment while retaining the program goals of serving the most in need and of providing community service. This new emphasis may require some adjustments in the way grantees and subgrantees operate. In any event, the 20 percent placement rate is required by the statute and the Department cannot change it. The Department continues to believe that many grantees will be able to do much better than that rate and thus will retain the option to set placement rates above 20 percent. In addition, exceeding the 20 percent goal is important because there is an additional goal of 35 percent overall placement for the entire program based on the Department's GPRA goal.

The Department believes it is entirely appropriate to negotiate different performance levels with different grantees. Because of varied circumstances, many discussed by the commenters, it is unrealistic to expect the same performance level of all grantees. The Department will take such differences into account in negotiating performance levels. In addition, one purpose of the performance measurement system is to promote continuous improvement. Setting identical performance levels regardless of their actual performance undercuts that purpose. Fair and appropriately tailored performance levels will enable good performers to meet and exceed their performance measures and be recognized and rewarded appropriately.

The three adjustment factors listed in § 641.730(d) are the only ones allowed by section 513(a)(2)(B) of the Act. Thus, the Department cannot add an additional factor as suggested. As discussed earlier, the Department will account for higher State minimum wages in the implementation and negotiation of the performance measures.

Finally, as discussed previously, the Department will monitor actual performance under the new measures in order to set realistic expected performance levels.

How Will the Department Determine Whether a Grantee Fails, Meets, or Exceeds Negotiated Levels of Performance? (§ 641.740)

Section 641.740 stated the rules for negotiating the performance status of each grantee. The Department proposed to evaluate each performance indicator to determine the level of success that a grantee has achieved and aggregate the measures to determine if, on the whole, the grantee met its performance objectives. The aggregate is calculated by combining the percentage results achieved on each of the individual measures to obtain an average score. A grantee fails to meet its performance measures when it is unable to meet 80 percent of the negotiated level of performance for the aggregate of all of the measures. Performance in the range of 80 to 100 percent constitutes meeting the level for the performance measures. Performance in excess of 100 percent constitutes exceeding the level for the performance measures.

In addition, each national grantee in a State must meet the measures negotiated for the State in which the national grantee serves. The Department will impose the sanctions outlined in section 514 of the OAA when a grantee fails to meet overall negotiated levels of performance or the levels of performance for its projects in a State.

When a grantee fails one or more measures, but does meet its performance measures in the aggregate, the Department will provide technical assistance on the particular failed measures but will not impose other sanctions. The Department will provide further guidance through administrative issuances.

Some commenters urged that these provisions not be included in regulations, but instead be transmitted through Older Worker Bulletins. Because this is the first year in which the Department is implementing performance standards, "DOL may need the flexibility to make adjustments in order to drive desired results.''

One commenter was of the opinion that it is not equitable or valid to apply an 80 percent pass/fail standard when the performance levels are negotiable. In addition, the commenter believed that "these performance measures are unnecessarily complicated'' and will make it difficult for grantees "to monitor their programs and make adjustments throughout the year.'' This commenter doubted that the Department will be able to provide sufficient technical assistance: "with the decreased flexibility to use 502(e) and the increased focus on hard-to-hire individuals, it is highly likely that there will be a large number of grantees that fail individual measures. DOL does not have the capacity to provide this level of technical assistance or they will have to spend additional funds contracting for technical assistance.''

As discussed above, the Department will use the Older Worker Bulletin system and/or a **Federal Register** Notice to further explain the measures and requirements and to delineate the Department's approach.

The Department believes that it is equitable to apply the same standards for passing or failing performance measures to all grantees. The fact that the levels of performance are negotiable simply assures that each grantee's circumstances will be taken into account in setting performance levels and promotes continuous improvement. Performance levels may be adjusted if the factors listed in section 513(a)(2)(B) exist. The Department believes that this system is fair to all grantees and that it is equitable to apply the same pass/fail standards to each grantee. The Department disagrees that significant numbers of grantees will fail their performance measures and intends to provide all technical assistance that grantees may need.

What Sanctions Will the Department Impose if a Grantee Fails To Meet Negotiated Levels of Performance? (§ 641.750)

What Sanctions Will the Department Impose if a National Grantee Fails To Meet Negotiated Levels of Performance Under the Total SCSEP Grant? (§ 641.760)

The Department received no comments on this section. For clarity, however, we have added: "The poor performing grantee that had its funds competed is not eligible to compete for the same funds.''

What Sanctions Will the Department Impose if a National Grantee Fails To Meet Negotiated Levels of Performance in any State it Serves? (§ 641.770)

Section 641.770 listed the sanctions that will be imposed if a national grantee fails to meet its negotiated performance level in a State. The test of failure is different in this case than it is for national grants generally. A national

grantee is considered to have failed its performance measures in a State if its levels of performance are 20 percent or more below its national performance measures and it has failed to meet the performance levels set for the State. The failure to meet performance measures for State projects may be justified using factors such as size of the project and the factors listed in OAA section 513(a)(2)(B).

Three comments were virtually identical: "[b]ased on our experience, size of project is not a valid consideration in measuring success. Some of our most successful projects have been our smallest, while some of our poorest performers have been extremely large. Mitigating factors should include only those factors identified by Congress in section 513 of the OAA, as cited above.''

Because program size is mentioned in the OAA, at section 514(e)(3)(A), the Department cannot remove the reference to program size from the regulation.

When Will the Department Assess the Performance of a National Grantee in a State? (§ 641.780)

Section 641.780 detailed the circumstances under which the Department will assess the performance of a national grantee in any State. Commenters recommended adding the phrase "or his/her designee'' after "State'' in § 641.780(b)(2).

The Department accepts this addition.

What Sanctions Will the Department Impose If the State Grantee Fails To Meet Negotiated Levels of Performance? (§ 641.790)

Section 641.790 details the sanctions that will be imposed if a State grantee fails to meet negotiated levels of performance. One commenter said it does not seem fair that programs may be financially sanctioned as a result of not meeting the outplacement ratios. If a program can document its efforts to achieve outplacement goals, those efforts should be rewarded. A second commenter pointed out that grantee performance is evaluated within 120 days of the end of the program year, but one of the measures, retention in the job for 6 months, would not be established that early for any end-of-the-year placements.

Regarding giving credit for efforts to achieve outplacement goals, the Department believes that time spent documenting such efforts would not be the best use of grantee resources. Grantees may seek adjustments of their placement goals based on the criteria enumerated in section 513(a)(2)(B) of the OAA.

The question of how to address the incompatibility of the retention measure and 120-day reporting deadline will be discussed in a forthcoming **Federal Register** Notice or in forthcoming administrative guidance.

Will There be Incentives for Exceeding Performance Measures? (§ 641.795)

Section 641.795 indicated that the Department is authorized by section 515(c)(1) of the OAA to use recaptured funds to provide incentive grants. The Department will issue administrative guidance detailing how incentive grants will be awarded.

Three commenters complimented the Department for providing incentives for exceeding performance measures, saying these are "long overdue.'' One commenter, however, urged the Department to reverse the proposal to recover all grantee carryover funds. High performing grantees should be allowed to retain these funds, the commenter said, as an added incentive.

A representative of a contractor specializing in customer satisfaction studies called for using customer satisfaction as an incentive rather than a sanctionable measure. The commenter suggested that high customer satisfaction scores be used as an additional consideration for grantees that perform well on other measures. This would give grantees a reason to take customer service seriously but would not penalize them for substandard performance.

As to the issue of recapturing funds, section 515(c) of the OAA gives the Department the authority to recapture unexpended funds from SCSEP recipients at the end of the Program Year and reobligate those funds within the two succeeding Program Years to be used for incentive grants, technical assistance, or grants or contracts for any other SCSEP program. Unless those funds are recaptured and reobligated, they will lapse. The Department will issue administrative guidance to provide SCSEP recipients with additional details on how recapture will be implemented. The Department will retain its discretionary authority to determine the best use of the funds. To the extent that high performing grantees have excess funds, they may be able to recoup those funds through incentive awards.

Regarding the use of customer satisfaction as an incentive, the 2000 Amendments, section 513(b)(4), lists customer satisfaction as a required indicator. It cannot, therefore, be used merely as an incentive. However, the Department will not use customer satisfaction as a sanctionable measure until baseline rates can be established.

Subpart H—Administrative Requirements

What Uniform Administrative Requirements Apply to the Use of SCSEP Funds? (§ 641.800)

Section 641.800 listed the various uniform administrative requirements and allowable cost principles that apply to the various kinds of SCSEP grantees and subgrantees. One commenter suggested that the references to allowable cost requirements in paragraphs (b) and (c) should be removed because they are covered in 641.847, and because administrative requirements shouldn't be confused with allowable cost requirements. The commenter also suggested that the language "OMB Circular A–102'' should be inserted before "common rule.''

The references to allowable cost requirements in paragraphs (b) and (c) of § 641.806 have been removed. The rest of the paragraph language, relating to uniform administrative requirements, has been retained. The reference to "OMB Circular A–102'' has been added to paragraph (b).

What Is Program Income? (§ 641.803)

How Is SCSEP Program Income To Be Used? (§ 641.806)

Section 641.806 provided for the use of program income for program purposes in various situations. Several commenters agreed that programs should be able to continue using program income if their grants are renewed; if not, then the program income should be remitted to the Department for "reprogramming.'' Under 29 CFR parts 95 and 97 and this regulation, continuing and terminated grantees may continue to use program income for SCSEP-related purposes without any time limitation. The grantee is not required to remit to the Department income that is earned after the termination of the SCSEP grant relationship between the grantee and the Department. If a grantee has unexpended program income on hand at the time its grant terminates, paragraph (c) requires that the program income be remitted to the Department.

A commenter suggested that § 641.806(b), which deals with income earned after the grant period, either should be removed because it is inconsistent with the generally applicable program income requirements or clarified as to continuing grant relationships. The program income requirements for governmental grantees (29 CFR 97.25(h))

provide that grantees are not accountable for income earned after the end of the grant period unless program regulations or grant agreements provide otherwise. The related regulation for non-profit and other non-governmental organizations (29 CFR 95.24(b)) is substantially similar but does not contain an exception for grant agreements and regulations that provide otherwise. The commenter also suggested that if the provision is retained, the regulation should explain when liability ends, or what ''continue'' means as used in the regulation.

The Department does not agree that § 641.806(b) should be removed. Most SCSEP grantees have a continuing grant relationship with the Department and earn substantial amounts of program income. Although grant terminations will punctuate these relationships at least once every three years, many of the relationships are likely to continue for much longer periods under new SCSEP grants, and program income will continue to be earned. Consequently, the Department has applied to the Office of Management and Budget (OMB) for an exception to 29 CFR 95.24(b), in accordance with 29 CFR 95.4, and has obtained OMB's approval of the exception and of § 641.806(b).

What Non-Federal Share (Matching) Requirements Apply to the Use of SCSEP Funds? (§ 641.809)

In § 641.809, the Department set out the rules for the situations in which non-Federal share funds are and are not required and what kinds of funding qualifies as match. One commenter said that it would be useful for DOL to add a requirement that funds be accounted for in the same way Federal funds are audited.

The commenter was referring to the fact that the uniform administrative requirements require all non-Federal contributions to project costs, including cash and third party in-kind contributions, to be allowable under the applicable allowable cost requirements. We agree that it would be useful to clearly state this principle in this regulation by: substituting the word ''determine'' for ''calculate'' in paragraph (c) of § 641.809; by redesignating paragraphs (e) and (f) as paragraphs (f) and (g); and by making the second sentence of paragraph (d) into a new paragraph (e). As changed, paragraphs (c) and (d) more clearly indicate that the determination of the non-Federal share of costs is subject to all the non-Federal share requirements in the uniform administrative regulations, not just those pertaining to calculation of the non-Federal share of costs. The Department believes it is inappropriate and unnecessary to re-state the non-Federal share requirements that are referred to in 29 CFR 95.23 and 29 CFR 97.24. The generally applicable administrative requirements referred to paragraphs (c) and (d) are not related to the prohibition now separately set out in new paragraph (e).

What Is the Period of Availability of SCSEP Funds? (§ 641.812)

May the Period of Availability Be Extended? (§ 641.815)

Section 641.815 outlined the circumstances under which grantees may request and the Department may approve an extension of the period of fund availability. One commenter suggested allowing for the use of a carryover of prior grant year funds, if any money is left since States may be losing funding under section 502(e) of the Act.

The Act permits the Secretary to extend the period for the obligation and expenditure of SCSEP funds where ''necessary to ensure the effective use of such funds.'' The Secretary may also recapture unexpended funds and take one of the three reobligation actions indicated in § 641.818. It is the Department's policy to encourage recipients to fully obligate and expend all available funds within the Program Year in which they are awarded. Thus, the Department will not amend the regulation to permit carryover.

What Happens to Funds That Are Unexpended at the End of the Program Year? (§ 641.818)

Section 641.815 indicated several options the Department has for redistributing funds that are unexpended at the end of a program year. Several commenters, while supporting the recapture and redistribution features of this provision, recommended that the Department should continue to allow recipients to request short-term extensions at the end of the year so that they can ''make most effective use of the funds.'' One commenter suggested that carried over funds should retain their original cost category identification in the carryover period.

The extension issue is fully discussed in the Department's response to comments on § 641.815. With regard to the suggestion that cost category identification be retained, we believe the comment is directed to spending plans, i.e., budgets, not cost categories, since SCSEP funds have no cost category identification until they are expended. The Department considers imposing expenditure limitations based on original budget estimates in addition to the cost limitations imposed by the Act to be an unnecessary added burden to affected grantees. Funds that are expended in an extension period are subject to the same cost limitations that apply to the original grant.

What Audit Requirements Apply to the Use of SCSEP Funds? (§ 641.821)

Section 641.821 listed the generally applicable Single Audit Act requirements that SCSEP grantees must follow and established audit requirements for commercial organizations. One commenter suggested changing the references in § 641.821(c)(2) from OMB Circular A–133 to 29 CFR part 99.

The Department does not agree with this suggestion. It is appropriate to refer to the OMB Circular here since the issue addressed in this paragraph is the selection of the threshold for single audit coverage, an organization-wide issue. However, OMB Circular A–133 was recently revised to raise the threshold from $300,000 to $500,000 (68 FR 38401, June 27, 2003). Accordingly, the reference to the threshold in the regulation is being raised to $500,000.

What Lobbying Requirements Apply to the Use of SCSEP Funds? (§ 641.824)

What General Nondiscrimination Requirements Apply to the Use of SCSEP Funds? (§ 641.827)

The NPRM contained two sections dealing with nondiscrimination. Section 641.827 dealt with general requirements applicable to all grant programs; § 641.830 dealt with requirements specific to the SCSEP program. In reviewing the comments on the two sections, particularly a question asking what non-discrimination protections apply specifically to participants in the SCSEP program, the Department has decided that the material covered could be more clearly presented by combining proposed §§ 641.827 and 641.830 into a single section containing requirements based on the OAA Amendments and on regulatory sources.

Paragraph 641.827(a) of the combined section remains unchanged. This paragraph notifies grantees that, as recipients of Federal financial assistance, they are subject to 29 CFR part 31, which prohibits discrimination based on race, color, or national origin under title VI of the Civil Rights Act of 1964, and 29 CFR part 32, which prohibits discrimination based on handicap, under section 504 of the Rehabilitation Act of 1973.

Paragraph 641.827(b) covered the nondiscrimination requirements

applicable to SCSEP programs and activities provided through the One-Stop system authorized by the Workforce Investment Act. One commenter asked what was intended by the phrase "operates programs and activities through One-Stop'' in § 641.827(b)(1). In this connection, the commenter asked whether the Department intended this provision to cover an SCSEP participant assigned to a One-Stop or only those cases where an SCSEP grantee physically co-located its operations in a One-Stop.

The Department has extensively revised § 641.827(b). It notifies grantees of the circumstances under which they may be subject to 29 CFR part 37, which implements the nondiscrimination provisions of section 188 of WIA. Paragraph (1) States that the WIA nondiscrimination regulations apply to One-Stop partners that operate "programs and activities that are part of the One-Stop Delivery System.'' This paragraph contains the same requirements as 29 CFR 37.2(a)(2) regarding which entities are subject to the WIA nondiscrimination regulations. Coverage under this provision is not limited to grantees that co-locate their operations in a One-Stop Center. Paragraph (2) is simply intended to make grantees aware that there may be additional circumstances under which they are subject to 29 CFR part 37. Readers should refer to the definition of "recipient'' in 29 CFR 37.4 for a complete listing of the types of entities covered by paragraph (2).

New § 641.827(c) implements section 503(b)(3) of the Act, which relates to providing participants with informational materials on their rights under the Age Discrimination in Employment Act of 1975.

New § 641.827(d) contains the DOL address for questions and complaints concerning nondiscrimination violations, which is the same material that appeared in § 641.830(b) of the Proposed Rule.

New § 641.827(e) is a revision of the material that appeared in § 641.830(a) of the NPRM. The paragraph omits the list of examples of Federal laws that may be applicable to such persons that appeared in paragraph 641.830(a) of the NPRM. The list of examples was omitted merely to simplify the paragraph; this change is not intended to alter the meaning of the paragraph.

One commenter suggested that the Department should emphasize that title VII of the Civil Rights Act, which applies to employees, does not cover SCSEP participants because participants are not employees. The Department does not take a position on the question of whether participants may or must be considered employees. The reason is that the only reference to employee status in title V is in section 504 of the OAA, which says that participants employed in any project funded under title V shall not be considered Federal employees. Accordingly, the issue of whether participants are considered employees for any other purposes must be decided by entities other than the Department.

Another commenter was concerned that the wording of proposed § 641.830(a) could be misinterpreted to cover only SCSEP participants whereas the nondiscrimination protections should also apply to applicants for participation, employees, and applicants for employment. Based on that suggestion, we have added language to clarify that the nondiscrimination protections of Federal, State, or local laws may apply to applicants for participation in SCSEP programs, or to other individuals, as well as to participants.

What Nondiscrimination Requirements Apply Specifically to Participants in SCSEP Programs? (§ 641.830) [Removed]

What Policies Govern Political Patronage? (§ 641.833)

Section 641.833 contained a prohibition on selecting or not selecting SCSEP participants or on funding or not funding subrecipients or host agencies based on political affiliation or belief. One commenter stated that 29 CFR part 37 governs issues regarding "political affiliation or belief,'' and asks that this section be amended to indicate that 29 CFR part 37 prohibits discrimination on these bases in SCSEP programs and activities that are part of the One-Stop system.

The Department agrees that this provision should explicitly prohibit the use of "political affiliation or belief'' as the basis of personnel actions involving SCSEP participants in One-Stop system programs and activities. Accordingly, we are adding a cross reference to the WIA nondiscrimination requirements.

What Policies Govern Political Activities? (§ 641.836)

Section 641.836 describes various requirements and prohibitions on political activities involving grantees and participants, including those established under the "Hatch Act.'' Several commenters agreed that the Hatch Act restrictions should be posted in grantee administrative offices, but questioned whether it is reasonable or practical to require the posting of the restrictions in "every workplace in which SCSEP activities are conducted.'' In order to avoid the "burdensome and onerous'' task, they recommend that grantees be required to inform participants of Hatch Act restrictions through written information provided upon enrollment.

