

§ 0.216 Influencing legislation or petitioning Congress.

Except for the official handling, through the proper channels, of matters relating to legislation in which the Department has an interest, employees shall not use government time, money, or property to petition a Member of Congress to favor or oppose any legislation or proposed legislation, or to encourage others to do so. This section does not prohibit the use of government time by union representatives to petition a Member of Congress to favor or oppose any legislation or proposed legislation, where permitted by the terms of a collective bargaining agreement.

Dated: October 4, 2017.

Kody H. Kinsley,

Assistant Secretary for Management.

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DEPARTMENT OF THE TREASURY**31 CFR Part 23**

RIN 1505-AC51

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

AGENCY: Department of the Treasury.

ACTION: Final rule.

SUMMARY: This final rule sets out the Department of the Treasury's (Treasury) 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. This final rule follows publication of an August 4, 2015, proposed rule and takes into account the comments received.

DATES: Effective November 13, 2017.

FOR FURTHER INFORMATION CONTACT: Mariam G. Harvey, Director, Office of Civil Rights and Diversity, Department of the Treasury, (202) 622-0316 (voice).

SUPPLEMENTARY INFORMATION:

I. Background

The Age Discrimination Act of 1975, 42 U.S.C. 6101-6107 ("the Act"), 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 (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). Treasury has enforced the provisions of the Act since that time. As a practical matter, the absence of Treasury-specific age regulations has not had an impact on Treasury's legal authority to enforce prohibitions against discrimination on the basis of age in programs or activities receiving Federal financial assistance from Treasury. Specifically, persons alleging age discrimination have not been hampered in their ability to file complaints nor has Treasury's Office of Civil Rights and Diversity's (OCRD) ability to process these complaints been affected.

On August 4, 2015 (80 FR 46208), the Department issued a notice of proposed rulemaking and invited comments on all aspects of the proposal.

II. Overview of Final Rule

This rule is designed to fulfill the statutory and regulatory obligations of Treasury to issue a regulation implementing the Act that conforms to the government-wide regulations at 45 CFR part 90. The rule carries out the Act's prohibition of discrimination based on age in programs and activities receiving financial assistance from Treasury and provides appropriate investigative, conciliation, and enforcement procedures. OCRD, part of

the Office of the Assistant Secretary for Management, will conduct Treasury enforcement. OCRD enforces all civil rights laws applicable to entities receiving financial assistance from Treasury.

The 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 Treasury under other statutes. Treasury does not provide financial assistance within the meaning of these rules merely by disbursing a payment on behalf of another Federal agency. The rule closely follows the wording and format of rules issued by other Federal agencies to implement the Act. In particular, Treasury modeled much of its proposal on the agency-specific regulations issued by 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, HHS, and ED rules were subjected to extensive public scrutiny, and the public comments were considered in finalizing those rules. Readers may review the HHS and ED *Federal Register* publications for historical and explanatory material regarding the Act, the government-wide regulations, and the provisions of the HHS and ED implementing regulations.

In general, the final rule mirrors the government-wide regulations at 45 CFR part 90 and HHS's and ED's regulations implementing the Act, with modifications to aid consistency and clarify the Treasury specific provisions. Subpart A sets forth the rule's purpose, applications, and definitions. Subpart B contains the standards for determining age discrimination. Subpart C comprises the duties and responsibilities of Treasury recipients. Subpart D establishes the procedures for investigations, conciliation and enforcement. For a complete discussion of the proposal, see the August 4, 2015, proposed rule at 80 FR 46208.

III. Summary of Public Comments and Explanation of Revisions

Treasury received three comments on the proposed rule which generally supported the rule. One commenter suggested revisions that are discussed below.

The commenter suggested there could be confusion in the employer community and among employees who may not be aware that the Age Discrimination Act (Age Act), and the Age Discrimination in Employment Act (ADEA) are separate statutes with

different purposes, procedures, and remedies. In response to this comment, Treasury added a reference to the Age Act, 42 U.S.C. 6103 (c)(2) to the rule, specifically stating that the rule does not in any way affect the Equal Employment Opportunity Commission's regulations implementing the ADEA at 29 CFR 1625, 1626, and 1627.

