



Federal Register

**Friday,
July 11, 2003**

Part IV

Department of Labor

Office of the Secretary

29 CFR Part 35

**Nondiscrimination on the Basis of Age in
Programs or Activities Receiving Federal
Financial Assistance From the
Department of Labor; Proposed Rule**

DEPARTMENT OF LABOR**Office of the Secretary****29 CFR Part 35**

RIN 1291-AA21

Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance From the Department of Labor**AGENCY:** Office of the Secretary, Labor.**ACTION:** Notice of proposed rulemaking.

SUMMARY: This Notice of Proposed Rulemaking sets out the Department of Labor's ("DOL" or "the Department") proposed rules for implementing the Age Discrimination Act of 1975, as amended ("Age Act"). The Age Act prohibits discrimination on the basis of age in programs or activities receiving Federal financial assistance. The Age Act also contains certain exceptions that permit, under limited circumstances, use of age distinctions or factors other than age that might have a disproportionate effect on the basis of age. The Age Act applies to persons of all ages.

DATES: Comments must be received by September 9, 2003.

ADDRESSES: Address all comments about this proposed rule to Annabelle T. Lockhart, Director, Civil Rights Center ("CRC"), Frances Perkins Building, 200 Constitution Ave., NW., Room N-4123, Washington, DC 20210. Brief comments (maximum five pages) may be submitted by facsimile machine (FAX) to 202/693-6505. Comments by electronic mail may be sent to CivilRightsCenter@dol.gov. Receipt of submissions, whether by mail, FAX transmittal or by e-mail, will not be acknowledged; however, the sender may request confirmation that a submission has been received, by telephoning the Civil Rights Center at (202) 693-6500 (VOICE) or (202) 693-6515, (800) 326-2577 (TTY/TDD).

Comments that CRC receives will be available for public inspection at DOL during normal business hours. Appropriate aids are available on request to persons needing assistance to review the comments. In addition, copies of this proposed rule are available, upon request, in large print and electronic file on computer disk. Other formats will be considered upon request. To schedule an appointment to review the comments and/or to obtain the proposed rule in an alternate format, contact CRC at the telephone number or address listed above.

FOR FURTHER INFORMATION CONTACT:

Annabelle T. Lockhart, Director, Civil

Rights Center (CRC), Frances Perkins Building, 200 Constitution Ave. NW., Room N-4123, Washington, DC 20210, CivilRightsCenter@dol.gov, (202) 693-6500 (VOICE) or (202) 693-6515, (800) 326-2577 (TTY/TDD).

SUPPLEMENTARY INFORMATION:**I. Background Information**

The Age Discrimination Act of 1975, 42 U.S.C. 6101 *et seq.*, prohibits discrimination on the basis of age in programs or activities receiving Federal financial assistance. The Age Act applies to discrimination at all age levels. The Age Act also contains specific exceptions that permit the use of certain age distinctions and factors other than age that meet the Age Act's requirements.

The Age Act required the former Department of Health, Education, and Welfare (HEW) to issue general, government-wide regulations setting standards to be followed by all Federal agencies implementing the Age Act. These government-wide regulations, which were issued on June 12, 1979 (45 CFR part 90; 44 FR 33768), and became effective on July 1, 1979, require each Federal agency providing financial assistance to any program or activity to publish final regulations implementing the Age Act, and to submit final agency regulations to HEW (now the Department of Health and Human Services (HHS)), before publication in the **Federal Register**. (See 45 CFR 90.31.)

II. Rulemaking History

On December 29, 1998, DOL published its first NPRM to implement the Age Act. See 63 FR 71714 (1998). No comments were received by DOL regarding the proposal. A second NPRM (NPRM II) was published on June 10, 2002, to address changes in statutory and case law that occurred subsequent to publication of the first NPRM. See 67 FR 39830 (2002). No comments were received by DOL regarding the second proposal.