The notice posting requirement is statutory. It is required by section 502(b)(1)(P) of the OAA. Not only must the required notice explaining allowable and unallowable political activities be posted in every workplace in which SCSEP activities are conducted, but an explanation of the law must be made available to each category of persons associated with the project. Therefore, the regulation has not changed as suggested.

Commenters also suggested that the Department provide the language that it wishes grantees to communicate to their participants so that everyone will communicate a consistent message.

The Department concurs and will provide this information by administrative issuance and has revised the regulation accordingly.

What Policies Govern Union Organizing Activities? (§ 641.839)

What Policies Govern Nepotism? (§ 641.841)

What Maintenance of Effort Requirements Apply to the Use of SCSEP Funds? (§ 641.844)

What Uniform Allowable Cost Requirements Apply to the Use of SCSEP Funds? (§ 641.847)

Are There Other Specific Allowable and Unallowable Cost Requirements for the SCSEP? (§ 641.850)

Section 641.850 listed several provisions governing allowable and unallowable costs that are unique to the SCSEP program or unique to grant programs administered by the Department. One commenter suggested that § 641.850(e), which discusses "accessibility and reasonable accommodation,'' be amended to permit SCSEP funds/financial assistance to be used to meet obligations under "Section 188 of the Workforce Investment Act of 1998, as amended; Section 504 of the Rehabilitation Act of 1973, as amended; any other applicable Federal disability nondiscrimination laws; and the regulations implementing these laws, to provide physical and programmatic accessibility and reasonable accommodation/modifications for, and effective communication with, individuals with disabilities.''

The Department agrees and § 641.850 has been amended to permit SCSEP resources to be used to provide

''physical and programmatic accessibility and reasonable accommodation/modifications for, and effective communication with, individuals with disabilities.''

A second commenter suggested amending § 641.850(e) to provide that ''Recipients and subrecipients may use SCSEP funds to meet their *own obligations* (emphasis provided) under section 504.'' The change would emphasize that ''scarce'' SCSEP funds ''are not intended to meet the obligations of community agencies or others subject to the relevant provisions of law.''

The Department does not agree that it should limit the use of SCSEP funds for meeting reasonable accommodation obligations under Federal disability nondiscrimination law to recipients' and subrecipients' ''own'' obligations. While there is no requirement to use SCSEP funds to modify host agencies' facilities, SCSEP funds may be used for this purpose. Regardless of where participants are placed, Federal disability nondiscrimination law requires their host agency to provide reasonable accommodations/modifications for qualified participants with disabilities.

One commenter stated ''[a]ccept in kind at One Stops.'' Another commenter questioned whether SCSEP funds could be used for One-Stop activities.

The Department's position on both comments is stated in a paper entitled Resource Sharing for Workforce Investment Act One-Stop Centers; Methodologies for Paying or Funding Each Partner Program's Fair Share of Allocable One-Stop Costs, published as a notice in the **Federal Register** (66 FR 29637, May 31, 2001) and available on ETA's Web site at *http://www.doleta.gov/usworkforce/documents/fr/fr-5-31-2001-a.pdf.* As the notice indicates, One-Stop partners, including the SCSEP, must use a portion of their funds to support the One-Stop system. One-Stop costs, like all other SCSEP costs, must be determined in accordance with the applicable cost principles, which provide that each partner must pay its fair share of allowable and allocable One-Stop costs. The Department does not mandate how this is to be accomplished. Instead, the One-Stop partners must mutually agree on each partner's share of One-Stop costs and on what resources shall be provided by each of the partners to defray its fair share of One-Stop costs. Such an agreement may include acceptance of in-kind services in satisfaction of the SCSEP fair share of One-Stop costs. More information on allocating One-Stop costs can be found in Part 1 of the One Stop Comprehensive Financial Management Technical Assistance Guide, also available on ETA's Web site at: *http://wdsc.doleta.gov/sga/pdf/FinalTAG_August_02.pdf.* The Department has decided to emphasize and clarify its position on the use of SCSEP funds for the support of One-Stop activities (*see* 20 CFR 662.230) by inserting a new paragraph (d) in § 641.850 covering One-Stop costs and redesignating paragraphs (d)–(f) respectively (e)–(g). As discussed in more detail in the Preamble discussion of subpart B, grantees may seek to negotiate agreements in which they become service providers for older workers in the One-Stop, which may lead to a significant reduction of their required contribution.

How Are Costs Classified? (§ 641.853)

Section 641.853 provided that costs are classified as program or administrative costs and provided rules for the classification of participant wage and fringe benefit costs as program costs. Four commenters stated that this section does not ''make sense'' and that clarification is needed or the section should be deleted because enrollee costs are always charged to Enrollee Wages and Fringe Benefits (EWFB).

The Department agrees with the commenters that this provision needs to be clarified, especially in presenting the idea that participant wages and fringe benefits costs are always treated as program costs, regardless of what function is performed by participants in their community service assignments. The Department has revised paragraph (b) accordingly.

One commenter requested relief from cost category restrictions due to the increased administrative effort required to comply with the Older Americans Act Amendments of 2000.

The Department agrees with the commenter that the OAA Amendments do require increased administrative effort. However, the Department cannot provide relief from the cost category restrictions since they are established by section 502(c)(3), (c)(4), and (c)(6) of the Act. The only relief available is the Department's authority, under section 502(c)(3)(b), to increase the administrative cost limitation from 13.5 percent to 15 percent. As stated in the Preamble discussion of § 641.700, the Department will take the possible increased costs of administering some of the new requirements of the 2000 Amendments into account in reviewing requests for increases in the administrative cost limitation. Further, relief from the cost category limitations probably is unnecessary since the definitions of Administrative Cost and Program Cost under the 2000 Amendments will result in substantial amounts of costs that may previously have been charged to the Administrative Cost cost category being charged to the Program Cost cost category. For example, costs of assessments, IEP preparation, and related data collection costs are chargeable to the Program Cost cost category.

What Functions and Activities Constitute Costs of Administration? (§ 641.856)

What Other Special Rules Govern the Classification of Costs as Administrative Costs or Program Costs? (§ 641.859)

Sections 641.856 and 641.859 provided the rules for classifying costs as either administrative or program costs. One commenter suggested that the Department insert a new paragraph (c) in § 641.859 which would state: ''All other costs under awards to subrecipients are program costs except for awards to first tier subrecipients that have comprehensive responsibilities for SCSEP program operations in the geographic area covered by their award.'' The objective of the proposed change was to reflect Congressional intent to make SCSEP administrative cost standards consistent with the WIA administrative cost provision at 20 CFR 667.220(a).

Paragraph (c) of § 641.859 was inadvertently omitted from the NPRM. This paragraph applies the following two criteria to costs classified as Administrative Cost: (1) The costs must be incurred for one of the functions listed in § 641.856(b); and (2) the cost must be incurred by a direct recipient of SCSEP funds, a first-tier subrecipient (awardee of funds from a direct recipient that has broad responsibilities for administering SCSEP programs), a recipient of an award from a direct recipient or a covered first tier subrecipient, or a vendor which performs administrative functions for recipients or first tier subrecipients and must be solely for the performance of administrative functions. This change in § 641.859 makes the treatment of SCSEP administrative costs consistent with the treatment of administrative costs under the WIA. Thus, it furthers the integration of SCSEP activities with WIA One-Stop system activities, as provided in the 2000 Amendments.

The Department's intent in applying the WIA cost structure to SCSEP is twofold. First, the Department wants to use the same type of cost structure for SCSEP as is used for WIA. Both programs offer many of the same types

of activity, and many organizations involved in the SCSEP program also are involved in the WIA program. These organizations benefit from the use of the same cost structure for both programs due to simplified accounting and financial reporting. Second, while every organization incurs what it considers administrative costs, the Department is interested in measuring only the administrative cost incurred by direct recipients and subrecipients that have broad responsibilities for successful program outcomes and that provide a broad range of services to participants. In the WIA context, States, local workforce areas, and One-Stop operators incur such costs. In the SCSEP context, direct grantees and first-tier subrecipients incur such costs. First-tier subrecipients are subrecipients that conduct three specified SCSEP program activities for all participants: eligibility determination; participant assessment; and development of and placement of participants into community service opportunities. The Department has determined that subrecipients that perform all of these functions have approximately the same breadth of responsibilities as WIA local grant recipients and One-Stop operators. It is therefore appropriate to use the same special rules for SCSEP administrative costs as for WIA administrative costs.

In order to effectuate the suggested change, §§ 641.856 and 641.859 have been modified. A new paragraph (c) defining first-tier subrecipient has been added to § 641.856 and the description of administrative costs in paragraph (a) has been modified to limit its coverage of subrecipients to first-tier subrecipients. Paragraph (b) of § 641.859 has been modified to fully describe administrative costs in terms of what types of entities can incur them and paragraph (e) has been incorporated in the revised paragraph (b).

Must SCSEP Recipients Provide Funding for the Administrative Costs of Subrecipients? (§ 641.861)

What Functions and Activities Constitute Program Costs? (§ 641.864)

Section 641.864 listed some of the activities that are counted as program costs. We have added language to § 641.864(d) to reflect the prohibition on stand alone job search assistance and job referral activities in § 641.535(c).

What Are the Limitations on the Amount of SCSEP Administrative Costs? (§ 641.867)

Under What Circumstances May the Administrative Cost Limitation Be Increased? (§ 641.870)

What Minimum Expenditure Levels Are Required for Participant Wages and Fringe Benefits? (§ 641.873)

Section 641.873 set forth the rule that 75 percent of grant expenditures must be made for participant wages and fringe benefits and explained how that rule would be applied. Three commenters took issue with the requirement that 75 percent of SCSEP funds be expended on participant wages and fringe benefits. They pointed out that this requirement makes it more difficult to achieve the Act's objectives relating to other allowable activities such as training for unsubsidized employment.

The Act, at section 502(c)(6)(B), requires that 75 percent of funds be expended on participant wages and fringe benefits. Since the Department has no discretion to alter this requirement, recipients must design their SCSEP-funded programs and activities to maximize coordination with the One-Stop system and other programs that can train and place SCSEP participants in unsubsidized jobs.

When Will Compliance With Cost Limitations and Minimum Expenditure Levels Be Determined? (§ 641.876)

What Are the Fiscal and Performance Reporting Requirements for Recipients? (§ 641.879)

This section established the reporting requirements for the program and indicated areas in which the Department may administratively issue supplemental reporting instructions. Several commenters stated that the proposed 45 days to submit a final Quarterly Progress Report (QPR) does not give sufficient time to submit accurate year-end reports, and suggested that a minimum of 60 to 120 days is needed to account for final placement, retention, and wage information. One commenter pointed out that § 641.879 of the proposed regulation and the Preamble discussing that section are inconsistent; the regulation requires that final financial and non-financial reports are due within 45 days while the Preamble states that they are due within 90 days.

The Department concurs with the commenters and the regulation has been changed to require submission of the QPR and quarterly financial status reports 30 days after the end of each quarter and final financial and non-financial reports 90 days after the end of the grant period.

One commenter noted that the language in paragraph (a) indicating that data that cannot be validated or verified may be treated as not reported only applies to the QPR non-financial report and suggested that it should refer to both performance and financial reports. One commenter suggested replacing the term "demographics'' to "demographic characteristics'' in § 641.879(f).

The Department agrees with the other comments and has incorporated them into the Final Rule.

What Are the SCSEP Recipient's Responsibilities Relating to Awards to Subrecipients? (§ 641.881)

What Are the Grant Closeout Procedures? (§ 641.884)

Subpart I—Grievance Procedures and Appeals Process

What Appeal Process Is Available to an Applicant That Does Not Receive a Grant? (§ 641.900)

In § 641.900, the Department reserved its opportunity to provide a rule on an administrative appeal process for grantees that do not receive a grant and asked for advice and guidance on this issue. The Proposed Rule requested comments on whether there should be an administrative appeal process and how it should be structured given the complexities of fashioning a remedy. Additionally, the Department requested suggestions on how to operate such an appeals process. For example, could such a SCSEP appeals process be modeled after the appeals process in the WIA Indian and Native American program? Finally, the Department sought feedback on whether it should create an appeals process for one-year grant applicants and 502(e) projects and if so whether and how such a process should differ from a process established for multi-year project appeals.

In this section, the Department establishes a formal appeals process for SCSEP grant applicants that feel they have been inappropriately denied a grant. This section should be read in conjunction with § 641.470, "What happens if an applicant's application is rejected?''

The Department received several comments on this section. Some comments suggested procedures for protesting the content or form of a Solicitation for Grant Applications (SGA) and appeals therein as well as procedures for protesting the rejection of a grant application and appeals

therein. None, however, addressed a separate appeals process for one-year grant applicants and section 502(e) projects.

The comments suggested that to protest the content of an SGA, a formal protest be submitted to the Department's Grant Officer by an interested party or potential grant applicant in a timely manner. The Grant Officer would be required to make a determination within ten days, in writing, stating factual findings and conclusions. If the protesting party found the determination adverse, it may appeal the determination to the Department's Office of Administrative Law Judge (ALJ). The ALJ would try to render a decision before the application submission deadline in order to provide time to implement a remedy. Remedies would include amendment to the SGA, reissuance of the SGA and/or extension of the deadline for submission of applications.

The comments also recommended the right to protest the award decision. To do so, the protesting party would, again, file a protest with the Grant Officer. Adverse decisions would be appealable to the ALJ and ultimately to the Department's Administrative Review Board.

The commenters suggested that the initial protest to the Grant Officer would need to be filed within ten days of the grant decision. In doing so, the protesting party may request, and receive within five days, a debriefing about the justification of the grant denial. The protest must also include a factual basis for the complaint and the specific issues contested. Furthermore, the protesting party would be given two working days following the debriefing to amend the protest document. The Grant Officer would then have thirty days to provide a determination of the protest. The final determination would contain findings of fact, conclusions or law, and in the event of an adverse decision for the protesting party, the Grant Officer would also inform the party of the opportunity to appeal the Grant Officer's determination to the ALJ. In the event the Grant Officer or the ALJ found in favor of the protesting party, the Grant Officer would have the authority to provide the following remedies: Retroactive award, reallocation or distribution of authorized positions, resolicitation or recompetition of the grant funds, or any other appropriate remedy.

The Department has decided not to institute a protest and appeal procedure for challenges to the SGA. The Department believes that the process could become too complicated and take too long to be worthwhile. The absence of a formal appeals process does not preclude applicants from raising questions about the contents of an SGA nor preclude the Grant Officer from making changes in response to such questions.

The Department believes that grant applicants dissatisfied with an award decision should have the opportunity to protest/appeal the award decision. The process, which places a strong emphasis on timeliness of appeals and decisions, will be as follows:

(a) An applicant for financial assistance under title V of the OAA that is dissatisfied because the Department has issued a determination not to award financial assistance, in whole or in part, to such applicant, may request that the Grant Officer provide the reasons for not awarding financial assistance to that applicant (a debriefing). The request must be made within 10 days of the date of notification indicating that the grant would not be awarded. The Grant Officer must provide the protesting applicant with a debriefing and a written decision stating the reasons for the decision not to award the grant within 20 days of receipt of the protest. Applicants may appeal to the U.S. Department of Labor, Office of Administrative Law Judges, within 21 days of the date of the Grant Officer's notice providing reasons for not awarding financial assistance. The appeal may be for a part or the whole of a denial of funding. This appeal will not in any way interfere with the Department's decisions to fund other organizations to provide services during the appeal period.

(b) Failure to either request a debriefing within the 10 day requirement or to file an appeal within 21 days as provided in paragraph (a) of this section constitutes a waiver of the right to a hearing.

(c) A request for a hearing under this section must state specifically those issues in the Grant Officer's notification upon which review is requested. Those provisions of the Grant Officer's notification not specified for review, or the entire final determination when no hearing has been requested within the 21 days, are considered resolved and not subject to further review.

(d) A request for a hearing must be transmitted by certified mail, return receipt requested, to the Chief Administrative Law Judge, U.S. Department of Labor, Suite 400, 800 K Street, NW., Washington, DC 20001, with one copy to the Departmental official who issued the determination.

(e) The decision of the ALJ constitutes final agency action unless, within 21 days of the decision, a party dissatisfied with the ALJ's decision, in whole or in part, has filed a petition for review with the Administrative Review Board (ARB) (established under Secretary's Order No. 2–96, published at 61 FR 19978 (May 3, 1996)), specifically identifying the procedure, fact, law or policy to which exception is taken. The Department will deem any exception not specifically urged to have been waived. A copy of the petition for review must be sent to the opposing party at that time. Thereafter, the decision of the ALJ constitutes final agency action unless the ARB, within 30 days of the filing of the petition for review, notifies the parties that the case has been accepted for review. Any case accepted by the ARB must be decided within 180 days of acceptance. If not so decided, the decision of the ALJ constitutes final agency action.

(f) The Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, set forth at 29 CFR part 18, govern the conduct of hearings under this section, except that:

(1) The appeal is not considered as a complaint; and

(2) Technical rules of evidence, such as the Federal Rules of Evidence and subpart B of 29 CFR part 18, will not apply to any hearing conducted under this section. However, rules designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination will be applied when the Administrative Law Judge conducting the hearing considers them reasonably necessary. The certified copy of the administrative file transmitted to the Administrative Law Judge by the official issuing the final determination must be part of the evidentiary record of the case and need not be moved into evidence.

(g) The Administrative Law Judge should render a written decision no later than 90 days after the closing of the record.

(h) The remedies available are provided in § 641.470.

(i) This section only applies to multi-year grant awards.

The Department does not believe that there is a generally effective way to provide an appeal for a single-year award because of the time it takes to perfect and try a case, and the time it takes to effectuate a remedy. However, such appellants protest basic review of the Department's decision in Federal District Court.

What Grievance Procedures Must Grantees Make Available to Applicants, Employees, and Participants? (§ 641.910)

In § 641.910, the Department required State and national grantees to establish grievance procedures for handling employee, participant, and applicant complaints. These procedures must be described in the grant agreement. Paragraph (c) allowed complaints that a grantee had not complied with applicable Federal laws to be filed with the Department if these grievances are not resolved within 60 days under the grantee's procedures. Paragraph (d) provided special procedures for complaints of discrimination under title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and where applicable, the WIA.

The Department received several comments on this section. Two comments suggested that the section, in general, be reorganized and that the appeal process for participants should actually be moved to § 641.580, which addresses the termination of participants. The commenter then asserted that the "grantee appeal process'' could remain listed in § 641.910. The commenter also suggested that the term "employees'' be deleted from the section.

One comment suggested concern about language in § 641.910(d), which states, "[Q]uestions about or complaints alleging discrimination may be directed or mailed to CRC.'' The commenter asserted that this language may be misinterpreted as signifying that all discrimination complaints must be filed with CRC, when in fact, under the WIA nondiscrimination regulations, complainants have the option of filing at the recipient level. The comment also requested that the language be amended to state that questions about "the requirements for complaint-processing procedures'' may be directed to CRC and that the Preamble discussion of this paragraph be amended to make this point clear.

We agree and have revised the Final Rule to reflect these suggestions.

Two commenters questioned the omission of a reference to 29 CFR part 31 and one of the comments requested that employment antidiscrimination laws not be applied to SCSEP participants' relations to grantees because the participants are not employees of the grantees.

