

modification unless the alteration occurs pursuant to a holder's option under the terms of the instrument to convert the instrument into equity of the issuer (notwithstanding paragraph (c)(2)(iii) of this section). The rules of paragraph (f)(7) of this section apply to determine whether an alteration or modification results in an instrument or property right that is not debt.

\* \* \* \* \*

(e) \* \* \*

(5) *Changes in the nature of a debt instrument*—(i) *Property that is not debt.* A modification of a debt instrument that results in an instrument or property right that is not debt for Federal income tax purposes is a significant modification. The rules of paragraph (f)(7) of this section apply to determine whether a modification results in an instrument or property right that is not debt.

\* \* \* \* \*

(f) \* \* \*

(7) *Rules for determining whether an alteration or modification results in an instrument or property right that is not debt*—(i) *In general.* Except as provided in paragraph (f)(7)(ii) of this section, the determination of whether an instrument resulting from an alteration or modification of a debt instrument will be recharacterized as an instrument or property right that is not debt for Federal income tax purposes shall take into account all of the factors relevant to such a determination.

(ii) *Financial condition of the obligor*—(A) *Deterioration in financial condition of the obligor generally disregarded.* Except as provided in paragraph (f)(7)(ii)(B) of this section, in making a determination as to whether an instrument resulting from an alteration or modification of a debt instrument will be recharacterized as an instrument or property right that is not debt under this section, any deterioration in the financial condition of the obligor between the issue date of the debt instrument and the date of the alteration or modification (as it relates to the obligor's ability to repay the debt instrument) is not taken into account. For example, any decrease in the fair market value of a debt instrument (whether or not the debt instrument is publicly traded) between the issue date of the debt instrument and the date of the alteration or modification is not taken into account to the extent that the decrease in fair market value is attributable to the deterioration in the financial condition of the obligor and not to a modification of the terms of the instrument.

(B) *Substitution of a new obligor; addition or deletion of co-obligor.* If there is a substitution of a new obligor or the addition or deletion of a co-obligor, the rules in paragraph (f)(7)(ii)(A) of this section do not apply.

\* \* \* \* \*

(h) *Effective/applicability date*—(1) *In general.* Except as otherwise provided in paragraph (h)(2) of this section, this section applies to alterations of the terms of a debt instrument on or after September 24, 1996. Taxpayers, however, may rely on this section for alterations of the terms of a debt instrument after December 2, 1992, and before September 24, 1996.

(2) *Exception.* Paragraph (f)(7) of this section applies to an alteration of the terms of a debt instrument on or after the date of publication of the Treasury decision adopting these rules as final regulation in the **Federal Register**. A taxpayer, however, may rely on paragraph (f)(7) of this section for alterations of the terms of a debt instrument occurring before that date.

**Steven T. Miller,**

*Deputy Commissioner for Services and Enforcement.*

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**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 7**

[EPA-HQ-OA-2004-0002; FRL-9159-1]

**RIN 2090-AA37**

**Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Assistance From the Environmental Protection Agency**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to take action on Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency. This document sets out EPA rules for implementing the Age Discrimination Act of 1975, as amended. The Act prohibits discrimination on the basis of age in programs or activities receiving Federal assistance.

**DATES:** Comments must be received on or before August 3, 2010.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OA-2004-0002, by mail to OEI Docket, U.S. EPA, Mail Code: 28221T, 1200

Pennsylvania Ave., NW, Washington, DC 20460. Comments can also be submitted electronically or through hand delivery/courier by following the detailed instructions in the **ADDRESSES** section of the direct final rule located in the "Rules and Regulations" section of this **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Tom Walker, U.S. Environmental Protection Agency, Office of Civil Rights, (Mail Code 1201A), 1200 Pennsylvania Ave., NW., Washington, DC 20460, telephone (202) 343-9894.

