



6 WEST 5TH STREET SUITE 650
SAINT PAUL, MINNESOTA 55102

PHONE: 651 223.5400
FAX: 651 223.5335

INTERNET:
LAWYERS@FLAGINC.ORG

WEB SITE:
WWW.FLAGINC.ORG

January 27, 2014

Attn: Anna G. Stroman
Chief, Policy Division
Office of the Assistant Secretary of Civil Rights
1400 Independence Ave. S.W.
Washington, D.C. 20250

**Re: Docket No. 0503-AA52
Comments on Proposed Rule, 7 C.F.R. Part 15d- Nondiscrimination in
Programs or Activities Conducted by the United States Department of
Agriculture**

Submitted electronically via <http://www.regulations.gov>

Dear Ms. Stroman:

Hmong National Development, Inc. (HND), the Rural Advancement Foundation International-USA (RAFI), the National Sustainable Agriculture Coalition (NSAC), the Rural Coalition, the Community Food and Justice Coalition (CFJC), and Farmers' Legal Action Group, Inc. (FLAG), submit these comments on the proposed amendment, published at 78 Federal Register 78,788 (December 27, 2013), concerning Nondiscrimination in Programs or Activities Conducted by the United States Department of Agriculture.

Hmong National Development, Inc. (HND), is a national, 501(c)(3), nonprofit organization. HND empowers the Hmong American community to achieve prosperity and equality through education, research, policy advocacy and leadership development. Founded in 1993, HND is the leading national policy advocacy organization for the Hmong American community. Given the large percentage of the Hmong community that is engaged in agriculture, one of HND's priorities has been to advocate for policies and legislation which support small, socially disadvantaged farmers. A major part of HND's advocacy has involved helping Hmong American

farmers address the many barriers they face in accessing USDA programs and resources.

The mission of Rural Advancement Foundation International-USA (RAFI) is to cultivate markets, policies, and communities that sustain thriving, socially just, and environmentally sound family farms. RAFI works nationally and inter nationally, focusing on North Carolina and the southeastern United States. RAFI is a 501(c)(3) nonprofit organization based in Pittsboro, North Carolina and incorporated in 1990.

RAFI has provided in-depth financial counseling to thousands of farm families and advocacy for fair treatment in lending and federal programs. RAFI also provides assistance with farmer contracts, especially production contracts, and education and assistance on development of new farm enterprises and market access.

RAFI has assisted Hmong contract poultry farmers since 2005, after receiving requests for assistance from local organizations and farmers. Since that time, RAFI has provided individual one-on-one consulting with Hmong farmers in Arkansas, Missouri, Oklahoma, and North Carolina, public trainings on credit and production issues to Hmong producers and to Hmong support organizations, and has provided training in agricultural business development for Hmong producers in North Carolina.

The National Sustainable Agriculture Coalition (NSAC) is an alliance of 100 grassroots, regional, and national organizations that advocates for federal policy reform to advance the sustainability of agriculture, food systems, natural resources, and rural communities. NSAC member groups advance common positions to support small and mid-size family farms, protect natural resources, promote healthy rural communities, and ensure access to healthy, nutritious foods by everyone. NSAC's Diversity Committee focuses on ensuring that federal policies and programs support diversity and equal access and opportunity, and has a keen interest in the issues raised in the proposed amendments to the rule.

The Rural Coalition, born of the civil rights and anti-poverty rural movements, has worked for thirty-five years to assure that diverse organizations from all regions, ethnic and racial groups, and gender have the opportunity to work together on the issues that affect them all. The foundation of this work are our members - strong local, regional and national organizations that work to assure the representation and involvement of every sector of this diverse fabric of rural peoples.

The Community Food and Justice Coalition (CFJC) works to support and uplift the knowledge of people across sectors in an effort to create an equitable food system for all.

Farmers' Legal Action Group, Inc. (FLAG), is a nonprofit, public interest law center dedicated to providing legal services and support to family farmers and their communities in order to help keep family farmers on the land. For more than twenty-five years, FLAG has provided legal services to thousands of small- and medium-scale family farmers throughout the nation in class action lawsuits, administrative proceedings, public education initiatives, and legislative technical assistance involving agricultural issues. FLAG has long worked to help farmers understand their legal rights and responsibilities. Within the last decade, FLAG has begun working with one of the newest segments of the farming community, Hmong American farmers.

