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DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 641

[Docket No. ETA-2017-0005]

RIN 1205-AB79

Senior Community Service Employment Program; Performance Accountability

AGENCY: Employment and Training Administration, Labor.

ACTION: Final rule.

SUMMARY: The Employment and Training Administration (ETA) of the Department of Labor (Department) is adopting as a final rule without change the interim final rule (IFR) published by the Department in the *Federal Register* on December 1, 2017. The IFR revised performance accountability measures for the Senior Community Service Employment Program (SCSEP). The Older Americans Act (OAA) Reauthorization Act of 2016 (2016 OAA) amended the measures of performance for the SCSEP program in large part to align them with the performance measures mandated for programs under the Workforce Innovation and Opportunity Act (WIOA) and required implementation, including through regulation by December 31, 2017. The IFR revised the Performance Accountability subpart of the SCSEP regulations to reflect changes necessitated by the passage of the 2016 OAA. In addition, the IFR made minor, non-substantive amendments to other subparts of the SCSEP regulations to reflect the 2016 OAA amendments that aligned the SCSEP program statutory language with WIOA, such as updating outdated terminology and outdated references to the Workforce Investment Act of 1998 (WIA),

which WIOA superseded. The implemented regulations, referred to as an IFR, took effect on January 2, 2018. The Department solicited public comment on the IFR, and the Department considered these comments when it prepared this final rule.

DATES: *Effective date:* This final rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

Compliance date: Grantees must report performance information under the measures implemented in the IFR and adopted without change in this final rule beginning July 1, 2018. This rule is not an E.O. 13771 regulatory action because this rule is not significant under E.O. 12866.

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I. Background

The SCSEP, authorized by title V of the OAA, is the only federally sponsored employment and training program targeted specifically to low-income, older individuals

who want to enter or re-enter the workforce. Participants must be 55 years of age or older, with incomes no more than 125 percent of the Federal poverty level. The program offers participants training at community service assignments in public and non-profit organizations and agencies so that they can gain on-the-job experience. The dual goals of the program are to promote useful opportunities in community service activities and also to move SCSEP participants into unsubsidized employment, where appropriate, so that they can achieve economic self-sufficiency.

The 2016 OAA, Pub. L. 114-144 (Apr. 19, 2016), amended the statutory provisions authorizing SCSEP and requires the Department to implement the amendments to the SCSEP performance measures by December 31, 2017. *See* OAA sec. 513(d)(4) (42 U.S.C. 3056k(d)(4), as amended by 2016 OAA sec. 6(d)(4)¹). The Department met this statutory deadline when it published the IFR on December 1, 2017 (82 FR 56869). This final rule responds to public comments received and finalizes the IFR.

The IFR included both the definitions of the measures (as required by OAA sec. 513(b)(2)) and the processes used to implement these measures in the conduct of the SCSEP grants. These processes include how the Department and grantees initially determine and then adjust expected levels of performance for the grants, and how the Department determines whether a grantee fails, meets, or exceeds the levels of performance.

¹ Section 6 of the 2016 OAA amended secs. 502-518 of title V of the original (1965) OAA (42 U.S.C. 3056 *et seq.*). For ease of reference, this preamble will refer to the changes to title V made by the 2016 OAA by referring to the amended sections of the OAA, and will not continue to provide the citations to sec. 6 of the 2016 OAA.

The Administrative Procedure Act (APA) authorizes agencies to issue a rule without notice and comment upon a showing of good cause. 5 U.S.C. 553(b)(B). The APA's good cause exception to public participation applies upon a finding that those procedures are "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(B). According to the legislative history of the APA, "unnecessary" means "unnecessary so far as the public is concerned, as would be the case if a minor or merely technical amendment in which the public is not particularly interested were involved." Senate Report No. 752 at p. 200, 79th Cong. 1st Sess. (1945). As explained by the U.S. Court of Appeals for the D.C. Circuit, "when regulations merely restate the statute they implement, notice-and-comment procedures are unnecessary." *Gray Panthers Advocacy Comm. v. Sullivan*, 936 F.2d 1284, 1291 (D.C. Cir. 1991). The Department determined that there was good cause to find that a pre-publication comment period was unnecessary for the IFR. The revisions set forth in the IFR to the previous regulations at 20 CFR part 641 codified statutory changes requiring little to no agency discretion or were technical amendments updating terminology or outdated references to WIA, which WIOA superseded. Therefore, the Department's issuance of the IFR, with provision for post-promulgation public comment, was in accordance with sec. 553(b) of the APA.

The 2016 OAA requires the Department to establish and implement the new SCSEP performance measures after consultation with stakeholders. OAA sec. 513(b)(2). The Department satisfied these statutory requirements when it solicited public input on the definitions and implementation of the statutory performance measures in April and May of 2017. On May 8, 2017, the Department sent an email to 4,529 stakeholders,

inviting them to register for the consultation. The Department also informed stakeholders that they could submit written comments after the consultation.

Of the 394 registered participants, 273 attended the consultation on May 16, 2017. The IFR discussed at length the comments received during and after the consultation and, in response to some of those comments, made the following clarifications:

- The changes in the IFR to the SCSEP performance measurement system reflect in large part an alignment of the SCSEP performance measures with the three employment outcome indicators mandated for WIOA core programs under WIOA sec. 116(b)(2)(A)(i)(I) through (III). In addition to these three WIOA employment outcome indicators of performance, SCSEP has three measures related to participation in the program: service level, hours of community service employment, and service to the most-in-need. These three measures are unique to SCSEP and the 2016 OAA amendments retained them unchanged. Although WIOA has several similar measures, these SCSEP measures are not directly applicable to WIOA. In addition, the WIOA primary indicators of performance include effectiveness in serving employers; the corresponding measure for SCSEP under the OAA, as discussed below at § 641.720, is not directly parallel because it includes participants and host agencies, as well as employers.
- All the SCSEP measures will be incorporated into the Participant Individual Record Layout (PIRL, the WIOA performance reporting system), along with other aspects of SCSEP performance.

