

the person submitting a comment is not exempt from disclosure.

#### A. Submitting Comments by Fax

You may submit written comments by facsimile transmission to (202) 927-0506. Facsimile comments must:

- Be legible;
- Include your mailing address;
- Reference this document number;
- Be 8½" x 11" in size;
- Contain a legible written signature; and
- Be not more than five pages long.

ATF will not acknowledge receipt of facsimile transmissions. ATF will treat facsimile transmissions as originals.

#### B. Request for Hearing

Any interested person who desires an opportunity to comment orally at a public hearing should submit his or her request, in writing, to the Director within the 90-day comment period. The Director, however, reserves the right to determine, in light of all circumstances, whether a public hearing is necessary.

#### C. Disclosure

Copies of this proposed rule and the comments received will be available for public inspection by appointment during normal business hours at: ATF Reference Library, Room 6480, 650 Massachusetts Avenue, NW., Washington, DC 20226, telephone (202) 927-7890.

#### Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in the **Federal Register** in April and October of each year. The RIN contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

#### Drafting Information

The author of this document is James P. Ficaretta; Enforcement Programs and Services; Bureau of Alcohol, Tobacco, Firearms, and Explosives.

#### List of Subjects in 27 CFR Part 555

Administrative practice and procedure, Authority delegations, Customs duties and inspection, Explosives, Hazardous materials, Imports, Penalties, Reporting and recordkeeping requirements, Safety, Security measures, Seizures and forfeitures, Transportation, and Warehouses.

#### Authority and Issuance

Accordingly, for the reasons discussed in the preamble, 27 CFR part 555 is proposed to be amended as follows:

#### PART 555—COMMERCE IN EXPLOSIVES

1. The authority citation for 27 CFR part 555 continues to read as follows:

**Authority:** 18 U.S.C. 847.

2. Section 555.11 is amended by revising the definition for "Propellant actuated device" to read as follows:

#### § 555.11 Meaning of terms.

\* \* \* \* \*

*Propellant actuated device.* (a) Any tool or special mechanized device or gas generator system that is actuated by a propellant or which releases and directs work through a propellant charge.

(b) The term does not include—

(1) Hobby rocket motors consisting of ammonium perchlorate composite propellant, black powder, or other similar low explosives, regardless of amount; and

(2) Rocket-motor reload kits that can be used to assemble hobby rocket motors containing ammonium perchlorate composite propellant, black powder, or other similar low explosives, regardless of amount.

\* \* \* \* \*

Dated: August 7, 2006.

**Paul J. McNulty,**

*Acting Attorney General.*

[FR Doc. E6-13201 Filed 8-10-06; 8:45 am]

**BILLING CODE 4410-FY-P**

#### EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

#### 29 CFR Part 1625

**RIN 3046-AA78**

#### Coverage Under the Age Discrimination in Employment Act

**AGENCY:** Equal Employment Opportunity Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Equal Employment Opportunity Commission ("EEOC" or "Commission") proposes to amend its regulations concerning the Age Discrimination in Employment Act (the "Act" or "ADEA") to reflect a Supreme Court decision interpreting the Act as permitting employers to favor older individuals because of age. This amendment will revise and clarify EEOC regulations that currently

describe the ADEA as prohibiting such age-based favoritism.

**DATES:** Comments must be received on or before October 10, 2006. The Commission will consider any comments received on or before the closing date and thereafter adopt final regulations. Comments received after the closing date will be considered to the extent practicable.

**ADDRESSES:** You may submit written comments by mail to Stephen Llewellyn, Acting Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, 1801 "L" Street, NW., Washington, DC 20507. As a convenience to commentators, the Executive Secretariat will accept comments transmitted by facsimile ("FAX") machine to (202) 663-4114. (There is no toll free FAX number). Only comments of six or fewer pages will be accepted via FAX transmittal, in order to assure access to the equipment. Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Executive Secretariat staff at (202) 663-4078 (voice) or (202) 663-4077 (TTY). (These are not toll free numbers). Copies of the comments submitted by the public will be available for inspection in the EEOC Library, FOIA Reading Room, by advanced appointment only, from 9 a.m. to 5 p.m., Monday through Friday except legal holidays, from October 10, 2006 until the Commission publishes the rule in final form. To schedule an appointment to inspect the comments, contact the EEOC Library by calling (202) 663-4630 (voice), (202) 663-4641 (TDD) (These are not toll free numbers).

