



November 14, 2022

Secretary Tom Vilsack
United States Department of Agriculture
Departmental Administration
1400 Independence Avenue, S.W.
Washington, DC 20250

Elizabeth Archuleta, Director
Office of Intergovernmental & External Affairs
United States Department of Agriculture
1400 Independence Avenue, S.W.
Washington, DC 20250

Via electronic submission to regulations.gov

Re: Assistance for Producers and Landowners Determined To Have Experienced Discrimination,
Docket No. USDA-2022-0015

Dear Secretary Vilsack and Director Archuleta,

We appreciate the opportunity to comment on the U.S. Department of Agriculture's (USDA) implementation of Section 22007 of the Inflation Reduction Act (IRA). This program is an important step in redressing the harm inflicted by USDA lending agents on producers, families, and the agricultural sector.

The Farm Bill Law Enterprise (FBLE) brings together faculty, staff, and students from programs across seven law schools with expertise in agriculture, nutrition, and the environment. Our mission is to work toward a farm bill that reflects a thoughtful consideration of the long-term needs of our society, including economic opportunity and stability, public health and nutrition, public resources stewardship, and fair access and equal protection. We accomplish this mission through joint research, analysis, and advocacy and by drawing on the experience of our members, collaboratively building deeper knowledge, and equipping the next generation of legal practitioners to engage with the farm bill.



FBLE recently published a report with recommendations for Congress and USDA to advance Equity in Agricultural Production & Governance.¹ In addition to recommendations, which we hope USDA will adopt or support, the report provides background on the history of discrimination against Black, Native American, Latinx, and Asian American farmers and ranchers in the U.S. agricultural sector. It also discusses the lawsuits concerning discrimination in lending: *Pigford*, *Keepseagle*, *Garcia*, and *Love*. We incorporate that background by reference here as further evidence of the need for this program. As the Department knows, while these lawsuits provided important relief and brought attention to USDA’s discriminatory lending and dysfunctional civil rights enforcement practices, their narrow scope prevented the claims processes from fully redressing the harm to individual claimants, from providing relief to all victims of discrimination within the relevant time period, and from providing an avenue to relief for farmers who experienced discrimination outside of the specified years (e.g., 1981-1997 in *Pigford*).

Our comment addresses several components of the administration of Section 22007 in hopes that the program may be used to fill some of these gaps.² Drawing on our previous research and the work experience of our members, this comment first articulates the appropriate definition of discrimination. It then discusses the application process and recommends that USDA take steps to reduce application barriers. Third, it outlines recommendations concerning the form and scope of compensation. Fourth, it details recommendations regarding the third-party administrators of the program and the scope of their authority. These comments are not intended to be comprehensive. Given the 30-day timeline for commenting, we focused on providing input where we could provide clear and concise recommendations. We would be happy to engage further to support USDA in developing a well-executed program in a swift manner to ensure there are no further, unnecessary delays in getting critical funds into the hands of those USDA has harmed.

I. DEFINING DISCRIMINATION

Because of the pervasiveness of past discrimination by USDA, the definition of discrimination used to implement Section 22007 should be broad. Given the intended purpose of addressing discrimination in lending, this definition should encompass discrimination on the basis of “race, color, national origin, religion, sex, gender identity (including gender expression), sexual

¹ FARM BILL L. ENTER., EQUITY IN AGRICULTURAL PRODUCTION & GOVERNANCE (2022), <https://www.farmbilllaw.org/wp-content/uploads/2022/10/Equity-Report.pdf>.

² This comment benefitted from research and drafting by Brooke Christy, University of Pittsburgh School of Law J.D. 2023 and Jessica Grubestic Harvard Law School J.D. 2024.



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.”³

Acts constituting discrimination should similarly be defined broadly. In the lending discrimination cases and their claims’ processes,⁴ eligibility was determined, in part, with respect to the definition of “credit transaction” under the Equal Credit Opportunity Act (ECOA).⁵ Since Section 22007 contemplates relief for discrimination in lending, USDA should turn to the ECOA definition as a starting point. Accordingly, farmers who, because of discrimination, experienced loan denials, late loans, underfunded loans, excessive collateral requirements, or improper service of loans by USDA should qualify for relief under Section 22007.⁶ Instances of farmers being turned away or discouraged from taking out loans, receiving loans on less favorable terms (e.g., supervised accounts), or other forms of disparate treatment in accessing lending offices should also qualify.⁷ The range of actions constituting discrimination may be further fleshed out in consultation with farmers and seasoned advocates and these suggestions are provided as a non-exhaustive, illustrative list of qualifying events. There should be no requirement that a farmer previously filed a discrimination complaint with USDA in order to obtain relief.

