

February 3, 2025

Via Federal eRulemaking Portal

Paul Kiecker,
Administrator
Food Safety and Inspection Service
U.S. Department of Agriculture
1400 Independence Ave SW
Washington, DC 20250

Kimberlee Trzeciak,
Deputy Commissioner for Policy, Legislation, and International Affairs
Food and Drug Administration
U.S. Department of Health and Human Services
10903 New Hampshire Ave.
Silver Spring, MD 20993

RE: Request for Information, “Food Date Labeling,” FSIS–2024–0021

Dear Administrator Kiecker and Deputy Commissioner Trzeciak:

I am a scholar at the Ethics and Public Policy Center (EPPC), director of EPPC’s Administrative State Accountability Project (ASAP), and a former attorney at the Equal Employment Opportunity Commission. I write in response to the request for information (RFI) on “Food Date Labeling” issued by the Department of Agriculture (USDA) and the Food and Drug Administration (FDA) on December 4, 2024.¹ The RFI “seeks information on industry practices and preferences for date labeling, research results on consumer perceptions of date labeling and any impact date labeling may have on food waste.”²

I take no position on the questions posed for comments in the RFI but instead wish to call the agencies’ attention to the RFI section titled “USDA Non-Discrimination Statement,” which states:

In accordance with Federal civil rights law and USDA civil rights regulations and policies, USDA, its Mission Areas, agencies, staff offices, employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs).³

¹ 89 Fed. Reg. 96205 (Dec. 4, 2024), <https://www.federalregister.gov/documents/2024/12/04/2024-27810/food-date-labeling>.

² *Id.* at 96205.

³ *Id.* at 96207.

It is unclear which bases are protected under federal civil rights law, and which are merely protected under USDA regulations and policies, and for which programs. As USDA and FDA review this RFI, I ask that the agencies ensure that the USDA non-discrimination statement complies with executive orders issued by President Trump since the RFI was published for public input.

To the extent that any of these non-discrimination regulations or policies are premised on President Biden's executive orders 13985 "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government" (Jan. 20, 2021), 13988 "Preventing and Combating Discrimination on the Basis of Gender Identity and Sexual Orientation" (Jan. 20, 2021), or 14075 "Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals" (June 15, 2022), President Trump revoked those executive orders on January 20, 2025, when he issued Executive Order 14148, "Initial Rescission of Harmful Executive Orders and Actions."⁴

On the same day, President Trump also issued an executive order titled, "Ending Radical and Wasteful Government DEI Programs and Preferencing,"⁵ which builds on the aforementioned revocation of Executive Order 13985 and expressly renounces the "illegal and immoral discrimination programs" that President Biden's executive order mandated:

Section 1. Purpose and Policy. The Biden Administration forced illegal and immoral discrimination programs, going by the name "diversity, equity, and inclusion" (DEI), into virtually all aspects of the Federal Government, in areas ranging from airline safety to the military. This was a concerted effort stemming from President Biden's first day in office, when he issued Executive Order 13985, "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government."

Pursuant to Executive Order 13985 and follow-on orders, nearly every Federal agency and entity submitted "Equity Action Plans" to detail the ways that they have furthered DEIs infiltration of the Federal Government. The public release of these plans demonstrated immense public waste and shameful discrimination. That ends today. Americans deserve a government committed to serving every person with equal dignity and respect, and to expending precious taxpayer resources only on making America great.⁶

On January 21, 2025, President Trump issued another executive order titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," reiterating the United States' commitment to nondiscrimination based on race, color, religion, sex, or national origin.⁷ Pursuant to the order:

It is the policy of the United States to protect the civil rights of all Americans and to promote individual initiative, excellence, and hard work. I therefore order all executive departments and agencies (agencies) to terminate all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements. I further order all agencies to enforce our longstanding civil-rights laws and to combat illegal private-sector DEI preferences, mandates, policies, programs, and activities.⁸

⁴ 90 Fed. Reg. 8237 (Jan. 28, 2025), <https://www.federalregister.gov/documents/2025/01/28/2025-01901/initial-rescissions-of-harmful-executive-orders-and-actions>.

⁵ 90 Fed. Reg. 8339 (Jan. 29, 2025), <https://www.federalregister.gov/documents/2025/01/29/2025-01953/ending-radical-and-wasteful-government-dei-programs-and-preferencing>.

⁶ *Id.* at 8339.

⁷ 90 Fed. Reg. 8633 (Jan. 31, 2025), <https://www.federalregister.gov/documents/2025/01/31/2025-02097/ending-illegal-discrimination-and-restoring-merit-based-opportunity>.

⁸ *Id.* at 8633.

Next, President Trump’s January 20, 2025, Executive Order, “Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government”⁹ is relevant to the statement that discrimination is prohibited based on “sex” and “gender identity (including gender expression).” I specifically direct you to the following aspects of the President’s Executive Order:

- Section 2(f) recognizes that “Gender ideology is internally inconsistent, in that it diminishes sex as an identifiable or useful category but nevertheless maintains that it is possible for a person to be born in the wrong sexed body.”
- Section 2(g) recognizes that “‘Gender identity’ reflects a fully internal and subjective sense of self, disconnected from biological reality and sex and existing on an infinite continuum, that does not provide a meaningful basis for identification and cannot be recognized as a replacement for sex.”
- Section 3(a) instructs the Secretary of HHS to “provide to the U.S. Government, external partners, and the public clear guidance expanding on the sex-based definitions set forth in this order.”
- Section 3(b) states that federal agencies “shall enforce laws governing sex-based rights, protections, opportunities, and accommodations to protect men and women as biologically distinct sexes.”
- Section 3(c) states that “[w]hen administering or enforcing sex-based distinctions,” federal agencies “shall use the term ‘sex’ and not ‘gender’ in all applicable Federal policies and documents.”
- Section 3(f) instructs the Attorney General to “immediately issue guidance to agencies to correct the misapplication of the Supreme Court’s decision in *Bostock v. Clayton County* (2020) to sex-based distinctions in agency activities.”¹⁰

To my knowledge, neither the HHS guidance described in Section 3(a), nor the DOJ guidance described in Section 3(f) has yet been issued. As USDA and FDA review this RFI, the agencies should look for those guidance documents and take them into account.

In sum, I encourage USDA and FDA to review the President’s executive orders mentioned above, along with any guidance or other relevant documents issued pursuant to the President’s executive orders, as the agencies considers the RFI and the USDA non-discrimination statement.

⁹ 90 Fed. Reg. 8615 (Jan. 30, 2025), <https://www.federalregister.gov/documents/2025/01/30/2025-02090/defending-women-from-gender-ideology-extremism-and-restoring-biological-truth-to-the-federal>.

¹⁰ *Id.* at 8615-8616.

Conclusion

For the reasons stated above, I urge USDA and FDA to carefully examine its reference to and reliance on the USDA non-discrimination statement in light of President Trump's executive orders. I hope this public comment helps the agencies better carry out their important responsibilities and ensure that their actions and policies reflect the President's priorities and directives.

Sincerely,

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