#### FOR FURTHER INFORMATION CONTACT:

Raymond Peeler, Senior Attorney Advisor, Office of Legal Counsel, at (202) 663-4537 (voice) or (202) 663-7026 (TTY) (These are not toll free numbers). This notice also is available in the following formats: Large print, braille, audio tape and electronic file on computer disk. Requests for this notice in an alternative format should be made to the Publications Information Center at 1-800-669-3362.

**SUPPLEMENTARY INFORMATION:** The ADEA states that employers may not discriminate against individuals who are age forty or older "because of such individual's age," but does not specify the meaning of the term "age." 29 U.S.C. 623(a)(1). When the Supreme Court addressed its meaning in *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 586 (2004), it noted that the term is ambiguous because it is commonly used in two different ways: to neutrally refer to the length of

someone's life, *i.e.*, chronological age, or to refer to old age. If the term "age" in section 623(a)(1) of the Act were a neutral reference to chronological age, then it would be unlawful under the Act for an employer<sup>1</sup> to favor older individuals over younger persons based on age, so long as all were at least forty years old. If, however, "age" is defined as old age, then such preferential treatment does not violate the Act.

### EEOC Interpretation of "Age"

Until the *Cline* decision, the Commission had generally construed the term "age" in section 623(a) of the Act to mean chronological age.<sup>2</sup> This interpretation was based, at least in part, on a statement made during a colloquy on the Senate floor by Senator Yarborough, one of the Act's sponsors. He explained:

It was not the intent of the sponsors of this legislation \* \* \* to permit discrimination in employment on account of age, whether discrimination might be attempted between a man 38 and one 52 years of age, or between one 42 and one 52 years of age. If two men applied for employment under the terms of this law, and one was 42 and one was 52, \* \* \* [the] employer \* \* \* could not turn either one down on the basis of the age factor. \* \* \* The law prohibits age being a factor in the decision to hire, as to one age over the other, whichever way his decision went.

113 Cong. Rec. 31,255 (1967). Thus, the Commission's current regulations prohibit any age-based preference between persons age forty or over, regardless of whether the treatment favors older or younger persons. 29 CFR 1625.2. A limited exception permits employers to provide additional benefits to older workers to "counteract problems related to age discrimination." 29 CFR 1625.2(b). Another provision prohibits employment advertising that expresses a preference for older applicants at the expense of younger applicants who also were covered by the

<sup>1</sup> The prohibitions described in this notice of proposed rulemaking apply to employment agencies and labor unions as well as employers, *see* 29 CFR 1625.1. However, for purposes of efficiency, the Commission will generically refer to all three with the term "employers."

<sup>2</sup> Brief of Amicus Curiae Equal Employment Opportunity Commission at 26, *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004) (No. 02-1080). The Department of Labor, which originally held enforcement authority over the Act, interpreted section 623(a) in the same manner, 33 FR 9172 (June 21, 1968). The Commission assumed authority over the Act on July 1, 1979, pursuant to Reorganization Plan No. 1, 43 FR 19807 (May 9, 1978). Upon obtaining this authority, the Commission reviewed the Department of Labor's interpretations of the Act, 44 FR 37974 (June 29, 1979). The Commission made no substantive change to the Department of Labor's regulations regarding section 623(a)'s reference to "age," *see* 44 FR 68858 (Nov. 30, 1979).

Act, and vice versa. 29 CFR 1625.4. Similarly, the regulations inform employers that requests for job applicants to disclose their age "may deter older applicants or otherwise indicate discrimination based on age." 29 CFR 1625.5

### Supreme Court Rejects EEOC Interpretation

In *Cline*, the Supreme Court rejected claims that favoritism toward older workers violated the ADEA.<sup>3</sup> It concluded that such claims were outside the scope of the Act, because Congress only intended "to protect a relatively old worker from discrimination that works to the advantage of the relatively young." *Cline*, 540 U.S. at 591. Noting that the "reference to 'age'" in section 623(a) was ambiguous and "could be read to look two ways," the Court based its conclusion on the Act's coverage of only those age forty and above, the "social history" of the term "age discrimination," the Act's stated purposes, and the legislative record as a whole. *Cline*, 540 U.S. at 586.

The Court deemed it significant that Congress decided to cover only those age forty and above, observing that:

[i]f Congress had been worrying about protecting the younger against the older, it would not likely have ignored everyone under 40. The youthful deficiencies of inexperience and unsteadiness invite stereotypical and discriminatory thinking about those a lot younger than 40, and prejudice suffered by a 40-year-old is not typically owing to youth, as 40-year-olds sadly tend to find out.