Grantees must have grievance procedures in place for resolving complaints arising between the grantee and its employees, subgrantees, applicants, or participants in the SCSEP program. There may be separate grievance processes for applicants and participants and for employees or subgrantees. A grievance procedure should cover applicants who wish to dispute a determination of non-eligibility for the SCSEP program and participants who wish to grieve other complaints with the grantee. There should also be clear easily understood steps for the applicant/participant to take in attempting to resolve an issue.

The Department will not investigate a grantee's final determination regarding a grievance except to determine whether the grantee's grievance procedures were followed. When the grievance has alleged a violation of Federal law (other than Federal nondiscrimination law), and has not been resolved within 60 days under the grantee's grievance procedures, the grievant may file the grievance with the Department as described in paragraph (c).

Complaints alleging discrimination under title VI or section 504 must be filed at the Federal level with the Department's Civil Rights Center (CRC) at the address listed in § 641.910(d). If the grantee is subject to the WIA nondiscrimination regulations, discrimination complaints under section 188 of WIA may be filed either with the grantee or directly with CRC. The grantee may attempt to resolve discrimination complaints by using the same procedures it uses to process grievances, if those procedures meet the requirements in 29 CFR 37.70 and 37.80. In such cases, if the complaint is not resolved to the complainant's satisfaction at the grantee level, the complainant may refile the complaint with CRC. Questions about grantee-level complaint-processing procedures may also be addressed to CRC.

The nondiscrimination provisions of 29 CFR parts 31, 32 and 37 apply to the relationship of grantees and participants whether or not the participants are considered employees of the grantees. As recipients of Federal financial assistance, grantees assume the obligation not to discriminate against participants.

What Actions of the Department May a Grantee Appeal and What Procedures Apply to Those Appeals? (§ 641.920)

In § 641.920, the Department prescribed rules for appealing certain grant decisions and the rules of procedure and timing of decisions for the Office of the Administrative Law Judge hearings. This section should be read in conjunction with the rule established in § 641.900—"What appeal process is available to an applicant that does not receive a grant?''

The Department received a few comments on this section. Some comments overlapped with the comments on § 641.900 in that they focus on the protest and appeal of Solicitation of Grant Application terms and grant decisions, specifically the denial of grant applications. Others proposed a procedure for protesting and appealing decisions about the grant and suggested procedures for such appeals. The comments suggested the following procedure:

Within 21 days of receipt of the final determination, an applicant may appeal a Grant Officer's decision by requesting a hearing before the OALJ. Such a hearing shall be requested in writing and transmitted by certified mail, return receipt requested, to the Chief Administrative Law Judge, United States Department of Labor, with a copy to the Grant Officer.

(i) Failure to request a hearing within 21 days of receipt of the final determination constitutes the waiver of a right to a hearing.

(ii) A request for a hearing under this section must state specifically those issues in the final determination upon which review is requested. Those provisions of the final determination not specified for review are considered resolved and not subject to further review.

(iii) The rules of practice and procedure promulgated by the OALJ govern the conduct of hearings under this section.

(iv) In ordering relief, the ALJ may provide remedies and other redress with the full authority of the Secretary under the Act.

(v) The ALJ should render a written decision within 60 days following the closing of the record. The ALJ's decision constitutes a final agency action unless a petition for review by the ARB is properly made within 21 days thereof, specifically identifying the procedure, fact, law or policy to which exception is taken.

The ALJ's decision will not constitute a final agency action if the ARB, within 15 days of the filing of a petition for review, notifies the interested parties that the case has been accepted for review. Any case accepted by the ARB must be decided within 60 days of acceptance. If not so decided, the decision of the ALJ constitutes final agency action under the Administrative Procedure Act (APA).

The ALJ's decision with regard to grant decision protests shall be reviewable at the discretion of the Secretary who may issue a final order on the contested matter.

Regarding other legal remedies, a party to a proceeding which resulted in a final agency action either by ARB decision or Secretary's final order may either pursue an appeal to the United States Court of Appeals having jurisdiction over the applicant by filing a review petition with in 30 days thereof; or in the alternative, a party to a proceeding resulting in final agency action may seek de novo review of the ARB decision or Secretary's final order in an appropriate district court. Nothing contained in this section prejudices the separate exercise of other legal rights in pursuit of other available remedies and sanctions.

The commenters' suggestions generally parallel the proposed regulation, with some difference in time limits. We have retained the proposed regulation as written but have added the imposition of sanctions as a ground for appeal and have accepted the commenters' suggestion to specify the ALJ's authority to order relief. We did not adopt the commenters' suggestion to create a protest procedure. The kinds of decisions that are appealable under this section are those in which written final determinations are routinely made, obviating the need for an additional procedural layer. We did not adopt the commenters' suggestion that the OALJ's rules of practice and procedure be adopted without exceptions. We have found that the two exceptions listed in the Proposed Rule in § 641.920(c)(3) have worked well in other Department programs, making the hearing process less formal. We did not adopt the suggestion that appears to create a second level of discretionary review by the Secretary. The Secretary has delegated her review authority to the ARB, making that suggestion redundant. We did not adopt the suggestion on appeal rights because it misstates the rights available. Since, unlike WIA, the OAA does not provide for review in the Court of Appeals, the only available avenue for review would be in the District Courts under the APA. The standard of review under the APA is whether the agency action was arbitrary, capricious or otherwise not in accordance with law. It is not a de novo review.

Is There an Alternative Dispute Resolution Process That May Be Used in Place of an ALJ Hearing? (§ 641.930)

In § 641.930, the Department provided for an alternative dispute resolution system in lieu of requesting a hearing with an ALJ. Any decision rendered through this process would be considered a final determination.

The Department received several comments on this section. The commenters made three suggestions for changes to the rule.

First, the commenters suggested that a written decision should be issued within 30 days, not 60. Second, the commenters suggested that any waiver to an administrative hearing should be revoked or become void if a settlement has not been reached or a decision has not been issued within 30 days. Finally, the commenters suggested that any final decision reached through this informal process be treated as a decision from an ALJ and that it be appealed accordingly.

Considering the amount of time it necessarily takes to prepare and present arguments and for the mediator to evaluate evidence and arguments, the Department believes that 60 days for the issuance of a decision in an alternative dispute resolution case is a reasonable time limit. Since we have decided to retain the 60-day time limit for resolution, the time for automatic revocation of the election to use alternative dispute resolution also needs to remain at 60 days. The Proposed Rule already provided that the decision in the alternative dispute resolution procedure would be treated as a final decision of the ALJ, and would constitute final agency action. The Department believes that not having a decision in the alternate dispute resolution procedures be appealable is consistent with the intent of alternate dispute resolution to create quick and inexpensive ways to resolve disputes and is more consistent with the deference that is given to arbitral and other alternate dispute resolution decisions.

A commenter requested that the reference to "641.920'' in paragraph (a) be amended to "641.920(a).''

We agree with the commenter that the regulation should make clear that the complaints involving discrimination are not subject to this alternate dispute resolution process. We have revised the regulation to change the reference to § 641.920 to § 641.920(a), (c), and (d).

Section 641.630(b) has been revised to provide an option for the parties to agree, in writing, to extend the alternative dispute resolution period.

IV. Administrative Information

A. Paperwork Reduction Act

Under the Paperwork Reduction Act, information collection requirements, which must be imposed as a result of this regulation have been submitted to the Office of Management and Budget. Public reporting burden for the collection of information is estimated to average 55 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The required reports described at § 641.879 are as follows: the Quarterly and Final Progress Report, the Quarterly and Final Financial Status Report, the Quarterly Report of Federal Cash Transaction, the Annual Equitable Distribution Report; a 502(e) Activity Report; reports related to the Common Performance Measure; and reports related to demographic characteristics.

Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (1205–0040), Washington, DC 20503: Attention: Desk Officer for Employment and Training Administration.

B. Executive Order 13132 (Federalism)

The Employment and Training Administration (ETA) has reviewed this rule in accordance with Executive Order 13132 on Federalism, and has determined that it does not have "Federalism implications.'' A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism. The rule establishes the administrative requirements for the Senior Community Service Employment Program, a grant program to assist older workers. The rule includes the process for applying for and receiving federal grants. If a State chooses to participate in the program, it receives grant funds from ETA for the cost of the program. The rule involves no preemption of State law nor does it limit State policymaking discretion.

After the enactment of the 2000 Amendments to the OAA, the Department consulted with public interest groups and intergovernmental groups on the development of regulations necessary to implement the amendments to the OAA. Included in the consultation process were the Intergovernmental Organizations; interested individuals; and representatives of the grantee community, including State representatives and representatives from the U.S. Forest Service; National Senior Citizens Education and Research Center;

National Council on the Aging; AARP Foundation; Green Thumb, Inc.; National Urban League, Inc.; National Center and Caucus for the Black Aged, Inc.; Asociacion Nacional Por Personas Mayores; National Asian Pacific Center on Aging; and National Indian Council on Aging.

C. Regulatory Flexibility and Regulatory Impact Analysis, SBREFA; Family Well-Being

The Regulatory Flexibility Act (5 U.S.C. Chapter 6) requires the Federal government to anticipate and reduce the impact of rules and paperwork requirements on small businesses and other small entities. "Small entities'' are defined as small businesses (those with fewer than 500 employees, except where otherwise provided) and small non-profit organizations (those with fewer than 500 employees, except where otherwise provided) and small governmental entities (those in areas with fewer than 50,000 residents). This rule will affect primarily the 50 States, the District of Columbia, and certain Territories; however, it affects those national organizations and host agencies that have fewer than 500 employees. As described in this Preamble, ETA has taken a variety of measures to consult with grant recipients of this program. The Department has assessed the potential impact of the Proposed Rule in order to identify any areas of concern. Based on that assessment, the Department certifies that these rules, as promulgated, will not have a significant impact on a substantial number of small entities.

In addition, under the Small Business Regulatory Enforcement Fairness Act (SBREFA) (5 U.S.C. Chapter 8), the Department has determined that these are not "major rules,'' as defined in 5 U.S.C. 804(s). While these rules govern the distribution and administration of funds appropriated by Congress, the rules themselves do not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises. Accordingly, under the Small Business Regulatory Enforcement Fairness Act (SBREFA) (5 U.S.C. Chapter 8), the Department has determined that these are not "major rules,'' as defined in 5 U.S.C. 804(2).

The Department certifies that the rule has been assessed in accordance with Public Law 105–277, 112 Stat. 2681, for its effect on family well-being. The purpose of SCSEP is to provide community service activities and employment opportunities to individuals age 55 and over who are low income and have poor employment prospects. This program is designed at the State and local level to fulfill this purpose with the effect of enhancing family well-being through increased skills and earnings and to promote self-sufficiency for older individuals.

D. Executive Order 12866

Executive Order 12866 requires that regulations be drafted to ensure that they are consistent with the priorities and principles set forth in the Executive Order. The Department has determined that these rules are consistent with these priorities and principles. This rulemaking implements statutory authority based on broad consultation and coordination. It reflects the Department's response to suggestions received in writing and through work groups.

To a considerable degree, these rules reflect the suggestions received. They also reflect the intent of the Act to improve the SCSEP by integrating SCSEP into the One-Stop Delivery System and improving the performance of the grantee community. The Department has determined that the rule will not have an adverse effect in a material way on the nation's economy.

However, this rule is a significant regulatory action under section (3)(f)(1) of Executive Order 12866 because it includes many provisions that are new to SCSEP and, therefore, the rule has been reviewed by OMB in accordance with that Order.

E. Executive Order 13211 (Energy Effects)

Executive Order 13211 requires all agencies to provide a Statement of Energy Effects for regulatory actions that effect energy supply, energy distribution, or energy use. The Department has analyzed this rule and determined that it is not a "significant energy action'' under that order because it is not a "significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. It has not been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. Therefore, this rule does not require a Statement of Energy Effects under Executive Order 13211.

F. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 *et seq.*) requires that a covered agency prepare a budgetary impact statement before promulgating a rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year.

The Department has determined that the Final Rule will not require the expenditure by State, local, or Tribal governments, in the aggregate, or by the private sector, of more than $100 million in any one year. Accordingly, the Department has not prepared a budgetary impact statement specifically addressing the regulatory alternatives considered, or prepared a plan for informing and advising any significantly or uniquely affected small government.

G. Executive Order 12988 (Civil Justice Reform)

The Department drafted and reviewed this rule according to Executive Order 12988, and determined that it will not unduly burden the Federal court system. The rule has been written to minimize litigation and provide a clear legal standard for affected conduct, and has been reviewed carefully to eliminate drafting errors and ambiguities.

H. Executive Order 13175 (Tribal Summary Impact Statement)

Executive Order 13175 requires consultation and coordination with Indian Tribal Governments and also requires a Tribal summary impact statement in the Preamble of regulation, which describes the extent of the agency's prior consultation with Tribal officials, a summary of nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of Tribal officials have been met. The Department has reviewed this regulation for Tribal impact and has determined that no provision preempts Tribal law or the ability of Tribes to self-govern.

Signed at Washington, DC, this 25th day of March, 2004.

Emily Stover DeRocco,

Assistant Secretary, Employment and Training Administration.

■ For the reasons stated in the Preamble, 20 CFR part 641 is revised to read as follows:

PART 641—PROVISIONS GOVERNING THE SENIOR COMMUNITY SERVICE EMPLOYMENT PROGRAM

Subpart A—Purpose and Definitions

Subpart B—Coordination with the Workforce Investment Act

Subpart C—The State Senior Employment Services Coordination Plan

Subpart D—Grant Application, Eligibility, and Award Requirements

Subpart E—Services to Participants

Subpart F—Private Sector Training Projects Under Section 502(e) of the OAA

Subpart G—Performance Accountability

Authority: 42 U.S.C. 3056 *et seq.*

Subpart A—Purpose and Definitions

§ 641.100 What does this part cover?

Part 641 contains the Department of Labor's regulations for the Senior Community Service Employment Program (SCSEP), authorized under the title V of the Older Americans Act, 42 U.S.C. 3056 *et seq.*, as amended by the Older Americans Act Amendments of 2000 (OAA), Public Law 106–501. This part, and other pertinent regulations expressly incorporated by reference, set forth the regulations applicable to the SCSEP.

(a) Subpart A of this part contains introductory provisions and definitions that apply to this part.

(b) Subpart B of this part describes the required relationship between the OAA and the Workforce Investment Act of 1998 (WIA), 29 U.S.C. 2801 *et seq.* These provisions discuss the coordinated efforts to provide services through the integration of the SCSEP within the One-Stop Delivery System.

(c) Subpart C of this part sets forth the requirements for the State Senior Employment Services Coordination Plan (State Plan), such as required coordination efforts, public comments, and equitable distribution.

(d) Subpart D of this part establishes grant planning and application requirements, including grantee eligibility, and responsibility review.

(e) Subpart E of this part details SCSEP participant services.

(f) Subpart F of this part provides the rules for projects designed to assure second career training and the placement of eligible individuals into unsubsidized jobs in the private sector.

(g) Subpart G of this part outlines the performance accountability requirements. This subpart establishes requirements for performance measures, defines such measures, and establishes corrective actions, including the imposition of sanctions for failure to meet performance measures.

(h) Subpart H of this part sets forth the administrative requirements for SCSEP grants.

(i) Subpart I of this part describes the grievance and appeals processes and requirements.

§ 641.110 What is the SCSEP?

The Senior Community Service Employment Program or the SCSEP is a program administered by the Department of Labor that serves low-income persons who are 55 years of age and older and who have poor employment prospects by placing them in part-time community service positions and by assisting them to transition to unsubsidized employment.

§ 641.120 What are the purposes of the SCSEP?

The purposes of the SCSEP are to foster and promote useful part-time opportunities in community service activities for unemployed low-income persons who are 55 years of age or older and who have poor employment prospects; to foster individual economic self-sufficiency; and to increase the number of older persons who may enjoy the benefits of unsubsidized employment in both the public and private sectors.

§ 641.130 What is the scope of this part?

The regulations in this part address the requirements that apply to the SCSEP. More detailed policies and procedures are contained in administrative guidelines issued by the Department. Throughout this part, phrases such as, "according to instructions (procedures) issued by the Department'' or "additional guidance will be provided through administrative issuance'' refer to the SCSEP Bulletins, technical assistance guides, and other SCSEP directives.

§ 641.140 What definitions apply to this part?

The following definitions apply to this part:

Authorized position level means the number of SCSEP enrollment opportunities that can be supported for a 12-month period based on the average national unit cost. The authorized position level is derived by dividing the total amount of funds appropriated for a Program Year by the national average unit cost per participant for that Program Year as determined by the Department. The national average unit cost includes all costs of administration, other participant costs, and participant wage and fringe benefit costs as defined in section 506(g) of the OAA. A grantee's total award is divided by the national unit cost to determine the authorized position level for each grant agreement.

Co-enrollment applies to any individual who meets the qualifications for SCSEP participation as well as the qualifications for any other relevant program as defined in the Individual Employment Plan.

Community service includes, but is not limited to, social, health, welfare, and educational services (including literacy tutoring); legal assistance, and other counseling services, including tax counseling and assistance and financial counseling; library, recreational, and other similar services; conservation, maintenance, or restoration of natural resources; community betterment or beautification; anti-pollution and environmental quality efforts; weatherization activities; and economic development. (OAA sec. 516(1)).

Core Services means those services described in section 134(d)(2) of WIA.

Department or DOL means the United States Department of Labor, including its agencies and organizational units.

Disability is defined at section 101(8) of the OAA as follows: a disability attributable to mental or physical impairment, or a combination of mental and physical impairments, that results in substantial functional limitations in one or more of the following areas of major life activity: (A) Self-care, (B) receptive and expressive language, (C) learning, (D) mobility, (E) self-direction, (F) capacity for independent living, (G) economic self-sufficiency, (H) cognitive functioning, and (I) emotional adjustment.

Equitable distribution report means a report based on the latest available Census data, which lists the optimum number of participant positions in each designated area in the State, and the number of authorized participant positions each grantee serves in that area, taking the needs of underserved counties into account. This report provides a basis for improving the distribution of SCSEP positions.

Grant period means the time period between the effective date of the grant award and the ending date of the award, which includes any modifications extending the period of performance, whether by the Department's exercise of options contained in the grant agreement or otherwise. Also referred to as "project period'' or "award period.''

Grantee means an entity receiving financial assistance directly from the Department to carry out SCSEP activities. The grantee is the legal entity that receives the award and is legally responsible for carrying out the SCSEP, even if only a particular component of the entity is designated in the grant award document. Grantees include States, Tribal organizations, territories, public and private nonprofit organizations, agencies of a State government or a political subdivision of a State, or a combination of such political subdivisions that receive SCSEP grants from the Department. (OAA sec. 502). In the case of the section 502(e) projects, grantee may be used to include private business concerns. As used here, "grantees'' include "grantees'' as defined in 29 CFR 97.3 and "recipients'' as defined in 29 CFR 95.2(g).

Greatest economic need means the need resulting from an income level at or below the poverty guidelines established by the Department of Health and Human Services and approved by the Office of Management and Budget. (OAA sec. 101(27)).

Greatest social need means the need caused by non-economic factors, which include: physical and mental disabilities; language barriers; and cultural, social, or geographical isolation, including isolation caused by racial or ethnic status that restricts the ability of an individual to perform normal daily tasks, or threatens the capacity of the individual to live independently. (OAA sec. 101(28)).