The commenter noted that the proposed rule purported to apply to programs under the Comprehensive Employment and Training Act (CETA) (29 U.S.C. 801, *et seq.*), but those programs are no longer in effect. Treasury has revised § 23.3(b)(2) to eliminate the reference to CETA.

The commenter suggested that the rule, at § 23.46(a)(2)(ii), should make more clear that referrals will be made to the EEOC with respect to violations of the ADEA. Treasury edited the rule to add specifically that referrals will be made to the EEOC, Labor, HHS or Education as applicable. The general reference in § 23.46(a)(2)(ii) to any Federal, State, or local government agency remains since referrals could be made to other agencies as well.

The commenter suggested that the ADEA be added to the definitions section in § 23.4. In response to this comment, Treasury added the ADEA to the definitions section.

The commenter noted that the Supreme Court held in *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 600 (2004) that “the [ADEA] does not mean to stop an employer from favoring an older employee over a younger one,” and suggested that Treasury consider whether *Cline* warrants any revisions to its Age Act regulation. Treasury has reviewed the statute and case law and has concluded that, unlike the ADEA, the Age Act does not limit its protection to a specific age group. The Age Act also provides exceptions from age discrimination requirements for normal operation or to meet statutory objectives of any program or activity (see §§ 23.13 and § 23.14). Therefore, Treasury did not adopt any revisions in response to this comment.

Another comment noted that §§ 23.13 and 23.14 discuss the defenses of 42 U.S.C. 6103(b)(1) (A) and (B), that the defense in subparagraph (A) appears to be functionally similar to the “bona fide occupational qualification” (BFOQ) defense set out in § 4(f)(1) of the ADEA, 29 U.S.C. 623(f)(1), and that the language of the defense in subparagraph (B) is identical to the “reasonable factors other than age” (RFOA) defense set out in the same ADEA section. The commenter then noted that the EEOC regulations at 29 CFR 1625.6 and 1625.7

address the BFOQ and RFOA defenses and suggested that Treasury consider whether any points made in the EEOC's BFOQ or RFOA regulations should be adapted for inclusion in the Age Act regulation. The commenter also cited the Supreme Court's decision in *Smith v. City of Jackson*, 544 U.S. 228 (2005), and note that this case caused the EEOC to revise the EEOC's “reasonable factor other than age” regulation. See 29 CFR 1625.7. It suggested that Treasury consider whether *Smith* warrants a revision of § 23.14.

Treasury considered adopting the EEOC's regulations for BFOQ and RFOA under the ADEA, but the legislative intent of the two statutes (ADEA and Age Act) is different. The ADEA was designed to protect older workers, while the Age Act was intended to prohibit all kinds of unreasonable age discrimination. In addition, adopting EEOC's BFOQ and RFOA factors, and applying them outside of the employment arena could create confusion with the ADEA. For these reasons, Treasury decided not to adopt the EEOC's regulations for BFOQ and RFOA for inclusion in our Age Act regulation.

The commenter noted that §§ 23.43(c) and 23.44(a)(3) discuss mediation agreements and, if the settlement purports to include rights under the ADEA, section 7(f) of the ADEA, 29 U.S.C. 626(f), sets out specific rules for the waiver of rights and claims under the ADEA. See 29 CFR 1625.22.

Treasury considered this comment, but because the regulations do not cover employment, see § 23.3(b)(2)), Treasury does not anticipate settlements will include rights under the ADEA and has made no revisions.

IV. Regulatory Procedures

Executive Order 12866

This rule is not a “significant regulatory action” under Executive Order 12866. Therefore, no regulatory impact analysis has been prepared.

Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is hereby certified that this rule would not have a significant economic impact on a substantial number of small entities. The rule will clarify existing requirements for entities receiving financial assistance from Treasury. 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 Treasury have been expressly informed of their obligations to comply with the Act by the offices administering the assisted programs. Because the rule does not substantively change existing obligations on recipients, but merely clarifies such duties, Treasury certifies that the rule will not have a significant economic impact on a substantial number of small entities. Consequently, a regulatory flexibility analysis is not required.

Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (Unfunded Mandates Act) requires an agency to prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. This rule will not result in expenditures by State, local or tribal governments or by the private sector of \$100 million or more. Accordingly, the Department has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

List of Subjects in 31 CFR Part 23

Aged, Discrimination against aged.