*Id.* at 591. Similarly, as a matter of social history, the Court found that the record surrounding the Act contained no evidence that younger workers were suffering while their elders were favored. Noting that America is often seen as a "youth culture" in which younger is better, the *Cline* majority explained, "talk about discrimination because of age is naturally understood to refer to discrimination against the older." *Id.* at 591.

The Court also concluded that the stated purposes of the Act reflect Congress' intent to protect the relatively older from discrimination favoring the

<sup>3</sup> The plaintiffs, a group of employees between the ages of forty and fifty, challenged their employer's decision to eliminate its future obligation to pay retiree health benefits to any employee then under fifty years old, while preserving future entitlement to such benefits for employees aged fifty or older, *Cline*, 540 U.S. at 584-5. Some courts refer to such claims as "reverse age discrimination claims," *see, e.g., id.* at 585 (noting that the district court referred to the plaintiff's ADEA claim as "one of 'reverse age discrimination'").

relatively younger.<sup>4</sup> The Court noted that the only phrase that does not directly refer to protecting older employees—prohibiting "arbitrary age discrimination"—actually is a reference "to age caps that exclude older applicants, necessarily to the advantage of younger ones." *Cline*, 540 U.S. at 590.

Finally, the Court found that the legislative history as a whole shows intent to protect the relatively older and not the relatively younger. It noted that the Act was drafted, at least in part, in response to a report issued by the Secretary of Labor concerning high unemployment rates among older workers ("Wirtz Report").<sup>5</sup> The Wirtz Report, the Court explained, "was devoid of any indication that the Secretary had noticed unfair advantages accruing to older employees at the expense of their juniors." *Cline*, 540 U.S. at 587. Further, the Court noted that "[t]he record [from Congressional hearings concerning the Wirtz Report] \* \* \* reflects the common facts that an individual's chances to find and keep a job get worse over time; as between any two people, the younger is in the stronger position[.]" *Cline*, 540 U.S. at 589.

With respect to Senator Yarborough's statement, the Court found it to be the only endorsement of protection for younger employees against acts that favor their elders in the Act's entire legislative history. *Cline*, 540 U.S. at 599. Even though Senator Yarborough was a sponsor of the Act, the Court concluded that his lone statement could not reflect the intent of Congress, particularly in light of the clear emphasis placed on protecting older workers. *Id.* For all of the reasons described above, the Supreme Court found the Commission's regulation in § 1625.2(a) was "clearly wrong." *Id.* at 600.

<sup>4</sup> *Cline*, 540 U.S. at 589-90. "It is therefore the purpose of this [Act] to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. 621(b).

<sup>5</sup> *See Cline*, 540 U.S. at 589 (noting that the introductory provisions of the ADEA mirrored the statement of purpose in the Department of Labor's report). Although Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.*, did not include protection from age discrimination, it required the Secretary of Labor to complete a study of age-based employment decisions and their consequences, and report its findings to Congress, *see* Pub. L. 88-352, 78 Stat. 265 (1964). The Department of Labor issued the report in 1965, entitled "The Older American Worker: Age Discrimination in Employment," and commonly referred to as the "Wirtz Report." Subsequently, the Department made a specific proposal for legislation, at the request of Congress, *Cline*, 540 U.S. at 587, n.2 (citing 113 Cong. Rec. 1377 (1967)).

## Revisions to Agency Regulations

Section 1625.2 is being revised as follows. The caption will be changed from "Discrimination between individuals protected by the Act" to "Discrimination prohibited by the Act" to reflect the Supreme Court's holding that the ADEA permits employers to make age-based employment decisions that favor relatively older employees. The text of the regulation will be similarly revised, and § 1625.2(b), which explicitly permits employers to give older employees preferential benefits in some circumstances, will be removed as redundant. Thus, the new regulation will not have paragraphs (a) and (b), and will simply be referred to as § 1625.2. Other language changes in § 1625.2 are made for the sake of clarity.

Although the question examined by the Supreme Court in *Cline* was the meaning of "because of age" in section 623(a) of the Act, its holding that "discrimination because of age" refers only to discrimination against relatively older persons unquestionably applies to the Act as a whole. When the term "age" is used in other contexts in the statute, it must be interpreted in a manner consistent with the statute's overarching purpose.<sup>6</sup> Thus, section 623(e)'s prohibition against age discriminatory job advertisements<sup>7</sup> must be construed to bar only advertisements that favor younger individuals. Accordingly, the portion of 29 CFR 1625.4(a) that prohibited job advertisements favoring older persons has been revised to make clear that it is permissible to encourage relatively older persons to apply.

