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from the requester. The NEH will follow the provisions of the Debt Collection Act of 1982 (Pub. L. 97-365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(j) *Advance payment.* (1) For requests other than those described in paragraphs (j)(2) and (3) of this section, the NEH will not require the requester to make an advance payment before it commences or continues work on a request. Payment owed for work already completed (i.e., payment before copies are sent to a requester) is not an advance payment.

(2) When the NEH determines or estimates that a total fee to be charged under this section will be more than \$250.00, it may require the requester to make an advance payment of an amount up to the amount of the entire anticipated fee before beginning to process the request, except where it receives a satisfactory assurance of full payment from a requester that has a history of prompt payment.

(3) When a requester has previously failed to pay a properly charged fee to the NEH within thirty (30) days of the billing date, the NEH may require the requester to pay the full amount due, plus any applicable interest, and to make an advance payment of the full amount of any anticipated fee, before the NEH begins to process a new request or continues to process a pending request from that requester.

(4) When there is an advance payment request, the NEH will not consider the request as received by the agency and no further work will be done on the request until the required payment is received. If the requester fails to respond within thirty (30) calendar days after the date of the advance payment request, the NEH will administratively close the request.

(k) *Aggregating requests.* When the NEH reasonably believes that a requester or a group of requesters acting together is attempting to divide a request into a series of requests for the purpose of avoiding fees, the NEH may aggregate those requests and charge accordingly. The NEH may presume that multiple requests of this type made within a 30-day period have been

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made in order to avoid fees. For requests separated by a longer period, the NEH will aggregate them only when there is a reasonable basis for determining that aggregation is warranted in view of all the circumstances involved. The NEH will not aggregate multiple requests involving unrelated matters.

[79 FR 9415, Feb. 19, 2014, as amended at 82 FR 46, Jan. 3, 2017]

§ 1171.12 Preservation of records.

NEH will preserve all correspondence pertaining to the requests that it receives as well as copies of all requested records, until disposition or destruction is authorized by the agency's General Records Schedule of the National Archives and Records Administration (NARA) or other NARA-approved records schedule. Records will not be disposed of while they are the subject of a pending request, appeal, or lawsuit under the Act.

§ 1171.13 Other rights and services.

Nothing in this part will be construed to entitle any person, as of right, to any service or to the disclosure of any record to which such person is not entitled under the FOIA.

PART 1172—NONDISCRIMINATION ON THE BASIS OF AGE IN FEDERALLY ASSISTED PROGRAMS OR ACTIVITIES

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AUTHORITY: 42 U.S.C. 6101–6107; 45 CFR 90.

SOURCE: 79 FR 26633, May 9, 2014, unless otherwise noted.

Subpart A—General

§ 1172.1 Purpose.

The purpose of this part is to set out the National Endowment for the Humanities' (NEH) policies and procedures for implementing the Age Discrimination Act of 1975, as amended, 42 U.S.C. 6101 *et seq.*, (the Act or the Age Act). The Act 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 or activities, and recipients of Federal funds, to continue to use certain age distinctions and factors other than age which meet the requirements of the Act and the regulations in this part. The regulations in this part are based upon the general, government-wide age discrimination regulations issued by the United States Department of Health and Human Services (HHS) at 45 CFR part 90. Complaints of employment discrimination based on age may be subject to the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 621 *et seq.*, (ADEA) and should be filed administratively with the Equal Employment Opportunity Commission (EEOC) (29 CFR part 1626).

§ 1172.2 Application.

- (a) The Act and the regulations in this part apply to each recipient and to any program or activity receiving financial assistance from the NEH.
- (b) The Act does not apply to:

(1) Any age distinction contained in that part of a Federal, State or local statute or ordinance adopted by an elected, general purpose legislative body which:

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

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

(3) The rights or responsibilities of any person or party pursuant to the ADEA, the EEOC regulations under the ADEA, or any statements of policy promulgated by the EEOC under the ADEA.

§ 1172.3 Definitions.

As used in this part, the term:

Act means the Age Discrimination Act of 1975, as amended, 42 U.S.C. 6101 *et seq.* (Pub. L. 94–135).

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, as amended, 29 U.S.C. 621 *et seq.* (Pub. L. 90–202).