Hmong American farmers are America's most prominent new farmers, and have established themselves in different sectors of America's farm community such as specialty crop producers, ranchers, and poultry growers. As limited resource and socially disadvantaged farmers, they often struggle, to varying degrees, to participate in USDA programs or connect with the technical support they need to stabilize their operations. USDA's efforts in strengthening its civil rights protection and compliance procedures will have a direct impact in stabilizing new and struggling family farm operations owned by Hmong American farmers.

We commend USDA for its efforts to strengthen its civil rights compliance and complaint processing activities, and fully support the expansion of civil rights protections based on political beliefs and gender identity. USDA should go further and require the collection of additional categories of data in order to fully capture the information needed to ascertain whether discrimination may be occurring and identify other areas for improvement.

The data collected should also be transparent and readily available to the public. USDA has historically struggled to maintain an effective discrimination complaint procedure, and should take this opportunity to assure that the purposes of the regulation will be realized in practice. We therefore feel that the Proposed Rules should more explicitly state how the data collected will be used to proactively inform strategies for addressing any identified inequities, and provide below some examples of recommended strategies.

**Comments for Proposed Rules, 7 CFR Part 15d —
Nondiscrimination in Programs or Activities Conducted by the USDA**

I. The Proposed Rule Should Include Additional Categories of Data that Agencies Should Be Required to Collect.

A. USDA Should Require the Agencies to Collect Additional Data on Ethnicity and Language Spoken.

Section 15d.4(b)(1) of the Proposed Rule states that each agency shall collect, at a minimum, numbers of applicants and participants by race, ethnicity, and gender, as well as the participation rates of these groups. The ethnicity data collected under current data collection practices, however, is extremely limited. We urge USDA to require agencies to collect additional information on ethnicity and language spoken in order to capture a more complete picture of any potential discrimination, as well as to identify other areas of improvement for program delivery.

According to USDA Departmental Regulation (DR) 4370-001, agencies must use Form AD-2106 to record the race, ethnicity, and gender of program applicants and participants. While this form lays out race and ethnicity categories, the categories are minimum standards for collection and actually leave out a great deal of important information.

Under Race, the choices are: 1) American Indian or Alaska Native, 2) Asian, 3) Black or African American, 4) Native Hawaiian or Other Pacific Islander, or 5) White. The only categories under Ethnicity are: 1) Hispanic or Latino, or 2) Not Hispanic or Latino.

By failing to provide other options under the Ethnicity category and also failing to capture the language spoken by the applicant or participant, USDA is missing a huge piece of data on who is and is not accessing their programs. In particular, the Asian racial category is made up of many different ethnic groups that have distinct cultures, languages, and countries of origin. While many view Asians as embodying one monolithic “Model Minority” group which enjoys high levels of financial and educational success, research shows that some Asian ethnic groups, such as the Hmong, suffer extraordinarily high levels of poverty and very low levels of educational attainment. Hmong Americans have the lowest per capita income of *any* racial or ethnic group nationwide (including Latinos and African Americans), with

nearly one-third of Hmong American children living in poverty.¹ The Hmong community consistently demonstrates some of the highest levels of need among the various Asian communities across the spectrums of housing, health, employment, and other economic and social indicators.

Failing to truly understand this diversity undermines USDA's ability to reach out to certain communities. Without analyzing data of specific ethnic groups and languages spoken by applicants and participants, USDA cannot determine the specific needs of each group and identify communities that require further outreach and technical assistance in order to fully utilize USDA's programs. Without adequate, targeted outreach, the set-asides for socially disadvantaged farmers are under-utilized or not used by those who could benefit most, since those farmers remain isolated and do not know about programs that could assist them.

Ethnic enclaves tend to be the norm for minority communities, with people of the same ethnicity generally concentrated in certain geographic areas. Therefore, the needs of certain local offices in a particular region may be quite different from a local office the next county over. We are concerned that if USDA fails to track data on language and ethnicity, USDA will also fail to meet the unique cultural and linguistic needs of an increasingly diverse population of farmers.