As part of the clearance process required by the government-wide Age Act regulations, DOL submitted its draft final rule to the Department of Health and Human Services (HHS) for review prior to publication as required by 45 CFR 90.31(c). HHS raised concerns about consistency between the draft DOL final Age Act rule and the government-wide Age Act regulations, as well as a few additional minor matters. The purpose of this NPRM is to address the HHS concerns and to propose minor technical corrections to the rule. These changes are discussed

below in the section-by-section review of the proposed rule.

III. Section-by-Section Review of the NPRM

The NPRM published today is identical to NPRM II with five exceptions. The proposed language in sections 35.2(b), 35.3, 35.13, 35.15 and 35.37 is different from the language proposed for these sections in NPRM II. The differences between today's proposal and NPRM II are discussed below. Individuals interested in information about those sections of the proposed rule not discussed below are referred to the December 29, 1998, NPRM (63 FR 71714) and the June 10, 2002, NPRM II (67 FR 39830) for additional information.

Section 35.2(b)

NPRM II proposed that Section 35.2(b) state that "[c]ompliance with Section 188 of the Workforce Investment Act of 1998 (WIA) (29 U.S.C. 2938) and implementing regulations at 29 CFR part 37, will satisfy the obligations of recipients of Federal financial assistance from DOL under WIA to comply with this part. CRC will use the legal standards in Subpart B of this part when evaluating whether a WIA recipient has engaged in unlawful age discrimination." Today the Department is proposing not to include this language in the rule.

Compliance with the implementing regulations for section 188 of WIA will not satisfy recipient obligations under the Age Act. The definition of "WIA Title I-funded program or activity" found in the WIA regulations is not consistent with the definition of "program or activity" found in the Age Act, which was amended by the Civil Rights Restoration Act of 1987 (CRRRA). The effect of the CRRRA on the Age Act was to define "program or activity" to encompass all parts of the recipient's operations; *i.e.*, the scope of coverage is institution-wide. The regulation implementing section 188 of WIA does not contain as broad a scope of coverage. The scope of coverage of WIA is limited to the specific program or activity that receives financial assistance and not the entire institution. Additionally, the regulation implementing section 188 of WIA does not contain the exemptions to the rules against age discrimination that are part of the government-wide rule at 45 CFR 91.13 and 91.14. Accordingly, to make the Department's Age Act rule correspond to the government-wide Age Act rule, the Department proposes to delete section 35.2(b) and renumber this section.

Section 35.3

Section 35.3 would contain definitions applicable to the Age Act regulations. The definition for “program or activity” has been modified in two respects in today’s NPRM: the modified definition contains an updated statutory citation to the definition of “local educational agency,” and the definition is now proposed to match the definition used in the Civil Rights Restoration Act of 1987. As discussed above, the CRRA amended the definition of “program or activity” in the Age Act to encompass all parts of the recipient’s operations. The definition proposed today is the same as the definition proposed for the Department of Justice common rule which will amend the definition of “program or activity” for various Executive branch agencies’ Title VI, Section 504 of the Rehabilitation Act, and Age Act regulations. (For more information on this change, see 65 FR 76460, December 6, 2000.)

Section 35.13

Section 35.13 is proposed to contain certain exemptions to the rules against age discrimination. Today’s proposal differs from NPRM II in that the word “reasonable” has been deleted from the text of this section to conform its language to that of the government-wide Age Act regulation.

Section 35.15

Section 35.15 is proposed to allow recipients to take steps to overcome the effects of conditions that result in a limited participation on the basis of age. Today’s NPRM proposes to revise the title of this section and to clarify that this section does not allow recipients to take actions that would permit any otherwise prohibited use of age distinctions in any program or activity receiving Federal financial assistance from DOL.

Section 35.37

In NPRM II DOL proposed to use its procedures for conducting hearings, issuing decisions, and conducting post-termination proceedings under Section 188 of the Workforce Investment Act to conduct such proceedings under the Age Act as well. Differences between the Age Act and WIA coverage, discussed above, make it more appropriate to propose use of DOL Title VI enforcement procedures for Age Act cases. Section 37.37 of today’s proposal would accomplish that end.