- Although the 2016 OAA amendments require SCSEP to adopt several of WIOA's primary indicators of performance, SCSEP is independent of WIOA, and SCSEP performance is not included in the WIOA State program or indicator scores.
- While the Department is exploring a new case management system that may replace the SCSEP Performance and Results Quarterly Progress Report (SPARQ) system in whole or in part, grantees must continue using SPARQ until the Department informs them that a new system is available.
- Like the current measures, the new performance measures apply to all grantees, including both State and national grantees.

See Section I of the IFR for a more detailed discussion of the comments received during stakeholder consultation process.

The 2016 OAA changes to the SCSEP performance measurement system reflect in large part an alignment of the SCSEP performance measures with those mandated for WIOA core programs under WIOA sec. 116(b)(2)(A)(i). The WIOA performance measures were implemented in a joint final rule issued by the Departments of Labor and Education on August 19, 2016 (81 FR 55792) (Joint WIOA final rule), after notice-and-comment rulemaking, and are codified in 20 CFR part 677. The IFR, which this final rule finalizes, revised the SCSEP regulations at 20 CFR part 641, subpart G (Performance Accountability) to codify the revised SCSEP performance measures in 2016 OAA sec. 513, which in large part aligns the SCSEP performance measures with the WIOA performance measures. In addition, the IFR made (and this final rule carries forward) technical amendments to other subparts of part 641 to reflect 2016 OAA amendments

that aligned the SCSEP program statutory language with WIOA, such as updating outdated terminology and outdated references to WIA, which WIOA superseded.

Coordination between the SCSEP and the WIOA programs continues to be an important objective of the OAA. SCSEP is a required partner in the workforce development system (per WIOA sec. 121(b)(1)(B)(v)), and SCSEP is required to coordinate with the WIOA One-Stop delivery system (OAA sec. 511, 42 U.S.C. 3056i), such as by accepting each other's assessments and Individual Employment Plans (IEPs) (OAA sec. 502(b)(3), 42 U.S.C. 3056(b)(3)). The underlying notion of the One-Stop delivery system is the coordination of programs, services, and governance structures, to ensure customer access to a seamless system of workforce development services.

Although there are many similarities to the system established under WIA, there are also significant changes under WIOA that are intended to make substantial improvements to the public workforce delivery system. The Joint WIOA final rule requires partners to collaborate to support a seamless customer-focused service delivery network; requiring that programs and providers co-locate, coordinate, and integrate activities and information, so that the system as a whole is cohesive and accessible for individuals and employers alike.

The Department remains committed to a system-wide continuous improvement approach grounded upon proven quality principles and practices. Although many of the SCSEP regulations remain unchanged from the 2010 SCSEP final rule (75 FR 53786; Sept. 1, 2010), the IFR codified the 2016 OAA revisions to the program that align senior employment services with the workforce development system under WIOA. In particular, the IFR aligned the SCSEP performance measures related to employment and earnings

with the performance measures established by WIOA to enhance consistency and coordination between the programs and ensure effective services for older Americans. Section III discusses in more detail the changes implemented by the IFR and finalized by this final rule.

II. Summary of Public Comments Received on the Interim Final Rule

The Department received comments from seven organizations and individuals. Four organizations (three national grantees and an association representing State grantees) submitted substantive comments that addressed issues within the scope of the IFR: Associates for Training and Development (A4TD), Vantage Aging (previously known as Mature Services), Senior Service America (SSAI), and the National Association of States United for Aging and Disabilities (NASUAD); the three individuals submitted non-substantive comments.

The Department considered all substantive comments received as it developed this final rule. In Section III below, “Section-by-Section Discussion of the Final Rule,” the Department summarizes and discusses the input received from A4TD, Vantage Aging, and NASUAD. SSAI resubmitted the same comments it submitted on June 6, 2017, in response to the May 16, 2017 stakeholder webinar, prior to the publication of the IFR. Because the Department fully responded to the SSAI comments in the preamble to the IFR, the Department will not respond further in this preamble except to clarify some of its prior responses.

Three comments from individuals described general dissatisfaction with the SCSEP program and its grantees based on either negative personal experiences or

unfavorable anecdotal evidence. The preamble does not address these comments, as they were not in the scope of the rulemaking.

III. Section-by-Section Discussion of the Final Rule

The Department has made no changes to the regulatory text issued in the IFR.

Non-substantive Technical Amendments

In addition to the changes made to part 641, subpart G (Performance Accountability) codifying the 2016 OAA statutory revisions as described more fully below, the IFR made non-substantive, technical amendments throughout all of part 641 to reflect the 2016 OAA amendments and to align the SCSEP program language with WIOA, such as updating outdated terminology and outdated references to WIA, which WIOA superseded. The Department did not receive any comments on these technical amendments and the final rule adopts them as issued in the IFR.

The remainder of this section-by-section discussion describes in detail only the substantive subpart G revisions.

Subpart G – Performance Accountability

Throughout this subpart, the Department has revised the term “core indicator(s)” to “core measure(s)” to align the regulation with the 2016 OAA, specifically sec. 513(a), 42 U.S.C. 3056k(a). The amended statute also refers to “indicators.” However, because the statute uses the terms interchangeably, for consistency and to reduce the possibility of confusion, the Department uses only the term “measures” throughout this subpart. Other changes made to the sections of subpart G are described below.

*Section 641.700 What performance measures apply to Senior Community Service
Employment Program grantees?*

The Department did not receive any comments on this section. The final rule adopts the provision as originally issued in the IFR.

Section 641.710 How are the performance measures defined?

This section of the rule provides definitions of the core measures.

The IFR revised the core indicator (now “core measure”) definitions contained in this section to align with the revised core measures set forth in § 641.700 of the IFR. As discussed below and in the IFR, the Department deleted the entirety of former paragraph (b) to remove the definitions for the former “additional indicators,” which the 2016 OAA removed. Thus, as an initial change, the IFR renumbered paragraphs (a)(1) through (6) to (a) through (g) (to include the definition for an added core measure, as discussed below).

Employment Measures

The IFR did not revise paragraph (a), renumbered from former paragraph (a)(1), which contains the definition for the first core measure for hours of community service employment as currently implemented.

