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Associate Director for Mitigation.

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NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

45 CFR Part 1156

Nondiscrimination on the Basis of Age

AGENCY: National Endowment for the Arts, National Foundation on the Arts and the Humanities.

ACTION: Final rule.

SUMMARY: The National Endowment for the Arts (NEA) is the Federal grantmaking agency that Congress created to support the visual, literary, design and performing arts, to benefit all Americans. The NEA's mission is to foster the excellence, diversity and vitality of the arts in the United States and to broaden public access to the arts. The NEA is adopting regulations to carry out its responsibilities under the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.) (the Act). The regulations are consistent with and reflect standards and procedures included in general government-wide regulations issued by the Department of Health and Human Services and published in the **Federal Register** June 12, 1979, 44 FR 33768 (1979).

The Act of 1975 prohibits discrimination on the basis of age in programs and 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.

DATES: Effective February 11, 1998.

FOR FURTHER INFORMATION CONTACT: Karen Elias, Deputy General Counsel, (202) 682-5418.

SUPPLEMENTARY INFORMATION:

Background

The regulations are consistent with and reflect standards and procedures included in general government-wide regulations issued by the Department of Health and Human Services (HHS) and published in the **Federal Register** June 12, 1979, 44 FR 33768 (1979). The Act prohibits discrimination on the basis of age in programs and 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.

45 CFR Section 90.31(b) of the HHS government-wide regulations required Federal agencies with statutory authority to extend Federal financial assistance to issue agency regulations applicable to the specific programs and activities administered by that agency. In addition to publishing specific regulations consistent with HHS government-wide regulations, the following actions are required to be taken by the NEA in connection with implementation of the Act.

(1) An appendix is required to be included in NEA regulations listing all age distinctions which appear in federal statutes and regulations and effect the agency's programs of financial assistance. A review of the National Foundation on the Arts and the Humanities Act of 1965, as amended, 20 U.S.C. 951 et seq., and NEA regulations reveals no statutory age distinctions used by the NEA in the administration of agency programs.

(2) As a second step in the public administration process, the NEA must review any age distinctions it imposes on its recipients by regulation, policy or administrative practice in order to determine whether these distinctions are permissible under the Act. The results of this review must be included in a report that the agency shall publish, for public comment, in the **Federal Register**, no later than 12 months from the date the agency publishes its final regulations. The NEA will conduct and publish this review no later than 12 months from the date of the publication of its Final Rule.

(3) The NEA is required to report annually to the Congress through HHS on its compliance and enforcement activities. The NEA regularly files this report.

(4) The NEA is required to provide written notices to each recipient of the recipient's obligations under the Act, to provide technical assistance to the recipients where necessary, and to make available educational materials explaining the rights and obligations of beneficiaries and recipients.

(5) The NEA is required to establish a procedure for processing complaints of age discrimination. The complaint handling procedure must include an initial screening by the NEA 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 the agency designated by the Secretary of HHS to manage the mediation process.

(6) The NEA must review the effectiveness of its regulations 30 months after their effective date. The review is to be published in the **Federal Register** with an opportunity for public comment.

The NEA received comments on its proposed rulemaking from the HHS Office of Civil Rights. After analyzing the comments received, all except for one of HHS's comments have been incorporated into the final rule.

The proposed regulations listed Sections 1156.11 *Notice to Subrecipients*, 1156.12 *Self-Evaluation*, 1156.13 *Information Requirements*, 1156.15 *Complaints*, 1156.16 *Mediation*, 1156.17 *Investigation*, and 1156.21 *Exhaustion of administrative remedies* as containing information collection requirements which must be submitted to OMB under the *Paper Reduction Act of 1980*, 44 U.S.C. 5301 et seq. (1982). HHS's conclusion that these sections do not contain information collection requirements subject to OMB clearance was adopted for the reasons listed below.

Section 3518(c)(1)(B) of the Paper Reduction Act exempts from OMB approval, collections of information "* * * during the conduct of * * * (ii) an administrative action or investigation involving an agency against specific individuals or entities." Therefore, as originally stated in the Proposed Regulations, the NEA need not submit Sections 1156.13, 1156.16, 1156.17 and 1156.21 to OMB for approval since all four of these requirements are tied to the agency's authority to investigate.

Moreover, the mandatory self-evaluation requirement contained in 1156.12 of the proposed regulation requiring recipients to complete a self-evaluation was disapproved and invalidated by OMB. NEA will, therefore, adopt the approach used in the HHS regulations set forth at 45 CFR 91.33(b). This approach provides NEA with discretionary authority to require a self-evaluation requirement as part of an investigation thereby eliminating any Paperwork Reduction Act problems because it is discretionary and tied to the authority to investigate.

