

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

RIN 1291-AA21

Nondiscrimination on the Basis of Age in Programs and Activities Receiving Federal Financial Assistance From the Department of Labor

AGENCY: Office of the Secretary, Labor.

ACTION: Proposed rule.

SUMMARY: This proposed rule sets out the Department of Labor (DOL) rules for implementing the Age Discrimination Act of 1975, as amended (the Act). The Act prohibits discrimination on the basis of age in programs and activities receiving Federal financial assistance. The Act, which applies to persons of all ages, permits the use of certain age distinctions and factors other than age that meet the Act's requirements.

Under the Act and the general, government-wide regulations (codified at 45 CFR part 90), all agencies that extend Federal financial assistance are required to issue agency-specific regulations implementing the Act. Programs and activities that receive Federal financial assistance under the Job Training Partnership Act, as amended (JTPA), are already expressly subject to the Act through the JTPA statutory language and the DOL regulations implementing JTPA that are published at 29 CFR part 34. Other DOL recipients have been subject to the Act and government-wide regulations since their effective date in 1979.

Accordingly, today's proposed rule does not substantially change DOL recipients' existing duty to refrain from discrimination on the basis of age. This proposal would fulfill the obligation on DOL to issue agency-specific rules under the Act, clarify the responsibilities of DOL recipients under the Act, and describe the DOL investigation, conciliation, and enforcement procedures to ensure compliance.

DATES: Comments on this proposed rule must be received on or before March 1, 1999.

ADDRESSES: Comments on this proposed rule should be sent to Annabelle T. Lockhart, Director, Civil Rights Center, Department of Labor, 200 Constitution Avenue, N.W., Room N-4123, Washington, DC 20210. Brief comments (maximum five pages) may be submitted by facsimile machine (FAX) to 202/219-5658. Receipt of submissions, whether by mail or FAX transmittal, will not be acknowledged; however, the sender may

request confirmation that a submission has been received, by telephoning the Civil Rights Center (CRC) at (202) 219-8927 (VOICE) or (202) 219-6118 or (800) 326-2577 (TTY/TDD).

Comments that CRC receives will be available for public inspection at DOL during normal business hours. Appropriate aids, such as readers or print magnifiers, are available on request to persons needing assistance to review the comments. In addition, copies of this proposed rule in the alternate formats of large print and electronic file on computer disk are available on 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 and address listed above.

FOR FURTHER INFORMATION CONTACT: Bud West, Senior Policy Advisor, CRC, (202) 219-8927 (VOICE) or (202) 219-6118 or (800) 326-2577 (TTY/TDD).

SUPPLEMENTARY INFORMATION:**I. Background Information**

The Age Discrimination Act of 1975, 42 U.S.C. 6101 *et seq.*, which Congress enacted as part of amendments to the Older Americans Act (Pub. L. 94-135, 89 Stat. 713, 728) prohibits discrimination on the basis of age in programs and activities receiving Federal financial assistance. The Civil Rights Restoration Act of 1987 (Pub. L. 100-259, 102 Stat. 28, 31 (1988)) amended the Act and other civil rights statutes to define "program or activity" to mean all of the operations of specified entities, any part of which is extended Federal financial assistance. (See 42 U.S.C. 6107(4).)

The Act applies to discrimination at all age levels. The Act also contains specific exceptions that permit the use of certain age distinctions and factors other than age that meet the Act's requirements.

The 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 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 proposed regulations implementing the 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.)

The Act became effective on the effective date of HEW's final government-wide regulations (i.e., July 1, 1979). DOL has enforced the provisions of the Act since that time. As a practical matter, the absence of DOL-specific age regulations has not had an impact on DOL's legal authority to enforce prohibitions against discrimination on the basis of age in programs or activities receiving Federal financial assistance from DOL. For example, persons alleging age discrimination have not been hampered in their ability to file complaints or in CRC's ability to process these complaints. In addition, most programs and activities that receive Federal financial assistance from DOL receive some part of that funding under the Job Training Partnership Act, as amended (JTPA), 29 U.S.C. 1501 *et seq.* Such programs and activities are therefore "JTPA recipients" subject to the broad nondiscrimination and equal opportunity provisions in Section 167 of JTPA, 29 U.S.C. 1577. Among other things, Section 167 of JTPA expressly applies the prohibitions against discrimination on the basis of age under the Age Discrimination Act of 1975 to JTPA recipients. The regulations implementing Section 167 of JTPA are published at 29 CFR part 34 and incorporate the Act's prohibition against discrimination on the basis of age.