In paragraph (b), renumbered from former paragraph (a)(2), the IFR included a definition for the second performance measure, “percentage of project participants who are in unsubsidized employment during the second quarter after exit from the project.” The IFR defined this performance measure by the following formula: the number of participants who exited during the reporting period who are employed in unsubsidized employment during the second quarter after the exit quarter, divided by the number of

participants who exited during the reporting period, multiplied by 100 so as to be reported as a percentage. This definition aligns with the definition of the corresponding WIOA performance measure, as explained in Training and Employment Guidance Letter (TEGL) 10-16, *Performance Accountability Guidance for Workforce Innovation and Opportunity Act (WIOA) Title I, Title II, Title III and Title IV Core Programs*, published December 19, 2016.

In paragraph (c), renumbered from former paragraph (a)(3), the IFR included a definition for the third performance measure, “percentage of project participants who are in unsubsidized employment during the fourth quarter after exit from the project.” This performance measure is defined by the following formula: the number of participants who exited during the reporting period who are employed in unsubsidized employment during the fourth quarter after the exit quarter, divided by the number of participants who exited during the reporting period, multiplied by 100 so as to be reported as a percentage. This definition aligns with the definition of the corresponding WIOA performance measure, as explained in TEGL 10-16.

In response to the IFR, the Department received one public comment relating to the employment measures set forth in this section. Specifically, with regard to the fourth quarter unsubsidized employment measure at paragraph (c), the commenter expressed concern that the new fourth quarter unsubsidized employment measure, while simplifying the current measure for employment retention, will require grantees to follow participants for at least an entire year even if the participants did not leave the program for unsubsidized employment. The commenter contended that this core performance measure

will place a significant burden on grantees while producing little increase in performance data.

The commenter is correct that the new measure is no longer conditioned on a participant's having been employed in the first quarter after the exit quarter (as the current core measure for employment retention and the additional measure for retention at 1 year require) and, therefore, includes in the pool every participant who exits from SCSEP unless the participant has one of the exclusions from exit. The Department, however, declines to revise the definition for this core measure. Once wage records are available to all grantees, nearly all data for this measure will be gathered without the need for follow-up, and there will be little additional burden on the grantees. *See* discussion of the use of wage records at § 641.720. Until that time, grantees should first focus their follow-up efforts on those participants who leave the program for unsubsidized employment or who are employed in the second quarter after the exit quarter. Grantees should then follow participants who did not have employment at exit or in the second quarter after exit but who grantees have reason to believe might become employed thereafter. The Department will provide technical assistance and guidance on the new timing and reporting requirements for § 641.710(b) through (d), which are hereinafter called the “three new employment outcome measures”.

Earnings Measure

In paragraph (d), renumbered from former paragraph (a)(4), the IFR included a definition for the fourth performance measure, “median earnings of project participants who are in unsubsidized employment during the second quarter after exit from the project.” This performance measure is defined by the following formula: for all

participants who exited and are in unsubsidized employment during the second quarter after the exit quarter, the wage that is at the midpoint (of all the wages) between the highest and lowest wage earned in the second quarter after the exit quarter. This definition aligns with the definition of the corresponding WIOA performance measure, as explained in TEGl 10-16.

The Department did not receive any comments relating to paragraph (d). The final rule adopts the provision as originally issued in the IFR.

Effectiveness Measure

The IFR added a definition in paragraph (e) for the fifth performance measure, “effectiveness in serving employers, host agencies, and project participants.” While this definition is similar to the definition used for this indicator under the 2006 OAA, when it was an additional indicator, the 2016 OAA revised the definition so that it focuses more specifically on effectiveness rather than satisfaction in general. The Department received no comments in response to this definition. The final rule adopts the provision as originally issued in the IFR.

Although the new SCSEP measure of effectiveness parallels the language of the WIOA measure, it differs because it also measures the effectiveness in serving participants and host agencies, as well as employers. The WIOA approach to the measure, which is being piloted until 2019, does not have obvious application to SCSEP’s other two customer groups. As a result, for the SCSEP measure, the Department has decided to continue surveying all three customer groups to assess the effectiveness of the services received as an interim measure at least until the WIOA pilot is complete and a WIOA measure is defined in final form. By using the same definition as that of the

current customer satisfaction measure during this period, the Department will not require SCSEP customers to change their current practices or take on any additional burden.

Other Changes

To conform to the changes outlined above, the IFR renumbered former paragraph (a)(5) to (f). The IFR also renumbered former paragraph (a)(6)(i) through (xiii) to (g)(1) through (13). Renumbered paragraphs (f) and (g) correspond to the sixth and seventh SCSEP performance measures, the definitions of which were unchanged by the IFR. The Department received no comments in response to these technical changes and they are incorporated into this final rule without change.

The 2016 OAA removed the additional indicators of performance previously established in sec. 513(b)(2) of the 2006 OAA. Therefore, the IFR deleted former paragraphs (b)(1) through (3) that contained definitions for the additional indicators. The Department received no comments in response to these deletions.

In addition to the regulatory text changes discussed above, the IFR made various non-substantive changes to the regulations for purposes of correcting typographical errors and improving clarity.

Section 641.720 How will the Department and grantees initially determine and then adjust expected levels of the core performance measures?

The Department received several comments related to this provision. The comments are addressed below in the “Employment Outcome Measure” heading.

The IFR made substantial revisions to this section to align with the 2016 OAA, which in large part mirrors the process for establishing the expected performance levels required by WIOA for the title I core programs, as implemented in 20 CFR 677.170.

The IFR revised paragraph (a), which requires agreement between the grantee and the Department for expected levels of performance for the first 2 program years of the grant, to mirror the statutory language in 2016 OAA sec. 513(a)(2)(B) and (C)(i) and align with WIOA sec. 116(b)(3)(A)(iv)(I). Specifically, paragraph (a) of the IFR stated that each grantee must reach agreement with the Department on levels of performance for each measure listed in § 641.700 for each of the first 2 program years covered by the grant agreement. In reaching the agreement, the grantee and the Department must take into account the expected levels of performance proposed by the grantee and the factors described in paragraph (c) of this section. This paragraph also stated that the levels agreed to will be considered to be the expected levels of performance for the grantee for such program years, and the Department may not award funds under the grant until such agreement is reached. Lastly, this paragraph stated that, at the conclusion of negotiations concerning the performance levels with all grantees, the Department would make available for public review the final negotiated expected levels of performance for each grantee, including any comments submitted by the grantee regarding the grantee's satisfaction with the negotiated levels.

