railroad owned covered hoppers, on a one trip basis, with a minimum of 25 loaded cars operated in the first movement, and the remaining cars of the unit-train operated together in the final movement of this unit-grain-train. The total tariff minimum weight will be transported as required except if the railroad is unable to move all of the empty covered hoppers to the loading point on the final movement, the train can be reduced by the allowable number of cars or allowable weight percentage, as set forth in section (b) of this Service Order.

This exception applies to railroad owned covered hopper cars.

The bills of lading and waybills shall bear the following endorsement:

"Unit-grain-train of ( ) tons or ( ) cars. Partial movement of ( ) tons or ( ) cars forwarded authority Exception No. 10 to ICC Revised Service Order No. 1312. ( ) tons or ( ) cars to follow".

Demurrage rules will be treated as if each of the movements of the unit-train is a complete movement in itself.

Effective May 25, 1979.

Expires 11:59 p.m., June 15, 1979.

Issued at Washington, D.C., May 25, 1979.

Joel E. Burns,

Director.

[FR Doc. 79-18276 Filed 6-11-79; 8:45 am]

BILLING CODE 7035-01-M

[Notice No. 23]

Motor Carrier Temporary Authority Applications

Correction

In FR Doc. 79-5267 appearing at page 10482 in the issue for Tuesday, February 20, 1979, on page 10487, second column, eigth line of MC 146068 (Sub-1A), insert "NY"after "NJ".

BILLING CODE 1505-01-M

Sunshine Act Meetings

Federal Register
Vol. 44, No. 114
Tuesday, June 12, 1979

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

CONTENTS

1

COMMODITY FUTURES TRADING COMMISSION.

TIME AND DATE: 11 a.m., June 15, 1979.

PLACE: 2033 K Street, N.W., Washington, D.C., 8th Floor Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Market Surveillance.

CONTACT PERSON FOR MORE INFORMATION: Jane Stuckey, 254-6314.

[S-1162-79 Filed 6-8-79; 10:09 am]

BILLING CODE 6351-01-M

2

FEDERAL HOME LOAN BANK BOARD.

TIME AND DATE: At the conclusion of the open meeting to be held at 9:30 a.m., June 14, 1979.

PLACE: 1700 G Street, N.W., Sixth Floor, Washinton, D.C.

STATUS: Closed meeting.

CONTACT PERSON FOR MORE INFORMATION: Franklin O. Bolling, 202-377-6677.

MATTERS TO BE CONSIDERED: Consideration of 1978 Financial Audits of the District Banks.

Announcement is being made at the earliest practicable time.

No. 245, June 8, 1979.

[S. 1166-79 Filed 6-8-79; 2:27 pm]

BILLING CODE 6720-01-M

3

FEDERAL RESERVE SYSTEM (Board of Governors).

TIME AND DATE: 9 a.m., Friday, June 15, 1979.

PLACE: 20th Street and Constitution Avenue, N.W., Washington, D.C. 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Proposed space consolidation plan, involving competitive bidding, for the Federal Reserve Bank of New York.
2. Construction management agreement for the Federal Reserve Bank of San Francisco's proposed building project.
3. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving, individual Federal Reserve System employees.
4. Any agenda items carried forward from a previously announced meeting.

[S-1165-79 Filed 6-8-79; 12:00 p.m.]

BILLING CODE 6210-01-M

4

NATIONAL SCIENCE BOARD.

DATE AND TIME: June 21, 1979, 9:30 a.m., Open Session. June 22, 1979, 10:30 a.m., Open Session. June 22, 1979, 12 noon, Closed Session.

PLACE: Headquarters, Association of Universities for Research in Astronomy and Kitt Peak National Observatory, Tucson, Arizona.

STATUS: Parts of this meeting will be open to the public. The rest of the meeting will be closed to the public.

MATTERS TO BE CONSIDERED AT THE OPEN SESSION:

Thursday, June 21

1. Minutes—Open Session—29th Annual (206th) Meeting.
2. Chairman's Report.
3. Director's Report:
   a. Report on Grant and Contract Activity—5/17-6/19, 1979,
   b. Organizational and Staff Changes,
   c. Congressional and Legislative Matters,
   d. NSB Budget for Fiscal Year 1980, and
   e. Other Items.
4. Board Committees—Reports on Meetings:
   a. Executive Committee,
   b. Committee on Eleventh NSB Report,
   c. Committee on Twelfth NSB Report,
   d. Ad Hoc Committee on Deep Sea and Ocean Margin Drilling Programs,
   e. Ad Hoc Committee on NSB Nominees, and
   f. Ad Hoc Committee on NSB Act Review.
5. NSP Advisory Groups.
6. Annual Reviews of RSB Centers at NSB.
7. Board Representation at Future Site Visits of Materials Research Laboratories.
8. Other Business.
9. Next Meetings.
10. Comments on Planning Environment Review.
11. Interim Reports of Discussion Groups.
12. Review of NSB Act of 1950 as Amended.

Friday, June 22

13. Final Reports of Discussion Groups.

MATTERS TO BE CONSIDERED AT THE CLOSED SESSION:

A. Minutes—Closed Session—29th Annual (206th) Meeting.
B. NSB Budgets for Fiscal Year 1981 and Subsequent Years.
C. NSB Annual Reports.

CONTACT PERSON FOR MORE INFORMATION: Miss Vernice Anderson, Executive Secretary, 202-632-5840.

[S-1163-79 Filed 6-8-79; 10:09 am]

BILLING CODE 7555-01-M

5

SECURITIES AND EXCHANGE COMMISSION.

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: To be published.

STATUS: Open meeting.

PLACE: Room 825, 500 North Capitol Street, Washington, D.C.

DATE PREVIOUSLY ANNOUNCED: Monday, June 4, 1979.

CHANGES IN THE MEETING: Additional items.

The following additional items will be considered at an open meeting scheduled for Wednesday, June 13, 1979 at 10 a.m.:

1. Consideration of whether to adopt an amendment to Regulation S-X [17 CFR Part 210.3-18(k)] to permit financial statement disclosure of oil and gas reserve information to be designated "unaudited" for fiscal years ending before December 26, 1980. For further information, please contact James D. Hall at (202) 755-0222.
2. Consideration of whether to re-open the comment period on the "Supplemental Earnings Summary" which was proposed in Securities Act Release No. 5969 [43 FR 40726] and extend the new comment period through July 25, 1979. For further information, please contact James D. Hall at (202) 755-0222.

Commissioners Loomis, Evans, and Karmel determined that Commission business required the above changes and that no earlier notice thereof was possible.

At times changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted, or postponed, please contact: Mike Rogan at (202) 755-1638.

June 7, 1979.

[S-1164-79 Filed 6-8-79; 10:09 am]

BILLING CODE 8010-01-M

federal register

Tuesday
June 12, 1979

Part II

Department of Agriculture

Food and Nutrition Service

Food Stamp Program; Procedures for Reduction or Cancellation of Allotments to Eligible Households

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 271, 272, and 273

[Amdt. 146]

Food Stamp Program; Procedures for Reduction or Cancellation of Allotments to Eligible Households

AGENCY: Food and Nutrition Service, USDA.

ACTION: Emergency rulemaking.

SUMMARY: This emergency rulemaking sets forth the procedures that are to be followed if the Secretary of Agriculture determines that it is necessary to reduce or cancel the food stamp allotments distributed to households eligible to receive food stamps. Such a reduction or cancellation would be necessary if it is determined that the value of full monthly food stamp allotments distributed to all eligible households will exceed the amount of funds appropriated by Congress. This rulemaking implements the provisions of Section 18(b) of the Food Stamp Act of 1977, Title XIII, P.L. 95–113, 91 Stat. 979, September 29, 1977, 7 U.S.C. 2525. Since there is a possibility that a reduction or cancellation of allotments may be necessary during this fiscal year, the Acting Administrator of the Food and Nutrition Service, Robert Greenstein, has determined that an emergency rulemaking is necessary to establish these procedures as expeditiously as possible. Comments are invited, however, for use in developing a final rule.

DATES: Effective date: Effective upon publication. Comments must be received on or before August 13, 1979, to be assured of consideration.

ADDRESSES: Comments should be submitted to: Alberta Frost, Acting Deputy Administrator for Family Nutrition Programs, Food and Nutrition Service, United States Department of Agriculture, Washington, D.C. 20250. A final rulemaking will be issued after considering the comments. All written comments, suggestions or objections will be open to public inspection at the offfice of the Food and Nutrition Service, USDA during regular business hours (8:30 a.m. to 5:00 p.m., Monday through Friday) at 500 12th Street, S.W., Washington, D.C., Room 650. An Impact Analysis has been prepared, and is available from Acting Deputy Administrator Frost. A copy will also be open for public inspection at the office shown above.

FOR FURTHER INFORMATION CONTACT: Sue McAndrew, Chief, Program Standards Branch, Program Development Division, Family Nutrition Programs, Food and Nutrition Service, Washington, D.C. 20250, (202) 447–6535.

SUPPLEMENTARY INFORMATION:

Information

Section 18(b) of the Food Stamp Act of 1977 directs the Secretary to reduce monthly food stamp allotments if program requirements are in excess of the amount appropriated. In part, Section 18(b) states: "If in any fiscal year the Secretary finds that the requirements of participating States will exceed the limitation set herein, the Secretary shall direct State agencies to reduce the value of such allotments to be issued to households certified as eligible to participate in the food stamp program to the extent necessary to comply with the provisions of this subsection." This rulemaking establishes the procedures that will be used in carrying out this provision of the Act. Since there is a possibility that the procedures will have to be used during this fiscal year, they are being issued as an emergency rulemaking, effective immediately. The rules are subject to public comment, however, and will be reissued in final form following the end of the comment period.

The Department's General Counsel and the Comptroller General of the United States have ruled that only a *pro rata* benefit reduction is legally permissible under Section 18(b) of the Act. The procedures in this rulemaking provide for such a *pro rata* benefit reduction.

Nature of reduction action. If the Secretary determines that a reduction in food stamp allotments is necessary, a decision must be made as to how this reduction is to be affected. Based on the best information available on levels of participation and amounts of benefits, FNS will monitor the expenditure of funds to determine if a budgetary shortfall is likely to occur. If it appears that the available appropriated funds will not be sufficient to provide all households with full monthly allotments for the remainder of the fiscal year, the Secretary will determine the best manner in which to make up the shortfall. The choices available are to reduce allotments for one or more months, cancel allotments for one or more months or use a combination of reduced and cancelled allotments. The manner in which the Secretary decides to make up the shortfall will depend on the extent of the shortfall and the number of months available to make up the shortfall.

As noted earlier, any reduction or cancellation of allotments deemed necessary by the Secretary shall have an equal effect on all households. Reductions will be accomplished by providing households with a certain percentage of their normal full monthly allotments. Thus, if the Secretary determines that a 25 percent reduction in allotments will produce an adequate savings of money so that appropriations will not be exceeded, *all* households will have their allotments reduced by 25 percent. If it is determined that a cancellation of allotments is necessary, *all* allotments to all households for a given month will be cancelled.

Enactment of allotment reductions. Since State agencies are responsible for issuing food stamps to eligible households, they will be responsible for implementing reductions and cancellations of allotments. This rulemaking establishes the procedures that States are to follow in carrying out such directives.

All project areas with computerized issuance systems will be required to add an element to their computer programs to allow for percentage reductions in allotments to be made if the Secretary so directs. This element would be a new, final computation to reduce benefits by a specified percentage. The computation would be structured in one of two ways. States could choose to add a two step computation which would first multiply the full allotment by the percentage reduction factor and then subtract the result from the full allotment to arrive at the reduced allotment. Thus, if a 25 percent reduction was ordered, the full allotment would be multiplied by 25 percent and the result subtracted from the full allotment. Alternatively, State agencies could subtract the percentage reduction factor from 1.00 and multiply the full allotment by this result. For example, if a 25 percent reduction was ordered, States would multiply the full allotment by 0.75 to arrive at the reduced allotment. State agencies may use either of these two computations to reduce allotments. To ensure that this adaptation is made now, however, the implementation segment of these rules suggests that State agencies include this field in their computers when they update their data bases to reflect the July 1979 cost-of-food increases.

Any project area with a computerized issuance system that cannot be changed in the manner described above must be changed in some way to allow for the issuance of reduced allotments. The method adopted in these areas must ensure that reduced allotments can be issued within 15 days of a notice from FNS to reduce allotments. Furthermore, the change in the computer system must be accomplished in time to reduce allotments for August 1979 if it is necessary to do so.

In project areas with manual issuance systems, preparation for a reduction in allotments in these areas includes the printing and distribution of new allotment tables or conversion tables to be used with current allotment tables. The Department will prepare and distribute them for State agencies to use. It is the responsibility of the State agencies, however, to ensure that sufficient copies are obtained and distributed in time to effect reductions in allotments.

A reduction in allotments in an area with an HIR card system can be accomplished in one of two ways. State agency personnel can either adjust all of the Household Issuance Records prior to the affected month's issuance or they can adjust the records as each household appears at the issuance office to pick up its monthly allotment. The choice of which method to use is up to the State agency.

It should be emphasized that if a reduction or cancellation of allotments is directed, the action is to affect all allotments for the month the cancellation or reduction is ordered. Thus, if August allotments are to be reduced by 50 percent, all allotments issued to eligible households for August are to be reduced by 50 percent. In States with fiscal months, this reduction shall be applied to all normal allotments for August, even if the allotment is not received until September. At the same time, allotments issued in the reduced month, but which actually represent the household's benefits for the previous month, shall not be reduced if no benefit reduction had been ordered for the previous month. Likewise, any retroactive or restored benefits for a period other than the reduced month should not be affected by the ordered reduction.

Along with putting a reduction or cancellation into effect, State agencies must notify households of the action. The rulemaking points out that the reduction or cancellation of allotments is to be considered a mass change and that the normal requirements for notifying households of mass changes are to be applied, with the one exception discussed below. Those requirements direct States to notify households through the news media, through posters in certification and issuance offices or through general explanatory notices mailed to participating households. Those requirements also give States the option of mailing individual notices of adverse action to households affected by the change. In view of the requirements of the law and the time element involved, this rulemaking prohibits States from using notices of adverse action. Households may not, under any circumstances, be entitled to continued benefits at their former level.

Included in this rulemaking is a provision that denies households an entitlement to the restoration of benefits lost as a result of a reduction or cancellation of allotments. Thus, if a reduction or cancellation of allotments results in a surplus of appropriated funds, the Department would not have to return these funds to the households affected by the reduction or cancellation. However, while households do not have an entitlement to the restoration of benefits and the Department would not be required to issue retroactive benefits the Department pledges to restore benefits to households affected by an allotment reduction or cancellation if the Secretary determines such a restoration is practicable.

In the event of a reduction or cancellation in benefits, the Department will endeavor to provide State agencies with as much lead-time as possible. Once the percentage reduction factor field is entered into computers, State agencies with computerized issuance will not require a great deal of lead-time to change the reduction factor on the computer. State agencies with manual systems will require more lead-time. The Department will make every effort to provide a minimum of one month lead-time for reductions in benefits and one-half month lead-time for cancellation. The Department anticipates that in the event a reduction or cancellation does occur, a longer lead-time than these minimums would be provided.

Effects of reductions and cancellations on ongoing Program operations. The reduction or cancellation of allotments is not intended to affect any aspect of Program operations other than the amount of benefits distributed to households. As noted in this rulemaking, applications are to be accepted and processed the same way during a month in which allotments are reduced or cancelled as they are in a normal month. Eligibility determinations are to be made according to the criteria in Part 273 and certification periods are to be assigned on a normal basis. Recertifications are also to be processed and not delayed.

As noted above, households affected by reductions and cancellations would not have an entitlement to a continuation of benefits if they object to the reduction or cancellation action. Households may request fair hearings and State agencies are required to honor and process the requests. However, fair hearings will not result in a reversal of the reduction or cancellation of a household's allotment. They will result in a correction to an incorrectly calculated allotment though, and to restored benefits if the reduction was too large because it was incorrectly computed.

Penalties

This rulemaking explains the penalties that may be invoked if State agencies fail to comply with a directive issued by FNS to reduce or cancel allotments. The penalties were developed with the realization that, in order to assure that the mandate of Congress is met, swift action would be necessary to induce to noncomplying State agencies to take immediate corrective action. Failing that, the penalties include a provision for the recovery of funds from State agencies that do not comply.