For the reasons stated in the preamble, the Department of the Treasury amends subtitle A of title 31 of the CFR by adding part 23 to read as follows:

PART 23—NONDISCRIMINATION ON THE BASIS OF AGE IN PROGRAMS AND ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE FROM THE DEPARTMENT OF THE TREASURY

Subpart A—General

Sec.

- 23.1 What is the purpose of the Age Discrimination Act of 1975?
- 23.2 What is the purpose of Treasury's discrimination regulations?
- 23.3 To what programs does this part apply?
- 23.4 Definitions of terms used in this part.

Subpart B—Standards for Determining Age Discrimination

- 23.11 Rules against age discrimination.
- 23.12 Definitions of “normal operation” and “statutory objective.”
- 23.13 Exceptions to the rules against age discrimination: Normal operation or

statutory objective of any program or activity.

- 23.14 Exceptions to the rules against age discrimination: Reasonable factors other than age.
- 23.15 Burden of proof.
- 23.16 Affirmative action by recipients.
- 23.17 Special benefits for children and the elderly.
- 23.18 Age distinctions contained in Treasury's regulations.

Subpart C—Duties of Treasury Recipients

- 23.31 General responsibilities.
- 23.32 Notice to subrecipients and beneficiaries.
- 23.33 Assurance of compliance and recipient assessment of age distinctions.
- 23.34 Information requirements.

Subpart D—Investigations, Conciliation, and Enforcement Procedures

- 23.41 Compliance reviews.
- 23.42 Complaints.
- 23.43 Mediation.
- 23.44 Investigation.
- 23.45 Prohibition against intimidation or retaliation.
- 23.46 Compliance procedures.
- 23.47 Hearings, decisions, post-termination proceedings.
- 23.48 Remedial action by recipient.
- 23.49 Alternate funds disbursement procedure.
- 23.50 Exhaustion of administrative remedies.

Authority: Age Discrimination Act of 1975, as amended, 42 U.S.C. 6101 *et seq.* (45 CFR part 90)

Subpart A—General

§ 23.1 What is the purpose of the Age Discrimination Act of 1975?

The Age Discrimination Act of 1975, as amended, is designed to prohibit discrimination on the basis of age in programs or activities receiving Federal financial assistance. The Act also permits federally assisted programs and activities, and recipients of Federal funds, to continue to use certain age distinctions and factors other than age that meet the requirements of the Act and these regulations.

§ 23.2 What is the purpose of Treasury's age discrimination regulations?

The purpose of these regulations is to set out Treasury's policies and procedures under the Age Discrimination Act of 1975 and the general age discrimination regulations at 45 CFR part 90. The Act and the general regulations prohibit discrimination on the basis of age in programs or activities receiving Federal financial assistance. The Act and the general regulations permit federally assisted programs and activities, and recipients of Federal funds, to continue to use age distinctions and factors other than age that meet the requirements of the Act and its implementing regulations. These

regulations do not apply to actions arising under the Age Discrimination in Employment Act of 1967, Public Law 90–202, 29 U.S.C. 621 through 634 (ADEA), and do not in any way affect the Equal Employment Opportunity Commission's regulations implementing the ADEA at 29 CFR 1625, 1626, and 1627.

§ 23.3 To what programs does this part apply?

(a) This part applies to any program or activity receiving Federal financial assistance from Treasury.

(b) The regulations in this part do 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 any benefits or assistance to persons based on age; or
- (ii) Establishes criteria for participation in age-related terms; or
- (iii) Describes intended beneficiaries to target groups in age-related terms; or

(2) Any employment practice of any employer, employment agency, labor organization, or any labor-management joint apprenticeship training program.

§ 23.4 Definition of terms used in this part.

As used in these regulations, the term: *Act* means the Age Discrimination Act of 1975, as amended, 42 U.S.C. 6101–6107.

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

ADEA means the Age Discrimination in Employment Act of 1967, which forbids employment discrimination against anyone 40 years of age or older.

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 (for example, “children,” “adult,” “older persons,” but not “student”).

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 Treasury provides assistance in the form of:

- (1) Funds; or
- (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 definition, 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 20 U.S.C. 7801), 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) That 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 that is established by two or more of the entities described in paragraph (1), (2), or (3) of this definition.

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 is extended, directly or through another recipient. Recipient includes any successor, assignee, or transferee, but excludes the ultimate beneficiary of the assistance.