The IFR explained that the Department considers PY 2016 and PY 2017 to be the first 2 program years under the current SCSEP grants (i.e. the four-year grant cycle that began in PY 2016). For national grantees, these were the first 2 program years following

the last (PY 2016) grant competition. For State grantees, these were the first 2 program years of the current (PY 2016) SCSEP State Plans.

The IFR also revised paragraph (b), which required agreement for expected levels of performance for the third and fourth program years of the grant, to mirror the statutory language provided in 2016 OAA sec. 513(a)(2)(B) and (C)(ii) and to align with WIOA sec. 116(b)(3)(A)(iv)(II). The IFR explained, in keeping with paragraph (a) above, that the Department considers PY 2018 and PY 2019 to be the third and fourth program years of the current (PY 2016) SCSEP grant agreements. Specifically, paragraph (b) stated that each grantee must reach agreement with the Department, prior to the third program year covered by the grant agreement, on levels of performance for each measure listed in § 641.700, for each of the third and fourth program years of the grant. This paragraph stated that, in reaching the agreement, the grantee and the Department must take into account the expected levels proposed by the grantee and the factors described in paragraph (c) of this section. This paragraph also stated that the levels agreed to will be considered to be the expected levels of performance for the grantee for those program years. Lastly, like the requirement in paragraph (a), this paragraph stated that, at the conclusion of negotiations concerning the performance levels with all grantees, the Department would make available for public review the final negotiated expected levels of performance for each grantee, including any comments submitted by the grantee regarding the grantee's satisfaction with the negotiated levels.

The IFR added a new paragraph (c), "Factors," to require that the negotiated levels of performance must be based on the three factors listed in paragraphs (c)(1) through (3), as required by OAA sec. 513(a)(2)(D) and to align with WIOA sec.

116(b)(3)(A)(v). Paragraph (c)(1) of the IFR stated that the negotiated levels must take into account how a grantee's levels of performance compare with the expected levels of performance established for other grantees. *See* OAA sec. 513(a)(2)(D)(i) and WIOA sec. 116(b)(3)(A)(v)(I). Paragraph (c)(2) stated that the negotiated levels must be adjusted using an objective statistical model based on the model established by the Department of Labor with the Department of Education in accordance with WIOA sec.

116(b)(3)(A)(viii) and implemented in § 677.170(c). *See* 29 U.S.C. 3141(b)(3)(A)(viii), OAA sec. 513(a)(2)(D)(ii), and WIOA sec. 116(b)(3)(A)(v)(II). The IFR explained that the objective statistical adjustment model is to account for actual economic conditions and characteristics of participants, including the factors required by WIOA sec.

116(b)(3)(A)(v)(II). Paragraph (c)(3) stated that the negotiated levels must take into account the extent to which the levels involved promote continuous improvement in performance accountability on the core measures and ensure optimal return on the investment of Federal funds. *See* OAA sec. 513(a)(2)(D)(iii) and WIOA sec.

116(b)(3)(A)(v)(III). The Department stated it would provide the model to grantees prior to the first negotiations under the new performance measures. The initial revision to the adjustment model was in fact presented to the grantees in a webinar held in May 2018, prior to the start of the negotiation period for PY 2018 and PY 2019.

In paragraph (d), the IFR revised the adjustment requirements contained in former paragraph (b). The IFR replaced the adjustment factors specified in former (b)(1) through (3) with the requirement that the Department will, in accordance with the objective statistical model developed pursuant to paragraph (c)(2), adjust the expected levels of performance for a program year for grantees to reflect the actual economic conditions and

characteristics of participants in the corresponding projects during such program year. The Department made these revisions in the IFR to align the pertinent regulations with OAA sec. 513(a)(2)(E).

For consistency with the 2016 OAA, the IFR removed the language in paragraphs (a)(1) through (3) of § 641.720 that describes the negotiation process in detail. However, as explained in the IFR, the negotiation process that the Department intends to use under these new performance measures is similar to the process that was used prior to the IFR, and includes similar opportunities for input from the grantees:

- In the spring of 2018, the Department analyzed grantees' baseline performance and issued proposed targets and goals for the next 2 program years, PY 2018 and PY 2019, based on the new adjustment factors.
- If a grantee disagreed with those targets and goals, it was allowed to propose its own goals and request to negotiate. No grantee chose to negotiate revisions to the proposed targets and goals.
- Prior to the negotiation, the grantee was required to provide the Department with the data on which the grantee based its proposed goals.
- The grantee and the Department must reach agreement before funds for PY 2018 and PY 2019 can be approved; the agreed-upon goals will be the expected levels of performance upon which the annual evaluation of grantee performance will be based. If the grantee and the Department fail to reach agreement, no funds may be released.
- At the conclusion of the negotiation, the grantee may submit comments regarding the grantee's satisfaction with the negotiated levels of

performance, which the Department will publish, along with the expected levels of performance.

- At the time of the annual evaluation of grantee performance, the expected levels of performance will be adjusted a second time using the latest available adjustment data. The Department will base this evaluation on the newly adjusted levels of performance. See preamble discussion of § 641.740.
- The same process will be followed for subsequent 2-year periods.

In addition to the regulatory text changes discussed above, the IFR made various non-substantive changes for purposes of correcting typographical errors and improving clarity. Those changes have been retained in this final rule.

The new measures implemented by the IFR became effective on January 2, 2018, and the new measures were used during the second half of PY 2017, to negotiate the targets and goals for PYs 2018 and 2019. Performance under the PY 2018 targets and goals will begin to be reported starting July 1, 2018. The SCSEP QPR for PY 2017 will be based on the measures that were in place prior to the IFR, and the QPRs for PY 2018, will be based on the measures established in the IFR (and adopted without change in this final rule).

