

## **USDA Civil Rights Developments and the Inflation Reduction Act**

**November 16, 2022**

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**National Agricultural Law Center**

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### **I. Introduction**

The webinar provides a short summary of civil rights developments in United States Department of Agriculture (USDA) Farm Loan Programs. It looks briefly at the history of civil rights at USDA, the series of lawsuits that alleged discrimination at USDA, provisions of the American Rescue Plan Act (ARPA) that addressed civil rights, the litigation following enactment of ARPA, the passing of The Inflation Reduction Act (IRA), the Farm Loan Program provisions in IRA that affect FSA borrowers, and the IRA program to provide payments to farmers that can show they were subjected to discrimination by USDA.

#### **A. Diversity In Farming**

Although it is widely assumed that farmers in the United States are white men, in reality, farmers often have been and still are not white, and a substantial portion of farmers are women.

#### **B. The People's Department in an Age of Inequality**

It goes without saying that a department created in 1863 operated and thrived in an environment of discrimination. New Deal programs, which sought to protect farms with a dispersed system of county office and locally elected county committees continued this discrimination into an era in which that discrimination was illegal. This discrimination was repeatedly documented at the time and was generally obvious to any that were willing to notice it.

#### **C. USDA Farm Loan Programs**

By the 1980s USDA programs provided substantial loans to family farms. Lending, the lifeblood of almost every successful farm, increasingly involved USDA as it made and guaranteed farms loans that were used for both operating money, equipment and livestock, and real estate. As the farm economy struggled, the Department tended not to respect procedural rights of borrowers, and in particular, tended to discriminate on the basis of race, ethnic, and gender in the loan programs.

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## **II. USDA Discrimination Cases**

Beginning in the late 1990s a series of cases alleged that USDA, in its farm lending programs, discriminated on the basis of race, ethnicity, and gender. Three of these cases, two on behalf of Black farmers, and one on behalf of Native American farmers, were certified as class actions and settled. Two other cases, one filed on behalf of women, and one on behalf of Hispanics, resulted in a USDA claims process.

In each of these instances, farmers filed claims that received individual determinations. While these processes varied, a consistent aspect of each is a cash award to prevailing claimants of fifty thousand dollars in cash and a payment on behalf of the claimant to the Internal Revenue Service. Very roughly nearly thirty thousand claimants succeeded with their claims and received well more than two billion dollars.

Two other aspects of these cases are notable and not widely recognized. First, they all hinged on USDA's failure to operate a coherent and effective discrimination claims process. Second, these cases did not require changes in USDA procedures or other changes in loan programs. They relied almost entirely on monetary payments.

## **III. 2020's and the American Rescue Plan Act (ARPA)**

In the Biden Administration USDA officials emphasized that there would be a significant improvement in civil rights at USDA.

### **A. ARPA Basics**

The American Rescue Plan Act of 2021 (ARPA) became law on March 11, 2021.<sup>2</sup> Section 1005 of ARPA provided financial assistance to what the Act calls Socially Disadvantaged (SDA) farmers and ranchers. ARPA does so by making payments to and for Farm Service Agency (FSA) borrowers.

### **B. Socially Disadvantaged Farmers and Ranchers**

Section 1005 of ARPA defines a socially disadvantaged farmer or rancher as a farmer or rancher that is a member of a socially disadvantaged group.<sup>3</sup> A socially disadvantaged group is a group whose members have been "subjected to racial or ethnic prejudice because of their identity as member of a group without regard to their individual qualities."<sup>4</sup>

USDA that socially disadvantaged borrowers, for the purpose of ARPA include, "but are not limited to" Blacks or African Americans, American Indians or Alaskan Natives, Asians, Native Hawaiians or other Pacific Islanders, and Hispanics or Latinos.<sup>5</sup>

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<sup>2</sup> The American Rescue Plan Act of 2021, Pub. L. 117-2 (March 11, 2021) (ARPA).

<sup>3</sup> ARPA, section 1005(b)(3). This section says that the definition follows that found in 7 U.S.C. § 2279(a), which in turn traces its definition back to congressional action in 1994. See the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Pub. L. 103-354, 108 Stat. 3178 (October 12, 1994).