Sections 1156.15 and 1156.11 are also not subject to OMB clearance because neither provision involves a "collection of information" within the meaning of the Act. Section 1156.15 provides individuals "may file" complaints and Section 1156.11 requires notice to subrecipients of their obligations under the Act and the regulations.

In accordance with HHS's comments, NEA has adopted a section on Special Benefits added to Section 1156.7 at (c) permitting 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 a recipient's program.

Section 1156.1 was amended to include "and as required by the general age discrimination regulations at 45 CFR Part 90" where both the Act and the general guidelines provide authority for the promulgation of regulations.

Section 1156.2(a) was amended to include the language "and these regulations" after "1975." The new section now reads "The Age Discrimination Act of 1975 and these regulations apply to any program or activity receiving financial assistance from the NEA and to each program or activity that receives or benefits from such assistance."

Section 1156.3 defining "action" was amended to include the language "or the use of any policy, rule, standard or method of administration." The new section now reads "action means any act, activity, policy, rule, standard or method of administration; or the use of any policy, rule, standard, or method of administration."

Section 1156.6 on Rules Against Age Discrimination was amended to include the language "[t]he rules stated in this section are limited by the exceptions contained in § 1156.7(b) and (c) of these regulations."

Section 1156.6(b)(1) was amended to include the word "or" to clarify that either of these effects constitutes a violation.

Section 1156.11 was amended to include the words "the Act and" after the word "under." The new section now reads "When a recipient passes on Federal financial assistance from the NEA to subrecipients, the recipient shall provide the subrecipients with written notice regarding the subrecipient's obligation under the Act and these regulations."

Section 1156.14 regarding "Compliance Reviews" was revised to provide requirements consistent with 45 CFR Part 90. The proposed regulation limited agency action to compliance reviews and pre-award reviews. The language is amended to include "and other similar procedures to investigate and correct violations of the Act and regulations." This amendment eliminates the limit on the NEA's authority to conduct compliance reviews only where the agency has reason to believe there may be a violation of the regulations. No similar

limitation is found in the government-wide regulations.

Section 1156.15 was amended to include the language "the Act and" after the language "prohibited by." The second sentence requiring a complainant to file a complaint within 180 days from the "time" that the complainant first had knowledge of an alleged discriminatory act, is clarified by stating "180 days from the date that the complainant first had knowledge of the alleged discriminatory act." Following 45 CFR 91.42(b), the language, "[t]he Endowment will consider the date a complaint is filed to be the date upon which the complaint is sufficient to be processed" is added to identify when a complaint will be deemed filed for purposes of the 180-day requirement.

Section 1156.16(a) was amended to include "promptly," after "Endowment" for consistency with § 90.43(c)(3). After the language "refer to," Section 1156.16(a) was amended to include the language "the agency designated by the Secretary of HHS to manage the mediation process" and delete the language "[f]ederal Mediation Service."

Section 1156.16(c) was amended to include for clarity the language "by the endowment" after the language "shall be taken."

Section 1156.19(a)(1) provides that cases settled in mediation or prior to a hearing will not involve termination of a recipient's Federal financial assistance from the NEA. However, a case settled in mediation could eventually go to enforcement if the recipient fails to abide by the agreement. In addition, a recipient could fail to abide by the provisions in a settlement agreement between the NEA and the recipient. Section 1156.19(a)(1) also was amended to include the language "unless it is reopened because of a violation of the agreement" to accurately reflect the intent of the provision.

Section 1156.19(b) is amended to include the language "or portion thereof" after "particular program or activity" to comply with the language contained in the statute and in government-wide regulations.

Section 1156.19(d) was amended to include "(a)(1)" for the sake of clarity.

Section 1156.19(d)(2) was amended to include "(a)(1) after 1156.19" for the sake of clarity.

The last sentence of Section 1156.19(d)(2) was changed from "[i]f a hearing results in a finding against the recipient, the Endowment shall continue a deferral until such time as the recipient demonstrates that it will operate in a non-discriminatory

manner" to "[i]f the hearing results in a finding against the recipient, the Endowment must terminate funds." This language was changed because an indefinite deferral is not authorized.

Section 1156.20(a) was amended to include "any public or nonprofit private organization or agency, or State or political subdivision of the State" after "recipient."

Section 1156.20(b)(2) was amended deleting the language "the Endowment's enabling legislation" and adding the language "[t]he ability to achieve the goals of the Federal statute authorizing the program or the activity" from § 90.48.