Additionally, to strengthen the program and support findings of discrimination, USDA should consider publishing a statement that unequivocally admits to a pervasive history and culture of discrimination in its lending programs. As has been repeatedly acknowledged by multiple

³ *Non-Discrimination Statement*, U.S. DEP’T AGRIC., <https://www.usda.gov/non-discrimination-statement> (last visited Nov. 12, 2022).

⁴ See *Pigford v. Glickman*, 206 F.3d 1212 (D.C. Cir. 2000); *Pigford v. Vilsack*, 613 F. Supp. 2d 78 (D.C. Dist. 2009); *Garcia v. Vilsack*, 563 F.3d 519 (D.C. Cir. 2009); *Love v. Johanns*, 439 F. 3d 723 (D.C. Cir. 2006); *Keepseagle v. Glickman*, 194 F.R.D. 1 (D.C. Dist. 2000). See also Stephen Carpenter, *The USDA Discrimination Cases: Pigford, in re Black Farmers, Keepseagle, Garcia, and Love*, 17 DRAKE J. AGRIC. L. 1 (2012).

⁵ Equal Credit Opportunity Act, 15 U.S.C. § 1691. See also Sarah L. Brinton, *Toward Adequacy*, N.Y.U. ANN. SURV. AM. L. 357. 378 (2013).

⁶ Carpenter, *supra* note 4. See also STEPHEN CARPENTER & LINDSAY KUEHN, FARMERS’ LEGAL ACTION GROUP, FARMERS’ GUIDE TO THE INFLATION REDUCTION ACT OF 2022 8 (2022), <http://www.flaginc.org/wp-content/uploads/2022/09/Farmers-Guide-to-Inflation-Reduction-Act-2022-IRA-September-15-2022-1.pdf>.

⁷ See Roxana Hegeman & Allen G. Breed, *Black US farmers awaiting billions in promised debt relief*, ASSOCIATED PRESS (Sept. 1, 2021), <https://apnews.com/article/Battle-for-Black-Farms-e1034c6701f55a3a5362447e0354c4cd>.



Presidents⁸ and Members of Congress,⁹ as well as USDA itself,¹⁰ Black farmers lost 90% of their farmland¹¹ in the 20th century due to discrimination in the administration of federal farm loan programs.¹² Native American, Hispanic, Asian American, and women farmers have similarly lost land and opportunities because of discrimination at USDA. USDA should acknowledge these patterns and practices in its lending programs in as much detail as possible, with estimates quantifying the economic harm where feasible. For instance, USDA should acknowledge that its discriminatory practices contributed to the loss at least \$326 billion in lost wealth and income of Black farmers.¹³ USDA should work with economists to similarly calculate losses experienced by all farmers of color between the 1930s (the beginning of USDA farm lending) and the present. Such analysis might also be conducted across all protected classes of individuals, depending on the data available. Quantifying specific harms—though not necessary to administer the program and provide assistance—will support USDA’s implementation of the program and the findings in individual cases of discrimination. And, while Section 22007 assistance will not be limited to those experiencing racial or ethnic discrimination, this proposed admission of wrongdoing and quantification of harm could advance the trust building that USDA and Congress have sought to achieve as a step in mitigating the pervasive harm caused by the federal government and put to rest any arguments that relief is not warranted. If pursued, however, this statement of admission and detailing of harms should not delay administration of the program.

⁸ See, e.g., CNN, *Black farmers, U.S. government settle discrimination suit* (Jan. 5, 1999), <http://www.cnn.com/US/9901/05/black.farmers/index.html> (Clinton administration); Tom Vilsack, *Turning the Page on Discrimination at USDA*, U.S. Dep’t Agric. (Feb. 21, 2017), <https://www.usda.gov/media/blog/2010/11/30/turning-page-discrimination-usda> (Obama administration); Ximena Bustillo, ‘*Rampant issues*’: *Black farmers are still left out at USDA*, POLITICO (Jul. 5, 2021), <https://www.politico.com/news/2021/07/05/black-farmers-left-out-usda-497876> (Biden administration).