IV. Regulatory Procedures*Executive Order 12866*

These proposed Age Discrimination Act regulations have been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. The Department has determined that this proposed rule is a “significant regulatory action” under Executive Order 12866, section 3(f), Regulatory Planning and Review, yet is not economically significant as defined in section 3(f)(1), and, therefore, the information enumerated in section 6(a)(3)(C) of the order is not required. Pursuant to Executive Order 12866, this proposed rule has been reviewed by the Office of Management and Budget.

Unfunded Mandates Reform

Executive Order 12875—This proposed rule would not create an unfunded Federal mandate on any State, local or tribal government.

Unfunded Mandates Reform Act of 1995—This proposed rule would not include any Federal mandate that might result in increased expenditures by State, local and tribal governments, in the aggregate, of \$100 million or more, or increased expenditures by the private sector of \$100 million or more.

Regulatory Flexibility Act

This proposed rule clarifies existing requirements for entities receiving financial assistance from DOL. The requirements prohibiting age discrimination by recipients of Federal financial assistance that are in the Age Act and the government-wide regulations have been in effect since 1979. In addition, entities receiving financial assistance from DOL under WIA have been expressly informed of their obligations to comply with the Age Act by both WIA statutory language and by the DOL regulations implementing the civil rights provisions of WIA. Because this proposed rule will not substantively change existing obligations on recipients, but merely clarifies such duties, the Department certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities. Consequently, a regulatory flexibility analysis is not required.

Paperwork Reduction Act

Section 35.31(c)(1) of the proposed rule allows a complainant to file a complaint by submitting a written statement that identifies the parties involved and the date the complainant first had knowledge of the alleged violation, describes generally the action or practice complained of, and is signed

by the complainant. Section 35.40(b)(3)(iii) of the proposed rule requires a complainant to give 30 days notice to the Secretary of Labor, the Secretary of Health and Human Services, the Attorney General of the United States, and the recipient, before commencing a civil action in the event that CRC issues a finding in favor of the recipient or fails to make a finding within 180 days. Based on the history of the program, the Department projects that fewer than 9 persons per year will either file a complaint with CRC or give notice that a civil action is being pursued. Accordingly, the Department believes the Paperwork Reduction Act is inapplicable to this rule. The Department invites the public to comment on its Paperwork Reduction Act analysis.

Executive Order 13132

This proposed rule has been reviewed in accordance with Executive Order 13132 regarding Federalism. This proposed rule will 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. Therefore, the requirements of section 6 of Executive Order 13132 do not apply to this rule.

List of Subjects in 29 CFR Part 35

Administrative practice and procedure, Age discrimination, Children, Civil rights, Elderly, Grant programs—Labor.

Signed at Washington, DC this 7th day of July, 2003.

Elaine L. Chao,
Secretary of Labor.

For the reasons set out in the preamble, 29 CFR subtitle A is proposed to be amended by adding a new part 35 to read as follows:

PART 35—NONDISCRIMINATION ON THE BASIS OF AGE IN PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE FROM THE DEPARTMENT OF LABOR

Subpart A—General

Sec.

35.1 What is the purpose of the Department of Labor (DOL) age discrimination regulations?

35.2 To what programs or activities do these regulations apply?

35.3 What definitions apply to these regulations?

Subpart B—Standards for Determining Age Discrimination

35.10 Rules against age discrimination.

- 35.11 Definitions of the terms "normal operation" and "statutory objective."
 35.12 Exceptions to the rules against age discrimination: normal operation or statutory objective of any program or activity.
 35.13 Exceptions to the rules against age discrimination: reasonable factors other than age.
 35.14 Burden of proof.
 35.15 Remedial action.
 35.16 Special benefits for children and the elderly.
 35.17 Age distinctions in DOL regulations.

Subpart C—Duties of DOL Recipients

- 35.20 General responsibilities.
 35.21 Recipient responsibility to provide notice.
 35.22 Information requirements.
 35.23 Assurances required.
 35.24 Designation of responsible employee.
 35.25 Complaint procedures.
 35.26 Recipient assessment of age distinctions.