Section 1156.21, Remedial and Affirmative Action by Recipients was deleted as repetitive of sections 1156.7 and 1156.19. Section 1156.21 is now Exhaustion of Administrative Remedies.

Section 1156.22(b)(3)(iii) was amended to clarify that the 30-day notice predicate to filing a civil action must be provided to the "Chairperson of the Arts Endowment, the Secretary, the Attorney General of the United States, and the recipient."

Summary of Regulation

The NEA's regulations are divided into four subparts: Subpart A—General; Subpart B—Standards for Determining Age Discrimination; Subpart C—Responsibilities of Endowment recipients; Subpart D—Investigation, Conciliation and Enforcement Procedures.

Subpart A of the regulations explains the purpose of the NEA's age discrimination regulations and sets forth general definitions. Section 1156.3(h) defines the term "recipient." As indicated recipient includes any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient. Recipient includes any successor, assignee, or transferee but excludes the ultimate beneficiary of the assistance. This language points out the inapplicability of these regulations to assistance programs administered directly by the Federal government to beneficiaries. With respect to direct assistance programs, the regulations may apply whenever direct aid is provided to an individual on conditions that the aid be spent in providing services or benefits to others. The general and specific prohibitions against discrimination on the basis of age as well as the exceptions to those prohibitions are set forth in Subpart B.

As a general rule, under the 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 subject to discrimination under any program or activity receiving NEA financial assistance.

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 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." "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 explicitly 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. This four-part test will be used to scrutinize age distinctions which are imposed in the administration of NEA assisted programs, but which are not explicitly authorized by a Federal, State or local statute.

Recipients of NEA funds also are 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, 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.

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

Subpart D of the regulations establishes the procedures for investigation, conciliation, and

enforcement of the Act. This Subpart closely reflects the procedural requirements included in HHS's government-wide regulations.

Section 1156.16 requires mediation as an initial step in the complaint process. The NEA will refer all complaints of discrimination under the Act to the federal agency designated by the Secretary of HHS to manage the mediation process. Complainants and recipients are required to participate in the effort to reach a mutually satisfactory mediated settlement of the complaint. Mediation may last no more than 60 days from the date the NEA first receives the complaint. The NEA will, however, investigate complaints that are unresolved after mediation or are reopened because the mediation agreement is violated.

Finally, the regulations permit the NEA to disburse withheld funds to an appropriate alternate recipient. The alternate recipient must be in compliance with the regulations and must demonstrate the ability to comply with the agency's regulations issued under this Act and to achieve the goals of the Federal statute authorizing the program or activity.

List of Subjects in 45 CFR Part 1156

Administrative practice and procedure, Civil rights, Discrimination, Grant programs, Investigations, Reporting and recordkeeping requirements.

Dated: February 4, 1998.

Karen Elias,
Deputy General Counsel, National Endowment for the Arts.

In consideration of the forgoing, part 1156 is hereby added to Title 45 of the Code of Federal Regulations to read as set forth below.

PART 1156—NONDISCRIMINATION ON THE BASIS OF AGE

Subpart A—General

- Sec.
- 1156.1 Purpose.
 - 1156.2 Application.
 - 1156.3 Definitions.
 - 1156.4 [Reserved]

Subpart B—Standards for Determining Discriminatory Practices

- 1156.5 Purpose.
- 1156.6 Rules against age discrimination.
- 1156.7 Exceptions to the rules against age discrimination.
- 1156.8 Burden of proof.

Subpart C—Responsibilities of Endowment Recipients

- 1156.9 [Reserved].
- 1156.10 General responsibilities.
- 1156.11 Notice to subrecipients.

- 1156.12 Self-evaluation.
- 1156.13 Information requirements.

Subpart D—Investigation, Conciliation, and Enforcement Procedures

- 1156.14 Compliance reviews.
- 1156.15 Complaints.
- 1156.16 Mediation.
- 1156.17 Investigation.
- 1156.18 Prohibition against intimidation or retaliation.
- 1156.19 Compliance procedure.
- 1156.20 Alternate funds disbursement procedure.
- 1156.21 Exhaustion of administrative remedies.

Authority: 42 U.S.C. 6101 *et seq.*; 45 CFR part 90.

Subpart A—General

§ 1156.1 Purpose.

The purpose of this part is to implement the Age Discrimination Act of 1975 ("Act"), as amended, and as required by the general age discrimination regulations at 45 CFR part 90. 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 the regulations in this part.

§ 1156.2 Application.