In §§ 1625.4(b) and 1625.5, which address the fact that advertisements or applications that ask job applicants to disclose their age may deter older persons from applying for the job, the phrase "otherwise indicate discrimination based on age" has been changed to "otherwise indicate discrimination against older individuals." Other minor revisions have been made to those sections to

improve clarity. No substantive changes are intended other than those necessary to explain that the ADEA permits employers to favor older individuals.

## Comments

The Commission invites comments on this proposed rule from all interested parties, and will consider such comments received within the previously noted time frames and formats. In proposing this rule, the Commission coordinated with other federal agencies in accord with Executive Order 12067, 43 FR 28967 (June 30, 1978), and, where appropriate, incorporated agency comments into the proposal.

## Executive Order 12866, Regulatory Planning and Review

The proposed rule has been drafted and reviewed in accordance with Executive Order 12866, 58 FR 51735 (Sept. 30, 1993), section 1(b), Principles of Regulation. It is considered to be a "significant regulatory action" pursuant to section 3(f)(4) of Executive Order 12866 in that it arises out of the Commission's legal mandate to enforce the Act, and therefore was circulated to the Office of Management and Budget for review. This regulation is necessary to bring the Commission's regulations into compliance with a recent Supreme Court interpretation of the Act, and revise regulatory provisions that were explicitly invalidated by the Court as outside the scope of the Act. The proposed rule is intended to add to the predictability and consistency between judicial interpretations and executive enforcement of the Act.

The proposed rule would apply to all employers with at least 20 employees. See 29 U.S.C. 630(b).<sup>8</sup> Nonetheless, the Commission does not believe that the proposed rule will have a significant impact on small business entities under the Regulatory Flexibility Act, because it imposes no economic or reporting burdens on such firms. To the contrary, the proposed rule expressly allows employers to make certain previously forbidden age-based decisions without fear of liability. Further, the proposed rule makes no change to employers' compliance obligations under the Act in any manner or form, because employers already were bound to follow the Supreme Court's interpretation of the Act. For the reasons described above, the Commission also believes that the proposed rule also imposes no burden

that requires additional scrutiny under either the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*, concerning the collection of information, or the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501, *et seq.*, concerning the burden imposed on state, local, or tribal governments.

## List of Subjects for 29 CFR Part 1625

Advertising, Aged, Employee benefit plans, Equal employment opportunity, Retirement.

Dated: August 4, 2006.

For the Commission.

**Cari M. Dominguez,**

*Chair.*

For the reasons discussed in the preamble, the Equal Employment Opportunity Commission proposes to amend 29 CFR chapter XIV part 1625 as follows:

## PART 1625—AGE DISCRIMINATION IN EMPLOYMENT ACT

### Subpart A—Interpretations

1. Revise the authority citation for part 1625 to read as follows:

**Authority:** 29 U.S.C. 621–634; 5 U.S.C. 301; sec. 2, Reorg. Plan No. 1 of 1978, 43 FR 19807; E.O. 12067, 43 FR 28967.

2. Revise § 1625.2 to read as follows:

#### § 1625.2 Discrimination prohibited by the Act.

It is unlawful for an employer to discriminate against an individual in any aspect of employment because that individual is 40 years old or older, unless one of the statutory exceptions applies. Favoring an older individual over a younger individual because of age is not unlawful discrimination under the Act, even if the younger individual is at least 40 years old.

3. Revise § 1625.4 to read as follows:

#### § 1625.4 Help wanted notices or advertisements.

(a) Help wanted notices or advertisements may not contain terms and phrases that limit or deter the employment of older individuals. Notices or advertisements that contain terms such as *age 25 to 35*, *young*, *college student*, *recent college graduate*, *boy*, *girl*, or others of a similar nature violate the Act unless one of the statutory exceptions applies. Employers may post help wanted notices or advertisements expressing a preference for older individuals with terms such as *over age 60*, *retirees*, or *supplement your pension*.

(b) Help wanted notices or advertisements that ask applicants to disclose or state their age do not, in

<sup>6</sup>In *Cline*, the Supreme Court explicitly endorsed the use of different meanings for the term "age" in order to comply with the statute's purpose. It noted, for example, "[f]or the very reason that reference to context shows that 'age' means 'old age' when teamed with 'discrimination,' the provision of an affirmative defense when age is a bona fide occupational qualification readily shows that 'age' as a qualification means comparative youth." *Cline*, 540 U.S. at 596.

<sup>7</sup>"It shall be unlawful for an employer \* \* \* to print or cause to be printed or published, any notice or advertisement relating to employment by such an employer \* \* \* or any classification or referral for employment \* \* \* indicating any preference, limitation, specification, or discrimination based on age." 29 U.S.C. 623(e).