⁹ See, e.g., *Hearing to Review the State of Black Farmers in the U.S. Before the Comm. on Agric., 117th Cong.* (2021), <https://www.congress.gov/event/117th-congress/house-event/LC67546/text?s=1&r=13>.

¹⁰ See, e.g., CNN, *Black farmers, U.S. government settle discrimination suit* (Jan. 5, 1999), <http://www.cnn.com/US/9901/05/black.farmers/index.html>; <https://www.usda.gov/media/blog/2010/11/30/turning-page-discrimination-usda>; Thomas J. Vilsack, Secretary, U.S. Dep’t Agric., *Opening Statement of Thomas J. Vilsack Before the House Comm. on Agric.—Remarks as Prepared* (Mar. 25, 2021), <https://www.usda.gov/media/press-releases/2021/03/25/opening-statement-thomas-j-vilsack-house-committee-agriculture>.

¹¹ Leah Douglas, *U.S. Black farmers lost \$326 bln worth of land in 20th century—study*, REUTERS (May 2, 2022), <https://www.reuters.com/world/us/us-black-farmers-lost-326-bln-worth-land-20th-century-study-2022-05-02/>.

¹² ALYSSA R. CASEY, CONG. RSCH. SERV., R46969, RACIAL EQUITY IN U.S. FARMING: BACKGROUND IN BRIEF (2021) <https://crsreports.congress.gov/product/pdf/R/R46969>; CONG. RSCH. SERV., RS20430, THE PIGFORD CASES: USDA SETTLEMENT OF DISCRIMINATION SUITS BY BLACK FARMERS (2013) <https://www.everycrsreport.com/reports/RS20430.html>.

¹³ Dania Francis, et. al., *How the Government Helped White Americans Steal Black Farmland*, NEW REPUBLIC (May 5, 2022), <https://newrepublic.com/article/166276/black-farm-land-lost-20th-century-billions>.



II. STREAMLINING THE APPLICATION PROCESS

A. *Minimize documentation requirements*

Despite the well-documented history of discrimination in USDA lending programs, many individual producers and landowners lack documentation of their experiences attempting to obtain credit. Despite requirements to do so, USDA has not consistently maintained farm lending records and has likely disposed of older records not subject to a litigation freeze.¹⁴ Furthermore, many instances of discrimination will lack documentation, as they may be based on an interaction prior to commencement of any paperwork. Multiple studies have shown that FSA officers did in fact discourage farmers of color from applying for loans or assistance.¹⁵ Wrongdoing should not go unremedied due to a lack of documentation that in many cases is due to USDA's failure to maintain records or provide adequate services.

Given these deficiencies, a sworn affidavit with the requisite specificity should suffice as evidence of discrimination. The affidavit could be required to specify the loan sought, including the amount requested, purpose for the loan, and approximate date of application; the location and description of the person or office from which the loan was sought; details of the interaction; facts concerning the impact of the discriminatory action, including any calculations or estimates the individual already has made about their economic losses due to the discrimination; facts establishing that the individual seeking assistance was a farmer or was attempting to farm at the time of application; and facts establishing that the individual seeking assistance is a member of a protected class. In some cases, farmers will be able to provide documentation relating to the rejection or discriminatory administration of USDA loans, which may be accepted in addition to a sworn affidavit but should not be required. Additionally, for each claim filed, USDA should be required to review its own records to determine if the Department has any documentation to support the individual's claim.

B. *Conduct affirmative outreach*

In 2021, over 14,000 farmers of color received letters promising debt relief under the American Rescue Plan Act Section 1005.¹⁶ The debt relief program was subsequently enjoined and then

¹⁴ See U.S. DEP'T AGRIC., FARM SERV. AGENCY, NOTICE AS-2328, LIFTING THE GENERAL RECORDS FREEZE AND DISPOSAL OF FARM LOAN PROGRAM (FLP) RECORDS (2020), https://www.fsa.usda.gov/Internet/FSA_Notice/as_2328.pdf.

¹⁵ CASEY, *supra* note 12.

