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Elizabeth Archuleta
Director
Office of Intergovernmental & External Affairs
U.S. Department of Agriculture
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Rural Advancement Foundation International - USA (RAFI-USA) is a nonprofit organization that challenges the root causes of unjust food systems, supporting and advocating for economically, racially, and ecologically just farm communities. We envision a thriving, sustainable, and equitable food system: where farmers and farmworkers have dignity and agency; where they are supported by just agricultural policies; and where corporations and institutions are accountable to their community.

We work directly with farmers: we help farmers find markets, advocate for and with farmers who are experiencing financial crisis, convene a Farmers of Color Network, work with farmers markets and rural faith communities to increase food access, provide infrastructure and emergency grants to farmers, and help coordinate a seed breeding cooperative. We draw on our decades of experience helping farmers to navigate financial crisis and to get access to credit and good loan servicing through FSA loan programs, for this comment. We thank USDA for the opportunity to comment on the implementation of Section 22007 of the Inflation Reduction Act of 2022.

We respond to the individual questions posed by USDA below, but feel it is important to first recognize the following broader points:

When Congress repealed Section 1005 of the American Rescue Plan Act (ARPA), and replaced it with Section 22007 of the Inflation Reduction Act, they replaced a systemic response to a systemic problem (decades of racial discrimination in USDA farm lending), with a case-by-case response to a systemic problem. As Dãnia Davy, Director of Land Retention & Advocacy at the Federation of Southern Cooperatives, stated in response,

> "... *the apparent discrimination claims process shifts the burden of addressing racial discrimination from institution to individual and after what we learned from the Pigford, Keepseagle and Garcia settlement processes, we are deeply concerned about the difficulties Black farmers will face in accessing these resources."*

We, too, are deeply concerned about the difficulties Black farmers, and other farmers of color, will face. We recognize that the legislative decision was made in response to lawsuits that threatened the payments promised in the American Rescue Plan Act, however we have grave concerns about the ability of a case-by-case process to deliver justice.

One reality feeding that concern is that we believe that the funds appropriated by Congress will not be anywhere close to sufficient. Approximately 17,000 FSA borrowers received letters about ARPA debt relief. That group of farmers consists of direct and guaranteed borrowers with FSA who are also farmers of color. However, that number does not include farmers who never became borrowers with FSA because of discriminatory treatment, nor does it include borrowers who may have experienced discrimination for reasons other than race/ethnicity (like gender, sexual orientation, etc). However, for illustration's sake, if the existing funding - $2.2 billion - were split evenly among those 17,000 ARPA letter recipients, each would receive $129,412. Given the scale of many farming operations and the worth of their assets, and the compounding impacts over time of lost opportunity or lost land, we believe many farmers will have a basis for much higher payments, certainly up to the $500,000 cap. There is enough funding in this appropriation for 4,400 farmers to receive $500,000 payments. While we do not expect that every single farmer will have experienced an impact as high as $500,000, it seems clear that the amount of funds appropriated will not be sufficient, and this will mean that rather than eligibility and payment guidelines that deliver complete justice to everyone affected, this program will be implemented in an environment of scarcity, where hard compromises must pick and choose who is prioritized.

There is also an unfortunate zero-sum tension between implementing the program quickly, and implementing it well. Claims processes set up from the previous discrimination lawsuits suffered because of the transitions between Presidential administrations; taking that into account, it makes sense to attempt to fully implement this program in the current administration. However, setting up a process, from USDA guidance through the third party/parties who will implement it, will take time. Sufficient outreach — that gets to all the farmers who have a right to know about the opportunity — will take time. The more rushed the process is, the more farmers who will be missed or ill-served because of clerical errors, insufficient outreach, or not enough time for the farmers themselves to participate. While acknowledging this tension, we encourage USDA to devote the energy and staff time needed to get the process set up, and the third party entities selected and started in their work, whereby farmers can receive payments no later than the end of 2024.

How should USDA identify those who have experienced discrimination under the USDA farm loan programs?

The way USDA defines "those who have experienced discrimination" will be determinative of the program's success in delivering justice.

"Socially disadvantaged farmer or rancher" is defined in statute as *"a farmer or rancher who is a member of a socially disadvantaged group" where, depending on the program, a socially disadvantaged group means "a group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities"* (7 U.S.C. §2279(a)(6). We call attention to this definition because we believe it will be important, as USDA defines discrimination for the purposes of this program, to take into account the larger systems of discrimination that have, for hundreds of years, advantaged some groups and disadvantaged others. To be specific: while individual prejudice can take many forms, and we certainly have assisted many white farmers who have unfairly received poor treatment from USDA, claims of "reverse racism" should not be considered under this program because white farmers have not, as a group, been subjected to prejudice because of their whiteness - the data shows the opposite, in fact.

