

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Office of the Secretary

7 CFR Parts 15 and 15d

RIN 0503-AA15

Nondiscrimination in USDA Conducted Programs and Activities

AGENCY: Department of Agriculture.

ACTION: Proposed rule.

SUMMARY: The United States Department of Agriculture (USDA or the Department) is proposing to revise its regulations governing nondiscrimination in programs and activities conducted by the Department. On April 23 1996, the Department published an earlier proposal to do so in the **Federal Register** (61 FR 17851). Specifically, the Department proposed to remove the current regulation on this subject found at 7 CFR part 15, subpart B, and place it in a new part 15d; clarify that the regulation applies to all Department-conducted programs and activities, not just to direct assistance programs; add familial status and marital status to the protected classes contained in the regulation; add a provision on Department agencies' compliance efforts; reflect that the Assistant Secretary for Administration has been delegated the authority to make final determinations as to whether prohibited discrimination occurred and the corrective action required to resolve complaints; remove the Appendix to the regulation that lists the Department programs subject to these provisions; and make other clarifications to the regulation.

A final rule never was issued because USDA was in the midst of a comprehensive evaluation of its civil rights program. Now that that review is complete, it is appropriate to continue with promulgation of the rule. However, because USDA is proposing several significant changes since the proposed rule, the Department has determined that it would be appropriate to again publish a proposed rule so that the

public will have an opportunity to comment on these changes. These changes include the addition of sexual orientation and public assistance status as protected classes and a prohibition against reprisal for exercising rights under the rule.

DATES: Comments must be received by December 10, 1998.

FOR FURTHER INFORMATION CONTACT: Alyce Boyd-Stewart, Chief, Policy and Planning Division, Office of Civil Rights, (202) 720-5212; or Ron Walkow, Attorney-Advisor, Office of the General Counsel, (202) 720-6056. If a copy of this final rule in an alternate format, e.g., braille, is necessary, contact 202-720-0353 (voice or TDD).

SUPPLEMENTARY INFORMATION: Subpart B currently contains the Department's civil rights regulations for programs and activities conducted by the Department. As noted in the Department's earlier proposed rule, the rule is in need of revision. The Department's earlier proposal to revise the rule was published April 23, 1996, and a 30-day comment period followed. The Department now is proposing additional changes, as well as modifications to the previous proposal. The instant proposal should be read alongside the earlier proposal for a complete explanation of what USDA is proposing.

The only comment the Department received on the earlier proposal was from a non-profit law center that represents farmers and rural communities. The commenter supports the addition of compliance reviews to the regulation and states that having the Department supplement an agency investigation of a complaint is a positive step that will ensure that complaints are fully investigated.

However, the commenter urged the Department to abandon the 180-day period for filing complaints or, in the alternative, to adopt a longer limitations period. The commenter argued that victims of discrimination often do not recognize the full effect of discrimination for several months and that many such victims will appropriately deal with their difficulties through other means before filing a complaint. The commenter further argued that there is no legal basis for the 180-day limit while under the Equal Credit Opportunity Act (ECOA), for example, an individual has two years to file a lawsuit. Thus, the commenter

argued, the limitations period may have the effect of encouraging litigation against the Department even when an individual would prefer to go through the administrative complaint process.

The Department has determined that it will retain the 180-day filing period for complaints in this proposed rule. The reasons for this retention are set out below. Nothing in those reasons is intended to indicate that full and fair consideration will not be given to comments on this matter received in response to this proposed rule. The 180-day period is intended to have individuals bring allegations of discrimination to the attention of the Department in a timely manner so that the Department can adequately address such allegations. A 180-day period also is used in the Department's Title VI regulations, which deal with allegations of discrimination against recipients of assistance through the Department. See 7 CFR 15.6. Indeed, this period is common to every Department and Federal agency that has a Title VI regulation. We believe the same period should apply to the Department conducted activities as that which applies to its Title VI activities.

In addition, the proposed regulation addresses the commenter's concern that some individuals may not recognize the full effects of discrimination within 180 days. Specifically, the regulation states that the 180-day period begins to run "from the date the person knew or should have known of the alleged discrimination * * *." Thus, the 180-day period will not begin to run until that individual knows, or at least should have known, that he or she was discriminated against. To emphasize, the filing period does not necessarily begin to run from the date of a particular action that may be discriminatory, for example the denial of a loan, but rather "from the date the person knew or should have known of the alleged discrimination * * *."

In addition, the proposed regulation states that the 180-day limit can be extended "for good cause." Thus, a complainant who files a complaint past the 180-day period will be given an opportunity to explain the delay and, in appropriate circumstances, retain the opportunity to present his or her complaint.