By capturing data on ethnicity and languages spoken, USDA would be able to make more informed choices on how to allocate limited resources. For example, USDA would be able to identify which local offices might benefit from bilingual staff hires (thus saving resources on hiring outside interpreters), which materials need to be translated into which languages (not all ethnic communities will require translations of certain materials), and which communities need targeted outreach. Other federal agencies have been successful in capturing more granular data that allows them to better serve diverse communities.² These practices provide a model that USDA could also use.

¹ Asian American Center for Advancing Justice, *A Community of Contrasts: Asian Americans in the United States: 2011*, 34-37 (2011) (compiled largely from data from the U.S. Census Bureau and the American Community Survey). Available at: <http://advancingequality.org/files/ComCont.pdf>.

² See, for example, U.S. Department of Health and Human Services Implementation Guidance on Data Collection Standards for Race, Ethnicity, Sex, Primary Language, and Disability States (October 2011).

Finally, we find no legal bases in the proposed rule, the statute authorizing the rule, or the internal administrative documents suggesting that the racial and ethnic categories used are required by law.³

B. Data Collected Should Include Information on Inquiries Made at Local Offices.

The Proposed Rule indicates that agencies should collect data on all program applicants and participants in conducted programs by county and state, including those for socially disadvantaged and limited resources applicants and participants. 7 C.F.R. § 15d.4(b). In addition to this information, USDA agencies should also be required to collect information on the type of inquiries that were received at the local offices and the outcomes of those inquiries. Farmers seeking to apply for certain USDA programs are at times misinformed by local office staff and told that they would be ineligible, even if they might be eligible, or are otherwise discouraged by local office staff from applying. Other farmers may be told that they would not qualify because they fail to meet some requirements, or that funding is not available for the program, or that the office is not currently accepting applications. These

³ The Food, Conservation and Energy Act of 2008 (2008 Act) §§ 14006, 14007 (codified at 7 U.S.C. § 227-1(a)-(d)) requires the collection of data by race and ethnicity. The 2008 Act appears not to establish the race and ethnicity categories to be used. The 2008 Act requires collection of data on socially disadvantaged farmers and ranchers, and defines socially disadvantaged farmer or rancher as defined in 7 § U.S.C. 2003(e). This section defines socially disadvantaged group as a group whose members have been subjected to racial, ethnic, or gender prejudice because of their identity as members of a group without regard to their individual qualities. 7 U.S.C. § 2003(e)(2). The section does not mandate that particular categories be used.

Departmental Regulation 4370-001 (October 11, 2011) implements Sections 14006 and 14007 of the 2008 Act. The Regulation defines “Asian” so as to include Hmong Americans, and requires that agencies use Form AD-2106 when collecting data. Department Regulation 4370-001, §§ 4(d), 5(b)(2). A USDA Notice, Notice CM-695, Implementing DR 4370-001 About Collecting Race, Ethnicity, and Gender Data (January 19, 2012), further describes how USDA will implement Departmental Regulation 4370-001.

Form AD-2106, Form to Assist in Assessment of USDA Compliance with Civil Rights Laws (January 19, 2012), appears to be the authority for using particular categories when collecting data on race and ethnicity. We see no legal reason why USDA could not amend Form AD-2106 to make these categories more useful.

farmers are effectively blocked from access to the programs and never even get to the application stage. The extent to which this failure to gain access to a program might be correlated to race or ethnicity or language is important information. Data on these farmers would not be captured under the Proposed Rules. In order to get a more accurate picture of whether certain groups are being denied access to programs, whether intentionally or unintentionally, agencies must track data on what types of inquiries were made and the outcomes of those inquiries.

The Receipt for Service appears to be the best tool that currently exists for tracking this data. Though we recognize that the Receipt for Service is not currently mandatory, we believe that it (or some other tool for tracking inquiries) should be made mandatory in order to capture this important data and get the most accurate picture of where discrimination may be occurring and/or where staff need to be better trained.