(a) The Age Discrimination Act of 1975 and the regulations in this part apply to any program or activity receiving financial assistance from the National Endowment for the Arts and to each program or activity that receives or benefits from such assistance.

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

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

- (i) Provides 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 assistance for public service employment under the Job Training Partnership Act (JTPA).

§ 1156.3 Definitions.

As used in the regulation in this part, the term:

(a) *Act* means the Age Discrimination Act of 1975, as amended (Title III of Pub. L. 94-135).

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

(c) *Age* means how old a person is or the number of elapsed years from the date of a person's birth.

(d) *Age distinction* means any action using age or any age-related term.

(e) *Age-related term* means a word or words which necessarily imply a particular age or range of ages (for example, "children," "adult," "older person," but not "student").

(f) *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:

(1) Funds;

(2) Services of Federal personnel; or

(3) Real and personal property including:

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

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

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

(h) *Recipient* means any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended, directly or through another recipient. Recipient includes any successor, assignee, or transferee, but excludes the ultimate beneficiary of the assistance.

(i) *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.

(j) *Sub-recipient* means any of the entities in the definition of recipient to which a recipient extends or passes on Federal financial assistance and has all the duties of a recipient in the regulations in this part.

(k) *Endowment* means the National Endowment for the Arts.

(l) *Chairperson* means the Chairperson of the National Endowment for the Arts.

(m) *Secretary* means the Secretary of the Department of Health and Human Services.

(n) *United States* means the fifty States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, the Federated States of Micronesia and the Republic of Palau, the Northern Marianas, and the territories and possessions of the United States.

§ 1156.4 [Reserved]

Subpart B—Standards for Determining Discriminatory Practices

§ 1156.5 Purpose.

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

§ 1156.6 Rules against age discrimination.

The rules stated in this section are limited by the exceptions contained in § 1156.7 (b) and (c).

(a) *General rule.* No person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

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

(1) Excluding individuals from, denying them the benefits of, or subjecting them to discrimination under a program or activity receiving Federal financial assistance; or

(2) Denying or limiting individuals in their opportunity to participate in any program or activity receiving Federal financial assistance.

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

§ 1156.7 Exceptions to the rules against age discrimination.

(a) *Normal operation or statutory objective of any program or activity.* A recipient is permitted to take an action otherwise prohibited by § 1156.6 if the action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity, if:

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

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

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

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

(b) *Reasonable factors other than age.* A recipient is permitted to take an action otherwise prohibited by § 1156.6 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.

(c) *Remedial and affirmative action by recipients.* 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.

§ 1156.8 Burden of proof.

The recipient of Federal financial assistance bears the burden of proving that an age distinction or other action falls within the exceptions outlined in § 1156.7.

Subpart C—Responsibilities of Endowment Recipients

§ 1156.9 [Reserved]

§ 1156.10 General responsibilities.

A recipient has primary responsibility to ensure that its programs and activities are in compliance with the Age Discrimination Act, to take steps to eliminate violations of the Act, and to provide notice to beneficiaries of its programs and activities concerning protection against discrimination provided by the Act and the regulations in this part. A recipient also has responsibility to maintain records, provide information, and to afford access to its records to the Endowment to the extent required to determine whether it is in compliance with the Act.

§ 1156.11 Notice to subrecipients.

Where a recipient passes on Federal financial assistance from the Endowment to subrecipients, the recipient shall provide the subrecipients with written notice regarding the subrecipient's obligations under the Act and the regulations in this part.

§ 1156.12 Self-evaluation.

(a) Each recipient employing the equivalent of 15 or more full time employees may be required to complete a written self-evaluation, in a manner specified by the responsible Endowment official during the course of an investigation, of any age distinction imposed in its program or activity receiving Federal financial assistance from the Endowment to assess the recipient's compliance with the Act.

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

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

§ 1156.13 Information requirements.

Each recipient shall:

(a) Make available to the Endowment, upon request, information necessary to determine whether the recipient is complying with the regulations in this part.

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

Subpart D—Investigation, Conciliation, and Enforcement Procedures**§ 1156.14 Compliance reviews.**

The Endowment may conduct compliance reviews, pre-award reviews and other similar procedures in order to investigate and correct violations of the Act and regulations. The Endowment may conduct these reviews in the absence of a complaint against the recipient. In the event a compliance review or pre-award review indicates a violation of the regulations in this part, the Endowment will attempt to achieve voluntary compliance with the Act. If voluntary compliance cannot be achieved, enforcement efforts will proceed as described in § 1156.19.

§ 1156.15 Complaints.