**SUPPLEMENTARY INFORMATION:**

**Why is EPA Issuing This Proposed Rule?**

This document proposes to take action on Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency. We have published a direct final rule approving regulations for implementing the Age Discrimination Act of 1975, as amended, which prohibits discrimination on the basis of age in programs or activities receiving Federal assistance in the "Rules and Regulations" section of this **Federal Register** because we view this as a noncontroversial action and anticipate no adverse comment. We have explained our reasons for this action in the preamble to the direct final rule.

If we receive no adverse comment, we will not take further action on this proposed rule. If we receive adverse comment, we will withdraw the direct final rule and it will not take effect. We would address all public comments in any subsequent final rule based on this proposed rule.

We do not intend to institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information, please see the information provided in the **ADDRESSES** section of this document.

**I. General Information**

These regulations implement provisions of the Age Discrimination Act of 1975, as amended. The Age Discrimination Act of 1975, 42 U.S.C. 6101 *et seq.*, (The Act) prohibits discrimination on the basis of age in programs or activities receiving Federal assistance. The Act applies to persons of all ages. 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 however, does not cover employment discrimination on the basis of age. The Age Discrimination in

Employment Act of 1967, 29 U.S.C. 621 *et. seq.*, (ADEA) applies specifically to employment practices and programs, both in the public and private sectors, and applies only to persons 40 and over. Complaints of employment discrimination based on age against an individual by recipients of federal financial assistance are subject to the ADEA and should be filed administratively with the Equal Employment Opportunity Commission (EEOC) (see 29 CFR part 1626). The EEOC has recently published in the **Federal Register** a Notice of Proposed Rulemaking (NPRM) under the authority of the ADEA (see 75 FR 7212 (Feb. 18, 2010)). EEOC's NPRM defines the term "reasonable factors other than age" (RFOA) under the ADEA, a term that is also used in the Age Discrimination Act and in the subject regulation. Because of the different statutory bases for the two regulations, the use of the term RFOA in EPA's regulation implementing the Age Discrimination Act has no effect on EEOC's regulation under the ADEA and the use of the term RFOA in EEOC's regulation has no effect on EPA's regulation. Nonetheless, EPA would accept comments about any potential impact of EEOC's definition on EPA's regulation. Parties interested in the ADEA action should refer to the **Federal Register**; 75 FR 7212 (Feb. 18, 2010).

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, required each Federal agency providing assistance to any program or activity to publish final 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). The Act was amended by the Civil Rights Restoration Act of 1987, Public Law 100-259, 102 Stat. 28, to add a definition for the term "program or activity."

The age discrimination regulations apply to all applicants for, and recipients of, EPA assistance in the operation of their programs or activities, and only establish and enforce statutory rights that prohibit discrimination on the basis of age. These regulations do not apply to any program or activity unless that program or activity applies

for and/or receives Federal assistance from the Agency.

EPA's Age discrimination regulations which implement the Age Discrimination Act of 1975, will amend the U.S. Code of Federal Regulations (40 CFR Part 7) by adding Age as a protected classification to the Agency's nondiscrimination regulations. Currently, the Agency's nondiscrimination regulations prohibit discrimination on the basis of race, color, national origin, sex (gender), or disability in any program or activity receiving EPA assistance. The Age Discrimination regulations will become the new Part 7 Subpart F—Discrimination Prohibited on the Basis of Age.

The regulation states, "No person in the United States may, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance." (40 CFR 7.140) The specific prohibited actions are patterned after the regulations issued under Title VI of the Civil Rights Act of 1964 (40 CFR 7.30). As a general rule, separate or different treatment which denies or limits services from, or participation in, a program receiving Federal funds will be prohibited by these regulations.

The Act does include some exceptions to the general rule against age discrimination. The regulations provide definitions for two terms "normal operations" and "statutory objective" (40 CFR 7.25) that provide the framework for which the exceptions can apply. (40 CFR 7.150) For example, the normal operations and objectives of our public schools are to educate our nation's children. Public schools, for instance, have received federal environmental grants, to establish ecology clubs or educate students on water restoration and beach ecology. These school programs are just a few examples of recipients operating under normal conditions and meeting their objectives while receiving federal assistance targeted at a specific age group, and are therefore, permissible under the Act.