SCSEP participants who exit during PY 2017 when goals based on the prior measures were still in effect will have their performance reported under the old measures for PY 2017. For this same cohort of exiters, reporting for the core employment outcome measures would also take place throughout PY 2018, under the new measures set forth in the IFR and adopted without change in this final rule, and would be reflected in the

grantees' PY 2018 QPRs. For example, a participant who exits in Quarter 3 of PY 2017 will be included in the previous entered employment measure for Quarter 4 of PY 2017; the grantee will also report this participant in the final rule's new measure of employment in the second quarter after exit in Quarter 1 of PY 2018. Since the underlying data required for the new measures that will be reported in PY 2018 are the same data required for the prior measures, grantees will have to follow different timing rules for the collection of data in PY 2018, but they will not be required to collect any new or additional data beyond the data they would have reported under the old measures. The Department will provide technical assistance and guidance on the new timing and reporting requirements. As with the core measures in use prior to the IFR, the grantees will collect data for the additional measures not carried forward in the IFR and now this final rule throughout PY 2017, and the final QPR for PY 2017 will be the last report of the additional measures.

Employment Outcome Measures

The Department received several comments relating to § 641.720, which are summarized below. The Department considered all of these comments as it finalized the IFR; our responses to each comment are set forth below. This final rule, however, adopts this provision as it was issued in the IFR for reasons discussed below.

A commenter asked for clarification of the calculation of two of the measures: whether exclusions from exit will still be applied and whether the year-to-date measure for median earnings will be based on cumulative data or an average of the quarterly results.

As the Department stated in the IFR, as part of its adoption of the WIA common measures in PY 2007, SCSEP has been following the WIA exclusions. With the 2016 OAA's adoption of the measures consistent with the WIOA primary indicators of performance, SCSEP will examine the revised WIOA exclusions and will issue revised guidance as appropriate. The calculation of the year-to-date performance will continue to be based on cumulative data, as it has always been. The Department will issue guidance on the calculations and timing rules for all the new measures.

One commenter expressed concern that while achieving unsubsidized employment is a key goal of the SCSEP program, in many States and localities there remains a significant gap between the unsubsidized income needed to make ends meet and the possible reduction of public benefits due to achieving employment; that pursuit of improved performance under the new employment outcome measures could result in worsening the quality of life of SCSEP participants rather than improving it; and that the Department should work with States to identify mechanisms to ensure that every participant's life is improved by participation in the SCSEP program. The commenter recommended that the Department allow States to use additional economic factors such as housing availability and other issues related to affordability and cost of living as a part of their outcome measures. The commenter also recommended that the Department work with partners in the Federal Government to evaluate options for a gradual reduction in benefits for individuals as they leave SCSEP instead of the current benefits cliff.

The Department agrees that SCSEP is designed to improve participants' quality of life, including self-sufficiency. In fact, data from the participant customer satisfaction surveys consistently confirm that the program does effectively improve participants'

physical, emotional, and financial quality of life, and that participants who exit from the program are satisfied with SCSEP, even if they do not achieve unsubsidized employment. Section 641.535(a)(3)(iii) of the SCSEP regulations (a section not affected by the IFR or this final rule) recognizes that unsubsidized employment may not be an appropriate goal for all participants and that if it becomes apparent that unsubsidized employment is not feasible, the grantee must modify the participant's IEP and assist the participant with other approaches to self-sufficiency, including transition to other services and programs.

The Department notes also that the goals for the employment outcomes have always been set at a level that recognizes that not all participants will obtain unsubsidized employment and that because seniors generally work part-time hours at lower pay levels, the goals for earnings have also been set at realistic levels. However, the Department disagrees that SCSEP participants in general cannot improve their financial condition through unsubsidized employment. If grantees do their best to help participants find jobs at their highest wage and skill level, many participants can and do achieve economic self-sufficiency.

Finally, the Department has no authority to revise the employment outcome measures required by the 2016 OAA and implemented by the IFR and this final rule. The Department will work with other Federal agencies to explore whether Federal benefits can be reduced gradually when SCSEP participants exit the program for unsubsidized employment. The Department will also consider adding additional economic factors to the statistical adjustment model as suggested by this commenter and other commenters. See discussion of the statistical adjustment model below.

Use of Unemployment Insurance Wage Records

Citing the additional burden the new measures place on grantees to conduct follow-ups and the incompleteness and inaccuracy of case management follow-up, all four commenters urged the Department to allow the use of unemployment insurance wage records to obtain employment outcome data. One commenter also urged the Department to phase out case management follow-up once access to wage records is available.

As the commenters recognized and as stated in the IFR, the Department is investigating access to wage records and hopes to implement aggregate wage record matching for all grantees. However, since wage matching does not provide data on all participants in unsubsidized employment, some supplemental use of case management follow-up would still be required. In addition, the SCSEP program model requires that grantees remain in touch with participants and employers during the four quarters after exit in order to help resolve any problems that may arise and to provide supportive services needed to help participants obtain and retain unsubsidized employment.

The Department will inform the grantees as soon as it ascertains when wage matching will be available to SCSEP and will consult with the grantees about the extent to which follow-up will still be required for both performance reporting and case management. In the meantime, as stated in the IFR, until the access to wage records occurs, all grantees must continue using case management follow-up. Using different methods of data collection would compromise the consistency of the performance measures and would potentially provide an unfair advantage to those grantees with access to wage records. In the meantime, the Department will review the standards for case management follow-up as set forth in various guidance materials, will confer with

grantees about the changes in procedures desired, and will issue revised guidance if appropriate.

Negotiation Process

One commenter provided several comments relating to the negotiation process, including several concerns about the current process. The commenter described challenges that States have reported facing in negotiations on performance levels, including lack of interest from Federal partners, inconsistency regarding negotiations on a regional basis, delay resulting from confusion about what data to provide, and time pressures. The commenter requested that the Department issue guidance to States regarding the types of data the Department would take into account when negotiating performance levels. This commenter also requested that the Department work with other Federal agencies, including the Department of Health and Human Services and the Department of Agriculture, to provide guidance regarding data-sharing between programs such as SNAP, TANF, Unemployment Insurance, and the SCSEP program. Lastly, this commenter recommended that the Department allow for adjustments in the timeline for negotiations and allow for a certain percentage of funds to be released prior to agreement on the goals and/or to provide funds on an interim contingency basis while negotiations are ongoing.