II. Overview of Proposed Rule

This proposed rule is designed to fulfill the statutory and regulatory obligations on DOL to issue a regulation implementing the Act that conforms to the government-wide regulations at 45 CFR part 90. The proposed rule would carry out the Act's prohibition of discrimination based on age in programs and activities receiving financial assistance from DOL and would provide appropriate investigative, conciliation, and enforcement procedures. DOL enforcement would be conducted by the Civil Rights Center (CRC) (previously organized as the Directorate of Civil Rights), in the Office of the Assistant Secretary for Administration and Management. CRC enforces all civil rights laws applicable to entities receiving financial assistance from DOL.

As noted above, the primary effect of this proposed rule is to clarify the existing requirements prohibiting age discrimination placed on those DOL recipients that receive no financial assistance under JTPA. The JTPA statutory language and the DOL regulations implementing JTPA at 29 CFR part 34 already expressly subject JTPA recipients to the Act's prohibitions on age discrimination.

The proposed rule is not intended to alter the legal standards found in the Act or the government-wide regulations, which are applicable to recipients of Federal financial assistance from DOL, whether under JTPA or other statutes. The proposed rule closely follows the wording and format of rules issued by other Federal agencies to implement the Act. In particular, DOL modeled much of its proposal on the regulations issued by HEW's successor agencies: HHS, the lead Federal agency coordinating implementation of the Act (45 CFR part 91; 47 FR 57850, Dec. 28, 1982); and the Department of Education (ED) (34 CFR part 110; 58 FR 40194, July 27, 1993). The government-wide and agency-specific rules were subjected to extensive public scrutiny, and the public comments were considered in developing those final rules. Readers may review the HEW, HHS and ED **Federal Register** publications for historical and explanatory material regarding the Act, the government-wide regulations, and the provisions of the agency-specific implementing regulations. The following discussion focuses on the sections of today's proposed rule that differ from the government-wide regulations. As explained below, these differences are meant to clarify provisions, and either mirror other Federal agency-specific regulations implementing the Act or address DOL-unique circumstances.

Subpart A—General

The three sections in Subpart A provide the proposed rule's purpose, application and definitions, and are consistent with the government-wide regulations. A new provision has been added to § 35.2 to indicate that JTPA recipients in compliance with 29 CFR part 34 are considered in compliance with this part. This provision also makes it clear that CRC will use the legal standards in Subpart B of these regulations when evaluating whether a recipient of funds under JTPA has engaged in unlawful discrimination under the Act.

The definitions in § 35.3 are substantively identical to definitions in the government-wide regulations (45 CFR 90.4), HHS agency-specific regulations (45 CFR 91.4), and ED regulations (34 CFR 110.3). To provide greater clarity to both recipients of Federal financial assistance and the general public, the proposed rule also defines the word "beneficiary," based on the existing definition in DOL rules implementing JTPA (29 CFR 34.2).

Subpart B—Standards for Determining Age Discrimination

Subpart B is virtually identical to the corresponding sections of the government-wide regulations at 45 CFR part 90. Some of the provisions have been reordered for greater clarity and coherence.

Section 35.10 follows the government-wide regulations in laying out the general and specific rules prohibiting age discrimination in programs or activities receiving Federal financial assistance from DOL. For clarity purposes, proposed paragraph (c) of § 35.10 would slightly revise language found in the government-wide regulations at 45 CFR 90.12(c). Like the government-wide rule, the proposal states that the list of prohibited forms of age discrimination in § 35.10(b) is not exhaustive and, consequently, does not imply that other forms of age discrimination are permitted.

Sections 35.11 and 35.12 follow the government-wide regulations (see 45 CFR 90.13–.14), in defining the terms "normal operation" and "statutory objective" and delineating the "normal operation" and "statutory objective" exceptions to the prohibitions against age discrimination that are specified in the Act, 42 U.S.C. 6103. Section 35.12 sets out the four-prong test, provided in the government-wide regulations (see 45 CFR 90.14), for determining when an action reasonably takes into account "age as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity" and thus does not violate the Act.

In the proposed rule, provisions concerning affirmative action and special benefits to children and elderly are in Subpart B at §§ 35.15 and 35.16; in the government-wide regulations, the analogous provisions are part of Subpart D (Investigation, Conciliation, and Enforcement Procedures) at 45 CFR 90.49. The HHS agency-specific regulations also moved these provisions to Subpart B (see 45 CFR 19.16–.17), and DOL believes this reordering aids comprehension.