Age means how old a person is, or the number of elapsed 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 which necessarily imply a particular age or range of ages (for example, *children*, *adult*, *older persons*, but not *student*).

Agency means a Federal department or agency that is empowered to extend financial assistance.

Chairman means the Chairman of the National Endowment for the Humanities.

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 NEH provides or

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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.

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

Program or activity means all of the operations of:

- (1)(i) A department, agency, special purpose district, or other instrumentality of a State or local government, or
- (ii) The entity of such State or local government that distributes Federal financial 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) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or
- (ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or
- (4) Any other entity which is established by two or more of the entities

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described in paragraph (1), (2), or (3) of this definition, any part of which is extended Federal financial assistance.

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 Department of Health and Human Services.

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.

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 the regulations in this part.

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

§ 1172.11 Rules against age discrimination.

The rules stated in this section are limited by the exceptions contained in § 1172.12.

(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 which 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) The specific forms of age discrimination listed in paragraph (b) of this section do not necessarily constitute a complete list of discriminatory actions.

§ 1172.12 Exceptions to the rules against age discrimination.

(a) *Normal operation or statutory objective of any program or activity.* A recipient may take an action otherwise prohibited by § 1172.11 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, if:

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

(2) 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;

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

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

(b) *Reasonable factors other than age.* A recipient may take an action otherwise prohibited by § 1172.11 which is based on a reasonable 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 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.

(c) *Affirmative action by recipient.* Even in the absence of a finding of discrimination, a recipient may take af-

firmative action to overcome the effects or conditions that resulted in limited participation in the recipient's program or activity on the basis of age.

(d) *Special benefits for children and the elderly.* If a recipient operating 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 § 1172.12(a).

(e) *Age distinctions in NEH regulations.* Any age distinction in a regulation issued by NEH is presumed to be necessary to the achievement of a statutory objective of the program or activity to which the regulation applies, notwithstanding the provisions of § 1172.12(a).

§ 1172.13 Burden of proof.

The recipient of Federal financial assistance bears the burden of proving that an age distinction or other action falls within the exceptions outlined in § 1172.12.

Subpart C—Responsibilities of NEH Recipients

§ 1172.21 General responsibilities.

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

§ 1172.22 Notice to subrecipients.

Where a recipient passes on Federal financial assistance from NEH to subrecipients, the recipient must provide the subrecipients with written notice of their obligations under the Act and the regulations in this part. Each recipient must also make necessary information available to its beneficiaries

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in order to inform them about the protections against discrimination provided by the Act and the regulations in this part.

§ 1172.23 Self-evaluation.

As part of a compliance review under § 1172.31 or a complaint investigation under § 1172.34, NEH may require a recipient employing the equivalent of fifteen (15) or more full time employees to complete a written self-evaluation, in a manner specified by NEH, of any age distinction imposed in its program or activity receiving Federal financial assistance. A recipient must take corrective and remedial action whenever a self-evaluation indicates a violation of the Act, and the recipient must make the self-evaluation available upon request to NEH and to the public for a period of three (3) years following its completion.

§ 1172.24 Information requirements.

Each recipient shall keep records containing information necessary for NEH to determine whether the recipient is in compliance with the Act and the regulations in this part, and shall provide any such records to NEH upon request and in the preferred format specified by NEH. Each recipient shall also permit reasonable access by NEH to its books, records, accounts, and other facilities and sources of information, to the extent necessary for NEH to determine whether the recipient is in compliance with the Act and this part.

Subpart D—Investigation, Conciliation, and Enforcement Procedures

§ 1172.31 Compliance reviews.

(a) NEH may conduct compliance reviews, pre-award reviews, and other similar procedures in order to investigate and correct violations of the Act and the regulations in this part. NEH may conduct these reviews even in the absence of a complaint against the recipient. Reviews may be as comprehensive as necessary to determine whether a recipient is in compliance with the Act and this part.

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(b) If a compliance review or pre-award review indicates a violation of the Act and the regulations in this part, NEH will attempt to contact the recipient and achieve the recipient's voluntary compliance. If the recipient does not comply voluntarily, NEH may pursue enforcement efforts as described in § 1172.36.

§ 1172.32 Complaints.