Host agency means a public agency or a private nonprofit organization exempt from taxation under the provisions of section 501(c)(3) of the Internal Revenue Code of 1986, other than a political party, which provides a work site and supervision for one or more participants. (See also OAA sec. 502(b)(1)(C)). A host agency may be a religious organization as long as the projects do not involve the construction, operation, or maintenance of any facility used or to be used as a place for religious instruction or worship.

Indian means a person who is a member of an Indian Tribe. (OAA sec. 101(5)).

Indian Tribe means any Tribe, band, nation, or other organized group or community of Indians (including Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act) which:

(1) Is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians; or

(2) Is located on, or in proximity to, a Federal or State reservation or rancheria. (OAA sec. 101(6)).

Individual employment plan or IEP means a plan for a participant that includes an employment goal, achievement of objectives, and appropriate sequence of services for the participant based on an assessment conducted by the grantee or subgrantee and jointly agreed upon by the participant. (OAA sec. 502(b)(1)(N)).

Intensive services means those services authorized by section 134(d)(3) of the Workforce Investment Act.

Jobs for Veterans Act means the program established in section 2 of Public Law 107–288 (2002) (38 U.S.C. 4215), that provides a priority for veterans and the spouse of a veteran who died in a service-connected disability, the spouse of a member of the Armed Forces on active duty who has been listed for a total of more than 90 days as missing in action, captured in the line of duty by a hostile force, or forcibly detained by a foreign government or power, the spouse of any veteran who has a total disability resulting from a service-connected disability, and the spouse of any veteran who died while a disability so evaluated was in existence, who meet program eligibility requirements to receive services in any Department of Labor-funded workforce development program.

Local Workforce Investment Area or local area means an area established by the Governor of a State under section 116 of the Workforce Investment Act.

Local Board means a Local Workforce Investment Board established under section 117 of the Workforce Investment Act.

National grantee means Federal public agencies and organizations, private nonprofit agencies and organizations, or Tribal organizations that operate under title V of the OAA that are capable of administering multi-State projects under a national grant from the Department. (*See* OAA sec. 506(g)(5)).

OAA means the Older Americans Act as amended by the Older Americans Act Amendments of 2000 (Pub. L. 106–501; 42 U.S.C. 3056 *et seq.*).

One-Stop Center means the One-Stop Center system in a WIA Local Area which must include a comprehensive One-Stop Center through which One-Stop partners provide applicable core services and which provides access to other programs and services carried out by the One-Stop partners. (See WIA sec. 134(c)(2)).

One-Stop Delivery System means a system under which employment and training programs, services, and activities are available through a network of eligible One-Stop partners, which assures that information about and access to core services is available regardless of where the individuals initially enter the statewide workforce investment system. (WIA sec. 134(c)(2)).

One-Stop partner means an entity described in section 121(b)(1) of the

Workforce Investment Act; *i.e.*, required partners, and an entity described in section 121(b)(2) of the Workforce Investment Act, *i.e.*, additional partners.

Other participant (enrollee) cost means the cost of participant training, including the payment of reasonable costs to instructors, classroom rental, training supplies, materials, equipment, and tuition, and which may be provided on the job or in conjunction with a community service assignment, in a classroom setting, or under other appropriate arrangements; job placement assistance, including job development and job search assistance; participant supportive services to assist a participant to successfully participate in a project, including the payment of reasonable costs of transportation, health care and medical services, special job-related or personal counseling, incidentals (such as work shoes, badges, uniforms, eyeglasses, and tools), child and adult care, temporary shelter, and follow-up services; and outreach, recruitment and selection, intake orientation, and assessments. (OAA sec. 502(c)(6)(A)).

Participant means an individual who is eligible for the SCSEP, has been enrolled and is receiving services as prescribed under subpart E of this part.

Placement into public or private unsubsidized employment means full- or part-time paid employment in the public or private sector by a participant for 30 days within a 90-day period without the use of funds under title V or any other Federal or State employment subsidy program, or the equivalent of such employment as measured by the earnings of a participant through the use of wage records or other appropriate methods. (OAA sec. 513(c)(2)(A)).

Poor employment prospects means the likelihood that an individual will not obtain employment without the assistance of the SCSEP or any other workforce development program. Persons with poor employment prospects include, but are not limited to, those without a substantial employment history, basic skills, and/or English-language proficiency; displaced homemakers, school dropouts, persons with disabilities, including disabled veterans, homeless individuals, and individuals residing in socially and economically isolated rural or urban areas where employment opportunities are limited.

Program year means the one-year period beginning July 1 and ending on June 30. (OAA sec. 515(b)).

Project means an undertaking by a grantee or subgrantee according to a grant agreement that provides community service, training, and employment opportunities to eligible individuals in a particular location within a State.

Recipient means grantee. As used here, ''recipients'' include ''recipients'' as defined in 29 CFR 95.2(g) and ''grantees'' as defined in 29 CFR 97.3.

Residence means an individual's declared dwelling place or address as demonstrated by appropriate documentation.

Retention in public or private unsubsidized employment means full- or part-time paid employment in the public or private sector by a participant for 6 months after the starting date of placement into unsubsidized employment without the use of funds under title V or any other Federal or State employment subsidy program. (OAA sec. 513(c)(2)(B)).

SCSEP means the Senior Community Service Employment Program authorized under title V of the OAA.

Service area means the geographic area served by a local SCSEP project.

State Workforce Agency means the State agency that administers the State Wagner-Peyser program.

State Board means a State Workforce Investment Board established under section 111 of the Workforce Investment Act.

State grantee means the entity designated by the Governor to enter into a grant with the Department to administer a State or territory SCSEP project under the OAA. Except as applied to funding distributions under section 506 of the OAA, this definition applies to the 50 States, Puerto Rico, the District of Columbia and the following territories: Guam, American Samoa, U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

State Plan means the State Senior Employment Services Coordination Plan required under section 503(a) of the OAA.

Subgrantee means the legal entity to which a subaward of financial assistance, which may include a subcontract, is made by the grantee (or by a higher tier subgrantee or recipient), and that is accountable to the grantee for the use of the funds provided. As used here, ''subgrantee'' includes ''subgrantees'' as defined in 29 CFR 97.3 and ''subrecipients'' as defined in 29 CFR 95.2(kk).

Subrecipient means a subgrantee.

Title V of the OAA means 42 U.S.C. 3056 *et seq.* or title V of Public Law 106–501.

Training services means those services authorized by section 134(d)(4) of the Workforce Investment Act.

Tribal organization means the recognized governing body of any Indian Tribe, or any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body. (OAA sec. 101(7)).

Workforce Investment Act or WIA means the Workforce Investment Act of 1998 (Public Law 105–220—Aug. 7, 1998; 112 Stat. 936); 29 U.S.C. 2801 *et seq*.

Workforce Investment Act regulations or WIA regulations means regulations at 20 CFR part 652 and parts 660–671.

Subpart B—Coordination with the Workforce Investment Act

§ 641.200 What is the relationship between the SCSEP and the Workforce Investment Act?

The SCSEP is a required partner under the Workforce Investment Act. As such, it is a part of the One-Stop Delivery System. SCSEP grantees are required to follow all applicable rules under WIA and its regulations. (WIA section 121(b)(1)(B)(vi) (29 U.S.C. 2841(b)(1)(B)(vi)) and the 29 CFR part 662 subpart B (§§ 662.200 through 662.280))

§ 641.210 What services, in addition to the applicable core services, must SCSEP grantees provide through the One-Stop Delivery System?

In addition to providing core services, SCSEP grantees must make arrangements through the One-Stop Delivery System to provide eligible and ineligible individuals with access to other activities and programs carried out by other One-Stop partners.

§ 641.220 Does title I of WIA require the SCSEP to use OAA funds for individuals who are not eligible for SCSEP services or for services that are not authorized under the OAA?

No, SCSEP requirements continue to apply. Title V resources may only be used to provide title V services to title V-eligible individuals. The Workforce Investment Act creates a seamless service delivery system for individuals seeking workforce development services by linking the One-Stop partners in the One-Stop Delivery System. Although the overall effect is to provide universal access to core services, SCSEP resources may only be used to provide services that are authorized and provided under the SCSEP to eligible individuals. Title V funds can be used to pay wages to SCSEP participants receiving intensive and training services under title I of WIA provided that the SCSEP participants are functioning in a community service assignment. All other individuals who are in need of the

services provided under the SCSEP, but who do not meet the eligibility criteria to enroll in the SCSEP, should be referred to or enrolled in WIA or other appropriate partner programs. (WIA sec. 121(b)(1)). These arrangements should be negotiated in the MOU.

§ 641.230 Must the individual assessment conducted by the SCSEP grantee and the assessment performed by the One-Stop Delivery System be accepted for use by either entity to determine the individual's need for services in the SCSEP and adult programs under title IB of WIA?

Yes, section 502(b)(4) of the OAA provides that an assessment or IEP completed by the SCSEP satisfies any condition for an assessment, service strategy, or IEP completed at the One-Stop and vice-versa. These reciprocal arrangements and the contents of the SCSEP IEP and WIA IEP should be negotiated in the MOU. (OAA sec. 502(b)(4)).

§ 641.240 Are SCSEP participants eligible for intensive and training services under title I of WIA?

(a) Yes, although SCSEP participants are not automatically eligible for intensive and training services under title I of WIA, Local Boards may deem SCSEP participants, either individually or as a group, as satisfying the requirements for receiving adult intensive and training services under title I of WIA.

(b) SCSEP participants who have been assessed through an SCSEP IEP have received an intensive service according to 20 CFR 663.240(a) of the WIA regulations. SCSEP participants who seek unsubsidized employment as part of their SCSEP IEP, may require training to meet their objectives. The SCSEP grantee/subgrantee, the host agency, the WIA program, or another One-Stop partner may provide training as appropriate and as negotiated in the MOU.

(c) The SCSEP provides opportunities for eligible individuals to engage in part-time community service activities for which they are compensated. These assignments are analogous to work experience activities or intensive service under 20 CFR 663.200 of the WIA regulations.

(d) SCSEP participants may be paid wages while receiving intensive or training services provided that the participant is functioning in a community service assignment.

Subpart C—The State Senior Employment Services Coordination Plan

§ 641.300 What is the State Plan?

The State Senior Employment Services Coordination Plan (the State Plan) is a plan, submitted by the Governor in each State, as an independent document or as part of the WIA Unified Plan, that describes the planning and implementation process for SCSEP services in the State, taking into account the relative distribution of eligible individuals and employment opportunities within the State. The State Plan is intended to foster coordination among the various SCSEP grantees operating within the State and to facilitate the efforts of stakeholders, including State and Local Boards under WIA, to work collaboratively through a participatory process to accomplish the SCSEP program's goals. (OAA sec. 503(a)(1)). The State Plan provisions are listed at proposed § 641.325.

§ 641.305 Who is responsible for developing and submitting the State Plan?

The Governor of each State is responsible for developing and submitting the State Plan to the Department.

§ 641.310 May the Governor delegate responsibility for developing and submitting the State Plan?

Yes, the Governor may delegate responsibility for developing and submitting the State Plan, provided that any such delegation is consistent with State law and regulations. To delegate responsibility, the Governor must submit to the Department a signed statement indicating the individual and/or organization that will be submitting the State Plan on his or her behalf.

§ 641.315 Who participates in developing the State Plan?

(a) In developing the State Plan the Governor must obtain the advice and recommendations of representatives from:

(1) The State and Area Agencies on Aging;

(2) State and Local Boards under the Workforce Investment Act (WIA);

(3) Public and private nonprofit agencies and organizations providing employment services, including each grantee operating an SCSEP project within the State, except as provided for in § 641.320(b);

(4) Social service organizations providing services to older individuals;

(5) Grantees under title III of the OAA;

(6) Affected communities;

(7) Underserved older individuals;

(8) Community-based organizations serving older individuals;

(9) Business organizations; and

(10) Labor organizations.

(b) The Governor may also obtain the advice and recommendations of other interested organizations and individuals, including SCSEP program participants, in developing the State Plan. (OAA sec. 503(a)(2)).

§ 641.320 Must all national grantees operating within a State participate in the State planning process?

(a) Yes, although section 503(a)(2) requires the Governor to obtain the advice and recommendations of SCSEP national grantees with no reciprocal provision requiring the national grantees to participate in the State planning process, the eligibility provision at section 514(c)(5) requires grantees to coordinate with other organizations at the State and local level. Therefore, any national grantee that does not participate in the State planning process may be deemed ineligible to receive SCSEP funds in the following Program Year.

(b) National grantees serving older American Indians are exempted from participating in the planning requirements under section 503(a)(8) of the OAA. These national grantees may choose not to participate in the State planning process, however, the Department encourages participation. If a national grantee serving older American Indians does not participate in the State planning process, it must describe its plans for serving older American Indians in its application for SCSEP grant funds.

§ 641.325 What information must be provided in the State Plan?

The Department issues instructions detailing the information that must be provided in the State Plan. At a minimum, the State Plan must include information on the following:

(a) The ratio of eligible individuals in each service area to the total eligible population in the State;

(b) The relative distribution of:

(1) Eligible individuals residing in urban and rural areas within the State;

(2) Eligible individuals who have the greatest economic need;

(3) Eligible individuals who are minorities; and

(4) Eligible individuals who have the greatest social need;

(c) The employment situations and the types of skills possessed by eligible individuals;

(d) The localities and populations for which community service projects of the type authorized by title V are most needed;

(e) Actions taken or planned to coordinate activities of SCSEP grantees with the activities being carried out in the State under title I of WIA;

(f) A description of the State's procedures and time line for ensuring an open and inclusive planning process that provides meaningful opportunity for public comment;

(g) Public comments received, and a summary of the comments;

(h) A description of the steps taken to avoid disruptions to the greatest extent possible (see § 641.365); and

(i) Such other information as the Department may require in the State Plan instructions. (OAA sec. 503(a)(3)–(4), (6)).

§ 641.330 How should the State Plan reflect community service needs?

The Governor must ensure that the State Plan identifies the types of community services that are needed and the places where these services are most needed. The State Plan should specifically identify the needs and locations of those individuals most in need of community services and the groups working to meet their needs. (OAA sec. 503(a)(4)(E)).

§ 641.335 How should the Governor address the coordination of SCSEP services with activities funded under title I of WIA?

The Governor must seek the advice and recommendations from representatives of the State and Area Agencies on Aging in the State and the State and Local Boards established under title I of WIA. (OAA sec. 503(a)(2)). The State Plan must describe the steps that are being taken to coordinate SCSEP activities within the State with activities being carried out under title I of WIA. (OAA sec. 503(a)(4)(F)). The State Plan must describe the steps being taken to ensure that the SCSEP is an active partner in each One-Stop Delivery System and the steps that will be taken to encourage and improve coordination with the One-Stop Delivery System.

§ 641.340 Must the Governor submit a State Plan each year?

The Governor is not required to submit a full State Plan each year; however, at a minimum, the Governor must seek the advice and recommendations of the individuals and organizations identified in the statute at section 503(a)(2) about what, if any, changes are needed, and publish the changes to the State Plan for public comment each year and submit a modification to the Department.

§ 641.345 What are the requirements for modifying the State Plan?

(a) Modifications are required when:

(1) There are changes in Federal or State law or policy that substantially change the assumptions upon which the State Plan is based;

(2) There are changes in the State's vision, strategies, policies, performance indicators, or organizational responsibilities;

(3) The State has failed to meet performance goals and must submit a corrective action plan; or

(4) There is a change in a grantee or grantees.

(b) Modifications to the State Plan are subject to the same public review and comment requirements that apply to the development of the State Plan under §§ 641.325 and 641.350.

(c) The Department will issue additional instructions for the procedures that must be followed when requesting modifications to the State Plan. (OAA sec. 503(a)(1)).

§ 641.350 How should public comments be solicited and collected?

The Governor should follow established State procedures to solicit and collect public comments. The State Plan must include a description of the State's procedures and schedule for ensuring an open and inclusive planning process that provides meaningful opportunity for public comment.

§ 641.355 Who may comment on the State Plan?

Any individual or organization may comment on the Plan.

§ 641.360 How does the State Plan relate to the equitable distribution (ED) report?

The two documents address some of the same areas, and are prepared at different points in time. The ED report is prepared by State agencies at the beginning of each fiscal year and provides a "snapshot'' of the actual distribution of all of the authorized positions within the State, grantee-by-grantee, and the optimum number of participant positions in each designated area based on the latest available Census data. It provides a basis for improving the distribution of SCSEP positions within the State. (See OAA sec. 508). The State Plan is prepared by the Governor and covers many areas in addition to equitable distribution, as discussed in § 641.325, and sets forth a proposed plan for distribution of authorized positions in the State. Any distribution or redistribution of positions made as a result of a State Plan proposal will be reflected in the subsequent year's ED report, which then forms the basis for the proposed distribution in the next year's State Plan. This process is iterative in that it moves the authorized positions from over-served areas to underserved areas over a period of time.

§ 641.365 How must the equitable distribution provisions be reconciled with the provision that disruptions to current participants should be avoided?

Governors must describe the steps that are being taken to comply with the statutory requirement to avoid disruptions in the State Plan. (OAA sec. 503(a)(6)). When there are new Census data indicating that there has been a shift in the location of the eligible population or when there is over-enrollment for any other reason, the Department recommends a gradual shift that encourages current participants in subsidized community service positions to move into unsubsidized employment to make positions available for eligible individuals in the areas where there has been an increase in the eligible population. The Department does not define disruptions to mean that participants are entitled to remain in a subsidized community service employment position indefinitely. As discussed in §§ 641.570 and 641.575, grantees may, under certain circumstances, place time limits on an SCSEP community service assignment, thus permitting positions to be transferred over time. Grantees shall not transfer positions from one geographic area to another without first notifying the State agency responsible for preparing the State Plan and equitable distribution report. Grantees must submit, in writing, any proposed changes in distribution that occur after submissions of the equitable distribution report to the Federal Project Officer for approval. All grantees are strongly encouraged to coordinate any proposed changes in position distribution with the other grantees servicing in the State, including the State project director, prior to submitting the proposed changes to their Federal Project Officer for approval.

Subpart D—Grant Application, Eligibility, and Award Requirements

§ 641.400 What entities are eligible to apply to the Department for funds to administer SCSEP community service projects?

(a) *National Grants.* Entities eligible to apply for national grants include nonprofit organizations, Federal public agencies, and Tribal organizations. These entities must be capable of administering a multi-State program.

State and local agencies may not apply for these funds.

(b) *National Grants in a State.* Section 514(e)(3) of the OAA permits nonprofit organizations, public agencies, and States to receive SCSEP funds when a national grantee in a State fails to meet its performance measures in the second and third year of failure. The poor performing grantee that had its funds competed is not eligible to compete for the same funds.

(c) *State Grants.* Section 506(e) of the OAA requires the Department to enter into agreements with each State to provide SCSEP services. States may use individual State agencies, political subdivisions of a State, a combination of such political subdivisions, or a national grantee operating in the State to administer SCSEP funds. If the State's funds are competed under section 514(f) of the OAA, other agencies within the State, political subdivisions of a State, a combination of political subdivisions of a State, and national grantees operating in the State are eligible to apply for funds. Other States may not apply for this funding.