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

Subrecipient means any of the entities in the definition of *recipient* to which a

recipient extends or passes on Federal financial assistance. A subrecipient is generally regarded as a recipient of Federal financial assistance and has all the duties of a recipient in these regulations.

Treasury means the United States Department of the Treasury.

United States means the fifty states, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Trust Territory of the Pacific Islands, the Northern Marianas, and the territories and possessions of the United States.

Subpart B—Standards for Determining Age Discrimination

§ 23.11 Rules against age discrimination.

The rules stated in this section are limited by the exceptions contained in §§ 23.13 and 23.14.

(a) *General rule.* No person in the United States shall, 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 Federal financial assistance.

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

- (1) Excluding individuals from, denying them the benefits of, or subjecting them to discrimination under, a program or activity receiving Federal financial assistance; or
- (2) Denying or limiting individuals in their opportunity to participate in any program or activity receiving Federal financial assistance.

(c) *Non-exhaustive list.* The specific forms of age discrimination listed in paragraph (b) of this section do not necessarily constitute a complete list.

§ 23.12 Definitions of “normal operation” and “statutory objective.”

For purposes of §§ 23.13 and 23.14, the terms “normal operation” and “statutory objective” shall have the following meaning:

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

§ 23.13 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 § 23.11, if the 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. 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, if:

- (a) Age is used as a measure or approximation of one or more other characteristics; and
- (b) The other characteristic(s) must be measured or approximated for the normal operation of the program or activity to continue, or to achieve any statutory objective of the program or activity; and
- (c) The other characteristic(s) can be reasonably measured or approximated by the use of age; and
- (d) The other characteristic(s) are impractical to measure directly on an individual basis.

§ 23.14 Exceptions to the rules against age discrimination: Reasonable factors other than age.

A recipient is permitted to take an action otherwise prohibited by § 23.11 that is based on a factor other than age, even though that action may have a disproportionate effect on persons of different ages. An action may be 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.

§ 23.15 Burden of proof.

The burden of proving that an age distinction or other action falls within the exceptions outlined in §§ 23.13 and 23.14 is on the recipient of Federal financial assistance.

§ 23.16 Affirmative action by 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 in the recipient's program or activity on the basis of age.

§ 23.17 Special benefits for children and the elderly.

If a recipient's operation of a program or activity provides special benefits to the elderly or to children, such use of age distinctions shall be presumed to be necessary to the normal operation of the program or activity, notwithstanding the provisions of § 23.13.

§ 23.18 Age distinctions contained in Treasury regulations.

Any age distinctions contained in a rule or regulation issued by Treasury shall be presumed to be necessary to the achievement of a statutory objective of the program or activity to which the rule or regulation applies, notwithstanding the provisions of § 23.13.

Subpart C—Duties of Treasury Recipients

§ 23.31 General responsibilities.

Each Treasury recipient has primary responsibility to ensure that its programs and activities are in compliance with the Act and these regulations, and shall take steps to eliminate violations of the Act. A recipient also has responsibility to maintain records, provide information, and afford Treasury access to its records to the extent Treasury finds necessary to determine whether the recipient is in compliance with the Act and these regulations.

§ 23.32 Notice to subrecipients and beneficiaries.

(a) Where a recipient passes on Federal financial assistance from Treasury to subrecipients, the recipient shall provide the subrecipients written notice of their obligations under the Act and these regulations.

(b) Each recipient shall make necessary information about the Act and these regulations available to its program beneficiaries to inform them about the protections against discrimination provided by the Act and these regulations.

§ 23.33 Assurance of compliance and recipient assessment of age distinctions.

(a) *Written assurance.* Each recipient of Federal financial assistance from Treasury shall sign a written assurance as specified by Treasury that it will comply with the Act and these regulations.

(b) *Recipient assessment of age distinctions.* (1) As part of a compliance review under § 23.41 or a complaint investigation under § 23.44, Treasury may require a recipient employing the equivalent of 15 or more employees to complete a written self-evaluation, in a manner specified by the responsible Department official, of any age distinction imposed in its program or activity receiving Federal financial assistance from Treasury to assess the recipient's compliance with the Act.

(2) Whenever an assessment indicates a violation of the Act or the Treasury regulations, the recipient shall take corrective action.