The first two penalty provisions describe what may occur if the Department discovers that a State agency does not intend to comply with an order to reduce or cancel allotments. FNS may issue a warning to such a State agency that will advise the State agency that if the ordered reduction or cancellation of allotments does not occur, FNS will cancel 100 percent of the Federal share of the State agency's administrative costs for the affected month. The warning period will be short and action to cancel the funding will come quickly following confirmation of the State's noncompliance. At the same time that this activity is taking place, FNS may, through the Attorney General, seek a court injunction against the State in question in an effort to compel the State to comply with the ordered allotment reduction or cancellation.

The last penalty provision involves the recovery of funds that are lost due to a State's failure to comply with an order to reduce or cancel allotments. As the rulemaking indicates, State agencies will be held liable for 100 percent of any overissuances that occur due to a State's failure to implement a reduction or cancellation order. It is obvious that if such an order is issued and a State ignores it, the effect of the order will be compromised, and both the food Stamp Act and the Anti-Deficiency Act, 31 U.S.C. 665, as amended, could be in danger of violation. Since the reason for the order is to stay within the limits set by the amount of funds appropriated by Congress and since the State agency's action will serve to force spending outside these limits, the Department determined that the noncomplying State agency should be liable for making up the overissuances it caused.

If a State agency fails to comply with an order to reduce or cancel benefits, FNS will bill the State agency for any resultant overissuances. The billing will prescribe a period of time in which FNS expects to receive payment of the bills. If payment is not made within that time period, steps will be taken to recover the billed amount through offsets to the Federal share of the State's administrative costs.

The penalty provisions in the rulemaking are strict. However, since orders to reduce or cancel allotments will only be issued if they are absolutely necessary, full compliance by all States is imperative.

Amendments

In order to ensure that there are no misunderstandings, Section 273.10(e) is being amended with the issuance of this rulemaking. This section explains how net income and benefit levels are to be calculated. The amendment in this rulemaking clarifies that the procedures for calculating benefit levels in paragraph (2) of that section apply only when a reduction or cancellation of allotments is not in effect. Further, the amendment suspends the requirement that all one and two person households be given a monthly $10 minimum allotment during months when allotments have been reduced or cancelled.

Implementation

Along with the rules establishing a procedure for reducing or cancelling allotments are requirements for the implementation of the procedure. The Department believes that there is a possibility that a reduction or cancellation of allotments may be necessary within the next few months. Therefore, expeditious implementation of the procedures is needed. To ensure that the procedures are put in place as swiftly as possible with as little disruption as possible in State agency operations, the adaptations to computer programs to add the new benefit computation can be made at the same time the issuance program is updated to reflect the July 1979 cost-of-food increases. In addition, all State agencies are required to establish internal procedures they need to have in palce so that they will be able to reduce allotments promptly if this proves necessary.

Parts 271, 272 and 273 are amended to include the following provisions:

PART 271—GENERAL INFORMATION AND DEFINITIONS

New § 271.7 is added to read as follows:

§ 271.7 Allotment reduction procedures.

(a) *General purpose.* This section sets forth the procedures to be followed if the monthly food stamp allotments determined in accordance with the provisions of § 273.10 are to be reduced or cancelled. A reduction in allotment levels would be necessary if it is determined by the Secretary that the amount of food stamp benefits that are to be distributed to households during a fiscal year, or remaining months of a fiscal year, will exceed the amount of funds appropriated. The best available data pertaining to the number of people participating in the program and the amount of benefits being issued shall be used in making this determination.

(b) *Nature of reduction action.* If the Secretary determines that the funds appropriated will not allow full monthly food stamp allotments for the remainder of a fiscal year, a decision shall be made as to the type of action needed to ensure that the appropriated funding level is not exceeded. Such action may be either a reduction in the allotment level for one or more months, a cancellation of allotments for one or more months or a combination of these two actions. All households shall be affected equally by a decision to either reduce or cancel food stamp allotments. If a reduction in allotments is deemed necessary, all households shall have their allotments reduced at the same rate. For example, if it is determined that a 25 percent reduction is necessary for two months, *all* allotments shall be reduced by 25 percent for two months. If cancellation is necessary, *all* eligible households shall have their allotments cancelled.

(c) *Implementation allotments reductions.* (1) *Reductions.* (i) If a decision is made to reduce monthly food stamp allotments, FNS shall notify State agencies of the date the reduction is to take effect and by how much they are to be reduced.

(ii) Upon receiving notification that a percentage reduction is to be made in an upcoming month's allotments, State agencies shall act immediately to implement the reduction. Such action would differ from State to State depending on the nature of the issuance systems in use. Where there are computerized issuance systems, the program used for issuing the affected month's ATP cards shall be altered to reflect the percentage reduction ordered in the FNS notice. In States where manual issuance is used, either through an HIR card system or through manually prepared ATP cards, new allotment tables or conversion tables reflecting the reduced allotments shall be prepared and distributed before the affected month's issuance activity begins. In an HIR card system State agencies have the option of enacting the reduction in benefits either by changing all HIR cards before issuance activity for the affected month begins or by adjusting allotments at the point of issuance as each household appears at the issuance office. FNS will assist State agencies in the preparation of issuance tables needed to implement a reduction in allotments.

(2) *Cancellations.* If a decision is made to cancel the distribution of food stamp benefits in a given month, FNS shall notify State agencies of the date the cancellation is to take effect. Upon receiving notification that an upcoming month's issuance is to be cancelled, State agencies shall take immediate action to effect the cancellation. This action would involve making necessary computer adjustments, and notifying issuance agents and personnel.

(3) *Affected allotments.* Whenever a reduction or cancellation of allotments is ordered for a particular month, all allotments issued for the designated month are to be reduced or cancelled. However, allotments or portions of allotments representing restored or retroactive benefits for a prior, unaffected month would not be reduced or cancelled, even though they are issued during an affected month.

(4) *Notification of eligible households.* Reductions and cancellations of allotments shall be considered to be Federal adjustments to allotments. As such, State agencies shall notify households of reductions and cancellations of allotments in accord with the notice provisions of § 273.12(e)(1), except that State agencies shall not provide notices of adverse action to households affected by reductions or cancellations of allotments.

(5) *Restoration of benefits.* Households whose allotments are reduced or cancelled as a result of the enactment of these procedures are not entitled to the restoration of the lost benefits at a future date. However, if there is any surplus of funds as a result of the reduction or cancellation, and the

Secretary determines that such a restoration is practicable, FNS will direct State agencies to provide affected households with retroactive benefits.

(6) *Records of reductions and cancellations.* State agencies must be able to produce a record of the amount of benefits each household receives during a month in which a percentage reduction is in effect along with a record of the amount of benefits each household would have received had full monthly allotments been distributed. Similarly, in the event that allotments are cancelled, State agencies must be able to produce a record of the amount of benefits each household would have received had full monthly allotments been distributed. These records will be used if FNS directs the provision of retroactive benefits.

(d) *Effects of reductions and cancellations on the certification of eligible households:* (1) Determinations of the eligibility of applicant households shall not be affected by a reduction or cancellation of allotments. State agencies shall accept and process applications during a month(s) in which a reduction or cancellation is in effect in accordance with the requirements of Part 273. Determinations of eligibility shall also be made according to the provisions of Part 273. If an applicant is found to be eligible for benefits, the amount of benefits shall first be figured in accordance with the provisions of § 273.10 and then either converted to reflect the percentage reduction in effect or not provided to reflect the cancellation in effect.

(2) The reduction or cancellation of allotments in a given month shall have no effect on the certification periods assigned to households. Those participating households whose certification periods expire during a month in which allotments were reduced or cancelled shall be recertified according to the provisions of § 273.14. Households found eligible to participate during a month in which allotments have been reduced or cancelled shall have certification periods assigned in accordance with the provisions of § 273.10.

(3) Any household that has its allotment reduced or cancelled as a result of the implementation of the requirements of this subpart may request a fair hearing if it disagrees with the action. However, since the reduction or cancellation would be necessary to avoid an expenditure of funds beyond those appropriated by Congress, the household does not have a right to a continuation of benefits. A household may receive retroactive benefits in an appropriate amount if it is determined that its benefits were reduced by more than the amount by which the State agency was directed to reduce benefits.

(e) *Penalties.* Notwithstanding any other provision of this subchapter, FNS may take one or more of the following actions against a State agency that fails to comply with a directive to reduce or cancel allotments in a particular month.

(1) If FNS ascertains that a State agency does not plan to comply with a directive to reduce or cancel allotments for a particular month, a warning will be issued advising the State agency that if there is not compliance, FNS may cancel 100 percent of the Federal share of the State's administrative costs for the affected month.

(2) If FNS ascertains after warning a State agency as provided in (1) above, that the State agency does not plan to comply with a directive to reduce or cancel allotments, a court injunction will be sought to compel compliance.

(3) If a State agency fails to reduce or cancel allotments as directed by FNS, FNS will bill the State agency for all overissuances that result. If a State agency fails to remit the billed amount to FNS within a prescribed period of time the funds will be recovered through offsets against the Federal share of the State agency's administrative costs, or any other means available under law.

* * * * *

PART 272—REQUIREMENTS FOR PARTICIPATING STATE AGENCIES

Paragraph 272.1(g)(3) is added and reads as follows:

§ 272.1 General terms and conditions.

* * * * *

(g) Implementation.

* * * * *

(3) *Amendment.* The procedures contained in amendment shall be implemented by State agencies as quickly as possible. All State agencies shall complete implementation in time to be able to issue reduced food stamp allotments in August 1979 if such action is determined to be necessary. State agencies with computerized issuance systems shall adjust these systems so that they are capable of issuing reduced coupon allotments. These adjustments may be made at the same time State agencies reprogram their computers to reflect the July 1979 cost-of-food increases.

* * * * *

PART 273—CERTIFICATION OF ELIGIBLE HOUSEHOLDS

In Section 273.10, subparagraph (e)(2)(ii) is amended and the words "Except as provided in subparagraph (iii) below," are added at the beginning. In addition, subparagraph (e)(2)(iii) is added to Section 273.10 and reads as follows:

§ 273.10 Determining household eligibility and benefit levels.

* * * * *

(e) Calculating net income and benefit levels.

* * * * *

(2) Eligibility and benefits.

* * * * *

(iii) During a month when a reduction or cancellation of allotments has been ordered pursuant to the provisions of § 271.7, eligible households shall first have their benefits calculated as follows:

(A) If the action in effect is a reduction action, eligible households shall have their allotment levels calculated according to the procedures of subparagraph (ii) above, and then reduced by the percentage reduction in effect, and rounded to the nearest whole dollar.

(B) If the action in effect is a cancellation action, eligible households shall have their allotment levels calculated according to the procedures of subparagraph (ii) above. However, the allotments shall not be issued for the month the cancellation is in effect.

(C) The $10 minimum allotment level for one- and two-person households shall be applied in calculating allotment levels *before* a percentage reduction or cancellation is applied to the month's issuance. The actual allotments issued to one- and two-person households in a month in which allotments are reduced or cancelled may be less than $10.

* * * * *

Authority: 91 Stat. 958 (7 U.S.C. 2011–2027).

Note.—This interim final rule has been designated as significant and is being published in accordance with the emergency procedures of Executive Order 12044 and Secretary's Memorandum 1955. It has been determined by Assistant Secretary of Agriculture Carol Tucker Foreman that the emergency nature of this interim final rule warrants publication without opportunity for prior public comment. This interim final rule implements regulations in Parts 271, 272 and 273. A Draft Impact Analysis regarding this regulation is available from Alberta Frost, Acting Deputy Administrator for Family Nutrition Programs, Food and Nutrition Service, United States Department of Agriculture, 500 12th Street, Washington, D.C. 20250.

(Catalog of Federal Domestic Assistance Programs No. 10.551, Food Stamps.)

Dated: June 6, 1979.

Carol Tucker Foreman,

Assistant Secretary for Food and Consumer Services.

[FR Doc. 79-18043 Filed 6-7-79; 8:45 am]

BILLING CODE 3410-30-M

federal register

Tuesday
June 12, 1979

Part III

Department of Health, Education, and Welfare

Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

45 CFR Part 90

Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance

AGENCY: Department of Health, Education, and Welfare.

ACTION: Final rule.

SUMMARY: These regulations implement the provisions of the Age Discrimination Act of 1975, as amended (Act). They are general regulations designed to guide the development of agency specific regulations by each Federal agency which administers programs of Federal financial assistance. The Age Discrimination Act prohibits discrimination on the basis of age in programs or activities receiving Federal financial assistance. The Act also contains certain exceptions which permit, under limited circumstances, continued use of age distinctions or factors other than age which may have a disproportionate effect on the basis of age. These regulations discuss what is age discrimination under the Act, the circumstances under which the statutory exceptions may be invoked, the responsibilities of Federal agencies and recipients to enforce the Act, and the procedures for investigation, conciliation, and enforcement. Each Federal agency which administers programs of Federal financial assistance must issue age discrimination regulations which conform to these general regulations.

EFFECTIVE DATE: July 1, 1979.

FOR FURTHER INFORMATION CONTACT: Bayla F. White, Director Age Discrimination Task Force, Room 711–E, Hubert Humphrey Building, 200 Independence Avenue, S.W., Washington, D.C. 20201, (202) 245–6284.

SUPPLEMENTARY INFORMATION:

Background

In November 1975, Congress enacted the Age Discrimination Act (42 U.S.C. 6101, *et seq.)* as part of the Amendments to the Older Americans Act (P.L. 94–135). At that time, the express purpose of the Act was to prohibit unreasonable discrimination based on age in programs and activities receiving Federal financial assistance, including the State and Local Fiscal Assistance Act of 1972. The Act also permitted federally assisted programs and activities, and recipients of Federal funds, to continue to use: (1) some age distinctions, and (2) "reasonable factors other than age." The Act applied to persons of all ages.

Prior to the enactment of any regulations, the Act required the Commission on Civil Rights to conduct a study of age discrimination in federally funded programs and activities. The Commission transmitted its study to the President and the Congress on January 10, 1978. The Commission published the second part of its study in January 1979. The Act also required each affected Federal agency to respond to the Commission's findings and recommendations.

After the receipt of the report of the Commission on Civil Rights and the Federal agency responses to that report, the Congress considered amendments to the Age Discrimination Act of 1975. In October 1978, Congress amended the Act (P.L. 95–478). Congress struck the word "unreasonable" from the statement of purpose clause, so that the purpose of the Act is to prohibit discrimination based on age in programs and activities receiving Federal financial assistance. However, the Congress retained the exceptions to the prohibition against age discrimination. Thus, the Act still permits the use of: (1) some age distinctions, and (2) "reasonable factors other than age." The Act continues to apply to persons of all ages.

According to the language of the Act, the prohibition against age discrimination will become effective when regulations are issued to enforce the Act. The Act requires the Secretary of HEW to publish proposed and then final general regulations. HEW issued proposed general regulations on December 1, 1978. These regulations are the final general regulations required by the Act. They set standards for other Federal agencies to follow in the development of agency specific regulations. The Act also requires each agency which provides Federal financial assistance to issue proposed and then final specific regulations. All agency specific regulations must conform to these general regulations and must be approved by the Secretary of HEW.

Rulemaking History

The Department of Health, Education, and Welfare has been vitally concerned about the need for public participation in the development of these regulations because of the substantial impact the Age Discrimination Act will have on the operation of federally assisted programs.

As the first step of its obligation to issue general regulations, HEW published in the **Federal Register** (43 FR 8756) a Notice of Intent To Issue Age Discrimination Regulations (NOI) on March 2, 1978. The NOI briefly identified some of the major issues addressed later in the regulatory process. Persons wishing additional information on the age discrimination regulations were asked to write to HEW. Over 600 individuals and organizations responded to the NOI. These names were incorporated into a mailing list for distribution of materials developed during the rulemaking process.

Since these general regulations apply to all Federal departments and agencies which administer programs of Federal financial assistance, HEW created an Interagency Age Discrimination Task Force to coordinate the development of the regulations. The Interagency Task Force consists of at least one representative from every department or agency which ultimately must issue its own age discrimination regulations, as well as observers, from other interested Federal agencies. The Interagency Task Force met five (5) times during the development of the age discrimination regulations to consider both substantive and procedural matters. Consultations were also held with individual Federal agencies. The Interagency Task Force will continue to function during the development of agency specific regulations.

The Notice of Proposed Rulemaking (NPRM) was published in the **Federal Register** (p. 56428–56446) on December 1, 1978. The NPRM contained a discussion of the major issues and a section-by-section analysis of the proposed regulations as well as the text of the proposed rules. At certain key places in the proposed rules, HEW presented options for public consideration and comment. Publication of the proposed rules inaugurated a 90-day public comment period.

