



NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Humanities

45 CFR Part 1172

RIN 3136-AA33

Nondiscrimination on the Basis of Age in Federally Assisted Programs or Activities

AGENCY: National Endowment for the Humanities.

ACTION: Final rule.

SUMMARY: In this final rule, the National Endowment for the Humanities (NEH) is issuing Age Discrimination Act of 1975 (the Act or the Age Act) regulations. These regulations implement provisions of the Act and the general, government-wide age discrimination regulations promulgated by the United States Department of Health and Human Services (HHS).

These regulations are designed to guide the actions of recipients of Federal financial assistance from NEH and incorporate the basic standards set forth in the general, government-wide regulations for determining what constitutes age discrimination. These regulations also discuss the responsibilities of NEH recipients and the investigations, conciliation, and enforcement procedures NEH has been using and will continue to use to ensure compliance with the Act.

DATES: The final rule will be effective [INSERT 30 DAYS AFTER PUBLICATION IN FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Mara Campbell, Office of the General Counsel, NEH, at 202-606-8322, 202-606-8282 (TDD), or mcampbell@neh.gov.

SUPPLEMENTARY INFORMATION:

General Information

The Age Discrimination Act of 1975, as amended, 42 U.S.C. 6101 et seq., (the Act or the Age Act), prohibits discrimination on the basis of age in programs or activities receiving Federal financial assistance. The Act, which applies to persons of all ages, also contains certain exceptions that permit, under limited circumstances, use of age distinctions or factors other than age that may have a disproportionate effect on the basis of age.

The Act however, does not cover employment discrimination on the basis of age, which is addressed by a different statute, the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 621 et seq., (ADEA). The ADEA applies specifically to employment practices and programs, both in the public and private sectors, and only applies to persons who are age forty and over. Complaints of employment discrimination based on age by recipients of Federal financial assistance are subject to the ADEA—and not the Act or these regulations—and should instead be filed with the Equal Employment Opportunity Commission (EEOC) (29 CFR part 1626).

Rulemaking History

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, issued on June 12, 1979 and codified at 45 CFR part 90, require each agency to publish agency-specific regulations implementing the Act and to submit such final agency regulations to HEW (now HHS) before publication in the **Federal Register**. (See 45 CFR 90.31).

The Act became effective on July 1, 1979—the effective date of HEW’s final government-wide regulations—and NEH has enforced the provisions of the Act since that time.

NEH first proposed agency-specific regulations implementing the Act on October 4, 1979 (44 FR 57130), but did not publish the final regulations. As a practical matter, however, the absence of such regulations has not affected NEH’s enforcement of prohibitions against discrimination on the basis of age in programs or activities receiving financial assistance from NEH.

Since a significant amount of time had passed, and because regulatory development guidelines had changed, NEH began the regulatory process anew and published a proposed rule, including a full regulatory analysis under the Administrative Procedure Act, in the **Federal Register** on May 15, 2013 (78 FR 28569). The public comment period ended on July 15, 2013, and the only comments NEH received were from the EEOC.

Comments from EEOC

The majority of the EEOC’s comments were intended to address potential confusion among the employment community and employees who may be unaware that the Age Act and the ADEA are separate statutes with different purposes, procedures, and remedies. In order to address this concern, NEH created a new “General Information” section under the Supplementary Information heading. This new section provides information on the ADEA and how it differs from the Age Act.

In addition to inserting this general overview, NEH amended specific sections of the rule to more clearly distinguish the two Acts:

Section 1172.1 has been amended to state that complaints of employment discrimination based on age by recipients of Federal financial assistance are subject to the ADEA and should be filed administratively with the EEOC.

Section 1172.2(b) has been amended to include subsection (3) which states that these regulations do not in any way affect any rights or responsibilities under the ADEA, the EEOC's regulations under the ADEA, or any statements of policy promulgated by EEOC under the ADEA.

Section 1172.3 has been amended to include a definition of the ADEA.

HHS review

As part of the clearance process required by the government-wide Age Act regulations, NEH submitted its draft final rule to HHS for review prior to publication. In response to this review, NEH updated the following sections:

Section 1172.12 has been amended to include subsection (e) which states that any age distinction issued by NEH in a regulation is presumed to be necessary to achieve a statutory objective, notwithstanding the provisions of § 1172.12(a).

Sections 1172.24 and 1172.33 have been amended to replace the word "must" with "shall."

Section 1172.33(a) has been amended to include the words, "Unless the age distinction complained of is clearly within an exception," at the beginning of the sentence. Additionally, the second sentence of subpart (b) has been deleted.