§ 641.410 How does an eligible entity apply?

(a) *General.* An eligible entity must follow the application guidelines issued by the Department. The Department will issue application guidelines announcing the availability of State and national SCSEP funds whether they are awarded on a competitive or noncompetitive basis. The guidelines will contain application due dates, application instructions, and other necessary information. All entities must submit applications in accordance with the Department's instructions.

(b) *National Grant Applicants.* All applicants for SCSEP national grant funds, except organizations proposing to serve older American Indians, must submit their applications to the Governor of each State in which projects are proposed before submitting the application to the Department. (OAA sec. 503(a)(5)).

(c) *State Applicants.* A State that submits a Unified Plan under WIA section 501 may include the State's SCSEP community service project grant application in its Unified Plan. Any State that submits an SCSEP grant application as part of its WIA Unified Plan must address all of the application requirements as published in the Department's instructions. State Plan applications and modifications are addressed in §§ 641.340 and 641.345.

§ 641.420 What factors will the Department consider in selecting grantees?

The Department will select grantees from among applicants that are able to meet the eligibility and responsibility review criteria at section 514 of the OAA. (Section 641.430 contains the eligibility criteria and §§ 641.440 and 641.450 contain the responsibility criteria.) If there is a full and open competition, the Department also will take the rating criteria described in the Solicitation for Grant Application or other instrument into consideration, including the applicant's/grantee's past performance in any prior Federal grants or contracts for the past 3 years.

§ 641.430 What are the eligibility criteria that each applicant must meet?

To be eligible to receive SCSEP funds, each applicant must be able to demonstrate:

(a) An ability to administer a program that serves the greatest number of eligible participants, giving particular consideration to individuals with greatest economic need, greatest social need, poor employment history or prospects, and over the age of 60;

(b) An ability to administer a program that provides employment for eligible individuals in communities in which they reside, or in nearby communities, that will contribute to the general welfare of the community;

(c) An ability to administer a program that moves eligible participants into unsubsidized employment;

(d) An ability to move participants with multiple barriers to employment into unsubsidized employment;

(e) An ability to coordinate with other organizations at the State and local levels, including the One-Stop Delivery System;

(f) An ability to properly manage the program, including its plan for fiscal management of the SCSEP program;

(g) An ability to minimize program disruption for current participants if there is a change in project sponsor and/or location, and its plan for minimizing disruptions; and

(h) Any additional criteria that the Secretary of Labor deems appropriate in order to minimize disruptions for current participants.

§ 641.440 What are the responsibility conditions that an applicant must meet?

Each applicant must meet each of the listed responsibility "tests'' by not having committed any of the acts of misfeasance or malfeasance described in § 641.440(a)–(n) of this section.

(a) The Department has been unable to recover a debt from the applicant, whether incurred by the applicant or by one of its subgrantees or subcontractors, or the applicant has failed to comply with a debt repayment plan to which it agreed. In this context, a debt is established by final agency action, followed by three demand letters to the applicant, without payment in full by the applicant.

(b) Established fraud or criminal activity of a significant nature within the applicant's organization.

(c) Serious administrative deficiencies identified by the Department, such as failure to maintain a financial management system as required by Federal regulations.

(d) Willful obstruction of the auditing or monitoring process.

(e) Failure to provide services to applicants as agreed to in a current or recent grant or to meet applicable performance measures.

(f) Failure to correct deficiencies brought to the grantee's attention in writing as a result of monitoring activities, reviews, assessments, or other activities.

(g) Failure to return a grant closeout package or outstanding advances within 90 days after the grant expiration date or receipt of closeout package, whichever is later, unless an extension has been requested and granted.

(h) Failure to submit required reports.

(i) Failure to properly report and dispose of Government property as instructed by the Department.

(j) Failure to have maintained effective cash management or cost controls resulting in excess cash on hand.

(k) Failure to ensure that a subgrantee complies with applicable audit requirements, including OMB Circular A–133 audit requirements specified at 20 CFR 667.200(b) and § 641.821.

(l) Failure to audit a subgrantee within the period required under § 641.821.

(m) Final disallowed costs in excess of five percent of the grant or contract award if, in the judgment of the Grant Officer, the disallowances are egregious findings.

(n) Failure to establish a mechanism to resolve a subgrantee's audit in a timely fashion.

§ 641.450 Are there responsibility conditions that alone will disqualify an applicant?

(a) Yes, an applicant may be disqualified if either of the first two responsibility tests listed in § 641.440 is not met.

(b) The remainder of the responsibility tests listed in § 641.440 require a substantial or persistent failure (for 2 or more consecutive years).

(c) The second responsibility test addresses "fraud or criminal activity of a significant nature.'' The existence of significant fraud or criminal activity will be determined by the Department and typically will include willful or grossly negligent disregard for the use, handling, or other fiduciary duties of Federal funding where the grantee has no effective systems, checks, or safeguards to detect or prevent fraud or criminal activity. Additionally, significant fraud or criminal activity will typically include coordinated patterns or behaviors that pervade a grantee's administration or are focused at the higher levels of a grantee's management or authority. To be consistent with the OAA section 514(d)(4)(B), this determination will be made on a case-by-case basis regardless of what party identifies the alleged fraud or criminal activity.

§ 641.460 How will the Department examine the responsibility of eligible entities?

The Department will conduct a review of available records to assess each applicant's overall fiscal and administrative ability to manage Federal funds. The Department's responsibility review may consider any available information, including the organization's history with regard to the management of other grants awarded by the Department or by other Federal agencies. (OAA sec. 514(d)(1) and (d)(2)).

§ 641.465 Under what circumstances may the Department reject an application?

(a) The Department may question any proposed project component of an application if it believes that the component will not serve the purposes of the SCSEP program. The Department may reject the application if the applicant does not submit or negotiate an acceptable alternative.

(b) The Department may reject any application that the Grant Officer determines unacceptable based on the content of the application, rating score, past performance, fiscal management, or any other factor the Grant Officer believes serves the best interest of the program, including the application's comparative rating in a competition.

§ 641.470 What happens if an applicant's application is rejected?

(a) Any entity whose application is rejected in whole or in part will be provided a timely notice as well as an explanation, or debriefing, of the Department's basis for its rejection. Notifications will include an explanation of the Department's decision and suggestions as to how to improve the applicant's position for future competitions.

(b) Incumbent grantees will not have an opportunity to cure in an open competition because that will create an inequity in favor of incumbents which already have opportunities to correct deficiencies through technical assistance, provided by the Department, under OAA sec. 514(e)(2)(A).

(c) If the Administrative Law Judge (ALJ) rules that the organization should have been selected, in whole or in part, and the organization continues to meet the requirements of this part, the matter must be remanded to the Grant Officer. The Grant Officer must, within 10 working days, determine whether the slots which are the subject of the ALJ's decision will be awarded, in whole or in part, to the organization and the timing of the award. In making this determination, the Grant Officer must take into account disruption to participants, disruption to grantees and the operational needs of the SCSEP. The Grant Officer must return the decision to the ALJ for review. In the event that the Grant Officer determines that it is not feasible, the successful appellant will be awarded its bid preparation costs or a pro rata share of those costs if Grant Officer's finding applies to only a portion of the funds that would be awarded to the successful appellant. An applicant so selected is not entitled to the full grant amount but will only receive the funds remaining in the grant that have not been expended by the current grantee through its operation of the grant and its subsequent closeout. The available remedy in an SCSEP non-selection appeal is the right to be selected in the future as an SCSEP grantee for the remainder of the current grant cycle. Neither retroactive nor immediately effective selection status may be awarded as relief in a non-selection appeal under this section and § 641.900.

Any organization selected and/or funded as an SCSEP grantee is subject to having its slots reduced or to being removed as an SCSEP grantee of an ALJ decision so orders. The Grant Officer provides instructions on transition and closeout to both the newly designated grantee and to the grantee whose slots are affected or which is being removed. All parties must agree to the provisions of this paragraph as a condition of being an SCSEP grantee.

§ 641.480 May the Governor make recommendations to the Department on grant applications?

(a) Yes, each Governor will have a reasonable opportunity to make comments on any application to operate a SCSEP project located in the Governor's State before the Department makes a final decision on a grant award. The Governor's comments should be directed to the Department and may include the anticipated effect of the proposal on the overall distribution of program positions within the State; recommendations for redistribution of positions to underserved areas as vacancies occur in previously encumbered positions in other areas; and recommendations for distributing any new positions that may become available as a result of an increase in funding for the State. The Governor's recommendations should be consistent with the State Plan.

(b) Under noncompetitive conditions, the Governor may make the authorized recommendations on all applications. However, under competitive conditions, the Governor has the option of making the authorized recommendations on all applications or only on those applications proposed for award following the rating process. It is incumbent on each Governor to inform the Department of his or her intent to review the applications before or after the rating process.

§ 641.490 When may SCSEP grants be awarded competitively?

(a) The Department must hold a competition for SCSEP funds when a grantee (national grantee, national grantee in a State, or State grantee) fails to meet its performance measures; the eligibility requirements; or the responsibility tests established by section 514 of the OAA.

(b) The Department may hold a full and open competition before the beginning of a new grant period, or if additional grantees are funded. The details of the competition will be provided in a Solicitation for Grant Applications published in the **Federal Register**. The Department believes that full and open competition is the best way to assure the highest quality of services to eligible participants.

Subpart E—Services to Participants

§ 641.500 Who is eligible to participate in the SCSEP?

(a) Anyone who is at least 55 years old and who is a member of a family with an income that is not more than 125 percent of the family income levels prepared by the Department of Health and Human Services and approved by the Office of Management and Budget (OMB) (poverty guidelines) is eligible to participate in the SCSEP. (OAA sec. 516(2)). A person with a disability may be treated as a "family of one'' for

income eligibility determination purposes. The Department will issue administrative guidance on the procedures for computing family income for purposes of determining SCSEP eligibility.

(b) States may enter into agreements between themselves to permit cross-border enrollment of eligible participants. Such agreements should cover both State and national grantee slots and must be submitted to the Department.

§ 641.505 When is eligibility determined?

Initial eligibility is determined at the time individuals apply to participate in the SCSEP. Once individuals become SCSEP participants, the grantee/subgrantee is responsible for verifying their continued income eligibility at least once every 12 months. Grantees may also verify an individual's eligibility as circumstances require.

§ 641.507 What types of income are included and excluded for participant eligibility determinations?

(a) The prior practice of excluding the first $500 of a participant's income for eligibility purposes is contrary to the section 516(2) of the OAA, which limits SCSEP eligibility to no more than 125 percent of the poverty guidelines established by OMB. Therefore, this practice will no longer be permitted, either for current participants or new applicants.

(b) The Department will use the U.S. Census Bureau's Current Population Survey (CPS) as the standard for determining income eligibility for the SCSEP. The Department will issue administrative guidance regarding income definitions and income inclusion and exclusion standards for determining eligibility.

§ 641.510 What happens if a grantee/subgrantee determines that a participant is no longer eligible for the SCSEP due to an increase in family income?

If a grantee/subgrantee determines that a participant is no longer eligible for the SCSEP, the grantee/subgrantee must give the participant written notification of termination within 30 days, and the participant must be terminated 30 days after the participant receives the notice. The only exception is for participants found ineligible because of providing false information who must be terminated immediately with written notification of the reason therefore. Grantees/subgrantees must refer such individuals to the services provided under the One-Stop Delivery System or other appropriate partner program. Participants may file a grievance according to the grantee's procedures and subpart I.

§ 641.515 How must grantees/subgrantees recruit and select eligible individuals for participation in the SCSEP?

(a) Grantees and subgrantees must develop methods of recruitment and selection that assure that the maximum number of eligible individuals have an opportunity to participate in the program. To the extent feasible, grantees should seek to enroll individuals who are eligible minorities, limited English speakers, Indians, or who have the greatest economic need at least in proportion to their numbers in the area, taking into consideration their rates of poverty and unemployment. (OAA sec. 502(b)(1)(M)).

(b) Grantees and subgrantees must list all community service opportunities with the State Workforce Agency and all appropriate local offices and must use the One-Stop Delivery System in the recruitment and selection of eligible individuals. (OAA sec. 502(b)(1)(H)).

§ 641.520 Are there any priorities that grantees/subgrantees must use in selecting eligible individuals for participation in the SCSEP?

(a) Yes, in selecting eligible individuals for participation in the SCSEP, priority must be given to:

(1) Individuals who are at least 60 years old (OAA sec. 516(2)); and

(2) A veteran, or the spouse of a veteran who died of a service-connected disability, a member of the Armed Forces on active duty, who has been listed for a total of more than 90 days as missing in action, captured in the line of duty by a hostile force, or forcibly detained by a foreign government or power, the spouse of any veteran who has a total disability resulting from a service-connected disability, and the spouse of any veteran who died while a disability so evaluated was in existence, who meet program eligibility requirements under section 2 of the Jobs for Veterans Act, Public Law 107–288 (2002).

(b) Grantees must apply these priorities in the following order:

(1) Veterans and qualified spouses at least 60 years old;

(2) Other individuals at least 60 years old;

(3) Veterans and qualified spouses aged 55–59; and

(4) Other individuals aged 55–59.

§ 641.525 Are there any other groups of individuals who should be given special consideration when selecting SCSEP participants?

Yes, in selecting participants from among those individuals who are eligible, special consideration must be given, to the extent feasible, to individuals who have incomes below the poverty level, who have poor employment prospects and who have the greatest social and/or economic need and to individuals who are eligible minorities, limited English speakers, or Indians, as further defined in § 641.515. (OAA sec. 502(b)(1)(M)).

§ 641.530 Must the grantee/subgrantee always select priority or preference individuals?

Grantees must always select qualified individuals in accordance with § 641.520. Grantees must apply the preference, to the extent feasible, when selecting individuals within the priority groups, unless the grantee determines based on an assessment of their circumstances and the available community service employment opportunities, that a non-preference individual should receive services over a preference individual. When the Department examines the characteristics of a grantee's participant population, the grantee may be asked to provide evidence that it is adhering to the enrollment priorities and preferences set forth in §§ 641.515, 641.520, and 641.525.

§ 641.535 What services must grantees/subgrantees provide to participants?

(a) When individuals are selected for participation in the SCSEP, the grantee/subgrantee is responsible for:

(1) Providing orientation to the SCSEP, including information on project goals and objectives, community service assignments, training opportunities, available supportive services, the availability of a free physical examination, participant rights and responsibilities, and permitted and prohibited political activities (OAA sec. 502);

(2) Assessing participants' work history, skills and interests, talents, physical capabilities, aptitudes, needs for supportive services, occupational preferences, training needs, potential for performing community service assignments, and potential for transition to unsubsidized employment as necessary, but no less frequently that two times during a twelve month period;

(3) Using the information gathered during the assessment to develop IEPs for participants; except that if an assessment has already been performed and an IEP developed under title I of WIA, the WIA IEP will satisfy the requirement for an SCSEP assessment and IEP (see § 641.260) and updating the IEPs as necessary to reflect information

gathered during the participant assessments (OAA sec. 502(b)(1)(N));

(4) Placing participants in appropriate community service activities in the community in which they reside, or in a nearby community (OAA sec. 502(b)(1)(B));

(5) Providing or arranging for necessary training specific to the participants' community service assignments (OAA sec. 502(b)(1)(I));

(6) Assisting participants in arranging for other training identified in their SCSEP IEPs (OAA sec. 502(b)(1)(N));

(7) Assisting participants in arranging for needed supportive services identified in their SCSEP IEPs (OAA sec. 502(b)(1)(N));

(8) Providing participants with wages and fringe benefits for time spent working in the assigned community service employment activity (OAA sec. 502(c)(6)(A)(i));

(9) Ensuring that participants have safe and healthy working conditions at their community service worksites (OAA sec. 502(b)(1)(J));

(10) Verifying participant income eligibility at least once every 12 months;

(11) Assisting participants in obtaining unsubsidized employment, including providing or arranging for employment counseling in support of their IEPs;

(12) Providing appropriate services for participants through the One-Stop Delivery System established under WIA (OAA sec. 502(b)(1)(O));

(13) Providing counseling on participants' progress in meeting the goals and objectives identified in their IEPs, and in meeting their supportive service needs (OAA sec. 502(b)(1)(N)(iii));

(14) Following-up with participants placed into unsubsidized employment during the first 6 months of placement to make certain that participants receive any follow-up services they may need to ensure successful placements; and

(15) Following-up at 6 months with participants who are placed in unsubsidized employment to determine whether they are still employed (OAA sec. 513(c)(2)(B));

(b) In addition to the services listed in paragraph (a) of this section, grantees and subgrantees must provide service to participants according to administrative guidelines that may be issued by the Department.

(c) Grantees may not use SCSEP funds for individuals who only need job search assistance or job referral services. Grantees may provide job search assistance and job club activities to participants who are enrolled in the SCESEP and are assigned to community service assignments.

§ 641.540 What types of training may grantees/subgrantees provide to SCSEP participants?

(a) Grantees and subgrantees must arrange skill training that is realistic and consistent with the participants' IEP, and that makes the most effective use of their skills and talents. This section does not apply to training provided as part of a community service assignment.

(b) Training may be provided before or after placement in a community service activity.

(c) Training may be in the form of lectures, seminars, classroom instruction, individual instruction, on-the-job experiences, or other arrangements, including but not limited to, arrangements with other workforce development programs such as WIA. (OAA sec. 502(c)(6)(A)(ii)).

(d) Grantees and subgrantees are encouraged to place a major emphasis on training available through on-the-job experience.

(e) Grantees/subgrantees are encouraged to obtain training through locally available resources, including host agencies, at no cost or reduced cost to the SCSEP.

(f) Grantees/subgrantees may pay reasonable costs for instructors, classroom rental, training supplies and materials, equipment, tuition, and other costs of training. Participants may be paid wages while in training. (OAA sec. 502(c)(6)(A)(ii)).

(g) Grantees/subgrantees may pay for costs associated with travel and room and board necessary to participate in training.

(h) Nothing in this section prevents or limits participants from engaging in self-development training available through other sources during hours when not assigned to community service activities.

§ 641.545 What supportive services may grantees/subgrantees provide to participants?

(a) Grantees/subgrantees may provide or arrange for supportive services to assist participants in successfully participating in SCSEP projects, including but not limited to payment of reasonable costs of transportation; health care and medical services; special job-related or personal counseling; incidentals such as work shoes, badges, uniforms, eyeglasses, and tools; child and adult care; temporary shelter; and follow-up services. (OAA sec. 502(c)(6)(A)(iv)).

(b) To the extent practicable, the grantee/subgrantee should provide for the payment of these expenses from other resources.

§ 641.550 What responsibility do grantees/subgrantees have to place participants in unsubsidized employment?

Because one goal of the program is to foster economic self-sufficiency, grantees and subgrantees should make reasonable efforts to place as many participants as possible into unsubsidized employment, in accordance with each participant's IEP. Grantees are responsible for working with participants to ensure that, for those participants whose IEPs include an unsubsidized employment goal, the participants are receiving services and taking actions designed to help them achieve this goal. Grantees and subgrantees must contact private and public employers directly or through the One-Stop Delivery System to develop or identify suitable unsubsidized employment opportunities. They must also encourage host agencies to assist participants in their transition to unsubsidized employment, including unsubsidized employment with the host agency.