<sup>8</sup>According to Census Bureau Information, approximately 1,976,216 establishments employed 20 or more employees in 2000, see Census Bureau, U.S. Department of Commerce, Statistics of U.S. Businesses (2000).

themselves, violate the Act. But because asking applicants to state their age may tend to deter older individuals from applying, or otherwise indicate discrimination against older individuals, employment notices or advertisements that include such requests will be closely scrutinized to assure that the requests were made for a lawful purpose.

4. Revise the first paragraph of § 1625.5 to read as follows:

**§ 1625.5 Employment Applications.**

A request on the part of an employer for information such as *Date of Birth* or *age* on an employment application form is not, in itself, a violation of the Act. But because the request that an applicant state his age may tend to deter older applicants or otherwise indicate discrimination against older individuals, employment application forms that request such information will be closely scrutinized to assure that the request is for a permissible purpose and not for purposes proscribed by the Act. That the purpose is not one proscribed by the statute should be made known to the applicant by a reference on the application form to the statutory prohibition in language to the following effect:

\* \* \* \* \*

[FR Doc. E6-13138 Filed 8-10-06; 8:45 am]

BILLING CODE 6570-01-P

**DEPARTMENT OF DEFENSE**

**Defense Logistics Agency**

**32 CFR Part 323**

[Docket: DoD-2006-OS-0022]

RIN 0790-A100

**Privacy Act; Implementation**

**AGENCY:** Defense Logistics Agency.

**ACTION:** Proposed rule.

**SUMMARY:** The Defense Logistics Agency (DLA) is proposing to update the DLA Privacy Act Program Rules, 32 CFR, part 323, by replacing the (k)(2) exemption with a (k)(5) exemption to more accurately describe the basis for exempting the records.

**DATES:** Comments must be received on or before October 10, 2006 to be considered by this agency.

**ADDRESSES:** You may submit comments, identified by docket number and or RIN number and title, by any of the following methods.

• Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

• Mail: Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301-1160.

*Instructions:* All submissions received must include the agency Name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Ms. Jody Sinkler at (703) 767-5045.

**SUPPLEMENTARY INFORMATION:** Executive Order 12866, "Regulatory Planning and Review". It has been determined that Privacy Act rules for the Department of Defense are not significant rules. The rules do not (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy; a sector of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

Public Law 96-354, "Regulatory Flexibility Act" (5 U.S.C. Chapter 6)

It has been determined that Privacy Act rules for the Department of Defense do not have significant economic impact on a substantial number of small entities because they are concerned only with the administration of Privacy Act systems of records within the Department of Defense.

Public Law 96-511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35)

It has been determined that Privacy Act rules for the Department of Defense impose no information requirements beyond the Department of Defense and that the information collected within the Department of Defense is necessary and consistent with 5 U.S.C. 552a, known as the Privacy Act of 1974.

Section 202, Public Law 104-4, "Unfunded Mandates Reform Act"

It has been determined that Privacy Act rulemaking for the Department of

Defense does not involve a Federal mandate that may result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more and that such rulemaking will not significantly or uniquely affect small governments.

Executive Order 13132, "Federalism"

It has been determined that Privacy Act rules for the Department of Defense do not have federalism implications. The rules do not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

**List of Subjects in 32 CFR Part 323**

Privacy.

Accordingly, 32 CFR part 323 is proposed to be amended as follows:

**PART 323—DLA PRIVACY ACT PROGRAM**

1. The authority citation for 32 CFR part 323 continues to read as follows:

**Authority:** Public Law 93-579, 88 Stat. 1896 (5 U.S.C. 552a).

2. Appendix H to part 323 is amended by revising the current paragraphs a.1. through a.4. with the following:

**Appendix H to Part 323, DLA Exemption Rules**

\* \* \* \* \*

a. ID: S500.10 (Specific Exemption)

1. *System name:* Personnel Security Files.

2. *Exemption:* Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identify of a confidential source. Therefore, portions of this system may be exempt pursuant to 5 U.S.C. 552a(k)(5) from the following subsections of 5 U.S.C. 552a(c)(3), (d), and (e)(1).

3. *Authority:* 5 U.S.C. 552a(k)(5).

4. *Reasons:* (i) From subsection (c)(3) and (d) when access to accounting disclosures and access to or amendment of records would cause the identity of a confidential source to be revealed. Disclosure of the source's identity not only will result in the Department breaching the promise of confidentiality made to the source but it will impair the Department's future ability to compile investigatory material for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, Federal contracts, or access to classified information. Unless sources can be assured that a promise of confidentiality will be honored, they will be less likely to