HEW distributed more than 16,000 copies of the proposed rules. Copies were mailed to every member of Congress, every State governor, the head of every Federal agency which provides Federal financial assistance, adminstrators of federally assisted programs, recipients of Federal funds at the State and local levels, interested individuals and groups. Special efforts were made to distribute copies of the NPRM to groups representing the interests of the elderly and of children and youth.

In January and early February, the Department held public hearings in Washington, D.C., and in each of HEW's 10 Regions in order to obtain public comment on the proposed rules. A total of 170 witnesses made presentations at those hearings. In addition, 246 letters were received containing comments, criticisms and suggestions on nearly every section of the proposed rules. Comments made at the public hearings and in writing have come from individuals, from State and local governmental units, from providers of federally supported services, from public officials at the Federal, State and local levels, and a large number have come from groups representing the interests of the elderly. The comments and verbatim transcripts from the eleven hearings have been analyzed and used in the development of these final regulations. A summary of the comments received and the responses to those comments follow the text of these regulations.

Although the final government-wide regulations have been significantly affected by the comments received, the implementation of the Age Discrimination Act is a continuing process which provides several opportunities for public participation. Each agency providing Federal financial assistance must now issue its own proposed and then final, specific age discrimination regulations. The issuance of proposed agency regulations 90 days after these general regulations are published will provide another opportunity for the public to participate in the shaping of age discrimination policies. The actual impact of the Age Discrimination Act and the problems which recipients of Federal financial assistance may encounter in implementing these general age discrimination regulations will be examined after 30 months time. Similarly, each agency will examine and publish for comment its own assessment of the effectiveness of its age discrimination regulations after they have been in effect for 30 months.

HEW will amend and revise the government-wide regulations as need and experience dictate.

Overview of the Regulations

The following paragraphs summarize the text of the final regulations. The last section of the preamble contains a discussion of the resolution of certain major issues which were raised in the NPRM and an explanation of key parts of the text of the final regulations.

Subpart A—General

The four sections in Subpart A explain the purpose of the Age Discrimination Act (§ 90.1), the purpose of the general age discrimination regulations (§ 90.2), the programs and activities covered by the Act (§ 90.3) and the meaning of important terms used in the regulations (§ 90.4).

The Age Discrimination Act is designed to prohibit discrimination on the basis of age in programs or activities which receive Federal financial assistance. The Act also contains certain exceptions which permit age distinctions and factors other than age to continue in use under certain circumstances (§ 90.1). The Act applies to persons of all ages.

The Act generally covers all programs and activities which receive Federal financial assistance. However, the Act does not apply to any age distinction "established under authority of any law" which provides benefits or establishes criteria for participation on the basis of age or in age related terms. Thus, age distinctions which are "established under authority of any law" may continue in use. These regulations (§ 90.3) define the phrase "any law" to mean Federal statutes, State statutes or local statutes adopted by elected, general purpose legislative bodies.

The Act also excludes from its coverage most employment practices, except for programs funded under the public service employment titles of the Comprehensive Employment and Training Act (CETA). These regulations do cover any program or activity which is both a program of Federal financial assistance and provides employment such as the College Work Study Program (42 U.S.C. 2751, *et seq.*) and the Work Incentive Program (42 U.S.C. 630, *et seq.*). The Age Discrimination in Employment Act (ADEA) which is administered by the Department of Labor, [Equal Employment Opportunity Commission (EEOC) after July 1, 1979], continues to be the Federal statute that prohibits employment discrimination for persons between the ages of 40 and 70. Individuals in this age range who experience employment discrimination, other than in CETA public service employment programs, must look to the ADEA for relief, not to the Age Discrimination Act.

Section 90.4 defines important terms used throughout these regulations.

Subpart B—What Is Age Discrimination?

This subpart sets out the rules against age discrimination and the conditions under which the statutory exceptions apply.

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 (§ 90.12(a)). This general rule is limited by the exceptions which are contained in section 304 of the Act and which are explained in §§ 90.14 and 90.15 of these regulations. The specific prohibited actions, are patterned after the regulations issued under Title VI of the Civil Rights Act of 1964 (45 CFR Part 80). As a general rule, separate or different treatment which denies or limits service from or participation in a program receiving Federal financial assistance will be prohibited by these regulations.

The Act contains several exceptions which limit the general prohibition against age discrimination. Section 304(b)(1) of the Act permits the use of age distinctions which are necessary to the normal operation or to the achievement of a statutory objective. It also permits actions which are based on reasonable factors other than age. The regulations provide definitions for two terms which are essential to an understanding of those exceptions: "normal operation" and "statutory objective" (§ 90.13). "Normal operation" means the operation of a program or activity without significant changes that would impair its ability to meet its objectives. "Statutory objective" is defined to mean any purpose which is explicity stated in a Federal statute, State statute or local statute or ordinance.

The regulations establish a four part test, all parts of which must be met for an explicit age distinction to satisfy one of the statutory exceptions and to continue in use in a Federally assisted program (§ 90.14). This four part test will be used to scrutinize age distinctions which are imposed in the administration of Federally assisted programs, but which are not explicitly authorized by a Federal, State or local statute.

Recipients of Federal funds are also permitted to take an action otherwise prohibited by the Act, if the action is based on "reasonable factors other than age." In that event, the action may be taken even though it has a disproportionate effect on persons of different ages. However, according to the regulations (§ 90.15), the factor other than age must bear a direct and substantial relationship to the program's normal operation or to the achievement of a statutory objective.

The regulations place on the recipient the burden of proving that an age distinction or a factor other than age qualifies for an exception (§ 90.16).

Subpart C—What Are the Responsibilities of the Federal Agencies?

This subpart contains four sections which explain the responsibilities that

Federal agencies have to implement the ADA.

Each agency which extends Federal financial assistance must issue proposed and then final regulations to enforce the Act (§ 90.31). The agency specific regulations must be consistent with these government-wide regulations and must be approved by the Secretary of HEW. The final agency specific regulation must contain an appendix listing all age distinctions which appear in Federal statutes and regulations which affect the agency's programs of Federal financial assistance. The appendix is the first step of a process set in motion by these regulations to inform the public of those age distinctions used in Federal Program administration. The appendix will *not* constitute agency approval or disapproval of the age distinctions contained in its regulations.

As a second step in this public information process, each Federal agency must review the age distinctions it imposes on its recipients by regulation or by administrative action to determine whether these age distinctions are permissible under the Act (§ 90.32). This review must be completed within 12 months after publication of the agency final regulations and must be published for public comment in the **Federal Register**. The report must indicate which age distinctions meet the requirements of the Act and will be continued and which will be eliminated. The report must identify age distinctions not in regulations which meet the requirements of the Act and which will subsequently be incorporated into regulations. Beginning with the effective date of an agency's specific regulations, no new age distinction may be imposed, unless it is adopted by regulation using the notice and comment procedures of the Administrative Procedure Act (5 U.S.C. 553). Beginning one year from the publication of an agency's specific regulations, no existing age distinction may be continued unless it has already been adopted by regulation or is adopted by regulation using the notice and comment procedures of the Administrative Procedure Act (5 U.S.C. 553).

The next two sections of the regulations (§§ 90.33 and 90.34) reflect HEW's goal of reducing administrative burden on recipients while still ensuring compliance with the Act. To avoid or minimize conflicting actions by different Federal agencies which deal with the same recipient, the Secretary of HEW may designate "lead agencies" to coordinate compliance and enforcement activities in those instances where two or more agencies provide assistance to the same recipient (§ 90.33). Interagency cooperation may extend to all compliance and enforcement activities *except* for the actual termination of funds and the notification to Congress of that termination.

The Act requires each agency to report annually to the Congress, through HEW, on its compliance and enforcement activities. The final regulations adopt a targeted approach to data collection and analysis, which will maximize the opportunity to measure and analyze actual progress in complying with the Act and, at the same time, minimize the burden of unnecessary data collection on recipients (§ 90.34).

The targeted approach to data collection builds on the analysis of existing data about compliance, such as complaint data and information from compliance reviews. The regulations also provide for agencies to collect data which are directly relevant to particular patterns or practices of discrimination revealed by complaints, compliance reviews or other compliance activities. This targeted approach gives each agency the authority to tailor its own data collection to the characteristics of its programs, rather than establishing specific reporting requirements for every federally assisted program.

Subpart D—Investigation, Conciliation and Enforcement Procedures

This subpart of the regulations is divided into 10 sections dealing with various aspects of the compliance and enforcement process.

Each agency is required to establish procedures for compliance, investigation, conciliation and enforcement (§ 90.41). A recipient has primary responsibility to ensure that its programs and activities are in compliance with the Act and must take necessary steps to eliminate any violations. An agency has responsibility to attempt to secure recipient compliance with the Act by voluntary means. An agency must enforce the Act when a recipient fails to eliminate violations of the Act (§ 90.42).

Each agency is required to provide written notice to each recipient of the recipient's obligations under the Act, to provide technical assistance to recipients where necessary and to make available educational materials explaining the rights and obligations of beneficiaries and recipients (§ 90.43(a)).

Moreover, each Federal agency must direct its recipients which employ the equivalent of 15 or more persons on a full-time basis to prepare a written self-evaluation (§ 90.43(b)). A recipient's self-evaluation will focus on age distinctions which are imposed directly by the recipient and not on any factors other than age. Each recipient must justify the continued use of any distinction as sanctioned under these regulations. A recipient must take corrective and remedial action whenever the self-evaluation indicates a violation of the Act. The recipient self-evaluation must be completed 18 months after the effective date of agency regulations. The self-evaluation must be available to the agency or the public for a period of three years following its completion.

Every agency must establish a procedure for processing complaints of age discrimination (§ 90.43(c)). The complaint handling procedure must include an initial screening by the Federal agency and notice to complainants and recipients of their rights and obligations in the complaint process. All complaints which fall within the coverage of the Act will be referred to a mediation process which will be managed by a single agency designated by the Secretary of HEW. That agency is the Federal Mediation and Conciliation Service (FMCS).

Complainants and recipients are required to participate in the effort to reach a mutually satisfactory mediated settlement of the complaint, although they need not meet with the mediator at the same time. The mediation process may last no more than 60 days from the date the agency first receives the complaint. The mediator will have the authority to terminate the mediation at any time before the end of the 60-day period if the process appears to have broken down. The terms of settlement that are satisfactory to both parties will be reduced to writing and sent to the Federal agency which referred the complaint. The Federal agency will take no further action on a complaint which has been successfully mediated.

If mediation does not succeed, or if a mediated settlement is violated, Federal agencies will engage in informal fact finding and then, if necessary, proceed to formal investigation of the complaint. The formal investigation may result in an administrative hearing before an administrative law judge. A Federal agency may terminate a recipient's Federal funds if the administrative law judge finds that the recipient has violated the Act.

The regulations of each Federal agency must provide that the agency may conduct compliance reviews, preaward reviews and use other similar procedures to determine compliance with the Act. These procedures are *not* dependent on the filing of a complaint of age discrimination (§ 90.44).

To help determine whether a recipient is in compliance with the Act, each Federal agency may require its recipients to make their records reasonably accessible to the agency and to furnish information to the agency (§ 90.45). Recipients are prohibited from acts of retaliation or intimidation against individuals who file age discrimination complaints or who cooperate in any aspect of the enforcement process (§ 90.46).

After a hearing before an administrative law judge, a Federal agency may terminate Federal funds to a recipient found to have violated the Act or regulations implementing the Act. Termination must be limited to the particular recipient which has violated the Act and to the program where the violation has been found. An agency may delay granting new Federal funds to a recipient when termination proceedings have been initiated (§ 90.47).

When Federal funds are terminated, the agency may pay those funds to another qualified recipient which can demonstrate the ability to achieve the goals of the Federal program's authorizing statute and to comply with the Age Discrimination Act (§ 90.48). If a Federal agency or an administrative law judge, finds that a recipient has engaged in age discrimination, the recipient must take remedial action as the agency requires. Even in the absence of a finding of discrimination, recipients may voluntarily take affirmative action to encourage the participation of persons in age groups where participation has been limited in the past. The regulations permit a recipient to provide special benefits to children or the elderly provided that the benefits do not result in the exclusion of persons who are eligible to participate in the recipients' program (§ 90.49).

The Act authorizes a private right of action, when an individual has exhausted administrative remedies. The regulations implement that provision (§ 90.50). Administrative remedies are exhausted when either 180 days have elapsed from the filing of the complaint and the agency has made no finding or the agency issues a finding in favor of the recipient. The complainant may then file a suit in a U.S. district court. The complainant must indicate at the time the suit is filed, if attorney's fees will be demanded in the event that the complainant is successful. No action can be brought if the same alleged violation by the same defendant is the subject of a pending action in any U.S. court. Complainants who wish to file an action must give 30 days notice to the Attorney General, the Secretary of HEW, the head of the granting agency and the recipient.

Subpart E—Future Review of Age Discrimination Regulations

HEW must review the effectiveness of these general age discrimination regulations 30 months after the regulations take effect (§ 90.61). In addition, each agency must review the effectivess of its own regulations 30 months after they become effective (§ 90.62). These reviews must be published in the **Federal Register** with an opportunity for public comment.

Critical Issues

Comments were submitted on many sections of the proposed regulations and on many different issues raised in the NPRM. These comments and the responses to them are set forth in the appendix which follows the text of the regulations. Some of the comments concerned critical policy issues with respect to the implementation of the Act. These critical issues are discussed in the following paragraphs.

1. *What Ages Does the Act Cover?* Section 303 of the Act prohibits discrimination on the basis of age in federally funded programs or activities. Although the legislative history indicates Congressional concern for the problems of the elderly in particular, the Congress made it clear in its Conference Committee report that the Act is intended to apply to persons of all ages.

When the Act was originally passed in 1975, Congress directed the United States Commission on Civil Rights to conduct a study of age discrimination in federally funded programs, and required each affected Federal agency to respond to the Commission's study. After reviewing the Commission's report and Federal agency responses to it, Congress considered amendments to the Act. Nowhere in the amendment process was there any discussion of limiting or changing the coverage of the Act. It continues to extend protection to persons of all ages.

Various advocacy groups for older persons have suggested that HEW construe these general implementing regulations to protect only the elderly or to provide greater protection for older persons than for other age groups. This construction is not legally supportable in view of the legislative history and the plain language of the Act.

However, the Congress has consistently made clear its support for the concerns of older persons. It is therefore unlikely that Congress intended the Act to call into question the generally accepted special benefits which are provided to older persons in programs that are otherwise available to a wider age range of the population. Public comment on the regulations was almost unanimously supportive of these benefits, which often take the form of special discounts. Similarly, no one has suggested that similar benefits for children should be questioned under the Act.

HEW supports the continuation of special benefits for children and older persons. Therefore, these regulations permit special benefits for the elderly persons and for children that are extended by recipients so long as they do not result in the exclusion from the program of otherwise eligible persons. [§ 90.49(c)].

2. *Does the Act Require Proportional Allocation of Services and Funds by Age?* Commenters also asked whether the Act requires proportional allocation by age of the services and the benefits of federally assisted programs. Some believe that certain groups, especially the elderly, do not get their "fair share" of funds in certain programs or that certain program participation rates among age groups like the elderly are disproportionately low.

These final regulations do not require proportional program participation by age or the proportional allocation of funds by age. Discrimination has not been defined in this way in other non-discrimination regulations. However, disproportionate allocation of funds or program participation may be one of the elements which triggers an examination of whether age discrimination exists in the federally funded program or activity. If further inquiry is necessary, the recipient may show that the disparity in rates of participation, fund allocation, or services has nondiscriminatory causes. Comments on the NPRM suggested that there may be nondiscriminatory reasons which adequately explain the disproportionately low participation of the elderly in some programs.

3. *What Programs or Activities are "Established Under Authority of Any Law"?* The Age Discrimination Act exempts from coverage age distinctions contained in a program or activity "established under authority of any law" which provides benefits on the basis of age or in age related terms. Congress did not expressly indicate anywhere in the legislative history of the Act what it meant by the term "any law." The regulations must, nevertheless, define the phrase "established under authority of any

law" in order to determine which age distinctions are exempted by this provision of the Act.

The NPRM presented four options for interpreting the phrase "any law" and asked for comments on those or any other reasonable interpretations. The NPRM cited two overriding issues to be considered in determining the meaning of "any law" (a) whether to include age distinctions contained in regulations; and (b) whether to include age distinctions enacted by State and local legislative bodies.

The narrowest option interpreted "any law" to mean only Federal statutes. The broadest option intepreted "any law" to include Federal, State and local statutes and Federal, State and local regulations. Supporters of defining "any law" to mean only Federal statutes argued that any other interpretation seriously weakens the Act. Congress could not have intended to give discretion to State or local legislative bodies to exempt any age distinction from the coverage of the Act. To do so would be an abdication of Federal responsibility which defeats the purpose of the Act.