§ 641.555 What responsibility do grantees have to participants who have been placed in unsubsidized employment?

(a) Grantees must contact placed participants during the first 6 months to determine if participants have the necessary supportive services to remain in the job.

(b) Grantees must contact participants 6 months after placement to determine if they have been retained by the employer or use wage records to verify continued employment. (OAA sec. 513(c)(2)(B)).

(c) Grantees may have other follow-up requirements under subparts G and H.

§ 641.560 May grantees place participants directly into unsubsidized employment?

Grantees are encouraged to refer individuals who may be placed directly in an unsubsidized employment position to an employment provider, including the One-Stop for job placement assistance under WIA. The SCSEP encourages grantees to work closely with participants to develop an IEP and assessment to determine what training the individual may need. The Department encourages grantees to work with those participants who are the most difficult to place to provide them with the services necessary to develop the skills needed for job placement.

§ 641.565 What policies govern the provision of wages and fringe benefits to participants?

(a) *Wages.* Grantees must pay participants the highest applicable minimum wage for time spent in orientation, training required by the

grantee/subgrantee, and work in community service assignments. The highest applicable minimum wage is either the minimum wage applicable under the Fair Labor Standards Act of 1938; the State or local minimum wage for the most nearly comparable covered employment; or the prevailing rate of pay for persons employed in similar public occupations by the same employer.

(b) *Fringe benefits*—(1) *Required fringe benefits.* Except as provided in paragraphs (b)(3) and (b)(4) of this section, grantees must ensure that participants receive all fringe benefits required by law.

(i) Grantees must provide fringe benefits uniformly to all participants within a project or subproject, unless the Department agrees to waive this provision due to a determination that such a waiver is in the best interests of applicants, participants, and project administration.

(ii) Grantees must offer participants the opportunity to receive physical examinations annually.

(A) Physical examinations are a fringe benefit, and not an eligibility criterion. The examining physician must provide, to participants only, a written report of the results of the examination. Participants may, at their option, provide the grantee or subgrantee with a copy of the report.

(B) Participants may choose not to accept the physical examination. In that case, the grantee or subgrantee must document this refusal, through a signed statement or other means, within 60 workdays after commencement of the community service assignment. Each year thereafter, grantees and subgrantees must offer the physical examination and document the offer and any participant's refusal.

(iii) When participants are not covered by the State workers' compensation law, the grantee or subgrantee must provide participants with workers' compensation benefits equal to those provided by law for covered employment.

(2) *Allowable fringe benefit costs.* Grantees may provide the following fringe benefits: annual leave; sick leave; holidays; health insurance; social security; and any other fringe benefits approved in the grant agreement and permitted by the appropriate Federal cost principles found in OMB Circulars A–87 and A–122, except for retirement costs. (See subpart H, §§ 641.847 and 641.850).

(3) *Retirement.* Grantees may not use grant funds to provide contributions into a retirement system or plan.

(4) *Unemployment compensation.* Unless required by law, grantees may not pay the cost of unemployment insurance for participants.

§ 641.570 Is there a time limit for participation in the program?

No, there is no time limit for participation in the SCSEP; however, a grantee may establish a maximum duration of enrollment in the grant agreement, when authorized by the Department. If there is such a time limit on enrollment established in the grant agreement, the grantee must provide for a system to transition participants to unsubsidized employment or other assistance before the maximum enrollment duration has expired. Provisions for transition must be reflected in the participant's IEP.

§ 641.575 May a grantee establish a limit on the amount of time its participants may spend at each host agency?

Yes, grantees may establish limits on the amount of time that its participants may spend at a host agency. Such limits should be established in the grant agreement, as approved by the Department, and reflected in the participants' IEPs.

§ 641.580 Under what circumstances may a grantee terminate a participant?

(a) If, at any time, a grantee or subgrantee determines that a participant was incorrectly declared eligible as a result of false information given by that individual, the grantee or subgrantee must immediately terminate the participant and provide the participant with a written notice that explains the reason for termination.

(b) If, during annual income verification, a grantee finds a participant to be no longer eligible for enrollment because of changes in family income, the grantee may terminate the participant. In order to terminate the participant in such a case, the grantee must provide the participant with a written notice and terminate the participant 30 days after the participant receives the notice. (*See* § 641.505).

(c) If, at any time, the grantee or subgrantee determines that it incorrectly determined a participant to be eligible for the program through no fault of the participant, the grantee or subgrantee must give the participant immediate written notice explaining the reason(s) and must terminate the participant 30 days after the participant receives the notice.

(d) A grantee and subgrantee may terminate a participant for cause. In doing so, the grantee or subgrantee must inform the participant, in writing, of the reason(s) for termination. Grantees must discuss the proposed reasons for such terminations in the grant application, and must discuss such reasons with participants and provide each participant a written copy of its policies for terminating a participant for cause or otherwise at the time of enrollment.

(e) A grantee or subgrantee may terminate a participant if the participant refuses to accept a reasonable number of job offers or referrals to unsubsidized employment consistent with the SCSEP IEP and there are no extenuating circumstances that would hinder the participant from moving to unsubsidized employment.

(f) When a grantee or subgrantee makes an unfavorable determination of enrollment eligibility under paragraphs (a), (b), and (c) of this section, it must give the individual a reason for termination and, when feasible, should refer the individual to other potential sources of assistance, such as the One-Stop Delivery System.

(g) Any termination, as described in paragraphs (a) through (f) of this section, must be consistent with administrative guidelines issued by the Department, and the termination must be subject to the applicable grievance procedures described in § 641.910.

(h) Participants may not be terminated from the program solely on the basis of their age. Grantees and subgrantees may not impose an upper age limit for participation in the SCSEP.

§ 641.585 Are participants employees of the Federal Government?

(a) No, participants are not Federal employees. (OAA sec. 504(a)).

(b) If a Federal agency is a grantee or host agency, § 641.590 applies.

§ 641.590 Are participants employees of the grantee, the local project, and/or the host agency?

Grantees must determine if a participant is an employee of the grantee, local project, or host agency as the definition of an "employee'' varies depending on the laws defining an employer/employee relationship.

Subpart F—Private Sector Training Projects Under Section 502(e) of the OAA

§ 641.600 What is the purpose of the private sector training projects authorized under section 502(e) of the OAA?

The purpose of the private sector training projects authorized under section 502(e) of the OAA is to allow States, public agencies, nonprofit organizations and private businesses to develop and operate projects designed to provide SCSEP participants with second career training and placement

opportunities with private business concerns. In addition, the OAA provides section 502(e) grantees or contractors with opportunities to initiate or enhance their relationships with the private sector, fostering collaboration with the One-Stop Delivery System, improving their ability to meet and exceed performance standards, and broadening the range of options available to SCSEP participants.

§ 641.610 How are section 502(e) activities administered?

(a) The Department may enter into agreements with States, public agencies, private nonprofit organizations, and private businesses to carry out section 502(e) projects.

(b) To the extent possible, private sector training activities should emphasize different work modes, such as job sharing, flex-time, flex-place, arrangements relating to reduced physical exertion, and innovative work modes with a focus on second career training and placement in growth industries in jobs requiring new technological skills.

(c) Grantees must coordinate section 502(e) private sector training activities with programs carried out under title I of WIA and with SCSEP projects operating in the area whenever possible.

§ 641.620 How may an organization apply for section 502(e) funding?

Organizations applying for section 502(e) funding must follow the instructions issued by the Department which will be published in the **Federal Register**, or in another appropriate medium.

§ 641.630 What private sector training activities are allowable under section 502(e)?

Allowable activities authorized under section 502(e) include:

(a) Providing participants with services leading to transition to private sector employment, including:

(1) Training in new technological skills;

(2) On-the-job training with private-for-profit employers;

(3) Work experience with private-for-profit employers;

(4) Adult basic education;

(5) Classroom training;

(6) Occupational skills training;

(7) In combination with other services listed in paragraphs (a)(1) through (6) of this section or in conjunction with the local One-Stop Delivery System, job clubs or job search assistance;

(8) In combination with other services listed in paragraphs (a)(1) through (7) of this section, supportive services, which may include counseling, motivational training, and job development; or

(9) Combinations of the above-listed activities.

(b) Working with employers to develop jobs and innovative work modes including job sharing, flex-time, flex-place and other arrangements, including those relating to reduced physical exertion.

§ 641.640 How do the private sector training activities authorized under section 502(e) differ from other SCSEP activities?

(a) The private sector training activities authorized under section 502(e) are not required to have a community service project component. However, 502(e) participants must also be co-enrolled in a community service assignment in a SCSEP project.

(b) The private sector training activities authorized under section 502(e) focus solely on providing SCSEP-eligible individuals with second career training, placement opportunities, and other assistance necessary to obtain unsubsidized employment in the private sector.

(c) The Department is authorized to pay all of the costs of section 502(e) activities (*i.e.*, there is no non-Federal share requirement). However section 502(e) grantees may choose to provide a non-Federal share and are encouraged to do so.

(d) The Department may enter directly into agreements with private businesses for section 502(e) activities.

(e) Grantees may fund private-for-profit and other organizations that do not have the IRS 501(c)(3) designation or are not public agencies to conduct section 502(e) activities if provided for in their grant or contract agreement with the Department.

§ 641.650 Does the requirement that not less than 75 percent of the funds be used to pay participant wages and fringe benefits apply to section 502(e) activities?

Yes, under section 502(c)(6)(B) of the OAA, 75 percent of SCSEP funds made available through a grant must be used to pay for the wages and fringe benefits of participants employed under SCSEP projects. This requirement applies to the total grant, and not necessarily to individual components of the grant. For entities that receive an SCSEP grant for both community service projects and section 502(e) projects, the requirement applies to the total grant. For entities that receive only a section 502(e) grant, the requirement applies to that grant.

§ 641.660 Who is eligible to participate in section 502(e) private sector training activities?

The same eligibility criteria used in the community service portion of the program apply for participation in the private sector training activities. (See subpart E, §§ 641.500, 641.510, 641.520, 641.525, and 641.530).

§ 641.665 When is eligibility determined?

Eligibility is determined at the time individuals apply to participate in the SCSEP. Grantees may also verify an individual's eligibility as circumstances require.

§ 641.670 May an eligible individual be enrolled simultaneously in section 502(e) private sector training activities operated by one grantee and a community service SCSEP project operated by a different SCSEP grantee?

Yes, an eligible individual must be enrolled simultaneously in section 502(e) private sector training activities and a community service SCSEP project, operated by two different SCSEP grantees. This is known as co-enrollment.

§ 641.680 How should grantees report on participants who are co-enrolled?

Referrals from a regular SCSEP grantee to a 502(e) only grantee that result in an unsubsidized placement may also be credited to the referring SCSEP grantee. However, if the SCSEP grantee is also a 502(e) grantee, the unsubsidized placement of the participant may only be counted once. The Department will issue administrative guidance on additional requirements.

§ 641.690 How is the performance of section 502(e) grantees measured?

(a) The following performance measures apply to section 502(e) grantees. The common performance measures that apply to this program are:

(1) Entered employment;

(2) Retention in employment; and

(3) Earnings increase.

(b) These measures are defined in and governed by subpart G of this part and the applicable provisions of administrative issuances implementing the SCSEP performance standards.

(c) If a section 502(e) grantee fails to meet its performance standards, the Department may require corrective action, may provide technical assistance, or may decline to fund the grantee in the next Program Year.

Subpart G—Performance Accountability

§ 641.700 What performance measures apply to SCSEP grantees?

(a) The OAA, at section 513(b), enumerates the indicators of performance as follows:

(1) The number of persons served, with particular consideration given to individuals with greatest economic need, greatest social need, or poor employment history or prospects, and individuals who are over the age of 60;

(2) Community services provided;

(3) Placement into and retention in unsubsidized public or private employment;

(4) Satisfaction of the participants, employers, and their host agencies with their experiences and the services provided; and

(5) Additional indicators of performance that the Department determines to be appropriate to evaluate services and performance.

(b) The additional indicator of performance is earnings increase.

§ 641.710 How are these performance indicators defined?

(a) For ease of calculation and to make the indicators better measures of performance, the Department has divided some of the indicators into multiple parts.

(b) The individual indicators are defined as follows:

(1) *The number of persons served* is defined by comparing the total number of participants served to a grantee's authorized number of positions adjusted for the differences in wages required paid in a State or area.

(2) *The number of persons served with the greatest economic need, greatest social need or with poor employment history or prospects and individuals who are over age 60* is defined by comparing the total number of participants served to the total number of participants who:

(i) Have an income level at or below the poverty line; (OAA sec. 101(27))

(ii) Have physical and mental disabilities; language barriers; and cultural, social, or geographical isolation, including isolation caused by racial or ethnic status, that restricts the ability of the individual to perform normal daily tasks, or threatens the capacity of the individual to live independently; or (OAA sec. 101(28))

(iii) Have poor employment history or prospects; and

(iv) Are over the age of 60.

(3) *Community services provided* is defined as the number of hours of community service provided by SCSEP participants. *Community service* is defined in the OAA at section 516(1) and in § 641.140.

(4) *Placement into unsubsidized public or private employment* is defined by comparing the number of participants placed into unsubsidized employment, as defined in § 641.140, to the total number authorized positions. (OAA sec. 513(c)(2)(A)).

(5) *Retention in public or private unsubsidized employment* means the number of participants retained in unsubsidized employment, as defined in § 641.140, compared to the total number of those who are employed in the first quarter after exit—*i.e.*, the number placed. (OAA sec. 513(c)(2)(B)).

(6) *Satisfaction of participants* means the results accumulated as the results of surveys of the participant customer group of their satisfaction with their experiences and the services provided.

(7) *Satisfaction of employers* means the results accumulated as the results of surveys of the employer customer group of their satisfaction with their experiences and the services provided.

(8) *Satisfaction of host agencies* means the results accumulated as the results of surveys of the host agency customer group of their satisfaction with their experiences and the services provided.

(9) *Earnings increase* means the percentage change in earnings pre-registration to post-program, and between the first quarter after exit and the third quarter after exit.

(c) The Department will publish administrative issuances that elaborate on these definitions and their application.

§ 641.715 What are the common performance measures?

The common performance measures are a Government-wide initiative adopted by the Department that apply to DOL-funded employment and job training programs. Adoption of these common measures across government will help implement the President's Management Agenda for budget and performance integration as well as reduce barriers to integrated service delivery through the local One-Stop Career Centers. Grantees will be required to report on the common performance measures as required under § 641.879. The common performance measure indicators are:

(a) Entered employment, defined as the percentage employed in the first quarter after program exit;

(b) Retention in employment, defined as the percentage of those employed in the first quarter after exit who were still employed in the second and third quarter after program exit; and

(c) Earnings increase, defined as the percentage change in earnings pre-registration to post-program; and between the first quarter after exit and the third quarter after exit.

(d) Program efficiency is defined as the cost per participant.

§ 641.720 How do the common performance measures affect grantees and the OAA performance measures?

One of the common performance measures, earnings increase, has been included as a performance measures under §§ 641.700 and 641.710 under the Secretary's discretionary authority. The two additional common performance measures will be used to determine the overall success of the program as compared to other programs Government-wide. The results will be the basis for making funding determinations for the SCSEP. The Department will require grantees to collect data for the common performance measures as a reporting requirement under § 641.879.

§ 641.730 How will the Department set and adjust performance levels?

(a) Before the beginning of each Program Year, the Department will negotiate and set baseline levels of negotiated performance for each measure with each grantee, taking into consideration the need to promote continuous improvement in the program overall, past performance, and, when applicable, the performance of similar programs.

(b) The baseline level of negotiated performance for "placement into public or private unsubsidized employment'' is set at 20 percent. (OAA sec. 513(a)(2)(C)).

(c) Grantees may request adjustments from these baseline levels before or during the Program Year. Grantees may base such requests only on the factors in paragraph (d) of this section. The Department will issue guidance for negotiating adjustment requests.

(d) Adjustments to performance levels may be made based on the following conditions only:

(1) High rates of unemployment, poverty, or welfare recipiency in the areas served by a grantee relative to other areas of the State or Nation;

(2) Significant economic downturns in the areas served by the grantee or in the national economy; or

(3) Significantly higher numbers or proportions of participants with one or more barriers to employment served by a grantee relative to grantees serving other areas of the State or Nation. (OAA sec. 513(a)(2)(B)).

(e) Grantees may seek an adjustment to their performance levels, based on the factors listed in paragraph (d) of this section, during the negotiation process or during the grant period.

§ 641.740 How will the Department determine whether a grantee fails, meets, or exceeds negotiated levels of performance?

(a) The Department will evaluate each performance indicator to determine the level of success that a grantee has achieved and take the aggregate to determine if, on the whole, the grantee met its performance objectives. The aggregate is calculated by combining the percentage results achieved on each of the individual measures to obtain an average score.

(b) Once the aggregate is determined, if a grantee is unable to meet 80 percent of the negotiated levels of performance for the aggregate of all of the performance measures, that grantee has failed to meet its performance measures. Performance in the range of 80 to 100 percent constitutes meeting the levels for the performance measures. Performance in excess of 100 percent constitutes exceeding the levels for the performance measures.

(c) A national grantee in a State must meet 80 percent of the negotiated level of performance for its national measures, and it must meet the measures negotiated for the State in which the national grantee serves.

(d) The Department will impose the sanctions outlined in section 514 of the OAA and in §§ 541.750, 541.760, 541.770 and 541.790 when a grantee fails to meet overall negotiated levels of performance.

(e) When a grantee fails one or more measures, but does not fail to meet its performance measures in the aggregate, the Department will provide technical assistance on the particular measures that a grantee failed.

(f) The Department will provide further guidance through administrative issuances.

§ 641.750 What sanctions will the Department impose if a grantee fails to meet negotiated levels of performance?

(a) Grantees that fail to meet negotiated levels of performance will be subject to the sanctions established in section 514 of the OAA. The sanctions that apply are grantee specific (*i.e.*, national grantee, national grantee in a State, or State grantee). These sanctions range from requiring grantees to submit a corrective action plan and receive technical assistance, to competition of part of the grant funds, to a competition of all of the grant funds.

(b) Until the Department establishes baseline levels for customer satisfaction measures, grantees that only fail the customer satisfaction performance measure, but meet or exceed all other performance measures, will not be subject to sanctions. The Department will provide additional instructions for how it will measure customer satisfaction.

§ 641.760 What sanctions will the Department impose if a national grantee fails to meet negotiated levels of performance under the total SCSEP grant?

(a) The Department will annually assess the performance of each national grantee no later than 120 days after the end of a Program Year to determine if a national grantee has failed to meet its negotiated levels of performance. (OAA sec. 514(e)(1)).

(b) If the Department determines that a national grantee has failed to meet its negotiated levels of performance for a Program Year, the national grantee must submit a corrective action plan not later than 160 days after the end of that Program Year. The plan must detail the steps the national grantee will take to improve performance. The Department will provide technical assistance related to performance issue(s). (OAA sec. 514(e)(2)(A)–(e)(2)(B)).

(c) If a national grantee fails to meet its negotiated levels of performance for a second consecutive Program Year, the Department will conduct a national competition to award an amount equal to 25 percent of that organization's funds in the following full Program Year. (OAA sec. 514(e)(2)(C)). The Department reserves the right to specify the locations of the positions that will be subject to competition. The poor performing grantee that had its funds competed is not eligible to compete for the same funds.