(a) Any person, individually or as a member of a class or on behalf of others, may file a complaint with NEH, alleging discrimination prohibited by the Act and the regulations in this part based on an action occurring on or after July 1, 1979. A complainant must file a complaint in writing within one hundred eighty (180) days from the date that the complainant first had knowledge of the alleged act of discrimination. However, for good cause, NEH may extend this time limit. NEH will consider the date a complaint is filed as the date when the complaint is sufficient to be processed.

(b) Complaints must include a written and signed statement identifying the parties involved, describing the alleged violation, and stating the date on which the complainant first had knowledge of the alleged violation.

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

(1) Widely disseminating information regarding the obligations of recipients under the Act and this part,

(2) Permitting a complainant to add information to the complaint to meet the requirements of a sufficient complaint,

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

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

(d) NEH will return any complaint that is unsigned or that is not within

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NEH's jurisdiction for any other reason, and NEH will provide an explanation for the return.

§ 1172.33 Mediation.

(a) *Referral of complaints for mediation.* Unless the age distinction complained of is clearly within an exception, NEH will promptly refer all complaints that fall within the jurisdiction of the regulations in this part, and that contain all information necessary for further processing, to the Mediation Agency designated by the Secretary of the Department of Health and Human Services.

(b) Both the complainant and the recipient shall participate in the mediation process to the extent necessary to reach an agreement, or for the mediator to make an informed judgment that an agreement is impossible.

(c) If the complainant and recipient reach a mutually satisfactory resolution of the complaint during the mediation period, the mediator shall prepare a mediation agreement in writing, to be signed by the complainant and recipient, and send a copy of the signed agreement to NEH. NEH will take no further action based on that complaint unless the complainant or the recipient has failed to comply with the agreement.

(d) The mediator shall protect the confidentiality of all information obtained in the course of the mediation process, and 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) If the complainant and recipient do not reach a mutually satisfactory resolution during mediation within sixty (60) days after NEH receives the complaint, the mediator shall return the complaint to NEH for investigation. The mediator may return a complaint at any time before the end of the sixty-day period if it appears that the complaint cannot be resolved through mediation or if an agreement is reached. The mediator may extend this sixty-day period, provided NEH concurs, for not more than thirty (30) days, if the mediator determines that

resolution is likely to occur within such period.

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

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

(ii) NEH will put any settlement agreement in writing and have it signed by the parties and NEH. The settlement is not a finding of discrimination against a recipient.

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

(b) *Formal investigation and finding.* If NEH cannot resolve the complaint during the initial investigation, it will complete the investigation of the complaint and make a formal finding. If the formal investigation indicates a violation of the Act or the regulations in this part, NEH will attempt to achieve voluntary compliance. If NEH cannot obtain voluntary compliance, it will begin appropriate enforcement action as provided in § 1172.36.

§ 1172.35 Prohibition against intimidation or retaliation.

A recipient may not engage in acts of intimidation or retaliation against any person who attempts to assert a right protected by the Act or this part, or cooperates in any mediation, investigation, hearing, or other part of NEH's investigation, conciliation, and enforcement process.

§ 1172.36 Enforcement procedure.

(a) NEH may enforce the Act and the regulations in this part through:

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(1) Termination of a recipient's Federal financial assistance under the program or activity involved where the recipient has violated the Act or the regulations in this part. Prior to such termination, a recipient must have the opportunity for a hearing on record before an administrative law judge who must determine that a violation has occurred. Therefore, NEH will not terminate a recipient's Federal financial assistance in a case that has been settled in mediation, or prior to a hearing, unless the case is reopened because of a violation of the settlement agreement.

(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 the regulations in this part.

(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) NEH will limit any termination under §1172.36(a)(1) to the particular recipient and particular program or activity, or portion thereof, that NEH finds in violation of the Act or the regulations in this part. NEH will not base its decision to terminate on any findings with respect to any other program or activity of the recipient that does not receive Federal financial assistance from NEH.

(c) NEH will not take action under §1172.36(a) until:

(1) The Chairman has advised the recipient of its failure to comply with the Act or the regulations in this part, and that NEH has determined that voluntary compliance cannot be obtained, and

(2) Thirty (30) days have elapsed after the Chairman has sent a written report of the circumstances and grounds of the action to the Congressional Committee(s) having legislative jurisdiction over the program or activity involved. The Chairman will file such report whenever it takes action under §1172.36(a).