Those who argued that "any law" should mean Federal and State statutes argued that the Act should permit the States to use age in exercising their traditional power in such areas as defining the age of majority, controlling access to a driver's license, and regulating compulsory school attendance. On the other hand, extending this exemption to local statutes and ordinances would permit thousands of local jurisdictions to introduce age distinctions into the administration of Federal programs which would fatally weaken the Act.

Supporters of defining "any law" to mean Federal, State and local statutes and ordinances argued that there is no clear basis for limiting the interpretation of "any law" to Federal statutes. Congress rejected an amendment to the Act in 1978 which would have defined "any law" to mean Federal statutes. Furthermore, there is no basis for excluding local statutes and ordinances if State statutes are included in the definition. They argued that no case has been made that age discrimination occurs as a result of age distinctions in State and local statutes and ordinances and that beneficial age distinctions are enacted by State and local legislative bodies.

Defining "any law" to include all regulations had relatively little support. Some suggested defining "any law" to mean Federal statutes and regulations. Supporters of including regulations in the definition argued that regulations have the force and effect of law and should be included in the "any law" exemption. This position has been rejected on the grounds that it would permit administrators of federally funded programs to impose age distinctions which are not authorized by a legislative body. In addition, HEW does not believe that the language "established under authority of any law" necessarily includes regulations having the force and effect of law.

The final regulations define "any law" to mean Federal, State and local statutes and ordinances. The language of the statute, and the general lack of legislative history to justify any narrower interpretation of that language support the conclusion that Federal and State statutes, and statutes or ordinances enacted by general purpose, elected local governments should be exempt from coverage of the Act. This is particularly appropriate in the absence of any clear indication that age discrimination occurs as a result of State and local statutes. This definition of "any law" recognizes the authority of State and general purpose, elected local governments to enact statutes which condition benefits or participation on the basis of age.

Examples: "Established Under Authority of Any Law".

1. *Federal statutes.* The Adult Education Act (20 U.S.C. 1201–1213) is statutorily designed to provide services or instruction below college level for adults. The Act defines adults as individuals who have attained the age of 16. This limitation on participation in adult education programs is not covered by the Act. The Runaway Youth Program (42 U.S.C. 5701) authorized under the Juvenile Justice & Deliquency Prevention Act, awards grants for the development and/or strengthening of local facilities to address the immediate needs of runaway youth in a manner which is outside of the law enforcement and juvenile justice systems. The terms "runaway youth," "juveniles," and "young people" are used in the statute without further definition. Reasonable definitions of these terms would not be covered by the Act.

2. *State statutes.* Statutes setting age limitations on obtaining a driver's license or fixing age limits for compulsory school attendance are not covered by the Act.

3. *Local statutes or ordinances.* Age limitations on consuming alcoholic beverages or possessing firearms are not covered by the Act as long as these are adopted by an elected general purpose legislative body.

Note.—Any age distinction not exempted from coverage by the "any law" provision, may still qualify for an exception under another provision of the Act or these regulations.

4. *What are the Rules Against Age Discrimination?* Many commenters asked for clarification of the rules against age discrimination contained in § 90.12 of the regulations. Section 90.12 sets forth a general rule against age discrimination which is based on Section 303 of the Act, and then presents specific rules against age discrimination. These rules are limited by the exceptions contained in the Act and these regulations.

The general rule in § 90.12 reflects the language of the Act: except as provided in the Act and these regulations, ". . . 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." It means that, unless sanctioned by one of the exceptions, recipients of Federal financial assistance may not, either directly or indirectly, do anything to exclude persons from their programs or activities on the basis of age. Nor may recipients do anything not sanctioned by one of the exceptions to deny or limit persons in their efforts to participate in federally funded programs or activities on the basis of their age. For example, a medical school may not exclude persons from admission solely because of their age.

The prohibition against age discrimination does not include an absolute prohibition against separate or different treatment on the basis of age. As a general rule, separate or different treatment which denies or limits services from, or participation in, a program receiving Federal financial assistance would be prohibited by these regulations. On the other hand, these regulations do not automatically invalidate the provision of services through separate or different treatment on the basis of age. Separate or different treatment necessary to normal operations or to the achievement of a statutory objective would qualify for an exception under these regulations.

Section 90.49 of these regulations contains language which affects the rules against discrimination in two important ways: a recipient may voluntarily act to overcome the effects of conditions which, in the past, have limited participation in a federally assisted program on the basis of age; and, a recipient may provide special benefits for children or the elderly if, by so doing, the recipient does not exclude others who are eligible from participating in the federally assisted program. As mentioned earlier, HEW does not believe that Congress meant to disturb the practices of recipients which provide special benefits to children or the elderly. For example, reduced fares for children and for senior citizens on public transportation or on railways or airlines would qualify as a special benefit under § 90.49 of these regulations. The definition of who qualifies as "children" or "elderly" for purposes of receiving a special benefit will be left to the reasonable discretion of the recipients who voluntarily provide the benefit.

5. *What are the Statutory Exceptions to the Rules Against Age Discrimination?* a. *Definitions of Statutory Objective and Normal Operation.* Many commenters questioned the meaning, clarity, and interpretation of the statutory exceptions to the prohibition against age discrimination contained in the proposed rules §§ 90.14 and 90.15.

Two phrases, "normal operations" and "statutory objective" are used in these regulations in interpreting the Act's exceptions for explicit age distinctions (§ 90.14) and for the use of factors other than age (§ 90.15). Critical to an understanding of these statutory exceptions is the definition of "statutory objective" and the definition of "normal operation."

The NPRM stated that statutory objective would mean either: (1) any purpose of a program or activity expressly stated in a statute, or (2) any purpose of a program or activity expressly stated in a statute or reasonably inferred from its provisions or legislative history. Because legislative history is a broad concept and because statutory objectives will be used to justify the use of administratively imposed age distinctions or factors other than age which have a disproportionate effect, HEW believes that the term "statutory objective" should be construed to mean only expressly stated objectives.

The NPRM was silent about whether the term "statutory objective" referred to Federal statutes, or State statutes, or local statutes, or all statutes. HEW believes the definition of "any law" in § 90.3 and the definition of "statutory objective" in § 90.13 should be parallel. Therefore, the final regulations define "statutory objective" to mean "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."

The final regulations have not changed the definition of "normal operation." "Normal operation" continues to mean "the operation of a program or activity without significant changes that would impair its ability to meet its objectives." This definition of "normal operation" means that a recipient of Federal funds may not use the statutory exceptions to justify refusing to make changes in program operation because those changes disturb administrative routine or are inconvenient.

b. *The four-part test for determining when an explicit age distinction is necessary to normal program operations or necessary to achieve a statutory objective.* Section 90.14 establishes a four-part test for explicit age distinctions which are claimed to be necessary to the normal operation of a program or activity, or to the achievement of a statutory objective of a program or activity.

The NPRM provided that an action reasonably takes age into account as a factor necessary to the normal operation or the achievement of a statutory objective of a program or activity, if:

(a) Age is used as a measure or approximation of one or more other characteristics (e.g., maturity);

(b) The other characteristic(s) must be measured or approximated in order for the normal operation of the program or activity to continue, or to achieve any statutory objective of the program or activity;

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

(d) The other characteristic(s) are difficult, costly, or otherwise impractical to measure directly.

The final regulations retain the four-part test, with some changes. The word "and" has been added after parts (a) and (b) to clarify the intent that an age distinction must meet all four parts in order to qualify for an exception. The reference to "maturity" has been deleted as an example of a characteristic for which age may be an approximation, because commenters felt that the term was too vague and did not illustrate what was meant in the test. The first part of the test in § 90.14 refers to a situation in which a program uses an age distinction as an indicator of some other characteristic, such as susceptibility to disease.

The third change occurs in part (d) of the test. The final regulations no longer contain a reference to cost or difficulty; however, part (d) now requires that the characteristics for which age is an approximation must be impractical to measure directly on an individual basis.

Thus, to qualify for an exception under § 90.14, all four of the following conditions must be met: (a) the age distinction in question must be used as an indicator or measure of some other (non-age) characteristic; (b) the *other* characteristic must be necessary for "normal operation" or for the achievement of a "statutory objective"; (c) the other characteristic must be capable of being reasonably approximated by age; and (d) the other characteristic must be impractical to measure directly on an individual basis.

The test set out in § 90.14 is designed to require careful scrutiny of age distinctions in programs receiving Federal financial assistance. It is not intended to serve as a basis for permitting continued use of age distinctions for the sake of administrative convenience if this results in denial or limitation of services on the basis of age.

HEW encourages recipients to apply age distinctions flexibly; that is, to permit a person, upon a proper showing of the necessary characteristic to participate in the activity or program even though he or she would otherwise be barred by the age distinction. Other things being equal, an age distinction is more likely to qualify under one of the statutory exceptions if it does not automatically bar all those who do not meet the age requirements.

Examples:* "Necessary to the Normal Operation of the Program."

1. A youth organization receiving Federal financial assistance imposes a maximum age limitation on membership. The organization claims that it has as an objective, the training, education and character development of youth. The use of a maximum age limit *is necessary* to the normal operation of the recipient's program because:

(a) Age is used as a measure of the need for training, education, and character building experiences preparing for the assumption of adult responsibility; and

(b) The need for the service must be measured in order for the youth organization's objective to be met; and

(c) Age is highly related to the need for this service and is thus a reasonable measure of it; and

(d) It is not practical to measure this need on an individual basis (i.e., while some persons over the age limit might benefit from the service and some persons under the age limit might not need it, there is no practical way to identify them on an individual basis).

2. A medical school receiving Federal financial assistance generally does not admit anyone over 35 years of age, even though this results in turning away highly qualified applicants over 35.

The school claims that it has an objective, the teaching of qualified medical students who, upon graduation, will practice as long as possible. The school believes that this objective requires it to select younger applicants over older ones.

The use of such an age distinction *is not necessary* to the normal operation of the

*The examples illustrate general situations in which the regulations are applied to hypothetical recipients.

recipient's program because it does not meet the requirement of § 90.14(b).

Age of the applicant may be a reasonable measure of a non-age characteristic (longevity of practice). This characteristic may be impractical to measure directly on an individual basis. Nevertheless, achieving a high average longevity of practice for its graduates cannot be considered a program objective for a medical school within the meaning of the Act. The "normal operation" exception is not intended to permit a recipient to use broad notions of efficiency or cost-benefit analysis to justify exclusion from a program on the basis of age. The basic objectives of the medical school involve training competent and qualified medical school graduates. These objectives are not impaired if the average length its graduates practice medicine is lowered by a fraction of a year (or even more) by the admission of qualified applicants over 35 years of age.

Examples:* "Necessary to the Achievement of a Statutory Objective."

1. Applications for grants for disease control programs under the Public Health Service Act can only be approved if they "(B) contain assurances satisfactory to the Secretary that . . . the applicant will conduct such programs as may by necessary (i) to develop an awareness in those persons in the area served by the applicant who are most susceptible to the disease or conditions . . . of appropriate preventive behavior and measures (including immunization) and diagnostic procedures for such disease, and (ii) to facilitate their access to such measures and procedures," (42 U.S.C. 247b).

Under the test of § 90.14, *it is necessary* to the achievement of this explicit statutory objective to give priority in immunization to age categories most at risk to the disease in question because:

(a) Age is being used as a measure of susceptibility to a disease; and

(b) Susceptibility to disease must be measured for the statutory objective to be met; and

(c) Age is a reasonable measure of susceptibility to the particular disease; and

(d) Susceptibility to the disease is impractical to measure directly on an individual basis.

2. The purpose of the Adult Education Act (20 U.S.C. 1201 *et seq.*) is to provide education that will "enable all adults to continue their education . . . and . . . enable them to become more employable, productive, and responsible citizens." (20 U.S.C. 1201.) The Act defines an adult as "any individual who has attained the age of 16." (20 U.S.C. 1201(a).)

A recipient limits participation in its adult education program to adults under 35 on the grounds that this is necessary to achieve the explicit Adult Education Act objective of increasing employability, productivity, and responsibility.

It *is not necessary* to the achievement of this statutory objective to limit participation to those under 35. This age limitation fails at least two elements of the four-part test set out in § 90.14. Employability, productivity and responsibility need not be measured in order to meet the statutory objective of making adults more employable, productive or responsible because the objective is comparative rather than absolute. The statute only requires an effort to improve these characteristics in an individual, not to maximize the degree of improvement.

These characteristics have no demonstrable correlation with age and cannot be reasonably measured by the use of age (§ 90.14(c)).

Whether or not these characteristics can practically be measured directly on an individual basis need not be considered, since the characteristics do not have to be measured in order to meet the statutory objective.

*The examples illustrate general situations in which the regulations are applied to hypothetical recipients.

c. *Use of Reasonable Factors Other than Age.* Section 90.15 of the NPRM set out four options to characterize the relationship between a factor other than age that may have a discriminatory effect and the normal operation of a program or the achievement of a statutory objective. Those four options were rational, direct, substantial, and necessary. Commenters disagreed about what relationship a factor other than age should bear to the normal operation or the statutory objective of a program or activity.

The final regulations require that a factor other than age bear a direct and substantial relationship to the normal operation of the statutory objective of a program or activity. The "rational" option, which was equated in the NPRM with the rational basis test used under the equal protection clause of the Fourteenth Amendment, has been rejected on the grounds that many serious discriminatory effects created by factors other than age would be likely to survive a rational basis level of scrutiny.

The "necessary" option has been rejected because it requires a test which is not sufficiently flexible to deal with the variety of factors other than age and the variation in facts and circumstances that contribute to whether those factors other than age are "reasonable."

The regulations adopt the "direct and substantial" standard because it provides the appropriate flexibility and, at the same time, avoids the weaknesses inherent in the "rational" standard. Use of the "direct and substantial" standard means that use of factors other than age must be carefully examined in light of the individual facts and circumstances surrounding their use. This examination will determine whether use of the factor other than age is a sufficiently effective method of achieving a worthwhile program purpose to justify limiting or denying services or participation to adversely affected persons.

Examples:* "Reasonable Factors Other Than Age."

1. A federally assisted training program uses a physical fitness test as a factor for selecting participants to train for a certain job. The job involves frequent heavy lifting and other demands for physical strength and stamina. Even though older persons might fail the test more frequently than younger persons, the physical fitness test measures a characteristic that is *directly and substantially* related to the job for which persons are being trained and is, therefore, permissible under the Act.

2. The same program referred to in (1) above uses the same physical fitness test to select participants for a training program for clerical work. It claims that persons who pass the test are likely to do better work than those who are unable to pass the test. Even if this were true, the relationship between the requirements of the test and the requirements of the type of job for which training is being offered *is not direct and substantial.* It is so tenuous and limited that it will not justify the test's age discriminatory effect. In this situation, use of the test would violate the Act.

6. *Cost/Benefit Analysis.* The NPRM raised the issue of whether cost-benefit considerations can justify the use of age distinctions or factors other than age. A majority of commenters expressed support for the NPRM position that a cost-benefit consideration by itself cannot be the sole justification for an exception under § 90.14 and § 90.15. Others, however, opposed any use of cost-benefit analysis in the administration of federally assisted programs.

The use of an explicit age distinction in the operation of a federally assisted program will have to be justified as necessary to the normal operation of the program or to the achievement of a statutory objective. That is, the explicit age distinction will have to meet the four part test of § 90.14 and cannot be disqualified or justified because it reflects a cost-benefit consideration. Use of a factor other than age will have to meet the test established in § 90.15 and cannot be disqualified or justified because it reflects a cost-benefit consideration. The scrutiny afforded age distinctions and factors other than age under these regulations should have the effect of screening out discriminatory cost-benefit considerations.

7. *Relationship Between General and Age-Targeted Programs.* Another major issue in the NPRM concerned similar services provided by both general and

* The examples illustrate general situations in which the regulations are applied to hypothetical recipients.

age-targeted programs. The question was whether the existence of an age-targeted program in any way relieved a general program of its obligation to serve the age group eligible for the age-targeted program.

Many commenters expressed the view that the general program was not relieved in any way of its obligation to serve everyone regardless of age. They reasoned that: the age targeted program was intended to supplement service for the eligible population, not to replace the services provided by the general program; an age-targeted program recognizes the special or additional needs of an age group, so that any restriction on the availability of services in a general program based solely on the existence of an age-targeted program would be discriminatory; administrators should not be given discretion to limit participation on the basis of age in a general program which Congress created to serve all ages.