Subpart D—Investigation, Conciliation, and Enforcement Procedures

- 35.30 Compliance reviews.
 35.31 Complaints.
 35.32 Mediation.
 35.33 Investigations.
 35.34 Effect of agreements on enforcement effort.
 35.35 Prohibition against intimidation or retaliation.
 35.36 Enforcement.
 35.37 Hearings, decisions, and post-termination proceedings.
 35.38 Procedure for disbursal of funds to an alternate recipient.
 35.39 Remedial action by recipient.
 35.40 Exhaustion of administrative remedies.

Authority: 42 U.S.C. 6101 *et seq.*; 45 CFR part 90.

Subpart A—General

§ 35.1 What is the purpose of the Department of Labor (DOL) age discrimination regulations?

The purpose of this part is to set out the DOL rules for implementing the Age Discrimination Act of 1975, as amended. The Act prohibits discrimination on the basis of age by recipients of Federal financial assistance and in federally assisted programs or activities, but permits the use of certain age distinctions and factors other than age that meet the requirements of the Act and this part.

§ 35.2 To what programs or activities do these regulations apply?

(a) *Application.* This part applies to any program or activity that receives Federal financial assistance, directly or indirectly, from DOL.

(b) *Limitation of application.* This part does not apply to:

(1) An age distinction contained in that part of a Federal, State, or local

statute or ordinance adopted by an elected, general purpose legislative body that:

- (i) Provides persons with any benefits or assistance based on age; or
- (ii) Establishes criteria for participation in age-related terms; or
- (iii) Describes intended beneficiaries or target groups in age-related terms.

(2) Any employment practice of any employer, employment agency, labor organization, or any labor-management joint apprentice training, except any program or activity receiving Federal financial assistance under the Workforce Investment Act of 1998 (29 U.S.C. 2801 *et seq.*).

§ 35.3 What definitions apply to these regulations?

As used in this part:

Act means the Age Discrimination Act of 1975, as amended (42 U.S.C. 6101 *et seq.*).

Action means any act, activity, policy, rule, standard, or method of administration, or the use of any policy, rule, standard, or method of administration.

Age means how old a person is, or the number of years from the date of a person's birth.

Age distinction means any action using age or an age-related term.

Age-related term means a word or words that necessarily imply a particular age or range of ages (e.g., "child," "adults," "older persons," but not "student").

Applicant for Federal financial assistance means the individual or entity submitting an application, request, or plan required to be approved by a DOL official or recipient as a condition to becoming a recipient or subrecipient.

Beneficiary means the person(s) intended by Congress to receive benefits or services from a recipient of Federal financial assistance from DOL.

CRC means the Civil Rights Center, Office of the Assistant Secretary for Administration and Management, United States Department of Labor.

Director means the Director of CRC.

Department means the United States Department of Labor.

DOL means the United States Department of Labor.

Federal financial assistance means any grant, entitlement, loan, cooperative agreement, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which DOL provides or otherwise makes available assistance in the form of:

- (1) Funds;
- (2) Services of Federal personnel; or

(3) Real and personal property or any interest in or use of property, including:

- (i) Transfers or leases of property for less than fair market value or for reduced consideration; and
- (ii) Proceeds from a subsequent transfer or lease of property if the Federal share of its fair market value is not returned to the Federal Government.

Program or activity means all of the operations of any entity described in paragraphs (1) through (4) of this section, any part of which is extended Federal financial assistance:

(1)(i) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(ii) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(i) A college, university, or other postsecondary institution, or a public system of higher education; or

(ii) A local educational agency (as defined in section 7801 of title 20), system of vocational education, or other school system;

(3)(i) An entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) Any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3) of this section.

Recipient means any State or its political subdivision, any instrumentalality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance from DOL is extended, directly or through another recipient, but excludes the ultimate beneficiary of the assistance. Recipient includes any subrecipient to which a recipient extends or passes on Federal

financial assistance, and any successor, assignee, or transferee of a recipient.