¹⁶ Leah Douglas & Christopher Walljasper, *Biden farm debt relief plan to exclude thousands of minority farmers*, REUTERS (Dec. 17, 2021), <https://www.reuters.com/markets/us/biden-farm-debt-relief-plan-exclude-thousands-minority-farmers-data-shows-2021-12-17/>; H.R. 1319, 117th Cong. (2021).



repealed.¹⁷ The 2021 letters generated significant reliance interests among farmers who, expecting debt relief, commenced with additional borrowing or purchased land and equipment.¹⁸ In many cases, this broken promise compounded the harm caused by other experiences of discrimination in USDA lending programs. To mitigate this particularly acute harm, USDA should conduct affirmative outreach to letter recipients and prioritize both assistance to complete their applications and review of same, as part of administering the Section 22007 program. USDA should require third-party administrators to carry out this mandate to the extent they are delegated outreach, assistance, and processing responsibilities. Farmers who faced discrimination are understandably frustrated and harmed by repeated but unkept promises of financial assistance.

USDA could also go further and conduct affirmative outreach to borrowers who belong to a protected class where certain red flags arise. For instance, there may be a county or census tract where members of a protected class received loans (in a given time period) at a disproportionate rate compared to other (non-protected) farmers. Such circumstances at least give rise to a suspicion of discrimination and warrant affirmative action to inform farmers of the program.

III. DETERMINING COMPENSATION

A. Types of Assistance

USDA should seek to grant applicants financial assistance that reflects the economic harm that occurred as a consequence of USDA's discrimination (but see Part III.C below). Although monetary awards should be the preference, the money appropriated for the program may not be sufficient to cover all claims. USDA should therefore leverage alternative means of redress while minimizing any potential negative ramifications that such alternatives may carry. Ideally, alternative relief would be awarded on an opt-in basis. Alternatives can include: loan modification and refinancing, debt forgiveness, and interest forgiveness. Regardless of the claimant's chosen form of assistance, USDA should work to minimize any affiliated tax burden (e.g., by awarding an additional amount to cover the taxes)¹⁹ or restrictions on future borrowing.

¹⁷ See, *Wynn v. Vilsack*, 545 F. Supp. 3d 1271, 1279 (M.D. Fla. 2021) (holding that USDA did not adequately prove that past remedial measures were insufficient such that debt relief under § 1005 could survive strict scrutiny); H.R. 5376, 117th Cong. (2022).

¹⁸ See, e.g., Ellyn Ferguson, *Civil rights lawyer Crump sues U.S. over repealed aid to Black farmers*, ROLL CALL (Oct. 12, 2022), <https://rollcall.com/2022/10/12/civil-rights-lawyer-crump-sues-us-over-repealed-aid-to-black-farmers/> (detailing the reliance interests of several farmers who are clients in a pending Federal Claims action).

¹⁹ See *Hearing to Review the State of Black Farmers in the U.S. Before the Comm. on Agric., 117th Cong.* (2021), <https://www.congress.gov/event/117th-congress/house-event/LC67546/text?s=1&r=13>; W. EXTENSION RISK MGMT.



B. Considering “recency”

The effects of discrimination in farm lending compound over time and inhibit the ability of the farmer, and their family, to build generational wealth. Therefore, rather than limiting assistance to those with recent experiences, USDA should keep the claims process open for those with discrimination claims that originate further back in time.

During the September 22, 2022, USDA Equity Commission public meeting, Commission Economist Ron Rainey discussed the compounding effects of discrimination within USDA.²⁰ Dr. Rainey explained that when a farmer experiences discrimination, they are met with barriers to accessing markets and resources which results in generations of marginalized farmers working to play “catch-up.”²¹ As a result, farmers experience decreased productivity, heightened vulnerability to disasters, and land loss.

For example, during the modernization of agriculture during the mid to late 1900s, the ability for a farmer to remain competitive within the market was contingent upon their ability to receive a loan for machinery and other equipment. Discrimination in lending thereby reduced a farmer’s market competitiveness and ability to turn a profit to reinvest in operations.²² Some marginalized farmers managed to continue farming, but many went bankrupt, as evidenced by the precipitous drop in Black farm ownership between 1920 and today.²³ As a result, many Black families were deprived of the opportunity to build and benefit from generational wealth. The ramifications of this discrimination and disinvestment continue in the present, with organizations like the National Black Growers Council explaining that they “find [themselves] in an *ongoing* struggle with inferior infrastructure and being undercapitalized in a very capital-intensive profession.”²⁴

EDUC., WASH. STATE U., *KEEPSEAGLE SETTLEMENT TAX ISSUES* (2017),

<https://s3.wp.wsu.edu/uploads/sites/2162/2017/03/Keepseagle-Tax-Issues-Hipp-PPT1.pdf>.