Some commenters did say, however, that there are occasions when a general program should be permitted to deny services to an age group which is served elsewhere. They reasoned that the general programs can then focus on those in need who are not being served elsewhere; services offered in a general program should be based on the needs of the community as a whole and should take into account what is offered elsewhere; to require a general program to spread its limited resources to all age groups, regardless of the availability of similar services, would weaken the quality of the services provided. There was no support for the view that the general program's obligation was unconditionally lessened by the existence of the age targeted program.

The final regulations continue the policy expressed in the NPRM that, for a general program, any deviation from a policy of serving all eligible persons regardless of age that results in a denial or limitation of service on the basis of age is only permissible if it meets one of the statutory exceptions under § 90.14 or § 90.15.

A general program can focus its services by referring persons to existing age targeted programs only if those actions do not result in the denial of services to the individual or in the provision of lesser or different services. However, HEW is persuaded that there are situations when referral to an age targeted program does not result in a denial or limitation of services. For example, a program which serves all ages may be aware of an age targeted program which, because of its specialization, offers better services to that age group. A general program may have a waiting list of applicants while a similar age targeted program has space available. In situations like these, a general program could refer an applicant to the age targeted program provided that it had sufficiently well established relationship with the age targeted program to assure that the person referred actually received the service sought.

8. *Mediation of Age Discrimination Complaints.* The NPRM proposed that complaints of age discrimination be subject to mediation after initial screening by the Federal agency. The NPRM also proposed that participation in mediation be mandatory for both complainant and recipient and that administration of the mediation process be centralized in one government agency, the Federal Mediation and Conciliation Service (FMCS). These provisions of the NPRM have been kept in the final regulations.

While most commenters supported the proposed use of mediation, some commenters questioned the appropriateness of requiring mediation as the first step in resolving an age discrimination complaint. They argued that mediation promotes inappropriate bargaining over civil rights, that mediation may jeopardize the rights of complainants, that not every complaint is suitable for mediation, that mediation introduces a new and different step in the complaint resolution process which will be unnecessarily confusing to complainants and recipients.

HEW continues to believe that the mediation process is an important innovation in resolution of age discrimination complaints. Mediation is an effort to provide faster and more creative resolution of complaints through informal methods of dispute resolution. Attempts to reach a mediated settlement of the complaint must be completed in the first 60 days after the complaint is received. While mediation does represent a new step in the complaint resolution process, the experience in resolving complaints under other civil rights statutes has been that the 60 days set aside for mediation will not significantly delay the enforcement process.

Experience with mediation in other areas indicates that even the most intransigent parties can arrive at a mutually satisfactory resolution of their dispute. Consequently, HEW believes it is desirable to require that mediation be attempted in all complaints. Mediation does not necessarily mean that the two parties to the dispute must meet face to face; each may meet separately with the mediator. Since the mediated settlement must be satisfactory to both parties, neither the complainant nor the recipient is compelled to settle the complaint. Since the cost of the mediator will be paid by the Federal government, the financial burden on complainants and recipients will be minimal. HEW believes that the ADA offers a unique opportunity to try this innovative approach to the resolution of disputes.

These regulations require that the management of the mediation process be centralized in one agency, designated by the Secretary of HEW. The FMCS will be that agency. Commenters critical of this decision questioned the wisdom of introducing a new agency into the civil rights enforcement process. Some suggested that each agency should manage its own mediation process, to permit the use of staff who would be more familiar with the program and problems of the Federal agency receiving the complaint.

HEW believes that the benefits to be realized by centralizing the management of the mediation process are substantial and that the FMCS is the appropriate agency for the job. The use of a single agency to manage the mediation process assures that uniform standards will be used in the recruitment and training of mediators, that the training will be centralized, that consistent procedures will be followed in the mediation, and that there can be a comprehensive and coherent evaluation of the process as part of the 30 month review of the effectiveness of these regulations. While the use of the FMCS does introduce a new agency into civil rights enforcement, one of the key elements in mediation is that both sides have confidence that the mediator is an independent third party. HEW believes that mediation of age discrimination complaints has a better chance to succeed if the mediator is not part of the staff of a Federal agency responsible for enforcing the Age Discrimination Act. The FMCS, which has an established reputation for mediating disputes, will draw on some of its experienced staff and will recruit and train a cadre of community based mediators who will work on age discrimination complaints.

After 30 months, HEW will evaluate the mediation process in accordance with § 90.61 of these regulations. The process will be used, revised or restructured as indicated by the results of that review.

The Department of Health, Education, and Welfare adds Part 90 to Title 45 of the Code of Federal Regulations as set forth below.

Dated: June 5, 1979.

Joseph A. Califano Jr.,

Secretary, Department of Health, Education, and Welfare.

The Department of Health, Education, and Welfare adds Part 90 to Title 45 of the Code of Federal Regulations as set forth below:

PART 90—NONDISCRIMINATION ON THE BASIS OF AGE IN PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

Subpart A—General

Subpart B—What is Age Discrimination?

Subpart C—What are the Responsibilities of the Federal Agencies?

Subpart D—Investigation, Conciliation and Enforcement Procedures

Subpart E—Future Review of Age Discrimination Regulations

Authority: *Age Discrimination Act of 1975, 42 U.S.C. 6101 et seq.*

Subpart A—General

§ 90.1 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 which meet the requirements of the Act and these regulations.

§ 90.2 What is the purpose of these regulations?

(a) The purpose of these regulations is to state general, government-wide rules for the implementation of the Age Discrimination Act of 1975, as amended, and to guide each agency in the preparation of agency-specific age discrimination regulations.

(b) These regulations apply to each Federal agency which provides Federal financial assistance to any program or activity.

§ 90.3 What programs and activities does the Age Discrimination Act of 1975 cover?

(a) The Age Discrimination Act of 1975 applies to any program or activity receiving Federal financial assistance, including programs or activities receiving funds under the State and Local Fiscal Assistance Act of 1972 (31 U.S.C. 1221 *et seq.*).

(b) The Age Discrimination Act of 1975 does not apply to:

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

(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 or target groups in age-related terms.

(2) Any employment practice of any employer, employment agency, labor organization, or any labor-management joint apprenticeship training program, except for any program or activity receiving Federal financial assitance for public service employment under the Comprehensive Employment and Training Act of 1974 (CETA), (29 U.S.C. 801 *et seq.*):

§ 90.4 How are the terms in these regulations defined?

As used in these regulations, the term:

"Act" means the Age Discrimination Act of 1975, as amended, (Title III of Public Law 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 form 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.

"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 the agency provides or otherwise makes available assistance in the form of:

(a) Funds;

(b) Services of Federal personnel; or

(c) Real and personal property or any interest in or use of property, including:

(1) Transfers or leases of property for less than fair market value or for reduced consideration; and

(2) Proceeds from a subsequent transfer or lease of property if the Federal share of its fair market value is not returned to the Federal Government.

"Recipient" means any State or its political subdivision, any instrumentality of a State or its political 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, Education, and Welfare.

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

Subpart B—What is Age Discrimination?

Standards for Determining Discriminatory Practices

§ 90.11 Purpose of this subpart.

The purpose of this subpart is to set forth the prohibitions against age discrimination and the exceptions to those prohibitions.

§ 90.12 Rules against age discrimination.

The rules stated in this section are limited by the exceptions contained in sections 90.14, and 90.15 of these regulations.

(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.

§ 90.13 Definitions of "normal operation" and "statutory objective."

For purposes of sections 90.14, and 90.15, 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.

§ 90.14 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 section 90.12, 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 in order 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.

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

A recipient is permitted to take an action otherwise prohibited by section 90.12 which 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.

§ 90.16 Burden of proof.

The burden of proving that an age distinction or other action falls within the exceptions outlined in sections 90.14 and 90.15 is on the recipient of Federal financial assistance.

Subpart C—What are the Responsibilities of the Federal Agencies?

§ 90.31 Issuance of regulations.

(a) The head of each agency which extends Federal financial assistance to any program or activity shall publish proposed and final age discrimination regulations in the **Federal Register** to:

(1) Carry out the provisions of section 303 of the Age Discrimination Act of 1975; and

(2) Provide for appropriate investigative, conciliation, and enforcement procedures.

(b) Each agency shall publish its proposed agency age discrimination regulations no later than 90 days after the publication date of the final general, government-wide age discrimination regulations.

(c) Each agency shall submit its final agency regulations to HEW for review no later than 120 days after publication of proposed agency age discrimination regulations.

(d) Final agency age discrimination regulations shall be consistent with these general, government-wide age discrimination regulations and shall not be published until the Secretary approves them.

(e) Each agency shall include in its regulations a provision governing the operation of an alternate funds disbursal procedure as described in section 90.48 of these regulations.

(f) Each agency shall publish an appendix to its final age discrimination regulations containing a list of each age distinction provided in a Federal statute or in regulations affecting financial assistance administered by the agency.

§ 90.32 Review of agency policies and administrative practices.

(a) Each agency shall conduct a review of age distinctions it imposes on its recipients by regulations, policies, and administrative practices. The purpose of this review is to identify how age distinctions are used by each Federal agency and whether those age distinctions are permissible under the Act and implementing regulations.

(b) No later than 12 months from the date the agency published its final regulations, the agency shall publish, for public comment, a report in the **Federal Register** containing:

(1) The results of the review conducted under paragraph (a) of this section;

(2) A list of the age distinctions contained in regulations which are to be continued;

(3) The justification under the requirements of the Act and these regulations for each age distinction to be continued;

(4) A list of the age distinctions not contained in regulations but which will be adopted by regulation under the Administrative Procedure Act using the notice and comment procedures specified in 5 U.S.C. 553; and

(5) A list of the age distinctions to be eliminated.

(c) Beginning with the effective date of an agency's final regulations, the agency may not impose a new age distinction unless the age distinction is adopted by regulation under the Administrative Procedure Act using the notice and comment procedures specified in 5 U.S.C. 553.

(d) Beginning 12 months after the publication of its age discrimination regulations, an agency may not continue an existing age distinction, unless the age distinction has already been adopted by regulation or is adopted by regulation under the Administrative Procedure Act using the notice and comment procedures specified in 5 U.S.C. 553.

§ 90.33 Interagency cooperation.

Where two or more agencies provide Federal financial assistance to a recipient or class of recipients, the Secretary may designate one of the agencies as the sole agency for all compliance and enforcement purposes with respect to those recipients, except for the ordering of termination of funds and the notification of the appropriate committees of Congress.

§ 90.34 Agency reports.

Each agency shall submit to the Secretary not later than December 31 of each year, beginning in 1979, a report which:

(a) Describes in detail the steps taken during the preceding fiscal year to carry out the Act; and

(b) Contains data on the frequency, type, and resolution of complaints and on any compliance reviews, sufficient to permit analysis of the agency's progress in reducing age discrimination in programs receiving Federal financial assistance from the agency; and

(c) Contains data directly relevant to the extent of any pattern or practice of age discrimination which the agency has identified in any programs receiving Federal financial assistance from the agency and to progress toward eliminating it; and

(d) Contains evaluative or interpretative information which the agency determines is useful in analyzing agency progress in reducing age discrimination in programs receiving Federal financial assistance from the agency; and

(e) Contains whatever other data the Secretary may require.

Subpart D—Investigation, Conciliation and Enforcement Procedures

§ 90.41 What is the purpose of this Subpart?

This subpart sets forth requirements for the establishment of compliance, investigation, conciliation, and enforcement procedures by agencies which extend Federal financial assistance.

§ 90.42 What responsibilities do recipients and agencies have generally to ensure compliance with the Act?

(a) A recipient has primary responsibility to ensure that its programs and activities are in compliance with the Age Discrimination Act and shall take steps to eliminate violations of the Act. A recipient also has responsibility to maintain records, provide information, and to afford access to its records to an agency to the extent required to determine whether it is in compliance with the Act.

(b) An agency has responsibility to attempt to secure recipient compliance with the Act by voluntary means. This may include the use of this services of appropriate Federal, State, local, or private organizations. An agency also has the responsibility to enforce the Age Discrimination Act when a recipient fails to eliminate violations of the Act.

§ 90.43 What specific responsibilities do agencies and recipients have to ensure compliance with the Act?

(a) *Written notice, technical assistance, and educational materials.* Each agency shall: (1) Provide written notice to each recipient of its obligations under the Act. The notice shall include a requirement that where the recipient initially receiving funds makes the funds available to a sub-recipient, the recipient must notify the sub-recipient of its obligations under the Act.

(2) Provide technical assistance, where necessary, to recipients to aid them in complying with the Act.

(3) Make available educational materials setting forth the rights and obligations of beneficiaries and recipients under the Act.

(b) *Self-evaluation.* (1) Each agency shall require each recipient employing the equivalent of 15 or more full time employees to complete a written self-evaluation of its compliance under the Act within 18 months of the effective date of the agency regulations.

(2) Each recipient's self-evaluation shall identify and justify each age distinction imposed by the recipient.

(3) Each recipient shall take corrective and remedial action whenever a self-evaluation indicates a violation of the Act.

(4) Each recipient shall make the self-evaluation available on request to the agency and to the public for a period of 3 years following its completion.

(c) *Complaints.*—(1) *Receipt of complaints.* Each agency shall establish a complaint processing procedure which includes the following:

(i) A procedure for the filing of complaints with the agency;

(ii) A review of complaints to assure that they fall within the coverage of the Act and contain all information necessary for further processing;

(iii) Notice to the complainant and the recipient of their rights and obligations under the complaint procedure, including the right to have a representative at all stages of the complaint procedure; and

(iv) Notice to the complainant and the recipient (or their representatives) of their right to contact the agency for information and assistance regarding the complaint resolution process.

(2) *Prompt resolution of complaints.* Each agency shall establish procedures for the prompt resolution of complaints. These procedures shall require each recipient and complainant to participate actively in efforts toward speedy resolution of the complaint.

(3) *Mediation of complaints.* Each agency shall prompty refer all complaints which fall within the coverage of the Act to a mediation agency designated by the Secretary.

(i) The referring agency shall require the participation of the recipient and the complainant in the mediation process, although both parties need not meet with the mediator at the same time.

(ii) If the complainant and recipient reach a mutually satisfactory resolution of the complaint during the mediation period, they shall reduce the agreement to writing. The mediator shall send a copy of the settlement to the referring agency. No further action shall be taken based on that complaint unless it appears that the complainant or the recipient is failing to comply with the agreement.

(iii) Not more than 60 days after the agency receives the complaint, the mediator shall return a still unresolved complaint to the referring agency for initial investigation. The mediator may return a complaint at any time before the end of the 60 day period if it appears that the complaint cannot be resolved through mediation.

(iv) 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 agency appointing the mediator.

(4) *Federal initial investigation.* Each agency shall investigate complaints unresolved after mediation or reopened because of a violation of the mediation agreement. As part of the initial investigation, the agency shall use informal fact finding methods including joint or individual discussions with the complainant and the recipient to establish the facts, and, if possible,

resolve the complaint to the mutual satisfaction of the parties. The agency may seek the assistance of any involved State program agency.

(5) *Formal investigation, conciliation, and hearing.* If the agency cannot resolve the complaint during the early stages of the investigation, it shall:

(i) Complete the investigation of the complaint.

(ii) Attempt to achieve voluntary compliance satisfactory to the agency, if the investigation indicates a violation.

(iii) Arrange for enforcement as described in section 90.47, if necessary.

§ 90.44 Compliance reviews.

(a) Each agency shall provide in its regulations that it may conduct compliance reviews, pre-award reviews, and other similar procedures which permit the agency to investigate, and correct, violations of the Act without regard to its procedures for handling complaints.

(b) If a compliance review or pre-award review indicates a violation of the Act, the agency shall attempt to achieve voluntary compliance with the Act. If voluntary compliance cannot be achieved, the agency shall arrange for enforcement as described in section 90.47.

§ 90.45 Information requirements.

Each agency shall provide in its regulations a requirement that the recipient:

(a) Provide to the agency information necessary to determine whether the recipient is in compliance with the Act; and

(b) Permit reasonable access by the agency to the books, records, accounts, and other recipient facilities and sources of information to the extent necessary to determine whether a recipient is in compliance with the Act.

§ 90.46 Prohibition against intimidation or retaliation.

Each agency shall provide in its regulations that recipients may not engage in acts of intimidation or retaliation against any person who:

(a) Attempts to assert a right protected by the Act; or

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

§ 90.47 What further provisions must an agency make in order to enforce its regulations after an investigation indicates that a violation of the act has been committed?

(a) Each agency shall provide for enforcement of its regulations 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 agency's 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 the agency's regulations.

(ii) Use of any requirement of or referral to any Federal, State, or local government agency which will have the effect of correcting a violation of the Act or implementing regulations.