Secretary means the Secretary of Labor, or his or her designee.

State means the individual States of the United States, the Commonwealth of Puerto Rico, the District of Columbia, Guam, the Virgin Islands, American Samoa, Wake Island and the Commonwealth of the Northern Mariana Islands.

Subpart B—Standards for Determining Age Discrimination

§ 35.10 Rules against age discrimination.

The rules stated in this section are subject to the exceptions contained in §§ 35.12 and 35.13.

(a) *General rule.* No person in the United States shall be, on the basis of age, excluded from participation in, denied the benefits of or subjected to discrimination under, any program or activity receiving Federal financial assistance from DOL.

(b) *Specific rules.* A recipient may not, directly or through contractual, licensing, or other arrangements, use age distinctions or take any other actions that have the effect of, on the basis of age:

(1) excluding individuals from, denying them the benefits of, or subjecting them to discrimination under, a program or activity receiving Federal financial assistance from DOL; or

(2) denying or limiting individuals in their opportunity to participate in any program or activity receiving Federal financial assistance from DOL.

(c) *Other forms of age discrimination.* The listing of specific forms of age discrimination in paragraph (b) of this section is not exhaustive and does not imply that any other form of age discrimination is permitted.

§ 35.11 Definitions of the terms “normal operation” and “statutory objective.”

As used in this part, the term:

(a) *Normal operation* means the operation of a program or activity without significant changes that would impair the ability of the program or activity to meet its objectives.

(b) *Statutory objective* means any purpose of a program or activity expressly stated in any Federal statute, State statute, or local statute or ordinance adopted by an elected, general purpose legislative body.

§ 35.12 Exceptions to the rules against age discrimination: normal operation or statutory objective of any program or activity.

A recipient is permitted to take an action otherwise prohibited by § 35.10 if

the action reasonably takes age into account as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity. An action reasonably takes age into account as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity if:

(a) Age is used as a measure or approximation of one or more other characteristics;

(b) The other characteristic(s) must be measured or approximated in order for the normal operation of the program or activity to continue, or to achieve any statutory objective of the program or activity;

(c) The other characteristic(s) can reasonably be measured or approximated by the use of age; and

(d) The other characteristic(s) are impractical to measure directly on an individual basis.

§ 35.13 Exceptions to the rules against age discrimination: reasonable factors other than age.

A recipient is permitted to take an action otherwise prohibited by § 35.10, if that action is based on a factor other than age, even though the action may have a disproportionate effect on persons of different ages. An action is based on a factor other than age only if the factor bears a direct and substantial relationship to the normal operation of the program or activity or to the achievement of a statutory objective.

§ 35.14 Burden of proof.

The recipient has the burden of proving that an age distinction or other action falls within the exceptions outlined in §§ 35.12 and 35.13.

§ 35.15 Remedial action.

Even in the absence of a finding of discrimination, a recipient, in administering a program, may take steps to overcome the effects of conditions that resulted in a limited participation on the basis of age. Nothing in this section will permit any otherwise prohibited use of age distinctions that have the effect of excluding individuals from, denying them benefits of, subjecting them to discrimination under, or limiting them in their opportunity to participate in any program or activity receiving federal financial assistance from DOL.

§ 35.16 Special benefits for children and the elderly.

If a recipient is operating a program or activity that provides special benefits to the elderly or to children, the use of such age distinctions is presumed to be necessary to the normal operation of the

program or activity, notwithstanding the provisions of § 35.12.

§ 35.17 Age distinctions in DOL regulations.

Any age distinction in regulations issued by DOL is presumed to be necessary to the achievement of a statutory objective of the program or activity to which the regulations apply, notwithstanding the provisions of § 35.12.

Subpart C—Duties of DOL Recipients

§ 35.20 General responsibilities.

Each DOL recipient has primary responsibility for ensuring that its programs or activities are in compliance with the Act and this part and for taking appropriate steps to correct any violations of the Act or this part.