Sections 1172.33(c) and 1124.34(a)(1) have been amended to replace the word "settlement" with "mediation."

Section 1172.36(d) has been amended to include subsection (3) which states that deferrals will be limited to the particular recipient and particular program or activity.

Additional changes

In addition to the changes noted above, NEH updated the following section of the final rule:

Section 1172.2(b) has been amended to delete the words “any program or activity receiving Federal financial assistance under the Workforce Investment Act of 1998 (29 U.S.C. 9201 et seq.)” as Congress eliminated this exception in the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Public Law 105-277.

Finally, HHS’s government-wide regulations require that each agency publish an appendix to its Age Act regulations listing all age distinctions which appear in federal statutes and regulations and affect the agency’s program of financial assistance. A review of National Foundation on the Arts and Humanities Act of 1965, 20 U.S.C. 951 et seq., and NEH’s regulations reveals no statutory age distinctions used by NEH in the administration of agency programs.

Overview of the Final Rule

NEH has designed this rule to fulfill its statutory and regulatory obligations to issue a regulation implementing the Act that conforms to the government-wide regulations at 45 CFR part 90. NEH’s rule is divided into four parts: Subpart A—General; Subpart B—Standards for Determining Age Discrimination; Subpart C—Responsibilities of NEH Recipients; and Subpart D—Investigation, Conciliation, and Enforcement Procedures.

Subpart A—General.

Subpart A explains the purpose of these regulations, which is to set out NEH's policies and procedures in accordance with the Act and the government-wide regulations. These regulations apply to any program or activity receiving Federal financial assistance from NEH. Subpart A also defines terms used in the regulations, many of which are identical to the definitions in the government-wide regulations. The definition of the term "recipient" points out the inapplicability of these regulations to assistance programs administered directly by the Federal government to beneficiaries. With respect to direct assistance programs, the regulations may apply whenever direct aid is provided to an individual on conditions that the aid is spent in providing services or benefits to others. Further, because the Act contains several exceptions which limit the general prohibition against age discrimination, the regulations provide definitions for two terms that are essential to understanding two of those exceptions: "normal operation" and "statutory objective."

Subpart B—Standards for Determining Age Discrimination.

Subpart B sets out the standards NEH uses for determining illegal age discrimination, which are based on the government-wide regulations. The regulations also establish a four-part test for a specific age distinction to satisfy the "normal operation" or "statutory objective" requirement for a recipient to use an age-based distinction in a program or activity receiving Federal financial assistance. NEH will use this four-part test to scrutinize age distinctions, if any, which are imposed in NEH-assisted programs, but which are not explicitly authorized by a Federal, State or local statute. NEH recipients are also permitted to take an action otherwise prohibited by the Act if the action is based on "reasonable factors other than age," but only if the factor

bears a direct and substantial relationship to the program's normal operation or to the achievement of a statutory objective.

Subpart C—Responsibilities of NEH Recipients.

Subpart C sets forth the duties of NEH recipients. NEH recipients are responsible for ensuring that their programs and activities are in compliance with the Act and NEH regulations. Where an NEH recipient passes on financial assistance to subrecipients, the recipient must notify subrecipients of their obligations under the regulations. Under these regulations, NEH could require a recipient or subrecipient to complete a written self-evaluation of its compliance with the Act and these regulations. The self-evaluation must be kept on file for three years from its effective date and made available to the public upon request.

Subpart D—Investigation, Conciliation, and Enforcement Procedures.

Subpart D establishes the procedures for investigation, conciliation, and enforcement of the Act, and closely follows the procedural requirements included in the government-wide age discrimination regulations. Mediation is the first step in the complaint process. NEH will refer all complaints of discrimination under the Act to the Federal agency designated by HHS to manage the mediation process. Complainants and NEH recipients shall participate in the effort to reach a mutually satisfactory settlement. Mediation may last no more than sixty (60) days from the date NEH first receives the complaint. NEH will investigate any complaints that are unresolved after mediation or are reopened because the mediation agreement is violated. Finally, these regulations permit NEH to withhold funds and disburse them to an appropriate alternate recipient, if

the alternate has demonstrated the ability to comply with these regulations and to achieve the goals of the National Foundation on the Arts and the Humanities Act of 1965.

Regulatory Procedures

Executive Order 12866, Regulatory Review

NEH has determined that the rule is not a “significant regulatory action” under Executive Order 12866 because it will not: (1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in Executive Order 12866. Therefore, the rule is not subject to Office of Management and Budget (OMB) review.