In our casework over the years, we have seen discrimination occur in many different ways. An agent may fail to tell a farmer about all the programs or options available to them, or simply can discourage a farmer from submitting a loan application by requiring an unreasonable and risky amount of assets as collateral. An agent can make changes on a farmer's application which keeps it from cash flowing, without informing them fully about those changes and without allowing the farmer to justify why they put the numbers they did. An agent can delay an application past the point where the farmer can have a successful season. An agent can make loan servicing decisions that seek to dispossess a farmer from their land instead of seeking to preserve the farm. We have also seen multiple cases where it seemed that the loan officer was trying to dispossess a farmer in favor of someone else they knew who wanted the land. This is a non-exhaustive list; and all of the conduct described above (and more) has hurt farmers, and should be considered as methods of potential discrimination.

Also, farmers who have submitted a civil rights complaint to the Office of the Assistant Secretary for Civil Rights (OASCR) should still be eligible for payments, regardless of whether or not the Office of Adjudication found that discrimination was present. We have assisted multiple farmers through the process of making a discrimination complaint to OASCR. We find the agency's orientation is to find defenses and rationales for USDA staff conduct, and the process (complaint > investigation > adjudication) does not allow the farmer to participate fully in the process or appeal decisions. It is not a process or agency where many farmers have found justice.

What kind of documentation or evidence should be submitted in support of a determination of discrimination?

The easiest way for agency staff to discriminate against a farmer in an FSA loan program is to either discourage them from applying, or to fail to provide information about all their options in the first place. Given the extremely poor implementation of the statutorily required receipt-for-service - including the agency's de facto position that they do not need to provide one unless a farmer asks for it - there is often no written record of this kind of interaction. And yet the impact of that differential and poor service has been felt throughout generations of farm families. Placing the onus on the farmer to provide evidence that never existed, of poor treatment by the agency which harmed them, would be to inflict additional harm. The only way to provide justice for those farmers is to accept a signed affidavit from the farmer with the particulars of their experience, and allow them to self-certify as to its accuracy. Supporting witness documents/affidavits should be encouraged but NOT mandatory since there may not be additional witnesses in every case.

Furthermore, for cases where a farmer does have records on file with FSA, we caution against a total reliance on analysis of those records: it simply is not practical. For example: one of our current cases is assisting a beginning farmer to get a loan approved with FSA. We have been working with this farmer for only part of 2022 - not even a full year - and it is their first time interacting with the agency. Their record is currently 478 pages long. Farmers who have interacted with FSA for a longer time can have records that are even longer. Imagining a process in which the implementing organization has staff - and the staff with the expertise - sufficient to analyze that magnitude of documents for all of the tens of thousands of farmers who are likely to apply, is wishful thinking.

The constant refrain in federal program oversight is to ensure that applicants to programs do not receive funds where they are not supposed to. While this principle obviously has merit, it has far outweighed the opposite principle with equal merit: ensuring that applicants to programs DO receive funds where they ARE supposed to. It is usually not possible to achieve both of these principles simultaneously 100% of the time: implementation is too messy, and there are too many gray areas and judgment calls, to write a perfect guideline. In the case of FSA, the theme we hear frequently from farmers is “it seemed like they were looking for reasons to deny my application, not ways to help me or figure out how to make it work.” We believe the time is past due to restore a better balance between these principles, and in this case, USDA should err on the side of ensuring that farmers who DO deserve recompense for experiencing discrimination, DO receive it - rather than focusing on a process that excludes anyone with less than perfect proof. Both the weight of past agency orientation in this respect, and the documentation-sparse nature of the discrimination experienced, demand this approach.

Furthermore, the process needs to be simple enough to be navigable by a farmer without them needing the help of an advocate or attorney to be successful. There are not enough farmer advocates to serve all the farmers who would need help in this process, and not every farmer can afford an attorney. Equitable access to the process and these funds, requires simplicity. There should be no cost for preparing an application, and that must be very clear to all potential farmer applicants up front.

Should USDA attempt to estimate only economic losses or also non-economic losses of those who have suffered discrimination in USDA farm loan programs when calculating the amount of financial assistance provided?

USDA should attempt to estimate non-economic losses as well as economic losses, and there are a number of factors that should be considered when estimating the amount of the loss. Lost opportunities should be included. Depreciation of assets should be considered, and estimates of loss in years past should be adjusted for inflation since then. If a farmer could not get equipment in the past for lack of credit from FSA, it will cost them a lot more now to get back into farming and get that equipment at today's price.

Alternatively, should USDA apply a fixed, uniform formula for calculating the amount of financial assistance provided? In any case, how should that calculation be done?

There are many potential ways to approach this question. We think that a two-track system could be a workable solution, whereby the first track is the simplest, with the least documentation required, and results in a set payment amount; and the second track could receive higher payments with some additional calculation in order to estimate the amount of the payment. The payment for the first track should be at *least* the equivalent of the Pigford Track One payments, adjusted for inflation (which should be over $80,000, depending on the years of calculation). **However,** this is a solution we only put forth under the condition that the second track does not require the same level of documentation and burden of proof as the Pigford process did. That process was too onerous. This one must be more accessible.

Should previous payments received for past claims of discrimination be considered in determining financial assistance available under section 22007?

Yes, previous payments received should be taken into account. We want to acknowledge that for many farmers who received payments from a previous legal settlement, those payments did not come close to redressing the financial harm they experienced. However, as we noted above, unfortunately we do not believe that sufficient funds have been appropriated to deliver justice to everyone who deserves it in this process. That being the case, the goal should be to distribute payments among those who deserve them as fairly as possible.