§ 35.21 Recipient responsibility to provide notice.

(a) *Notice to other recipients.* Where a recipient of Federal financial assistance from DOL passes on funds to other recipients, that recipient shall notify such other recipients of their obligations under the Act and this part.

(b) *Notice to beneficiaries.* A recipient shall notify its beneficiaries about the provisions of the Act and this part and their applicability to specific programs or activities. The notification must also identify the responsible employee designated under § 35.24 by name or title, address, and telephone number.

§ 35.22 Information requirements.

Each recipient shall:

(a) Keep such records as CRC determines are necessary to ascertain whether the recipient is complying with the Act and this part;

(b) Upon request, provide CRC with such information and reports as the Director determines are necessary to ascertain whether the recipient is complying with the Act and this part; and

(c) Permit reasonable access by CRC to books, records, accounts, reports, other recipient facilities and other sources of information to the extent CRC determines is necessary to ascertain whether the recipient is complying with the Act and this part.

§ 35.23 Assurances required.

A recipient or applicant for Federal financial assistance from DOL shall sign a written assurance, in a form specified by DOL, that the program or activity will be operated in compliance with the Act and this part. In subsequent applications to DOL, an applicant may incorporate this assurance by reference.

§ 35.24 Designation of responsible employee.

Each recipient shall designate at least one employee to coordinate its compliance activities under the Act and this part, including investigation of any complaints that the recipient receives alleging any actions that are prohibited by the Act or this part.

§ 35.25 Complaint procedures.

Each recipient shall adopt and publish complaint procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by the Act or this part.

§ 35.26 Recipient assessment of age distinctions.

(a) In order to assess a recipient's compliance with the Act and this part, as part of a compliance or monitoring review, or a complaint investigation, CRC may require a recipient employing the equivalent of 15 or more full-time employees to complete a written self-evaluation, in a manner specified by CRC, of any age distinction imposed in its program or activity receiving Federal financial assistance from DOL.

(b) Whenever such an assessment indicates a violation of the Act or this part, the recipient shall take prompt and appropriate corrective action.

Subpart D—Investigation, Conciliation, and Enforcement Procedures**§ 35.30 Compliance reviews.**

(a) CRC may conduct such compliance reviews, pre-award reviews, and other similar procedures as permit CRC to investigate and correct violations of the Act and this part, irrespective of whether a complaint has been filed against a recipient. Such reviews may be as comprehensive as necessary to determine whether a violation of the Act or this part has occurred.

(b) Where a review conducted pursuant to paragraph (a) of this section indicates a violation of the Act or this part, CRC will attempt to achieve voluntary compliance. If voluntary compliance cannot be achieved, CRC will begin enforcement proceedings, as described in § 35.36.

§ 35.31 Complaints.

(a) *Who may file.* Any person, whether individually, as a member of a class, or on behalf of others, may file a complaint with CRC alleging discrimination in violation of the Act or these regulations, based on an action occurring on or after July 1, 1979.

(b) *When to file.* A complainant must file a complaint within 180 days from the date the complainant first had

knowledge of the alleged act of discrimination. The Director may extend this time limit for good cause shown.

(c) *Complaint procedure.* A complaint is considered to be complete on the date CRC receives all the information necessary to process it, as provided in paragraph (c)(1) of this section. CRC will:

(1) Accept as a complete complaint any written statement that identifies the parties involved and the date the complainant first had knowledge of the alleged violation, describes generally the action or practice complained of, and is signed by the complainant;

(2) Freely permit a complainant to add information to the complaint to meet the requirements of a complete complaint;

(3) Notify the complainant and the recipient of their rights and obligations under the complaint procedure, including the right to have a representative at all stages of the complaint procedure; and

(4) Notify the complainant and the recipient (or their representatives) of their right to contact CRC for information and assistance regarding the complaint resolution process.

(d) *No jurisdiction.* CRC will return to the complainant any complaint outside the jurisdiction of this part, with a statement indicating why there is no jurisdiction.

§ 35.32 Mediation.