²⁰ U.S. Dep’t Agric., *Equity Commission Third Public Meeting - Day 2*, YOUTUBE (Sep. 2022), <https://www.youtube.com/watch?v=0jHyx3vTEsk>.

²¹ *Id.*

²² *Id.* See also U.S. DEP’T OF AGRIC., *A TIME TO CHOOSE: SUMMARY REPORT ON THE STRUCTURE OF AGRICULTURE* 117–18 (1981), https://static.ewg.org/reports/2021/BlackFarmerDiscriminationTimeline/1981_A_Time_to_Choose.pdf?_ga=2.240810692.691365680.1668037978-1751189336.1668037978.

²³ U.S. Dep’t Agric., *Equity Commission Third Public Meeting - Day 2*, *supra* note 20. See also CASEY, *supra* note 12.

²⁴ NAT’L BLACK GROWERS COUNCIL, *NBGC RESPONSE TO RACISM AND RALLIES* (Jun. 7, 2020), <https://nationalblackgrowerscouncil.com/nbgc-coronavirus-update-2/> (*emphasis added*).



USDA can use Section 22007 to help address these impacts by considering the full scope of economic harm attributable to discriminatory action and by establishing an interest rate, compounded annually, to be included in determining the financial assistance award.²⁵ As those who experienced discrimination may be deceased, their descendants should be eligible to seek financial assistance through an estate claim. Such relief is appropriate given the intergenerational effects of discrimination, noted above.

USDA will likely need to authorize estate claims expressly. While allowing estate claims will add complexities to the determination process, the problems, as the Farmers' Legal Action Group notes, "are not insurmountable."²⁶ Like general claims under Section 22007, estate claims could be administered by a third-party entity tasked with developing the criteria for receipt of payment and calculating payment amounts. USDA guidance to third-party entities should include instructions on assisting descendants in establishing their claim to an estate and evidence of sufficient reliability that shows that discrimination took place (since a first-person account via sworn affidavit will be unlikely to exist).

C. Assistance amounts and the role of past claims

While ideally everyone who has experienced discrimination will receive assistance, there may not be sufficient funds. USDA could approach this challenge in various ways. Under one approach, USDA could establish a base amount of assistance for all applicants who successfully demonstrate that they experienced discrimination, to be paid to claimants immediately following the discrimination determination. Third-party entities would then also make a finding as to the economic harm suffered as a result of the discrimination. Once all applications are processed, remaining funds could be distributed to those successful applicants proportionate to the economic harm suffered relative to the entire pool of applicants. Those who have received compensation for a discrimination claim previously would be eligible for assistance, but their award should be reduced by the amount previously received to ensure that the funds reach as many applicants as possible. USDA should also advocate for and work with Congress to appropriate additional funds for the programs if claims exceed the current funds.

²⁵ For instance, in backpay awards under Title VII, some courts have determined that claimants are entitled to interest on the backpay owed because simply awarding backpay without interest would "fall short of making the claimant whole." *See Davis v. Kansas City Housing Authority*, 822 F.Supp. 609, 617 (W.D. Mo. 1993). *See also* Donald T. Kramer, Annotation, *Allowance and Rates of Interest on Backpay Award Under Title VII of Civil Rights Act of 1964 (42 U.S.C.A. §§ 2000e et seq.)*, 138 A.L.R. Fed. 1 (1997).

²⁶ STEPHEN CARPENTER & LINDSAY KUEHN, FARMERS' LEGAL ACTION GROUP, FARMERS' GUIDE TO THE INFLATION REDUCTION ACT OF 2022 10 (2022), <http://www.flaginc.org/wp-content/uploads/2022/09/Farmers-Guide-to-Inflation-Reduction-Act-2022-IRA-September-15-2022-1.pdf>.