Section 35.17 of the proposed rule provides that age distinctions in DOL regulations are entitled to a presumption of validity. For example, the provision in 20 CFR 628.605(a), which limits participation in the Adult Program funded under JTPA to individuals who are 22 years of age or older, is presumed valid. This presumption of validity is consistent with the "statutory objective" exception in the Act. Analogous provisions are in the HHS and ED agency-specific

regulations (45 CFR 91.18; 34 CFR part 110.17.)

Subpart C—Duties of DOL Recipients

Subpart C is consistent with the government-wide regulations at 45 CFR part 90. As described below, language differences between this Subpart of the proposed rule and the government-wide regulations are meant to clarify the duties of DOL recipients.

The proposed rule fosters awareness of the Act's provisions, by requiring that recipients provide notice concerning obligations and rights under the Act to other recipients and to beneficiaries (§ 35.21) and that recipients complete a written assurance of compliance (§ 35.23). The notice requirements in § 35.21 are modeled after the HHS provision in 45 CFR 91.32 and the ED provisions in 34 CFR 110.21 and 110.25(b). The § 35.23 requirement for assurances of compliance is similar to the HHS rule at 45 CFR 91.33(a) and the ED rule at 34 CFR 110.23(a). In addition, the regulations implementing the nondiscrimination provisions of JTPA already require JTPA recipients to make an assurance of compliance with the Age Discrimination Act. 29 CFR 34.20.

Section 35.22 lists recordkeeping, reporting, and access to records requirements under the Act. The government-wide regulations already require recipients to maintain records, provide information and afford access to its records to agencies for the purposes of determining whether the recipient is complying with the Act. (See 45 CFR 90.42(a).) The government-wide regulations also mandate that agencies include in their regulations implementing the Act the requirements that recipients provide information and access to records to the extent the agencies find necessary to determine compliance with the Act and regulations. (See 45 CFR 90.45.) In addition, the regulations implementing the nondiscrimination provisions of JTPA already require JTPA recipients to collect data, maintain records, and provide access to such information and records as CRC finds necessary to determine whether the JTPA recipient is complying with the Age Discrimination Act. (See 29 CFR 34.24.) Proposed § 35.22 follows the format of the analogous HHS provision in 45 CFR 91.34.

The proposed rule also furthers the goals of the Act by requiring the recipient to designate at least one employee to be responsible for coordinating its compliance activities under the Act and these regulations. (See 29 CFR 35.24.) The responsibilities assigned to this employee(s) are similar

to those already required under other civil rights regulations enforced by CRC. (See 29 CFR 32.7 (implementing Section 504 of the Rehabilitation Act), and 29 CFR 34.22 (implementing JTPA).) The ED regulations implementing the Act also require designating a responsible employee, 34 CFR 110.25(a). Designating an employee to coordinate compliance helps a recipient to ensure that it will carry out its responsibilities under the Act and these regulations. This rule would not require recipients to designate a separate or additional responsible person to comply with these regulations, but would permit recipients to assign these duties to their existing person or staff who have similar responsibilities under other Federal laws and regulations enforced by CRC. Furthermore, the proposed rule would not require that recipients establish a full-time position responsible solely for ensuring compliance with this part. The duties described in this section could be performed by an individual (or individuals) who are assigned other duties.

Section 35.25 would require the recipient to establish a recipient-level procedure for processing complaints that allege a violation of the Act or these regulations. The ED rules contain a similar provision at 34 CFR 110.25(c). This provision would provide both recipients and complainants the opportunity to resolve disputes at the recipient level. No specific process, however, would be mandated by this regulation. For instance, recipients may adopt the complaint processing procedures contained in the DOL regulations implementing the nondiscrimination provisions of the JTPA. (See 29 CFR part 34.)

Section 35.26 of this proposed rule provides that CRC may require a recipient employing the equivalent of 15 or more employees to complete a written self-evaluation as part of a compliance review or complaint investigation. The government-wide regulations at 45 CFR 90.43 contain the requirement that all recipients with the equivalent of 15 or more full-time employees must complete a written self-evaluation of their compliance under the Act. However, the Office of Management and Budget (OMB) subsequently disapproved of this across-the-board self-evaluation requirement as excessively burdensome and inconsistent with the Federal Reports Act of 1942, the precursor of the Paperwork Reduction Act, as amended (44 U.S.C. 3501 *et seq.*). Correspondingly, HHS and other Federal agencies have rejected imposing self-evaluation requirements on all

recipients and instead state in their agency-specific regulations that such evaluations will only be required as part of a compliance review or complaint investigation. (See 34 CFR 110.24; 45 CFR 91.33.) The OMB and HHS determinations to impose self-evaluation requirements only when there is an ongoing compliance review or complaint inspection has been upheld by the courts. See, e.g., *Action Alliance of Senior Citizens of Greater Philadelphia v. Sullivan*, 930 F.2d 77 (D.C. Cir.), *cert. denied*, 502 U.S. 938 (1991). Accordingly, the DOL proposal abides by the OMB determination and closely follows the age discrimination regulations of the other Federal agencies.