<sup>4</sup> 7 U.S.C. § 2279(a)(6).

<sup>5</sup> USDA, Farm Service Agency, Notice of Funds Availability: American Rescue Plan Act of 2021 Section 1005 Loan Payment (ARPA), 86 Fed. Reg. 28,329, 28,330 (May 26, 2021).

USDA has also said that it will decide on a case-by-case basis whether other groups should qualify as socially disadvantaged for the purposes of ARPA. USDA will also decide on a case-by-case basis whether additional groups qualify under this definition.<sup>6</sup>

### **C. Loans Affected by ARPA**

In general, there are three types of loans that farmers affected by ARPA might have. These were direct loans, guaranteed loans, and storage loans.

### **D. ARPA Payments**

ARPA called for loan payments to borrowers that worked the following way.

First, eligible direct loans would be paid off by USDA at an amount equal to 120 percent of the balance of the loan on January 1, 2021. For these borrowers, 20 percent of the debt payment amount was intended to be sent to the farmer.

Second, for eligible guaranteed loans, a payment made to the farmer would be equal to 120 percent of the loan amount on January 1, 2021.

Many of the details for how the payments would have been carried out are not yet known. If and when ARPA payments are actually made, a newer version of this Guide will discuss them in detail.

### **E. Lawsuits Against USDA**

After ARPA passed, and before USDA was able to move forward with payments, lawsuits were filed in over a dozen courts against USDA. The lawsuits sought to prevent USDA from carrying out the ARPA debt payment program. Rulings in two of these courts halted debt payments.

These lawsuits against USDA, including one filed in federal court in Texas, called *Miller v. Vilsack*, argued that ARPA was illegal. In general, the lawyers in these lawsuits, and the farmers that are the clients of the lawyers, argue that ARPA provided benefits based on the race of the farmer, that white farmers could not take part, and that therefore the courts should strike down ARPA. It appears that the lawyers for the white farmers believe that despite discrimination that occurred in the past against farmers of color, and that farmers of color today say certainly continues, Congress should not be allowed to create a program that takes race into account when creating a law.

On March 22, 2022, a federal appeals court allowed the Federation of Southern Cooperatives to intervene in the case so that the voice of the farmers most affected—farmers of color—can be heard in the case.<sup>7</sup>

On July 1, 2021, the court in Texas issued a preliminary injunction. This injunction said that although there was still much to decide in the *Miller* case, the court thought it was likely that the ARPA debt program, as the court understands it, would be ruled illegal. In addition, in the meantime the court banned USDA from carrying out the debt payments for farmers in a way that takes into account race or

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<sup>6</sup> FSA, Notice of Funds Availability, 86 Fed. Reg. 28,329, 28,330 (May 26, 2021). USDA will do this in response to a written request with supporting explanation.

<sup>7</sup> *Miller v. Vilsack v. Federation of Southern Cooperatives/Land Assistance Fund*, U.S. App. LEXIS 7563, 2022 WL 851782 (5<sup>th</sup> Cir. 2022).

ethnicity. Although the wording of the order is confusing, it effectively means USDA will not issue any payments to farmers under section 1005 of ARPA. That preliminary injunction is still in place.

The Rural Coalition, Intertribal Agriculture Council, Land Loss Prevention Project and twenty-three other groups, represented by the Southern Poverty Law Center, submitted an “amicus curiae” in a federal case in Wisconsin, arguing that ARPA debt payments are constitutional, and especially arguing that FSA has long discriminated against farmers of color, and quite importantly, continue to do so.

#### IV. **Inflation Reduction Act: Borrower Relief**

On August 16, 2022, the Inflation Reduction Act of 2022 (IRA) became law.<sup>8</sup>

##### **A. Borrower Relief**

The IRA provides 3.1 billion dollars to provide relief for certain FSA borrowers. It does so in a somewhat unclear way that is quite different from the relief provided in the original American Rescue Plan Act (ARPA). The following sections describe what farmers can get this relief, what sort of loans can be the basis for the relief, and how, in general, the relief will be carried out.

##### **B. “Distressed Borrower”**

In order to be eligible for borrower relief borrowers must be considered “distressed borrowers.” Distressed borrower is not defined by the IRA. That means it will be up to USDA to define the term. It is important to emphasize that USDA has wide discretion in defining what it means to be a distressed borrower.