(b) Any termination under section 90.47(a)(1) shall be limited to the particular recipient and particular program or activity receiving Federal financial assistance or portion thereof found to be in violation of the Act or agency regulations. No termination shall be based in whole or in part on a finding with respect to any program or activity which does not receive Federal financial assistance.

(c) No action under paragraph (a) of this section may be taken until:

(1) The head of the agency involved has advised the recipient of its failure to comply with the Act or the agency's regulations and has determined that voluntary compliance cannot be obtained.

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

(d) An agency may defer granting new Federal financial assistance to a recipient when termination proceedings under section 90.47(a)(1) are initiated.

(1) New Federal financial assistance includes all assistance administered by or through the agency for which an application or approval, including renewal or continuation of existing activities, or authorization of new activities, is required during the deferral period. New Federal financial assistance does not include assistance approved prior to the beginning of termination proceedings or to increases in funding as a result of changed computation of formula awards.

(2) A deferral may not begin until the recipient has received a notice of opportunity for a hearing under section 90.47(a)(1). A deferral may not continue 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 agency. A deferral may not continue for more than 30 days after the close of the hearing, unless the hearing results in a finding against the recipient.

§ 90.48 Alternate funds disbursal procedure.

When an agency withholds funds from a recipient under its regulations issued under section 90.31, the head of the agency may disburse the withheld funds so directly to any public or non-profit private organization or agency, or State or political subdivision of the State. These alternate recipients must demonstrate the ability to comply with the agency's regulations issued under this Act and to achieve the goals of the Federal statue authorizing the program or activity.

§ 90.49 Remedial and affirmative action by recipients.

(a) Where a recipient is found to have discriminated on the basis of age, the recipient shall take any remedial action which the agency may require to overcome the effects of the discrimination. If another recipient exercises control over the recipient that has discriminated, both recipients may be required to take remedial action.

(b) 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.

(c) If a recipient operating a program which serves the elderly or children in addition to persons of other ages, provides special benefits to the elderly or to children the provision of those benefits shall be presumed to be voluntary affirmative action provided that it does not have the effect of excluding otherwise eligible persons from participation in the program.

§ 90.50 Exhaustion of administrative remedies.

(a) The agency shall provide in its regulations that a complainant may file a civil action following the exhaustion of adminstrative remedies under the Act. Administrative remedies are exhausted if:

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

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

(b) If either of the conditions set forth in § 90.50(a) is satisfied the agency shall:

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

(2) Advise the complainant of his or her right, under section 305(e) of the Act, to bring a civil action for injunctive relief that will effect the purposes of the Act; 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 shall give 30 days notice by registered mail to the Secretary, the Attorney General of the United States, the head of the granting agency, and the recipient;

(iv) That the notice shall state: the alleged violation of the Act; the relief requested; the court in which the action will be brought; and whether or not attorney's fees are demanded in the event the complainant prevails; and

(v) That no action shall 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.

Subpart E—Future Review of Age Discrimination Regulations

§ 90.61 Review of general regulations.

The Secretary shall review the effectiveness of these regulations in securing compliance with the Act. As part of this review, 30 months after the effective date of these regulations, the Secretary shall publish a notice of opportunity for public comment on the effectiveness of the regulations. The Secretary will assess the comments and publish the results of the review and assessment in the Federal Register.

§ 90.62 Review of agency regulations.

Each agency shall review the effectiveness of its regulations in securing compliance with the Act. As part of this review, 30 months after the effective date of its regulations, each agency shall publish a notice of opportunity for public comment on the effectiveness of the agency regulations. Each agency shall assess the comments and publish the results of the review in the Federal Register.

Note.—The following comment analysis will not appear in the Code of Federal Regulations.

Comment Analysis

The following comments suggestions and criticisms were made at public hearings or submitted in writing in response to the proposed rules. After the summary of each comment, a response is set forth stating the changes which have been made in the regulations or the reasons why no change was deemed necessary or appropriate. The comments are grouped according to sections of the proposed rules and are arranged in sequence.

Subpart A—General

§ 90.1 *What is the purpose of the Age Discrimination Act of 1975?*

§ 90.1 *Exclusive protection for the elderly.*

Comment: A number of commenters stated that Congress intended the ADA to protect the elderly exclusively or to a greater extent than other age groups. These commenters cited the fact that the ADA is part of the Older Americans Act and that most of the debate on the Act concerned discrimination against the elderly.

Response: The House/Senate Conference Committee report is clear in stating that the ADA applies to persons of all ages. The regulations do not, therefore, limit protection to the elderly or to any other age group. HEW does not believe that this interpretation of the coverage of the Act will in any way diminish protection of the elderly.

§ 90.1 *Reference to statutory exceptions*

Comment: Several commenters were concerned specifically about the second sentence in § 90.1 of the NPRM which stated that the ADA permits the use of certain age distinctions and factors other than age. They felt the sentence weakened the intent of the ADA by emphasizing that some age distinctions are permitted.

Response: HEW agrees that the proposed wording may have created a wrong impression. HEW has modified the sentence to serve the intended purpose of informing the reader, early in the regulations, that the ADA specifically allows certain age distinctions.

§ 90.3 *What programs and activities does the Age Discrimination Act of 1975 cover?*

§ 90.3(b)(1) *"Any law" exemption.*

Comment: Many commenters responded to the issue presented in the NPRM of how "any law" should be interpreted. Although a number of commenters stated that "any law" should be interpreted to mean either Federal, State and local statutes and regulations, or Federal, State and local statutes, the majority of commenters favored either Federal and State statutes, or Federal statutes only. A small number of commenters supported an interpretation of Federal statutes and Federal regulations.

Response: A discussion of the four options (presented in the NPRM) for interpreting "any law", the commenters' reasons for supporting one of the options, and HEW's final choice appears in the preamble to these regulations.

§ 90.3(b)(2) *Coverage of employment practices.*

Comment: Many commenters discussed employment practices. Some requested clarification of the distinction between the ADA and Age Discrimination in Employment Act of 1967 (ADEA), which only covers persons between 40 and 70 years of age. These commenters were uncertain if persons under 40 or over 70 were covered under the ADA. Although the commenters recognized that CETA public service employment is covered by the ADA, they were concerned that the ADA regulations fail to reach other types of employment.

A few commenters supported the NPRM position that the ADA covers programs which are both financial assistance and employment, like the College Work Study Program and the Work Incentive Program. Many commenters suggested that mandatory retirement ages be prohibited.

Response: HEW has made no change in the text of the regulations. Section 304(c)(1) of the ADA excludes employment practices from coverage, except for CETA-funded public service employment. The final regulations continue to apply only to programs that are both employment and Federal financial assistance, for example: the College Work Study Program. Other types of employment and employment practices, including mandatory retirement ages, clearly are not covered by the ADA and are not addressed in these regulations.

The ADEA, which the Equal Employment Opportunity Commission (EEOC) will administer beginning July 1, 1979, is the statute that addresses age discrimination in employment. However, the ADEA applies only to persons between the ages of 40 and 70.

§ 90.4 *How are the terms in these regulations defined?*

§ 90.4 *Definition for the term United States.*

Comment: Several commenters questioned whether the regulations applied to *territories.* The proposed rules defined the word "recipient" in terms of a State or its political subdivision, but did not mention territory.

Response: HEW has added *"United States"* to the definitions and has defined United States to include the territories.

This is consistent with the regulations implementing Title VI of the Civil Rights Act of 1964 (45 CFR Part 80) which define United States to include territory.

§ 90.4 *Definition of other terms.*

Comment: A few commenters suggested that the word *action* be defined to include the failure to take an action. Other commenters suggested that additional terms should be defined in this section, including *benefits* or *assistance, discriminate, undersirable age distinction, person, program or activity.* Commenters also suggested additions or changes to the definitions of *Federal financial assistance* and *recipient.*

Response: HEW has not changed the definition of *action.* A failure to act is an action and is covered by the definition. Many of the definitions including *Federal financial assistance* and *recipient* are designed to coincide with the definitions in other civil rights regulations (covering prohibitions against race, sex, and handicap discrimination). HEW believes that definitions appearing in more than one of the civil rights regulations, should be consistent with one another.

HEW believes that the regulations are sufficiently clear concerning the meaning of the suggested terms and that further additions to the definition section would not add to the clarity of the regulations. The phrase *cooperative agreement* has been added to the definition of Federal financial assistance to reflect another type of assistance.

Subpart B—What is Age Discrimination? (Standards for Determining Discriminatory Practices)

§ 90.13 *Definitions of "normal operation" and "statutory objective."*

§ 90.13(a) *Definition of normal operation.*

Comment: Several commenters supported the NPRM definition. Several other commenters stated that it was either unclear or too broad. Suggestions for making the definition clearer included the following: explain how the term will apply to new operations; define what constitutes a significant change; define how long a program's ability to meet its objectives must be impaired; and define how the program objectives should be determined. Suggestions for restricting the definition included: limiting the "normal operation" to a statutory objective; requiring that the operation be appropriate and not for administrative ease; or requiring that a change must impair substantially the program's achievement of a statutory objective.

Response: HEW has not changed the definition of "normal operation." The existing definition provides other governmental agencies flexibility in applying the definition to their own programs which receive Federal financial assistance. Since there is a wide variation in federally funded programs, HEW does not want to restrict other agencies from refining the definition of "normal operation" to suit the characteristics of their individual programs.

"Normal operation" is defined in a way that does not require a program to make any change in its operation so significant as to impair achievement of its objectives. At the same time, a recipient would be required to make a change that merely disturbs administrative routine or causes administrative inconvenience.

§ 90.13(b) *Definition of statutory objective.*

Comment: A number of commenters stated that the definition of "statutory objective" should include reasonable inferences from its provisions or legislative history.

Several commenters suggested that a statutory objective must be expressly stated in the statute. They feared that anything may be inferred from a statute or its legislative history.

A few commenters stated that the regulations should contain a discussion of the relationship between the normal operation and a statutory objective.

Another commenter stated that a statutory objective should be limited to a Federal statutory objective. One commenter stated that no definitions were necessary since § 90.14 provided a "functional way" of interpreting the terms.

Response: HEW has changed the definition of "statutory objective" to clarify that it refers to the objective of any applicable Federal, State or local statute. The final regulations provide that a "statutory objective" means expressly stated objectives of Federal, State or local statutes. HEW believe that the definitions of "statutory objective" and "any law" should coincide.

Since "legislative history" is a broad concept, and because the "statutory objective" exception will be used to justify the use of administratively imposed age distinctions or factors other than age which have a disproportionate effect, HEW believes that "statutory objective" should be construed to mean only the expressly stated objectives of any Federal, State or local statute which affects the provision of Federal financial assistance.

§ 90.14 *Exceptions to the rules against age discrimination. Normal operation or statutory objectives of any program or activity.*

§ 90.14 *General use of this exception.*

Comment: A large number of commenters stated that either age distinctions should not be permitted or should be permitted only under narrow circumstances. Several of these commenters cited the Civil Rights Commission's conclusion that factors other than age are nearly always available and should be used. Commenters suggested restricting the use of age distinctions to children's programs; situations where individual or public safety is concerned; or situations where alternative characteristics are not available.

Response: The ADA makes specific provisions for exceptions to the general prohibition against the use of age distinctions. Section 304(b)(1)(A) of the ADA permits an exception for actions which reasonably take into account age as a factor necessary to the normal operation or the achievement of a statutory objective of a program or activity. Section 304(b)(1)(B) permits a further exception from coverage under the Act for reasonable factors other than age. HEW believes that the intent of the ADA is conveyed most accurately by adoption of the specific statutory language into § 90.14 and § 90.15 of the regulations together with a strict four part test in § 90.14 and a narrow interpretation of reasonable factors other than age in § 90.15.

§ 90.14 *Restriction on use of the exceptions.*

Comment: Several commenters stated that the regulations should be altered to require that a program must accept any person who does not meet the program's age requirements, if the person possesses the characteristics for which age is a measure or approximation.

A few commenters suggested that the regulations should make clear that persons must not be excluded from programs or activities on the presumption that because of their age they are economically, mentally, socially, or physically unqualified. An age classification, based on that kind of presumption, is an improper subterfuge for the real consideration.

Response: The ADA allows the use of age distinctions which are necessary to the normal operation or to the achievement of a statutory objective of a program or activity. The regulations implement this legislative provision and establish standards for determining whether an age distinction is necessary to the normal operation or to the achievement of a statutory objective. HEW believes that the four part test in § 90.14 establishes an appropriate standard. In determining whether an age distinction qualifies for one of the exceptions, it may be relevant that as a matter of policy the age distinction is not rigidly applied. That is, the recipient employing an age distinction may permit a person, upon a proper showing of the necessary characteristic, to participate in the program or activity even though that person would otherwise be barred by the age distinction.

§ 90.14 *General comments on the four-part test for determining when an action reasonably takes age into account as a factor necessary to the normal operation or statutory objective.*

Comment: Several commenters supported the four-part test. Several others stated that the criteria used in the test are unclear and difficult to interpret. Their reasons were that many of the terms used cannot be defined and that the issue of whether an action meets the criteria must be resolved on the basis of individual judgments.

Another commenter said that it was not clear whether all of the four-part test had to be met. A few commenters suggested that the regulations should include a list of programs or activities that meet the test and qualify under the exceptions.

A few commenters stated that the criteria were too strict and might prohibit many desirable programs and activities, such as extracurricular school activities. Another commenter stated the exception should permit age distinctions that are reasonably necessary to achieve any statutory objective or normal program operation.

Several commenters said the test was too broad or too general. As a result, all age distinctions could meet the test and agencies would have too much latitude in applying the test.

Response: HEW has retained the four part test in the final regulations. The word "and" has been added after parts (a)–(c) of the test to make clear that all four criteria must be met for the age distinction to qualify for an exception.

HEW believes the test will prohibit the use of age distinctions that violate the ADA and will permit the use of age distinctions that meet the requirements of the ADA. The test set out in § 90.14 is similar to the criteria which agencies have used successfully under the Age Discrimination in Employment Act to show exceptions for age distinctions which are *bona fide* occupational qualifications.

§ 90.14(a) *Age is used as a measure or approximation of other characteristics.*

Comment: A commenter stated there is an incorrect presumption in § 90.14(a) and (c) that the relationship between age and other characteristics is the same at both ends of the age continuum.

Response: HEW does not agree that this section makes the stated presumption. The only presumption made is that age may represent, in varying degrees, other characteristics in persons of all ages. Since the Act applies to persons of all ages, HEW believes it is neither necessary nor desirable to provide different standards for different age groups.

Comment: Several commenters suggested that the term "maturity" used as an example in this section be omitted or further defined. The reasons were that it is too vague a term or that age may be an indicator of physical maturity but not mental or emotional maturity.

Response: HEW agrees with the suggestion and has deleted the example. HEW does believe, however, that age may be, in some circumstances, a reasonable measure or approximation of characteristics reflecting either physical or emotional maturity.

Comment: A commenter said that the regulations should not limit the use of age to situations where it is used as a proxy only. A few other commenters stated that the term "proxy" should be defined and one suggested that the word "indicator" be used instead of "proxy".

Response: HEW has made no change in § 90.14(a). Where age is used by itself and does not represent another characteristic, that use of age would not pass the four-part test of § 90.14. The term "proxy" was not used in the text of the proposed regulations but only for discussion purposes in the preamble to the NPRM.

§ 90.14(b) *The other characteristic(s) must be measured or approximated.*

Comment: A few commenters suggested that the regulations should explain the meaning of the phrases "must be measured" and "necessary characteristic".

Response: HEW believes no change is necessary. A characteristic that "must be measured" is one that, if omitted from the program or activity, would significantly impair the normal operation or the achievement of a statutory objective. The phrase "necessary characteristic" does not appear in the text of the proposed regulations but was used for discussion purposes in the preamble to the NPRM. A necessary characteristic is one which meets the four part test. For example, age may be used as a measure of the likelihood of catching a communicable childhood disease. A program would be permitted to use age as a factor in identifying those persons to be vaccinated only if, in addition to the other requirements of the four part test, identification of individuals who are likely to get the disease is necessary in order to achieve a statutory objective of the program or to allow normal operation of the program.

§ 90.14(c) *The other characteristic can be reasonably measured or approximated by age.*

Comment: A commenter said that age should not be a proxy for adult characteristics. Several commenters said there must be a close relationship between age and the characteristic it represents because anything less is typically the basis for stereotyping or other discriminatory practices. A few commenters suggested the relationship should be mathematically, or statistically valid. A few other commenters suggested omitting the term "reasonable".

Response: HEW has not changed the final regulations. When age is used as a measure of one or more adult characteristics, the age distinction must still meet the remaining parts of the four part test. Implicit in the requirement that a characteristic be reasonably measured or approximated by the use of age, is the idea that there must be a close relationship between age and the characteristic being measured.