Although the OAA provides that grantees may comment on the negotiation process and that the Department will publish such comments, very few grantees have commented at all since PY 2007, and no grantees have expressed the concerns raised by the commenter. The Department notes that it has been providing annual teleconferences and webinars on the negotiation process each year since PY 2007, and that, during the

negotiations themselves, the Department and its subject matter experts make every effort to identify and help grantees locate data that may be useful to them in their negotiations. The Department thus welcomes the commenter's suggestions for improving the negotiation process and will take them under consideration to the extent it has the authority to do so. The Department agrees that all Federal regions should be engaged in the process and that grantees should be given the support they require to participate meaningfully. The Department will work with the Federal Project Officers to ensure that all grantees are aware of their right to negotiate their goals and have a full opportunity to do so. The Department will also ensure that grantees have information about relevant data sources.

As the commenter recognized, however, the requirement to reach agreement on negotiated levels of performance before the Department may release grant funds is contained in the OAA. The Department has no authority to waive or modify that requirement. The Department recognizes that the time period for negotiation is condensed and that negotiations occur during the same time that grantees are preparing their annual grant applications. The need to obtain the most recent baseline data and economic information to use in the goal setting and adjustment process necessitates this timing. The Department shares the commenter's desire to allow for a more relaxed schedule and will explore the possibility of using a more flexible baseline once the new performance measures have been in place long enough for a new baseline to emerge.

Indicators of Effectiveness

One commenter who addressed the new measure of effectiveness in serving SCSEP's three customer groups pointed out that "effectiveness" is more difficult to

measure than “satisfaction”, which for this commenter is a more concrete measure. The commenter expressed uncertainty about how well the WIOA pilot project to explore measures of effectiveness will translate to SCSEP. This commenter expressed appreciation for the Department’s continuing to utilize the current customer satisfaction measure until a more detailed and rigorous effectiveness measure can be tested and developed. The commenter recommended that the Department create a stakeholder workgroup to collaborate on evaluating the applicability of the WIOA pilot measures to SCSEP, as well as on the modification or development of new measures of effectiveness. A different commenter made a similar recommendation about involving grantees in the exploration and adoption of pilot measures of effectiveness in serving employers.

Another commenter asked whether there would be any changes in the administration, substance, or timeline for the customer satisfaction surveys during the interim period while the WIOA measure of effectiveness is not yet final.

The Department welcomes the suggestions for grantee involvement and reiterates that it will continue to use the current customer satisfaction surveys at least until the WIOA pilot is complete and the new WIOA effectiveness measure is finalized. During this interim period, the Department will explore with grantees, and with its three customer groups, options for best measuring the effectiveness of SCSEP’s services, including the suggestions made by the commenters. The Department will also explore ways to improve the efficiency of the current customer surveys (including the use of online surveys and changes to the administration of the employer survey) and will examine what, if any, new or revised questions would support an index of effectiveness as an alternative to the current index of satisfaction. Until the Office of Management and

Budget (OMB) approves any proposed changes to the content or methods of administration of the surveys, the currently approved surveys will continue to be administered as approved.

Statistical Adjustment Model

One commenter had several comments that relate to the statistical adjustment model, suggesting that the Department recognize differences between employment prospects for an individual residing in a metro or urban area versus one in a rural or frontier area, which would include allowing for different regional measures within the same State; the Department should consider other factors that influence performance, such as access to affordable housing, transportation, and the interplay of various public benefits programs with one another; and whenever possible, the Department should use data on older workers in its calculations. This includes when determining local and regional employment and unemployment figures, among others.

As the Department stated it would do in the preamble to the IFR, the Department is re-examining its current adjustment model to determine if additional aspects of the WIOA model should be incorporated into the SCSEP model or if other changes are appropriate. This consideration includes accounting for the percentage of participants who reside in rural areas, as well as examining an adjustment for the percentage of participants who are ex-offenders (as suggested by a comment made by SSAI). The Department will also explore whether it can obtain current economic data on the senior population as opposed to the general population. The adjustment model applied to the PY 2018 and PY 2019 proposed targets and goals included five new participant

characteristics (including residing in a rural area) and one new economic factor (average weekly wages).

The Department notes that to the greatest extent possible, it uses county-level data in its adjustment model, thereby permitting the adjustment factors to be tailored to the specific service area of each grantee. This approach accounts for regional differences within each grantee's service area, as requested by the commenter. In applying the revised adjustment model, the Department used economic data for the new service areas in which the grantees were located at the time of the goal setting for PY 2018 and PY 2019. *See also* discussion of baseline in § 641.730.

Section 641.730 How will the Department assist grantees in the transition to the new core performance measures?

Although the Department received a few public comments relating to this provision, which are discussed below, the final rule adopts this provision as it was issued in the IFR.

The IFR made several changes in this section to update the Department's transition assistance plans to correspond with the 2016 OAA. As a non-substantive change, the IFR deleted the designation of paragraph (a) and its title "General transition provision," because the IFR deleted paragraph (b), as discussed below. This section was, thus, left with only two sentences.

The first sentence as revised by the IFR stated that, as soon as practicable after January 2, 2018, the Department would determine whether a SCSEP grantee's performance under the measures in effect prior to January 2, 2018, would have met the

expected levels of performance for PY 2018. The second sentence as revised by the IFR stated that if the Department determines that a grantee would have failed to meet those expected levels of performance, then the Department would provide technical assistance to help the grantee to eventually meet the expected levels of performance under the measures in § 641.700, as those measures were revised by the IFR.