(d) If a national grantee fails to meet its negotiated levels of performance for a third consecutive Program Year, the Department will conduct a national competition to award an amount equal to the full amount of that organization's remaining grant after deducting the amount awarded in paragraph (c) of this section. (OAA sec. 514(e)(2)(D)). The poor performing grantee that had its funds competed is not eligible to compete for the same funds.

(e) To the extent possible, the competitions outlined in paragraphs (c) and (d) of this section will be conducted in such a way as to minimize the disruption of services to participants. (OAA sec. 514(e)(2)(C)).

(f) The organizations selected to receive a grant through the national competitions discussed in paragraphs (c) and (d) of this section must continue to provide service to the geographic areas formerly served by the national grantee(s) whose positions were the subject of the competition. (OAA sec. 514(e)(2)(D)).

§ 641.770 What sanctions will the Department impose if a national grantee fails to meet negotiated levels of performance in any State it serves?

(a) Each national grantee must be assessed on the performance of the projects it operates within any State. Such an assessment may lead to a finding that the national grantee has failed to meet negotiated levels of performance for its projects in a particular State. A national grantee's failure to meet performance measures in a State may be mitigated by justifying the failure, taking into consideration the adjustments permitted under section 513(a)(2)(B) of the OAA, or size of the project. (OAA sec. 514(e)(3)(A)).

(b) If the Department determines that there has been a failure to meet negotiated levels of performance within a State, the Department will require a corrective action plan and may take other appropriate actions, including transfer of the responsibility for the project to other grantees or providing technical assistance. (OAA sec. 514(e)(3)(B)).

(c) The Department will take corrective action if there is a second consecutive Program Year of failure by a national grantee operating within a particular State. Such corrective action may include transfer of, or a competition for, all or a portion of the project(s) of the national grantee in the State to another entity. Entities that were the subject of this corrective action will not be eligible to receive the funds of the transfer or to compete. (OAA sec. 514(e)(3)(C)).

(d) If there is a third consecutive Program Year of failure, the Department will conduct a competition for all of the funds available to a national grantee for operations within a particular State. Entities that are the subject of this corrective action will not be eligible to participate in the competition. (OAA sec. 514(e)(3)(D)).

§ 641.780 When will the Department assess the performance of a national grantee in a State?

(a) The Department will assess the performance of a national grantee in a State annually.

(b) The Department may also initiate an assessment of a national grantee's performance in a State if:

(1) The Department receives information indicating that a grantee is having difficulty implementing a particular performance indicator; or

(2) The Governor of a State, or his or her designee, requests the Department to review the performance of a particular national grantee serving in the State. (OAA sec. 514(e)(4)).

§ 641.790 What sanctions will the Department impose if a State grantee fails to meet negotiated levels of performance?

(a) The Department will annually assess the performance of State grantees no later than 120 days after the end of a Program Year to determine if the State has failed to meet its negotiated levels of performance. (OAA sec. 514(f)(1)).

(b) A State failing to meet its negotiated levels of performance must submit a corrective action plan not later than 160 days after the end of the Program Year in which the failure occurred. The plan must detail the steps the State will take to improve performance. The Department will also provide technical assistance. (OAA sec. 514(f)(2) and (f)(3)).

(c) If a State fails to meet its negotiated levels of performance after two consecutive years, then the State must conduct a competition to award an amount equal to 25 percent of its allotted funds for the following year. The Department reserves the right to specify the locations of the positions that will be subject to competition.

(d) In the event that a State fails to meet its negotiated levels of performance after three consecutive years, then the State must conduct a competition to award an amount equal to 100 percent of its allotted funds for the following year.

(e) Entities that operated any portion of the State's program that contributed to the failure will not be eligible to participate in the competitions.

§ 641.795 Will there be incentives for exceeding performance measures?

Yes, the Department will address non-financial incentives in administrative issuances. The Department is authorized by section 515(c)(1) of the OAA to use recaptured funds to provide incentive grants. The Department will issue administrative guidance detailing how incentive grants will be awarded.

Subpart H—Administrative Requirements

§ 641.800 What uniform administrative requirements apply to the use of SCSEP funds?

(a) SCSEP recipients and subrecipients must follow the uniform administrative requirements and allowable cost requirements that apply to their type of organization. (OAA sec. 503(f)(2)).

(b) Governments, State, local, and Indian Tribal Organizations that receive SCSEP funds under grants or cooperative agreements must follow the common rule implementing OMB Circular A–102, ''Grants and Cooperative Agreements with State and Local Governments'' (10/07/1994) (further amended 08/29/1977), codified at 29 CFR part 97.

(c) Nonprofit and commercial organizations, institutions of higher education, hospitals, other nonprofit organizations, and commercial organizations that receive SCSEP funds under grants or cooperative agreements must follow the common rule implementing OMB Circular A–110, codified at 29 CFR part 95.

§ 641.803 What is program income?

Program income, as described in 29 CFR 97.25 (governments) and 29 CFR 95.2(bb) (nonprofit and commercial organizations), is income earned by the recipient or subrecipient during the grant period that is directly generated by an allowable activity supported by grant funds or earned as a result of the award of grant funds. Program income includes income earned from license fees and royalties for copyrighted material, patents, patent applications, trademarks, and inventions produced under an award. (*See* 29 CFR 95.24(e) and 29 CFR 97.25(e)). Costs of generating SCSEP program income may be deducted from gross income received by SCSEP recipients and subrecipients to determine SCSEP program income earned or generated provided these costs have not been charged to the SCSEP program.

§ 641.806 How must SCSEP program income be used?

(a) SCSEP recipients that earn or generate program income during the grant period must add the program income to the Federal and non-Federal funds committed to the SCSEP program and use it for the program, as provided in 29 CFR 95.24(a) or 29 CFR 97.25(g)(2), as applicable.

(b) Recipients that continue to receive an SCSEP grant from the Department must spend program income earned or generated from SCSEP funded activities after the end of the grant period for SCSEP purposes in the Program Year it was received.

(c) Recipients that do not continue to receive an SCSEP grant from the Department must remit unexpended program income earned or generated during the grant period from SCSEP funded activities to the Department after the end of the grant period.

§ 641.809 What non-Federal share (matching) requirements apply to the use of SCSEP funds?

(a) The Department will pay no more than 90 percent of the total cost of activities carried out under a SCSEP grant. (OAA sec. 502(c)(1)).

(b) All SCSEP recipients, including Federal agencies if there is no statutory exemption, must provide or ensure that at least 10 percent of the total cost of activities carried out under an SCSEP grant (non-Federal share of costs) consists of non-Federal funds, except as provided in paragraphs (e) and (f) of this section.

(c) Recipients must determine the non-Federal share of costs in accordance with 29 CFR 97.24 for governmental units, or 29 CFR 95.23 for nonprofit and commercial organizations.

(d) The non-Federal share of costs may be provided in cash, or in-kind, or a combination of the two. (OAA sec. 502(c)(2)).

(e) A recipient may not require a subgrantee or host agency to provide non-Federal resources for the use of the SCSEP project as a condition of entering into a subrecipient or host relationship.

(f) The Department may pay all of the costs of activities carried out under section 502(e) of the OAA. (OAA sec. 502(e)).

(g) The Department may pay all of the costs of activities in an emergency or disaster project or a project in an economically distressed area. (OAA sec. 502(c)(1)).

§ 641.812 What is the period of availability of SCSEP funds?

(a) Except as provided in § 641.815, recipients must expend SCSEP funds during the Program Year for which they are awarded (July 1–June 30). (OAA sec. 515(b)).

(b) SCSEP recipients must ensure that no sub-agreement provides for the expenditure of any SCSEP funds before July 1, or after the end of the grant period, except as provided in § 641.815.

§ 641.815 May the period of availability be extended?

SCSEP recipients may request in writing, and the Department may grant, an extension of the period during which SCSEP funds may be obligated or expended. SCSEP recipients requesting an extension must justify that an extension is necessary. (OAA sec. 515(b)). The Department will notify recipients in writing of the approval or disapproval of any such requests.

§ 641.818 What happens to funds that are unexpended at the end of the Program Year?

(a) The Department may recapture any unexpended funds at the end of any Program Year and use the recaptured funds during the two succeeding Program Years for:

(1) Incentive grants;

(2) Technical assistance; or

(3) Grant and contract awards for any other SCSEP programs and activities. (OAA sec. 515(c)).

(b) The Department will provide the necessary information through an administrative issuance.

§ 641.821 What audit requirements apply to the use of SCSEP funds?

(a) Recipients and subrecipients receiving Federal awards of SCSEP funds must follow the audit requirements in paragraphs (b) and (c) of this section that apply to their type of organization. As used here, Federal awards of SCSEP funds include Federal financial assistance and Federal cost-reimbursement contracts received directly from the Department or indirectly under awards by SCSEP recipients or higher-tier subrecipients. (OAA sec. 503(f)(2)).

(b) All governmental and nonprofit organizations that are recipients or subrecipients must follow the audit requirements of OMB Circular A–133. These requirements are codified at 29 CFR parts 96 and 99 and referenced in 29 CFR 97.26 for governmental organizations; and in 29 CFR 95.26 for institutions of higher education, hospitals, and other nonprofit organizations.

(c) (1) The Department is responsible for audits of SCSEP recipients that are commercial organizations.

(2) Commercial organizations that are subrecipients under the SCSEP program and that expend more than the minimum level specified in OMB Circular A–133 ($500,000, for fiscal years ending after December 31, 2003) must have either an organization-wide audit conducted in accordance with OMB Circular A–133 or a program-specific financial and compliance audit.

§ 641.824 What lobbying requirements apply to the use of SCSEP funds?

SCSEP recipients and subrecipients must comply with the restrictions on lobbying codified in the Department's regulations at 29 CFR part 93. (Also refer to § 641.850(c), "Lobbying costs.'')

§ 641.827 What general nondiscrimination requirements apply to the use of SCSEP funds?

(a) SCSEP recipients, subrecipients, and host agencies are required to comply with the nondiscrimination provisions codified in the Department's regulations at 29 CFR parts 31 and 32.

(b) Recipients and subrecipients of SCSEP funds are required to comply with the nondiscrimination provisions codified in the Department's regulations at 29 CFR part 37 if:

(1) The recipient:

(i) is a One-Stop partner listed in section 121(b) of WIA, and

(ii) operates programs and activities that are part of the One-Stop Delivery System established under the Workforce Investment Act; or

(2) The recipient otherwise satisfies the definition of "recipient'' in 29 CFR 37.4.

(c) Recipients must ensure that participants are provided informational materials relating to age discrimination and/or their rights under the Age Discrimination in Employment Act of 1975 that are distributed to recipients by the Department pursuant to section 503(b)(3) of the OAA.

(d) Questions about, or complaints alleging a violation of the nondiscrimination requirements cited in this section may be directed or mailed to the Director, Civil Rights Center, U.S. Department of Labor, Room N–4123, 200 Constitution Avenue, NW., Washington, DC 20210, for processing. (See § 641.910(d)).

(e) The specification of any right or protection against discrimination in paragraphs (a) through (d) of this section must not be interpreted to exclude or diminish any other right or protection against discrimination in connection with an SCSEP program that may be available to any participant, applicant for participation, or other individual under any applicable Federal, State, or local laws prohibiting discrimination, or their implementing regulations.

§ 641.833 What policies govern political patronage?

(a) A recipient or subrecipient must not select, reject, promote, or terminate an individual based on political services provided by the individual or on the individual's political affiliations or beliefs. In addition, as indicated in § 641.827(b), certain recipients and subrecipients of SCSEP funds are required to comply with the Workforce Investment Act nondiscrimination regulations in 29 CFR part 37. These regulations prohibit discrimination on the basis of political affiliation or belief.

(b) A recipient or subrecipient must not provide funds to any subrecipient, host agency or other entity based on political affiliation.

(c) SCSEP recipients must ensure that every entity that receives SCSEP funds through the recipient is applying the policies stated in paragraphs (a) and (b) of this section.

§ 641.836 What policies govern political activities?

(a) No project under title V of the OAA may involve political activities. SCSEP recipients must ensure compliance with the requirements and prohibitions involving political activities described in paragraphs (b) and (c) of this section.

(b) State and local employees involved in the administration of SCSEP activities may not engage in political activities prohibited under the Hatch Act (5 U.S.C. chapter 15), including:

(1) Seeking partisan elective office;

(2) Using official authority or influence for the purpose of affecting elections, nominations for office, or fund-raising for political purposes. (5 U.S.C. 1502).

(c) SCSEP recipients must provide all persons associated with SCSEP activities with a written explanation of allowable and unallowable political activities under the Hatch Act. A notice explaining these allowable and unallowable political activities must be posted in every workplace in which SCSEP activities are conducted. The Department will provide the form and content of the notice and explanatory material by administrative issuance. (OAA sec. 502(b)(l)(P).

(d) SCSEP recipients must ensure that:

(1) No SCSEP participants or staff persons engage in partisan or nonpartisan political activities during hours for which they are being paid with SCSEP funds.

(2) No participants or staff persons engage in partisan political activities in which such participants or staff persons represent themselves as spokespersons for the SCSEP program.

(3) No participants are employed or out-stationed in the offices of a Member of Congress, a State or local legislator, or on the staff of any legislative committee.

(4) No participants are employed or out-stationed in the immediate offices of any elected chief executive officer of a State or unit of general government, except that:

(i) Units of local government may serve as host agencies for participants, provided that their assignments are non-political; and

(ii) While assignments may technically place participants in such offices, such assignments actually must be concerned with program and service activities and not in any way involved in political functions.

(5) No participants are assigned to perform political activities in the offices of other elected officials. Placement of participants in such offices in non-political assignments is permissible, however, provided that:

(i) SCSEP recipients develop safeguards to ensure that participants placed in these assignments are not involved in political activities; and

(ii) These safeguards are described in the grant agreement and are subject to review and monitoring by the SCSEP recipient and by the Department.

§ 641.839 What policies govern union organizing activities?

Recipients must ensure that SCSEP funds are not used in any way to assist, promote, or deter union organizing.

§ 641.841 What policies govern nepotism?

(a) SCSEP recipients must ensure that no recipient or subrecipient hires, and no host agency serves as a worksite for, a person who works in an SCSEP community service position if a member of that person's immediate family is engaged in a decision-making capacity (whether compensated or not) for that project, subproject, recipient, subrecipient, or host agency. The Department may exempt this requirement from worksites on Native American reservations and in rural areas provided that adequate justification can be documented, such as that no other persons are eligible and available for participation in the program.

(b) To the extent that an applicable State or local legal requirement regarding nepotism is more restrictive than this provision, SCSEP recipients must ensure that the more restrictive requirement is followed.

(c) For purposes of this section, ''Immediate family'' means wife, husband, son, daughter, mother, father, brother, sister, son-in-law, daughter-in-law, mother-in-law, father-in-law, brother-in-law, sister-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent, or grandchild.

§ 641.844 What maintenance of effort requirements apply to the use of SCSEP funds?

(a) Employment of a participant funded under title V of the OAA is permissible only in addition to employment that would otherwise be funded by the recipient, subrecipient, and host agency without assistance under the OAA. (OAA sec. 502(b)(1)(F)).

(b) Each project funded under title V:

(1) Must result in an increase in employment opportunities in addition to those that would otherwise be available;

(2) Must not result in the displacement of currently employed workers, including partial displacement such as a reduction in hours of non-overtime work, wages, or employment benefits;

(3) Must not impair existing contracts for service or result in the substitution of Federal funds for other funds in connection with work that would otherwise be performed;

(4) Must not substitute SCSEP-funded positions for existing Federally assisted jobs; and

(5) Must not employ or continue to employ any participant to perform work that is the same or substantially the same as that performed by any other person who is on layoff. (OAA sec. 502(b)(1)(G)).

§ 641.847 What uniform allowable cost requirements apply to the use of SCSEP funds?

(a) *General.* Unless specified otherwise in this part or the grant agreement, recipients and subrecipients must follow the uniform allowable cost requirements that apply to their type of organization. For example, a local government subrecipient receiving SCSEP funds from a nonprofit organization must use the allowable cost requirements for governmental organizations in OMB Circular A–87. The Department's regulations at 29 CFR 95.27 and 29 CFR 97.22 identify the Federal principles for determining allowable costs that each kind of organization must follow. The applicable Federal principles for each kind of organization are described in paragraphs (b)(1) through (b)(5) of this section. (OAA sec. 503(f)(2)).

(b) *Allowable costs/cost principles.* (1) Allowable costs for State, local, and Indian Tribal government organizations must be determined under OMB Circular A–87, ''Cost Principles for State, Local and Indian Tribal Governments.''

(2) Allowable costs for nonprofit organizations must be determined under OMB Circular A–122, ''Cost Principles for Non-Profit Organizations.''

(3) Allowable costs for institutions of higher education must be determined under OMB Circular A–21, ''Cost Principles for Educational Institutions.''

(4) Allowable costs for hospitals must be determined in accordance with appendix E of 45 CFR part 74, ''Principles for Determining Costs Applicable to Research and Development Under Grants and Contracts with Hospitals.''

(5) Allowable costs for commercial organizations and those nonprofit organizations listed in Attachment C to OMB Circular A–122 must be determined under the provisions of the Federal Acquisition Regulation (FAR), at 48 CFR part 31.

§ 641.850 Are there other specific allowable and unallowable cost requirements for the SCSEP?

(a) Yes, in addition to the generally applicable cost principles in § 641.847(b), the cost principles in paragraphs (b) through (g) of this section apply to SCSEP grants.

(b) *Claims against the Government.* For all types of entities, legal expenses for the prosecution of claims against the Federal Government, including appeals to an Administrative Law Judge, are unallowable.

(c) *Lobbying costs.* In addition to the prohibition contained in 29 CFR part 93, SCSEP funds must not be used to pay any salaries or expenses related to any activity designed to influence legislation or appropriations pending before the Congress of the United States or any State legislature. (See § 641.824).

(d) *One-Stop Costs.* Costs of participating as a required partner in the One-Stop delivery system established in accordance with section 134(c) of the Workforce Investment Act of 1998 are allowable, provided that SCSEP services and funding are provided in accordance with the Memorandum of Understanding required by the Workforce Investment Act and section 502(b)(1)(O) of the Older Americans Act, and costs are determined in accordance with the applicable cost principles.

(e) *Building repairs and acquisition costs.* Except as provided in paragraph (e) of this section and as an exception to the allowable cost principles in § 641.847(b), no SCSEP funds may be used for the purchase, construction, or renovation of any building except for the labor involved in:

(1) Minor remodeling of a public building necessary to make it suitable for use for project purposes;

(2) Minor repair and rehabilitation of publicly used facilities for the general benefit of the community; and

(3) Minor repair and rehabilitation by participants of housing occupied by persons with low incomes who are declared eligible for such services by authorized local agencies.

(f) *Accessibility and reasonable accommodation.* Recipients and subrecipients may use SCSEP funds to meet their obligations under section 504 of the Rehabilitation Act of 1973, as amended, and the Americans with Disabilities Act of 1990 and any other applicable Federal disability nondiscrimination laws to provide

physical and programmatic accessibility and reasonable accommodation/modifications for, and effective communications with, individuals with disabilities. (29 U.S.C. 794).