II. Data and Results of Compliance Reviews Must Be Transparent and Readily Available to the Public.

Data collected by agencies in accordance with the Proposed Rules, as well as the results of the Office of the Assistant Secretary of Civil Rights (OASCR) Compliance Reviews, should be made readily available to the public. Currently, the data that agencies collect on race, ethnicity, and gender are available on the Office of Advocacy and Outreach's website on the REGStats page. However, results of OASCR's Compliance Reviews are not. When organizations have inquired about how to access copies of the Compliance Reviews, the USDA response has typically been to direct organizations to file a Freedom of Information Act (FOIA) Request. FOIA requests, however, can take an extremely long time to be processed.

It is important to make the Compliance Reviews available to the public in order to keep the agencies accountable and to point out areas that need to be addressed. It is also important to make the information accessible to the public so that organizations can target their resources to the most underserved communities.

III. The Proposed Rules Should State How the Data Collected Will Be Used to Proactively Inform Strategies for Addressing Any Identified Inequities.

The Proposed Rules state that OASCR shall evaluate the agencies' compliance with civil rights regulations and make recommendations for improving such efforts. 7 C.F.R. § 15d.4. However, the Rules do not specify what sorts of actions OASCR would take if the data collected or complaints filed showed civil rights violations. The Supplemental Information for the Proposed Rules identifies a couple of potential actions that might be taken in response to administrative complaints, including

recommending additional training for USDA employees or additional outreach. However, we believe that the data should be used more proactively, and that the Proposed Rules should explicitly state the actions that should be taken when violations or specific needs are identified.

Below are some recommendations for proactively using the data collected to inform strategies to increase access and address potential discrimination:

- The data should be analyzed on a regular basis to identify groups with low participation rates in certain programs relative to the total participation rate, and that information should be used to inform OAO's Strategic Plan and for the development of targeted outreach campaigns.
- The data could be used to inform decisions on set-asides that are more strategic. For example, if it appears that a group of farmers from a certain region had very low rates of approval or participation in a program, a set-aside for that specific region could be created that would increase potential access to that group.
- Where it appears that large numbers of applicants from a particular group were denied access to a program or had low rates of approval, affirmative reviews should be done for those cases to see whether errors were made and/or potential discrimination is taking place.

Data collection is extremely important, but without clear directives on how the data is to be used, the information may ultimately go to waste.

IV. Alternative Dispute Resolution Provisions Should be Clarified.

The proposed rule changes the existing rule by adding that when OASCR deems it appropriate, OASCR shall offer Alternative Dispute Resolution (ADR) services to claimants. ADR can be a valuable tool for avoiding litigation while still offering two or more parties a means of resolving a dispute, and we applaud the Department's willingness to use ADR where appropriate. We are concerned, however, that the proposed rule does not explicitly say that ADR is not a requirement for a complainant who seeks a remedy through the complaint process.

Further, it would be helpful if the rule provided an additional explanation of other aspects of how ADR might be used. For example, will both parties be responsible for the cost? At present, the OASCR website describes ADR and includes a description of ADR among the questions that are frequently asked. Perhaps the rule or the prefatory comments to the rule could explain how the rule's provision will change the use of ADR within OASCR.

V. USDA Should Take Additional Steps to Assure That the Purposes of the Regulation are Realized.

With the notice of proposed ruling making, the Department, for the first time in more than fifteen years, seeks comments on the central regulatory authority, 7 C.F.R. § 15d, by which the Department seeks to limit discrimination in its programs.

As is well known, USDA has struggled historically to provide programs in a fair and equal manner. Recent years have seen a concerted effort to craft a USDA that fights discrimination in its programming. Ultimately, however, for that effort to be effective it will need to be sustained and deepened over time.

For USDA to root out discrimination, complaints of discrimination must be fairly and objectively investigated, and remedies must be identified and provided for when discrimination is found. Put differently, the fate of civil rights at USDA rests in significant part on 7 CFR § 15d.4 and how it is implemented. It is here that complaints of discrimination are authorized, and here, as well, that the Department is required to investigate all complaints. USDA must make determinations on the merits of the complaints and determine corrective action that may be required to resolve the complaints.