The IFR explained that the Department would only make the above determination for the three new employment outcome measures, defined in § 641.710(b) through (d) of the IFR, since no transition is required for the remaining four core measures (three are unchanged, and for the fourth, the “indicators of effectiveness in serving employers, host agencies, and participants,” the IFR stated that the Department would use the same customer satisfaction measure that was used prior to the IFR). In making the determination, the IFR indicated that the Department intended to examine all relevant data, as feasible, in order to provide a crosswalk between the existing measures and the measures implemented in the IFR and to develop a new baseline from which to begin the development of goals for PY 2018 and PY 2019. The IFR promised to provide the analysis to all grantees when it was completed. As set forth above, the Department completed the analysis and cross-walk and provided it to the grantees prior to the development of proposed targets and goals for PY 2018 and PY 2019.

As noted above, the IFR removed paragraph (b) from § 641.730, which provided that PY 2007 would be treated as a baseline year for the most-in-need indicator so that grantees and the Department may collect sufficient data to set a meaningful goal for the measure for PY 2008. The IFR explained that since this provision included dates that have already passed, and given that the Department has documented information on this

measure, this provision is no longer required. Therefore, the IFR deleted it from this section.

Baseline Year for New Employment Outcome Measures

Some comments from some of the organizations that responded to the IFR, like comments received from the stakeholder webinar, expressed concern that the new employment outcome measures are substantially different from the current SCSEP outcome measures and that there is no baseline upon which goals for the new measures can be set. For this reason, some comments suggested that the Department establish a pilot period for the new employment measures during which there would not be any expected levels of performance.

One commenter noted that, as a result of the 2016 national grantee competition, many national grantees operate in service areas different from their prior service areas and that the economic conditions in the new area are different as well. This commenter urged the Department to use a valid baseline rather than old data in establishing goals for the new measures.

The Department recognizes that all three of the new outcome measures use different calculations from the measures that were in place prior to the IFR, and that it will take time to establish a reliable baseline to use in setting goals for these measures. As stated in the preamble to the IFR, to help determine how performance under the prior measures relates to performance under the new measures, the Department reanalyzed prior grantee performance data reported under the prior measures using the calculations required for the new measures and created a crosswalk between the two sets of measures. Because the recalculation proved to be an inadequate basis for setting the PY 2018 and

PY 2019 grantee-expected levels of performance, the Department decided to treat PYs 2018 and 2019 as baseline years for which targets, rather than expected levels of performance, are assigned, and has reserved the right to renegotiate the PY 2019 targets based on actual performance in PY 2018. Moreover, in developing the proposed goals, the Department used the grantees' most recent, reliable baseline performance. Where the recent baseline data were not reliable, the Department used a longer, historical baseline.

Use of the Participant Individual Record Layout (PIRL) and New Case Management System

One commenter requested that the Department offer training on using the PIRL system and raised several questions related to the transition from SPARQ to PIRL, including whether SPARQ data will migrate to PIRL and whether grantees should anticipate a period of dual entry into both systems. The comment further asked that the Department align its technical documentation with the PIRL data field specifications so that grantees may adjust their internal systems to support the new information codes and that the Department provide advanced notice of the new requirements and training on the new system.

The Department has announced that it is developing a new case management system that is designed to replace SPARQ in whole or in part. The Department anticipates that SPARQ data will be migrated to the new system and that grantees will continue to use SPARQ for exited case records until the conclusion of the reporting of the PY 2017 performance data on or around September 30, 2018. Since grantees will report the new performance measures beginning July 1, 2018, SPARQ is being reconfigured to support the new measures; grantees will continue using SPARQ for at least the first

quarter of PY 2018. The Department anticipates that grantees will begin using the new system for active cases in the second or third quarter of PY 2018. The Department has aligned SPARQ data collection for the case management system with the PIRL. The Department will provide details of the new case management system and the transition requirements to the grantees as soon as possible and does anticipate providing training to grantees.

Section 641.740 How will the Department determine whether a grantee fails, meets, or exceeds the expected levels of performance and what will be the consequences of failing to meet expected levels of performance?

The Department did not receive any comments on this section. The final rule adopts the provision as it was issued in the IFR.

Section 641.750 Will there be performance-related incentives?

The Department did not receive any comments on this section. The final rule adopts the provision as it was issued in the IFR.

IV. Regulatory Flexibility Analysis, Executive Order 13272, Small Business

Regulatory Enforcement Fairness Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, requires the Department to evaluate the economic impact of this rule with regard to small entities. The RFA defines small entities to include small businesses, small organizations including not-for-profit organizations, and small governmental jurisdictions. The Department must

determine whether the rule imposes a significant economic impact on a substantial number of such small entities.

There are 75 SCSEP grantees; 50 of these are States and are not small entities as defined by the RFA. Six grantees are governmental jurisdictions other than States (four grantees are territories such as Guam; one grantee is Washington, DC; and another grantee is Puerto Rico). Governmental jurisdictions must have a population of less than 50,000 to qualify as a small entity for RFA purposes and the population of these 6 SCSEP grantees each exceeds 50,000. The remaining 19 grantees are non-profit organizations, which includes some large, national non-profit organizations.

The Department has determined that this final rule will impose no additional burden on small entities affected. Since the alignment with WIOA involved only definitions, the grantees are not required to collect any additional information that may cause a burden increase. In addition, the SCSEP program funds provided to grantees cover all such costs.

The Departments certifies that this final rule does not impose a significant economic impact on a substantial number of small entities.

V. Other Regulatory Considerations

Executive Order 12866

Under Executive Order (E.O.) 12866, OMB's Office of Information and Regulatory Affairs determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive Order and review by OMB. 58 FR 51735 (Oct. 4, 1993). Section 3(f) of E.O. 12866 defines a "significant regulatory action" as an

action that is likely to result in a rule that: (1) has an annual effect on the economy of \$100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order. *Id.* OMB has determined that this final rule is not a “significant regulatory action” under sec. 3(f) of E.O. 12866.

This rule is not an E.O. 13771 regulatory action because this rule is not significant under E.O. 12866.

E.O. 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; it is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

OMB declined review of this final rule because it is not a significant regulatory action.

Paperwork Reduction Act

The purposes of the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*, include minimizing the paperwork burden on affected entities.