(a) *Referral to mediation.* CRC will promptly refer to the Federal Mediation and Conciliation Service or the mediation agency designated by the Secretary of Health and Human Services under 45 CFR part 90, all complaints that:

(1) Fall within the jurisdiction of the Act or this part, unless the age distinction complained of is clearly within an exemption under § 35.2(c); and

(2) Contain all information necessary for further processing, as provided in § 35.31(c)(1).

(b) *Participation in mediation process.* Both the complainant and the recipient shall participate in the mediation process to the extent necessary to reach an agreement or to make an informed judgment that an agreement is not possible. The recipient and the complainant do not need to meet with the mediator at the same time, and a meeting may be conducted by telephone or other means of effective dialogue if a personal meeting between the party and the mediator is impractical.

(c) *When agreement is reached.* If the complainant and the recipient reach an

agreement, the mediator shall prepare a written statement of the agreement, have the complainant and recipient sign it, and send a copy of the agreement to CRC.

(d) *Confidentiality.* The mediator shall protect the confidentiality of all information obtained in the course of the mediation process. No mediator may testify in any adjudicative proceeding, produce any document, or otherwise disclose any information obtained in the course of the mediation process, unless the mediator has obtained prior approval of the head of the mediation agency.

(e) *Maximum time period for mediation.* The mediation shall proceed for a maximum of 60 days after a complaint is filed with CRC. This 60-day period may be extended by the mediator, with the concurrence of the Director, for not more than 30 days, if the mediator determines that agreement is likely to be reached during the extended period. In the absence of such an extension, mediation ends if:

(1) 60 days elapse from the time the complaint is filed; or

(2) prior to the end of the 60-day period, either

(i) an agreement is reached; or

(ii) the mediator determines that agreement cannot be reached.

(f) *Unresolved complaints.* The mediator shall return unresolved complaints to CRC.

§ 35.33 Investigations.

(a) *Initial investigation.* CRC will investigate complaints that are unresolved after mediation or reopened because the mediation agreement has been violated.

(1) As part of the initial investigation, CRC will use informal fact-finding methods, including joint or separate discussions with the complainant and recipient to establish the facts and, if possible, resolve the complaint to the mutual satisfaction of the parties. CRC may seek the assistance of any involved State, local, or other Federal agency.

(2) Where agreement between the parties has been reached pursuant to paragraph (a)(1) of this section, the agreement shall be put in writing by DOL, and signed by the parties and an authorized official of DOL.

(b) *Formal findings, conciliation, and hearing.* If CRC cannot resolve the complaint during the early stages of the investigation, CRC will complete the investigation of the complaint and make formal findings. If the investigation indicates a violation of the Act or this part, CRC will attempt to achieve voluntary compliance. If CRC cannot obtain voluntary compliance, CRC will

begin appropriate enforcement action, as provided in § 35.36.

§ 35.34 Effect of agreements on enforcement effort.

An agreement reached pursuant to either § 35.32(c) or § 35.33(a) shall have no effect on the operation of any other enforcement effort of DOL, such as compliance reviews and investigations of other complaints, including those against the recipient.

§ 35.35 Prohibition against intimidation or retaliation.

A recipient may not engage in acts of intimidation or retaliation against any person who:

(a) Attempts to assert a right protected by the Act or this part; or

(b) Cooperates in any mediation, investigation, hearing or other part of CRC's investigation, conciliation, and enforcement process.

§ 35.36 Enforcement.

(a) DOL may enforce the Act and this part through:

(1) Termination of, or refusal to grant or continue, a recipient's Federal financial assistance from DOL under the program or activity in which the recipient has violated the Act or this part. Such enforcement action may be taken only after a recipient has had an opportunity for a hearing on the record before an administrative law judge.

(2) Any other means authorized by law, including, but not limited to:

(i) Referral to the Department of Justice for proceedings to enforce any rights of the United States or obligation of the recipient created by the Act or this part; or

(ii) Use of any requirement of, or referral to, any Federal, State, or local government agency that will have the effect of correcting a violation of the Act or this part.