(a) Any person, individually or as a member of a class or on behalf of others, may file a complaint with the Endowment, alleging discrimination

prohibited by the Act and the regulations in this part based on an action occurring on or after July 1, 1979. A complainant shall file a complaint within 180 days from the date that the complainant first had knowledge of the alleged act of discrimination. However, for good cause, the Endowment may extend this time limit. The Endowment will consider the date a complaint is filed to be the date upon which the complaint is sufficient to be processed.

(b) Complaints must include a written statement identifying the parties involved, describing the alleged violation, and stating the date on which the complainant first had knowledge of the alleged violation. Complaints must be signed by the complainant. The Endowment will return any complaint that does not contain the necessary information, that is not signed by the complainant, or that is not within the Endowment's jurisdiction for any other reason. The Endowment will provide an explanation for all such returned complaints.

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

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

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

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

§ 1156.16 Mediation.

(a) *Referral of complaints for mediation.* The Endowment will promptly refer all complaints to the agency designated by the Secretary of HHS to manage the mediation process that:

(1) Fall within the jurisdiction of the regulations in this part; and

(2) Contain all information necessary for further processing.

(b) Both the complainant and the recipient shall participate in the mediation process to the extent necessary to reach an agreement or make an informal judgment that an agreement is not possible. There must be at least one meeting with the mediator before the Endowment will accept a judgment that an agreement is not possible. However, the recipient and

the complainant need not meet with the mediator at the same time.

(c) 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 Endowment. No further action shall be taken by the Endowment based on that complaint unless it appears that the complainant or the recipient has failed to comply with the agreement.

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

(e) Not more than 60 days after the Endowment receives the complaint, the mediator shall return a still unresolved complaint to the Endowment 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. The mediator may extend this 60-day period, provided the Endowment concurs, for not more than 30 days, if the mediator determines that resolution is likely to occur within such period.

§ 1156.16 Investigation.

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

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

(3) The Endowment will put any agreement in writing and have it signed by the parties and an authorized official at the Endowment.

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

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

(b) *Formal investigation, conciliation, and hearing.* If the Endowment cannot

resolve the complaint during the early stages of the investigation, it shall:

(1) Complete the investigation of the complaint.

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

(3) Arrange for enforcement as described in § 1156.19, if necessary.

§ 1156.18 Prohibition against intimidation or retaliation.

A recipient may not engage in acts of intimidation or retaliation against any person who:

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

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

§ 1156.19 Compliance procedure.

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

(1) Termination of a recipient's Federal financial assistance from the Endowment under the program or activity involved where the recipient has violated the Act and the regulations in this part. 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. Therefore, a case which is settled in mediation, or prior to a hearing, will not involve termination of a recipient's Federal financial assistance from the Endowment unless it is reopened because of a violation of the agreement.

(2) Any other means authorized by law including, but not limited to:

(i) Referral to the Department of Justice for proceedings to enforce any rights of the United States or obligations of the recipient created by the Act or the regulations in this part.

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

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

(c) The Endowment will not take action under paragraph (a) of this section until:

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

(2) Thirty days have elapsed after the Chairperson 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. The Chairperson will file a report whenever any action is taken under paragraph (a) of this section.

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

(1) New Federal financial assistance from the Endowment includes all assistance for which the Endowment requires an application or approval, including renewal or continuation of existing activities, or authorization of new activities, during the deferral period. New Federal financial assistance from the Endowment does not include assistance approved prior to the beginning of a termination hearing under paragraph (a)(1) of this section or increases in funding as a result of changed computation of formula awards.

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

§ 1156.20 Alternate funds disbursement procedure.

(a) When the endowment withholds funds from a recipient under the regulations in this part, the Chairperson may disburse the withheld funds directly to an alternate recipient otherwise eligible for Endowment support: any public or nonprofit private organization or agency, or State or political subdivision of the State.

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

(1) The ability to comply with the regulations in this part; and

(2) The ability to achieve the goals of the Federal statute authorizing the program or the activity.

§ 1156.21 Exhaustion of administrative remedies.

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

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

(2) The Endowment issues a finding in favor of the recipient.

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

(1) Promptly advise the complainant if either of the conditions of paragraph (a) of this section has been met;

(2) Advise the complainant of his or her right to bring a civil action for injunctive relief that will effect the purpose of the Act;

(3) Inform the complainant:

(i) That the complainant may bring a civil action only in the United States district court for the district in which the recipient is located 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 the complainant must demand these costs in the complaint;

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

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

(v) That the complainant may not bring an action if the same alleged violation of the Act by the same recipient is the subject of a pending action in any court of the United States.

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