A Federal agency may not conduct or sponsor a collection of information unless OMB approves it under the PRA and it displays a currently valid OMB control number. The public is also not required to respond to a collection of information unless it displays a currently valid OMB control number. In addition, notwithstanding any other provisions of law, no person will be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number (44 U.S.C. 3512). OMB has approved the information collections contained in this final rule. See ICR Reference Number 201802-1205-003.

The information collection is summarized as follows.

DOL-Only Performance Accountability, Information, and Reporting System

Agency: DOL-ETA.

Title of Collection: DOL-Only Performance Accountability, Information, and Reporting System.

Type of Review: Revision.

OMB Control Number: 1205-0521.

Affected Public: State, Local, and Tribal Governments; Individuals or Households; and Private Sector—businesses or other for-profits and not-for-profit institutions.

Obligation to Respond: Required to Obtain or Retain Benefits.

Estimated Total Annual Respondents: 17,532,542

Estimated Total Annual Responses: 35,064,970

Estimated Total Annual Burden Hours: 8,938,029

Estimated Total Annual Other Burden Costs: \$6,791,395.

*Regulations sections: § 684.420, § 684.610, § 684.700, § 684.800, § 685.210,
§ 685.400, § 688.420, § 688.610. § 641.700, § 641.710, § 641.720, § 641.730,
§ 641.740, § 641.750*

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995, this rule does not include any Federal mandate that may result in increased expenditures by State, local, and tribal governments in the aggregate of more than \$100 million, or increased expenditures by the private sector of more than \$100 million.

Executive Order 13132

The Department has reviewed this rule in accordance with E.O. 13132 regarding federalism and has determined that it does not have “federalism implications.” The rule does not “have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” This final rule defines and implements performance measures for the SCSEP and while States are SCSEP grantees, this rule merely makes changes to data collection processes that are ongoing. Requiring State grantees to implement these changes does not constitute a “substantial direct effect” on the States, nor will it alter the relationship or responsibilities between the Federal and State governments.

Executive Order 13045

E.O. 13045 concerns the protection of children from environmental health risks and safety risks. This rule defines and details the performance measures used by the SCSEP, a program for older Americans, and has no impact on safety or health risks to children.

Executive Order 13175

E.O. 13175 addresses the unique relationship between the Federal Government and Indian tribal governments. The order requires Federal agencies to take certain actions when regulations have “tribal implications.” Required actions include consulting with Tribal Governments prior to promulgating a regulation with tribal implications and preparing a tribal impact statement. The order defines regulations as having “tribal implications” when they have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

The Department has reviewed this final rule and concludes that it does not have tribal implications. While some tribes may be recipients of national SCSEP grantees, this rule will not have a substantial direct effect on those tribes because, as outlined in the RFA section of the preamble above, there are only small cost increases associated with implementing this regulation. This regulation does not affect the relationship between the Federal Government and the tribes, nor does it affect the distribution of power and responsibilities between the Federal Government and Tribal Governments. Accordingly, we conclude that this rule does not have tribal implications for the purposes of E.O. 13175.

Environmental Impact Assessment

The Department has reviewed this rule in accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*), the regulations of the Council on Environmental Quality (40 CFR part 1500), and the Department's NEPA procedures (29 CFR part 11). The rule will not have a significant impact on the quality of the human environment and, thus, the Department has not prepared an environmental assessment or an environmental impact statement.

Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105-277, 112 Stat. 2681), requires the Department to assess the impact of this rule on family well-being. A rule that is determined to have a negative effect on families must be supported with an adequate rationale.

The Department has assessed this rule and determines that it will not have a negative effect on families. Indeed, the SCSEP strengthens families by providing job training and support services to low-income older Americans so that they can obtain fruitful employment and enjoy increased economic self-sufficiency.

Privacy Act

The Privacy Act of 1974, 5 U.S.C. 552a, provides safeguards to individuals concerning their personal information that the Government collects. The Act requires certain actions by an agency that collects information on individuals when that information contains personally identifiable information such as Social Security Numbers (SSNs) or names. Because SCSEP participant records are maintained by SSN, the Act applies here.

A key concern is for the protection of participant SSNs. Grantees must collect the SSN in order to pay participants properly for their community service work in host agencies. When grantees send participant files to the Department for aggregation, the transmittal is protected by secure encryption. When participant files are retrieved within the internet-based SCSEP data management system of SPARQ, only the last four digits of the SSN are displayed. Any information that is shared or made public is aggregated by grantee and does not reveal personal information on specific individuals.

The Department works diligently to ensure the highest level of security whenever personally identifiable information is stored or transmitted. All contractors that have access to individually identifying information are required to provide assurances that they will respect and protect the confidentiality of the data. ETA's Office of Performance and Technology has been an active participant in the development and approval of data security measures – especially as they apply to SPARQ.

In addition to the above, the Department provides a Privacy Act Statement to grantees for distribution to all participants. The Department advised grantees of the requirement in ETA's Older Worker Bulletin OWB-04-06. Participants receive this information when they meet with a caseworker or intake counselor. When the Department monitors the programs, implementation of this term is included in the review.

Executive Order 12630

This rule is not subject to E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, because it does not involve implementation of a policy with takings implications.

Executive Order 12988

This regulation has been drafted and reviewed in accordance with E.O. 12988, Civil Justice Reform, and will not unduly burden the Federal court system. The Department has written the regulation so as to minimize litigation and provide a clear legal standard for affected conduct, and the Department has reviewed the regulation carefully to eliminate drafting errors and ambiguities.

Executive Order 13211

This rule is not subject to E.O. 13211, because it will not have a significant adverse effect on the supply, distribution, or use of energy.

Plain Language

The Department drafted this IFR in plain language.

List of Subjects in 20 CFR Part 641

Aged, Employment, Government contracts, Grant programs-labor, Privacy, Reporting and recordkeeping requirements.

Accordingly, the IFR amending 20 CFR part 641 which was published at 82 FR 56869 on December 1, 2017, is adopted as final without change.

Rosemary Lahasky,
Deputy Assistant Secretary for Employment and Training, Labor.
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