Subpart D—Investigation, Conciliation, and Enforcement Procedures

In accordance with the government-wide regulations, Subpart D describes procedures for compliance reviews and Federal-level complaint processing, and outlines the role of mediation in resolving complaints. This Subpart closely follows the HHS and ED age regulations, adopting minor stylistic and organizational changes that DOL believes will improve clarity.

Section 35.34 would incorporate the HHS agency-specific regulation published at 45 CFR 91.44(a)(4). This section would provide that settlements during the agency investigation process will not affect the operation of any other enforcement effort by the agency, such as compliance reviews and investigations of other complaints, including those against the same recipient. In addition, § 35.34 clarifies that agreements made during mediation also do not affect other enforcement efforts.

Section 35.37 would provide that the procedures applicable to enforcement of Title VI of the Civil Rights Act of 1964, as amended, published at 29 CFR 31.9 and 31.10 apply to CRC's enforcement of the Act and this part. These procedures have been incorporated into the Department's regulation implementing Section 504 of the Rehabilitation Act of 1973, as amended (29 CFR part 32), and are incorporated here for consistency.

Section 35.38 of the proposed rule describes procedures for disbursement of funds to an alternate recipient if funds are withheld from the original recipient because of violations of these rules. Section 35.38 is not intended to replace established grant-awarding procedures. The requirements listed in § 35.38(b) would be in addition to any requirements contained in other applicable Federal laws or regulations.

III. Regulatory Procedures

Executive Order 12866

This proposed rule is not a "significant regulatory action" under Executive Order 12866 because this action will not: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or, tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866. Therefore, no regulatory impact analysis has been prepared.

Unfunded Mandates Reform

Executive Order 12875—This proposed rule, if promulgated in final, will not create an unfunded Federal mandate on any State, local or tribal government.

Unfunded Mandates Reform Act of 1995—This proposed rule, if promulgated in final, will not include any Federal mandate that may 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

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

Paperwork Reduction Act

This proposed rule will not impose new information collection requirements subject to the Paperwork Reduction Act.

List of Subjects in 29 CFR Part 35

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

Signed at Washington, D.C. this 22nd day of December 1998.

Alexis M. Herman,
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 AND 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 and 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 Affirmative action by a recipient.
- 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 disbursement 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 and 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 and 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) *Compliance with 29 CFR part 34.* Compliance with Section 167 of the Job Training Partnership Act, as amended (JTPA) (29 U.S.C. 1577) and implementing regulations at 29 CFR part 34, shall satisfy the obligation of recipients of Federal financial assistance from DOL under JTPA to comply with this part. CRC will use the legal standards in Subpart B of this part when evaluating whether a JTPA recipient has engaged in unlawful age discrimination.

(c) *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;
- (ii) Establishes criteria for participation in age-related terms; or
- (iii) Describes intended beneficiaries or target groups in age-related terms; or

(2) Any employment practice of any employer, employment agency, labor organization, or any labor-management joint apprentice training program, except any program or activity receiving Federal financial assistance under JTPA (29 U.S.C. 1501 *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.

Department means the United States Department of Labor.

Director means the Director of CRC.

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.

Recipient means any State or its political subdivision, any instrumentality 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 reasonable factor other than age, even though the action may have a disproportionate effect on persons of different ages. An action is based on a reasonable 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 Affirmative action by a recipient.

Even in the absence of a finding of discrimination, a recipient may take affirmative action to overcome the effects of conditions that resulted in limited participation on the basis of age in the recipient's program or activity.

§ 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, 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 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 and 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. 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 review or a complaint investigation conducted under §§ 35.30 or 35.31, or a compliance review, monitoring review or complaint investigation conducted under 29 CFR part 34, 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 program 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 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.

The provisions applicable to enforcement procedures under regulations effectuating Title VI of the Civil Rights Act of 1964, as amended, found at 29 CFR 31.9 and 34.10, apply to CRC's enforcement of the Act and this part.

§ 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 program or activity.

§ 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) So 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.