Recipients of EPA funds are also permitted to take an action otherwise prohibited by the Act, if the action is based on "reasonable factors other than age." (40 CFR 7.155) For example, children may be more vulnerable to environmental exposures (*i.e.* lead poisoning) than adults because their bodily systems are still developing. Providing grants to recipients to research these specific exposure risks in children play an important role in protecting children's health. Even

though environmental toxins may also affect adults, it is thought that children are generally more vulnerable to such environmental exposures. Thus, recipients that are solely studying the unique environmental exposure risks to children (targeting a specific age group) are taking actions based on "reasonable factors other than age", and, such studies are therefore permissible under the Act. As noted above, the use of the term "reasonable factors other than age" in EPA's regulation has no effect on EEOC's RFOA definition under the ADEA and, conversely, the use of the term RFOA by the EEOC has no effect on EPA's regulation.

In addition, these regulations incorporate the provisions of the general regulations (45 CFR part 90; 44 FR 33768) permitting a recipient of a program to provide special benefits for children and the elderly. (40 CFR 7.165) These special benefits often take the form of special discounts or reduced fees for the elderly or children in a federally funded program.

## II. Rulemaking History

EPA first proposed regulations implementing the Age Discrimination Act as part of its proposed consolidated nondiscrimination regulations on January 8, 1981 (46 FR 2306-2312). The Age Discrimination Act provisions were not included in the final rule published on January 12, 1984 (49 FR 1656-66), because they had not been approved by HHS as required by the Act. During 1993 through 1998, the regulations were submitted to HHS and went through different revisions in an on-going effort between EPA and HHS. Because of the time lapse since the regulations were initially drafted, in 2002 EPA had conducted an internal re-review of the draft regulations. The draft Age Discrimination Act regulations were then resubmitted to HHS in 2002, which granted its approval later that year. In January 2003, new regulatory development guidelines were issued, which spurred another delay in the publication of EPA's draft Age regulations. Between 2003 and 2004, EPA's internal re-review resulted in various revisions to the draft regulations based on the new regulatory development guidelines. In 2005, EPA resubmitted its final draft Age discrimination regulations to HHS. The revised regulations were subsequently approved by HHS in 2006. EPA is now publishing these regulations as a direct final rule along, with a parallel proposed rule. Any comments submitted during the 1981, public comment period pertaining to the Age provisions of the consolidated

nondiscrimination regulations are no longer available for viewing. Comments on the current rule are welcome. If we receive comment on the current rule, we will withdraw the direct final rule and it will not take effect. We would address all public comments in any subsequent final rule based on this proposed rule as mentioned above.

### III. Statutory and Executive Orders Reviews

#### A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a “significant regulatory action.” Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

#### B. Paperwork Reduction Act of 1995

This action does not impose any new information collection burden. EPA Form 4700-4 (Preaward Compliance Review Report for All Applicants Requesting Federal Financial Assistance), which is used to collect compliance information under EPA’s nondiscrimination regulations, already requests civil rights compliance information based on age under the Age Discrimination Act of 1975. The current version, which also requests civil rights compliance information based on race, color, national origin, sex, or handicap as well as age, has been in use since January 1990. The Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations at 40 CFR part 7 under the provisions of the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2030-0020. The OMB control numbers for EPA’s regulations in 40 CFR are listed in 40 CFR part 9.

#### C. Regulatory Flexibility Act (RFA)

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

*For purposes of assessing the impacts of today’s rule on small entities, small*

*entity is defined as:* (1) A small business as defined by the U.S. Small Business Administration in 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today’s proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities.