§ 23.34 Information requirements.

Each recipient shall:

(a) Keep records in a form and containing information that Treasury determines may be necessary to ascertain whether the recipient is complying with the Act and these regulations.

(b) Provide to Treasury, upon request, information and reports that Treasury determines are necessary to ascertain whether the recipient is complying with the Act and these regulations.

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

Subpart D—Investigation, Conciliation, and Enforcement Procedures**§ 23.41 Compliance reviews.**

(a) Treasury may conduct compliance reviews and pre-award reviews or use other similar procedures that will permit it to investigate and correct violations of the Act and these regulations. Treasury may conduct these reviews even in the absence of a complaint against a recipient. The reviews may be as comprehensive as necessary to determine whether a violation of the Act or these regulations has occurred.

(b) If a compliance review or pre-award review indicates a violation of the Act or these regulations, Treasury will attempt to achieve voluntary compliance. If voluntary compliance cannot be achieved, Treasury will arrange for enforcement as described in § 23.46.

§ 23.42 Complaints.

(a) Any person, individually or as a member of a class or on behalf of others, may file a complaint with Treasury, alleging discrimination prohibited by the Act or these regulations based on an action occurring on or after July 1, 1979. A complainant shall file a complaint within 180 days from the date the complainant first had knowledge of the alleged act of discrimination. However, for good cause shown, Treasury may extend this time limit.

(b) Treasury will consider the date a complaint is filed to be the date upon which the complaint is sufficient to be processed.

(c) Treasury will attempt to facilitate the filing of complaints wherever possible, including taking the following measures:

(1) Accepting as a sufficient 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 permitting a complainant to add information to the complaint to meet the requirements of a sufficient complaint.

(3) Notifying 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 resolution process.

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

(d) Treasury will notify the complainant when the complaint falls outside the jurisdiction of these regulations, and will state the reason(s) why it is outside the jurisdiction of these regulations.

§ 23.43 Mediation.

(a) Treasury will promptly refer to a mediation agency designated by the Secretary of the Department of Health and Human Services (HHS) all sufficient complaints that:

(1) Fall within the jurisdiction of the Act and these regulations, unless the age distinction complained of is clearly within an exception; and,

(2) Contain all information necessary for further processing.

(b) Both the complainant and the recipient shall participate in the mediation process to the extent necessary to reach an agreement or make an informed judgment that an agreement is not possible.

(c) If the complainant and the recipient reach an agreement, the mediator shall prepare a written statement of the agreement and have the complainant and the recipient sign it. The mediator shall send a copy of the agreement to Treasury. Treasury will take no further action on the complaint unless the complainant or the recipient fails to comply with the agreement.

(d) The mediator shall protect the confidentiality of all information obtained in the course of the mediation process. No mediator shall testify in any adjudicative proceeding, produce any document, or otherwise disclose any information obtained in the course of the mediation process without prior approval of the head of the mediation agency.

(e)(1) The mediation will proceed for a maximum of 60 days after a complaint

is filed with Treasury. Mediation ends if:

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

(ii) Prior to the end of that 60-day period, an agreement is reached; or

(iii) Prior to the end of that 60-day period, the mediator determines that an agreement cannot be reached.

(2) This 60-day period may be extended by the mediator, with the concurrence of Treasury, for not more than 30 days if the mediator determines that agreement likely will be reached during such extended period.

(f) The mediator shall notify Treasury when mediation is not successful and Treasury will continue processing the complaint.

§ 23.44 Investigation.

(a) *Informal investigation.* (1) Treasury will investigate complaints that are unresolved after mediation or are reopened because of a violation of a mediation agreement.

(2) As part of the initial investigation, Treasury will use informal fact finding methods, including joint or separate discussions with the complainant and recipient, to establish the facts and, if possible, settle the complaint on terms that are mutually agreeable to the parties. Treasury may seek the assistance of any involved State agency.

(3) Any settlement agreement will be put in writing and the parties will sign it.

(4) The settlement shall not affect the operation of any other enforcement effort of Treasury, including compliance reviews and investigation of other complaints that may involve the recipient.

(5) The settlement is not a finding of discrimination against a recipient.