At times, the term distressed borrower is used in other places by USDA. For example, when servicing a loan, FSA rules say a “financially distressed borrower” is a borrower that is unable to develop a feasible plan for the current or next production cycle. USDA is not, however, required to use the same definition for the IRA that it might have used for other purposes.

Similarly, a number of possible ways to decide if borrowers would be eligible for debt programs were discussed in the run-up to passing the IRA. USDA is not required to use any of those definitions either.

Borrowers and farm organizations will have the chance to weigh in with USDA as it defines this important term.

##### **C. Operations “at Financial Risk”**

In order to be eligible for borrower relief the borrower’s agricultural operation must be “at financial risk.” A farm operation in financial risk is not defined by the IRA. That means it will be up to USDA to define the term. It is important to emphasize that USDA has wide discretion in creating a definition.

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<sup>8</sup> See The White House, Remarks by President Biden At Signing of H.R. 5376, The Inflation Reduction Act of 2022 (August 16, 2022), at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/08/16/remarks-by-president-biden-at-signing-of-h-r-5376-the-inflation-reduction-act-of-2022/>. The official title of the Act is “To provide for reconciliation pursuant to title II of S. Con. Res. 14.” The important parts of the Act for the purposes of this Guide are at Title I, Subtitle C, Part 2, sections 22006, 22007, and 22008. For the whole Act, see <https://www.congress.gov/bill/117th-congress/house-bill/5376/text>.

At first glance, it looks like the term “at financial risk” is not used in USDA loan programs to describe farming operations. Even if it was, however, USDA is not required to use the same definition for this section of the IRA that it might have used for other purposes.

Similarly, a number of possible ways to decide if borrowers would be eligible for debt programs were discussed in the run-up to passing the IRA. USDA is not required to use any of those definitions either.

Borrowers and farm organizations will have the chance to weigh in with USDA as it defines this important term.

#### **D. Implementation**

On October 18, 2022, USDA announced that it had begun to implement the program by making payments on loans that had been delinquent for sixty days. More implementation is expected soon.

#### **E. Federal Income Taxes**

It is highly likely that the Internal Revenue Service (IRS) will consider borrower relief—whether in the form of a payment or some sort of a debt reduction—to be income under federal tax law. This is an important and complicated issue. The IRA does not provide for a separate pot of money that goes to the IRS on behalf of the borrower. In the end borrowers are responsible for understanding and paying their federal income tax. There will likely need to be significant outreach to borrowers that benefit from borrower relief to make sure they are aware of all of the potential tax consequences.

#### **V. Inflation Reduction Act: Discrimination Financial Assistance**

Under the IRA, 2.2 billion dollars are made available for what is called “discrimination financial assistance.” The following sections describe how this assistance should work. Many important parts of this assistance are left to USDA to make rules for and carry out.

##### **A. Who is Eligible: Farmer, Rancher, or Forest Landowner**

In order to be eligible for discrimination financial assistance a person must be a farmer, a rancher, or a forest landowner.

##### **B. Who is Eligible: Those Determined to Have Experienced Discrimination**

In order to be eligible for this assistance the farmer, rancher, or forest landowner must be “determined to have experienced discrimination prior to January 1, 2021.” That eligibility rule has several parts and there is much we do not know about how it will work.

##### **C. Discrimination on What Basis**

The IRA does not say what kind of discrimination is covered by the IRA’s Discrimination Financial Assistance. For comparison, USDA’s antidiscrimination policy covers a number of bases for discrimination.

It seems likely that USDA will include all of these bases of possible discrimination, and possible that they will add others. If a possible basis for discrimination is not included in the IRA program there is a chance that a farmer, rancher, or forest landowner will go to court to try and get that basis included.

#### **D. Discrimination in FSA Farm Lending Programs**

For the discrimination to create eligibility for Discrimination Financial Assistance under the IRA it must have occurred “in [USDA] farm lending programs.” Several points follow from this wording.