This proposed rule will not impose any requirements on small entities because it only formalizes existing requirements for entities receiving assistance from EPA and would not substantively change existing obligations on recipients. The requirements prohibiting age discrimination by recipients of Federal assistance that are in the Age Discrimination Act and the government-wide regulations have been in effect since 1979. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

#### D. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes

any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Today’s rule contains no Federal mandates under the regulatory provisions of Title II of the UMRA for State, local, or tribal governments or the private sector for the following reasons: (1) The UMRA excludes from the definitions of “Federal intergovernmental mandate” and “Federal private sector mandate” duties that arise from conditions of Federal assistance; (2) The UMRA generally excludes from the definition of “Federal intergovernmental mandate” duties that arise from participation in a voluntary Federal program; (3) The UMRA excludes from the definition of “Federal private sector mandate” duties that arise from participation in a voluntary Federal program; and (4) The UMRA does not apply to rules that establish or enforce statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability. These regulations were mandated by Congress in the Act. These regulations only establish and enforce statutory rights that prohibit discrimination on the basis of age. These regulations do not apply to any program or activity unless that program or activity applies for and receives Federal assistance from the Agency. Application for, and receipt of, Federal assistance from the Agency is entirely voluntary. No program or activity is required to apply for, or accept, Federal assistance from the Agency. Thus, today’s rule is not subject to the requirements of sections 202 and 205 of the UMRA.

EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. These regulations apply uniformly to all recipients of Federal assistance from the Agency, regardless of whether the recipient is a small government. Moreover, the application for, and acceptance of, Federal assistance from the Agency that triggers the applicability of these regulations is entirely voluntary. Furthermore, it has already been

determined that these regulations will not have a significant economic impact on small entities.

#### *E. Executive Order 13132: Federalism*

Executive Order 13132 (64 FR 43255), entitled "Federalism," requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that 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 proposed rule does not have federalism implications. It 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, as specified in Executive Order 13132. This rule does not directly impose any obligations on the States and there are no significant compliance costs associated with it. This rule only applies to State and non-State entities that apply for and receive assistance from EPA. When the recipient receives the EPA assistance, they accept the obligation to comply with EPA's Age Discrimination Act implementing regulations. Compliance obligations are, therefore, voluntary and contractual. No entity is required to apply for or accept EPA assistance. Thus, Executive Order 13132 does not apply to this rule.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed rule from State and local officials.

#### *F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

Executive Order 13175 (65 FR 67249), entitled "Consultation and Coordination with Indian Tribal Governments," requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." This proposed rule does not have tribal implications, as specified in Executive Order 13175. This rule does not directly impose any obligations on the Tribes and there are no significant compliance costs

associated with it. This rule only applies to Tribal and non-Tribal entities that apply for and receive assistance from EPA. When the recipient receives the EPA assistance, it accepts the obligation to comply with EPA's Age Discrimination Act implementing regulations. Compliance obligations are, therefore, voluntary and contractual. No entity is required to apply for or accept EPA assistance. Thus, Executive Order 13175 does not apply to this rule. EPA specifically solicits additional comment on this proposed rule from tribal officials.

#### *G. Executive Order 13045: Protection of Children From Environmental Health & Safety Risks*

Executive Order 13045 (62 FR 19885), "Protection of Children from Environmental Health Risks and Safety Risks," applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5-501 of the Order has the potential to influence the regulation. This proposed rule is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

#### *H. Executive Order 13211: Actions that Significantly Affect Energy Supply, Distribution, or Use*

This rule is not a "significant energy action" as defined in Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. EPA is proposing to approve rules for implementing the Age Discrimination Act of 1975, as amended. The Act prohibits discrimination on the basis of age in programs or activities receiving Federal assistance. Accordingly, we have concluded that this rule is not likely to have any adverse energy effects.

#### *I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104-113, 12(d) (15 U.S.C. 272 n) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

#### *J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. EPA is proposing to approve rules for implementing the Age Discrimination Act of 1975, as amended. The Act prohibits discrimination on the basis of age in programs or activities receiving Federal assistance. This rule does not adversely affect minority or low-income populations therefore, we have concluded that this rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations.

#### **List of Subjects in 40 CFR Part 7**

Environmental protection, Administrative practice and procedure,

Age discrimination, Civil rights, Equal employment opportunity, Individuals with disabilities, Reporting and

recordkeeping requirements, Sex discrimination.

Dated: May 27, 2010.

**Lisa P. Jackson,**  
*Administrator.*

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