The various offices that preceded OASCR often did not function well when it came to responding to discrimination complaints. Those failures, and their legal aftermath, are a part of the public record.⁴ Far more important, however, is the extent to which discrimination complaints are handled going forward. We know that the Department, and OASCR in particular, has worked hard to change investigation procedures, reduce backlogs, and make other changes. These efforts are laudable, and we welcome the opportunity to publicly support them.

There are reasons, however, to remain concerned. In an Office of Inspector General (OIG) Report issued in August 2012, OIG noted approvingly of USDA changes in the handling of civil rights complaints. No one who has read previous OIG reports on civil rights at USDA could help but be impressed with the changes described by OIG. OIG also found, however, that USDA needed to improve processing of complaints, and improve its process for documenting settlement agreements and compiling data

⁴ Not always acknowledged is that the now-famous discrimination cases against USDA hinged directly on USDA difficulty in addressing discrimination complaints. See, for example, *Pigford v. Glickman*, 185 F.R.D. 82, 92-93 (D.C. Dist. 1999).

on complaints after an investigation.⁵ We strongly urge USDA to address these remaining tasks.

A Government Accountability Office report, also issued in August 2012, also found significant progress in several civil rights-related problems previously identified by GAO in 2008 and earlier reports.⁶ As is the case with the OIG report, no one who has read previous GAO discussions of the civil rights complaint process at USDA could fail to be heartened by the Department's apparent improvements. Read closely, however, the GAO report finds that particular recommendations made five years earlier had yet to be addressed fully. These included GAO recommendations made in 2008 that USDA prepare and implement plans for resolving discrimination complaints; ensure that records of complaints are accurate, complete, and reliable; and develop a department-level strategic plan for civil rights. We strongly urge USDA to address these remaining recommendations.

Many Hmong American farmers question whether they are being treated by USDA in an equitable manner. Making sure that their doubts are ultimately unfounded requires two significant steps by the Department. First, it must work hard to ensure that delivery of programs is not accompanied by discrimination. Second, and less obvious perhaps, the anti-discrimination provisions addressed in this proposed rule must be vigorously and effectively enforced.

VI. Conclusion

Hmong National Development, Inc., the Rural Advancement Foundation International-USA, the National Sustainable Agriculture Coalition, the Rural Coalition, the Community Food and Justice Coalition (CFJC), and Farmers' Legal Action Group, Inc., appreciate the opportunity to comment on the proposed rules published at 78 Federal Register 78,788 (December 27, 2013) concerning Nondiscrimination in Programs or Activities Conducted by the United States Department of Agriculture.

The success of Hmong American and other socially disadvantaged farmers hinges in significant part on the ability of USDA to deliver programs in a nondiscriminatory

⁵ USDA Office of Inspector General, Review of the Office of the Assistant Secretary for Civil Rights' Oversight of Agreements in Program Complaints, Audit Report 60601-0001-23 (August 2012).

⁶ GAO, U.S. Department of Agriculture: Progress toward Implementing GAO's Civil Rights Recommendations, GAO-12-976R (August 29, 2012).

manner. The discrimination complaint process housed at OASCR plays a central role in preventing such discrimination.

We applaud the Department's focus on antidiscrimination, and support the expansion of civil rights protections based on political beliefs and gender identity. USDA should go further and require the collection of additional categories of data in order to fully capture the information needed to ascertain whether discrimination may be occurring and identify other areas for improvement. The data collected should also be transparent and readily available to the public. The Proposed Rules should more explicitly state how the data collected will be used to proactively inform strategies for addressing any identified inequities. Further, the rule should clarify the role of ADR in the process. Finally, USDA should take further steps to assure that the purposes of the regulation are realized in practice.

Sincerely,

A handwritten signature in black ink, appearing to read 'Bao Vang', written in a cursive style.

Bao Vang
President/CEO
Hmong National Development, Inc.

FARMERS' LEGAL ACTION GROUP, INC.

/s/ Hli Xyooj

Hli Xyooj
Staff Attorney
Email: HLXyooj@flaginc.org

HX/rgc