(g) *Participants' fringe benefit costs.* Recipients and subrecipients may use SCSEP funds for participant fringe benefit costs only under the conditions set forth in § 641.565.

§ 641.853 How are costs classified?

(a) All costs must be classified as "administrative costs'' or "program costs.'' (OAA sec. 502(c)(6)).

(b) Recipients and subrecipients must assign participants' wage and fringe benefit costs and other participant (enrollee) costs such as supportive services to the Program Cost cost category. (See § 641.864). When participants' community service assignments involve functions whose costs are normally classified as Administrative Cost, compensation provided to the participants shall be charged as program costs instead of administrative costs, since participant wage and fringe benefit costs are always charged to the Program Cost category.

§ 641.856 What functions and activities constitute costs of administration?

(a) The costs of administration are that allocable portion of necessary and reasonable allowable costs of recipients and first-tier subrecipients (as defined in paragraph (c) of this section) that are associated with those specific functions identified in paragraph (b) of this section and that are not related to the direct provision of programmatic services specified in § 641.864. These costs may be both personnel and non-personnel and both direct and indirect costs.

(b) The costs of administration are the costs associated with:

(1) Performing overall general administrative and coordination functions, including:

(i) Accounting, budgeting, financial, and cash management functions;

(ii) Procurement and purchasing functions;

(iii) Property management functions;

(iv) Personnel management functions;

(v) Payroll functions;

(vi) Coordinating the resolution of findings arising from audits, reviews, investigations, and incident reports;

(vii) Audit functions;

(viii) General legal services functions; and

(ix) Developing systems and procedures, including information systems, required for these administrative functions;

(2) Oversight and monitoring responsibilities related to administrative functions;

(3) Costs of goods and services used for administrative functions of the program, including goods and services such as rental or purchase of equipment, utilities, office supplies, postage, and rental and maintenance of office space;

(4) Travel costs incurred for official business in carrying out administrative activities or the overall management of the program; and

(5) Costs of information systems related to administrative functions (for example, personnel, procurement, purchasing, property management, accounting, and payroll systems) including the purchase, systems development, and operating costs of such systems. (OAA sec. 502(c)(4)).

(c) First-tier subrecipients are those subrecipients that receive SCSEP funds directly from an SCSEP recipient and perform the following activities for all participants:

(1) Eligibility determination;

(2) Participant assessment;

(3) Development of and placement into community service opportunities.

§ 641.859 What other special rules govern the classification of costs as administrative costs or program costs?

(a) Recipients and subrecipients must comply with the special rules for classifying costs as administrative costs or program costs set forth in paragraphs (b) through (e) of this section.

(b)(1) Costs of awards by recipients and first-tier subrecipients that are solely for the performance of their own administrative functions are classified as administrative costs.

(2) Costs incurred by recipients and first tier subrecipients for administrative functions listed in § 641.856(b) are classified as administrative costs.

(3) Costs incurred by vendors performing administrative functions for recipients and first tier subrecipients are classified as administrative costs.

(4) Except as provided in paragraph (b)(1), all costs incurred by subrecipients other than first-tier subrecipients are classified as program costs.

(5) Except as provided in paragraph (b)(3) of this section (*i.e.,* costs that are incurred to perform administrative functions for recipients and first tier subrecipients), all costs incurred by vendors are program costs. (See 29 CFR 99.210 for a discussion of factors differentiating subrecipients from vendors.)

(c) Personnel and related non-personnel costs of staff who perform both administrative functions specified in § 641.856(b) and programmatic services or activities must be allocated as administrative or program costs to the benefiting cost objectives/categories based on documented distributions of actual time worked or other equitable cost allocation methods.

(d) Specific costs charged to an overhead or indirect cost pool that can be identified directly as a program cost must be charged as a program cost. Documentation of such charges must be maintained.

(e) Costs of the following information systems including the purchase, systems development and operating (*e.g.,* data entry) costs are charged to the "program cost'' category:

(1) Tracking or monitoring of participant and performance information;

(2) Employment statistics information, including job listing information, job skills information, and demand occupation information; and

(3) Local area performance information.

§ 641.861 Must SCSEP recipients provide funding for the administrative costs of subrecipients?

(a) Recipients and subrecipients must obtain funding for administrative costs to the extent practicable from non-Federal sources. (OAA sec. 502(c)(5)).

(b) SCSEP recipients must ensure that sufficient funding is provided for the administrative activities of subrecipients that receive SCSEP funding through the recipient. Each SCSEP recipient must describe in its grant application the methodology used to ensure that subrecipients receive sufficient funding for their administrative activities. (OAA sec. 502(b)(1)(R)).

§ 641.864 What functions and activities constitute program costs?

Program costs include, but are not limited to, the costs of the following functions:

(a) Participant Wages and Fringe Benefits, consisting of wages paid and fringe benefits provided to participants for hours of community service assignments, as described in § 641.565;

(b) Outreach, recruitment and selection, intake, orientation, assessment, and preparation and updating of IEPs;

(c) Participant training provided on the job, in a classroom setting, or utilizing other appropriate arrangements, consisting of reasonable costs of instructors' salaries, classroom space, training supplies, materials, equipment, and tuition;

(d) Subject to the restrictions in § 641.535(c), job placement assistance,

including job development and job search assistance, job fairs, job clubs, and job referrals; and

(e) Participant supportive services, as described in § 641.545. (OAA sec. 502(c)(6)(A)).

§ 641.867 What are the limitations on the amount of SCSEP administrative costs?

(a) Except as provided in paragraph (b), no more than 13.5 percent of the SCSEP funds received for a Program Year may be used for administrative costs.

(b) The Department may increase the amount available for administrative costs to not more than 15 percent, in accordance with § 641.870. (OAA sec. 502(c)(3)).

§ 641.870 Under what circumstances may the administrative cost limitation be increased?

(a) SCSEP recipients may request that the Department increase the amount available for administrative costs. The Department may honor the request if:

(1) The Department determines that it is necessary to carry out the project; and

(2) The recipient demonstrates that:

(i) Major administrative cost increases are being incurred in necessary program components, including liability insurance, payments for workers' compensation, costs associated with achieving unsubsidized placement goals, and other operation requirements imposed by the Department;

(ii) The number of employment positions in the project or the number of minority eligible individuals participating in the project will decline if the amount available for paying the cost of administration is not increased; or

(iii) The size of the project is so small that the amount of administrative expenses incurred to carry out the project necessarily exceeds 13.5 percent of the amount for such project. (OAA sec. 502(c)(3)).

(b) A request by a recipient or prospective recipient for an increase in the amount available for administrative costs may be submitted as part of the grant application or as a separate submission at any time after the grant award.

§ 641.873 What minimum expenditure levels are required for participant wages and fringe benefits?

(a) Not less than 75 percent of the SCSEP funds provided under a grant from the Department must be used to pay for the wages and fringe benefits of participants in such projects, including awards made under section 502(e) of the OAA. (OAA sec. 502(c)(6)(B)).

(b) An SCSEP recipient is in compliance with this provision if at least 75 percent of the total expenditures of SCSEP funds provided to the recipient were for wages and benefits, even if one or more subrecipients did not expend at least 75 percent of their SCSEP funds for wages and fringe benefits for community service projects.

(c) Recipients receiving both general SCSEP funds and section 502(e) funds must meet the 75 percent requirement based on the total of both grants.

§ 641.876 When will compliance with cost limitations and minimum expenditure levels be determined?

The Department will determine compliance by examining expenditures of SCSEP funds. The cost limitations and minimum expenditure level requirements must be met at the time all such funds have been expended or the period of availability of such funds has expired, whichever comes first.

§ 641.879 What are the fiscal and performance reporting requirements for recipients?

(a) In accordance with 29 CFR 97.40 or 29 CFR 95.51, as appropriate, each SCSEP recipient must submit an SCSEP Quarterly Progress Report (QPR) to the Department in electronic format via the Internet within 30 days after the end of each quarter of the Program Year (PY). The SCSEP recipient must prepare this report to coincide with the ending dates for Federal PY quarters. Each SCSEP recipient must also submit a final QPR to the Department within 90 days after the end of the grant period. If the grant period ends on a date other than the last day of a Federal Program Year quarter, the SCSEP recipient must submit the final QPR covering the entire grant period no later than 90 days after the ending date of the grant. The Department will provide instructions for the preparation of this report. (OAA sec. 503(f)(3)).

(b) In accordance with 29 CFR 97.41 or 29 CFR 95.52, each SCSEP recipient must submit an SCSEP Financial Status Report (FSR) in electronic format to the Department via the Internet within 30 days after the ending of each quarter of the Program Year. Each SCSEP recipient must also submit a final FSR to the Department via the Internet within 90 days after the end of the grant period. If the grant period ends on a date other than the last day of a Federal PY quarter, the SCSEP recipient must submit the final FSR covering the entire grant period no later than 90 days after the ending date of the grant. The Department will provide instructions for the preparation of this report. (OAA sec. 503(f)(3)).

(1) Financial data are required to be reported on an accrual basis, and cumulatively by funding year of appropriation. Financial data may also be required on specific program activities.

(2) If the SCSEP recipient's accounting records are not normally kept on the accrual basis of accounting, the SCSEP recipient must develop accrual information through an analysis of the documentation on hand.

(c) Each State agency receiving title V funds must annually submit an equitable distribution report of SCSEP positions by all recipients in the State. The Department will provide instructions for the preparation of this report. (OAA sec. 508).

(d) Each SCSEP recipient that receives section 502(e) funds must submit reports on its section 502(e) activities. The Department will provide instructions for the preparation of these reports. (OAA sec. 503(f)(3)).

(e) Each SCSEP recipient must collect data and submit reports regarding the program performance measures and the common performance measures. *See* §§ 641.700–641.720. The Department will provide instructions detailing these measures and how recipients must prepare this report.

(f) Each SCSEP recipient may be required to collect data and submit reports about the demographic characteristics of program participants. The Department will provide instructions detailing these measures and how recipients must prepare this report.

(g) Federal agencies that receive and use SCSEP funds under interagency agreements must submit project fiscal and progress reports in accordance with this section. Federal recipients must maintain the necessary records that support required reports according to instructions provided by the Department. (OAA sec. 503(f)(3)).

(h) Recipients may be required to maintain records that contain any other information that the Department determines to be appropriate in support of any other reports that the Department may require. (OAA sec. 503(f)(3)).

(i) Grantees submitting reports that cannot be validated or verified as accurately counting and reporting activities in accordance with the reporting instructions may be treated as failing to submit reports, which may result in failing one of the responsibility tests outlined in § 641.440 and section 514(d) of the OAA.

§ 641.881 What are the SCSEP recipient's responsibilities relating to awards to subrecipients?

(a) The SCSEP recipient is responsible for all grant activities, including the performance of SCSEP activities by subrecipients, and ensuring that subrecipients comply with the OAA and this part. (See also OAA sec. 514 on responsibility tests).

(b) Recipients must follow their own procedures for allocating funds to other entities. The Department will not grant funds to another entity on the recipient's behalf.

§ 641.884 What are the grant closeout procedures?

SCSEP recipients must follow the grant closeout procedures at 29 CFR 97.50 or 29 CFR 95.71, as appropriate. The Department will issue supplementary closeout instructions to title V recipients as necessary.

Subpart I—Grievance Procedures and Appeals Process

§ 641.900 What appeal process is available to an applicant that does not receive a grant?

(a) An applicant for financial assistance under title V of the OAA that is dissatisfied because the Department has issued a determination not to award financial assistance, in whole or in part, to such applicant, may request that the Grant Officer provide the reasons for not awarding financial assistance to that applicant (debriefing). The request must be filed within 10 days of the date of notification indicating that it would not be awarded. The Grant Officer must provide the protesting applicant with a debriefing and with a written decision stating the reasons for the decision not to award the grant within 20 days of the protest. Applicants may appeal to the U.S. Department of Labor, Office of Administrative Law Judges, within 21 days of the date of the Grant Officer's notice providing reasons for not awarding financial assistance. The appeal may be for a part or the whole of a denial of funding. This appeal will not in any way interfere with the Department's decisions to fund other organizations to provide services during the appeal period.

(b) Failure to either request a debriefing within 10 days or to file an appeal within 21 days provided in paragraph (a) of this section constitutes a waiver of the right to a hearing.

(c) A request for a hearing under this section must state specifically those issues in the Grant Officer's notification upon which review is requested. Those provisions of the Grant Officer's notification not specified for review, or the entire final determination when no hearing has been requested within the 21 days, are considered resolved and not subject to further review.

(d) A request for a hearing must be transmitted by certified mail, return receipt requested, to the Chief Administrative Law Judge, U.S. Department of Labor, Suite 400, 800 K Street, NW., Washington, DC 20001, with one copy to the Departmental official who issued the determination.

(e) The decision of the ALJ constitutes final agency action unless, within 20 days of the decision, a party dissatisfied with the ALJ's decision, in whole or in part, has filed a petition for review with the Administrative Review Board (ARB) (established under Secretary's Order No. 2–96, published at 61 FR 19978 (May 3, 1996)), specifically identifying the procedure, fact, law or policy to which exception is taken. The Department will deem any exception not specifically urged to have been waived. A copy of the petition for review must be sent to the opposing party at that time. Thereafter, the decision of the ALJ constitutes final agency action unless the ARB, within 30 days of the filing of the petition for review, notifies the parties that the case has been accepted for review. Any case accepted by the ARB must be decided within 180 days of acceptance. If not so decided, the decision of the ALJ constitutes final agency action.

(f) The Rules of Practice and Procedures for Administrative Hearings Before the Office of Administrative Law Judges, set forth at 29 CFR part 18, govern the conduct of hearings under this section, except that:

(1) The appeal is not considered as a complaint; and

(2) Technical rules of evidence, such as the Federal Rules of Evidence and subpart B of 29 CFR part 18, will not apply to any hearing conducted under this section. However, rules designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination will be applied when the Administrative Law Judge conducting the hearing considers them reasonably necessary. The certified copy of the administrative file transmitted to the Administrative Law Judge by the official issuing the final determination must be part of the evidentiary record of the case and need not be moved into evidence.

(g) The Administrative Law Judge should render a written decision no later than 90 days after the closing of the record.

(h) The remedies available are provided in § 641.470.

(i) This section only applies to multi-year grant awards.

§ 641.910 What grievance procedures must grantees make available to applicants, employees, and participants?

(a) Each grantee must establish, and describe in the grant agreement, grievance procedures for resolving complaints, other than those described by paragraph (d) of this section, arising between the grantee, employees of the grantee, subgrantees, and applicants or participants.

(b) The Department will not review final determinations made under paragraph (a) of this section, except to determine whether the grantee's grievance procedures were followed, and according to paragraph (c) of this section.

(c) Allegations of violations of Federal law, other than those described in paragraph (d) of this section, which are not resolved within 60 days under the grantee's procedures, may be filed with the Chief, Division of Older Worker Programs, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Allegations determined to be substantial and credible will be investigated and addressed.

(d) Questions about, or complaints alleging a violation of, the nondiscrimination requirements of Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, Section 188 of the Workforce Investment Act of 1998 (WIA), or their implementing regulations may be directed or mailed to the Director, Civil Rights Center, U.S. Department of Labor, Room N–4123, 200 Constitution Avenue, NW., Washington, DC 20210. In the alternative, complaints alleging violations of WIA section 188 may be filed initially at the grantee level. See 29 CFR 37.71, 37.76. In such cases, the grantee must use complaint processing procedures meeting the requirements of 29 CFR 37.70 through 37.80 to resolve the complaint.

§ 641.920 What actions of the Department may a grantee appeal and what procedures apply to those appeals?

(a) Appeals from a final disallowance of costs as a result of an audit must be made under 29 CFR 96.63.

(b) Appeals of suspension or termination actions taken on the grounds of discrimination are processed under 29 CFR part 31 or 37, as appropriate.

(c) Protests and appeals of decisions not to award a grant, in whole or in part, will be handled under § 641.900.

(d) Upon a grantee's receipt of the Department's final determination relating to costs (except final disallowance of costs as a result of an audit, as described in paragraph (a) of this section), payment, suspension or termination or the imposition of sanctions, the grantee may appeal the final determination to the Department's Office of Administrative Law Judges, as follows:

(1) Within 21 days of receipt of the Department's final determination, the grantee may transmit by certified mail, return receipt requested, a request for a hearing to the Chief Administrative Law Judge, United States Department of Labor, 800 K Street, NW., Room 400 N, Washington, DC 20001 with a copy to the Department official who signed the final determination. The Chief Administrative Law Judge will designate an Administrative Law Judge to hear the appeal.

(2) The request for hearing must be accompanied by a copy of the final determination, and must state specifically those issues of the determination upon which review is requested. Those provisions of the determination not specified for review, or the entire determination when no hearing has been requested within the 21 days, are considered resolved and not subject to further review.

(3) The Rules of Practice and Procedures for Administrative Hearings Before the Office of Administrative Law Judges, set forth at 29 CFR part 18, govern the conduct of hearings under this section, except that:

(i) The appeal is not considered as a complaint; and

(ii) Technical rules of evidence, such as the Federal Rules of Evidence and Subpart B of 29 CFR Part 18, will not apply to any hearing conducted under this section. However, rules designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination will be applied when the Administrative Law Judge conducting the hearing considers them reasonably necessary. The certified copy of the administrative file transmitted to the Administrative Law Judge by the official issuing the final determination must be part of the evidentiary record of the case and need not be moved into evidence.

(4) The Administrative Law Judge should render a written decision no later than 90 days after the closing of the record. In ordering relief, the ALJ may exercise the full authority of the Secretary under the OAA.

(5) The decision of the ALJ constitutes final agency action unless, within 21 days of the decision, a party dissatisfied with the ALJ's decision, in whole or in part, has filed a petition for review with the Administrative Review Board (ARB) (established under Secretary's Order No. 2–96), specifically identifying the procedure, fact, law or policy to which exception is taken. The Department will deem any exception not specifically urged to have been waived. A copy of the petition for review must be sent to the opposing party at that time. Thereafter, the decision of the ALJ constitutes final agency action unless the ARB, within 30 days of the filing of the petition for review, notifies the parties that the case has been accepted for review. Any case accepted by the ARB must be decided within 180 days of acceptance. If not so decided, the decision of the ALJ constitutes final agency action.

§ 641.930 Is there an alternative dispute resolution process that may be used in place of an OALJ hearing?

(a) Parties to a complaint that has been filed according to the requirements of § 641.920 (a), (c), and (d) may choose to waive their rights to an administrative hearing before the OALJ. Instead, they may choose to transfer the settlement of their dispute to an individual acceptable to all parties who will conduct an informal review of the stipulated facts and render a decision in accordance with applicable law. A written decision must be issued within 60 days after submission of the matter for informal review.

(b) Unless the parties agree in writing to extend the period, the waiver of the right to request a hearing before the OALJ will automatically be revoked if a settlement has not been reached or a decision has not been issued within the 60 days provided in paragraph (a) of this section.

(c) The decision rendered under this informal review process will be treated as the final agency decision.

[FR Doc. 04–7282 Filed 4–8–04; 8:45 am]

BILLING CODE 4510–30–P