The commenter argued that the 180-day period may be shorter than the

period some complainants have to file a lawsuit. However, the Department does not believe that this alone is sufficient cause for lengthening the filing period. In regard to the commenter's point about ECOA, it should be noted that Part 15d is not an ECOA administrative procedure, nor an administrative procedure pursuant to any other Federal statute. The proposed regulation merely informs the public of the Department's nondiscrimination policy and of an individual's right to file a complaint if he or she believes that he or she has been discriminated against by the Department so that the Department can take appropriate action. Of course, the availability of 15d and ECOA often will be co-extensive, and it often will be the case that a 15d complaint will afford the Department an opportunity to provide relief to a complainant that may avoid an ECOA lawsuit. The fact that the 180-day period has run does not prohibit an individual from filing an ECOA lawsuit, nor does it prohibit the Department from settling a potential ECOA lawsuit before such a suit is initiated. There is no exhaustion of administrative requirement to filing an ECOA lawsuit. In addition, the fact that a complainant may have a legitimate ECOA claim might be the basis for applying the "good cause" exception to the filing period.

The commenter next contended that the "good cause" exception to the 180-day filing period should be explained in 15d rather than in internal guidance. After reviewing the commenter's arguments, the Department does not agree with this contention. The "good cause" exception is intended to give discretion to the Director of the Office of Civil Rights (CR) or his or her designee to extend the filing period when appropriate. The exception is not intended to create a rigid rule as to when "good cause" has been met. Thus, it would not be appropriate to address the specifics of good cause in the published regulation. Any complainant who files after the 180-day period may explain the reason for the delay and in appropriate circumstances an extension will be granted. The fact that a claim may be time barred does not prohibit the Department from looking into the allegations and taking appropriate action as to internal matters. The Department believes that an enumeration of the elements of the good cause exception may deter some individuals from filing complaints because they mistakenly believe that their situation is not covered by the listed elements. A simple good cause exception will allow for individuals to

file complaints who believe that they have a good reason for filing after the 180-day period.

Finally, the commenter objected to proposed section 15d.5. After further review, the Department has determined that this provision should not be included in the rule. As is explained in more detail in the preamble to the original proposed rule, the purpose of this section was to make clear the intent and legal effect of the regulation. However, the Department believes that the statement of intent contained in the preamble to the earlier proposed rule is sufficient notice as to the intent of the prohibition of discrimination contained in the rule. In short, proposed section 15d.5 is more confusing than illuminating.

The Department also is proposing two additional protected classes in addition to those discussed in the earlier proposal. As stated in that proposal, the Department's policy has been that the protected classes contained in the rule should, at a minimum, reflect those classes protected by the various civil rights laws. Thus, the earlier proposal stated that the rule should include marital status and familial status since these classes are included in the Fair Housing Act (marital status) and ECOA (marital and familial status). However, the Department neglected the fact that ECOA also prohibits discrimination against individuals because all or part of their income is derived from any public assistance program. 15 U.S.C. 1691(a)(3). Accordingly, the Department is proposing to add "public assistance status" to the list of protected classes contained in the regulation.

The Department also is proposing to add sexual orientation as a protected class in the rule. Beginning with the Secretary's Civil Rights Policy Statement issued in February 1997, the Secretary of Agriculture has included sexual orientation as a prohibited basis for discrimination against both USDA employees and customers in his civil rights policy statements. In doing so, the Secretary has determined that treatment of USDA employees and customers based on sexual orientation is treatment that is unfair and inequitable. Based on this policy and Executive Order 13087 in which the President directed a uniform policy prohibiting discrimination on this basis in Federal employment, USDA is about to add sexual orientation as a protected class to its complaint process for USDA employees. In order to be consistent, the Department is now proposing to add sexual orientation to the instant rule so that USDA customers who believe that they have been discriminated against by

USDA employees will be able to file a complaint with USDA, have this complaint investigated and resolved and, if appropriate, have corrective action provided.

The Department also is proposing that a provision on reprisal be added to the rule. It is USDA's policy that no individual who files a complaint or otherwise participates in the complaint process under the proposed rule be subject to reprisal or retaliation. In addition, no person who opposes any practice prohibited by the rule in any manner should be subjected to such reprisal. By including a prohibition against reprisal in the rule, individuals who believe that they have been subject to reprisal will be able to file a complaint with CR, have this complaint investigated and resolved and, if appropriate, have corrective action provided. Finally, this is consistent with all Federal civil rights complaint processes, which uniformly contain a prohibition against reprisal.

The earlier proposed rule stated that the authority to make final determinations, including corrective action, would be delegated to the Assistant Secretary for Administration. However, after a reevaluation of this proposal, the Department is proposing that this authority should be delegated to the Director, CR. Thus, the proposed rule reflects this change. In addition, the proposed provision on compliance similarly reflects that the Director has been delegated the authority for enforcement of this rule.

Finally, the Department is proposing to modify section 15d.4(c) from the form it originally was proposed so that it is less confusing. The purpose of this provision is to make clear that complaints submitted under this part alleging discrimination based on disability will be processed pursuant to 7 CFR Part 15e, which contains the Department's regulations implementing the Rehabilitation Act as it applies to federally conducted programs.

This proposed rule has been determined to be "not-significant" for purposes of Executive Order 12866, and therefore has not been reviewed by the Office of Management and Budget. USDA certifies that this final rule would not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.). USDA also certifies that this final rule would not impose any reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995. 44 U.S.C. Chapter 35.