(b) *Formal investigation.* If Treasury cannot resolve the complaint through informal investigation, it will begin to develop formal findings through further investigation of the complaint. If the investigation indicates a violation of these regulations, Treasury will attempt to obtain voluntary compliance. If Treasury cannot obtain voluntary compliance, it will begin enforcement as described in § 23.46

§ 23.45 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 these regulations; or

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

§ 23.46 Compliance procedures.

(a) Treasury may enforce the Act and these regulations through:

(1) Termination of a recipient's Federal financial assistance from Treasury under the program or activity involved where the recipient has violated the Act or these regulations. The determination of the recipient's violation may be made 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 obligations of the recipient created by the Act or these regulations;

(ii) Referral to the Equal Employment Opportunity Commission, Department of Labor, the Department of Health and Human Services, or the Department of Education, as applicable; and

(iii) 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 these regulations.

(b) Treasury will limit any termination under paragraph (a)(1) of this section to the particular recipient and particular program or activity or part of such program or activity Treasury finds in violation of these regulations. Treasury will not base any part of a termination on a finding with respect to any program or activity of the recipient that does not receive Federal financial assistance from Treasury.

(c) Treasury will take no action under paragraph (a) of this section until:

(1) The Secretary has advised the recipient of its failure to comply with the Act and these regulations and has determined that voluntary compliance cannot be obtained.

(2) Thirty days have elapsed after the Secretary has sent a written report of the circumstances and grounds of the action to the committees of Congress having legislative jurisdiction over the Federal program or activity involved. The Secretary will file a report whenever any action is taken under paragraph (a) of this section.

(d) Treasury also may defer granting new Federal financial assistance to a recipient when a hearing under paragraph (a)(1) of this section is initiated.

(1) New Federal financial assistance from Treasury includes all assistance for which Treasury 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 Treasury does not include increases in funding as a result of changed computation of formula awards or assistance approved prior to the beginning of a hearing under paragraph (a)(1) of this section.

(2) Treasury will not begin a deferral until the recipient has received a notice of an opportunity for a hearing under paragraph (a)(1) of this section. Treasury will not continue a deferral for more than 60 days unless a hearing has begun within that time or the time for beginning the hearing has been extended by mutual consent of the recipient and the Secretary. Treasury will not continue a deferral for more than 30 days after the close of the hearing, unless the hearing results in a finding against the recipient.

(3) Treasury will limit any deferral to the particular recipient and particular program or activity or part of such program or activity Treasury finds in violation of these regulations. Treasury will not base any part of a deferral on a finding with respect to any program or activity of the recipient that does not, and would not in connection with the new funds, receive Federal financial assistance from Treasury.

§ 23.47 Hearings, decisions, post-termination proceedings.

Treasury procedural provisions for hearings, decisions, and post-termination proceedings applicable to Title VI of the Civil Rights Act of 1964 and its implementing regulations within Title 31 of the CFR shall apply to Treasury enforcement of these regulations.

§ 23.48 Remedial action by recipient.

Where Treasury finds a recipient has discriminated on the basis of age in violation of the Act or this part, the recipient shall take any remedial action that Treasury may require to overcome the effects of the discrimination.

§ 23.49 Alternate funds disbursement procedure.

(a) When Treasury withholds funds from a recipient under these regulations, the Secretary may disburse the withheld funds directly to an alternate recipient, where appropriate: Any public or non-profit private organization or agency, or State or political subdivision of the State.

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

(1) The ability to comply with these regulations; and

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

§ 23.50 Exhaustion of administrative remedies.

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

(1) 180 days have elapsed since the complainant filed the complaint and Treasury has made no finding with regard to the complainant; or

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

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

(1) Promptly advise the complainant of this fact; and

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

(3) Inform the complainant:

(i) That 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) That a complainant prevailing in a civil action has the right to be awarded the costs of the action, including reasonable attorney's fee, but that the complainant must demand these costs in the complaint.

(iii) That before commencing the action the complainant shall give 30 days notice by registered mail to the Secretary, the Secretary of HHS, the Attorney General of the United States, and the recipient.

(iv) That the notice 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 the complainant prevails; and

(v) That 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.

Kody H. Kinsley,

Assistant Secretary for Management.

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DEPARTMENT OF HOMELAND SECURITY**Coast Guard****33 CFR Part 117**

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Drawbridge Operation Regulation; Sacramento River, Sacramento, CA

AGENCY: Coast Guard, DHS.