§ 90.14(d) *The other characteristics are difficult, costly, or otherwise impractical to measure directly.*

Comment: Several commenters stated that cost factors should never be used or should be used only if the other characteristics are impossible to measure. A few stated that if the other characteristic is so difficult or costly to determine it should not be an eligibility factor.

A few other commenters stated that, as an alternative, age be considered if direct measurement of the other characteristic is either impossible or so onerous to recipients or participants that it would impair the normal operation or achievement of any statutory objective.

Response: HEW has changed part four of the test to require that the characteristics for which age is an approximation must be impractical to measure directly on an individual basis. The references to cost and difficulty in measuring the factor have been deleted.

§ 90.14 *Exceptions for clubs or programs that have no basis in Federal statutes.*

Comment: A number of commenters said that the regulations either should provide a special or additional exception for, or should clarify how, senior citizens and other clubs may continue to apply an age criteria. Most said that a separate exception is needed in order for these types of programs to continue.

Suggestions for exempting or providing for the effective continuation of these age-related programs under the regulations included: permitting an exception for administrative action by any governmental level in developing and funding programs; provide a definition of "program" that allows an age-focused group to administer Federal funds as long as absolute age restrictions are not used in that portion of the program receiving Federal funds; permitting affirmative action that addresses the needs of various constituent groups.

A few commenters said that these organizations should either be prevented from using age criteria or be allowed to do so only if they meet the exceptions stated in § 90.14.

Response: It is not HEW's intention to prohibit the existence of such age-focused groups as senior citizens clubs or Junior Chambers of Commerce. If the organization receives Federal financial assistance, however, the age distinctions used by these organizations must qualify under § 90.14 of the final regulations.

§ 90.15 *Exceptions to the rules against discrimination. Reasonable factors other than age.*

§ 90.15 *General comments about the exception.*

Comment: A few commenters suggested that the meaning of the phrase, "disproportionate effect" be explained or defined. Another commenter suggested that a list of examples be included to show how the exception applies.

Response: This phrase has an established meaning in other civil rights statutes, like Title VI of the Civil Rights Act of 1964. HEW intends the phrase to have a similar meaning in these regulations; i.e., to prohibit those actions which do not make use of express age distinctions, but which result in discrimination on the basis of age. This means, for example, that due to the recipient's use of a factor other than age which does not have a direct and substantial relationship to a statutory objective or to the normal operation of a program, persons of a certain age group do not receive services under the recipient's program in proportion to their needs for those services.

§ 90.15 *Rational for linking this exception to statutory objective/normal operation.*

Comment: A commenter stated that reasonable factors other than age need not bear any relationship to the normal operation of a program or to a statutory objective. The reason stated was that these terms are not used in Section 304(b)(1)(B) of the ADA, which is the basis for the exception provided under § 90.15. The commenter said that it is only necessary to show that the factors used are reasonable.

Response: HEW believes it is necessary to establish a standard for what may be considered reasonable factors other than age. If no standard is set, the interpretation of what is reasonable could be so broad and inclusive that few factors would be prohibited. If this were true, the Act would provide little protection against factors other than age used to discriminate against various age groups.

§ 90.15 *Relationship of factors other than age to statutory objective/normal operation.*

Comment: A number of commenters suggested that factors other than age must bear a rational relationship to a program's statutory objectives or normal operation. A rational relationship is less restrictive, permits greater flexibility in considering individual factors such as needs, and is consistent with the legislative history and reflects the language of the ADA. Several commenters said the use of a stricter standard would impose great hardships and would disrupt worthwhile programs.

A number of commenters stated that a stricter standard is needed. They stated that the rational standard is too subjective and is easily influenced by traditional modes of operation. It is too easy for a recipient to meet on the one hand, and too difficult for a plaintiff to overcome in proving a claim of discrimination on the other hand.

A few commenters stated that by deleting the term "unreasonable" from the purpose clause of the original ADA, Congress intended that any action, in order to qualify for an exemption, should be subject to strict scrutiny. A few commenters stated that since the use of age must be "necessary" to the normal operation or statutory objective, the use of factors other than age should also be "necessary."

Another commenter stated that there would be a discrepancy between § 90.14 and § 90.15 if the rational standard were used. While a program may be prevented from using an age distinction because the factor it represents is not necessary to its statutory objective, the factor itself may be used under § 90.15 if it is only rationally related to the statutory objective.

Another commenter stated that the ADEA contains a similar exception for the use of reasonable factors other than age. The regulations for the ADEA and court decisions made on this issue have successfully applied a standard of careful scrutiny.

Response: HEW has concluded that the relationship of factors other than age to the normal operation or statutory objective of a program must be a "direct and substantial" relationship. This relationship requires use of a standard of careful review and examination of uses of factors other than age on a case-by-case basis. The exception in § 90.15 for a factor other than age becomes an issue for resolution if raised in a complaint or in a compliance review.

To use a rational relationship or minimal scrutiny standard would leave open the possibility of purposefully circumventing the ADA by allowing administrators to use factors other than age to operate a program when an explicit use of age would be prohibited. HEW also believes that a minimal scrutiny standard would permit activities that should be prohibited. The use of that standard would make it very difficult to establish that an activity is in violation of the ADA. Therefore, HEW has adopted the "direct and substantial" test to define the relationship between "factors other than age" and the "normal operation" or "statutory objective" of a federally assisted program or activity.

§ 90.15 *Cost-benefit considerations as justification for age-distinctions.*

Comment: A number of commenters supported the NPRM position that a cost-benefit consideration by itself cannot be the justification for an exception under § 90.14 or § 90.15. Several commenters suggested factors to be considered in applying the tests, such as availability of adequate alternative services, relative equality of services in a given locale over a longer time period, effectiveness of program coordination at the local level, and the degree of necessity of limiting services based on extent of need and resources available. A few commenters stated that examples of specific programs should be included in the ADA regulations to illustrate where cost-benefit considerations will be allowed.

A few commenters opposed any use of cost-benefit analysis because it is too difficult to quantify the benefits involved in human services and it is impossible to predict the benefits a person will derive from services.

Several commented that the use of cost-benefit considerations is especially harmful to the elderly, and two commented that young people are even more vulnerable, being without political power. A few commenters stated that cost-benefit analysis should be specifically disallowed in the regulations.

Several commenters supported providing wider latitude for targeting programs based on cost-benefit considerations. They stated that programs with limited funds are unable to function without cost-benefit allocations and that program administrators should not be required to compose lengthy justifications for those allocations.

Response: The final regulations do not permit a cost-benefit consideration alone to justify an age distinction or a factor other than age. They allow the use of cost-benefit justifications for age distinctions or factors other than age only where those actions meet the tests of §§ 90.14–90.15. The tests of § 90.14 and § 90.15 should be sufficient to eliminate the misapplication of cost-benefit analysis.

§ 90.15 *Services rendered under age-specific programs.*

Comment: A number of commenters stated that the responsibility of a general program is not diminished by the existence of or referral to an age-specific program which provides the same service. Several commenters stated that the main thrust of the ADA is to make certain that the elderly receive their fair share of services, which requires full participation by both types of programs. Commenters cited several adverse effects of relieving a general program's obligation by using an age-specific program: separate and unequal treatment; overloading the age-specific program; and creating gaps of unserved populations.

Several commenters suggested that, to prevent duplication of services, a general program could be permitted to fulfill its obligations by referring people to a special program if: the general program could prove that the specific program's services were available; the general program used outreach to identify those ineligible for the specific program; the general program did not use more than its proportional share of funding as compared to the funding of the specific program; the general program did not deny services to anyone wishing to participate in its program.

Response: General programs may not restrict eligibility solely because of the existence of a similar age-targeted program if the result is a denial or limitation of services. A general program can focus its services by referring persons to existing age-targeted programs only if those actions do not result in a denial of services to the individual, or in the provision of lesser or different services. The recipient operating a general program should establish procedures to insure that a person referred to an age-targeted program in fact receives service.

§ 90.16 *Burden of proof.*

Comment: Several commenters supported the position that the burden is on the recipient to prove whether an age distinction or other action falls within an exception. A few commenters disagreed. Commenters in favor of placing the burden of proof upon the recipient stated that only the recipient has sufficient program knowledge.

Another commenter stated that the burden should be on the recipient only after a charging party makes a reasonable showing of discrimination. A few commenters agreed that the recipient should have the burden when the complaint concerns advancing age, but that the burden should shift to the complainant when he or she is denied the benefits of the program because he or she is too young.

Response. The final regulations continue to require that the recipient has the burden of proving that an age distinction or other action used in its program qualifies for one of the statutory exceptions.

HEW believes that the recipient is best able to demonstrate that an age distinction or factor other than age is entitled to an exception under § 90.14 or § 90.15. The recipient (rather than the complainant) is the party most knowledgeable about its program or activity, the normal operation of the program or activity, and any statutory objective governing the program or activity.

Subpart C—What Are the Responsibilities of the Federal Agencies?

§ 90.31 *Issuance of regulations.*

§ 90.31(d) *HEW approval of other agency regulations.*

Comment: A number of commenters supported the ADA's requirement that HEW review and approve the specific regulations issued by co-equal Federal agencies because this review will ensure that all agency regulations are consistent with both the ADA and the general regulations. Several commenters opposed a review role for HEW because HEW lacks sufficient knowledge of other agency programs to review their regulations effectively. Another commenter suggested the HEW seek clarification of its evaluation role from Congress.

Response: Under Section 304(a)(4) of the ADA, HEW is required to approve all agency age discrimination regulations. The final regulations have been changed to make clear that the regulations of each agency must be submitted to HEW and may not be published in final form until approved by the Secretary.

§ 90.31 *Mechanics and timetable for HEW review of other agency regulations.*

Comment: A few commenters suggested that interagency teams be established to assist HEW in reviewing regulations of other agencies. Several commenters expressed concern that the mechanics and the timetable for the review process are unclear and noted that there is insufficient time allowed in § 90.31 of the NPRM for HEW to complete the review and approval of other agency regulations required by the ADA.

Response: HEW has involved in the development of these regulations an Interagency Task Force composed of those agencies affected by the ADA. This Task Force will continue to function during the development of specific regulations by each agency. The final regulations have been revised to require that each agency submit its final regulations to HEW at the end of 120 days for review and approval. An agency's final regulations may not be published until approved by the Secretary.

§ 90.32(f) *Appendix listing age distinctions.*

Comment: Several commenters suggested that the appendix containing existing age distinctions be published together with the agency's proposed regulations so that the public has an opportunity to comment on existing age distinctions as well as on the regulations proposed.

Response: For information purposes, HEW requires each Federal agency to publish, together with its final regulations, a list of age distinctions found in statutes and regulations. During the 12 months following the publication of its final regulations and appendix listing age distinctions, each agency is further required to review and evaluate against the tests and criteria outlined in §§ 90.13 and 90.14 all the agency's existing and proposed age distinctions. At the end of 12 months, each agency must publish in the Federal Register a report of this review indicating for each age distinction: (1) its elimination, or (2) a justification for its retention in agency regulations or, if not contained in regulations, its proposed adoption in regulation form.

§ 90.32 *Review of agency policies and administrative practices.*

§ 90.32 (a) and (b) *Twelve month review.*

Comment: A few commenters suggested that HEW be the sole agency responsible for evaluating the appropiateness of any age distinctions proposed by other agencies in their 12 month reviews, prior to the adoption of those age distinctions by regulations. A few other commenters suggested that HEW outline in the general regulations criteria for judging whether an agency may continue an age distinction so that these criteria are available to other agencies as they assess their age distinctions.

Response: HEW does not have the necessary knowledge of other agencies' programs to determine whether specific age distinctions are or are not appropriate. Agencies must justify the age distinctions used in their programs as lawful under the Act and these final regulations. HEW believes each agency is in the best position to assess which of its age distinctions should be retained or eliminated. The publication of each agency's assessment of its age distinctions and the accompanying opportunity for public comment on that assessment should provide information useful to agencies in reviewing their age distinctions. HEW will comment, where appropriate, on those distinctions during that public comment process.

§ 90.32(c) *Adopting age distinctions through regulations.*

Comment: Several commenters supported the position that only Congress has the authority to create age distinctions. These commenters opposed the adoption of age distinctions through agency regulations.

Response: Congress, through the ADA, has prohibited the use of age distinctions, with certain specific legislative exceptions. These exceptions permit age distinctions to be imposed not only through Congressional action, but also by way of agency regulations, policies and guidelines. HEW has required that in the case of federally imposed age distinctions, agencies must adopt those age distinctions by regulation under the Administrative Procedure Act (APA). In doing so, agencies must use the notice and comment procedure specified in 5 U.S.C. 553 of the APA.

§ 90.33 *Interagency cooperation.*

Comment: The commenters supported interagency cooperation for those recipients receiving funds from more than one Federal agency. They stated cooperation would eliminate duplication of enforcement procedures and reporting requirements. Commenters noted that the problem of duplication was particularly acute for State agencies, counties, and local governments receiving funds from a number of Federal agencies.

A number of commenters suggested that HEW be responsible for developing uniform government-wide procedures for complaint processing, compliance investigations, and enforcement proceedings. One suggested that given HEW's authority to review regulations, HEW should also act as a clearinghouse to review government-wide procedures.

Some commenters questioned what constitutes a "class of recipients," asking whether State agencies, counties or local governments would be considered a "class" for the purpose of designating a lead agency, and whether senior citizens could be considered a "class". [If so, would an Area Agency on Aging be an appropriate lead agency for that class?] Several commenters stated that criteria need to be established for designating the lead agency responsible for each class of recipients.

Response: HEW has revised this section of the regulations to provide further guidance in the setting up of a system of interagency cooperation. The revised § 90.33 provides that where two or more agencies provide Federal financial assistance to a recipient, the Secretary may designate one of the agencies as the sole agency for all compliance and enforcement purposes with respect to those recipients, except for ordering the termination of funds and the notification of appropriate committees of Congress.

§ 90.34 *Agency reports.*

Comment: Many commenters favored the targeted approach to data collection proposed by HEW because it minimizes the paper-work burden. Others supported a targeted approach but questioned what criteria would be used to select the data for targeting and collection. Some commenters opposed the targeted approach. They believe it will not provide sufficient information to meet the Act's reporting requirements because program participation and service population data are necessary to track age discrimination.

Some commenters opposed relying exclusively on complaints to satisfy the ADA data requirements because complaints may not reflect accurately the extent of age discrimination. Other commenters supported the use of complaints as part of a targeted data collection approach because complaints may help identify programs in which discriminatory practices are occurring.

Reponse: HEW believes that targeting is the most effective way to satisfy the ADA's reporting requirements without increasing the burden on recipients. The targeted approach does not rely exclusively on tracking complaints but recognizes that complaint data have been useful in uncovering patterns of discrimination in other civil rights statutes. In all cases, each agency should seek data that appear to be most useful in identifying age discrimination and that will impose the least burden on recipients.

§ 90.34(e) *Data requirements.*

Comment: Some commenters suggested deleting the data requirement in § 90.34(e) because it permits HEW to require potentially unlimited additional data without giving agencies fair notice of what data they will be expected to collect.

Response: This section remains unchanged. Under the ADA it is HEW's responsibility to review the performance of each agency in complying with the ADA. HEW is committed to exercising this responsibility in the least burdensome way while retaining the flexibility to require the data necessary to fulfill that responsibility.

Subpart D—Investigation, Conciliation, and Enforcement Procedures

§ 90.43 *What responsibilities do recipients and agencies have specifically to ensure compliance with the act?*

§ 90.43(b)(3) [renumbered § 90.43(a)(3)] *Providing information to beneficiaries.*

Comment: Several commenters said that the regulations should place more emphasis on informing citizens of their rights under the Act.

Response: HEW has made no change. The regulations require that each agency make available educational materials on the rights and obligations of beneficiaries and recipients. Agencies are free to use whatever methods they deem appropriate to accomplish this.

§ 90.43(c) [renumbered § 90.43(b)] *Self-evaluation generally.*

Comment: Several commenters stated that all self-evaluations should be subjected to a review, either by the specific funding agency or by an objective third party. Other commenters suggested that the funding agency spot check recipients' self-evaluations for compliance purposes. Generally commenters stated that self-evaluations alone would be insufficient to meet the ADA reporting requirements.

Several commenters expressed a need for guidelines for self-evaluations, and suggested the development of uniform guidelines for all Federal recipients. Most commenters urged the importance of keeping the self-evaluation simple, while a few supported a broader examination of recipients' policies and practices. A few commenters suggested that recipients seek assistance in completing their self-evaluations from young people and the elderly.