IV. THE ROLE OF THIRD-PARTY ENTITIES

The third-party entities selected to administer the program pursuant to Section 22007 should have experience in agriculture and at least five years of experience working with farmers of color.²⁷ Although the program will be open to claims other than those premised on racial or ethnic discrimination, siting claims administration with such trusted organizations in the agricultural community will be important for engendering confidence in the program. These entities should then be required to assemble teams with the necessary expertise to steer the claims process, including a lawyer or similar practitioner with civil rights expertise and an economist or accountant with expertise in projecting the economic value of wrongdoing.

Third-party entities should be tasked with making a determination as to whether discrimination occurred and the amount to award in financial assistance, with guidance from USDA developed in consultation with advocates with experience working with farmers and handling or supporting claims of discriminatory farm lending. Third-party entities should consider the affidavit and any supporting documents the claimant provides to make these determinations. These entities should be further empowered to contract with appraisers or other external agents to assess the appropriate award. Decisions should be made based on evidence and arguments submitted by the claimant; USDA should not dispute, and should not be given the opportunity to dispute, the claim or award in any proceedings. Applications denied due to missing data or technical errors should be eligible for refiling and reconsideration upon correction of the cited errors.

Though the statute requires third-party entities to be given wide latitude in making initial determinations of eligibility and financial assistance, there should also be an appeals process where adverse decisions may be reconsidered. It is useful to compare the *Pigford I* claims process, in which claimants could petition the Office of the Monitor for review of merits decisions, to the claims processes of *Pigford II*, *Keepseagle*, *Love*, and *Garcia*, which did not have an appeals process.²⁸ The review process in *Pigford I* led to reexamination of more than half of the underlying claims, with nearly half of claims previously denied being approved or receiving an award increase.²⁹ An appeals process can thus ensure that applicants with meritorious claims of discrimination receive assistance and will further accountability and program access, helping to fulfill Section 22007's promise to "provide[] a transformative opportunity for USDA to help

²⁷ Requirements enacted for administering the Heirs' Property Relending Program provide a useful example. 7 C.F.R. pt. 769 (2022). 7 U.S.C. § 1936c(b).

²⁸ See OFF. OF THE MONITOR, <https://media.dcd.uscourts.gov/pigfordmonitor/>; Carpenter, *supra* note 4, at 26–34.

²⁹ GOV. ACCOUNTABILITY OFF., GAO-06-469R, PIGFORD SETTLEMENT: THE ROLE OF THE COURT-APPOINTED MONITOR 4 (2006), <https://www.gao.gov/assets/gao-06-469r.pdf>.



farmers, ranchers, and forest landowners impacted by discrimination in USDA farm lending programs.”³⁰

Upon denial of their application, applicants should have no less than 30 days to file an appeal. Appeals may be administered by an office or body established with input from the Equity Commission. Applicants should have the opportunity to present new or additional evidence in support of their discrimination claim, but the existence of new evidence should not be required to initiate an appeal.

V. NEXT STEPS

As mentioned at the beginning of this comment, FBLE recently published recommendations for the 2023 Farm Bill in a report entitled *Equity in Agricultural Production & Governance*.³¹ The report identifies opportunities to address past discrimination in the upcoming farm bill, but also identifies administrative actions that may be taken without additional authorization from Congress. USDA should refer to this report as it considers additional ways to support marginalized producers like those filing claims under Section 22007. We would be happy to discuss the substance of this comment, next steps, or the recommendations in our report in order to support USDA’s equity goals.

Sincerely,

Farm Bill Law Enterprise³²
farmbilllaw.org

³⁰ *USDA Seeking Public Comment on a New Provision to Provide Assistance to Agricultural Producers Who Have Experienced Discrimination*, U.S. DEP’T OF AGRIC. (Oct. 13, 2022), <https://www.usda.gov/media/press-releases/2022/10/13/usda-seeking-public-comment-new-provision-provide-assistance>.

³¹ FARM BILL L. ENTER., *EQUITY IN AGRICULTURAL PRODUCTION & GOVERNANCE* (2022) 4, 24, 51, <https://www.farmbilllaw.org/wp-content/uploads/2022/10/Equity-Report.pdf>.

³² Contacts for purposes of this comment: Emma Scott, escott@law.harvard.edu; Fran Miller, fmiller@vermontlaw.edu.