(d) NEH also may defer granting new Federal financial assistance to a recipient when a hearing under §1172.36(a)(1) is initiated.

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(1) New Federal financial assistance includes all assistance for which NEH 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 does not include assistance approved prior to the beginning of a termination hearing under §1172.36(a)(1), or increases in funding as a result of changed computation of formula awards.

(2) NEH will not begin a deferral until the recipient has received a notice of an opportunity for a hearing under §1172.36(a)(1). NEH will not continue a deferral for more than sixty (60) days unless a hearing has begun within that time, or the time for beginning the hearing has been extended by mutual written consent of the recipient and NEH. NEH will not continue a deferral for more than thirty (30) days after the close of the hearing, unless the hearing results in a finding against the recipient.

(3) NEH will limit any deferral to the particular recipient and particular program or activity, or portion thereof, that NEH finds in violation of the Act or the regulations in this part. NEH will not base the deferral decision any finding with respect to any other program or activity of the recipient that does not receive Federal financial assistance from NEH.

§ 1172.37 Hearings, decisions, post-termination proceedings.

Certain NEH procedural provisions applicable to Title VI of the Civil Rights Act of 1964 apply to NEH enforcement of the regulations in this part. They are found at 45 CFR chapter XI, subchapter A, 1110.9 through 1110.11.

§ 1172.38 Remedial action by recipients.

Where NEH finds a recipient has discriminated on the basis of age, the recipient shall take any remedial action that NEH may require to overcome the effects of discrimination. If another recipient exercises control over the recipient that has discriminated, NEH may require both recipients to take remedial action.

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§ 1172.39 Alternate funds disbursement procedure.

When NEH withholds funds from a recipient under the regulations in this part, the Chairman may disburse the withheld funds directly to an alternate recipient otherwise eligible for NEH support. NEH will require any alternate recipient to demonstrate the ability to comply with the regulations in this part and to achieve the goals of the National Foundation on the Arts and the Humanities Act of 1965, Pub. L. 89-209 (20 U.S.C. 951)—the Federal statute authorizing the Federal financial assistance.

§ 1172.40 Exhaustion of administrative remedies.

(a) A complainant may file a civil action under the Act and the regulations in this part following the exhaustion of administrative remedies. Administrative remedies are exhausted if one hundred eighty (180) days have elapsed since the complainant filed the complaint and NEH has made no finding with regard to the complaint, or NEH issues any finding in favor of the recipient.

(b) If either of the conditions set forth in §1172.40(a) is satisfied, NEH will:

(1) Promptly advise the complainant of this fact,

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

(3) Inform the complainant:

(i) That a civil action can only be brought 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 fees, but that these costs must be demanded in the complaint,

(iii) That before commencing the action, the complainant must give thirty (30) days' notice by registered mail to the Secretary, the Attorney General of the United States, the Chairman, 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 no action may be brought 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.

PART 1173—INDEMNIFICATION OF EMPLOYEES

Sec.

1173.1 Policy on employee indemnification.

1173.2 [Reserved]

AUTHORITY: 5 U.S.C. 301.

SOURCE: 87 FR 8431, Feb. 15, 2022, unless otherwise noted.

§ 1173.1 Policy on employee indemnification.

(a) This part explains when the National Endowment for the Humanities (NEH) will indemnify you, an employee or a former employee of NEH, against a verdict, judgment, or other monetary award that a court or other competent authority renders against you. When NEH indemnifies you against a verdict, judgment, or other monetary award, it means that NEH will pay the amounts that the court orders you to pay.

(b) This part also explains when NEH will settle a claim (also referred to as compromising a claim) that someone brings or threatens to bring against you in court or before another competent authority. It is only in exceptional circumstances that NEH will agree to settle a claim before a court or other competent authority has entered a verdict, judgment, or monetary award against you.

(c) In order for NEH to indemnify you or settle a claim:

(1) The verdict, judgment, or monetary award to be paid or the claim to be settled must relate to something that you did (or failed to do) within the scope of your employment with NEH; and

(2) The Chairperson of NEH or someone the Chairperson designates (the Agency Official) must determine, as a matter of discretion, that indemnifying you or settling the claim would be in the interest of NEH.

(d) If you become aware that someone has made or may make a claim