Response: HEW believes that the primary purpose of the self-evaluation is internal review by the recipient. The self-evaluation process is not intended to yield sufficient information to satisfy the ADA reporting requirements. However, funding agencies will be able to review recipient self-evaluations where they might provide useful information. HEW plans to issue self-evaluation guidelines for HEW recipients after the publication of HEW specific regulations. Other agencies may choose to use HEW's guidelines as a model. The self-evaluations are intended to be simple and straight-forward, with each age distinction capable of being analyzed in a page or less. HEW's position is that agency regulations should avoid imposing conflicting requirements on recipients. Although the general regulation is silent on the question of public participation in the self-evaluation process, agencies have discretion to provide in their regulations for public participation in recipient self-evaluations.

§ 90.43(c) [renumbered § 90.43(b)] *Self-evaluation timetable and application.*

Comment: Most commenters stated that 18 months is an appropriate time for recipients to complete their self-evaluations. Some commenters stated that 18 months is too long and suggested that Federal agencies be required to review their age distinctions within six months after publication of their final regulations (rather than the 12 months allowed under § 90.32 of the proposed regulations). Recipients would then be required to complete their self-evaluations six months later, or one year from publication of the agency's final regulations.

Several commenters stated that restricting self-evaluations to recipients with 15 or more employees is reasonable. A few suggested including recipients with fewer than 15 employees. Some commenters stated that requiring self-evaluations from recipients with as few as 15 employees is unreasonable; cutoffs of 50, 100 or 500 were suggested. Alternative bases suggested for self-evaluations were the amount of funding received, or the number of people served by the recipient.

Response: HEW has retained the 18 month self-evaluation period because the Federal agencies need a year to analyze and review the age distinctions imposed in their programs through statutes and administrative actions. HEW expects recipients to use the information in these Federal agency reviews in their self-evaluations.

HEW has retained a cut-off based on the equivalent of 15 or more employees in the ADA self-evaluation requirement because it is consistent with self-evaluation requirements in other civil rights statutes and regulations. In addition, HEW has determined that it would be impractical to use the number of people served, or the amount of Federal financial assistance received, as a basis for requiring recipients to perform the one-time self-evaluation.

§ 90.43(d)(1)(i) [renumbered § 90.43(c)(1)(i)] *Complaints by organizations or groups.*

Comment: A few commenters suggested that the complaint procedure specifically cover group complaints. They defined group complaints as complaints by an organization representing older persons; e.g. on behalf of one or more individuals. Inclusion of this type of complaint would permit advocates for older persons to assert rights on behalf of many individuals who would be reluctant to do so on their own.

Response: The regulations do not prohibit this kind of complaint. A complaint may be made by an individual, a class, or by an organization on behalf of its members or on behalf of other persons.

§ 90.43(d)(1)(ii) [renumbered § 90.43(c)(1)(ii)] *Agency screening of complaints prior to mediation.*

Comment: Several commenters stated that there should be an investigation prior to assigning the dispute to a mediator. Frivolous complaints could be eliminated by this process and many legitimate complaints could be settled without progressing to a more formal procedure. Several commenters said that this investigation period should be 60 days in length. A few commenters expressed similar concerns but stated only that HEW should clarify the steps for initiating mediation and provide more information regarding the initial stages of the process.

Response: HEW believes that the present screening process is the most effective possible without resorting to immediate investigation, which would be time consuming and duplicative. Each agency will screen complaints for those programs it administers which receive Federal financial assistance. Screening will eliminate complaints about actions which are not covered by the ADA, and thereby reduce the number of groundless complaints which might otherwise go forward in the process.

§ 90.43(d)(2) [renumbered § 90.43(c)(2)] *Length of time for the complaint process.*

Comment: Many commenters were concerned with the length of time that was involved to process a complaint. Several commenters stated that specific time lines were needed for each step in the complaint procedure. Other commenters stressed that even a few months was too long a time, for the elderly to wait for complaint resolution.

Response: HEW is aware of the damaging effect of long drawn out complaint resolution procedures. It has adopted mediation and an informal investigation step as part of the complaint resolution process in an attempt to improve the responsiveness of that process. However, HEW has decided not to impose government-wide timeframes for every step of the complaint process. This is a drastic step to take in advance of any specific indication that there will be unusual problems of delay. Accordingly, no additional timeframes have been placed in the regulations.

§ 90.43(d)(3) [renumbered § 90.43(c)(3)] *Mediation—mandatory mediation.*

Comment: A number of commenters discussed the proposal to make mediation a mandatory step in the complaint process. Several commenters supported mandatory mediation; a few stated that mediation should be made mandatory only after a successful trial period. Several other commenters stated that mediation should not be a mandatory step. Those opposing mandatory mediation through age discrimination should not be subject to such a broad experiment that might diminish the effectiveness of the ADA.

Response: HEW believes that making the mediation process voluntary is not a reliable way of testing its effectiveness. The need to get away from the the traditional problems of complaint backlogs in civil rights enforcement requires us to carry out this effort. HEW has instead sought to rely on other safeguards such as the presence of a trained Federal mediator, the 60-day time limit, the policy of mediator confidentiality, the informality of the process and continuous monitoring of the process to insure that mediation is effective.

§ 90.43(d)(3) [renumbered § 90.43(c)(3)] *Mediation: Effectiveness of the mediation process.*

Comment: A large number of commenters addressed the issue of the effectiveness of the mediation process. While many commenters thought the process would be quick and effective in resolving complaints, others cited problems regarding possible harm to or discouragement of complainants which could make the process ineffective.

The major problems cited were:

(1) Complainants would be discouraged or intimidated from seeking their full rights through the formal administrative process;

(2) Mediation would impose a burden of expense upon the parties to the complaint, including travel expenses to the mediation site;

(3) Complainants might desire legal assistance but would be unable to afford the expense;

(4) Mediation would not always be appropriate for a complaint; and

(5) Mediation would impose another layer on the complaint process thereby delaying relief to the complainant.

Response: HEW has tried to structure the mediation process to protect the complainant and insure that valid complaints are pursued and successfully resolved.

The mediation will be conducted by a specially trained mediator who will explain the procedure to both parties. A complainant who does not believe that he is obtaining full satisfaction through mediation need not agree to a settlement. A complainant will have to wait no more than 60 days for the agency enforcement process to begin. This 60 days will count as part of the 180 day period which the agency has to resolve the complaint before a court action can be filed by the complainant.

The mediation process has been designed to minimize expenses to the parties. The mediator can travel to the location of the parties and the mediator's services will be paid for by the Federal government. The mediation process is designed to allow a party to participate in mediation without resort to an attorney and without having to build a formal legal case. Experience with other processes similar to the proposed mediation system suggest that the expense to the parties will not be significant.

These concerns about the effectiveness of the mediation process will be carefully monitored, as part of the 30 month evaluation of the use of mediation.

§ 90.43(d)(3) [renumbered § 90.43(c)(3)] *Should mediation be conducted by a single mediation agency or by each Federal agency subject to the ADA?*

Comment: A majority of the commenters favored having a single agency manage all mediation under the ADA rather than having agencies develop their own mediation capabilities.

Response: The final regulations provide that the Secretary shall designate one agency to be responsible for administering a centralized mediation process for all age discrimination complaints. A single agency insures uniform policy and practice, efficiency and centralized accountability for purposes of monitoring and evaluation. In the early stages of implementing the ADA, it would be particularly inefficient to have each Federal agency develop it own separate mediation capability.

§ 90.43(d)(3) [renumbered § 90.43(c)(3)] *Use of the Federal Mediation and Conciliation Service (FMCS).*

Comment: Most commenters supported using the FMCS to coordinate the mediation process. A few favored using a private mediation agency. Many commenters favored the use of private individuals as mediators at the local level rather than FMCS staff mediators. Some Federal agency commenters expressed a desire for additional information regarding the procedures to be used in managing the national mediation system.

Response: HEW has designated the FMCS to coordinate the mediation of ADA complaints. As is the case with every other aspect of mediation, the results of this decision will be closely monitored and evaluated as part of the 30-month review of these regulations. The FMCS is the only Federal government agency with extensive expertise in mediation. The Service has a national staff of more than 300 experienced full-time mediators located in field offices around the country.

As currently planned, mediators will be drawn from both the professional staff of FMCS and from among private citizens experienced in resolving community disputes, who will be trained by the FMCS. HEW and the FMCS intend to work closely with other Federal agencies to implement mediation.

§ 90.43(d)(3) [renumbered § 90.43(c)(3)] *Availability of qualified mediators.*

Comment: A number of commenters raised problems about obtaining mediators. A commenter stated that all parties should be allowed to approve or disapprove the mediator. Several commenters stated that older persons who are familiar with the problems of the elderly should be trained as mediators. This group would not be limited to mediating complaints of the elderly.

Several commenters stated that although mediation has been used in labor-management disputes, different methods would be required to deal with age discrimination. The mediator should have knowledge of age discrimination in program services and knowledge of alternatives available in the delivery of services. The different requirements in mediating discrimination complaints might require development of a corps of Federal program specialists trained in mediation.

Response: Mediation is proving useful in resolving a wide variety of disputes outside the traditional labor-management area. Mediators will be selected by the FMCS in order to insure their neutrality. All mediators selected to resolve age discrimination complaints will receive thorough training in the ADA and applicable regulations. Moreover, mediators will be drawn from both FMCS staff and from private citizens who have experience in resolving community disputes.

§ 90.43(d)(3) [renumbered § 90.43(c)(3)] *Length of the mediation trial period.*

Comment: A number of commenters stated that mediation should be used only on an experimental basis. Some suggested limiting the mediation experiment to geographic regions or Federal agencies. Several commenters stated that the trial period should be 30 months; a few others suggested 12, 15, 18 or 24 months.

Response: HEW is aware that the use of mediation to resolve complaints on this scale is highly innovative. Accordingly, close monitoring and evaluation are planned. However, the likelihood of success appears high enough, and the problems of traditional methods are serious enough, that mediation will be attempted nationwide rather than as a regional demonstration project.

The final regulations continue to provide for a review of the mediation experiment 30 months after these regulations are published. No complaint of age discrimination can be processed until final agency regulations are effective. Therefore, mediation will not begin until late 1979. As a result, the 30 month review will report on approximately two years of mediation.

§ 90.43(d)(3) [renumbered § 90.43(c)(3)] *Confidentiality of mediation.*

Comment: Some commenters were concerned with the adequacy of confidentiality protections in the mediation process. A few others suggested that reports of mediated settlements shoud have restricted availability.

Response: The confidentiality provision of the regulations has been changed to deal exclusively with the protection of the neutrality of the mediator and the public interest in the success of the mediation process. The parties must be able to speak freely in the mediation without fear that the mediator will testify or provide information in a later enforcement proceeding. The parties must not be bound in subsequent administrative or court proceedings by the statements made in mediation. The terms of any settlement agreed to in mediation will be sent to the agency which received the complaint originally.

§ 90.43(d) [renumbered § 90.43(c)] *Mediation of multiple jurisdiction complaints.*

Comment: A few commenters were concerned about how agencies would handle complaints that involved charges of multiple types of discrimination (e.g., age and race). They were concerned about the usefulness of mediation with this type of complaint. A few commenters stated that in such complaints, each charge of discrimination should be processed individually.

Response: The potential problem with the multiple complaint is that the ADA mediation procedure is not required in other civil rights areas. HEW expects that agencies will be able to separately mediate the age element of a complaint. A successful mediation might also resolve all the issues which gave rise to the dispute in the first instance. If a successful mediation failed to do this or mediation was unsuccessful, the agency could further process the complaint following its normal procedures for handling multiple jurisdiction complaints.

§ 90.43(d)(3) [renumbered § 90.43(c)(3)] *Initial efforts to resolve complaints.*

Comment: Several commenters were concerned that a mediation process would preclude initial efforts to informally resolve complaints.

Response: Nothing in the regulations prohibits informal resolutions between parties. However, once a formal complaint has been filed, the Federal agency has a responsibility to become involved in the process. The mediation procedure is an attempt to achieve informal resolution of complaints and to avoid lengthy and costly litigation.

§ 90.43(4)(d) [renumbered § 90.43(c)(3)(iii)] *Mediation time limits.*

Comments: Several commenters addressed the issue of the length of time which should be allowed for mediation. Some stated that the period for mediation should be 60 days; others recommended 30 days; 90 days or 120 days.

Response: HEW has changed the final regulations to allow a maximum of 60 days for mediation. The 60 day period begins as soon as the complaint is received by the Federal agency. The mediator has been given authority to terminate mediation early if it appears no agreement can be reached. The 60 day period leaves at least 120 days for agencies to investigate an unresolved complaint before the expiration of the 180 day time limit for exhaustion of administrative remedies. Because the mediation period is part of the 180 day time limit, a short mediation period is important if complaints are going to be resolved administratively rather than in court.

§ 90.44(a) *Compliance reviews.*

Comments: Several commenters supported a requirement for mandatory compliance reviews. A few other commenters supported the retention of a requirement for optional compliance reviews.

Response: Compliance reviews will be conducted at the option of the agency. HEW has modified the regulations to require that every agency include in its regulations a provision that it may conduct compliance reviews if the need should arise, regardless of the size of the agency or its programs.

§ 90.45 [renumbered § 90.45 and § 90.46] *Information requirements and prohibition against intimidation or retaliation.*

Comment: A commenter recommended that HEW set minimum record keeping requirements and specify a length of time for retention of records by recipients.

Response: HEW has specified only general data provisions and record keeping requirements because it is almost impossible to achieve the desired level of detail in general regulations. As a matter of policy, HEW is committed to minimizing record keeping requirements whenever possible by avoiding duplicative and unnecessary requirements. A time limit for record retention may be considered if specific record keeping requirements are implemented in the future.

§ 90.45 *Information requirements—assurances of compliance.*

Comment: Some commenters suggested that the regulations should require recipients to submit assurances of compliance with the ADA, similar to those required under other civil rights statutes.

Response: The regulations remain unchanged. There is no requirement in these regulations that each recipient submit a general assurance of compliance with the ADA. However, even without an assurance of compliance, the legal obligation of a recipient remains unchanged. HEW wishes to avoid imposing any unnecessary burden on recipients with respect to the compliance and enforcement procedures and accordingly has decided not to require assurances of compliance with the ADA.

§ 90.46 [renumbered § 90.47] *What further provisions must an agency make in order to enforce its regulations after an investigation indicates that a violation of the act has been committed?*

§ 90.46(d)(1) [renumbered § 90.47(d)(1)] *Deferral of funds.*

Comment: A commenter recommended that the deferral of funds apply only to the program area where non-compliance is found.

Response: Deferral precedes any final finding of non-compliance through an administrative hearing. The enforcing agency must have discretion to defer Federal financial assistance in any program affected by the agency's preliminary findings. There would be no basis for deferring any other Federal financial assistance. Accordingly, it is not necessary to make any change in the regulations.

§ 90.47 [renumbered § 90.48] *Alternate funds disbursal procedure.*

Comment: A commenter suggested that the regulations further clarify the process of selecting the alternate recipient when a recipient's funds have been terminated for noncompliance with the ADA. The question was asked "Should the alternate recipient have to satisfy the requirements of the grant statute?"

Response: The regulations permit an agency to disburse withheld funds to an appropriate alternate recipient. The recipient must demonstrate the ability both to achieve the goals of the Federal statute authorizing the program or activity and to comply with the agency's regulations issued under the ADA. Each Federal agency is authorized and required to publish its own regulations implementing this process for its programs. These regulations may consider all relevant factors to determine if the required ability has been demonstrated. HEW believes that any amplification on this process should be made in each agency's own regulations consistent with the relevant requirements of the ADA.

§ 90.50 *Exhaustion of administrative remedies.*

Comment: A few commenters stated that the time period of 180 days before civil action may commence should be reduced to 90 or 120 days. A major reason cited in support of a reduced period was that six months is too long for the elderly to wait.

Response: The period of 180 days is expressly required by the Age Discrimination Act and accordingly cannot be changed by the regulations.

Subpart E—Future Review of Age Discrimination Regulations

§ 90.61 and § 90.62 *Review of General and Agency Regulations.*

Comment: A few commenters stated that 30 months is too long a time to wait for a review of the regulations. Some commenters stated that 30 months is an adquate time but another commenter suggested that waiting longer than 30 months would be wiser.

Response: HEW intends to wait 30 months before asking for public comment on the effectiveness of these regulations. The 30 month time period was selected because use of a 30 month period will enable HEW to have information from at least one complete cycle of complaints, mediation, data collection and report preparation and time to analyze that information.

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