(b) Any termination or refusal under paragraph (a)(1) of this section will be limited to the particular recipient and to the particular program or activity found to be in violation of the Act or this part. A finding with respect to a program or activity that does not receive Federal financial assistance from DOL will not form any part of the basis for termination or refusal.

(c) No action may be taken under paragraph (a) of this section until:

(1) DOL has advised the recipient of its failure to comply with the Act or with this part and has determined that

voluntary compliance cannot be obtained; and

(2) Thirty days have elapsed since DOL sent a written report of the circumstances and grounds of the action to the committees of Congress having jurisdiction over the program or activity involved.

(d) *Deferral.* DOL may defer granting new Federal financial assistance to a recipient when termination proceedings under paragraph (a)(1) of this section are initiated.

(1) New Federal financial assistance from DOL includes all assistance for which DOL requires an application or approval, including renewal or continuation of existing activities, or authorization of new activities, during the deferral period. New Federal financial assistance from DOL does not include increases in funding as a result of changed computation of formula awards or assistance approved prior to the initiation of a hearing under paragraph (a)(1) of this section.

(2) DOL may not defer a grant until the recipient has received notice of an opportunity for a hearing under paragraph (a)(1) of this section. A deferral may not continue for more than 60 days unless a hearing has begun within the 60-day period or the recipient and DOL have mutually agreed to extend the time for beginning the hearing. If the hearing does not result in a finding against the recipient, the deferral may not continue for more than 30 days after the close of the hearing.

§ 35.37 Hearings, decisions, and post-termination proceedings.

Certain DOL procedural provisions applicable to Title VI of the Civil Rights Act of 1964 apply to DOL enforcement of these regulations. They are found at 29 CFR 31.9 through 31.11.

§ 35.38 Procedure for disbursement of funds to an alternate recipient.

(a) If funds are withheld from a recipient under this part, the Secretary may disburse the funds withheld directly to an alternate recipient.

(b) The Secretary will require any alternate recipient to demonstrate:

(1) The ability to comply with the Act and this part; and

(2) The ability to achieve the goals of the Federal statute authorizing the Federal financial assistance.

§ 35.39 Remedial action by recipient.

Where CRC finds discrimination on the basis of age in violation of this Act

or this part, the recipient shall take any remedial action that CRC deems necessary to overcome the effects of the discrimination. In addition, if a recipient funds or otherwise exercises control over another recipient that has discriminated, both recipients may be required to take remedial action.

§ 35.40 Exhaustion of administrative remedies.

(a) A complainant may file a civil action under the Act following the exhaustion of administrative remedies. Administrative remedies are exhausted if:

(1) One hundred eighty days have elapsed since the complainant filed the complaint with CRC, and CRC has made no finding with regard to the complaint; or

(2) CRC issues any finding in favor of the recipient.

(b) If CRC fails to make a finding within 180 days, or issues a finding in favor of the recipient, CRC will promptly:

(1) Notify the complainant;

(2) Advise the complainant of his or her right to bring a civil action for injunctive relief; and

(3) Inform the complainant that:

(i) The complainant may bring a civil action only in a United States district court for the district in which the recipient is found or transacts business;

(ii) A complainant who prevails in a civil action has the right to be awarded the costs of the action, including reasonable attorney's fees, but that the complainant must demand these costs in the complaint filed with the court;

(iii) Before commencing the action, the complainant must give 30 days notice by registered mail to the Secretary, the Secretary of Health and Human Services, the Attorney General of the United States, and the recipient;

(iv) The notice required by paragraph (b)(3)(iii) of this section must state the alleged violation of the Act, the relief requested, the court in which the complainant is bringing the action, and whether or not attorney's fees are demanded in the event that the complainant prevails; and

(v) The complainant may not bring an action if the same alleged violation of the Act by the same recipient is the subject of a pending action in any court of the United States.

[FR Doc. 03-17591 Filed 7-10-03; 8:45 am]

BILLING CODE 4510-23-P