USDA is providing a 30-day comment period for this rule. Comment is invited

on all aspects of the proposal, including the appropriateness and effect of the proposed changes, and any additional or alternative measures that would serve the goals of USDA as outlined in the proposal.

List of Subjects in 7 CFR Parts 15 and 15d

Nondiscrimination.

Accordingly, The Department of Agriculture proposes to amend Title 7 of the Code of Federal Regulations, Subtitle A, as follows:

PART 15—[AMENDED]

1. The authority citation for part 15 continues to read as follows:

Authority: 5 U.S.C. 301; 29 U.S.C. 794.

2. Part 15, subpart B (§§ 15.50–15.52) and the appendix thereto is proposed to be removed.

3. Part 15, subpart C (§§ 15.60–15.143) is proposed to be redesignated as part 15, subpart B.

4. A new part 15d is proposed to be added to read as follows:

PART 15d—NONDISCRIMINATION IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE UNITED STATES DEPARTMENT OF AGRICULTURE

Sec.

15d.1 Purpose.

15d.2 Discrimination prohibited.

15d.3 Compliance.

15d.4 Complaints.

Authority: 5 U.S.C. 301.

§ 15d.1 Purpose.

The purpose of this part is to set forth the nondiscrimination policy of the United States Department of Agriculture in programs or activities conducted by the Department, including such programs and activities in which the Department or any agency thereof makes available any benefit directly to persons under such programs and activities.

§ 15d.2 Discrimination prohibited.

(a) No agency, officer, or employee of the United States Department of Agriculture shall exclude from participation in, deny the benefits of, or subject to discrimination any person in the United States on the ground of race, color, religion, sex, age, national origin, marital status, familial status, public assistance status, sexual orientation, or disability under any program or activity conducted by such agency, officer or employee.

(b) No person shall be subjected to reprisal for opposing any practice prohibited by this part or for filing a complaint or participating in any other manner in a proceeding under this part.

§ 15d.3 Compliance.

The Director of the Office of Civil Rights shall evaluate each agency's efforts to comply with this part and shall make recommendations for improving such efforts.

§ 15d.4 Complaints.

(a) Any person who believes that he or she (or any specific class of individuals) has been, or is being, subjected to practices prohibited by this part may file on his or her own, or through an authorized representative, a written complaint alleging such discrimination. No particular form of complaint is required. The complaint must be filed within 180 calendar days from the date the person knew or reasonably should have known of the alleged discrimination, unless the time is extended for good cause by the Director of the Office of Civil Rights or his designee. Any person who complains of discrimination under this part in any fashion shall be advised of his or her right to file a complaint as herein provided.

(b) All complaints under this part should be filed with the Director of the Office of Civil Rights, United States Department of Agriculture, Washington, DC 20250, who will investigate the complaints. The Director of the Office of Civil Rights will make final determinations as to the merits of complaints under this part and as to the corrective actions required to resolve the complaints. The complainant will be notified of the final determination on his or her complaint.

(c) Any complaint filed under this part alleging discrimination on the basis of disability will be processed under Part 15e of this chapter.

Dated: October 20, 1998.

Dan Glickman,

Secretary of Agriculture.

[FR Doc. 98-28699 Filed 11-9-98; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1214

[FV-96-705-APR]

Proposed Kiwifruit Research, Promotion, and Consumer Information Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Supplementary Notice of Proposed Rulemaking.

SUMMARY: This proposed rule would amend an October 17, 1997, proposed rule which described the proposed Kiwifruit Research, Promotion, and Consumer Information Order (Order). Under the proposed Order, producers and importers would pay an assessment not to exceed 10 cents per 7-pound tray of kiwifruit to the proposed National Kiwifruit Board (Board). The Board would conduct a generic program of research, promotion, and consumer information to maintain, expand, and develop markets for kiwifruit under the supervision of the Department of Agriculture (USDA). The amended proposed rule would revise the Order by eliminating the requirement that 51 percent of the members of the Board be domestic kiwifruit producers to reflect the June 23, 1998, amendments to the National Kiwifruit Research, Promotion, and Consumer Information Act.

DATES: Comments must be received by January 11, 1999. A referendum order establishing the voting period for the referendum and the representative period for voter eligibility will be published at a later date in the **Federal Register**.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposed rule to the Docket Clerk, Research and Promotion Branch, Fruit and Vegetable Programs, Agricultural Marketing Service (AMS), USDA, Stop 0244, Room 2535-S, 1400 Independence Avenue, S.W., Washington, D.C. 20250-0244. Comments should be submitted in triplicate and will be made available for public inspection at the above address during regular business hours. Comments may also be submitted electronically to:

malinda_e_farmer@usda.gov. All comments should reference the docket number and the date and page number of this issue of the **Federal Register**. A copy of this rule may be found at: www.ams.usda.gov/fv/rpdocketlist.htm.

Pursuant to the Paperwork Reduction Act of 1995 (PRA), send comments regarding the merits of the burden estimate, ways to minimize the burden, including the use of automated collection techniques or other forms of information technology, or any other aspect of this collection of information to the above. Comments concerning the information collection associated with this action should also be sent to the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503.

FOR FURTHER INFORMATION CONTACT: Stacey L. Bryson, Research and