We suggest that farmers who have never received any discrimination-based benefit receive first priority for payments, followed by those who have received a benefit from one of the legal settlements against USDA or an OASCR discrimination complaint decision. For those who have received a benefit, that amount can be deducted from the amount they would otherwise receive in this program, unless the instance of discrimination in question is new and different.

Debt relief payments provided under Section 22006 of the Inflation Reduction Act should not be considered, because they are not based on having experienced discrimination.

Are there forms of non-monetary equitable relief that can be used in conjunction with the financial assistance provided under section 22007 for those who have experienced discrimination and who continue to farm or continue to participate in USDA farm loan programs?

We believe that, given the insufficiency of funds available, non-monetary equitable relief will be a crucial tool in helping make things right for farmers who should receive payments (though they should not be used in lieu of payments). We suggest the following measures:

- Eliminate the 7-year graduation requirement for operating loans for the farmer.
- If the farmer has received a write-down in the past, restore their eligibility to participate in FSA loan programs.
- When the farmer's eligibility for a loan application is being considered, farming experience more than 5 years in the past should still count towards fulfilling the "managerial ability" requirement, <u>without needing to supplement that experience with other activities</u>. Especially in cases where the farmer stopped farming due to lack of access to credit at FSA, this provision is currently an especially cruel way to prevent farmers who have experienced discrimination from accessing future credit.
- FSA agents should not be allowed to consider the farmer's credit history as a reason to deny a loan application.

We have heard stories from farmers of color - some of whom did not even receive ARPA letters - who had people in their farming community make comments or statements about how now that they were going to get debt relief (from ARPA), they would not be needing any more help. This stands on its own as a reason for concern. However, as discrimination payments are made, FSA should anticipate similar pushback and retaliation on a local level, for farmers who receive payments - or who people might assume would receive payments - and ensure that absolutely none of that retaliation is coming from local agency staff.

One recompense that is due to farmers who have experienced discrimination is better oversight for FSA agents. Individual staff reviews should include:

  - Applications' time to funding broken down by race/ethnicity and gender
  - Number of discrimination complaints filed
  - Withdrawn adverse decisions.

This data should be tracked at the state, county, and national level, and made available to the public as a transparency measure and a way to track progress. Information included in staff reviews should not create an incentive structure which motivates staff to unnecessarily deny applications. The values of investing federal funds wisely, and providing good service to all farmers, must be balanced in the staff review process.

What criteria should USDA use in the selection of the third-party entity (or entities)?

The entity/entities selected should have competence and experience in the following areas:

- Experience working with farmers, sufficient to be knowledgeable about what harm (economic and non-economic) would have been done by various agency conduct. Those running the program need to understand the investment and capital required for farming, and how much equity is at stake for farmers.
- Cultural competency for all racial/ethnic groups eligible for payments, and an understanding of what kinds of discrimination those groups have experienced.
- Ability to provide assistance to farmers who don't speak English, in their own language.

We think it likely that multiple groups may need to be selected to ensure that all the criteria above are covered, and that farmers can identify at least one group they are comfortable working with. We believe that the Farmers Legal Action Group is one such group that has the relevant experience and skills.

What guidance should USDA provide to the selected entity (or entities)?

If multiple entities are selected, the same set of criteria for eligibility and payments should be used by all the entities.

There should be an appeals process and some type of monitor or ombudsman. The number of adverse decisions in the Pigford settlement that were ultimately overturned by the Monitor's Office indicates that sometimes justice is not delivered on the first decision.

USDA should also leverage its funding for cooperative agreements to support organizations (beyond the third party entity/entities selected) who will help conduct outreach to ensure that all farmers who are eligible for these payments hear about them, in plenty of time to apply. Those organizations must have significant history working with socially disadvantaged farmers. Organizations with relationships in regions with histories of discrimination and being underserved should be prioritized, for example: regions that produce the most discrimination complaints, or areas where FSA data indicates large numbers of declined loan applications, especially from farmers of color. USDA must provide full transparency and public reporting on how outreach activities have been conducted and where.

How should USDA use programs, funding, financial support, and other authorities, in conjunction with section 22007 financial assistance, to provide support for those who have experienced discrimination under the USDA farm loan programs?

As noted above, given the insufficiency of funds available, USDA should look at all options to provide additional support for farmers who have experienced discrimination in USDA farm loan programs. We suggest, at least, the following:

- Give farmers priority consideration for NRCS funding pools by adding points to their applications.
- Give farmers priority consideration for Value-Added Producer Grant funds by adding points to their applications.
- When applying for NAP insurance, count them as beginning farmers so that their fees are waived and the only thing they would need to pay would be buy-up fees.
- If those farmers apply for Whole Farm Revenue Protection insurance:
    - Allow them to take additional years of production history out of consideration or
    - Require fewer years of production history.

We thank you for your opportunity to comment, and for your work implementing a program that we hope will deliver the greatest justice possible to those who have experienced discrimination from FSA loan programs.

Sincerely,

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