#### **E. What Counts as Discrimination**

The IRA does not define discrimination. Because the discrimination in question must have taken place in a farm loan program, it seems likely that USDA will follow, at least in part, the Equal Credit Opportunity Act (ECOA) to define discrimination. While there is not room here to discuss ECOA, it is notable that ECOA covers every aspect of a loan transaction. That should mean that the Discrimination Financial Assistance under the IRA could cover discrimination experienced through program loan denials, late loans, underfunded loans, excessive collateral, and the rest of the types of discrimination that have long been a part of FSA loan programs.

#### **F. Discrimination Before January 1, 2021**

The discrimination that a farmer, rancher, or forest landowner experiences must have occurred before January 1, 2021. Discrimination after that point, however, is still illegal even though it is not covered by the Discrimination Financial Assistance under the IRA. In addition, filing a discrimination complaint or a lawsuit for discrimination that took place before January 1, 2021, is still possible. Notably, there is no beginning date for discrimination covered under the IRA. That means the discrimination could have taken place long ago and the farmer, rancher, or forest landowner could be eligible for Discrimination Financial Assistance.

#### **G. Must be “Determined” to Have Experienced Discrimination**

For someone to be eligible for Discrimination Financial Assistance, they must have been “determined” to have experienced discrimination. For many people that determination likely took place long ago. For many others, there will need to be a process to determine whether discrimination took place.

#### **H. Discrimination Payments: Up to \$500,000**

Farmers, ranchers, and forest landowners that have been determined to have experienced discrimination in a USDA farm loan program are eligible for a payment under the IRA of up to five hundred thousand dollars. The amount of the payment will be “determined to be appropriate based on any consequences experienced from the discrimination.” The IRA does not say this directly, but it seems likely that a person or organization outside of USDA will “determine” the amount of money that is appropriate under the IRA. Administration of the discrimination program is discussed below.

#### **I. Will There Be Enough Money?**

Congress gave USDA 2.2 billion dollars to pay to farmers for Discrimination Financial Assistance. We do not know if that will be enough to cover the assistance that people will be eligible to receive. For example, if 30,000 people are determined to have experienced discrimination, and the average person is determined to be eligible for one hundred thousand dollars, that is 3.0 billion dollars. Congress could give USDA more money for the program if all of the money is used, but there is no guarantee that will happen. If USDA feels that it might not have enough money for the program it might provide what is sometimes called a pro rata share for each farmer. For example, if the 2.2 billion dollars covered only

half of the payments for those determined to have experienced discrimination, USDA might provide only 50 percent of the eligible assistance for each farmer, rancher, or forest landowner.

#### **J. Estate Claims?**

As noted above, there is no starting date for eligibility for when the discrimination could take place. The IRA does not say whether estate claims will be allowed for Discrimination Financial Assistance. It will probably be up to USDA to decide how to handle these possible claims for assistance.

One of the main things that discrimination does is limit the ability of farmers and others to accumulate intergenerational wealth. It would seem strange, therefore, to say that a farmer would be eligible for a five-hundred-thousand-dollar payment in this program, but because the farmer died two years ago, the farmer's family should receive nothing.

On the other hand, determining that there was discrimination experienced by a person that is no longer living, and determining the financial cost of that discrimination, is hard. Many farmers that were subjected to discrimination, but who have passed away, did not have an official estate under state law. It is difficult in those instances to know who in the family should receive the payment. These problems are not insurmountable, but they are challenging and require considerable thought, time, effort, and resources to sort out.

A claims process for estates would also create an immense level of work for those filing claims and those assisting them.

#### **K. Federal Income Tax**

It is highly likely that the Internal Revenue Service (IRS) will consider Discrimination Financial Assistance to be income under federal law. This is an important and complicated issue. The IRA does not provide for a separate pot of money that goes to the IRS on behalf of those in the program. In the end farmers, ranchers, and forest landowners are responsible for understanding and paying their federal income tax. There will likely need to be significant outreach to those that benefit from Discrimination Financial Assistance under the IRA to make sure they are aware of all of the potential tax consequences of this assistance.

#### **L. The End of ARPA Section 1005**

The IRA repealed Section 1005 of the American Rescue Plan Act of 2021 (ARPA). Section 1005 was the section that was to provide debt payments to what ARPA called "socially disadvantaged farmers and ranchers" that were FSA borrowers.