Regulatory Flexibility Act

In accordance with section 605(b) of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601, et seq., as amended by the Small Business Regulatory Enforcement Fairness Act of 1996), the Chairman of NEH has certified that this rule will not have a significant economic impact on a substantial number of small entities. In making this determination, NEH used the definition of small entity set forth in the RFA: (1) a small business, as defined by the Small Business Administration (SBA) in 13 CFR part 121.201; (2) a small governmental jurisdiction, which 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, which is any non-profit enterprise that is independently owned and operated and is not dominant in its field. Some NEH grant programs support humanities projects developed by small, independently-owned non-profits, such as museums, libraries, and other cultural organizations. NEH funds approximately 75-100 small non-profits each year, which accounts for less than ten percent of NEH's annual funding.

However, the rule, if promulgated in final form, will not impose any additional requirements on these small entities because it will not substantively change existing requirements, but will merely clarify such duties for entities receiving financial assistance from NEH. The requirements prohibiting age discrimination by recipients of Federal financial assistance contained in the Act and the government-wide regulations have been in effect since 1975. The rule only formalizes those existing requirements for NEH recipients.

Small Business Regulatory Enforcement Fairness Act of 1996

NEH has determined that the rule is not a "major rule" as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), as amended, Pub. L. 104-121 (5 U.S.C. 804). This rule will not result in: (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation or the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 104-4 (2 U.S.C. 1501 et seq.), does not apply to the rule because it does not apply to regulatory actions that establish or enforce statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap or disability. Further, the rule contains no “Federal mandate” under Title II of UMRA because UMRA excludes from the definitions of “Federal intergovernmental mandate” and “Federal private sector mandate” duties that arise from conditions of Federal assistance and duties that arise from participation in a voluntary Federal program. Congress mandated in the Act the establishment of these agency-specific regulations to enforce the prohibition of discrimination on the basis of age in programs or activities receiving Federal financial assistance. These regulations do not apply to any program or activity unless it applies for and receives financial assistance from NEH. Application for, and receipt of, NEH assistance is entirely voluntary. In addition, NEH has determined that the rule will not significantly or uniquely affect small governments. These regulations apply uniformly to all organizational recipients of NEH financial assistance.

Paperwork Reduction Act

NEH has determined that the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 et seq., does not apply because the rule does not impose any new information collection requirements that require OMB approval. Section 3518(c)(1)(B) of the PRA exempts from OMB approval, collections of information “during the conduct of... (ii) an administrative action or investigation involving an agency against specific individuals or entities.” These regulations provide NEH with discretionary authority to require information from recipients as part of an investigation, thereby eliminating any PRA

concerns, because it is discretionary and tied to NEH’s authority to investigate. Further, the rule provides that individuals “may file” complaints and requires that recipients provide notice to subrecipients of their obligations under the Act and the regulations, neither of which involve a “collection of information” under the PRA.

Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. NEH will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2). This rule will be effective [INSERT 30 DAYS AFTER PUBLICATION IN FEDERAL REGISTER].

List of Subjects in 45 CFR Part 1172

Administrative practice and procedure, Age discrimination, Civil rights, Grant programs, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, NEH is amending 45 CFR chapter XI, subchapter D, by adding part 1172 as follows:

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

Subpart A – General

Sec.

- 1172.1 Purpose.
- 1172.2 Application.
- 1172.3 Definitions.

Subpart B – Standards for Determining Age Discrimination

- 1172.11 Rules against age discrimination.
- 1172.12 Exceptions to the rules against age discrimination.
- 1172.13 Burden of proof.

Subpart C – Responsibilities of NEH Recipients

- 1172.21 General responsibilities.
- 1172.22 Notice to subrecipients.
- 1172.23 Self-evaluation.
- 1172.24 Information requirements.

Subpart D – Investigation, Conciliation, and Enforcement Procedures

- 1172.31 Compliance reviews.
- 1172.32 Complaints.
- 1172.33 Mediation.
- 1172.34 Investigation.
- 1172.35 Prohibition against intimidation or retaliation.
- 1172.36 Enforcement procedure.
- 1172.37 Hearings, decisions, post-termination proceedings.
- 1172.38 Remedial action by recipients.
- 1172.39 Alternate funds disbursement procedure.
- 1172.40 Exhaustion of administrative remedies.

Authority: 42 U.S.C. 6101-6107; 45 CFR 90.

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.

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

ADEA means the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 621 et seq. (Pub. L. 90-202).

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 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 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 sub-division, 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 affirmative 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 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.

- (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 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.

§ 1172.34 Investigation.

- (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:

(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.
- (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.

§ 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.

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